



Department of Law

SENTENCING IN INTERNATIONAL CRIMINAL LAW:

The approach of the two UN ad hoc Tribunals and future
perspectives for the International Criminal Court

Silvia D'Ascoli

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, June 2008

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Sentencing in International Criminal Law:

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List of Abbreviations and Terminology

Additional Protocol I =	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II =	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
Art. =	Article
cf. =	compare
Ch. =	Chapter
CJA =	Criminal Justice Act
Common Article 3 =	Article 3 common to the four Geneva Conventions of 1949
ECHR=	European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950
ECtHR =	European Court of Human Rights
ed./eds. =	edition, editor / editions, editors
e.g. =	for example
et al. =	and others
ff. =	and following
fn. =	footnote
FRY =	Federal Republic of Yugoslavia
GAOR =	General Assembly Official Records (UN)
i.e. =	that is
ICCPR=	International Covenant on Civil and Political Rights, G.A. Resolution no.2200A (XXI), 21 U.N. GAOR

Supp.(No.16) at 52, U.N. Doc.A/6316 (1966), 999
U.N.T.S. 171

ICESCR =	International Covenant on Economic, Social and Cultural Rights
ICJ =	International criminal justice
ICTY =	International Criminal Tribunal for the former Yugoslavia
ICTR =	International Criminal Tribunal for Rwanda
ICRC =	International Committee of the Red Cross
IMTs =	International Military Tribunals (of Nuremberg and Tokyo)
JCE =	Joint criminal enterprise
NGO =	Non-governmental organisation
no./nos. =	number / numbers
OTP =	Office of the Prosecutor
p./pp. =	page / pages
para./paras. =	paragraph / paragraphs
Prosecution =	Office of the Prosecutor
Res. =	Resolution
RPE =	Rules of Procedure and Evidence
s. =	section
Sentencing =	the process of meting out punishment, including the criteria for the determination and individualisation of penalty by judges at the end of judicial proceedings. 'International sentencing' , more specifically, refers to the process of meting out punishment by international courts and tribunals
StGB =	<i>Strafgesetzbuch</i> (German Criminal Code)
UN =	United Nations

UN Doc. =	United Nations Document
UNDU =	United Nations Detention Unit
USC =	United States Criminal Code
USSG =	United States Sentencing Guidelines
v. =	versus
VStGB =	<i>Völkerstrafgesetzbuch</i> (German Code of Crimes against International Law)

INTRODUCTION

International criminal law is still an expanding discipline within the broader context of international law, although in recent times – and especially in the last decade – it has experienced extensive developments and renewed attention from the international community. The establishment and the conspicuous works of the UN International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the creation of mixed tribunals such as the Special Court for Sierra Leone (SCSL), the adoption and entry into force of the Rome Statute for the International Criminal Court (ICC) have, to a large extent, contributed to these developments and are evidence that international criminal law has come a very long way since Nuremberg and Tokyo.

A proper system of international justice, conceived as a response and reaction by the international community to the commission of atrocities amounting to international crimes, is nowadays a more concrete reality than in the past, although still a developing one. This system should be considered as a global and common undertaking which consists of, and links together, a number of international and national institutions (e.g. the UN ad hoc Tribunals, the ICC, the various systems of national criminal justice, and so on) which are expected to work *jointly* and often *complementarily* in order to achieve effectiveness and to maximize the opportunities of enforcing international criminal law.

International justice deals with the most heinous and serious criminal offences and one of its objectives is to achieve individual accountability for those atrocities. Therefore, like national criminal law, international criminal law can be seen as a tool by which the values and principles of the international community as a whole are protected. In this context, the process of sentencing and the sanctioning phase of international proceedings acquire great significance.

Against this background, my thesis focuses on the topic of sentencing in international criminal law. The title – *Sentencing in International Criminal Law: The Approach of the two UN ad hoc Tribunals and future perspectives for the International Criminal Court* – already indicates the central role occupied by the jurisprudence of the ICTY and ICTR in this analysis. The motivation in undertaking research on the topic of international sentencing is rooted in the belief that a study of this kind could contribute to the current debate and provide an interesting contribution to the existing literature.

Despite the recognised and increasing importance of international sentencing, it is evident that this area of international criminal law is still 'under construction' and many aspects are not regulated, especially if compared to the law of sentencing at the domestic level. This is partly due to the fact that the system of international criminal law itself is still rather young and lacks a codified and coherent international procedural criminal law. Although significant steps have been made towards an improved elaboration of its principles and rules of application, a large number of rules are still undeveloped. This at least was the case in 1993, when the ICTY was created. At that time, international criminal law was quite embryonic with regard to both its substantial and procedural principles. This can be appreciated from the limited substantive and procedural norms contained in the ICTY Statute.

In short, the current status of international sentencing presents a panorama which is not regulated by exact norms and pre-defined principles. Currently, there is no established body of international principles regarding the determination of sentences, notwithstanding the fact that sentencing research has a long tradition and that the debate concerning the purposes of punishment and sentencing principles is not a recent one. The jurisprudence of the International Military Tribunals of Nuremberg and Tokyo (and the following trials held by various national military tribunals) offers no real sentencing guidance. Concerning statutory provisions, Statutes of past and existing Tribunals and Courts (such as ICTY, ICTR and ICC) contain only a few norms on the application of penalties and do not provide detailed sentencing principles. Certainly, the creation of the ICC added some sophistication to the system, but a number of important elements are yet to be developed, amongst them: a comprehensive scheme for criminal sanctions; general agreement as to the scope and purposes of penalties at the international level; a more precise understanding of the influential factors in international sentencing.

The fact that little guidance is offered and that international judges have a wide degree of discretion can favour inconsistencies in sentencing and lead to the risk that similar cases may be sentenced in different ways. These issues highlight the need for a more coherent sentencing policy, which may ensure proportionality and relative uniformity, thereby contributing to the fairness of international sentences. Thus, the aim of my research in this field is to develop a more advanced and comprehensive system of

principles in order to foster the development of a law of sentencing for international criminal justice.

In particular, my research intends to achieve three main objectives: 1) to clarify the scope of international sentencing law; 2) to highlight problems arising from the current sentencing practice of the ad hoc Tribunals; and 3) to indicate possible ways of addressing such problems and developing a coherent system of guiding principles for sentencing in international criminal justice. The research questions that guided my analysis and that this thesis addresses are the following:

- *What is the current and evolving tendency of international criminal justice?*
- *Are the purposes of punishment at the international level comparable to those of national sentencing?*
- *How can the ‘principle of proportionality’ be applied in international sentencing?*
- *Is the principle of legality of penalties fully respected?*
- *Which are the influential factors on sentencing that can be appreciated throughout the jurisprudence of the ICTY and ICTR?*
- *Is it possible to identify consistent patterns or trends for international sentencing emerging from the practice of the ad hoc Tribunals?*

It is against this background that the law and process of international sentencing is analysed and the need to develop an appropriate law of sentencing for international criminal justice is maintained. A more uniform sentencing policy may assist the judicial decision-making process in trying to achieve ‘just’ and relatively uniform sentences by international courts and tribunals.

The research also takes into account the prescriptions of human rights law, sharing the view that it constitutes a fundamental interpretative tool through which the substantial and procedural mechanisms of international criminal justice can be analysed and developed. As observed by Professor A. Cassese, international criminal law is peculiar and exhibits distinctive characteristics as it originates from and draws upon both human rights law and national criminal law.¹ Undoubtedly, there are numerous cross-references between international criminal law, international humanitarian law and international

¹ CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, at pp.18, 26.

human rights law. Over the past 50 to 60 years, human rights law has played a substantial role in consolidating a wide range of common values between national States and the international community. The body of international human rights law should thus be of assistance in determining the appropriate standard of fairness for international trials.

With regard to the structure and contents of the work presented here, the thesis is essentially concerned with description and analysis of the process of international sentencing within the UN ad hoc Tribunals, the ICTY and the ICTR, and the recently established ICC. The scope of the research does not take into consideration mixed or hybrid tribunals and courts such as the Special Court for Sierra Leone: in view of their 'mixed' character, which combines elements of international justice and the relevant domestic legal systems, I deemed it opportune to concentrate the analysis on 'pure' international systems of criminal justice, thus restricting the study to the ad hoc Tribunals and the ICC.

In the following chapters, I try to deconstruct the context of international sentencing at several levels and with regard to both principles and procedural norms: the rationale and practice of international sentencing are analysed with a focus on sentences as final acts of the judicial decision-making process, and on the factors which are relevant to the determination of the final penalty. I intend to use the term 'sentencing' as the overall process of meting out punishment, including the criteria for the determination and individualisation of penalty used by judges. The research comprises the analysis of the influence exercised on the determination of penalty by both normative and judicial criteria. The analysis has been carried out by taking into account the provisions on sentencing in the relevant Statutes and Rules of Procedure and Evidence, and the judicial process of sentencing, i.e. the way in which international judges have evaluated and considered factors deemed relevant for sentencing.

It was expressly decided not to deal with issues of restorative justice, with the nature and extent of victim participation in international criminal proceedings and the impact of international sentencing on them. Also the issues of enforcement, execution of sentences, and equality of treatment of the convicted person at the enforcement stage are not dealt with here. The few cases concerning convictions for contempt of the Tribunals

have not been considered within the sentencing case-law analysed, as they do not relate to the international crimes under the jurisdiction of the ICTY and ICTR, but rather to offences against the administration of justice which fall in a completely different category.

Given the focus of this study on the *process* of sentencing and its determinants, I felt it was useful to support the doctrinal analysis with an empirical study focused on the sentencing determinants employed by the ICTY and ICTR, in order to verify their effective influence on the length of sentences. My analysis incorporates literature and jurisprudence of the ad hoc Tribunals up to and including December 2007.

Chapter 1 offers an overview of the current status of international sentencing and various issues which are relevant in the decision-making process in sentencing (i.e., the scope of the principle of legality and of proportionality of penalties, etc.). The first chapter also has the aim of presenting an appropriate conceptual framework against which the sentencing norms of ICTY, ICTR and ICC may subsequently be analysed, interpreted and evaluated. The legal and practical issues presented and described in Chapter 1 are subsequently analysed in the course of the thesis in the light of the case-law of the ad hoc Tribunals, together with a final assessment of the proper role they should play in international sentencing.

Chapter 2 is devoted to a comparison between the national and the international spheres of sentencing, and focuses on the way in which the sentencing process is structured in some selected domestic systems, with particular attention to the relevant principles and rules found in national sentencing laws.

After the introduction to international and national sentencing, their characteristics and problematic areas, the purpose of Chapter 3 is to present first an overview of the relevant legal context for sentencing in the system of the UN ad hoc Tribunals and, second, to analyse the way in which the sentencing process is shaped in practice. The chapter thus focuses on the case-law of the ad hoc Tribunals, and deals particularly with the factors that have influenced the decision-making process in sentencing by the ICTY and ICTR, in an attempt to describe their sentencing practice and to verify the existence of patterns or inconsistencies.

Continuing with this line of analysis, Chapter 4 develops a quantitative study by presenting an empirical analysis of influential factors in the ICTY and ICTR sentencing practice, with the aim of verifying the impact of each factor on the length of sentences. The combination of doctrinal and empirical analysis should offer sufficient elements to proceed towards a complete and reliable appraisal of the sentencing process at the ad hoc Tribunals. This should represent the factual basis on which to develop a body of ‘guiding principles’ for international sentencing.

Chapter 5 focuses on the law of sentencing as stated in the system of the ICC. At the time of writing, the ICC has not yet handed down any judgement, therefore the analysis of the sentencing process before the permanent court is confined to an examination of the relevant provisions contained in the Rome Statute and in the Rules of Procedure and Evidence, without having the opportunity to explore and evaluate any concrete case-law.

Finally, Chapter 6 suggests some ways of resolving the debate concerning the issues discussed throughout the thesis, and presents my conclusions and proposals for ‘guiding principles’ which would contribute to the construction of a comprehensive law of sentencing for international criminal law. The conclusion of the thesis recapitulates the results achieved, the suggestions and the principal propositions elaborated throughout the study.

PART I
**THE LAW AND PROCESS OF SENTENCING: NATIONAL AND
INTERNATIONAL DIMENSIONS**

International justice, if it is meant to be neither arbitrary nor discretionary, must be based on generally valid norms susceptible to application in concrete situations. In this sense, *substantive* criminal law – describing certain behaviours as punishable, defining appropriate sanctions for the commission of offences, regulating the application of such sanctions, and so on – acquires a fundamental importance for any criminal jurisdiction or legal system. The same is true for the *international* criminal system, where criminal jurisdiction is exercised on behalf of the international community.

Crimes under international law endanger and violate the values and interests of a macro-society, the international community. In the words of an ICTY Trial Chamber, core crimes ‘transcend the individual because when the individual is assaulted, humanity comes under attack and is negated’.¹ Mankind as a whole is offended by the commission of genocide, crimes against humanity or war crimes; the international community – and each single State in it – has therefore the right and the duty to intervene in order to claim a violation of the international order.²

In the same way as criminal law in a national legal system is regarded as one of the means to protect the highest values and interests of society, so *international* criminal law as well should be seen as an indispensable tool of *ultima ratio* for the system of the community of nations. In this context, international sentencing should be regarded as forming part of the international institutional machinery which enables the sentiments and values of the entire global community to find practical expression when international crimes are perpetrated.

International criminal law, as a part of the law of nations, must develop its own norms, criminalise behaviours, and protect its own legal values and interests through the imposition of penalties. On the one hand, it is uncontroversial that, as regards its subject

¹ *Prosecutor v. Erdemovic*, Case No.IT-96-22-T, Trial Chamber, Judgement of 29 November 1996, para.28.

² Geoffrey Best noted that: ‘...humanitarian sentiment...has become so universal and articulate that it is something governments cannot afford to ignore’. BEST, GEOFFREY, *War and Law since 1945*, Oxford, Clarendon, 1994, p.410.

matter and application, international criminal law is essentially *criminal law* in nature: it is therefore bound by the same principles (both of human rights law and of fundamental criminal law), rules and limitations generally recognised and accepted in all democratic systems as important parts of criminal justice. On the other hand, there can be no doubt that substantial differences exist between the international and the national sphere. For instance, in relation to their scope of application, international criminal law distinguishes itself from domestic criminal law insofar as the former is limited to the protection of the most fundamental values of the international community and thus is concerned with the punishment of only the most serious and heinous crimes of international concern. Moreover, the international system does not have legislative or political structures comparable to those of domestic jurisdictions. International criminal law even departs from the fundamental principle of separation of powers, which is typical of the national level and implies that the three main powers of the State (legislative, executive, and judicial) be separate and independent. Conversely, in international criminal law, it is actually the executive and the judiciary that create laws and rules of procedure. Problems and issues that international judicial institutions are confronted with are thus often complex and qualitatively different from those encountered by national institutions; the same applies to international sentencing versus national sentencing.

This first part of the thesis is concerned with the law of sentencing at the national and international level. The first chapter outlines the main features of international sentencing (and related problematic areas), whereas the second chapter transposes the discourse at the national level to identify characteristics of national sentencing and to draw a comparison between the national and the international sphere. The overall objective is to facilitate the identification of fundamental elements in the law of sentencing, and to verify whether the two processes (international/national) are somehow similar.

CHAPTER 1.

ANALYZING THE SENTENCING PROCESS IN INTERNATIONAL JUSTICE

A. International Sentencing: A General and Preliminary Overview

“Penal law is one of the remedies suitable to ensure compliance with the law, and should be at the disposal of the international community for purposes of deterrence and retribution.”³

Any attempt to describe the current body of sentencing law, principles and practice in international criminal justice must acknowledge the increasing importance and complexity that the subject has acquired in recent years and the fact that the law and philosophy of sentencing at the domestic level has already been studied and discussed from different angles and perspectives.

Concerning the specific terminology utilised in this context, *sentencing* can be broadly defined as the process of punishing individuals found guilty of a criminal behaviour which violated the law and offended the protected values of a given community. *Penalty* is the sanction provided for such a violation of law: it is intended as reparation, and as a sort of compensation for the harm suffered. Sanctions can therefore be seen as the *quantification* of the harm done, a way of attributing a negative value and weight to violations and disrespect of the laws and values of a given community. This holds equally true for the international community. *International sentencing* thus represents a relation between positive values (rights, values and principles protected by the international community) and negative behaviours (violations of those values, international crimes and so on) and has the important function of quantifying, through the imposition of a penalty, the harm caused by violations of those fundamental values.

If the aim of criminal law is to serve as a mean of *ultima ratio* for the protection of legally accepted values and interests, it is self-evident that a verdict at the end of a public trial and the imposition of a penalty to the perpetrator, is one of the most important contributions of criminal proceedings to the repression and eventual prevention of violations of legally protected values. Public trials and the process of

³ TOMUSCHAT, C., ‘Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State’, *Israel Yearbook on Human Rights*, 24(1995), at p.41.

sentencing demonstrate to society that perpetrators will not go unpunished. As former Prosecutor of the UN ad hoc Tribunals, Louise Arbour, noted:

Criminal justice affirms and reinforces the norms of conduct that are acceptable and denounces those that are not. Trial courts tend to convey clear and easily understood information. They help to build a social consensus to promote compliance with the law even when the risk of capture and punishment is minimal.⁴

Sentencing connotes the process of determining an appropriate sanction when individual criminal responsibility is ascertained. The determination of a suitable penalty is the last and fundamental stage of criminal adjudication. Punishment is undoubtedly an essential element of sentencing, and it is against the broader background of the ongoing legal, philosophical and political debate about sanctions and the functions of punishment that the process of sentencing should be explored. The various theories on punishment have historical roots in the cultural and political environment from which they have derived. The ultimate decision about the types of behaviour to criminalise is not an easy or a predetermined one, but depends on the values of a given society and on the chosen functions of criminal law. This naturally has an influence on the functions and purposes of punishment, which may change over time thus legitimising the need to re-examine, periodically, the justifications of punishment and the legitimacy of the actual forms of sanctions utilised by a certain society.

By way of introduction, it is sufficient here to note that the principal sources of sentencing law are mainly legislation and judicial decisions. Normally the role of legislation is essential at the national level, as the role of laws is to provide powers, to lay down criteria for their use, and to establish limits. However, when considering international sentencing, *legislation* often plays a marginal role due to the lack of exhaustive provisions regarding the decision-making process in sentencing, its principles, and the range of penalties to be applied.

Amongst the legal principles regulating the imposition of penalties and the process of sentencing, the principle of legality and the principle of proportionality of penalties play a fundamental role and are recognised in all the major national criminal systems of the world. Here too, the international sphere presents specific characteristics with

⁴ See ARBOUR L., 'Access to Justice – The Prosecution of International Crimes: Prospects and Pitfalls', *Washington University Journal of Law and Policy*, vol.1, 1999, p.23.

respect to these principles, which appear to be perceived differently in international criminal law.

For the purpose of providing a preliminary overview of the process of sentencing – and of its peculiarities at the international level – this first chapter introduces some of its most important aspects, both procedural and substantive: how the process of sentencing is currently shaped at the international level; the most important principles regulating the imposition of sentences; the different theories on the purposes of punishment in international justice; the factors which are important in meting out punishment; the problem of a hierarchy of international crimes.

1.1 The current status of sentencing at the international level

Sentences, and the outcomes they comprise, should be regarded as probably the most important aspect of the adjudication process overall considered. A sentence plays a fundamental role *in primis* for the convicted person (for its effects on the offender), but also for the public (considering the impact of the judgement upon society) and for judges themselves (in light of the fact that a judgement represents the concluding stage of the decision-making process in sentencing). International sentencing acquires a particular value insofar as it represents and highlights the *existence* of international criminal law and international justice. In fact, international trials serve the purposes of demonstrating the seriousness with which the international community regards violations of its laws, condemns transgressions and metes out penalties for the commission of crimes of international concern.

International sentencing is likely to provoke continuous debate due to the fact that, currently, there is no established body of principles regarding the determination of sentences. Furthermore, at least until the UN ad hoc Tribunals began operating, there was very little jurisprudential precedent to assist international courts in sentencing decisions. In effect, with regard to the determination of penalties at the international level, for a long time the Nuremberg and Tokyo Military Tribunals (IMTs) represented the only two precedents in international justice.⁵ However, the jurisprudence of the

⁵ For an introduction to international sentencing, see SCHABAS, W., 'International Sentencing: From Leipzig (1923) to Arusha (1996)', in BASSIOUNI, M.C., *International Criminal Law*, 2nd ed., vol.III, Transnational Publishers, NY, 1999, pp.171-193.

IMTs, and that of the national military tribunals established after the Second World War, is not truly enlightening with regard to the process of international sentencing. Sentencing provisions in the Nuremberg Charter were characterised by extreme vagueness and were substantially limited to the few words of Article 27 of the Charter, thus stating:

The Tribunal shall have the right to impose upon a defendant on conviction, death or such other punishment as shall be determined by it to be just.

Article 28, in addition, allowed the Tribunal to deprive a convicted person of any property s/he had stolen.⁶ Finally, Article 29 provided that the German Control Council could reduce, but not increase, the severity of sentences meted out. As it appears, judges of the Nuremberg and Tokyo Tribunals had nearly unlimited discretion in the application of penalties – being free to impose the death penalty, life imprisonment or other punishments *determined by them to be just* – discretion that resulted in 19 convictions to hangings, 19 life imprisonments, and other custodial convictions (ranging from 7 to 20 years).⁷

The context in which the IMTs were established and operated has considerably changed over time, and is no longer comparable to that in which modern international tribunals and courts exercise their functions. Since the end of the Second World War, for instance, a large number of States have abolished the death penalty and the UN and a large number of NGOs have campaigned for its universal abolition, recently achieving the adoption by the UN General Assembly of a moratorium against the death penalty.⁸ It thus comes at no surprise that the death penalty was not included in the applicable penalties of the UN ad hoc Tribunals.⁹

⁶ See Article 28 of the Nuremberg Charter: ‘In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany’.

⁷ See TELFORD, TAYLOR, *Anatomy of the Nuremberg Trials*, 1992, at pp.559-661. See also TRIFFTERER, OTTO, *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, pp.987-988.

⁸ The resolution calling for ‘a moratorium on the use of the death penalty’ was approved on 18 December 2007 with 104 votes in favour, 54 against, and 29 abstentions. It called on all States that still allow capital punishment to “progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed”. Those countries were also called on to provide the Secretary-General with information on their use of capital punishment and to respect international standards that safeguard the rights of condemned inmates. See Resolution n.A/RES/62/149, 18 December 2007, Sixty-second General Assembly Plenary, 76th Meeting.

⁹ See, on the issue of death penalty, SCHABAS, W., *The Abolition of the Death Penalty in International Law*, 3rd edition, Cambridge University Press, 2002. See also, on the issue of life imprisonment as a

With regard to the ‘law of sentencing’ of the UN ad hoc Tribunals, which will be illustrated in more details in Chapter 3, it will suffice here to say that neither their Statutes nor the Rules of Procedure and Evidence (RPE) determine any specific penalty for the crimes falling under the jurisdiction of the Tribunals. It is only provided that penalties to be imposed shall be limited to imprisonment. Moreover, the Statutes do not even rank the various crimes and, in theory, sentences are the same for each of the three crimes (war crimes, crimes against humanity, genocide) namely, a maximum term of life imprisonment. None of the (few) provisions for penalties in the ICTY and ICTR system seems therefore to implement the principle of legality of penalties by fixing and explicitly defining the range of penalties or the specific maximum penalty that an accused may face for each of the crimes under the jurisdiction of the Tribunals.

This already introduces two of the problematic issues connected with international sentencing: the respect of the principle of legality of penalties (and the extent to which the principle is in fact applicable in international justice), and the problem of a hierarchy of international crimes. In fact, with regard to the latter, the fact that penalties are in theory the same for all international crimes implies a supposed lack of ‘objective gravity’ of these crimes. In theory therefore, all are equally serious given that no differences of penalty are specified for them.

Moving on to consider the specific rules regulating decision-making in sentencing with regard to the circumstances to be taken into account, both the ICTY and ICTR Statutes only provide some ‘factors’ which should be taken into consideration in the process of sentencing. Under current practice, Chambers of the ad hoc Tribunals seem to determine the sentence by considering the totality of the circumstances in each case being judged, including the gravity of the crime and the individual circumstances of the accused, but without having to refer to any external and predetermined scale of penalties or to a predetermined list of aggravating and mitigating factors. This implies that – in meting out penalties – international judges are called upon to use a high degree of discretion, much greater than is normal for cases at the national level.

Sentencing issues also have an important role in the system of the ICC, whose Statute is the first international instrument to codify some substantial and procedural

penalty in international law: ZYL SMIT D., ‘Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective’, *Criminal Law Forum*, vol.9, numbers 1-2, 1998, pp.5-54.

aspects of international criminal law. The following general remarks are intended to provide a framework for this issue, which will be better analysed in Chapter 5.

Article 76 of the ICC Statute provides that, in case of conviction, a Trial Chamber ‘shall consider the appropriate sentence’ and ‘take into account the evidence presented and submission made during the trial that are relevant to the sentence’. In Article 77, the Statute provides for two types of custodial sentence: ‘imprisonment for a specified number of years, which may not exceed a maximum of 30 years’; and life imprisonment. The Statute reserves the penalty of life imprisonment to crimes of an ‘extreme gravity’, and only when individual aggravating circumstances are present. General sentencing criteria to be taken into account in determining the sentence are then found in Article 78, which mentions the ‘gravity of the crime’ and the ‘individual circumstances of the convicted person’. The RPE of the ICC then specify some of the relevant circumstances in more detail.

On the whole, international judges at the ICC also have quite broad discretion in the sentencing process. The situation may be further complicated by the interface between international and domestic criminal law, as the ICC’s jurisdiction is complementary to that of national courts. This means that, according to Article 17 of the Rome Statute, the Court can only operate when national jurisdictions are unwilling or unable to act. Thus, national sentencing will also become important at the international level as a lens through which to evaluate the admissibility of the State’s action.¹⁰

In short, the current status of international sentencing presents a panorama which is not regulated by strict norms and predefined principles. This leaves open numerous possibilities for interpretation, may favour inconsistencies in sentencing between similar cases, and does not contribute to the development of a united policy for international sentencing. For all these reasons, a more in-depth investigation of the subject-matter is deemed relevant and valuable, in order to contribute to the future progress of international criminal adjudication.

¹⁰ National sentencing may be relevant under the heading of ‘unwillingness’ in cases where the sentence meted out at the national level proves insufficient in light of the gravity of the crimes or the participation of the accused therein.

1.2 The principle of legality

The prohibition of retroactive punishment, known by the Latin maxim *nulla poena sine lege*, is part of the principle of legality. This principle, which also comprises the prohibition of retroactive offences (*nullum crimen sine lege*) is a fundamental and essential principle of criminal law, at both the national and international levels.¹¹

Before recalling the scope and content of the principle as developed by domestic systems of criminal law, it should be stated that the role of the *nulla poena sine lege* principle in international sentencing is a debated issue. It will thus be dealt with but – not being a core element of the analysis – it will be evaluated only in relation to those aspects which are relevant to international sentencing. The main research questions in this area are whether or not the principle of legality of penalties is fully respected in international sentencing, and whether or not the absence of specific ranges of punishment for international crimes endangers the legality of penalties. As pointed out in section 1.1, international criminal law (and the Statutes and RPE of ICTY, ICTR, as well as the ICC) does not address in depth the issue of penalties and their ranges for sentencing purposes. Consequently, one of the problems is whether international provisions on penalties satisfy the principle of *nulla poena sine lege*.

a) National and supranational dimensions: contents

It is well known that the principle of legality, in its first component, requires that nobody be punished for a conduct which was not criminal at the time of its commission.¹² Moreover, it not only prescribes that crimes have to be defined (and

¹¹ The elaboration of the maxim '*nullum crimen, nulla poena sine lege*' dates back to 1801 and is attributable to Anselm Feuerbach who first used it in his work '*Lehrbuch des Peinlichen Rechts*' (1801).

¹² For a reconstruction of the historical origins of the principle of legality and of its status in human rights law and international law, see AMBOS K., 'Nulla Poena Sine Lege in International Criminal Law', in HAVEMAN R., OLUSANYA O., *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp – Oxford, 2006, pp.17-28; KITTICHAISAREE, K., *International Criminal Law*, Oxford University Press, 2001, pp.13-16, 43. See also, on the origins of the principle, MOKHTAR, ALY, 'Nullum Crimen Nulla Poena Sine Lege: Aspects and Prospects', *Statute Law Review*, 26(1), 2005, pp.41-55. See, on the invocation of the principle of legality during the Nuremberg trials, SCHABAS, W., 'Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals', *European Journal of International Law*, vol.11 no.3, 2000, pp.521-539. More in general on the principle of legality in international criminal law: OLASOLO, H., 'A Note on the Evolution of the Principle of Legality in International Criminal Law', *Criminal Law Forum*, vol.18, issue 3-4, 2007, pp.301-319; ZAPPALA, S., "Quale principio di legalità nel diritto internazionale penale?", in DELMAS-MARTY M., FRONZA E., (sous la direction de), *Les sources du droit international pénal : l'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale*

therefore must exist) before the relevant conduct, but also that the punishment for those acts must be known and pre-established. The principle of legality of penalties, which would require law-imposed tariffs of penalties for each crime, is intended to render the addressee aware of the potential punishment for transgressions of particular criminal norms. The main aim of this principle is to ensure a minimum degree of certainty with regard to punishment and to make sure that individuals be aware of the penalty they can expect if found guilty of a certain crime. The overall inner significance of the principle is that rules of criminal law must be expressed only by and within the law, and that punishment for certain acts must be already established in order for the criminalised acts to be punishable.

As to its origins, the principle of legality derives from the age of the Enlightenment, when it was affirmed as a reaction and counter-measure against the broad discretion enjoyed by judges in determining penalties throughout the *ancient regime*. The history of the principle seems to date back to the XVIII century,¹³ when the principle of legality was firmly stated first by Montesquieu¹⁴ and then by Cesare Beccaria.¹⁵

The principle was then rapidly codified and became part of national legislations.¹⁶ Following its first affirmation, the principle subsequently acquired a fundamental role in the criminal law codified by European countries.¹⁷

internationale, Société de législation comparée, 2004, pp.277-284. Specifically on the principle *nulla poena sine lege* and the ad hoc Tribunals, see: SCALIA, DAMIEN, « Constat sur le respect du principe *nulla poena sine lege* par les tribunaux pénaux internationaux », *Revue internationale de droit comparé* (2006), vol.58, issue 1, pp.185-209.

¹³ For a detailed history of the principle see, for instance, PRADEL, JEAN, *Droit Pénal Général*, Ed. Cujas, Paris, 2001, pp.171 ff..

¹⁴ MONTESQUIEU, C.L., *De l'esprit des lois*, Book XI, chap.VI, 1748.

¹⁵ BECCARIA, C., *Dei delitti e delle pene*, 1764, Capitolo III: “La prima conseguenza di questi principi è che le sole leggi possono decretar le pene su i delitti, e quest' autorità non può risedere che presso il legislatore, che rappresenta tutta la società unita per un contratto sociale; nessun magistrato (che è parte di società) può con giustizia infligger pene contro ad un altro membro della società medesima”.

¹⁶ For instance, for its symbolic importance we should mention the French *Déclaration des droits de l'homme et du citoyen* of August 1789 that stated at Article 7: « *Nul homme ne peut être accusé, arrêté ou détenu que dans les cas déterminés par la loi et selon les formes qu'elle a prescrites* ». Article 8 stated more specifically that: « *La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée* ».

¹⁷ For instance, in the German legal system, §1 of the German Criminal Code (StGb) incorporates the formula of *nulla poena sine lege* in the title: ‘*Keine Strafe ohne Gesetz*’. Similar norms are contained in the Criminal Codes of Netherlands, Italy, Spain, Portugal, etc.. Article 111-3 of the French Criminal Code presents a more articulated provision, which limits the scope of the principle only to ‘*délits*’ and ‘*crimes*’ (« *Nul ne peut être puni d'une peine qui n'est pas prévue par la loi, si l'infraction est un crime ou un délit, ou par le règlement, si l'infraction est une contravention* »). Less strict is the provision of the

The basic idea underlying the principle of legality is that, if the trial process has to implement *in concreto* the necessary conditions for judges to be the so-called *bouche de la loi*, then proceedings have to be regulated at every stage by legal provisions.

In concrete terms, respect of the principle of legality imposes some obligations on the legislator: first of all, the legislator must define offences and penalties in sufficiently precise terms so that any arbitrary application of them will be avoided. Secondly, the legislator must ensure the non-retroactivity of new dispositions of law. Thirdly, delegation of legislative powers to the government must be reduced as much as possible.

One of the problems posed by the principle at the domestic level is that it is not interpreted in the same way in civil law and common law jurisdictions.¹⁸ In effect, as will be seen in the next chapter, a survey of comparative law shows different situations in various countries: while countries like France or Italy apply the principle with its original and more severe implication and under both aspects of the *nullum crimen* and *nulla poena sine lege*,¹⁹ in other countries the principle is recognised as an important principle of justice but is applied less strictly (leaving judges a broad margin of discretion in interpreting elements of crimes) and does not require that all aspects of offences and penalties be strictly pre-established (as long as they are foreseeable or identifiable through a settled jurisprudence).

If firm application of the principle is already quite problematic in common law systems, where it could hinder the development of common law if used too strictly, its application is even more complicated at the international level, where formally there is no governmental body authorised to enact substantive rules, and where judges have greater discretion than in national courts. Moreover, it is well known that international criminal law is not even based on an international criminal code.

principle of legality in the English legal system, characterised by a broad discretion of the judge in the sentencing phase (the applicable penalties are nonetheless provided for by the *Powers of Criminal Courts (Sentencing) Act 2000*).

¹⁸ On the different scope of the principle of legality in the common law and civil law traditions, see for instance: CADOPPI, A., *Introduzione allo studio del diritto penale comparato*, 2a edizione, CEDAM, Padova, 2004; PALAZZO F., PAPA M., *Lezioni di diritto penale comparato*, Giappichelli Editore, Torino, 2000, p.166 and ff.

¹⁹ This means that penalties are predetermined by written laws and their *quantum* is specified, either with the applicable maximum and minimum penalty for every crime, or just with the maximum.

The purpose of this section is to provide an overview of the principle of legality and not to reconstruct its development and legislative history at national or international level; therefore, it is sufficient to add here that, in the aftermath of the Second World War, the principle slowly acquired importance also in international law, where it was recognised in a number of instruments, such as the Universal Declaration of Human Rights (Articles 9, 10 and 11.2), the European Convention on Human Rights (Article 7.1), the American Convention on Human Rights (Article 9), the International Covenant on Civil and Political Rights (Article 15.1). It was also given due consideration by the International Law Commission (ILC) and by supra-national courts like the European Court of Human Rights (ECtHR).²⁰

The principle appears to be consistently non-derogable in all the major international treaties and seems to focus more on the *nullum crimen sine lege* component than on the *nulla poena* one. In fact, in a number of international human rights instruments the principle only prohibits the imposition of a criminal sanction that is heavier than the one applicable at the time when the offence was committed, whereas quite often nothing is said concerning the legality of penalties and the fact that they should be fixed or determined beforehand, and contained in ‘written’ laws.²¹ If one looks, for instance, at Article 7 ECHR²² and Article 15 ICCPR,²³ it is clear that the principle of the prohibition of retroactive (heavier) penalties is contemplated (*lex praevia*), but there is no specification as to the requirement that penalties must be certain in nature or degree (*lex*

²⁰ See for instance: ECtHR, *C.R. v. United Kingdom*, Application No.20190/92, judgement of 27 November 1995, paras.30-34; ECtHR, *S.W. v. United Kingdom*, Application No.20166/92, judgement of 22 November 1995, paras.32-36; ECtHR, *Cantoni v. France*, Application No.17862/91, judgement of 15 November 1996, paras.26, 29-31.

²¹ In light of the differences regarding the implementation of the principle of legality that exist between common law and civil law countries, the prescription of the *lex scripta* would be, in fact, in contrast with the very essence of common law. Therefore, in the majority of the international instruments which contain the principle, the reference to ‘law’ includes both written (or codified) and unwritten (or not codified) laws. See, for instance, BARTOLE S., CONFORTI B., *Commentario alla Convenzione Europea per la Tutela dei Diritti dell’Uomo e delle Libertà Fondamentali*, Cedam, Padova, 2001, p.249 and ff.; PETTITI, DECAUX, IMBERT, *La Convention européenne des droits de l’homme*, Economica, 1999, p.294.

²² Article 7, para.1, European Convention on Human Rights: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

²³ Article 15, para.1, International Covenant on Civil and Political Rights: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

certa).²⁴ The same provisions also establish an ‘exception’ to the principle of legality, when prescribing that the principle “...shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.²⁵ It thus seems that international law has been provided with an *explicit exception* which allows departure from the principle of legality as such and, in particular, from that part of the principle forbidding the imposition of a heavier penalty than the one applicable at the time when the criminal offence was perpetrated.²⁶

In conclusion, as K. Ambos observes, the principle of *nullum crimen nulla poena sine lege* in domestic laws can certainly be considered as including the two components of *lex praevia* and *lex certa*, whereas the current *status quo* is less certain with regard to the *lex stricta* principle, given the different interpretations in common law and civil law countries.²⁷ Turning to the sphere of international law, and international criminal law in particular, matters become more complicated, and it seems that not even the principle of *lex certa* finds application. Ambos thus concludes by observing that, although comparative national law recognises the *lex praevia* and *lex certa* elements of the principle of legality of penalties, this does not seem to automatically imply that precise penalties or penalty ranges for international crimes are also required; rather it seems that international law and human rights law have chosen a more flexible approach.²⁸ For instance, with regard to human rights law, the ECtHR has interpreted the principle of legality at Article 7.1 ECHR as requiring ‘accessibility’ and ‘foreseeability’ in criminal

²⁴ In the words of Professor K. Ambos: “...the mere reference to a ‘heavier penalty’ cannot be interpreted as a requirement for precise penalties”. AMBOS, K., ‘Nulla Poena Sine Lege in International Criminal Law’, in HAVEMAN R., OLUSANYA O., *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp – Oxford, 2006, at p.24.

²⁵ Article 7, para.2, ECHR; Article 15, para.2, ICCPR.

²⁶ This has been recognised not only by the ECtHR in: *Naletilic v. Croatia*, Application no.51891/99, Admissibility Decision, 4 May 2000, p.4, para.2, and *Karmo v. Bulgaria*, Application no.76965/01, Decision on Admissibility, 9 February 2006; but also by national or mixed courts dealing with international criminal law and international crimes. See, for instance, the Court of Bosnia and Herzegovina in the case of *Abduladhim Maktouf*, Appellate Division, Case No.KPZ 32/05, 4 April 2006, pp.17-18, where – in relation to the principle of legality and para.2 of Article 7 ECHR – the panel stated that: “...the principle of mandatory application of more lenient law is excluded in processing of those criminal offences for which at the time of their perpetration it was predictable and generally known that they were contrary to general rules of international law”.

²⁷ See AMBOS, K., ‘Nulla Poena Sine Lege in International Criminal Law’, *ibid.*, at p.23.

²⁸ AMBOS, K., *ibid.*, at p.27. On the issue of whether core crimes are equally subject to the principle of legality as ordinary crimes are, see FERDINANDUSSE, WARD N., *Direct Application of International Criminal Law in National Courts*, TMC Asser Press, The Hague, 2006, at pp.224-229.

law, without impeding progressive developments through the judicial law-making process.²⁹

In short, it seems that the principle of legality is more flexible and minimalist in international law than in national law and that, although there is a nucleus common to both spheres of law, discrepancies undoubtedly exist.

b) *Which standard for international sentencing?*

It appears that the principle of legality of penalties is not strictly applied in international criminal law, where sentencing tariffs do not exist and States have not decided or agreed upon a scale of penalties to be applied to international crimes.³⁰

As to its concrete application during trials before the IMTs, the violation of the principle of legality was invoked several times through the argument that there can be no punishment of crimes without a pre-existing law and that *ex post facto* punishment is abhorrent to the law of all civilized nations. All those pleas were rejected and the argument that “in such circumstances the attacker must know that he is doing wrong” was put forward, together with the assumption made by judges at the Nuremberg Tribunal that defendants could not claim that such horrible actions were not previously criminalised, given that since the Hague Conventions of 1907 those crimes were punishable as offences against the laws of war.³¹

It comes as no surprise that the UN ad hoc Tribunals have followed the findings of the IMTs, where the Nuremberg Tribunal simply referred to the principle of *nullum crimen, nulla poena sine lege* as a principle of justice requiring basic knowledge of the fact that the acts concerned were criminal and punishable.³² As observed by Professor

²⁹ See ECtHR, *Achour v. France*, Application n.67335/01, Judgement of 10 November 2004, para.33; ECtHR, *E.K. v. Turkey*, Application no.28496/95, Judgement of 7 February 2002, para.51; ECtHR, *Cantoni v. France*, Application no.17862/91, Judgement of 15 November 1996, para.29; ECtHR, *S.W. v. the United Kingdom*, Application no.20166/92, Judgement of 22 November 1995, para.36. Cf. also AMBOS K., ‘Nulla Poena Sine Lege in International Criminal Law’, in HAVEMAN R., OLUSANYA O., *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp – Oxford, 2006, p.22.

³⁰ Judge A. Cassese, in his Separate Opinion in the *Tadic* appeal case, went as far as to state that the principle of legality is still ‘inapplicable’ to international criminal law. See Separate Opinion of Judge Cassese, *Prosecutor v. Tadic*, Case No.IT-94-1-A, Appeals Sentencing Judgement, 26 January 2000, para.4. See also CASSESE A., *International Criminal Law*, Oxford University Press, 2003, p.157.

³¹ See *France et al. v. Goering et al.*, IMT, judgement and sentence of 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, vol.I, at 203, 219.

³² The point is not questionable and appears well established also in human rights instruments, where it is specified that the principle of legality is not meant to impede the punishment of individuals responsible of

Schabas, a plea focusing on the *nulla poena* argument could never succeed before an international court or tribunal, given that any term of detention cannot be a 'heavier penalty' compared to the death penalty originally prescribed for such crimes.³³

The problem of respecting the principle of legality was clearly perceived when creating the ad hoc Tribunals. The Secretary-General, in his report to the Security Council accompanying the ICTY Statute, affirmed that 'there is one ... issue which would require reference to domestic practice, namely, penalties'.³⁴ As will be explained in more detail in Chapter 3, a formal attempt was thus made to respect the *nulla poena sine lege* principle. Article 24 ICTY Statute and Article 23 ICTR Statute, in fact, establish a link with the penalties generally applied by Yugoslav and Rwandan courts (with the exclusion of the death penalty). This approach has been criticised³⁵ and, however, on a number of occasions judges of the ad hoc Tribunals have specified that the relevance of national practice is only an indication that has no binding effect on the Tribunals.³⁶

In rejecting the alleged violations of the principle of legality, Chambers of the ad hoc Tribunals seemed to adopt a flexible approach to the principle in international legal practice. For instance, the *Delalic* Appeals Chamber noted that the RPE provided for life imprisonment, thus:

...any sentence up to this does not violate the principle of *nulla poena sine lege*. There can be no doubt that the accused must have been aware of the fact that the crimes for which they are indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties.³⁷

acts that, according to the general principles of law recognised by civil nations, were to be considered as crimes/criminal acts. See, for instance, para.2 of Article 15, ICCPR: '...2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.' In the same sense, also para.2 of Article 7, ECHR.

³³ See SCHABAS, W., 'War Crimes, Crimes Against Humanity and the Death Penalty', *Albany Law Journal*, no.60 (1997), p.736; SCHABAS, W., 'Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals', *European Journal of International Law*, vol.11 no.3, 2000, p.523.

³⁴ Secretary-General's Report, S/25074, 3 May 1993, para.34.

³⁵ SCHABAS, W., 'Sentencing by International Tribunals: A Human Rights Approach', *Duke Journal of Comparative and International Law*, no.7 (1997), pp.461-516, at 478-482.

³⁶ See, for instance, for the ICTY: *Prosecutor v. Delalic and others*, Case No.IT-96-21-T, Trial Chamber Judgement, 16 November 1998, para.1194; *Prosecutor v. Aleksovski*, Trial Judgement, Case No.IT-95-14/1-T, 25 June 1999, para.242; *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.818. For the ICTR: *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T, Trial Judgement, 2 September 1998, para.14; *Prosecutor v. Kambanda*, Case No.ICTR-97-23-S, Trial Judgement, 4 September 1998, para.23.

³⁷ *Delalic et al., cit.*, Appeals Chamber, 20 February 2001, para.817.

The Appeals Chamber in the *Kunarac* case was even more explicit on the scope of the *nulla poena sine lege* by recognising that:

...the principle requires that a person shall not be punished if the law does not prescribe punishment. It does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity³⁸

and thus concluding for the lack of violation of the principle of legality:

The Statute does not set forth a precise tariff of sentences. It does, however, provide for imprisonment and lays down a variety of factors to consider for sentencing purposes. The maximum sentence of life imprisonment is set forth in Rule 101(A) of the Rule ... for crimes that are regarded by States as falling within international jurisdiction because of their gravity and international consequences. Thus, the maxim *nulla poena sine lege* is complied with for crimes subject to the jurisdiction of the Tribunal.³⁹

Recent case-law of the European Court of Human Rights (ECtHR) is also significant at this regard. Although in relation to the *nulla poena* element of the principle of legality, the ECtHR held that, as a general rule, penalties must be established by law,⁴⁰ in the case of *Naletilic v. Croatia*⁴¹ the ECtHR rejected and found inadmissible a complaint based on Article 7, in which the applicant, indicted by the ICTY on counts of war crimes and crimes against humanity, denounced his transfer to the international tribunal and asserted that it violated *inter alia* Article 7 ECHR on the grounds that the ICTY could impose on him a heavier sentence than the maximum one he could receive in the domestic courts. The ECtHR dismissed the complaint and the alleged violation of Article 7 ECHR on the basis that the provision applicable to the applicant's case was in fact paragraph 2 of Article 7 and not paragraph 1: as seen above, Article 7, para.2,⁴² contains an exception clause to the principle of legality for those acts that, at the time of perpetration, were criminal according to the general principles of law recognised by civilized nations.⁴³ Thus, it seems that there is in fact a double standard of application of the principle of legality for crimes at the national and at the international level.

³⁸ *Prosecutor v. Kunarac*, Case No.IT-96-23&96-23/1-A, Appeals Judgement, 12 June 2002, para.372.

³⁹ *Ibid.*, para.373.

⁴⁰ ECtHR, *Coeme and others v. Belgium*, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgement, 22 June 2000, para.145; ECtHR, *C.R. v. United Kingdom*, Application no.20190/92, judgement of 27 November 1995, para.33.

⁴¹ ECtHR, *Naletilic v. Croatia*, Application no.51891/99, Admissibility Decision, 4 May 2000.

⁴² Article 7, para.2: '...This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.'

⁴³ ECtHR, *Naletilic v. Croatia*, Application no.51891/99, Admissibility Decision, 4 May 2000, p.4, para.2. Also: ECtHR, *Karmo v. Bulgaria*, Application no.76965/01, Decision on Admissibility, 9 February 2006, p.10 C.

The issue of legality of penalties is certainly an important topic in international criminal law; the scope of this thesis, however, does not allow for a detailed analysis of the principle, which is thus taken into consideration and evaluated only insofar as it touches upon issues of sentencing.

How the principle is enshrined in the system of the ICC will be analysed in Chapter 5, and a final assessment of the role of the principle in international criminal law is provided in Chapter 6. It is considered that a fundamental issue is at stake when discussing the role of the principle of legality in international criminal law: the *notion of law* at the international level.

1.3 The principle of proportionality of penalties

“The punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender.”⁴⁴

The principle of proportionality of penalties is a general principle of criminal law common to national legal systems as well as to the law and practice of international criminal tribunals. The requirement that penalties must not be disproportionate also derives from international human rights standards. This significant principle is meant to ensure two important elements: first, that the punishment does not exceed the gravity of the offence (thus the principle would impose restraints to excessive or arbitrary penalties); second, that a minimum level of punishment be guaranteed and imposed upon the accused (thus the principle would ensure that the final sentence takes into account the concrete seriousness of the offence and the gravity of the crime).⁴⁵

After describing the content and sources of the principle of proportionality of penalties, this section includes a brief survey of the relevant doctrine and the case-law of the European Court of Human Rights; the relevant jurisprudence of the ad hoc Tribunals is illustrated in Chapter 3.

⁴⁴ UN Congress on the Prevention of Crime and Treatment of Offenders, UN doc.A/Conf.144/28, 1990.

⁴⁵ On the principle of proportionality, see for instance: ASHWORTH A., VAN ZYL SMIT D., ‘Disproportionate Sentences as Human Rights Violation’, *The Modern Law Review*, vol.67, no.4, July 2004, pp.541-560; VON HIRSCH, ANDREW, ‘Proportionality in the Philosophy of Punishment’, *Crime and Justice*, vol.16, 1992, pp.55-98; ELLIS, E., *The Principle of Proportionality in the Laws of Europe*, Oxford, Hart Publishing, 1999.

a) *The content of the principle*

The principle according to which penalties imposed upon conviction must be proportionate in their severity to the gravity of the offence⁴⁶ and to the degree of responsibility and personal circumstances of the offender⁴⁷ is universally recognised by criminal law. It is considered a basic requirement of fairness having its roots in respect for human dignity, in the rule of law and in the protection of citizens against arbitrariness in the administration of justice.

That the principle has constantly had a crucial role in human rights law and in any sanctioning theory is because it seems to embody notions of justice, as it is recognised or felt that penalties scaled to the gravity of the offences and the particular circumstances of the case at hand are fairer than those not scaled in such a way.

In particular, the prohibition of disproportionate punishment focuses on the severity of a certain kind of penalty considered *per se* admissible, such as the penalty of imprisonment. The seriousness of the crime(s) committed and the particular circumstances of the case are relevant in order to assess the acceptable *quantity* of punishment. Punishment becomes inadmissible when it is not proportionate to a particular offence; the punishment that is allowed for certain types of crime may not be allowed if imposed for other lesser offences. Proportionality is therefore important where the *type* and the *quantum* of sanctions for a particular case are concerned.

Proportionality is not an exact concept: a sentence labelled as ‘disproportionate’ should be one that falls outside the normal and acceptable boundaries of proportionality, but these boundaries may not be easy to establish and to assess. In particular, the relationship between the seriousness of the offence and the severity of the penalty might differ in diverse social and cultural contexts. This holds equally true in connection with the relative seriousness of different types of offence. Nonetheless, there are certain elements which must always be taken into account when assessing the proportionality of a penalty: the harm done or risked, the culpability of the offender, any relevant aggravating and mitigating factors. This approach aims at ensuring that the particular sentence imposed is not disproportionate, within the given relevant legal framework.

⁴⁶ This component of the principle of proportionality is usually referred to as the ‘objective component’: it is determined by assessing the degree of harm caused by the offence.

⁴⁷ The ‘subjective component’ of the principle of proportionality is the culpability of the offender. The central consideration regards whether the crime was committed intentionally or recklessly or negligently. The culpability focuses on the mental state of the perpetrator at the time of the offence (*mens rea*).

In general terms, a ‘disproportionate’ punishment can be either too severe or too lenient. However, given that the principle of proportionality of penalties has its roots in the rule of law and in the legal safeguards that citizens should have against abuses in the administration of justice, it is usually considered more important to prevent exceedingly harsh penalties than to prevent exceedingly lenient ones. The main function of the principle of proportionality is, in other words, to impose an upper limit which the punishment must never exceed. This does not imply that the principle is not relevant with respect to sentences that are less severe than the offender’s acts would have deserved, although usually – in such a case – it is interpreted in a less restrictive way.

b) *The sources of the principle*

The principle of proportionality of penalties is generally included, either expressly or by implication, in both national constitutions and international human rights instruments.⁴⁸

Since the Second World War there has been a proliferation of human rights instruments in which we find relevant provisions on punishment. Starting from the 1948 Universal Declaration of Human Rights, Article 5 states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. The same wording is present in other international conventions, such as the International Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights (Article 3), the American Convention on Human Rights (Article 5.2),⁴⁹ and, similarly, in the African Charter on Human and Peoples’ Rights (Article 5).⁵⁰ Analogous – and at times even broader – provisions are enshrined in many national constitutions which prohibit disproportionate sentences, either explicitly (i.e., with provisions expressly devoted to such a prohibition) or implicitly (through other human rights guarantees, such as the right to physical and mental integrity or the prohibition of

⁴⁸ See, for instance, BASSIOUNI, M.C., ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and the Equivalent Protections in National Constitutions’, *Duke Journal of Comparative and International Law*, 3 (1993), 263; and VAN ZYL SMIT D., *Taking Life Imprisonment Seriously in National and International Law*, The Hague: Kluwer, 2002, ch.4.

⁴⁹ Article 5, ACHR, ‘Right to Humane Treatment’: “1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. ...”

⁵⁰ Article 5, African Charter: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

cruel, inhuman and degrading punishment).⁵¹ When it is included by implication, the principle of proportionality is generally linked to the prohibition of cruel, inhumane or degrading punishment.⁵²

In various jurisdictions around the world it is a constitutional principle that no person should be subjected to a grossly disproportionate sentence.⁵³

Returning to the international dimension, endorsement of the principle of proportionality of penalties is explicitly included, in the context of humanitarian law, in Article 67 of the IV Geneva Convention, which states that courts ‘shall apply only those provisions of law ... which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence’.

The principle of proportionality is specifically provided for also in Article 49 of the Draft EU Charter of Fundamental Rights under the heading ‘Principles of legality and proportionality of criminal offences and penalties’. After having restated the importance of respecting the principle of legality in its two components of the *nullum crimen* and *nulla poena sine lege*, the EU Charter states that ‘...The severity of penalties must not be disproportionate to the criminal offence.’⁵⁴ Previously, the Council of Europe’s “Recommendation on Consistency in Sentencing” already required that, whatever rationale(s) for sentencing a member state might adopt, no disproportion between the seriousness of the offence and the punishment be permitted, or more specifically,

⁵¹ Cf., BASSIOUNI, M.C., ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and the Equivalent Protections in National Constitutions’, *Duke Journal of Comparative and International Law*, 3 (1993), 263.

⁵² See, for instance, the Supreme Court of the United States in *Solem v Helm* ((1983) 463 U.S. 277), in which the Court stated that the cruel and unusual punishment-clause ‘prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.’ The Court also clarified the ‘objective criteria’ that are necessary to determine proportionality: ‘i) the gravity of the offence and the harshness of the penalty; ii) the sentences imposed on other criminals in the same jurisdiction; and iii) the sentences imposed for commission of the same crime in other jurisdictions.’

⁵³ For example, the right to human dignity in Germany has been interpreted as including a prohibition on disproportionate punishments (B.Verf.GE 1, 348). Cf. VAN ZYL SMIT D., *Taking Life Imprisonment Seriously in National and International Law*, The Hague: Kluwer, 2002, ch.4.

⁵⁴ The formulation of the principle is of particular interest since the principle (and its corresponding constitutional formulations) is usually expressed elsewhere in terms of *grossly disproportionate* sentences. Article 49(3) seems therefore to set a broader standard. Reflecting on the implications of such ‘new’ terminology, the difference between *disproportionality* and *gross disproportionality* should be in the ‘degree’ of disproportion, although the exact point where a ‘disproportionate’ sentence becomes ‘grossly’ disproportionate is hard to identify in abstract terms. Moreover, the general principle of proportionality between penalties and criminal offences is enshrined in the common constitutional traditions of the Member States and is also based on and reflected in the case law of the European Court of Justice (see for instance the case-law discussed by BAKER, E., ‘Taking European Criminal Law Seriously’, *Criminal Law Review*, 1998, at pp.371-373).

'disproportionality between the seriousness of the offence and the sentence should be avoided'.⁵⁵

Thus one of the main foundations for the prohibition of disproportionate punishment – both at the international and at the national level – is the prohibition of cruel, inhuman or degrading treatment or punishment.

c) *Doctrinal and judicial interpretation of the principle of proportionality*

The principle of proportionality – in its requiring that the penal treatment be proportionate to the seriousness of the crime in order to reflect the appropriate degree of censure – is regarded as a key principle by a number of sentencing theorists.⁵⁶

With regard to 'desert' theories, punishment is scaled according to the seriousness of the crime and a distinction is drawn between two types of proportionality: *cardinal proportionality*, which requires that the severity of punishment be proportional to the seriousness of the offence and that a proportion be maintained between the overall gravity of the different levels of punishment and the gravity of the criminal conduct; and *ordinal proportionality*, which focuses on the relative seriousness of the offence, and considers how offenders are punished in relation to each other, requiring an assessment of the seriousness of the crime in relation to other forms of offending, in order to establish acceptable relativities and a comparative scale of the gravity of crimes.⁵⁷

Andrew von Hirsch, in his sentencing theory, attributes a central role to the principle of proportionality, maintaining that *'the principle calls for A and B to receive comparably severe punishments, if the gravity of their crimes is approximately the same'*.⁵⁸ Furthermore, he draws attention to the question of the 'spacing' of penalties:

⁵⁵ Council of Europe, *Consistency in Sentencing*, Recommendation No.R(92)17 (Strasbourg, Council of Europe Press, 1993), para.A4. See also ASHWORTH, A., 'Towards European sentencing standards', *European Journal on Criminal Policy and Research*, 2(1994), 7.

⁵⁶ See, on the interpretation of the principle of proportionality, VON HIRSCH, A., 'Proportionality in the Philosophy of Punishment', *Crime and Justice*, vol.16, 1992, pp.55-98; CANNIZZARO, ENZO, *Il principio della proporzionalità nell'ordinamento internazionale*, Milano, Giuffrè, 2000; VON HIRSCH A., ASHWORTH A., *Proportionate Sentencing*, Oxford University Press, 2005.

⁵⁷ This means that when offenders have committed crimes of comparable seriousness, they deserve to be punished with penalties of comparable harshness, unless the special circumstances of the case (such as mitigating and aggravating factors) justify a substantially different penalty. See VON HIRSCH, A., *Censure and Sanctions*, Oxford, Clarendon Press, 1993, Ch. 4 and 5; VON HIRSCH, A., 'Proportionality in the Philosophy of Punishment', *Crime and Justice*, vol.16, 1992, p.79.

⁵⁸ VON HIRSCH, A., *Censure and Sanctions*, Oxford, Clarendon Press, 1993, p.75.

not only should penalties be ranked according to the gravity of the crimes, but they should also reflect a certain space between them, *i.e.* a certain difference in harshness between a given penalty and the one immediately more serious or less serious, in order to reflect corresponding differences in crime seriousness.⁵⁹

One of the most relevant implications of the principle of proportionality for international sentencing is that it requires that sentences be proportional to the other sentences meted out in similar cases. There must be a relationship of proportionality between comparable cases for the sentence imposed to be considered as ‘just’ and ‘fair’.

There is a significant body of judicial interpretation on the principle of proportionality of penalties. The scope of this analysis does not allow for extensive examination of this aspect, thus attention will be given only to some essential case-law of the European Court of Human Rights (ECtHR), which appears to be the most instructive for the purposes of this section.

European Court of Human Rights

The case-law of the ECtHR seems to support the consideration that disproportionality must be assessed taking into account both the seriousness of the offence and the characteristics of the offender.

Although no article of the European Convention on Human Rights (ECHR) explicitly provides for a specific right to question the severity of a sentence imposed as a consequence of a conviction for a criminal offence, other provisions have been used for that purpose. In fact, both the former European Commission and the ECtHR have adopted the position that – in particular circumstances, especially when the offender is either very young or suffers from a mental disorder of some kind – the length of a custodial sentence could amount to inhuman or degrading punishment contrary to Article 3 ECHR.⁶⁰

More in general, in its case-law the Court held that, in deciding whether a sentence violates the prohibition on ‘inhuman or degrading punishment’ under Article 3, the penalty must attain ‘a minimum level of severity’ and that this should be assessed in

⁵⁹ VON HIRSCH, A., ‘Proportionality in the Philosophy of Punishment’, *Crime and Justice*, vol.16, 1992, p.94.

⁶⁰ See ECtHR, *Weeks v. United Kingdom*, Application no.9787/82, 2 March 1987, paras.47, 58-59; ECtHR, *Hussain v. United Kingdom*, Application no.21928/93, 21 February 1996, para.53.

relation to the ‘sex, age and state of health’ of the offender.⁶¹ This means that the possibility that a custodial sentence be considered as an inhuman and/or degrading punishment depends on the concrete circumstances of the case at hand, and in particular on the ‘sex, age and state of health’ of the defendant.⁶²

Some additional guidance can be derived from the case-law of the ECtHR on extradition. In fact, in the well-known *Soering* case, the Court found that a proposed extradition could have given rise to inhuman treatment under Article 3 due to the existence of a ‘real risk’ that the sentence likely to be imposed in the requesting State be disproportionate to the gravity of the crime committed.⁶³

Standards governing the application of the principle of proportionality in international criminal law are apparently less clear than those adopted within national legal systems. In fact, due to the peculiarities of the context in which international crimes are committed, fitting the punishment to the crime has developed into one of the most controversial areas of international sentencing law and practice, as it will be seen in Chapter 3 when analyzing the jurisprudence of the ad hoc Tribunals.

As to the role of the principle of proportionality in international criminal law and international sentencing, in the concluding part of this research I will attempt to restate the proportionality principle in relation to the elements that should be *proportionate*. The basic assumption I uphold is that the principle finds many difficulties in its application to international criminal law, given that, especially where international crimes are concerned, the degree of suffering and the degree of harm caused are incommensurable with the punishment and penalties imposed.

⁶¹ For an early expression of this point, see ECtHR, *Republic of Ireland v. United Kingdom*, Application no.5310/71, 18 January 1978, para.162; also: *V. and T. v. United Kingdom*, Application no.24888/94, 16 December 1999, paras.69-74. For a broader analysis, see EMMERSON B., ASHWORTH A., *Human Rights and Criminal Justice*, London, Sweet & Maxwell, 2001, pp.481-484, and chapter 16 generally.

⁶² See, for instance, ECtHR, *Republic of Ireland v. United Kingdom*, Application no.5310/71, 18 January 1978, para.162; ECtHR, *Campbell and Cosans v. United Kingdom*, Application no.7511/76 and 7743/76, 25 February 1982, para.28; ECtHR, *A. v. United Kingdom*, Application no.25599/94, 23 September 1998, para.20.

⁶³ ECtHR, *Soering v. United Kingdom*, Application no.14038/88, 7 July 1989, para.104.

1.4 Other human rights standards relevant to sentencing

It can safely be affirmed that international criminal law has drawn considerably on human rights law both for its substantive contents and for procedural norms and safeguards.⁶⁴ This close link between the two disciplines has been recognised several times by the UN ad hoc Tribunals. For instance, the ICTR Trial Chamber in the *Barayagwiza* case observed that:

Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law.⁶⁵

The area of interaction between human rights law and procedural prescriptions for the sentencing process is certainly a delicate one, and it is probably here that the tension between human rights protection (especially protection of victims and accused during the trial process) and criminal prosecution of international crimes is most striking.⁶⁶ In fact, although humanitarian objectives seem to underpin the reasons for the existence of international criminal trials,⁶⁷ the incorporation of human rights principles in the statutes and rules of procedure of international courts and tribunals does not always appear to be effective, due to procedural constraints and boundaries.

However, one of the areas in which the influence of human rights law is more evident is the discipline of the rights of the accused to a fair trial.⁶⁸ To a lesser extent, the area of participation and protection of victims of international crimes as well as

⁶⁴ See more extensively on the influence of human rights law on criminal proceedings: ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003. See also: HENHAM, R., 'Procedural Justice and Human Rights in International Sentencing', *International Criminal Law Review*, vol.4 (2004), pp.185-210.

⁶⁵ *Prosecutor v. Barayagwiza*, Case No. ICTR-99-52-T, Appeals Chamber, Decision, 3 November 1999, para.40.

⁶⁶ More specifically, on the threat that procedural constraints on international sentencing could represent for the notion of fair trial within international sentencing, see HENHAM, R., 'Procedural Justice and Human Rights in International Sentencing', *International Criminal Law Review*, vol.4 (2004), pp.185-210. Also: FINDLAY, M., 'Internationalised Criminal Trial and Access to Justice', *International Criminal Law Review*, 2 (2002), p.237.

⁶⁷ Professor Cassese recognises the importance of concerns for victims of international crimes as a core and central part of international criminal justice. See CASSESE, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections', *European Journal of International Law*, 1(1999), pp.144-171, at p.168.

⁶⁸ This aspect was emphasised in the Report of the UN Secretary-General before the establishment of the ICTY. He stressed that the Tribunal 'must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings.' See Report of the Secretary-General of the UN pursuant to Paragraph 2 of SC Resolution 808 (1993), UN Doc. S/24704, para.106.

witnesses also seems to reflect human rights concerns, although the discipline has only recently received attention and refinement in the Rome Statute of the ICC. Although these individuals seem to be guaranteed many safeguards throughout trial proceedings, the same does not hold true for the sentencing phase, in particular for the deliberation and pronouncement of the sentence.⁶⁹ In fact, as will be seen more specifically later on, the actual practice of the ad hoc Tribunals – in contrast to that prescribed for the ICC system – does not allow for separate sentencing hearings but prescribes that all evidence (including that related to sentencing) be heard during the trial and before the pronouncement of the verdict.⁷⁰

With regard to human rights principles applicable to the sentencing process, a study conducted by Professor Schabas considered the general applicability of the provisions of the 1948 Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights of 1976.⁷¹ In particular, Schabas suggested that Article 7 ICCPR ‘encompasses the notion of proportionality in criminal punishment’, and that the combined provisions of Article 7 and Article 10 enshrine the importance of rehabilitation.⁷² Article 14 of the ECHR should also be recalled in this context as it states that rights shall be secured without discrimination on any ground such as sex, race, colour, language and religion, political or other opinion.⁷³ This provision should equally apply to the rights of the accused, the rights of victims and witnesses, and to the way in which procedural and substantial rights should be secured during the whole sentencing process.

⁶⁹ Cf. HENHAM, R., ‘Procedural Justice and Human Rights in International Sentencing’, *cit.*, at p.190.

⁷⁰ See Rule 85 ‘Presentation of Evidence’ of the ICTY and ICTR Rules of Procedure and Evidence; Article 76, para.1, of the Rome Statute for the ICC.

⁷¹ SCHABAS, W., ‘Sentencing by the International Tribunals: A Human Rights Approach’, *Duke Journal of Comparative and International Law*, 7(1997), p.467.

⁷² Article 7, ICCPR: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ Article 10, ICCPR, thus provides: ‘1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. ... 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.’

⁷³ Article 14, ECHR: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

The presumption of innocence is clearly a fundamental principle in this context. It is thus important to mention the relevance of the principle of culpability, which was not codified or identifiable anywhere in the Statutes of ICTY and ICTR, but which appears at Article 30 ('Mental Element') of the ICC Statute, and in Rule 145 of the ICC RPE, where the principle is explicitly mentioned.⁷⁴ The principle of culpability must thus represent one of the key aspects to be taken into account in the determination of the appropriate penalty.

Some principles of 'social justice' are also related to the decision-making process in sentencing, including: the principle of proportionality, already mentioned, the principle of equality before the law, and the principle of equal impact and treatment.

One of the applications of the principle of equality before the law is that, as far as sentencing is concerned, sentences should treat offenders equally, irrespective of their race, colour, sex, wealth, abilities or family status. The most obvious application of this principle is that no person should be sentenced more severely because of race or colour. If the seriousness of the offence and the culpability of the offender are considered to be the primary criteria of punishment, then naturally sentencing should be not affected by discriminatory considerations such as those of race or colour, etc.

The principle of equal treatment, by which – within a given legal system – the imposition of penalties having an unequal impact on different offenders or groups of offenders must be avoided, is a principle similar to that of proportionality in that it seeks to ensure fair treatment for all individuals and an equal impact of sentences on the offenders.⁷⁵

The issue of *equal impact* was already addressed and recognised as important in the XVIII century. It is not difficult to imagine situations in which a certain sentence will have a different impact on individual offenders. For instance, imprisonment may have a

⁷⁴ This is the first time that the principle of culpability is explicitly mentioned in the regulating norms of an international court. See Rule 145 'Determination of Sentence', para.1: 'In its determination of the sentence pursuant to Article 78, paragraph 1, the Court shall: a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under Article 77 must reflect the culpability of the convicted person ...'.

⁷⁵ For instance, A. Ashworth and E. Player have argued for a principle of proportionality which would recognise that similar sentences may have a different impact on different offenders, depending on their individual circumstances; therefore attempts should be made to remove these differences of impact as far as possible. Cf. ASHWORTH A., PLAYER E., *Sentencing, Equal Treatment and the Impact of Sanctions*, in ASHWORTH A., WASIK M., eds., *Fundamental of Sentencing Theory*, Oxford, Clarendon Press, 1998, at p.271.

different impact – and therefore results as more inflictive and less bearable – on pregnant women or persons suffering from a major physical illness.⁷⁶ Professor Ashworth observed that judicial fairness would require recognition that the same sentence may have a disproportionately severe impact on certain offenders than on others, and that only the adoption of the principle of equal impact can help to minimize this effect.⁷⁷ He then recalled the range of factors enumerated by Jeremy Bentham which may affect the response of different individuals to a given sentence, for instance – and among others – health, strength, firmness of mind, moral and/or religious sensibility, insanity, habitual occupations, sex, age, rank, education, and so on.⁷⁸ This is only to demonstrate that equality of impact has long since been recognised and proposed as an important principle of fairness in meting out punishment.

Although it is reasonable to recognise that equality of punishment might never be fully achieved in practice for a number of reasons, such as the variety of people appearing before courts, the different systems of criminal law, and so on, nevertheless mechanisms and principles do exist and should be applied in order to reduce disparities and gross incongruence.

B. Determination of the Sentence: Relevant Issues for International Justice

In the analysis of international sentencing, a fundamental point is to determine which factors are in fact relevant to the decision-making process in sentencing. The general criteria and influential elements for the determination of sentences must thus be identified and described. One point of departure in reconstructing and defining these criteria and influential factors is clearly represented by the normative provisions related to sentencing and the judicial concept of sentencing adopted by the system under analysis here.

Although factors taken into account in the determination of sentences are of a varied nature, essentially they appear connected to the following elements: purposes

⁷⁶ See ASHWORTH A., PLAYER E., *Sentencing, Equal Treatment and the Impact of Sanctions*, in ASHWORTH A., WASIK M., eds., *Fundamentals of Sentencing Theory*, Oxford, Clarendon Press, 1998, at p.254.

⁷⁷ See ASHWORTH, A., *Sentencing and Criminal Justice*, Butterworths, London, 3rd ed., 2000, pp.79-80.

⁷⁸ BENTHAM, J., *Principles of Morals and Legislation*, 1789, Ch.VI, para.6. It should be recalled that Bentham's preventive theory of punishment considers general deterrence as the main principle for the distribution and amount of punishment.

assigned to punishment; influence exercised by general principles of law on the sentencing process; the specific circumstances of the case at hand; and procedural aspects. The role of the international judge in the determination of the penalty is also a central issue.

Concerning the first ‘complex’ of factors, the importance of having clear purposes for punishment in international sentencing will be clarified in the next section. It is clearly an issue which will be tackled in depth throughout the thesis and which, starting from a comparative analysis of the traditional purposes of punishment in domestic systems (Chapter 2), will imply an assessment of the purported purposes of international punishment and a proposition concerning the purposes deemed as most suitable for international justice.

General principles of law and human rights are also considered relevant elements for the law of sentencing. Among these, the principle of legality, the principle of proportionality of penalties and other human rights standards have already been mentioned, and their significance for the sentencing process has been described. Propositions concerning their role in international sentencing will be put forward in this research.

The notion of ‘general principles of law’ as a source of international law, derived from Article 38 para.1(c) of the Statute of the International Court of Justice,⁷⁹ can be transplanted and applied also to international criminal law to justify the construction of a system of international sentencing based on the shared values and principles recognised by civilized nations.⁸⁰

The other important ‘complex’ of influential factors on sentencing is represented by aggravating and mitigating circumstances, as well as elements linked to proceedings.

⁷⁹ Article 38, para.1, ICJ Statute: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

⁸⁰ The notion of ‘general principles of law’ is not limited to principles of international law, but also includes principles of domestic law. In the framework of the present study on international sentencing, that implies and suggests a review and analysis of national laws and principles of sentencing in order to have a more comprehensive reconstruction of the subject-matter. An overview of comparative law is thus offered in Chapter 2.

Considering the significant impact exercised by these elements on the sentencing process, and the fact that little attention has been devoted so far in the literature to the exact role that aggravating and mitigating factors should have in international sentencing, these factors are one of the focal points of my research, especially in analysing the case-law of the ad hoc Tribunals. From this perspective, the empirical analysis carried out on the ICTY and ICTR sentencing practice, and illustrated in Chapter 4, concentrates also on aggravating and mitigating factors as interpreted by judges of the ad hoc Tribunals.

Some introductory notes on the role of influential factors in sentencing are presented in the following paragraphs.

1.5 The purposes of punishment. *Which purposes for international sentencing?*

Amongst the influential factors on sentencing, the purposes of punishment clearly have a prominent role. The problem of defining the appropriate objectives for international sentencing therefore becomes crucial.⁸¹ By ‘purposes of punishment’, I mean the legal

⁸¹ In fact, a great deal of attention has already been devoted to the purposes of international criminal justice. See, amongst others, AKHAVAN, P., ‘Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda’, *Duke Journal of Comparative and International Law*, vol.7 (1997), pp.325-348; AKHAVAN, P., ‘Justice in The Hague, Peace in the former Yugoslavia?’ *Human Rights Quarterly*, 20(1998), pp.737-816; AKHAVAN, P., ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, *American Journal of International Law*, vol.95 (Jan.2001), pp.7-31; AMBOS, KAI, ‘Sobre los fines de la pena al nivel nacional y supranacional’, in Ambos Kai, *Temas de derecho penal internacional y europeo : derechos humanos, fines de la pena, ius puniendi, responsabilidad individual, crímenes mas graves, derecho penal y guerra, proceso penal internacional y europeo, inmunidades*, Marcial Pons, Ediciones Jurídicas y Sociales, Madrid, 2006; BASSIOUNI, M.C., ‘Combating Impunity for International Crimes’, *University of Colorado Law Review*, vol.71 (2000), pp.409-422; BASSIOUNI, ‘International Criminal Justice in the Age of Globalization’, in *International Criminal Law: Quo Vadis? - Proceedings of the International Conference held in Siracusa, Italy, 28 November/3 December 2002, on the Occasion of the 30th Anniversary of ISISC*, Erés, Ramonville Saint-Agne, 2004, pp.79-155; BEIGBEDER, YVES, *International Justice against Impunity*, Martinus Nijhoff Publishers, 2005; FATIC, ALEKSANDAR, *Reconciliation via the War Crimes Tribunal?*, Ashgate, 2000; FINDLAY M., HENHAM R., *Transforming International Criminal Justice – Retributive and Restorative Justice in the Trial Process*, Willan Publishing, 2005; HENHAM, R., ‘The Philosophical Foundations of International Sentencing’, *Journal of International Criminal Justice*, vol.1(2003), pp.64-85; HENHAM, R., ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research’, *Journal of International Criminal Justice*, volume 5, issue 3 (2007), p. 757-778; SAFFERLING, CHRISTOPH J.M., ‘The Justification of Punishment in International Criminal Law’, *Austrian Review of International and European Law*, vol.4(1999), pp.126-163; TALLGREN, I., ‘The Sensibility and Sense of International Criminal Law’, *European Journal of International Law*, vol.13 no.3 (2002), pp.561-595; ZOLO, DANILO, ‘Peace through Criminal Law?’, *Journal of International Criminal Justice*, vol.2 issue 3 (Sept.2004), pp.727-734. See also, as a more general framework on the functions of international law, TOMUSCHAT, C., ‘International Law: Ensuring the Survival of Mankind on the Eve of New Century’, *Recueil des Cours*, no.23(1999), pp.1-281;

and social underpinnings that legitimate punishment imposed by criminal courts and link to it certain effects that the legal system wishes to achieve. These purposes have the function of guiding judges in the concrete determination of the penalty and allowing for *ex post* evaluation of the legitimacy of sentences.

At the domestic level, each legal system assigns its own goals to the sentencing process, which are normally decided at the national level through legislation (constitutional charters, penal codes, etc.). Goals of punishment are essential to any system of criminal justice in so far as they determine the character of the legal system and its effectiveness, the severity of sentences and the process of their execution.

Despite this recognised importance, the system of international criminal justice has not yet agreed about the purposes that should characterised and lead its actions. It is submitted that there is an absence of penological justifications for international sentencing. Scholars and practitioners agree on the fact that the current praxis of international sentencing reveals a certain degree of obfuscation and confusion in the penal justifications for punishment.⁸²

Especially when looking at the philosophy of punishment at the international level and when trying to ascertain the purpose(s) of international sentencing, it appears clear that the normative structure of international criminal justice remains uncertain and confused compared to national laws. In fact, none of the provisions of international Tribunals and Courts addresses the issue of the purposes of punishment: whether the penalty imposed should be mostly retributive in nature or should match the degree of social danger represented by the accused, whether it should redress the specific harm done or rather perform a function of general prevention and/or rehabilitation. The only relevant precedents in international justice – the judgements of the IMTs of Nuremberg and Tokyo – do not expressly state the purposes sought in meting out punishment for war crimes or crimes against humanity. However, the declarations of the signatory parties of the London Charter (8 August 1945) and the case-law of the IMTs seem to indicate that penalties were directed at general deterrence and retribution.

KOSKENNIEMI, M., 'What is International Law for?', in EVANS, MALCOM D., *International Law*, 2nd ed., Oxford University Press, 2006, pp.57-78, at 77-78.

⁸² See HENHAM, R., 'The Philosophical Foundations of International Sentencing', *Journal of International Criminal Justice*, vol.1(2003), pp.64-85, at 69 and ff; ZOLO, D., 'Peace through Criminal Law?', *Journal of International Criminal Justice*, vol.2 issue 3 (Sept.2004), pp.727-734, at 728-729.

Although the ‘traditional’ purposes of sentencing have been upheld in different ways by international tribunals, the question of which rationale(s) international sentencing should pursue still remains open.

It is argued that the absence of penological justifications in the Statutes of the ad hoc Tribunals and of the ICC weakens attempts by those institutions to exercise principles of criminal justice in a rationally founded and accepted way. To determine the appropriate goals of international sentencing is therefore of vital importance for the system of international justice. For instance, international justice might pursue different strategies of prosecution depending on which purpose of sentencing is considered most important: either to prosecute and try the biggest number of suspects possible in a purely retributive perspective, or to restrict prosecution and trials only to those who bear the greatest responsibility (as it has been the case so far for the ad hoc Tribunals) in a mainly preventive and deterrent perspective.

The general aims of international sentencing could be summarised in the five following areas: deterrence, retribution, rehabilitation, social defence, restoration and maintenance of peace. The issue at stake is what relevance each purpose should exercise on the sentencing process, and which objectives should be considered as the most appropriate for international justice.

An assessment concerning the purposes of penalty in international sentencing will therefore be made, commencing primarily by an evaluation of those purposes as determined in the ICTY and ICTR jurisprudence. In the absence of any guidance in their founding Statutes, Chambers of the ad hoc Tribunals have in effect examined the purposes of penalties in the light of precedents in international as well as national law. As will be seen when analysing ICTY and ICTR case-law, judges of the Tribunals have tended to attach more importance to deterrence and retribution than to other objectives, such as rehabilitation of the convicted person. As stressed by R. Henham, sentences issued so far by the ad hoc Tribunals were inspired by the paradigm of the *retributive* and *stigmatizing* function of punishment.⁸³

With regard to the existing literature, it has been argued that there is a serious need to re-examine the current justifications of punishment in international sentencing

⁸³ HENHAM, R., ‘The Philosophical Foundations of International Sentencing’, *Journal of International Criminal Justice*, 1 (2003), Oxford University Press, pp.64-85, at 66-69.

practice, as recent approaches are confused and unclear and there is a significant lack of clarity from the ad hoc tribunals in addressing fundamental issues of sentencing.⁸⁴ On the other hand, commentators have maintained that the primary goal of punishment for the system of international criminal justice should be the preservation of the world order and maintenance of peace and security.⁸⁵ It has been affirmed that – at this point in history – international criminal justice means essentially *retributive justice* for international crimes. As punishment is deemed fundamental to world order (in the same way as it is for the order of national societies), then punishment for international crimes must be basically *retributive*, not in the sense of vengeance but with a view towards future general deterrence and a marginal concern for rehabilitating individual offenders.⁸⁶

Other commentators have argued that the central function of international criminal trials is *deterrence*, considered in its dual role of specific deterrence of powerful elites and of a broader ‘socio-pedagogical’ deterrence addressing the whole international community.⁸⁷ It is believed that the punishment of war criminals should be motivated primarily by its deterrent effect, given that the satisfaction of instincts of revenge and retribution are deemed the least sound basis for punishment. If the focus of human rights law upon the fight against impunity is considered the most important, it can then be argued that the significance of *retribution* as an objective of sentencing should be less and less relevant.⁸⁸

Another frequently mentioned justification for international criminal justice is the *fight against impunity*.⁸⁹ On the one hand, it is undoubtedly true that impunity is a

⁸⁴ HENHAM, R., ‘The Philosophical Foundations of International Sentencing’, *ibid.*, pp.64-85.

⁸⁵ BASSIOUNI, M.C., ‘International Criminal Justice in the Age of Globalization’, in *International Criminal Law: Quo Vadis? - Proceedings of the International Conference held in Siracusa, Italy, 28 November/3 December 2002, on the Occasion of the 30th Anniversary of ISISC*, Erés, Ramonville Saint-Agne, 2004, p.86; BASSIOUNI, M.C., *Introduction to International Criminal Law*, Transnational Publishers, NY, 2003, p.680. Also: BROOMHALL, B., *International Justice and the International Criminal Court – Between Sovereignty and the Rule of Law*, Oxford University Press, 2003, p.44.

⁸⁶ BASSIOUNI, M.C., *Introduction to International Criminal Law*, Transnational Publishers, NY, 2003, pp.689-690, 697. The author considers that retribution and just desert are more appropriate for the punishment of international crimes, whereas rehabilitation and social integration are more relevant as goals of national systems of criminal justice. *Ibid.*, p.681.

⁸⁷ See, for instance, AKHAVAN, P., ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, *American Journal of International Law*, vol.95 (Jan.2001), pp.7-31.

⁸⁸ SCHABAS, W., ‘Sentencing by the International Tribunals...’, *op.cit.*, pp.500-504.

⁸⁹ See on this issue, ZOLO, D., ‘Peace through Criminal Law?’, *Journal of International Criminal Justice*, vol.2 issue 3 (Sept.2004), p.730; STROMSETH, JANE E., *Accountability for atrocities*, Transnational

reality and that it is quite widespread at the international level. On the other hand, it is not clearly proved yet whether international justice is capable of providing an entirely satisfactory remedy to impunity. It cannot be denied, however, that the establishment of first the ICTY and then the ICTR contributed both to abolishing some of the numerous legal and political barriers to international justice, and to strengthening international criminal law. As Judge Meron effectively put it: “Without the establishment of the tribunal ... the perception that even the most egregious violations of international humanitarian law *can be committed with impunity* would have been confirmed”.⁹⁰

Furthermore, it is important to stress that, as with justice at the national level, international criminal justice should be considered a way of contributing to the protection of the international public order. Administering genuine international justice should serve that relevant ‘social’ purpose. In this perspective, a further aim put forward for international justice by scholars and practitioners is that of *reconciliation* and *promotion of peace*. It has been argued that the two ad hoc Tribunals should— since the beginning – have emphasized their goal of promoting peace. Both Tribunals, in fact, were intended to respond to specific political contexts: the harsh conflicts that exploded in the region of the former Yugoslavia and Rwanda. In those contexts, ‘*to do justice*’ should be interpreted as contributing to the reconciliation of the local communities involved in the atrocities and devastation of war through the appropriate means of criminal justice.⁹¹ The goal of promoting peace is, in effect, an important feature of international justice. In order to obtain ‘peace through criminal law’ – as one could say after the title of a well-known work by Hans Kelsen –⁹² key aspects are those related to the quality of trials, the penalties imposed, the specific goals promoted by them, and the link between these goals and the promotion of peace in general.

Attention has also been devoted to the purpose of rehabilitation. As Professor Henham stressed, in international justice *rehabilitation* and *reconciliation* are treated as subsidiary rationales, given that international tribunals continue to function on the basis

Publishers, NY, 2003, pp.7, 58-69, 97; BASSIOUNI, M.C., ‘Combating Impunity for International Crimes’, *University of Colorado Law Review*, vol.71 (2000), pp.409-422.

⁹⁰ MERON, T., ‘Answering for War Crimes – Lessons from the Balkans’, *Foreign Affairs*, vol.76, no.1 (1997), pp.1-8, at 7 (emphasis added).

⁹¹ ZOLO, D., ‘Peace through Criminal Law?’, *Journal of International Criminal Justice*, vol.2 issue 3 (Sept.2004), pp.729-730.

⁹² KELSEN, H., *Peace through law*, [1944], New York, Garland Pub, 1973, or in the Italian version: “*La pace attraverso il diritto*”, Giappichelli, Torino, 1990.

that retributive punishment should then lead to reconciliation, when exercised in a manner consistent with a fundamentally just moral purpose.⁹³ He thus underlined the failure of the ad hoc Tribunals to articulate the need for rehabilitation and reconciliation, observing the same flaw in the ICC system, where there is no attempt to define the possible meaning of rehabilitation in the wider context of international trials.

It may thus be interesting to verify whether it can be asserted that persons convicted by international tribunals/courts have a specific right to rehabilitation and whether any weight should be assigned to this purpose.⁹⁴ Consideration of the requirement of individualization of penalties is an element which could contribute to the suggestion that rehabilitation plays an important role at the sentencing stage.⁹⁵ The fact that the Statutes of the ad hoc Tribunals require that the individual circumstances of the convicted person be taken into account implies that the sentence must be shaped upon the accused, rather than the objectives of the whole system of international justice. Thus, *rehabilitation* could in fact be one of the basic rationales for international justice: penalties should match the degree of ‘social danger’ represented by the offender as well as take into account the evolution of his/her personality, for instance through providing for flexibility and for alternative remedies to imprisonment during the implementation of the assigned penalty. It has been argued that otherwise, *rebus sic stantibus*, international criminal justice will not be able to perform the function of ‘transitional justice’ for which it has been established.⁹⁶

However, it should be acknowledged that – besides the difficulty of precisely determining what is meant by the term ‘rehabilitation’ – rehabilitation itself as a general goal of international penalties may prove problematic, as it represents a process linked to a certain social environment. In international justice, considering that the execution of the sentence is not controlled by the relevant international tribunals or courts that mete out the penalty, rehabilitation might constitute instead a task for the penitentiary system of States willing to execute those sentences. In this respect, international

⁹³ HENHAM, R., ‘Some Issues for Sentencing in the International Criminal Court’, *International and Comparative Law Quarterly*, vol.52 no.1(2003), pp.81-114, at p.89.

⁹⁴ It should be noted, for instance, that in the agreements between the United Nations and States willing to execute sentences of the ad hoc Tribunals there is no reference to a right of the convicted person to rehabilitative treatment, or to rehabilitation more generally.

⁹⁵ See ZAPPALÁ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, at p.206.

⁹⁶ ZOLO, D., ‘Peace through Criminal Law?’, *Journal of International Criminal Justice*, vol.2 issue 3 (Sept.2004), at p.733.

courts/tribunals could recommend that States agreeing to execute their sentences give consideration to rehabilitation and re-educational issues.⁹⁷

Some commentators argue for the potential of *restorative justice* in international sentencing, on the basis that restorative objectives are necessary for the resolution of social conflicts.⁹⁸ The very word ‘restorative’ intrinsically implies notions of ‘rebuilding’, ‘repairing’, ‘re-establishing’, etc., that should direct sentencing in order to achieve effective reparation and reconciliation.⁹⁹ Similarly, it has been maintained that international sentencing should be guided by principles that combine retributive and restorative aspirations.¹⁰⁰

The need to pay more attention to the paradigm of *restorative justice* is thus put forward and much has been argued in favour of giving restorative justice a more central place in international criminal law.¹⁰¹

Restoration would be able to provide for the empowerment and inclusion of victims, more than retribution. Principles of restorative justice may become very important in international criminal justice as they can assist in the process of fact-finding, and favour a sense of satisfaction for victims and their communities. Consequently, it has been acknowledged that advocating a restorative paradigm for any system of criminal justice necessitates a reconsideration of justice at the outset. The theoretical premises are based on the assumptions that restorative justice is fundamentally ‘communitarian’ and that international criminal justice also presents an element of ‘communitarianism’, given that it is meant to serve the ‘global community’. Restorative justice, through its incorporation within international trial models, could

⁹⁷ ZAPPALÁ, S., *Human Rights in International Criminal Proceedings, cit.*, at p.207.

⁹⁸ See, for instance, BORAINÉ, ALEXANDER, ‘Retributive Justice and Restorative Justice: Contradictory or Complimentary?’, in NICE G., VEIL S., *Genocide and Accountability : Three Public Lectures*, ed. Adler, Amsterdam, 2004; COMBS, N. A., *Guilty Pleas in International Criminal Law - Constructing a Restorative Justice Approach*, Stanford University Press, 2007; FINDLAY M., HENHAM R., *Transforming International Criminal Justice – Retributive and Restorative Justice in the Trial Process*, Willan Publishing, 2005; VON HIRSCH ANDREW, BOTTOMS ANTHONY E., ROBERTS JULIAN, ROACH KENT, SCHIFF MARA, *Restorative Justice & Criminal Justice – Competing or Reconcilable Paradigms?*, Hart Publishing, Oxford and Portland, 2003; ROCHE, DECLAN, *Accountability in Restorative Justice*, Oxford University Press, 2003; WALDORF, LARS, ‘Rwanda's Failing Experiment in Restorative Justice’, in *Handbook of Restorative Justice: a Global Perspective*, ed. by Dennis Sullivan and Larry L. Tifft, London: Routledge, 2006.

⁹⁹ HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, at pp.148-149.

¹⁰⁰ ZAPPALÁ, S., *Human Rights in International Criminal Proceedings, cit.*, at pp.111-112.

¹⁰¹ FINDLAY M., HENHAM R., *Transforming International Criminal Justice*, Willan Publishing, 2005, at p.273 and ff..

bring new and more relevant motivations for justice,¹⁰² with the hope that ‘*finally, restoration and retribution may sit together in a collaborative justice resolution*’.¹⁰³ Nonetheless, it is also recognized that principles of restorative justice cannot exist as a universal rationale *per se*, as in the case of retributivism for instance. Restorative justice can only exist as a reality if its principles are recognized, legitimated and related to other well-established rationales for punishment such as retribution.

Two other specific functions of international trials and ICJ should be emphasized: the function of historical acknowledgment and truth-finding, and that of accountability.¹⁰⁴ In fact, in contexts where human rights violations are typically denied, the determination of a crime is in itself an important and far-reaching achievement. Judicial determination that crimes occurred, and consequent convictions, represent official acknowledgement of past injustices and the sufferings of victims, establish a historical record of what happened, and prevent falsification of history. The determination of individual accountability is clearly also important for victims and survivors.

Similarities between international and national criminal legal systems have been recognised by some scholars, on the assumption that the international criminal system would work better if functioning by analogy with domestic systems.¹⁰⁵ This leads to recognition of the important role that an examination of national systems and national sentencing practice must play in investigating international sentencing.¹⁰⁶

The above summary illustrates the vast and confusing panorama that international justice currently offers with regard to its principal aims and objectives in meting out punishment. The purposes and objectives of international sentencing still remain – even after the establishment of the ICC –largely implicit and to be derived from a deductive process. Against this background, the proposition of what I believe to be the appropriate

¹⁰² *Ibid.*, at p.276.

¹⁰³ *Ibid.*, at p.278.

¹⁰⁴ See, extensively on these issues, STROMSETH, JANE E., *Accountability for atrocities*, Transnational Publishers, NY, 2003, pp.8, 11, 49-54, 73-81, 127-133.

¹⁰⁵ SAFFERLING, CHRISTOPH, ‘The Justification of Punishment in International Criminal Law’, *Austrian Review of International and European Law*, vol.4(1999), pp.126-163.

¹⁰⁶ This is the object of Chapter 2, which focuses on the analysis of the sentencing process in national systems of criminal law.

purposes for international sentencing will be advanced in the course of this research. Establishing this element is fundamental in the attempt to develop a more principled approach to international sentencing. The theory which will be proposed in Chapter 6 takes into account the value-oriented goals of punishment for international crimes and results in a mixed theory of punishment, not structured around a single major purpose.

1.6 The non-existent hierarchy of international crimes

Another important issue for international sentencing concerns the intrinsic and relative gravity of international crimes, and thus of the offences under the jurisdiction of the ad hoc Tribunals and of the ICC, namely war crimes, crimes against humanity and genocide. The question at stake is whether international crimes differ as to their seriousness, and therefore should be ranked accordingly, thus entailing different degrees of punishment and ranges of penalties.

The problem arises from the fact that there is no hierarchy nor are there clear guidelines in the Statutes of the ad hoc Tribunals and the ICC concerning the differing gravity of war crimes, crimes against humanity and genocide.¹⁰⁷ In practice, several acts pertaining to the different categories may in fact overlap and thus create problems at the sentencing stage.

A closer look at the categories of crimes in the Statutes of the ad hoc Tribunals shows that considering, for example, crimes against humanity and war crimes, there are some offences which are identical under the two categories: for instance, murder, rape, unlawful imprisonment. Therefore, there may be cases in which the two categories

¹⁰⁷ On the issue of a hierarchy of international crimes, see: DANNER, ALLISON MARSTON, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', *Virginia Law Review*, vol.87 (May 2001), pp.415-501; FRULLI, MICAELA, 'Are Crimes Against Humanity more serious than War Crimes?', *European Journal of International Law*, vol.12, 2(2001), pp.329-350; MAY RICHARD, WIERDA MARIEKE, *Is there a Hierarchy of Crimes in International Law?*, in VOHRAH L., POCAR F., et al (eds.) *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, 2003, pp.511-532; NEMITZ, J. CHRISTOPH, 'Sentencing in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', in FISCHER H., KRESS C. (eds), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag, 2001, pp.605-625; OLUSANYA, OLAOLUWA, *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia*, Europa Law Publishing, 2005; PALOMBINO, FULVIO MARIA, 'The Overlapping Between War Crimes and Crimes Against Humanity in International Criminal Law', *The Italian Yearbook of International Law*, vol. XII (2002), pp.123-145; PALOMBINO, F. M., 'Should Genocide Subsume Crimes Against Humanity?', *Journal of International Criminal Justice*, 3 (2005), pp.778-789.

overlap. Similar situations are likely to have an influence on the application of penalties. Moreover, it must be considered that – under the ICTY Statute – crimes against humanity are strictly linked to an armed conflict, given that Article 5 speaks of those crimes when ‘committed in armed conflict, whether international or internal in character’.¹⁰⁸ These elements increase the possibilities of an overlap of the two categories.

No guidance in this matter is offered by international criminal law. The Charters of the Nuremberg and Tokyo Tribunals did not include any distinction either. Moreover, no other international instrument contains provisions entailing a hierarchy of international crimes. The Convention on the Prevention and Punishment of the Crime of Genocide (December 1948), for example, only prescribes that State Parties shall establish effective penalties for persons guilty of genocide (Article 5).¹⁰⁹ Also the Geneva Conventions limit themselves to establishing the obligation of the Contracting Parties to take all necessary measures to provide for adequate and effective penalties to apply to offenders under the Convention (Article 146 of the Convention of 12 August 1949).¹¹⁰

As rightly observed by J. Nemitz¹¹¹ and O. Olusanya,¹¹² this is a problem that we do not encounter with domestic offences, given that in national law the difference in

¹⁰⁸ Although no reference is made in Article 5 ICTY St. to the traditional requirement that crimes against humanity be part of a ‘widespread or systematic attack against a civilian population’, the jurisprudence of the Tribunal has nonetheless required the presence of such a traditional element of the offence for qualifying an act as a crime against humanity. See, for instance, CASSESE A., GAETA P., JONES J., *The Rome Statute of the International Criminal Court – A Commentary*, vol. I, Oxford University Press, 2002, p.353. The ICTR Statute, on the contrary, explicitly requires that crimes against humanity be committed as ‘part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds...’ (see Article 3).

¹⁰⁹ Article 5 of the Convention: ‘The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.’

¹¹⁰ See Article 146: ‘The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.’

¹¹¹ NEMITZ, J. C., ‘Sentencing in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda’, in FISCHER H., KRESS C. (eds), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag ed., 2001, pp.605-625, at p.614.

¹¹² OLUSANYA, O., *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia*, Europa Law Publishing, 2005, at p.8.

seriousness between one offence and another is clearly spelled out and sentencing tariffs are normally provided for to assist judges in determining the relative gravity of a crime.

As will be seen in more detail in Chapter 3, no uniform approach to the issue of hierarchy of crimes is to be found in the practice of the ad hoc Tribunals; thus, an aspect that should (and will) be verified through the empirical analysis is whether their case-law implicitly provides an answer to the problem of the ‘intrinsic gravity’ of international crimes.

Given the fact that international criminal law is still evolving, it might be acceptable that a hierarchy of crimes had not yet been established at the time of the creation of the ad hoc Tribunals. However, I believe that issues of consistency and uniformity in sentencing, as well as the importance of having ‘guiding principles’, oblige us to establish a hierarchy of crimes in relation to their gravity. Moreover, given that *prima facie* there are elements which seem to show that a certain hierarchy can be clearly identified, I consider it is now opportune to formalise this tendency. In fact, as will be seen later on in more detail when analysing – doctrinally and empirically – the case-law of the ad hoc Tribunals, it appears that the heaviest penalties (mostly life imprisonment) have been imposed for genocide (by the ICTR) and that the lowest penalties have been imposed for war crimes.

An assessment regarding the different degrees of seriousness of international crimes should start by comparing their respective characteristics, that is the constituting elements of the *actus reus* and *mens rea*. In establishing a hierarchy it is helpful to note that, in fact, each criminal offence presents different components.

Furthermore, from a principled perspective, several reasons exist to advocate for the establishment of a hierarchy of international crimes. First of all, the existence of such a hierarchy would clarify the respective gravity of international crimes. Secondly, it would favour transparency and greater clarity in sentencing, so that any individual would be cognisant of the exact nature of the charges against him/her and of the amount of penalty that s/he can face if found guilty.

Yet another argument stands in favour of a predetermined scale of punishment: any attempt to draw up a successful preventive criminal policy must take into account the fact that the deterrent function of punishment is more effective on the single offender if there are pre-established and pre-fixed penalties. Only when the potential offender is

aware of the type and length of penalties attached to each crime, can the criminal system be expected to exercise a real deterrent function and be effective.

Another aspect of the issue at hand is to understand whether there is a distinction or an emerging hierarchy even *within* each category, for example in relation to the different conducts constituting crimes against humanity or war crimes. Again, in this respect the Statutes of the ad hoc Tribunals do not distinguish between the ‘seriousness’ of the underlying offences of genocide, crimes against humanity and war crimes, and do not provide for differentiated ranges of sentencing.

On the basis of these preliminary observations, the need for the establishment of a hierarchy of international crimes is hereby maintained. Of course, even when a hierarchy is established, it must be recognised that there will always be cases for which comparison is impossible (for instance, between the crime of sexual assault as a crime against humanity and the bombing of a town as a war crime); therefore the comparison should be limited to cases which are broadly similar in nature, facts and circumstances.

I will not deal, in the course of the thesis, with the historical reasons why a hierarchy was not established before, nor with the origins of the concepts of war crimes, crimes against humanity and genocide, nor with the reasons why the IMTs of Nuremberg and Tokyo did not contribute to clarify the issue.¹¹³ Rather, considering the scope of this study, I will limit my analysis to how the jurisprudence of the ad hoc Tribunals interpreted this issue, and to the possibility of establishing a hierarchy of international crimes in the framework, and as a necessary element of, a more comprehensive law of international sentencing.

1.7 The role of aggravating and mitigating circumstances

The origins of the debate regarding a set of circumstances that may modify the penalty can be traced back to the XII century, when penalties were so rigidly established and

¹¹³ For these aspects, see for instance: OLUSANYA, O., *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia*, Europa Law Publishing, 2005. See also: CARCANO, A., ‘Sentencing and the Gravity of the Offence in International Criminal Law’, *International and Comparative Law Quarterly*, vol.51, July 2002, pp.583-609, at pp.594-600.

were typically so harsh that legal scholars began to appreciate the need for instruments permitting a graduation of the penalty according to the specific case at hand.¹¹⁴ The penalty provided for a certain crime would be known as the *poena ordinaria*, being the penalty established by the legislator in connection with a specific crime in the normality of cases; further, the judge would also have the power to dissociate him/herself from the given penalty, aggravating or attenuating it, in the presence of a *cause*, a particular circumstance which would modify the ‘normality’ of the case. The incidence of such circumstances on the penalty needed to be evaluated with regard to the ‘ordinary penalty’, in other words, the average penalty that would result from legislative prescriptions.

It was within this complex and evolving process of theoretical elaboration that a certain number of mitigating and aggravating circumstances was developed, probably inspiring the modern legal conception of the circumstances of crime.¹¹⁵ The codification of the circumstances of crime was then considered as an important step in their historical evolution.

Aggravating and mitigating circumstances are not at all specified in the Statutes and RPE of the ad hoc Tribunals, with some exceptions (as will be clarified in Chapter 3). In particular, with reference to the way in which aggravating circumstances are treated, it is suggested that their imprecision and the lack of any specification of the precise factors to be taken into account is contrary to the principle of legal certainty and seems to confirm the reduced scope that the *nulla poena sine lege* principle has in international criminal law. Moreover, if such an approach was admissible in the nascent and developing system of international justice that saw the creation of the UN ad hoc Tribunals, the same is no longer acceptable in the more mature (and permanent) system of the ICC.

There is certainly a need for proper assessment of those circumstances and of their role in international sentencing. In investigating this subject, a first step is to identify the factors that may mitigate and the factors that may aggravate the penalty; a second step is to verify the practical effects of those factors on sentencing and their influence on the

¹¹⁴ See, for a historical reconstruction of the debate and the role of circumstances of crimes within legal systems of the pre-Enlightenment period, MELCHIONDA, A., *Le circostanze del reato – Origine, sviluppo e prospettive di una controversa categoria penalistica*, CEDAM, Padova, 2000, pp.76 and ff.

¹¹⁵ See MELCHIONDA, A., *Le circostanze del reato*, *ibid.*, at p.83.

harshness of penalties (this will be one of the objectives of the quantitative analysis of sentencing data in Chapter 4); the final step is to establish the degree to which mitigating and aggravating factors should allow for subsequent reduction or aggravation of the penalty to be imposed.

The main research questions to be addressed with regards to aggravating and mitigating factors as used by judges at the ad hoc Tribunals are therefore the following:

- Do findings of aggravating/mitigating factors lead to heavier/more lenient sentences? - Are there any specific aggravating/mitigating circumstances which are more likely to cause a heavier/more lenient sentence than others? – Is their use consistent throughout the ICTY and ICTR case-law?

Another element which must be considered when assessing the relevant aggravating and mitigating circumstances for international sentencing is that they must be coherent with the intended aims of sentencing. For example, if one of the main aims is rehabilitation or re-socialisation, then factors such as remorse and cooperation of the offender will assume a central role and importance in sentencing; whereas if a retributive approach prevails in sentencing, then factors such as the role of the offender in committing the crime and the harm inflicted on victims will be of the utmost importance.

In brief, the research carried out in this thesis should help to develop an indicative list of circumstances to be utilised by international judges in mitigation or aggravation of the sentence, together with an indication of the weight those circumstances should have on the final sentence.

1.8 The role of the judge in international sentencing

Within this framework, it is opportune to mention the important and peculiar role that the judge retains in sentencing at the international level. In fact, understanding the discretionary decision-making process which leads to international sentencing is pivotal to a thorough explanation of all the elements involved in the complex process of meting out punishment at the international level.

Once again the inherent characteristics of international sentencing and international criminal law, as branches of international law related to criminal proceedings

concerning *individuals*, are important points in understanding the role played by the judge in international trials and proceedings. The judge is seen in this context as the interpreter of the values and principles of the international community as a whole.

Judicial discretion, and the consequent fundamental role of judges, comes into play in the phase of determining penalties. Although the extent of this discretion, and therefore of the role played by the judge, may vary considerably depending on the different legal frameworks present at the national level, judicial discretion is an inevitable and necessary feature of the determination of sentences. While differences existing in domestic systems between various levels of discretion conferred upon judges may be better appreciated in the next chapter devoted to national sentencing, some particular features of judicial discretion at the international level should be illustrated here. Given the numerous undefined elements characterising international sentencing, and the broad discretion enjoyed by the international judge, it appears clear that the myth of the judge as '*la bouche de la loi*' – as intended by Montesquieu – is less applicable to international criminal law than to certain national systems. In addition, very often the legal and cultural background of international judges, together with their previous experiences at the national level and their personal beliefs or motivations, might be influential on sentencing, and may be more evident at the international level than at the national one. In fact, the composition of the judicial bench is by nature more variegated in international trials than in domestic ones, where judges generally share the same nationality, the same education and legal background. Furthermore, while in domestic law judicial discretion is more limited and reduced by the ample scope of written laws, this is clearly not the case for judges at the international level.¹¹⁶ In the absence of an international law-making body, the role of the interpreter of the international judicial order is more delicate.¹¹⁷

¹¹⁶ However, as will be illustrated in Chapter 2, it must be acknowledged that numerous national legal systems of a civil law tradition recognise an ample scope of application to judicial discretion in implementing the law. Specifically on the issue of *discretion* in criminal law, see for instance BRICOLA, F., *La discrezionalità nel diritto penale*, Giuffrè, Milano, 1965, in particular pp.157-158, where *discretionality* is described as: "...fenomeno di rinvio al caso concreto come il più idoneo ad esprimere quella gamma di valori che è suscettibile di condizionare un certo trattamento giuridico-penale. Alla base di questo rinvio sta l'impossibilità per il legislatore di fissare in astratto una serie di significati che soltanto il caso concreto, nella sua specifica individualità e quale espressione di una determinata personalità dell'agente può rilevare".

¹¹⁷ P.M. Dupuy stresses the importance of the role of the judges in the international legal order: DUPUY, PIERRE-MARIE, *L'unité de l'ordre juridique international*, Cours général de droit international public (2000), Collected Courses of The Hague Academy of International Law, vol.297, Martinus Nijhoff

It is undeniable that the process of sentencing is also influenced by the cultural differences existing between international judges, by their different nationalities and legal traditions, by their professional background and working experiences. These elements are accentuated in international tribunals and courts, considering the ‘multicultural’ composition of an international bench. It may be of interest to recall that Article 12 ICTY Statute (and Article 11 ICTR Statute), in specifying the composition of the Chambers, rules out the possibility that judges be nationals of the same State.¹¹⁸ Furthermore, attention to the multicultural composition of the Chambers at the ad hoc Tribunals is prescribed as early as the process of the election of judges.¹¹⁹

It is legitimate to wonder whether these differences – or rather the multicultural facet of the judiciary in international courts and tribunals – are likely to be reflected in the sentencing process and to result in various irreconcilable standards applied to sentences by judges as representative of diverse national legal systems. The relevance of cultural factors in international sentencing, and the role of the judge will not be considered in depth in this study, since the nature of such an analysis would be more closely linked to the sociological sphere than to the legal one. It may also be assumed that, considering the composition of Chambers of the ad hoc Tribunals (3 judges for Trial Chambers and 5 judges for the Appeals Chamber) and the fact that decisions are taken by the majority of the members of the judicial panel, the undue influence of a single judge is limited and virtually non-existent.

However, in order to verify this hypothesis, part of the quantitative analysis will focus on studying the composition of the ad hoc Tribunals’ Chambers (the legal

Publishers, 2003, at pp.480-487. See also: LOLLINI, ANDREA, « L’expansion ‘interne et externe’ du rôle du juge dans le processus de création du droit international pénal », in DELMAS-MARTY M., FRONZA E., (sous la direction de), *Les sources du droit international pénal : l’expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale*, Société de législation comparée, 2004, pp.223-241 ; JORDA C., DE HEMPTINNE J., « Le rôle du juge dans la procédure face aux enjeux de la répression internationale », in ASCENSIO H., DECAUX E., PELLET A., *Droit International Pénal*, Paris, Pedone, 2000, pp.807-821.

¹¹⁸ Article 12, ICTY St.: “The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.”

¹¹⁹ See for instance, Article 13 ICTY St. (and Article 12bis ICTR St.), which regulates ‘qualifications and election of judges’ and explicitly states that the Security Council, in establishing a list of candidates from the nominations received, shall take ‘due account of the adequate representation of the principal legal systems of the world’ (para.2.c). See also, in relation to the role of the ICTY President in selecting the judicial panels for Trial and Appeals Chamber: MERON, T., ‘Judicial Independence and Impartiality in International Criminal Tribunals’, *American Journal of International Law*, vol.99, issue 2, 2005, pp.359-369, at pp.363-365.

background of the judges, civil law or common law traditions; their educational background, academics or practitioners; and their gender) and on whether this composition has any significant influence at all on the harshness of sentences. It will be seen whether certain patterns of sentencing are recognisable in association with a certain composition of the Chamber (as linked, for instance, to the presence of a majority of common law judges or of civil law judges, of women or men, of practitioners rather than academics, etc.) or not.

With regard to the role of the judge in international sentencing, and in the absence of a grid of penalties or of any sentencing guidelines, amongst others the following questions will be addressed:

- *How do judges of the ad hoc Tribunals decide upon the sanctions to be inflicted?* -
Which criteria do they refer to? - Which factors do they take into consideration?

1.9 Guilty plea and plea-bargaining in international criminal justice

A further aspect which deserves attention is that of guilty pleas and plea-bargaining in international justice.¹²⁰

¹²⁰ 'Guilty plea' is the admission of responsibility by the accused in relation to one or more charges; 'plea bargaining' is a formal or informal agreement entered into by the prosecutor and the defence counsel under which, in return for a plea of guilty by the accused, the sentence that would otherwise be imposed is reduced. In the Northern-American model, plea bargaining often precedes guilty pleas; objects of the negotiation can be either the charges (*charge bargaining*) or the penalty (*sentence bargaining*). The issue of guilty pleas and plea bargaining in international criminal justice has been tackled by a great number of commentators. See, for instance, BOSLY, HENRI-D., 'Admission of Guilt before the ICC and in Continental Systems', *Journal of International Criminal Justice*, 2(2004), pp.1040-1049; COMBS, NANCY AMOURY, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', *University of Pennsylvania Law Review*, 151(2002), no.1; COMBS, N. A., 'Prosecutor v. Plavsic', *American Journal of International Law*, 97(2003), pp.929-937; COMBS, N. A., 'Procuring Guilty Pleas for International Crimes: the Limited Influence of Sentence Discounts', *Vanderbilt Law Review*, vol.59, issue 1 (2006), pp.67-151; COMBS, N. A., *Guilty Pleas in International Criminal Law - Constructing a Restorative Justice Approach*, Stanford University Press, 2007; COOK, JULIAN A., 'Plea Bargaining at The Hague', *The Yale Journal of International Law*, vol.30, issue 2 (2005), pp.473-506; DAMASKA, MIRJAN, 'Negotiated Justice in International Criminal Courts', *Journal of International Criminal Justice*, vol.2, issue 4 (2004), pp.1018-1039; DELMAS-MARTY M., SPENCER J.R., *European Criminal Procedures*, Cambridge University Press, 2002, at p.641 and ff.; DIXON, RODNEY, 'Advising Defendants about Guilty Pleas before International Courts', *Journal of International Criminal Justice*, vol.3, issue 3 (2005), pp.680-694; HENHAM, RALPH, 'Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process', *Modern Law Review*, vol.62, issue 4 (July 1999), pp.515-538; HENHAM, R., 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia', *Criminal Law Forum*, vol.16, issue 1, 2005, pp.33-48; HENHAM, R., 'Plea Bargaining and the Legitimacy of International Trial Justice: some Observations on the Dragan Nikolic Sentencing Judgement of the ICTY', *International Criminal Law Review*, vol.5, issue 4, 2005, pp.601-607; SCHARF, MICHAEL, 'Trading Justice for Efficiency – Plea-Bargaining and International Tribunals', *Journal of International Criminal Justice*, 2 (2004), pp.1070-

The practice of guilty pleas and plea bargaining has certainly some ‘benefits’ especially from the economic and administrative point of view. In fact, a guilty plea may save the system substantial financial resources, in particular when entered into at an early stage of the proceedings; moreover, a high guilty plea rate may render the system more ‘efficient’ and faster in administering justice. Additionally, from the point of view of the defendant, a guilty plea may secure him/her a lesser sentence and, when combined with plea bargaining, possibly diminished charges.

However, the implementation of guilty plea-procedure in international justice has provoked controversy and concerns under various points of view: from a defence perspective there is the risk that the accused be in a position of weakness towards the Prosecution, and therefore ready to accept any negotiation; from the due process perspective, as highlighted by S. Zappalà, there are concerns regarding whether or not the evidence has been effectively reviewed at the pre-trial stage, a phase during which there might be some pressure on the defendant to plead guilty.¹²¹ Furthermore, as to the reconstruction of facts, when a guilty plea is entered, facts are limited to those in the agreement, which might not always reflect the entire factual basis available.

Many commentators, in particular from the European system of civil law, have criticised the recent routinisation of guilty pleas and plea bargaining in international justice considering such a practice to be inconsistent with the discovery of the truth.¹²² A problematic aspect of the use of guilty plea is that to some extent it precludes the collection and presentation of evidence. As will be clarified in the next chapter, while the admission of guilt in civil law systems is simply a part of the evidence presented at trial, and is therefore considered and evaluated by the judge together with the other means of proof, in common law (the prevailing discipline in international criminal law especially regarding guilty pleas), where there is sufficient factual basis underpinning the plea of the accused then the collection and presentation of (further) evidence is

1081; TIEGER, ALAN, ‘Plea Agreements in the ICTY’, *Journal of International Criminal Justice*, vol.3, issue 3, 2005, pp.666-679.

¹²¹ ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, at pp.77-79.

¹²² See, for instance, HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, at p.117.

substantially reduced.¹²³ Therefore, one of the most apparent drawbacks of guilty pleas is that they deny the possibility of testing the evidence in court. If the court does not have the possibility of evaluating the whole criminal conduct of the accused, ultimately it will probably impose a sanction that does not adequately reflect the seriousness of the crime(s) and the culpability of the offender. As a result, it has been argued that the effectiveness of the international punishment, as to its symbolic function, is seriously compromised if the magnitude of punishment is not seen to be proportionate to the totality of the criminal conduct of the accused.¹²⁴

The interests of victims are also to be taken into account when guilty pleas are concerned. Victims have in fact a clear interest in seeing the offender punished through the criminal process; they may therefore be prepared to face the whole criminal process in order to see the perpetrator 'justly' punished rather than not testify and thus see the offender sentenced to a reduced penalty by virtue of a guilty plea. Victims should therefore be allowed to participate in the decision to accept a guilty plea and to express their voice and their opinion on the matter. From the point of view of victims, sentence discounts resulting from guilty pleas are probably unsatisfactory, since they fail to reflect the degree of harm actually suffered by the victim.¹²⁵ However, many have argued that, considering the distress provoked by giving evidence, especially for victims, one of the purposes and advantages of guilty plea procedures would be that of shielding victims from the trial.

Further, it has been maintained that certain offenders, responsible of the most heinous crimes, should not deserve any discount in penalty under any circumstances, guilty pleas and cooperation included. On the other hand, the discount often associated with guilty pleas is justified by judges on the basis of the remorse rationale.¹²⁶

In sum, a number of different interests are involved, such as: those of the international community in saving time and resources of international tribunals by

¹²³ For more on the different approach of common law and civil law systems to guilty pleas, see: DAMASKA, MIRJAN, 'Negotiated Justice in International Criminal Courts', *Journal of International Criminal Justice*, vol.2, issue 4 (2004), pp.1018-1039, at pp.1024-1027.

¹²⁴ HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, at p.118.

¹²⁵ Cf. FENWICK, H., 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?', *Modern Law Review*, 60 (1997), pp.317-333, at p.330.

¹²⁶ Although desert theorists argue for an assessment of punishment based only on the gravity of the offence and on the degree of responsibility of the accused, without any consideration given to other elements, in their opinion remorse should become relevant only at a second stage, during the phase of the execution of the sentence. See, for instance, VON HIRSCH, A., *Censure and Sanctions*, Oxford, Clarendon Press, 1993, at p.72.

expediting proceedings through plea agreements; the interest of the victims and of the international community itself in having the person responsible for serious crimes held accountable for their actions; the interest of all the parties and victims in having a full and accurate historical record of the events occurred.

There surely is a need to investigate this subject-matter further and to assess what conditions or circumstances should govern the impact of guilty pleas on the determination of the final sentence. In this respect, one of the aims of the empirical analysis will be to verify whether it can be said that a practice has developed whereby an accused person who pleads guilty receives a significantly lighter penalty than an accused person who does not plead guilty, in similar circumstances, and in what measure. After the case-law analysis (Chapter 3) and the empirical analysis (Chapter 4) of negotiated justice as intended and applied by the ad hoc Tribunals, an assessment of the weight of guilty pleas and plea agreements in international criminal proceedings will be advanced in the concluding chapter.

1.10 Standards of punishment

‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.¹²⁷

The issue of the standards of punishment for international crimes is a very controversial one. Some of the problems at stake may be framed as follows:

- *What is or what should be the proper sanction for war crimes, crimes against humanity and genocide?*
- *Are ‘extraordinary crimes’ adjudicated through an ‘ordinary process’ and mainly with ‘ordinary sentences’ and ‘ordinary punishment’?*¹²⁸

As already seen, no specific indication concerning the length of sentences is provided for by international criminal law. The only indication is that penalties can be

¹²⁷ ‘The Trial of Major German War Criminals: Opening Speeches of the Chief Prosecutors’, 1946, at 57-58.

¹²⁸ For the use of these dichotomies, see: DRUMBL, MARK A., *Atrocity, Punishment and International Law*, Cambridge University Press, 2007, p.1; HARMON MARK B., GAYNOR FERGAL, ‘Ordinary Sentences for Extraordinary Crimes’, *Journal of International Criminal Justice*, vol.5, issue 3 (2007), pp.683-712.

up to and including life imprisonment. The only clear exclusion is the possibility of imposing the death penalty. The issue of the appropriate penalties for international crimes is certainly a very complex one. Already with regard to the penalty of life imprisonment, controversies and debates exist between countries which consider it indispensable to their legal systems, and other countries which consider life imprisonment an inhuman penalty.¹²⁹

The international community has never reached consensus on the issue of appropriate penalties for international crimes. The problem of determining penalties appeared as early as 1953 within the UN Committee on International Criminal Jurisdiction that had the task of drafting a statute for an international criminal court.¹³⁰ The importance of providing some precise sentencing norms, similar to those of domestic penal codes, was stressed in that context in order to ensure respect and application of the *nulla poena sine lege* principle. Despite all good intentions, the provision on penalties approved on that occasion was quite indeterminate, stating that:

...The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court.¹³¹

Also included in the report was the suggestion that:

...it would be desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable national law to serve as some guidance for its decision.¹³²

It is clear that it was difficult, if not impossible, for members of the UN Committee to agree upon and to settle any definitive prescription of appropriate penalties to which sovereign states, signatories to a treaty on an international criminal court, would be willing to subject their citizens. The same difficulty can be recognised also in the later 1992 report of the International Law Commission (ILC), where it was noted that – with regards to the penalties to be applied at the international level and the sentencing of

¹²⁹ On the issue of life imprisonment and imprisonment in general, see for instance: VAN ZYL SMIT D., 'Life Imprisonment as an Ultimate Penalty in International Law: A Human Rights Perspective', *Criminal Law Forum*, vol.9, no.1-2, 1998, pp.5-54; and VAN ZYL SMIT D., 'International Imprisonment', *The International and Comparative Law Quarterly*, vol.54, issue 2, 2005, pp.357-385.

¹³⁰ The Committee was established by General Assembly Resolution 687 (VII) of 5 December 1952.

¹³¹ *Report of the 1953 Committee on International Criminal Jurisdiction*, UN GAOR, 9th session, Supp. No.12, UN Doc.A/2645 (1954), at article 32.

¹³² *Ibid.* at 17, §118.

convicted persons – it might in the end be necessary to base them on the applicable national law.¹³³

In the 1996 ‘Draft Code of Crimes Against the Peace and Security of Mankind’, the International Law Commission did not specify any precise penalties, only stating at Article 3 that ‘punishment shall be commensurate with the character and gravity of the crime’.¹³⁴

Against this background, it can therefore be said that there is no agreement upon the ‘level’ of penalties and the range of sentences for international crimes. Is a penalty of 20 years of imprisonment ‘just’ for a war crime? Is a penalty of 30 years too harsh or too lenient for crimes against humanity or genocide?

Certainly, lenient penalties (for instance, 10 years of imprisonment or less) imposed for multiple murders as crimes against humanity have raised legitimate doubts and criticism in all those legal systems where life imprisonment or even the death penalty are applicable penalties when the accused is found guilty of just one single murder. It is understandable that citizens all around the world base their opinions about sentences meted out by international tribunals on their personal and ‘national’ background, therefore evaluating the ‘justness’ of a sentence on the basis of the penalties applied in their domestic systems. Obviously, there will probably be as many expectations as there are nations. The fact that the system of penalties changes from country to country makes it difficult to conceive and elaborate a unique and commonly shared system of values agreed upon at the international level. This problem has been raised with regard to the works of the ICTY, whose sentencing practice, in comparison to that of domestic courts, has been considered either too severe or too lenient (especially by victims, commentators and practitioners, and by the public opinion of some European countries).¹³⁵ As effectively put by M. Drumbl:

¹³³ *Report of the International Law Commission on the Work of its Forty-Fourth Session*, 4 May-24 July 1992, UN GAOR 47th Session, Supp. No.10, UN Doc.A/47/10 (1992), p.72, § 110.

¹³⁴ *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May-26 July 1996, UN GAOR 51st Session, Supp. No.10, UN Doc.A/51/10 (1996), at p.22, Article 3. The commentary accompanying the Draft Code explained that it was not necessary for an individual to know in advance the precise punishment, especially when the offences constituted an extremely serious crime, as international crimes are, for which it should be expected that penalties be necessarily harsh (*ibid.*, pp.22-23, para.7). See also SCHABAS, W., ‘Perverse Effects of the *Nulla Poena* Principle: National Practice and the ad hoc Tribunals’, *European Journal of International Law*, vol.11 no.3, 2000, pp.523-524.

¹³⁵ As regards this, see: HARMON MARK B., GAYNOR FERGAL, ‘Ordinary Sentences for Extraordinary Crimes’, *Journal of International Criminal Justice*, volume 5, issue 3 (2007), pp.683-712.

...International lawmakers have demarcated normative differences between extraordinary crimes against the world community and ordinary common crimes. However, despite the proclaimed extraordinary nature of atrocity crime, its modality of punishment, theory of sentencing, and process of determining guilt or innocence, each remain disappointingly, although perhaps reassuringly, ordinary – so long as ordinariness is measured by the content of modern Western legal systems.¹³⁶

What should be recognised is that there are no uniquely ‘just’ or ‘deserved’ penalties, in the sense that whether a certain sentence is proportionate or appropriate to the crime(s) committed also depends on how other crimes are punished by the same criminal system, on how the overall scale of punishment is framed and to which minima of penalty it is anchored. The scale of penalties imposed will thus depend on the general framework of penalties applied by a given system of (national or international) justice.

I consider that it is not possible to apply at the international level the same scale of penalties used at the national level within domestic jurisdictions. This also seems to be warranted by Article 77(1) of the ICC Statute, which provides that life imprisonment can only be imposed ‘when justified by the *extreme gravity* of the crime and the individual circumstances of the convicted person’. If the same scale of gravity that characterises the national level were to be applied to international criminal law, then one could argue that – compared to national offences – all international crimes are already characterised by ‘extreme gravity’, therefore they should all fall into the ‘extreme gravity’ category and all attract life imprisonment.

The empirical analysis of the sentencing practice of the ad hoc Tribunals in Chapter 4 will also be used as a tool to understand and explain the ‘quantity’ of penalty imposed so far by both the ICTY and ICTR. However, it is very likely that international sentencing will develop its own gravity-severity pattern, and this produces the effect that the scale of punishment at the international level is bound to appear more lenient compared to national models of sentencing.¹³⁷

¹³⁶ DRUMBL, MARK A., *Atrocity, Punishment and International Law*, Cambridge University Press, 2007, at p.6.

¹³⁷ As Judge Bonomy observed: “In war crimes trials the sentences may be shorter than those imposed in an equivalent domestic context” (BONOMY, I., ‘The Reality of Conducting a War Crimes Trial’, *Journal of International Criminal Justice*, volume 5, no.2, 2007, pp.348-359, at 351). Cf. also: BERESFORD, S., ‘Unshackling the Paper Tiger – The Sentencing Practices of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda’, *International Criminal Law Review*, 1 (2001), pp.33-90, at pp.89-90.

Some examples from the case law of the ad hoc Tribunals may be instructive and helpful in order to provide a more concrete framework to the issue under discussion.

Several cases resulted in very lenient sentences, especially when compared with sentences in domestic jurisdictions. For instance, for the heinous crimes committed in the Omarska camp (in north-western Bosnia and Herzegovina), Miroslav Kvočka, a police officer operating in the camp, and Milošević, a guard, were condemned respectively to 7 and 6 years of imprisonment as co-perpetrators of war crimes and crimes against humanity (persecution, murder and torture) committed at the Omarska camp;¹³⁸ Mario Cerkez, a Bosnian Croat military commander, was convicted for war crimes and crimes against humanity (persecution, imprisonment and unlawful confinement of civilians) and received a sentence of 6 years of imprisonment;¹³⁹ Milan Simić, a prominent figure at the municipal level, pleaded guilty to personally participating in torture as a crime against humanity and received a 5-year sentence;¹⁴⁰ Naser Orić, senior commander of Bosnian Muslim forces in eastern Bosnia and Herzegovina, was sentenced to two years of imprisonment for superior responsibility, having failed to take all the necessary and reasonable measures to prevent war crimes (murder of four persons and cruel treatment of five others) committed by his subordinates.¹⁴¹

Cases before the ad hoc Tribunals certainly concern crimes of a greater magnitude than many offences adjudicated at the national level, yet penalties meted out in domestic jurisdictions are often lengthier and heavier than those imposed by the ICTY in particular.

Issues of adequacy and ‘proportionality’ of penalties (both in the sense of excessive leniency of the sentence imposed, and of manifestly disproportionate and harsh punishment), were invariably raised at the appeal stage, by the Prosecution and by defence counsels, in relation to mild sentences or to (the very few) severe penalties.

¹³⁸ *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001; *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-A, Appeal Judgement, 28 February 2005.

¹³⁹ *Prosecutor v. Kordić & Cerkez*, Case No.IT-95-14/2-A, Appeal Judgement, 17 December 2004.

¹⁴⁰ *Prosecutor v. Milan Simić*, Case No.IT-95-9/2-S, Sentencing Judgement, 17 October 2002.

¹⁴¹ *Prosecutor v. Orić*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006. As of 31 January 2008, the case is still pending before the Appeals Chamber. On the *Orić* case, see also: BLUMENSTOCK T., PITTMAN W., ‘*Prosecutor v. Naser Orić: the International Criminal Tribunal for the Former Yugoslavia Judgment of Srebrenica's Muslim Wartime Commander*’, *Leiden Journal of International Law*, volume 19, issue 4 (2006), pp.1077-1093.

For instance, in the *Aleksovski* appeal case, the Prosecution submitted that the Trial Chamber erred in imposing a sentence of only 2 years and 6 months of imprisonment on the Appellant, who was found guilty of violations of the laws and customs of war (in particular, outrages upon personal dignity).¹⁴² In support, the Prosecution submitted several grounds, which may be summarised as follows: (a) the sentence of two and a half years' imprisonment was '*manifestly disproportionate*' to the crimes committed and, accordingly, outside the limits of a fairly exercised discretion; (b) such a sentence defeated one of the main purposes of the Tribunal, namely to deter future violations of international humanitarian law.

The Appeals Chamber accepted the Prosecution arguments and held that the Trial Chamber erred in not having had sufficient regard to the gravity of the conduct of the Appellant, which – for its seriousness – should have resulted in a longer sentence.¹⁴³ The Appeals Chamber was thus satisfied that the Trial Chamber erred in sentencing the Appellant to two and a half years' imprisonment and that such error consisted in giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position of commander as an aggravating element in relation to his responsibility. The sentence imposed by the Trial Chamber was considered manifestly inadequate and was adjusted to 7 years of imprisonment.

In the *Celebici* case, the Prosecution filed an appeal against the sentence of one of the accused, Zdravko Mucic, who was sentenced to 7 years imprisonment on 8 counts of grave breaches of the 1949 Geneva Conventions, and 7 counts of violations of the laws and customs of war. The Prosecution alleged that the sentence imposed on Mucic was inadequate and manifestly disproportionate (being 'too lenient'). The Appeals Chamber found that the Trial Chamber did not have in fact sufficient regard to the gravity of the offences committed by the accused in exercising its sentencing discretion and thus imposed a sentence which did not adequately reflect his overall criminal conduct.¹⁴⁴ The Prosecution's ground of appeal related to sentencing was thus allowed, and the Appeals Chamber remitted the matter of the imposition of an appropriate

¹⁴² *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.179.

¹⁴³ *Ibid.*, para.183.

¹⁴⁴ *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.851.

revised sentence for Mucic to another Trial Chamber, with the suggestion to impose a sentence of around ten years imprisonment.¹⁴⁵

In the only case before the ICTY in which life imprisonment was imposed on first instance (the *Stakic* case),¹⁴⁶ issues of proportionality of penalties were at stake as well. The Prosecution recommended a sentence of life imprisonment ‘in order to give due consideration to the victims of ... crimes and to make clear the determination of the international community to deter ethnic cleansing.’¹⁴⁷ It is interesting to note the reasoning of the Trial Chamber in deciding upon the Prosecution’s request for life imprisonment. Firstly, the Trial Chamber noted that in a number of countries the killing of one person already results in a mandatory life sentence, whereas in others life imprisonment is forbidden by Constitution.¹⁴⁸ Secondly, the Chamber recalled that the ICTY Statute reflects the global policy of the United Nations aiming at the abolition of the death penalty and therefore favouring life imprisonment as the maximum sanction to be imposed. Finally, the Trial Chamber stressed the fact that on both the international and the national level the imposition of the maximum sanction is not restricted to the most serious imaginable criminal conducts. Accordingly, the final decision of the Trial Chamber was to condemn Milomir Stakic to life imprisonment.¹⁴⁹

On appeal, Stakic’s defence asserted that the Trial Chamber failed to adequately consider the principle of proportionality.¹⁵⁰ The Appellant also argued that in his case a life sentence constituted a form of ‘punitive retribution’ rather than social rehabilitation, and as such represented a form of cruel, inhuman or degrading punishment. In support of this argument, the Appellant maintained that many States, including the former Yugoslavia, did not allow for life imprisonment, qualifying it as cruel, inhuman and degrading treatment or punishment. In addition, the Appellant argued that a sentence of

¹⁴⁵ In the end, Mucic received a final sentence of 9 years imprisonment. See, *Prosecutor v. Delalic et al.*, Case No.IT-96-21-Tbis, Trial Judgement, 9 October 2001.

¹⁴⁶ *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003. Recently, life imprisonment has been imposed on appeal in the *Galic* case. See *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeals Chamber, 30 November 2006.

¹⁴⁷ *Prosecutor v. Stakic, cit.*, Trial Judgement, 31 July 2003, para.895.

¹⁴⁸ *Ibid.*, para.932. See for example the Constitution of the Portuguese Republic, Fourth Revision, 1997, Article 30: “No one shall be subjected to a sentence or security measure that involves deprivation or restriction of liberty for life or for an unlimited or indefinite term.”

¹⁴⁹ *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, paras.932-937.

¹⁵⁰ *Prosecutor v. Stakic*, Case No.IT-97-24-A, Appeal Judgement, 22 March 2006, para.377.

life imprisonment was incompatible with the essential aims of reformation and social rehabilitation set forth in Article 10 of the ICCPR.¹⁵¹

The Appeals Chamber was very clear and firm in recognising that not only was the imposition of life imprisonment envisaged by Rule 101(A) of the RPE of the Tribunal, but also that – where the crimes for which the accused was found responsible were particularly serious – the imposition of a life sentence did not constitute a form of inhuman treatment but, in accordance with proper sentencing practice common to many countries, reflected a specific level of criminality.¹⁵² It was then stressed that neither Article 7 nor Article 10 of the ICCPR prohibits life imprisonment, and that the Appellant did not demonstrate the existence of a rule of international law prohibiting the imposition of life imprisonment. For those reasons, the Appeals Chamber dismissed the argument that a life sentence constitutes a form of punitive retribution.¹⁵³

Notwithstanding this clear statement in support of life imprisonment as an ‘appropriate’ sentence in cases of particularly grave crimes committed by the accused, there are no other cases to date where Trial Chambers of the ICTY have imposed life sentences.

These few examples are sufficiently indicative of the controversial standards of punishment in the sphere of international criminal justice and of the problems encountered by international judges in sentencing and in deciding upon the ‘just’ penalty to impose. The lack of any indication or guidance for international sentencing has certainly exacerbated those difficulties – an issue that this thesis attempts to tackle in the following chapters.

C. Looking Ahead: The Development of a Coherent System for International Sentencing

Given the situation described above, the following sections sum up the relevant legal and practical issues tackled by this thesis.

¹⁵¹ *Ibid.*, para.394.

¹⁵² *Ibid.*, para.395.

¹⁵³ In any case, it should be recalled that, on appeal, the previously imposed life sentence was turned into a sentence of 40 years of imprisonment due to additional errors that the Appeals Chamber found in the judgement rendered by the Trial Chamber. See *Prosecutor v. Stakic, cit.*, Appeal Judgement, para.428.

1.11 The need for sentencing guidance

International criminal law has clearly not yet developed a sentencing pattern of its own and cannot even rely on ample and consistent previous case-law. One of the aims of my research on international sentencing is to investigate the feasibility of establishing flexible guidelines or principles to guide the decision-making process of sentencing in future cases before international courts and tribunals.

Sentencing guidelines or guiding principles could facilitate achieving proportionality and relative uniformity and consistency in sentencing. Any international court or tribunal, which *per se* intends to contribute to the respect of the rule of law and the development of international justice, if it seeks to provide a ‘just’ example for both national and international systems, it must undoubtedly develop and apply consistent patterns in its practice; sentencing is one of the areas in which this consistency is of the utmost importance.

The conundrum of achieving consistency in sentencing has been addressed, for instance, by the institutions of the European Union in the effort to combine common law and civil law traditions and harmonise the legal systems of EU Member States. In this regard, the Council of Europe’s Eighth Criminological Colloquium on disparities in sentencing of 1987 should be mentioned. In that context, the difficulty of reducing disparity in mixed sentencing systems was acknowledged. For example, it was emphasised that, while some systems (such as France or Portugal) consider the principle of individualisation of penalties as the guiding principle in each case, other national systems accept a combination of different aims and, although they give priority to *proportionality*, they also take into account other purposes such as individual and general prevention, incapacitation or rehabilitation.¹⁵⁴ In order to avoid disparity, it would be necessary to establish an ideal sentencing pattern valid for all countries. In the subsequent recommendations of the Council of Europe of 1993 on consistency in sentencing, it was suggested that at the national level two techniques should be developed for enhancing consistency in sentencing: these were referred to as

¹⁵⁴ Council of Europe, *Disparities in Sentencing: Causes and Solutions*, Collected Studies in Criminological Research, Vol. XXVI, 1989, Strasbourg – Council of Europe, 1/15, p.101.

‘sentencing orientations’ and ‘starting points’.¹⁵⁵ The former were described as indicating ranges of sentence for different variations of an offence, according to the presence or absence of various aggravating or mitigating factors, with discretion for courts to depart from the orientations. The latter were illustrated as indicating a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect aggravating and mitigating circumstances.

This further demonstrates how important is the issue of consistency in sentencing, both in national and supra-national systems of law.

In order to better elaborate guiding principles for international sentencing, an analysis of the existing sentencing practice is deemed essential as it allows the identification of patterns, trends and types of sentencing in relation to the various factors taken into account in the decision-making process. If a coherent framework arises from the ICTY and ICTR practice, then this framework could be used as a model and starting point for ICC judges. Vice-versa, if inconsistencies prevail, then some mechanisms should be proposed to provide guidance and ensure consistency in future international sentencing practice.

Several commentators have already acknowledged that the establishment of some form of sentencing guidance would provide the appropriate discretionary framework for the future development of sentencing jurisprudence both before the ICTY and ICTR and, in particular, before the ICC, which only recently became operative.¹⁵⁶ The advantages of having clear sentencing guidelines/principles have also been advocated from other perspectives: they would facilitate a better implementation of the *nulla poena sine lege* principle, which demands clarity in sentencing and sanctions; they

¹⁵⁵ Council of Europe, *Consistency in Sentencing*, Recommendation n. R(92) 17, Strasbourg, Council of Europe Press, p.7.

¹⁵⁶ Cf. BERESFORD, S., ‘Unshackling the Paper Tiger – The Sentencing Practices of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda’, *International Criminal Law Review*, 1 (2001), pp.33-90, see in particular p.85 where the author advocates the formulation of guideline judgements similar to those used by the English Court of Appeal; HENHAM, R., ‘Some Issues for Sentencing in the International Criminal Court’, *International and Comparative Law Quarterly*, vol.52 no.1(2003), pp.81-114; and PICKARD, DANIEL B., ‘Proposed Sentencing Guidelines for the International Criminal Court’, *Loyola of Los Angeles International & Comparative Law Review*, vol.20 (Nov. 1997), pp.123-157.

would favour internal consistency of the system of international justice; they would reduce the risks deriving from excessive judicial discretion.¹⁵⁷

Even in the search for consistency and uniformity in sentencing, it must be acknowledged that a certain disparity for a number of cases is to be considered normal. In fact, the existence of some unique cases which cannot be forced into a schematic model is unavoidable and elements of disparity are somehow ‘necessary’, due to the fact that a sentence needs to ‘be fitting’ the specific circumstances of the case. This approach underlines how every case is in some sense unique, related as it is to a specific person in particular circumstances.

Clearly, it is very difficult – or probably impossible – to foresee all the possible concrete situations which might confront judges in practice. This suggests the necessity to maintain some sort of flexibility in the system for judges while imposing punishment. Flexibility and discretion are certainly compatible with guiding principles, given that judges would always maintain a degree of discretion even within the framework of pre-established principles and rules. It is however in the interest of justice and legal certainty not to render the determination of punishment completely discretionary.

1.12 Identification of the essential elements of sentencing: relevant legal and procedural issues

The panorama described above is sufficient to identify the essential issues that will be addressed by this thesis.

General criteria and influential factors for the determination of sentences have already been highlighted: purposes of punishment, principle of proportionality, principle of legality, aggravating and mitigating factors, and so on.

It has been stressed that it will be necessary and opportune to identify the *ratio* of punishment at the international level, and the role that the international community attributes to international criminal law and sentencing, as both elements contribute to shaping the way in which international adjudication operates. Although international sentencing seems to refer to the traditional purposes of punishment, a more complicated dimension of punishment in international criminal law appears to emerge, due to the

¹⁵⁷ See, for example, HAVEMAN R., OLUSANYA O., *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp – Oxford, 2006, at p.14.

particularities of the context in which international crimes are committed and to the magnitude of the crimes themselves.

This leads to another aspect: the issue of *proportionality* in sentencing. Generally speaking, in national law *proportionality* is seen as a just correlation between the final sentence and the gravity of the crime, mitigated or aggravated by consideration and evaluation of the conduct and the personal circumstances of the accused. In international sentencing, given the peculiarities of the context in which international crimes are committed, it seems that a *proportion* between the sentence and the crimes committed is not feasible and should thus be shaped in a different way. The development of a ‘new’ concept of *proportionality* for international sentencing is thus opportune.

To recapitulate, this chapter has presented the general subject matter of sentencing, highlighting in particular the current status of *international* sentencing, and has argued in favour of a future development of principled sentencing, in particular: a statement of purposes and principles for international sentencing; procedural norms to provide guidance and ensure consistency and fairness in the sentencing process; a hierarchy of international crimes; a better defined system of aggravating and mitigating circumstances for international sentencing.

The model which will be proposed here is a normative one, based on propositions that identify substantive and procedural principles for the phase of sentencing in the international criminal justice process.

CHAPTER 2.

COMPARATIVE OVERVIEW OF SENTENCING PROVISIONS IN NATIONAL LEGAL SYSTEMS

The importance of any criminal trial, domestic or supra-national, resides in the fact that criminal proceedings help to restore the equilibrium of benefits and burdens in society, an equilibrium that is infringed by the commission of a crime. Criminal trials serve the purpose of demonstrating the seriousness, with which civil society regards the violations of its laws, condemns transgressions and provides remedies for victims of crime. This is true for both national and international trials, especially if it is assumed that the latter can serve the purpose of preserving truth and history, strengthening the rule of law and eventually deterring future crimes.

However, certain differences exist between the two levels. National criminal law aims at the protection of those values and interests which are inherent to the national legal order and have been chosen by the national legislator as those to be protected and safeguarded. International criminal law protects the legal values of the international community, *in primis* peace and security of the community of nations. Any 'international' prosecutor acts on behalf of the international community to secure the punishment of crimes whose heinous nature offends the whole of mankind.

Notwithstanding some inevitable distinctions, we can definitely observe a process of reciprocal influence and cross-fertilization between national and international systems of criminal justice.¹ On the one hand, we can speak of a process of *internationalization* of national criminal justice: the emergence of international criminal law has influenced domestic systems of criminal justice in the sense of reinforcement or creation of national norms and laws for the prohibition and punishment of international crimes. This phenomenon has been more evident especially since the adoption of the Rome Statute for the ICC. On the other hand, international tribunals have also been influenced by national criminal law, essentially by the features of the two main systems of common law and civil law (which apply, respectively, the adversarial and the

¹ See for instance, on this issue, DELMAS-MARTY, M., *Droit comparé et droit international: interaction et internormativité*, in CHIAVARIO, MARIO, (sous la direction de), *La justice pénale internationale entre passé et avenir*, Dalloz, Giuffrè, 2003, pp.11-26 ; *ibid.*, BUCK, V., *La procédure pénale internationale et l'utilisation du droit comparé. Essai de modélisation*, pp.57-78.

inquisitorial model).² This process is evident in the ICC Statute, which results in a unique and complex combination of different procedures deriving from different systems of law. Recent international tribunals and courts have also witnessed an ongoing compromise between different legal systems and their criminal procedures, although a prevalence of adversarial features can be identified.³

It is debatable whether international tribunals and courts should simply adopt concepts and mechanisms from the national sphere or rather transform them according to the specific needs and characteristics of the system of international justice.⁴ The rationale behind this is that it is difficult to automatically transpose norms of substantive or, especially, procedural criminal law developed in a specific and particular context, for example for national purposes, to another legal context, such as international criminal law and proceedings. Given that sentencing at the international level, and particularly in the context of serious violations, presents different features to those

² One of the main differences between the two legal systems can be identified, for instance, in the approach on the part of the court or judge: this approach is more active in the inquisitorial legal tradition, and rather passive in the common law tradition. Moreover, the adversarial model essentially leaves the establishment of the judicial truth to the parties of the case, whereas the essence of the inquisitorial model is in the powers and significant role of judges and prosecutors as representing the public interest in prosecuting and punishing offenders. For an overview on the main characteristics of the two systems, see CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, at p.367 and ff.; CADOPPI, A., *Introduzione allo studio del diritto penale comparato*, 2a ed., CEDAM, Padova, 2004; DAMMER R., FAIRCHILD E., *Comparative Criminal Justice Systems*, Wadsworth, 3rd ed. 2005, at pp.50-58; DELMAS-MARTY M., CHIAVARIANO M., *Procedure Penali d'Europa*, Cedam, Padova, 2001, at pp.19-24; GAMBARO A., SACCO R., *Sistemi giuridici comparati*, UTET, Torino, 1998, at pp.41-59.

³ This was also explicitly recognised by Chambers of the ICTY, see for instance: *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Chamber, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para.20. To read more about the main elements of the adversarial and inquisitorial models incorporated into international criminal procedure, see for instance: CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, at p.386; DELMAS-MARTY, M., *L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux*, in CASSESE A., DELMAS-MARTY M., *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 2002, at p.95; AMBOS, KAI, 'The Structure of International Criminal Procedure: Adversarial, Inquisitorial or Mixed?', in BOHLANDER, MICHAEL, *International Criminal Justice: a Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, pp.429-503; FAIRLIE, M., 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit', *International Criminal Law Review*, 4(2004), pp.243-319; KEEN, PETER CARMICHAEL, 'Tempered Adversariality: The Judicial Role and Trial Theory in International Criminal Tribunals', *Leiden Journal of International Law*, 17 (2004), pp.767-814.

⁴ See the opinion of Judge Cassese on the inter-relationship between national and international criminal law and the extent to which an international criminal court may or should draw upon national law concepts and transpose them into international criminal proceedings, in *Prosecutor v. Erdemovic*, Case No.IT-96-22-A, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, paras.1-6. Judge Cassese argued that, for a number of reasons, legal constructs and concepts of national law should not be automatically applied at the international level and mechanically imported into international criminal proceedings without precautions.

identified in national systems, an automatic transposition of concepts and standards elaborated and developed in national jurisdictions for traditional crimes might not be feasible without previous adjustment of the same concepts to the particular features and intrinsic characteristics of international criminal justice. On the other hand, ICTY and ICTR judges have very often drawn upon national criminal law and procedure in their practice, and have made extensive use of national case-law in interpreting and applying the Tribunals' Statutes and RPE.⁵ The jurisprudence of the ICTY reveals that, to a certain degree, rules and decisions of the Tribunal are formulated along the lines of national laws.⁶

In order to better evaluate similarities and differences between national and international sentencing, and to assess the extent to which national schemes of sentencing can be transferred to the international sphere, this chapter is devoted to a comparative analysis of the law of sentencing in selected national legal systems, representing common law and civil law traditions, in order to investigate how the decision-making process in sentencing works at the national level and compare it with that of the international sphere. It is believed that some lessons can be learned from national models of determination of the appropriate penalty.

Furthermore, the importance of 'general principles of law', thus of national laws, as sources of international law (although of a secondary nature), deriving from Article 38 para.1(c) of the Statute of the International Court of Justice, should equally apply to international criminal law and the system of international criminal justice, and thus advocate for a comparative law approach.⁷ In order to have a truly 'international'

⁵ See BOAS GIDEON, SCHABAS WILLIAM A., *International Criminal Law Developments in the Case Law of the ICTY*, Martinus Nijhoff Publishers, Leiden, 2003, pp.277-296.

⁶ For example, in the *Kupreskic* case (*Prosecutor v. Kupreskic*, Case No.IT-95-16-A, Appeal Judgement, 23 October 2001, para.46) the Appeals Chamber relied on a mixture of its own case law and national law to assess the rule on admissibility of new evidence in appeal cases. In the *Erdemovic* case, the Trial Chamber extensively referred to national case law to ascertain the scope of the defence of duress (*Prosecutor v. Erdemovic*, Case No.IT-96-22-T, Trial Judgement, 29 November 1996, paras.52-56).

⁷ Although the sources of law are not clearly identified in the Statutes of the ad hoc Tribunals, judges have recognised the influence of common law and civil law principles on the procedural norms of the Tribunals, and the importance of respecting and taking into account 'principles of law from the main legal systems of the world' (*Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Chamber, Judgement of 16 November 1998, paras.158-159). As to the ICC, the Rome Statute explicitly spells out the applicable law and also recognises 'general principles of law derived ... from national laws of legal systems of the world' as a legitimate source (see Article 21 of the Rome Statute), even though a residual one (Art.21c). Regarding the residual nature of recourse to national laws within the jurisprudence of the ad hoc Tribunals, see for instance, *Prosecutor v. Erdemovic*, Case No.IT-96-22-A, Appeals Chamber, 7 October

justice, the general principles of law recognised by civilized nations and related to the justice system should be taken into account.

Before analysing in detail the sentencing process in the domestic systems selected, and in order to introduce the national dimension of sentencing, the initial sections define some of the most important differences between the national and the international systems of justice, and provide an overview of the traditional purposes of punishment elaborated for domestic jurisdictions.

A. National and International Dimension of Sentencing

2.1 The international criminal legal system versus national criminal legal systems

Without doubt significant differences exist between the international and the national spheres, and these differences lie in both their structures and substance. In the first case, for instance, national legal systems have established and long-standing institutions, structures and personnel specifically devoted to the enforcement of criminal law on a regular basis; national courts are thus part of a complex state machinery, called upon to perform the functions set out by the national Parliament, and may also avail themselves of state enforcement agencies to execute their judicial orders. By contrast, such a permanent and articulated system of justice is lacking at the international level, due to the absence of a comprehensive structure comparable to that of national jurisdictions. International criminal courts are not part of a wider judicial system and do not act under the supervision/authority and with the support of a state apparatus. International courts operate in a system which is notably lacking in many respects and which departs from the fundamental constitutional principle of separation of powers, given that its laws are

1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para.5, and Separate and Dissenting Opinion of Judge Cassese, paras.1-6; *Prosecutor v. Furundzija*, Case No.IT-95-17/1-T, Trial Judgement, 10 December 1998, paras.177-179; *Prosecutor v. Kupreskic*, Case No.IT-95-16-T, Trial Judgement, 14 January 2000, paras.537-540). See also, on the issue of 'general principles of law' in international criminal law: RIVELLO, ROBERTO, « Les principes généraux de droit et le droit international pénal », in CHIAVARIO, MARIO, (sous la direction de), *La justice pénale internationale entre passé et avenir*, Dalloz, Giuffrè, 2003, pp.89-111 ; RAIMONDO, FABIAN, « Les principes généraux de droit dans la jurisprudence des tribunaux ad hoc : une approche fonctionnelle », in DELMAS-MARTY M., FRONZA E., (sous la direction de), *Les sources du droit international pénal : l'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale*, Société de législation comparée, 2004, pp.75-95.

not promulgated by an international legislative body. Instead, it is the executive or the judiciary themselves which create laws.⁸ The absence of an international legislator or law-maker and, correspondingly, of an established set of rules for international criminal proceedings and assessment of the *seriousness* of crimes is quite evident; often rules are not clear, particularly when of customary origin. In addition, on a policy level, it seems that international justice operates in very different circumstances from domestic forms of justice: while in most liberal democracies the courts are independent from politics, in the international arena politics still play a major role. Moreover, whereas national criminal codes are generally codes « *des délits et des peines* » and contain the definition of crimes and penalties provided for by the specific legal system concerned; on the contrary, international criminal law does not contemplate any indication of penalties and their aims nor does it define or specify penalties at all. The only exception is represented by the consideration given to the issue of the death penalty, whose imposition is strictly forbidden.

These differences have a significant influence on the philosophical choices and policy considerations of the two types of legal system. National systems of criminal justice are overtly concerned with preservation, restoration and improvement of the public order, and also pursue an important educational function in their attempt to achieve the goals of rehabilitation and social re-integration of individual offenders. All these goals and functions are performed through numerous social and political structures. The international system, which has not yet developed similar structures, has acted mainly on an ad hoc basis. Consequently, the purposes and functions of international sentencing are not at all obvious.

⁸ International judges, especially in the system of the ad hoc Tribunals, enjoy a sort of 'legislative' power. It should be recalled, in fact, that the Rules of Procedure and Evidence of the ad hoc Tribunals have been created (and are currently amended) directly by judges of the same Tribunals. The situation has been changed in the system of the ICC, where the Rome Statute attributes to the Assembly of States Parties the power to adopt (and modify) the RPE (see Article 51, ICC Statute). This is meant to ensure the necessary separation between the formulation/creation and the application of procedural rules.

On the role of the international judge, see: LOLLINI, ANDREA, « L'expansion 'interne et externe' du rôle du juge dans le processus de création du droit international pénal », in DELMAS-MARTY M., FRONZA E., (sous la direction de), *Les sources du droit international pénal: l'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale*, Société de législation comparée, 2005, pp.223-241. See also: KNOOPS, GEERT-JAN ALEXANDER, *Theory and practice of international and internationalized criminal proceedings*, Kluwer Law International, 2004, p.12; SWART, MIA, 'Ad Hoc Rules for Ad Hoc Tribunals? The Rule-Making Power of the Judges of the ICTY and ICTR', *South African Journal on Human Rights*, vol.18 (2002), pp.570-589.

Despite the differences outlined here between domestic criminal law and international criminal law, it is true that it is also possible to detect some similarities. In effect, as noted by Prof. Ambos, if domestic criminal law aims at facilitating and securing the peaceful cohabitation of people within the same State, international criminal law pursues the same objective but across State borders and with a narrower scope, concerning only grave violations of human rights and humanitarian law.⁹ Crimes under international law can thus be considered as endangering or violating the values and interests of a macro-society,¹⁰ and international criminal law can be seen as a tool of *ultima ratio* to protect the legal values inherent to the international community of States as a whole.

The need for harmonization of the international and the national criminal justice systems has thus been put proposed and it has been suggested that the two systems could function as a united network based on cooperation between the two levels. This would imply the development of uniform or substantially similar legal norms, analogous procedures for international cooperation in criminal matters, harmonized penalties for international crimes and harmonized norms of due process applicable both to the national and the international jurisdictions.¹¹

In any case, as stated earlier, a twofold relationship between international and national criminal law is increasingly emerging and becoming recognisable. On the one hand, more and more general principles of (national) criminal law, common to the majority of the national legal systems of the world, have been integrated into international criminal law, thus *nationalising* it; on the other hand, national criminal law has been *internationalised* in the sense that both customary and conventional international law have been integrated into national legal systems, for example with the introduction of international crimes into national legal systems.¹² The creation of international criminal jurisdictions with powers to try and sentence individuals for

⁹ See AMBOS, K., 'On the rationale of punishment at the domestic and international level', in HENZELIN M., ROTH R., *Le droit pénal à l'épreuve de l'internationalisation*, Georg Librairie de l'Université, Bruylant, 2002, p.323.

¹⁰ TRIFFTERER, O., 'The Preventive and Repressive Functions of the ICC', in POLITI, NESI, *The Rome Statute of the International Criminal Court – A Challenge to Impunity*, Ashgate, 2001, at p.154.

¹¹ See BASSIOUNI, M.C., *Introduction to International Criminal Law*, Transnational Publishers, NY, 2003, at p.682. See also DELMAS-MARTY, M., *Droit Comparé et Droit International: Interaction et Internormativité*, in CHIAVARIO, MARIO, (sous la direction de), *La justice pénale internationale entre passé et avenir*, Dalloz, Giuffrè, 2003, pp.11-26.

¹² MANTOVANI, F., 'The General Principles of International Criminal Law', *Journal of International Criminal Justice*, 1 (2003), pp.26-38.

international crimes has been considered as one – and perhaps the most important – stage in the so-called *internationalisation* of (domestic) criminal law.¹³

The concept of *internationalisation* has been put forward also in relation to sentencing, by M. Findlay and R. Henham.¹⁴ They argue that such a concept suggests a move, a sort of development or evolutionary process towards harmonisation and uniformity in sentencing, beyond any specific jurisdictional context. This also implies that beneficial consequences may be derived for sentencing by the merging of trial traditions or by their hybridisation. In deconstructing and explaining the relationship between domestic, regional and international sentencing contexts, Findlay and Henham suggest that the ‘cultural transmission of processes’ is reciprocal and has both horizontal and vertical effects.¹⁵ Viewed in this way, the perspective of *internationalisation* also provides an important tool to verify whether international sentencing practice conforms to particular human rights norms that might be taken as measures of international criminal justice. One of the implications deriving from this is the importance of analysing and understanding the principles and procedures of domestic criminal law.

2.2 Traditional theories of punishment

The subject of *punishment* is very complex and not altogether unambiguous, and has inspired an enormous body of philosophical, criminological, sociological and legal literature. The apparently simple questions *why punish?* and *which goals is society aiming to achieve through the punishment of offenders?*, have many possible answers and have always divided philosophers, practitioners and scholars, thus generating ample debate on the subject. Just to mention some of the possible answers: it is believed that offenders should be punished because they deserve it; in order to halt them from committing further crimes and to discourage other persons from doing the same; in

¹³ As observed by Professor Serge Sur: « Cette dernière étape représente un degré d'internationalisation incontestablement supérieur, une internationalisation institutionnelle, conduisant à l'apparition d'un droit international pénal, au-delà du droit pénal international classique reposant sur une coordination des droits et procédures pénaux internes. » (cf. HENZELIN M., ROTH R., *Le droit pénal à l'épreuve de l'internationalisation*, Georg Librairie de l'Université, Bruylant, 2002, p.51).

¹⁴ FINDLAY M., HENHAM R., *Transforming International Criminal Justice*, Willan Publishing, 2005.

¹⁵ FINDLAY M., HENHAM R., *ibid.*, pp.15, 255 and ff.. See also HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, at p.3.

order to protect society from dangerous individuals; to reassure victims and to offer reparation to them, etc..

Punishment and penalties are thus one of the core features of criminal law, both domestically and internationally, and are characterised by the general aim of denunciation and condemnation of certain conducts by a (national or international) community of people in order to re-establish the violated order.

The classic purposes identified at the domestic level for punishment can be summarised by the following: retribution (or ‘just desert’), general and specific prevention (or deterrence), rehabilitation of the convicted person (through re-education or social reintegration of the offender) and protection of society (through the neutralization of the danger represented by the convicted person when at large).¹⁶

The way in which those objectives are pursued is closely linked to the cultural, social and political dimension of punishment. Depending either on the context or on the functions that a given society seeks to fulfil, one of the above mentioned aims frequently end up prevailing on the others. In other words, each national legal system chooses the purpose(s) considered the most appropriate by it; consequently, the nature, type and duration of the penalties imposed is directly influenced by the purported objectives and functions of punishment in a given society.¹⁷

The fact that penalties applied at the national level are strictly linked to and influenced by the specific characteristics of the national jurisdiction in which they are elaborated, determines the different degrees of punishment that can be observed around the world, but it also assures a certain inner coherence of the system which, on the opposite, is lacking in the system of international justice.¹⁸

¹⁶ These correspond more or less to the purposes, identified in Chapter 1, for international sentencing with the addition, for the international context, of restoration, reconciliation and maintenance of peace.

¹⁷ See LA ROSA, A.-M., *Juridictions Pénales Internationales – La procédure et la preuve*, Publications de l’Institut Universitaire de Hautes Études Internationales, 2003, at p.157 and ff.. Also: PRADEL, J., *Droit pénal comparé*, Dalloz, Paris, 1995, at pp.113 and ff..

¹⁸ This was recognised also by the International Law Commission when, in its Report of 1991, it noted that: ‘...whereas in domestic law there was in each State a certain unity of moral and philosophical concepts that justified a single system of punishment applicable to all offences, in international law the diversity of concepts and philosophies was such as to be hardly conducive to a uniform system of punishment. Certain punishment current in some countries was unknown in others...’ and thus concluded by stating that it is: ‘...extremely difficult to institute a single internationally and uniformly applicable system of punishment’. See *Report of the International Law Commission on the Work of its Forty-Third Session*, 29 April-19 July 1991, UN GAOR, 46th Sess., Supp.No.10, UN Doc.A/46/10 (1991), at p.80, para.67. On the variety of penalties in different national legal systems, see also: PRADEL, J., *Droit pénal comparé*, Dalloz, Paris, 1995, pp.569 ff..

Problems arise when these purposes conflict with each other. Traditionally, such conflicts between the different goals of punishment are frequent, especially with regards to those theories that favour the aspect of preventing future crimes and those that favour the idea of punishment as retribution or ‘just desert’. When criminal codes or legislation do not indicate which goal should have priority then, in order to avoid conflicts between the different purposes of punishment, the role of judges is of the utmost importance either in balancing the different purposes or in assigning priority to one of them together with the appropriate reasoning for such a choice.

It has to be acknowledged, however, that the debate between the different rationales of punishment is probably bound to remain unsolved, due to the intrinsic characteristics of the question itself, rooted as it is in the functions that members of a society choose for their national criminal systems.

The amount of literature regarding the traditional purposes of punishment is vast and it is not intended to provide a complete account here; what follows is only a brief review of the traditional theories elaborated in domestic systems of justice. These theories, although mainly developed at the domestic level, may also be relevant for international sentencing.

Retribution

Retribution – which originally derives from primitive theories of revenge and ‘just deserts’ (another retributivist approach) – implies that the offender be punished for the harm caused because s/he ‘deserves’ such punishment. Punishment is therefore made in ‘return’ for past crimes. In this perspective, the primary justification lies in the fact that an offence has been committed and deserves punishment.

New theories of ‘modern retributivism’, articulated during the 1970s, have specified that the *severity* of punishment should be commensurate to the *seriousness* of the crime for which punishment is inflicted.¹⁹ The primary principle of new retributivism is that punishment should be *proportionate* to the seriousness of the

¹⁹ The most authoritative and philosophically elaborated version of the new retributivism appeared in 1976 with the publication of *Doing Justice* by Andrew Von Hirsch. (VON HIRSH, A., *Doing Justice: The Choice of Punishments*, New York, Hill and Wang, 1976). See also: FLETCHER, G., *Rethinking Criminal Law*, Little, Brown and Company, Boston, 1978; SINGER, R., *Just Desert: Sentencing Based on Equality and Desert*, Ballinger Publishing, Cambridge, 1979.

offence.²⁰ The application of this principle requires the establishment of a range of penalties providing a sort of scale (from the most serious sentence reserved for the most serious offences to a more lenient one for lesser crimes) based on a progressive graduation of punishment according to gravity of offence.²¹ This approach is often known as *sentencing tariffs*, involving a pre-established ‘presumptive sentence’ for the various types of crimes. This further implies the necessity of *ranking* offences in terms of *seriousness*, in order to establish a scale of penalties of commensurate severity. The solution most frequently adopted in common law countries to solve the ranking problem is that of sentencing guidelines.²²

In systems which adopt a retributive approach, the overall severity of the scale of punishment depends on the most severe penalty prescribed. If life imprisonment is the most severe penalty available, then ordinal proportionality will indicate shorter terms of imprisonment, up to non-custodial penalties, for less severe offences.

Adherents to retributive theories stress that retribution offers more secure protection from punishment for the innocent than most other theories do, and claim that it reduces the scope of judicial discretion and the risk that people might be sentenced for their personal or social characteristics rather than for the crime(s) they committed.

The idea of a ‘just’ foundation for punishment and of justice as ‘fairness’ is derived from the wider theory of political obligations propounded by the social philosopher John Rawls, whose work has profoundly influenced English and American political and legal thinking. In his famous work, *A Theory of Justice* (1972),²³ Rawls offers a modern version of the social contract theory looking at the advantages that people would expect

²⁰ As noted by A. Ashworth, the modern *retributive theory* is based on the concept of *proportionality*, according to which a defendant must be sentenced to neither more nor less than what s/he deserves. See ASHWORTH A., PLAYER, *Sentencing, Equal Treatment and the Impact of Sanctions*, in ASHWORTH A., WASIK M., eds., *Fundamental of Sentencing Theory*, Oxford, Clarendon Press, 1998, p.251. See also: VON HIRSCH A., ASHWORTH A., *Proportionate Sentencing*, Oxford University Press, 2005.

²¹ See HUDSON, BARBARA A., *Understanding Justice – An Introduction to ideas, perspectives and controversies in modern penal theory*, Open University Press, Buckingham, Philadelphia, 1997, p.38. Furthermore: ASHWORTH, A., *Sentencing and Penal Policy*, London, Weidenfeld and Nicolson, 1983; ASHWORTH, A., ‘Criminal Justice and Deserved Sentences’, *Criminal Law Review*, 1989, pp.340-355; VON HIRSCH A., ‘The Politics of Just Deserts’, *Canadian Journal of Criminology*, no.32(1990), pp.397-413.

²² As will be seen later in this chapter, an example of this approach is to be found in the United States system. There, sentencing guidelines are often represented by a grid with two axes: the horizontal one showing previous convictions, and the vertical one showing the offence type. Within the grid, each cell contains a presumptive prison term expressed in months, a term which would be the ‘normal’ one for a standard case of that type. The choice of the actual sentence is left to the judge and will depend on the aggravating and mitigating factors of the case at hand.

²³ RAWLS, J., *A Theory of Justice*. Oxford: Clarendon Press, 1972.

in return for their engagement in social matters and their respect for social and legally recognised rules. Rawls maintains that the institutions and rules adopted by a given society would be those that members of that society, seen as free and equal citizens, would rationally agree upon. Punishment, intended as a sanction determined by criminal law, is to be enforced because it is consistent with the rational will of citizens that the rule of law be upheld. The principle of *justice as fairness* that he elaborated in his book has considerably attracted and influenced modern retributivism, which has utilised Rawls' principles of fairness and equal treatment, and his attack on Utilitarian theories, as a basis for advancing *retribution* as a justifying aim as well as a principle for the distribution of punishment. In effect, Rawls' idea that – taking into account the arrangements that free and rational citizens would choose and establish – the object of all social institutions must be to promote as fair a distribution of advantages as possible, reinforced the retributivist concept that the object of punishment is to restore the balance of advantages and disadvantages created through the commission of crime(s).²⁴

Modern retributivist and desert-based thinkers, in order to soften the harsh effect of a purely retributive approach, have increasingly resorted to a combination of deterrent and fairness rationales.²⁵ One of the leading commentators in this area, A. Ashworth, has stressed that modern retributive theories focus on the concept of proportionality which – as seen in Chapter 1 – is based on the assumption that the defendant be sentenced to what s/he deserves, neither more nor less.²⁶ In order to achieve that objective, the sentence must be proportionate to the gravity of the crime and the

²⁴ Critics of this approach have pointed out that removal of unfair advantages cannot be or serve as a general justification for punishment for several reasons. Firstly, it applies only to some categories of crimes, particularly property crimes where there is a material advantage to be gained through the offence. It cannot apply, for instance, to other types of offences such as murder or rape, where the 'wrongness' of the crime does not lie in the fact that such an offence deprives a law-abiding citizen of an advantage, but lies in the nature itself of the harm done to the victim and in the breach of society's boundaries of moral conduct. Secondly, it is not correct to presume that non-offenders would be tempted to commit acts prohibited by the law, therefore non-offenders cannot be said to deny themselves the advantage of something they will never be tempted to do. See DUFF R. A., *Trials and Punishments*, Cambridge University Press, 1986, p.212.

²⁵ For instance, A. Von Hirsch argues for a more subtle combination of both rationales in order to preserve respect for individual rights and integrity. This implies recognition of the important role that the principle of proportionality must play in the sentencing process. See VON HIRSCH, A., *Censure and Sanctions*, Oxford, Clarendon Press, 1993, pp.12-15. See also: MORRIS, N., *The Future of Imprisonment*, Chicago University Press, 1974; ROBINSON, P., 'Hybrid Principles for the Distribution of Criminal Sanctions', *Northwestern University Law Review*, vol.82(1987), pp.19-42.

²⁶ See, for instance, VON HIRSCH A., ASHWORTH A., *Proportionate Sentencing*, Oxford University Press, 2005, pp.131-132.

individual responsibility of the accused, and attention must be paid to the level of sentencing imposed in similar cases. What deserts theorists also point out is that, as punishment conveys blame for wrongdoing, thus the condemnation of unlawful behaviour by society is a way of satisfying the victims and the public in general, when the social order has been endangered or violated. Retributivism has also been said to produce ‘utilitarian’ results and to help the achievement of other objectives such as deterrence and rehabilitation.²⁷

Critics of this theory of punishment have argued that the retributive or ‘just desert’ view is very out-of-date and attributes only a penitentiary function to the penalty imposed on the offender;²⁸ moreover it is questionable whether society is sufficiently ‘just’ to justify the application of desert-determined penalties.²⁹ One of the negative aspects of this concept, based as it is mainly on the afflictive and penitentiary aspect of penalties, is that it clearly cannot be reconciled with any aspiration to use penalties as a social peace-making process. The retributive character of punishment, if not mitigated by other finalities, would rule out the goal of re-education and would not allow for any form of re-socialization of the convicted persons. It has been noted that the modern philosophy of punishment has increasingly departed from this afflictive view of penalty, evolving towards the paradigm of restorative justice, re-socialization and re-education of offenders.³⁰

Deterrence

Deterrence, broadly defined, is the ability of a legal system to prevent (or to discourage) certain behaviours through the threat of punishment. ‘Deterrent’ means ‘anything which impedes or has the tendency to prevent; e.g. punishment is a “deterrent” of crime’.³¹

²⁷ Von Hirsch sums up these two fundamental aspects of retributive punishment by saying: ‘Persons are assumed to be moral agents capable of taking seriously the message conveyed through the sanction, that the conduct is reprehensible. They are fallible, nevertheless, and thus face temptation. The function of the disincentive is to provide a prudential reason for resisting the temptation’. See: VON HIRSCH, A., *Censure and Sanctions*, Oxford Clarendon Press, 1993, at p.13.

²⁸ See BRAITHWAITE J., PETTIT P., *Not Just Desert: A Republican Theory of Criminal Justice*, Oxford University Press, 1990.

²⁹ See TONRY, M., ‘Proportionality, Parsimony and Interchangeability of Punishments’, in DUFF A., MARSHALL S. (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice*, Manchester University Press, 1994.

³⁰ BRAITHWAITE J., PETTIT P., *Not Just Desert: A Republican Theory of Criminal Justice*, Oxford University Press, 1990.

³¹ Black’s Law Dictionary, 7th edition, 1999.

Deterrence theories are more future-oriented than past-oriented, as they hold that the purpose of punishment is to prevent future crimes by creating a fear of punishment in potential offenders, thus discouraging them from committing crimes. The threat of punishment should inhibit potential criminals and, therefore, protect society.

Traditionally, deterrence theorists distinguish between *individual* (or *special*) and *general* deterrence. While the former is mainly directed to the single offender, and aims at preventing someone who has already offended from re-offending; the latter addresses more broadly the entire society and aims at deterring potential offenders from committing crimes at all.³² Traditionally the strategies to achieve individual deterrence have been identified as, for example, removing the physical power and/or desire to offend from the individual, and/or making the offender afraid of breaking the law again; general deterrence, on the other hand, has been pursued by using punishment itself as an example to others.

It is opportune here to specify that – although the terms of *prevention* and *deterrence* are generally interchangeable – *prevention* has a broader meaning and is often used to indicate the effect of *general prevention* that punishment should produce on society as a whole; *deterrence*, on the other hand, has a more limited scope as, theoretically, it should signify *special prevention*, and represents the specific effect of punishment on the single individual.³³

In his well-known *Dei delitti e delle pene*, published in 1764, Cesare Beccaria – supporting *general deterrence* as the main aim of criminal justice – proposed a graduated system of penalties, with provisions of different levels of punishments appropriate to the type of crime committed.³⁴ This was a remarkable novelty in a system of governments where penalties were arbitrary, mostly delegated to monarchs and the nobility, and where there was very little proportionate gradation of penalties. Beccaria's idea of a criminal offender was that of an individual with free choice who should

³² See, in particular for general deterrence, BENTHAM, J., *Principles of Penal Law*, in *Collected Works*, ed. J. Bowring, vol. I, 1832.

³³ See ANDENAES, J., 'The General Preventive Effects of Punishment', *University of Pennsylvania Law Review*, vol. 114, no. 6 (1966), pp. 949-984. According to the author, '...a basic distinction is made between the effects of punishment on the man being punished – individual prevention or special prevention – and the effects of punishment upon the members of society in general – general prevention. The characteristics of special prevention are termed "deterrence," "reformation" and "incapacitation"... General prevention, on the other hand, may be described as the restraining influences emanating from the criminal law and the legal machinery', at p. 949.

³⁴ BECCARIA, CESARE, *Dei delitti e delle pene*, (a cura di Piero Calamandrei), Firenze: Felice Le Monnier, 1965.

therefore be deterred by the anticipation of the punishment s/he would undergo if committing a crime. In his system, there was no consideration of circumstances, personal characteristics, or other factors.

Overall, critics of a *preventive/deterrent* approach to sentencing stress the fact that the offender should not be punished more than s/he deserves for the offence(s) committed in the name of some possible preventive effects on others. Exemplary sentences – intended to make potential offenders think twice about the possibility of committing a crime – could lead to more severe penalties than those ordinarily applicable. They should therefore be avoided, as they endanger respect of basic principles of justice, such as the principle of proportionality of penalties, and inevitably conflict with the notion of ‘justice’ and ‘just punishment’. It seems, in fact, that exemplary sentences envisage the punishment of offences that may possibly be committed in the future, rather than offences which have actually been committed. Another difficulty with purely deterrence-theories is that it is impossible to determine if a certain degree of punishment or a very severe penalty will in fact deter people from committing crimes. Some studies conducted into the effects of sentences in fact support the conclusion that deterrent sentencing strategies are not successful in reducing crime rates, either generally or in relation to specific crimes.³⁵

Theories of rehabilitation, restoration and social defence are of more recent origin and are more victim-oriented.

Rehabilitation

Punishment is also expected to fulfil the purpose of rehabilitating the offender. This objective, traditionally upheld in domestic systems of criminal justice, also seems to become relevant in the context of human rights violations, where social reconstruction and reconciliation are of the utmost importance.

The main objective of *rehabilitation* is to reintegrate the offender into society after a certain period, and to shape the content and level of punishment in such a way as to

³⁵ See HUDSON, B., *Understanding Justice, op.cit.*, p.22 and ff., where the author thus affirms: ‘...Among Western countries, those with the most severe penalty scales tend to have the highest crime rates. This is especially true of the USA, where those states which have retained the death penalty do not have lower murder rates than those which have not. More generally, the death penalty has not prevented rates of violent crimes being the highest of all the advanced Western societies’.

achieve a re-educative effect. In order to realise this goal, ad hoc treatment programmes are often needed to assist the offender in returning to society.

There has been much criticism with regard to rehabilitation, in particular as to its effectiveness; for example, it has been argued that no programme is very successful in preventing reoffending and that, if the real value of criminalising certain behaviours is to prevent or reduce their occurrence, then rehabilitation cannot serve as a unique justifying motivation in punishment.³⁶

Social defence theory and incapacitation

Theories that conceive of punishment as a means of social defence maintain that criminals are to be punished in order to protect society from dangerous individuals, and concentrate on the benefits to the community resulting from restraining offenders and keeping them in custody, thus reducing or eliminating the risk that members of society might become victims of crimes. These theories focus on the benefit to society offered by the removal and imprisonment of criminal offenders. Confinement is thus considered the most effective way to deal with some types of offenders, particularly recidivists or violent offenders. The validity of this goal of sentencing depends very much on the ability of the legal system to accurately predict, control and regulate the potential danger.

Theories of incapacitation look at the effects of penalty not after the end of the sentence but during its duration, *i.e.* during the imprisonment of the offender. It is of course imprisonment and other custodial sentences (such as detention centres, custodial institutions, etc.) that are deemed to have the most complete and continuous incapacitating effect.

Restoration and Reparation

In the 1980s, one of the major developments in criminal justice was the increasing recognition of the rights and needs of victims of crimes.³⁷ It was affirmed that seeking justice and reparation for victims should be considered as one of the first goals of

³⁶ See HART, H.L.A., *Freedom and Responsibility: Essays in the Philosophy of Law*, Oxford Clarendon Press, 1968.

³⁷ The UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly Resolution 40/34 of 29 November 1985, probably contributed to draw attention to and recognise the rights and needs of victims.

sentencing and one of the most relevant purposes pursued by a system of criminal justice. From this perspective, the primary aim would therefore become to ensure that the offender compensate the victim(s) of crimes and the wider community for the effects and consequences of the wrong done.³⁸ As Prof. Henham suggests, any conceptualisation of restorative justice in international sentencing invokes a paradigm that must include the issues of restitution, reparation, victim participation and compensation.³⁹ Restorative justice places the victim's situation at the core of the judicial process, thus focusing on how reparation for the injuries received can best be made. In this context, the sentence, as the final act in the judicial process, acquires a special importance and is placed in the broader framework of significance involving society and the individuals affected by the criminal acts. Restorative justice approaches also promote different modes of accountability, more informal agreements between the parties involved, and a new role for judges.⁴⁰

It is worth briefly mentioning, that recent human rights theories have acquired an increasing importance in sentencing matters, firstly in relation to the determination of the overall severity of penalties – excluding for example certain kinds of punishment such as the death penalty – and, secondly, in relation to the basic and fundamental standards to be guaranteed to the accused in respect of recognised principles of due process. International human rights law must thus be considered as applicable to the regime of penalties and to the treatment of defendants both during trial and after conviction.⁴¹

2.3 Review of the literature

Much research and numerous studies have already been carried out on the topic of national sentencing. Before entering into more detail in the analysis of the sentencing process in selected national legal systems (in the following sections) and in international criminal law (in Chapter 3), it is essential to acknowledge this literature. However, I will not repeat nor describe in detail the way in which the voluminous literature has

³⁸ See: WRIGHT, M., *Justice for Victims and Offenders*, Open U.P., 1989.

³⁹ HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, p.196.

⁴⁰ See, for instance: ROCHE, DECLAN, *Accountability in Restorative Justice*, Oxford University Press, 2003.

⁴¹ BASSIOUNI, M.C., *Introduction to International Criminal Law*, *op.cit.*, at pp.320-321.

tackled sentencing issues, nor will I attempt a critical appraisal of the studies conducted so far. The scope of this thesis does not allow for such an extensive review and the objectives of my analysis are also more limited. Nevertheless, the following references may provide a broader and more comprehensive panorama for scholars and practitioners willing to invest more time and/or research into sentencing related topics.

Sentencing research has indeed a long tradition: several jurisdictions all over the world have introduced or contemplated sentencing reforms or reviews of their penalty systems,⁴² and – as can be appreciated from the above discussion regarding traditional theories of punishment – commentators have devoted conspicuous legal and philosophical thinking to sentencing issues.

Furthermore, an extensive literature has examined the effects of guidelines or guidance-schemes in regulating sentencing discretion and reducing disparity or inconsistencies. Similar studies suggested that the degree of success of sentencing guidelines or other models of guidance in promoting more consistent sentences varies greatly and depends on the structure of the model proposed and on the level of cooperation of the parties involved.⁴³

Sentencing reforms have often concerned ranges of penalty, in the sense of reducing their scope and compressing the choices available, in order to limit the discretionary power of judges and render punishment more effective.⁴⁴

⁴² For example, sentencing reforms have periodically been conducted in the major common law systems: Canada, USA, Australia, England and Wales. See Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Ottawa, Supply and Services Canada, Report of the Canadian Sentencing Commission, 1987; ROBERTS J.V., VON HIRSCH A., 'Legislating the Purpose and Principles of Sentencing', in Roberts J.V. and Cole D. (eds.), *Making Sense of Sentencing*, Toronto, University of Toronto Press, 1999; TONRY, M., 'Structuring Sentencing', in TONRY M., MORRIS N. (eds), *Crime and Justice*, University of Chicago Press, Chicago, vol.10 (1988); FREIBERG, A., *Pathways to Justice: Sentencing Review 2002*, Melbourne: Department of Justice, 2002; HENHAM, RALPH, 'Human Rights, Due Process and Sentencing', *British Journal of Criminology*, vol.38, no.4 (1998), pp.592-610; HENHAM, RALPH, 'Theory and Contextual Analysis in Sentencing', *International Journal of Sociology of Law*, no.29 (2001), pp.253-276; ROBERTS, J.V., 'Alchemy in Sentencing: an Analysis of Sentencing Reform Proposals in England and Wales', *Punishment and Society*, 4 (2002), p.425; TONRY M., REX SUE, (eds), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, 2002.

⁴³ See TONRY M., FRASE R. (eds.), *Sentencing and Sanctions in Western Countries*, Oxford University Press, 2001, chapters 3 and 11. See also: TONRY, M., *Sentencing Matters*, Oxford University Press, 1996; TONRY M., HATLESTAD K., *Sentencing Reforms in Overcrowded Times*, Oxford University Press, 1997.

⁴⁴ This has been the case for the sentencing reforms in the USA. See, for instance, BLUMSTEIN A., COHEN J., MARTIN S.E., TONRY M., *Research on Sentencing: The Search for Reform*, National Academy Press, Washington D.C., 1983; VON HIRSCH A., KNAPP K., TONRY M., *The Sentencing Commission and its Guidelines*, Northeastern University Press, Boston, 1987; MANNOZZI, GRAZIA, *Razionalità e 'Giustizia'*

Another substantial part of the literature has been devoted to the study of disparities and inequalities in sentencing: the so-called ‘*sentencing disparity*’ intended as any phenomenon which brings about arbitrary variations in the determination of penalty.⁴⁵ Various systems and ways of facilitating sentencing consistency have similarly been attempted and proposed.⁴⁶

Individual-oriented studies have investigated, on the one hand, the role of the judge and the influence of his/her individual characteristics on the decision-making process in sentencing;⁴⁷ on the other hand, the influence on sentences and penalties of characteristics related to the accused (such as race, gender, age, social and economic background, etc.).⁴⁸

Further, criminological and econometric research has tackled in depth the issue of mitigating and/or aggravating factors which influence the decision-making process of sentencing within national jurisdictions.⁴⁹

nella commisurazione della pena – Il Just Desert Model e la riforma del Sentencing nordamericano, CEDAM, Padova, 1996, p.40.

⁴⁵ FORST, M.L., *Sentencing Reform. Experiment in Reducing Disparity*, Sage, Beverly Hills, 1982; FORST, M.L., ‘Sentencing Disparity: An Overview of Research and Issues’, *ibid.*; MANNOZZI, G., *Razionalità e ‘Giustizia’ nella commisurazione della pena*, *cit.*, 1996, pp.121-122 (see also references cited therein), 127-133; SPOHN, C.C., *How Do Judges Decide? The Search for Fairness and Justice in Punishment*, CA: Sage, 2002.

⁴⁶ For systems providing statistical information on past cases and sentencing practices, see: LOVEGROVE, A., ‘Statistical Information Systems as a Means to Consistency and Rationality in Sentencing’, *International Journal of Law and Information Technology*, vol.7, no.1, 1999, pp.31-72, and the literature referred to therein; also: TATA C., WILSON J.N., HUTTON N., ‘Representations of Knowledge and Discretionary Decision-Making by Decision-Support Systems: the Case of Judicial Sentencing’, *Journal of Information, Law and Technology*, 2 (1996); LOVEGROVE, A., *Judicial Decision Making, Sentencing Policy and Numerical Guidance*, Springer-Verlag, New York, 1989.

⁴⁷ See, amongst others: HOGART, J., *Sentencing as Human Process*, University of Toronto Press, 1961; GIBSON, J.L., ‘Environmental Constraints on the Behaviour of Judges: A Representational Model of Judicial Decision-Making’, *Law and Society Review*, vol.14 (1980), pp.343-370; ANDERSON J.M., KLING J.R., STITH K., ‘Measuring Inter-Judge Sentencing Disparity Before and After the Federal Sentencing Guidelines’, *Journal of Law and Economics*, no.42 (1999), 271; STEFFENSMEIER D., BRITT C.L., ‘Judges’ Race and Judicial Decision Making: Do Black Judges Sentence Differently?’, *Social Science Quarterly*, vol.82, no.4, December 2001, pp.749-764.

⁴⁸ See, particularly on the relation between race of the accused and length of sentences, BULLOCK, H.A., ‘Significance of the Racial Factor in the Length of Prison Sentences’, *Journal of Criminal Law, Criminology and Police Science*, vol.52(4), 1961, pp.411-418; BLUMSTEIN, A., ‘Racial Disproportionality of US Prison Populations’, *Journal of Criminal Law and Criminology*, 73(1983), pp.1259-1281; CLAYTON, O., ‘A Reconsideration of the Effects of Race in Criminal Sentencing’, *Criminal Justice Review*, vol.8 (1983), pp.15-20; GIBSON, J.L., ‘Race as a Determinant of Criminal Sentences: A Methodological Critique and Case-Study’, *Law and Society Review*, 12(1978), pp.455-478; GREEN, E., ‘Inter- and Intra-racial Crime Relative to Sentencing’, *Journal of Criminology and Political Science*, 60(1964), pp.306-313; ABRAMS D.S., BERTRAND M., MULLAINATHAN S., ‘Do Judges Vary in their Treatment of Race?’, *University of Chicago Law and Economics*, On-line Working Paper no.375.

⁴⁹ See, for instance, SHAPLAND, J., *Between Conviction and Sentence – The process of mitigation*, Routledge & Kegan Paul Ltd, London, 1981; VON HIRSCH ANDREW, BOTTOMS ANTHONY E., BURNEY

In addition to aspects of the sentencing process mentioned above, and although the legal-philosophical approach has been dominant in this area, a significant part of the scholarship has also addressed the problem of sentencing from a different perspective which lends more relevance to the sociological and policy-making aspects.⁵⁰

Finally, with regard to sentencing studies of a comparative nature, one of the most important for an analysis of international sentencing law and practice is certainly the report prepared by the Max-Planck-Institute for Foreign and International Criminal Law of Freiburg (Germany) in response to a specific request by judges of the Yugoslav Tribunal. On 25 September 2003, Trial Chamber II of the ICTY, in the case of *Prosecutor v. Dragan Nikolic*, requested the Max-Planck-Institute of Freiburg, in the person of its Director, Prof. Dr. Ulrich Sieber, to conduct a comparative analysis of sentencing law and practice in European and non-European countries, including the territories of the former Yugoslavia.⁵¹ The final Report, submitted to the ICTY in October 2003, combined both comparative and criminological methods and focused on the domestic sentencing laws and applicable penalties for serious crimes (such as murder, torture, rape, persecution) in 23 countries (legal systems in Europe, countries in North and South America, Australia, Asia and Africa).⁵² The *Dragan Nikolic* judgement extensively referred to the Report and was thus the first sentencing judgement of an international criminal tribunal based on a broad criminological and legal comparative survey.

2.4 Comparative overview: country selection and method of analysis

The main purpose of the analysis contained in the following sections is to explore how the sentencing process works at the national level and to compare it with the international one, investigating similarities and differences between national and international sentencing. A comparative analysis of the law and procedures followed in

ELIZABETH, WILKSTRÖM P.O., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, University of Cambridge Institute of Criminology, Oxford - Portland: Hart Publishing, 1999.

⁵⁰ See, amongst others, TATA C., HUTTON N., *Sentencing and Society*, Ashgate, Aldershot, 2002; ROBERTS, J.V., 'Public Opinion and Sentencing Policy', in TONRY M., REX S., (eds.), *Reform and Punishment: The Future of Sentencing*, Willan Publishing, 2002, pp.18-35.

⁵¹ *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-PT, Scheduling Order, 25 September 2003, p.2.

⁵² SIEBER, ULRICH, *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, vol.2: Country Reports, Edition Iuscrim, Freiburg im Breisgau, 2004.

the decision-making process in sentencing of national legal systems can certainly provide significant insights, facilitate an understanding of the process of sentencing and shed light on some critical issues for international sentencing. Given the system of complementarity established by the ICC, a better understanding of how national systems of criminal justice work in sentencing matters acquires considerable importance, as national courts will be the primary actors in the punishment of international crimes.

The following pages describe and compare six model systems of criminal justice corresponding to six different nations from both common law and civil law traditions. The selection of countries was influenced by several considerations. Firstly, priority was given to European countries, the legal systems of which are more familiar to me and whose literature and jurisprudence was more accessible. Secondly, I deemed necessary to include in the analysis systems representative of both civil law and common law countries. Thirdly, amongst the countries from a common law tradition, I gave priority to two legal systems: England and the United States of America (USA), as I considered them to represent effectively common-law traditions and their related characteristics. Furthermore, the extent of the comparative research and process of country selection were influenced by both the study's time-limits and frame and by practical research possibilities and sources available. A study of greater magnitude and a more thorough analysis would certainly have been instructive but was not feasible in the particular circumstances of this thesis. Moreover, instructive examples of comparative and criminological sentencing studies covering much broader questions and issues are already available.⁵³

The countries included in this comparative review are the following: England and Wales, France, Germany, Italy, Spain and the USA.⁵⁴ England has historically represented the prototype of common law systems, based on the adversarial model. France and Germany constitute a model of civil law systems and have been the leading nations in developing the modern civil law tradition. Italy is also interesting for its

⁵³ SIEBER, ULRICH, *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, vol.2: Country Reports, Edition Iuscrim, Freiburg im Breisgau, 2004.

⁵⁴ It should be specified that this comparative overview cover the situation and status of the legal systems analysed, theirs laws and legislation in force, as of 30 April 2007.

historically important legal tradition and for having recently developed a mixed system which introduced elements of a common law tradition into a civil law system of criminal justice. Spain enriches the analysis, representing a country which refuses the penalty of life imprisonment as such. The USA, based on the English common law model with subsequent and extensive autonomous developments, represents one of the few examples of modern and democratic countries still permitting the death penalty.

With regard to the method of analysis, the research carried out in this section makes use of the traditional law-based *normative method* of legal comparison. This approach (which focuses on the analysis and comparison of norms) facilitated the identification of provisions which regulate the sentencing process at the domestic level and establish penalties for serious crimes.⁵⁵

In analysing the sentencing provisions of a certain country, the questions at stake concern the kind of sentences (types and severity) recognised for serious criminal offences by each of the legal systems (for example, the possibility or not of life imprisonment, the longest possible term of imprisonment etc.), the identification of relevant factors in establishing the final sentence, the weight given to confessions, guilty pleas, mitigating and aggravating factors, and so on. Regarding the types of crimes taken into account, attention was paid to both the most serious offences in the national systems analysed (murder, torture, rape, *et sim.*) and – considering the fact that in recent years a number of countries enacted provisions for the punishment of international crimes – to international crimes as punished under national laws.

In short, the research carried out in this chapter focuses on the analysis of sentencing provisions,⁵⁶ with the object of investigating how the sentencing process is

⁵⁵ For the analysis of the relevant codes and law provisions, I generally relied on the original documents and, for Germany, on official translations provided by the Federal Ministry of Justice, or in-house translations.

⁵⁶ Both the provisions contained in the Special Part (devoted to criminal offences) of a country's criminal code, and those contained in the General Part of criminal codes have been explored. A comparative empirical analysis of sentencing data (based on case-law) retrieved from the chosen national legal systems was not considered possible due to the limited time frame and to the difficulty of comparing and 'measuring' those types of data which represent different legal and cultural contexts. On the challenges of comparative analysis in criminal justice, see for instance: ALBRECHT, H.J., 'Post-Adjudication Dispositions in Comparative Perspective', in TONRY M., FRASE R. (eds.), *Sentencing and Sanctions in Western Countries*, Oxford University Press, 2001, p.294; FRASE, R., 'Comparative Criminal Justice Policy', *Comparative Criminal Justice Systems: From Diversity to Rapprochement*, Proceedings of the International Conference for the 25th Anniversary of the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, 16-20 December 1997, *Nouvelles Etudes Penales*, No.17, Edition Eres, p.119.

shaped in the selected domestic systems, the type and ranges of penalties provided for serious offences (both ‘ordinary’ and international crimes), the purposes assigned to punishment, the incidence of mitigating and aggravating circumstances on the final sentence, whether confessions or guilty pleas are admitted and what impact they have on sentencing.

B. Six National Models - The Sentencing Process

2.5 Overview of the national legal systems considered

As anticipated above, the national systems hereby included are representative of two main legal traditions: common law and civil law. The essential differences between these two systems are well known and there is no need to recall them here.

Before exploring the sentencing process of these countries, some brief notes concerning general principles of criminal law as incorporated by those national systems may be useful.

The principle of legality is undoubtedly recognised in all the domestic systems of criminal justice under consideration.⁵⁷ Another principle consistently recognised and accepted is the principle of proportionality of penalties.⁵⁸

Furthermore, the panorama offered with regard to the purported purposes of punishment is somewhat varied. Criminal sanctions seem to serve mainly a *retributive*

⁵⁷ For instance, in the French criminal system, the principle of legality is enshrined in Article 111-3 of the *Code Pénal* entered into force on 1 March 1994, which thus provides:

« Nul ne peut être puni pour un crime ou pour un délit dont les éléments ne sont pas définis par la loi, ou pour une contravention dont les éléments ne sont pas définis par le règlement.

Nul ne peut être puni d'une peine qui n'est pas prévue par la loi, si l'infraction est un crime ou un délit, ou par le règlement, si l'infraction est une contravention. »

In the Spanish legal system, Article 2, para.1, of the Spanish Penal Code of 1995 provides for the principle of legality, which is also enshrined in the Constitution of 1978 (Article 25, para.1).

In the Italian system, the principle is contained in Article 25, paras.2-3, of the Constitution, and in Article 1 of the Criminal Code.

The German Penal Code focuses particularly on the *nulla poena sine lege* aspect of the principle. See § 1 of the Code: “An act may only be punished if its punishability was determined by law before the act was committed”. The principle of legality is also enshrined in the German Constitution (Article 103, para.2, of the 1949 *Grundgesetz*).

⁵⁸ See, for Italy, Articles 3 and 27 of the Constitution. Article 27 also enshrines the principle of humanity of penalties, stating that penalties cannot consist of inhumane treatments. The same is also affirmed by the 8th Amendment of the US Constitution. The principle of proportionality has several times been recognised explicitly by the US Supreme Court. See for instance: *John Albert Ewing v. California*, 538 U.S. 11 (2003).

and *preventive* function in the French legal system.⁵⁹ However, at the same time, Article 132-24, para.2, of the 1994 French Criminal Code emphasises that the nature, quantity and type of penalty imposed have to be determined by taking into account and trying to conciliate issues of effective protection of society, punishment of the perpetrator and interests of the victim(s) with the necessity of facilitating the re-socialisation of the convicted person and of preventing the perpetration of new crimes in the future.

A ‘polyfunctional’ idea of punishment, according to which in the determination of penalties judges may take into account retributive, rehabilitative and deterrent functions, seems to be present in the Italian system, according to the finding of its Constitutional Court which has several times emphasized this multi-faceted aspect, stressing in particular the importance of the re-educative function of penalty.⁶⁰ In fact, Article 27, paragraph 3, of the Italian Constitution, explicitly mentions the rehabilitative purpose of punishment and states that penalties must tend towards the re-education and re-socialisation of the offender.⁶¹ This means that the social reintegration function of penalties must be taken into account by judges when deciding upon the imposition of a certain term of imprisonment.

The same importance is given to the re-education and re-socialisation of the offender in the Spanish Constitution, where Article 25, paragraph 2, states that penalties and security measures must tend to re-socialise and re-educate offenders.⁶²

A certain ‘future oriented’ perspective seems also to be shared by the German legal system, where the effects that punishment is expected to have on the perpetrator's future life in society are amongst the factors to be considered by judges (§ 46 *StGB*). However, under the relevant provisions of the German Penal Code, the ‘culpability’ of the accused – and therefore the retributive function of penalty – seems to remain the fundamental guiding principle in the determination of punishment (§ 46(1) *StGB*).

Proceeding to the English legal system, the Criminal Justice Act (CJA) of 1991, which was the first instrument providing for a coherent approach to sentencing, firmly

⁵⁹ See PRADEL, J., *Droit Pénal Général*, Ed. Cujas, Paris, 2001, p.492.

⁶⁰ See: Constitutional Court, judgement n.364 of 23 March 1988; and judgement n.313 of 26 June 1990 (see Amoroso, G., *et al.*, *Giurisprudenza della Corte Costituzionale Italiana*, Giuffrè, Milano, 1998).

⁶¹ Article 27, para.3, Italian Constitution: “...Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato. ...”.

⁶² Article 25, para.2, Spanish Constitution: “... Las penas privativas de libertad y las medidas de seguridad estarán orientadas hacia la reeducación y reinserción social y no podrán consistir en trabajos forzados. ...”.

indicated that ‘desert’ is the principal rationale for sentencing and should be achieved by taking into account *proportionality* between crime and punishment. Moreover, surviving from the CJAs of 1982 and 1988, the *restorative* rationale was also taken into account obliging the courts to consider making a compensation order in favour of the victim in every case involving death or injury, loss or damage. Under the recent CJA of 2003, proportionality still remains a factor of primary importance (section 143), but judges are also obliged to take into account a whole range of other possible sentencing purposes. In particular, section 142 of the CJA 2003 provides as follows:

Any Court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing: a) the punishment of offenders; b) the reduction of crime (including its reduction by deterrence); c) the reform and rehabilitation of offenders; d) the protection of the public, and e) the making of reparation by offenders to persons affected by their offences.

However, Section 142 gives no guidance as to which of the aforementioned aims should be given priority in sentencing.⁶³

Concerning the United States of America, the purposes of sentencing as enumerated in Title 18 of the US Criminal Code (18 U.S.C. §3553(a)(2)) are the following: just punishment, deterrence, incapacitation, and rehabilitation.⁶⁴ Moreover, it must be recalled that the Eighth Amendment of the American Constitution bans cruel punishments, therefore also prohibiting sentences that are grossly disproportionate to the crime committed.⁶⁵

Finally, with regard to the relationship between the national jurisdictions under study and the ICC, among the six domestic systems chosen only the US has not ratified

⁶³ A. Ashworth argues that this provision invites inconsistency as judges are required to consider a variety of different purposes. See ASHWORTH, A., *Sentencing and Criminal Justice*, 4th edition, Cambridge University Press, 2005, pp.68, 74. For more detail on each of the above mentioned aims, see ELLIOTT C., QUINN F., *English Legal System*, 5th ed., Pearson Education Limited, 2004, pp.360-363.

⁶⁴ See: 18 U.S.C. §3553(a)(2): “(a) Factors To Be Considered in Imposing a Sentence - ... The court, in determining the particular sentence to be imposed, shall consider: [...]”

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment for the offence;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. ...”.

⁶⁵ See: Amendment 8 - Cruel and Unusual Punishment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

the Rome Statute. Italy ratified the Statute on 26 July 1999; France and Germany in the year 2000; the UK on 4 October 2001; Spain on 24 October 2000.

2.6 Offences and penalties – Quantum of penalties

An overview of the penalties applied for serious crimes by the selected national systems is provided in the following pages. The six countries analysed all provide for ranges of penalty and/or for maximum limits of penalty. They all contemplate the penalty of life imprisonment (except for Spain) and prohibit the death penalty (with the exception of the US). An upper limit to the sentence that judges can impose is generally indicated. Judges are thus guided in the determination of the sentence and are bound to respect the ranges indicated by law. Maximum penalties can then be increased or decreased by statute depending on a number of factors such as modes of liability (principal, accomplice, etc.), aggravating and mitigating factors, plea bargaining or confessions. A simple comparison between terms of imprisonment shows that, while some countries (namely, the US) make a particular heavy use of custodial sanctions, others (such as Germany or Spain) provide on the contrary for lighter sentences with a maximum between 15 and 20 years of imprisonment.

France

Due to the substantial transformations brought about by the French Revolution of 1789, the *Code Pénal* of 1791 already introduced a rigid system of fixed penalties, predetermined by the legislator both in type and degree for each single crime.⁶⁶

Under the 1994 Criminal Code, which replaced the Napoleonic *Code Pénal* of 1810 (the oldest of all the criminal codes still in force in Europe in the '90s), only the maximum applicable penalties are specified, and no longer specific minimums. The maximum sentence that can be imposed depends on whether the offences have been classified as “*crimes*”, “*délits*” or “*contraventions*” (*serious, major or minor offences*).⁶⁷

⁶⁶ See MELCHIONDA, A., *Le circostanze del reato – Origine, sviluppo e prospettive di una controversa categoria penalistica*, CEDAM, Padova, 2000, p.147 ff.; PALAZZO F., PAPA M., *Lezioni di diritto penale comparato*, Giappichelli Editore, Torino, 2000, pp.86-91.

⁶⁷ See Articles 131-1/131-18 of the French Criminal Code. In particular, Article 131-1 lays down the penalties for *serious offences* ('*crimes*'). For more details, see: DESPORTES F., LEGUNEHEC F., *Droit Pénal Général*, Economica, Paris, 2004; PRADEL, J., *Droit Pénal Général*, Ed. Cujas, Paris, 2001; ELLIOTT, C., *French Criminal Law*, Willan Publ., Devon, 2001.

Crimes defined as *peines criminelles* comprise the highest penalty provided for by the French Code, which is life imprisonment (the death penalty was abolished by Law n.81-908 of 9 October 1981), followed by four other maximum levels of imprisonment: imprisonment for 30 years, for 20 years, and for 15 years (Article 131-1).⁶⁸ Obviously, given that those indicated are the maximum terms of imprisonment for serious offences, judges can always choose to impose a lighter sentence, although Article 131-1 requires a minimum sentence of 10 years imprisonment in the case of serious offences, those defined as *crimes*.⁶⁹

Article 131-3 (*peines correctionnelles*) deals with penalties for the so-called *délits*, laying down – besides imprisonment (which for *délits* can be a maximum of 10 years)⁷⁰ – other penalties such as: fines, daily fines, work in a community, deprivation or restriction of certain rights, complementary punishments.⁷¹

Providing additional details of penalties for serious crimes, Article 222-7 regulates the hypothesis of involuntary homicide punishing it with 15 years of imprisonment. Article 222-8 provides for an aggravated form of the same offence, raising the punishment to 20 years of imprisonment for specific circumstances, such as: an offence committed on a minor under fifteen; on a person particularly vulnerable for age, illness, infirmity; on a judge, counsel, public official; when the offence is committed by the spouse or partner of the victim; an offence committed with premeditation or with the use or threat of a weapon.

The offence of voluntary homicide, regulated by Article 221-1, punishes the act of deliberately killing a person (murder) with a maximum of 30 years imprisonment. This limit was introduced by the 1994 Criminal Code, as the punishment previously provided for was life imprisonment (under Article 302 of the old Criminal Code). The legislator

⁶⁸ The French Criminal Code makes a distinction between “*peines criminelles*” and “*peines correctionnelles*” and between imprisonment for “*crimes*”, which is called “*réclusion criminelle*”, and imprisonment for “*délits*”, which is called “*emprisonnement*”. See Articles 131-1/131-4, Criminal Code.

⁶⁹ However, it is only possible to impose a sentence of imprisonment of less than 10 years even for “*crimes*” when there is a “*correctionnalisation*” of the sentence and thus instead of pronouncing a “*peine criminelle*” (*réclusion criminelle*) the judge will pronounce a “*peine correctionnelle*” (*emprisonnement*). See Cass.Crim., 20 November 1996, Bull.Crim. 1996 no.416, quoted under Art.132-18 of *Code Pénal*, Dalloz, 102nd edition, 2005.

⁷⁰ The terms of imprisonment for *major offences* are specified in Article 131-4 of the Criminal Code.

⁷¹ In fact, when convicting an accused person for a serious offence, a judge can also decide to assign a fine or a range of complementary punishments. These are the so-called *peines complémentaires*, provided for by the same text that contains the criminal offence, and which can be added to the main penalty. Some of these are mandatory (e.g. confiscation), others not.

reduced the maximum penalty for voluntary murder in order to be able to draw a distinction compared to other aggravated forms of murder. In fact, aggravated murder (Article 221-4) punished by a life sentence recurs when the victim falls within one of the categories of individuals accorded special protection by the Code. All the listed aggravating circumstances relate to specific characteristics of the victim (minor of 15 years, particularly vulnerable or ill, member of an ethnic, religious or racial group, etc.) and reflect a desire to protect particularly vulnerable categories in society. Additional aggravating circumstances are, for instance, the fact that the victim was raped, tortured or subjected to inhumane acts. Other forms of murder punished with life imprisonment are the following: assassination;⁷² murder combined with another serious offence or murder combined with major offences;⁷³ and poisoning. All aggravated murders are thus punished with life imprisonment and can include the prescription of a minimum time that must be spent in prison.

Other offences that might be useful to review include the crime provided for under Article 222-9, which punishes violence causing a mutilation or permanent infirmity by a penalty of up to ten years imprisonment and a fine; Article 222-1, which punishes the basic offence of torture and inhumane acts⁷⁴ with 15 years imprisonment, a penalty that can be increased to 20 years, 30 years or life imprisonment when specific cases or aggravating circumstances occur;⁷⁵ and Article 222-23, which punishes the ordinary offence of rape with a maximum sentence of 15 years imprisonment which can be increased in a number of circumstances.⁷⁶

⁷² Article 221-3 of the 1994 French Criminal Code states that murder committed with premeditation constitutes *assassination*, and punishes it with life imprisonment.

⁷³ Article 221-2, paras.1 and 2. The offence of murder, when it aims at preparing or facilitating a major offence, for instance in order to enable the escape or to assure the impunity of the author or the accomplice of a major offence, is thus punished by life imprisonment.

⁷⁴ It is interesting to point out that the offences of torture and inhumane acts are currently criminalised as 'ordinary crimes', whereas under the old Code they were treated as aggravating circumstances. In the Code of 1994, torture and inhumane acts still remain aggravating circumstances for certain specific offences such as rape, murder and theft (Articles 222-6, 221-2, and 311-10).

⁷⁵ More specifically, the penalty is increased to 20 years for aggravated torture, in presence of one of the aggravating circumstances provided for by Article 222-3; it can be increased to 30 years imprisonment where the violence caused mutilation or permanent infirmity (Article 222-5); the penalty provided for is 30 years imprisonment when the victim was under fifteen years old, the offender in a position of authority over the minor and the violence was habitually carried out (Article 222-4); finally, the sentence is raised to life imprisonment when the acts have preceded, accompanied or followed another serious offence or have been habitually carried out, or when death has been caused without the intention to kill (Article 222-6).

⁷⁶ Aggravated rape is punished with a maximum of 20 years when aggravating circumstances are present; with a maximum of 30 years when rape has led to the death of the victim (Article 222-25); the penalty is

Germany

The German Penal Code (*StGB*) distinguishes between ‘serious criminal offences’ and ‘less serious criminal offences’ (§12 *StGB*).⁷⁷ The former are represented by unlawful acts punishable by a minimum term of imprisonment of one year or more (§12(1) *StGB*); the latter are represented by acts punishable by a minimum term of imprisonment of less than a year, or by a fine (§12(2) *StGB*).

The main penalties available in the German system of criminal justice are imprisonment (for life or for a specific term) and fines.⁷⁸ Section 38 of the Penal Code specifies that, when the law does not provide for life imprisonment, then the penalty of imprisonment must be intended for a fixed term; the maximum term of imprisonment is 15 years, the minimum is one month (§38(2) *StGB*). In practice, numerous provisions of the German Penal Code discourage custodial sentencing severity: for instance, the imposition of terms of imprisonment inferior to six months is not encouraged and, in fact, §47 of the Criminal Code requires that a court may impose imprisonment for less than six months only when special circumstances exist (related either to the act or to the personality of the perpetrator) which render the imposition of imprisonment indispensable to exert influence on the perpetrator or to defend the legal order. In all other cases, short terms of imprisonment should be avoided or limited, and courts must give special reasons for any such sentence imposed.

The maximum penalty available is life imprisonment which is provided for by law in the following cases: preparation of a war of aggression (§80); murder (§211); incitement to murder (§211 and §26); serious cases of manslaughter (§212); genocide (§220a); sexual abuse or coercion or rape resulting in death (§176b; §178); arson resulting in death (§306c).

With regard to other serious offences, §177 *StGB* punishes rape and sexual coercion with a minimum penalty of one year, or two years for particularly serious cases.

raised to life imprisonment when the crime has been preceded, accompanied or followed by torture or inhumane acts (Article 222-26).

⁷⁷ For German Criminal Law, see: VINCIGUERRA, S. (ed.), *Il Codice Penale Tedesco*, Cedam, Padova, 2003; JESCHECK, H.-H., *Il codice penale tedesco*, Cedam, Padova, 1994; VOLK, K., *Introduzione al diritto penale tedesco*, Cedam, Padova, 1993; FORNASARI, GABRIELE, *I principi del diritto penale tedesco*, Cedam, Padova, 1993.

⁷⁸ The death penalty was abolished by the Constitution of 1949: see Article 102 of the Fundamental Law. More generally, on the system of penalties, see for instance: PALAZZO F., PAPA M., *Lezioni di diritto penale comparato*, Giappichelli Editore, Torino, 2000, pp.78-84; FORNASARI, G., *I principi del diritto penale tedesco*, Cedam, Padova, 1993, pp.485-493.

Minimum penalties of three or five years are also prescribed when specific aggravating circumstances recur (such as when the perpetrator uses a weapon or another dangerous tool during the act, maltreats the victim, or places the victim in danger of death). The maximum term of imprisonment is the legal one of 15 years.

Torture is not specifically criminalised as ‘ordinary’ crime, but it is punishable under Chapter Seven of the Criminal Code, devoted to crimes against bodily integrity. In particular, §223 *StGB* prescribes imprisonment for not more than five years or a fine for whoever physically maltreats or harms the health of another person. The penalty is increased to a maximum of 10 years for serious bodily injuries (§226). Section §340 (‘Bodily Injury in Public Office’) is also applicable to cases where torture is committed by a public official; the prescribed penalty is imprisonment from three months to five years.

Italy

The Italian Criminal Code distinguishes between main penalties and accessory penalties.⁷⁹ The former restrict personal freedom and, for criminal offences (*delitti*) are represented by life imprisonment, imprisonment for a term, and fines (Article 17, Criminal Code); the latter are applied in addition to the main penalty, when criminal responsibility is ascertained, and, for criminal offences, they consist of, for instance, permanent or temporary suspension or disqualification of the offender from public functions (Article 19).

Analysing the ranges of penalties provided for by the Italian system, the maximum penalty is represented by life imprisonment (Article 22).⁸⁰ Other terms of imprisonment are all of a fixed duration, ranging from a minimum of 15 days to a maximum of 24 years for crimes (*delitti*),⁸¹ and from a minimum of five days to a maximum of three years in the case of misdemeanours (*contravvenzioni*).⁸² Pecuniary penalties can also

⁷⁹ In general, on Italian Criminal Law, see: FIANDACA G., MUSCO E., *Diritto Penale*, Bologna, Zanichelli, 2002; ANTOLISEI, F., *Istituzioni di Diritto Penale*, Giuffrè, Milano, 2000.

⁸⁰ The death penalty was first abolished for ordinary offences by the Constitution of 1945 (Article 27), and then completely (including in the case of war) by Law 589 of 1994. It is interesting to note that Italy was one of the first countries that historically adopted an abolitionist policy for the death penalty. In fact, as early as 1786 the *Gran Ducato* of Tuscany, one of the Italian states before unification, abolished the death penalty; after unification, the Zanardelli Code of 1889 confirmed the abolition of the death penalty (with the exception of times of war).

⁸¹ Article 23, Italian Penal Code.

⁸² Article 25, Italian Penal Code.

be prescribed together with the ordinary ones (Article 24). The maximum term of imprisonment of 24 years can be raised to 30 years when more aggravating circumstances are present, or for cases of particularly serious offences.

The offence of murder is punishable with a term of imprisonment for not less than 21 years (Article 575), which can be transformed into life imprisonment when two or more aggravating factors (those indicated in Article 61) recur, or when the specific circumstances indicated in Articles 576 and 577 are present.⁸³

Violence causing personal damage, mutilation or permanent infirmity is punished with a term of imprisonment ranging from a minimum of three months to a maximum of three years (Article 582); the penalty is increased to seven or to 12 years of imprisonment if certain aggravating circumstances are present (Article 583).

The provisions on personal violence can also be used to punish acts of torture. In fact, despite the fact that Italy has been a member of the UN Convention against Torture since 1987, a specific offence criminalising torture and other inhumane acts is not yet contained in the Italian Criminal Code,⁸⁴ as required by Article 1 of the Convention. A legislative draft intended to introduce a new Article 613*bis* proscribing torture, to the Criminal Code, was approved by the Italian Chamber of Deputies in December 2006 and is still under scrutiny at the Senate, where it must also be approved.⁸⁵ The draft article provides for a penalty of imprisonment ranging from three to 12 years for the basic offence, and this can be increased if torture is performed by a public official or if it causes serious damages; the minimum and maximum penalties applicable are increased by double (up to six and 24 years) if death derives from torture.

Other particularly serious offences contained in the Criminal Code are: enslavement, which is punished by a term of imprisonment ranging from eight to 20 years (Article 600); trade and trafficking of slaves, punishable by imprisonment from eight to 20 years (Article 601); and sexual violence or sexual offences, punishable by

⁸³ Article 576, nn.2-5, and Article 577, Criminal Code. Circumstances include, for instance: murder of parents or relatives; murder committed by heinous means such as poison; premeditated murder; murder committed by a fugitive in order to escape arrest or incarceration.

⁸⁴ Torture is punishable as a specific offence under the Italian wartime military penal code (*Codice penale militare di Guerra*, Article 185*bis*, introduced by Law no.6 of 31 January 2002) but Italy has yet to include a specific crime of torture in its ordinary criminal legislation.

⁸⁵ Act no.S.1216. See the Italian Senate's website: www.senato.it – last visited 31 December 2007.

imprisonment from five to 10 years (Article 609*bis*) which may be increased to 12 or 14 years if specific aggravating circumstances are present.⁸⁶

Spain

One of the novelties of the Spanish Criminal Code of 1995 was the simplification of the complex system of ‘gradual levels’ of penalties provided for under the previous code, and its replacement by a more general classification of all penalties in three groups, distinguishing between ‘serious penalties’, ‘less serious penalties’ and ‘light penalties’ (Article 33, Criminal Code).⁸⁷ Besides the main penalty of imprisonment for a given term,⁸⁸ the Code of 1995 introduced an ample range of ancillary penalties, such as deprivation or suspension of certain rights and freedoms, or from public offices and professions, fines, community work and services.

Parts of the 1995 Code were reformed in 2003, by three main laws (*Ley Organica 7/2003*, *Ley Organica 11/2003*, and *Ley Organica 15/2003*). The reform has changed, for instance, minimum and maximum penalties: ‘less serious’ penalties now have a maximum duration of 5 years (previously 3 years) and a minimum duration of 3 months (whereas the minimum was previously 6 months). According to Article 36, the penalty of imprisonment, when it is not otherwise provided for, generally ranges from a minimum term of 3 months to a maximum of 20 years.

The basic offence of murder is punished with imprisonment from 10 to 15 years (Article 138); this may be increased to 20 years for aggravated murder, when the circumstances of perfidy or cruelty (*alevosia*), personal gain or additional pain inflicted on victims are present (Article 139); or 25 years when more than one aggravating circumstances are present at the same time (Article 140).

⁸⁶ See Article 609*ter*. Amongst others, the following are considered aggravating factors: if acts of sexual violence are committed on a minor of 14 years or less; if committed with the use of weapons or under the effect of alcohol or drugs.

⁸⁷ ‘Serious penalties’ are considered to be imprisonment for more than five years; ‘less serious penalties’ include imprisonment from three months to five years; ‘light penalties’ include e.g., suspension of a driving licence, suspension of weapon licence, suspension of residence permits, fines, etc.. In general, on Spanish Criminal Law, see: BUSTOS, RAMIREZ J., *Nuevo Sistema de Derecho Penal*, Ed. Trotta, 2004; MIR PUIG, SANTIAGO, *Derecho Penal*, 7^a ed., Editorial Reppertor, 2004; MUÑOZ CONDE F., GARCÍA ARÁN M., *Derecho Penal – Parte General*, 4^a edición, Tirant Lo Blanch, 2000; PALAZZO F., PAPA M., *Lezioni di diritto penale comparato*, Giappichelli Editore, Torino, 2000, pp.156-160.

⁸⁸ The death penalty was abolished by Article 15 of the 1978 Constitution. The penalty of life imprisonment is not provided for by the Criminal Code of 1995 and was already excluded by the Penal Code when reformed in 1973, under which 30 years was the maximum duration of the penalty of imprisonment.

Acts causing physical or psychological damage or wounds are punished with imprisonment from 6 months to 3 years (Article 147), subject to an increase to 5 years when specific aggravating circumstances are present (Article 148).

Torture and inhumane acts are also specifically criminalised by the Spanish Penal Code. Inhumane and degrading acts are punished with a term of imprisonment ranging from 2 months to 2 years (Article 173); torture is punished with imprisonment from 2 to 6 years and, in addition, with disqualification from 8 to 12 years (Article 174).

Sexual aggression is punished with imprisonment from 1 to 4 years, unless more specific (aggravated) forms are provided for.⁸⁹ The crime of rape is punished with imprisonment from 6 to 12 years (Article 179). When particularly heinous aggravating circumstances are present (such as use of violence or intimidation, crime committed by several persons acting together, use of weapons, particular vulnerability of victims, etc.), then Article 180 provides for increased ranges of penalties: from 4 to 10 years for sexual aggressions under Article 178, and from 12 to 15 years for rape under Article 179.

England and Wales

Four types of sentences are at the disposal of English courts: discharges, financial penalties, community orders, and custodial sentences.⁹⁰

In English criminal law, most of the offences have been created by statute (law enacted by a legislator) and have a statutory maximum penalty.⁹¹ There are three categories of criminal offence: offences subject to only summary trial (that is only in Magistrates' Courts) representing a large majority and not of a very serious nature; offences subject to trial on indictment (indictable offences), representing the most serious crimes (murder, rape, serious offences against the person) and tried in the Crown Court before a judge and jury; offences which may be tried in either way. This

⁸⁹ Article 178-180, Spanish Criminal Code. See also Articles 181-183 referring to 'sexual abuses'.

⁹⁰ Both magistrates courts and the Crown Court can impose them, although magistrates courts are subject to an upper limit for financial and custodial sentences. For more details about these types of sentence, see DAVIES, M., *Criminal Justice – An Introduction to the Criminal Justice System in England and Wales*, 3rd ed., Pearson Education Limited, 2005, pp.303-310.

⁹¹ On the English legal system, see in more details: ASHWORTH, A., *Sentencing and Criminal Justice*, 4th ed., Cambridge University Press, 2005.

last category includes virtually all criminal offences, where the defendant can elect whether or not to have the case tried before a jury of his peers in the Crown Court.⁹²

With regard to the type and severity of penalties recognised by the English legal system for serious criminal offences, life imprisonment is the harshest penalty provided. Capital punishment was fully abolished in 1998 (by the Crime and Disorder Act 1998, s.6).

In the year 2000, a consolidated sentencing law was approved by the Parliament with the aim of organizing penalties and changing the earlier sentencing structure.⁹³ The act was then replaced by the new provisions of the Criminal Justice Act (CJA) 2003.

The highest penalty of life imprisonment is mandatory for murder and discretionary for other offences that can attract life imprisonment as maximum penalty. Moreover, life imprisonment is automatically imposed for the second serious offence of a same type, committed on or after 30 September 1997.⁹⁴

The maximum length of fixed-term *custodial sentences* for serious indictable offences is almost always established by the statutes creating the offences. The longest possible term of imprisonment is 14 years, followed by other limits of ten, seven, five, and two years. For common law offences the penalty is not subject to any limitation.

Sections 224-236 of the CJA 2003 are devoted to the so called 'Dangerous Offenders' and introduced an entirely new regime for sentencing offenders considered 'dangerous' with longer penalties than the 'proportionate' ones generally established for the normality of cases.⁹⁵

Analysing more specifically serious crimes, the CJA 1988 (s.134) punishes torture with a maximum penalty of life imprisonment. A discount may be granted in the presence of a guilty plea, ranging from a discretionary life sentence which would result in a fixed-term custodial sentence to a non-custodial alternative penalty, depending on the gravity of the offence. Racial bias would be an aggravating circumstance.⁹⁶

⁹² See, for more details, VAN DEN WYNGAERT, C., *Criminal Procedure Systems in the European Community*, Butterworths, 1993, p.79; ASHWORTH, A., *Sentencing and Penal Policy*, London, Weidenfeld and Nicolson, 1983, p.2.

⁹³ Powers of Criminal Courts, Sentencing Act 2000 s. 109 [PCC(S) Act2000].

⁹⁴ See Powers of Criminal Courts, Sentencing Act 2000 s. 109 [PCC(S) Act2000].

⁹⁵ For further analysis, see ASHWORTH, A., *Sentencing and Criminal Justice*, 4th ed., Cambridge University Press, 2005, pp.210-217.

⁹⁶ As will be seen later, if torture is committed as an international crime (e.g. crime against humanity), then the penalty is imprisonment for a term not exceeding 30 years (ICC Act 2001 s.53.6).

Relevant provisions concerning rape and other sexual offences (incitement to rape or indecent assault; participation by creating the occasion to perform such offences, etc.) were introduced by the Sexual Offences Act (SOA) 1956, s.1. The maximum penalty available for rape was life imprisonment (s.37).⁹⁷ More recently, the SOA 2003 expanded the definition of rape and introduced a new range for other serious sexual offences. The general starting point for a rape conviction is now 5 years; a longer term of 8 years is provided when one or more specific aggravating factors are present (for instance rape by more offenders, abuse of trust, abduction, rape of a child or other vulnerable victims, discrimination, etc.). From those starting points, the court can then move downwards to take into account mitigating factors, and upwards to take into account aggravating factors other than those indicated. In practice, that means that a rape without aggravating factors and to which the offender pleaded guilty could be punished with a sentence of as little as four or even three and a half years.⁹⁸

United States of America

In the United States types and terms of penalties may vary from state to state and include fines, probation, terms of imprisonment up to a life sentence, and the death penalty (in some states). For serious offences the Federal Criminal Code of the United States (USC), Title 18, currently provides for the death penalty, life imprisonment without the opportunity of parole (LWOP), life imprisonment, and imprisonment for a specific term. Other penalties may consist of fines or restitution to victims (or both). The harshest penalties of death and life imprisonment are in general prescribed for offenders convicted of any crime under Title 18 USC which has caused death.

With regard to concrete offences, the crime of ‘first degree murder’ (18 USC 1111) signifies murder committed with cruelty or particular heinous means, torture, assault, or by poisoning, or with premeditation, etc., and entails the death penalty or life imprisonment. Non-aggravated murder is considered as ‘second degree murder’ and is

⁹⁷ If rape or sexual violence are committed as international crimes (e.g. crime against humanity), then the penalty will be imprisonment for a term not exceeding 30 years (ICC Act 2001 s.53.6). There is no special offence of persecution (as an ordinary crime) under English law. If persecution is committed as an international crime (e.g. crime against humanity), then the penalty will be imprisonment for a term not exceeding 30 years (ICC Act 2001 s.53.6).

⁹⁸ However, statistics from the year 2000 showed that, due to the frequent presence of aggravating circumstances, the average term of imprisonment for rape was seven years and four months for normal trials, and six years and seven months for offenders who pleaded guilty. See ASHWORTH, A., *Sentencing and Criminal Justice*, 4th edition, Cambridge University Press, 2005, p.128.

punished by life imprisonment or any other term of imprisonment. Voluntary manslaughter (18 USC 1112) is punished with a maximum of 10 years imprisonment and a fine; whereas assault (18 USC 113) is punished by a maximum penalty of 20 years of imprisonment when the intent was to commit murder, otherwise a lower maximum is prescribed.

For rape – not resulting in death – the prescribed penalty is a fine and/or imprisonment for not more than 20 years (18 USC 2242). Aggravated sexual abuse (18 USC 2241), signifying the basic offence plus specific characteristics (e.g. use of force or threats, victim under supervisory control of defendant, etc.) is punishable with any term of imprisonment or life imprisonment. Sexual abuse resulting in death (18 USC 2245) is punishable by the death penalty, life imprisonment, or any term of imprisonment. Also female genital mutilation is criminalised by the US Criminal Code (18 USC 116a), which punishes the offence with imprisonment for a maximum of five years and/or a fine.

In the case of torture (18 USC 2340A, introduced in 1994), the sentences provided range from a fine and/or imprisonment up to a maximum of 20 years. If death results from acts of torture, the punishment shall be the death penalty or life imprisonment, or imprisonment for any term of years.

Persecution is punishable under the offence of ‘Conspiracy against rights’ (18 USC 241) and the penalties applicable are a fine of a maximum \$10,000 and/or imprisonment for maximum 10 years; if death results, the applicable penalty is life imprisonment or imprisonment for any term of years.

Furthermore, at the level of national states, a particular type of punishment which has raised harsh criticism also exists, and is known as the ‘*three strikes law*’ or the ‘*habitual offender law*’. According to this, individuals who have already been convicted and repeatedly engaged in serious or violent criminal behaviour should be isolated from society and punished with harsher penalties (than those usually applicable) in order to protect public safety.⁹⁹ *Three strikes laws* thus require courts to hand down mandatory

⁹⁹ The three strikes law is enacted, for instance, in the State of California (the so-called ‘Three Strikes and You’re Out’ law). Cf. California Penal Code § 667(b), where it is specified that the law was designed ‘to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offences’. According to the relevant provisions of the California Penal Code, if the defendant has one prior ‘serious or violent’ felony conviction, then s/he must be sentenced to twice the term otherwise applicable for the current felony conviction; if, on the other

and lengthy prison sentences to habitual offenders, considering that persons committing three or more criminal offences are recidivist and incorrigible criminals and that harsh terms of imprisonment are justified on grounds of public security. It is, in substance, a particular form of increased penalty provided for in cases of serious recidivism.

2.7 Modes of criminal liability

In domestic systems of criminal justice different degrees of responsibility are recognised depending on the modalities of the criminal conduct, whether the offender materially committed the crime(s) or s/he participated in it in other ways (for instance as an aider or abettor, accomplice, instigator, facilitator, etc.). Crimes are not always committed by a single offender acting alone but, more often, they involve contributions from many participants.

At the national level, these cases are regulated, to a certain extent, by specific provisions. Conversely, in international criminal law, differences are not so clear and no ranges of penalties are associated with the various types of criminal liability.

The national legal systems analysed all recognise that, in cases of crimes committed by several individuals, all offenders (principals, accessories, and so on) are responsible for the crime(s) committed; what differs from country to country is the *quantity* of punishment associated with the different roles played by the offenders.¹⁰⁰ Many national systems (France, Italy, USA) do not provide for statutory different penalties to attach to the various categories of offenders (principals, accessories, instigators, etc.) as they do not provide for different classes of participants.¹⁰¹ In other national systems (Germany

hand, the defendant has already two or more prior ‘serious or violent’ felony convictions, then s/he must receive an indeterminate term of life imprisonment (*i.e.* life imprisonment without the opportunity of parole). There is no uniformity as to the nature of the crimes committed: in some states all three crimes should be serious and violent, whereas in others, the third could be of a non-violent nature and ‘non-serious’.

¹⁰⁰ A comprehensive study on the issue of ‘participation in crime’ – on how and to what extent the various legal systems around the world punish persons who participate in criminal offences – has been commissioned from the Max Planck Institute for Foreign and International Criminal Law in Freiburg, by the ICTY (Office of the Prosecutor). See SIEBER, ULRICH, *Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks*, Expert Opinion Commissioned by the United Nations International Criminal Tribunal for the Former Yugoslavia – Office of the Prosecutor, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, 2006. The study analyses the problem of ‘participation in crime’ in common and civil law countries from Europe, Africa, Middle East, Asia, and Latin America.

¹⁰¹ See for instance, Article 121-6 of the French Criminal Code, which provides that the accomplice be punished in the same way as the principal perpetrator. The same principle is contained in Article 110 of

and Spain) however,¹⁰² the law establishes from the outset a legal distinction between categories of offenders (principals, accomplices or accessories) and therefore provides different penalties for each of those categories of perpetrators. In the English system, accessories to a crime (persons who aid, abet, counsel, procure) are tried and punished as principal offenders.

Notwithstanding the specific disciplines prescribed, adjustments to the final sentence are possible during the process of individualisation of the penalty. While in England, France, and Italy judges are free to apply, within certain limits, discretionary reductions for modes of liability other than direct perpetration, in Germany and Spain judges must follow statutory reductions.

Codified differences, on the contrary, do not exist in international criminal law especially as far as corresponding penalties are concerned. The reason is once again the rudimentary character of this body of law.¹⁰³ If differences are established by the judges between various forms of committing a crime, those distinctions have mainly a descriptive character and do not imply any necessary variation of treatment at the sentencing stage. Modes of commission of crime(s) will simply be another element amongst those that judges must evaluate in order to assess the most appropriate penalty to be meted out in the case at hand.

Other sentencing variations may derive from the particular position of power or authority occupied by the accused. For instance, with regard to cases of superior

the Italian Criminal Code. According to the Federal Criminal Code of the USA (18 USC §2) primary and secondary forms of participation should be punished equally. Therefore, in these three national systems, each participant to the commission of the crime is considered as a 'principal', notwithstanding his/her degree of participation, and in theory penalties are the same for each offender involved although they contributed to the crime in different ways (as direct executors, aiders and abettors, instigators, etc.). However in practice, for the purposes of sentencing, individual circumstances surrounding the commission of the crime may be taken into account by the judge, with subsequent 'adjustments' in penalties between different participants. For instance, according to the US Guidelines, the role of the accused in the commission of the offence is a decisive factor in determining the offence level and thus determining the sentencing guideline range (see Sentencing Guidelines USSG §3B1.1). In Italy, Articles 112 and 114 of the Italian Criminal Code provide, respectively, for aggravating and mitigating circumstances surrounding the commission of the crime by several offenders, therefore allowing for upwards or downwards adjustments of the penalty depending on the role played by the offender.

¹⁰² See, for Germany: §27(2) of the German Criminal Code, which states that punishment for the accessory to a crime corresponds to the punishment established for the perpetrator but shall be mitigated pursuant to §49. There is therefore a statutory mitigation for accomplices, who are punished with less severe penalties than those provided for the principal perpetrator(s). For Spain see: Articles 28-29, and Article 63 of the Spanish Criminal Code, which establish that accomplices are punished with more lenient sentences than those applicable to principal perpetrators of the crime.

¹⁰³ CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, pp.179-180.

responsibility, in national laws they may be treated as cases of ‘responsibility by omission’ and therefore also punished with lesser penalties than those applicable to direct or principal perpetrators.¹⁰⁴ As will be seen in the next chapter, in international sentencing if the accused held an official position of responsibility, this is considered as an aggravating factor in the final penalty.

As to inchoate offences, in many national systems ‘attempted’ crimes are punished in a different and more lenient way than accomplished ones.¹⁰⁵

These particular aspects of modes of liability and attempted crime will not be dealt with in depth in the course of this thesis; it is therefore suggested that future sentencing research should focus on the differences in treatment at the sentencing stage between the categories of direct perpetration, incitement, conspiracy, accessories to crimes, aiding and abetting, attempted crimes, etc., which seem to be regulated in different ways under national and international criminal law.¹⁰⁶

2.8 The sentencing process

a) *General criteria to determine sentence*

Each national system of criminal justice is provided with a general set of criteria, principles and legal provisions which are designed to be of guidance in the determination of sentences and to offer judges some support.

¹⁰⁴ See, for instance, section 13, para.2, of the German Criminal Code which provides that in cases of commission by omission the punishment can be mitigated. However, when international crimes are involved, section 4, para.1, of the German Code of Crimes against International Law establishes that a military commander or a civilian superior who omits to prevent subordinates from committing an international crime shall be punished with the same penalty provided for the perpetrator. In that case it is expressly established that section 13, para.2, of the Criminal Code is not applicable. Sections 13 and 14 of the German Code of Crimes against International Law provide for maximum penalties of 3 to 5 years of imprisonment (depending on the *mens rea* - negligence or intention - of the superior) for cases of superior responsibility for violation of the duty of supervision or for omission to report a crime.

Also Article 615*bis* of the Spanish Criminal Code, which refers to international crimes, establishes the principle that military and civilian superiors failing to prevent their subordinates from committing international crimes are in theory punished with the same penalty established for the direct perpetrator(s).

¹⁰⁵ See, for instance, §23(2), of the German Penal Code: “An attempt may be punished more leniently than the completed act (Section 49a subsection (1))”; and §30 for attempted participation in a crime, whereby it is established that punishment shall be mitigated pursuant to §49(1).

Moreover, Article 62 of the Spanish Criminal Code establishes that authors of inchoate offences are punishable with more lenient penalties than those applicable to the accomplished offence.

The same applies in the Italian system (Article 56, para.2, Criminal Code). In the US, according to 18 USC §1113, attempted murder or manslaughter, for instance, are punished with lighter sentences than the corresponding accomplished crimes.

¹⁰⁶ Further research might be of interest especially in light of the discipline on attempt introduced by the ICC Statute at Article 25(3), letter F.

How these rules for sentencing are established varies substantially between domestic legal systems. Spain and Germany for instance, have only very general rules for sentencing, while other systems have adopted more specific regulations or indicated modalities and approved guidelines (England and USA), and yet others have developed detailed norms on influential factors (Italy).

It is at the stage of the judicial determination of the final penalty that the role of judges and their discretionary powers become relevant and play a fundamental part. The level of discretion allowed for judges clearly depends on the different national systems but, in common law as well as in civil law, judicial discretion is a fundamental feature of the decision-making process in sentencing and cannot be excluded. What differs from one system to another is the principled legislative framework assigned to the judiciary to guide its actions and decisions. In some countries, more significance is placed on the principle of proportionality; in others on the purposes of retribution, deterrence or rehabilitation. Necessarily, the predetermined legal and ideological framework will influence the sentencing outcome and guide judicial discretion in one direction or in another, although the main criteria for the *quantum* of penalties remain the gravity of the offence and the degree of culpability of the offender.

In the first chapter the significant role and extent of judicial discretion in international sentencing was highlighted. With regard to the national sphere, judicial discretion is certainly more limited, but of course in no case is it completely eliminated. Each national system can provide its own different mechanisms and rules to minimise the risks of arbitrariness (deriving from excessive judicial discretion) in sentencing, but judicial discretion will always play an averagely significant role.

The following sections provide an overview of domestic provisions related to the individualisation of penalties as well as the criteria to guide the judges' decisions in the sentencing process.

France

The French Criminal Code of 1994 paid great attention to the problem of individualisation of penalties by devoting a section specifically to this issue (Section II, Chapter II of Title III of the Code). Moreover, the Code delineates a new scale of

punishment and widens the range of sentences left to the discretion of the court, thus giving judges considerable latitude in sentencing.¹⁰⁷

The legal basis for the discretion of judges in determining penalties is to be found in Article 132-24, para.1, which defines the principle of individualisation of penalties. The article states that the court shall impose penalties and establishes rulings according to the circumstances of the offence and the personality of the accused.¹⁰⁸ The extent of the judicial individualisation of penalties is determined by limitations introduced by laws related, for instance, to maximum levels of punishment,¹⁰⁹ and by respect of the principle of proportionality, in that the punishment must be related to the seriousness of the offence and the offender's personality.¹¹⁰

As already recalled, legal provisions in the Criminal Code now specify only the maximum penalty applicable for each offence and no longer the minimum one.¹¹¹ This has, of course, also impacted on the discipline of mitigating circumstances (as will be seen later), which is considered partly superfluous when judges are not bound to a predefined minimum penalty and can thus choose the minimum they consider just and appropriate to the case at hand.

After having ascertained the criminal responsibility of the offender, the judge has to determine the exact penalty to apply, given the specific circumstances of the case and those related to the accused. This process is naturally to the responsibility of the judge,

¹⁰⁷ See, among others, PALAZZO F., PAPA M., *Lezioni di diritto penale comparato*, Giappichelli, Torino, 2000, pp.116-120.

¹⁰⁸ Article 132-24, para.1: « Dans les limites fixées par la loi, la juridiction prononce les peines et fixe leur régime en fonction des circonstances de l'infraction et de la personnalité de son auteur. Lorsque la juridiction prononce une peine d'amende, elle détermine son montant en tenant compte également des ressources et des charges de l'auteur de l'infraction.»

¹⁰⁹ In order to respect the principle of legality of penalty and sanctions, judges – when meting out penalties – are in fact obliged to respect the maximum penalty established by the law and, therefore, not to apply penalties which are harsher than the given maximum (see, for ex.: Crim. 27 avril 1987, B.C., n.166; Crim. 12 octobre 1994, BC, n.327).

¹¹⁰ It is interesting to note that in no provision of the French Constitution is there any mention of the principle of individualisation of penalty or the nature of punishment. However, in many of its pronouncements, the *Conseil Constitutionnel* seemed to recognise some sort of '*valeur constitutionnelle*' to the principle. See for example, C.C. 13 août 1993, DC n.93-325, p.11725: « Si elle n'est pas un principe constitutionnel à part entière, l'individualisation de la peine est donc pour le moins la condition du respect de certains principes constitutionnels. En effet, lorsque la loi viole le principe de proportionnalité, cette violation n'est pas censurée dès lors que, dans l'exercice de son pouvoir d'individualisation, le juge peut rétablir la proportionnalité rompue entre la gravité des faits et la sanction ».

¹¹¹ Under the old Criminal Code each penalty – both those entailing a deprivation of personal freedom and those entailing the payment of a fine – was determined in its minimum and maximum terms. For each crime the old Criminal Code specified the maximum and minimum penalty to be applied.

given that the law cannot provide in detail for all the different circumstances of a particular case. The judge thus pronounces the sentence that s/he deems as the most suitable for the accused, all else considered (*individualisation ou personnalisation judiciaire de la peine*) and within the limits imposed by the law.

Germany

The legislative criteria guiding the decision-making process in sentencing are rather scant under the German Penal Code – *Strafgesetzbuch (StGB)* – and seem to give a central role to the element of ‘culpability’. The only provision explicitly called ‘Principles for the determination of punishment’ is §46 *StGB*, which at paragraph (1) states that the guilt of the perpetrator is the basic criterion for determining punishment and that the effects of the penalty on the perpetrator's future life in society shall be considered.¹¹² As will be seen shortly, §46 also takes into consideration the circumstances of the crime with no mention of other general sentencing criteria. In deciding upon the specific penalty to impose in the case at hand, the judge shall consider and counterbalance the circumstances both in favour of and against the accused.

Other indications (§§47 and 49 *StGB*) are then related to specific terms of imprisonment to be applied in particular cases. Judges are therefore relatively bound by the ranges of penalty established by law, and even the amount by which penalties can be increased or decreased is specified by law. Within the prescribed ranges of penalties, the judge must determine the most appropriate for the case in hand.

The principle of proportionality is explicitly mentioned in relation to remedies which provide an alternative to imprisonment: the so-called ‘measures of reform and prevention’ (§62 *StGB*). It is established that similar measures cannot be imposed if disproportionate to the significance of the acts committed by the perpetrator, as well as to the degree of danger s/he poses.

¹¹² On the criteria for the determination of penalty in the German system, see also: FORNASARI, GABRIELE, *I principi del diritto penale tedesco*, Cedam, Padova, 1993, pp.497-508.

Italy

In the Italian legal system, the process of determination of penalty has always been subject to very detailed norms.¹¹³

Regarding the current sentencing process, the Italian Penal Code provides for minimum and maximum terms of penalty; therefore, judges are not completely free to decide on the length of the sentence but are rather bound by the law. Article 132 of the Penal Code provides that judicial discretion must be exercised within the legally established penalty-ranges. The provision also imposes an obligation to give reasons for the sentence and to relate the facts of the case to the severity and nature of the punishment.¹¹⁴

Moreover, Article 133 defines the criteria that should guide judges in exercising their discretionary powers under Article 132.¹¹⁵ These guiding criteria concern factors such as the seriousness of the offence (which includes means and modalities of the crime, the gravity of the behaviour of the offender and of his/her *mens rea*, the extent and seriousness of harm and damage caused), and the offender's propensity to commit crimes again (deduced from the motives and character of the offender, previous conduct and criminal record, personal situation and family status). The notion of 'gravity' of the offence is therefore intended to assist the judge in determining the appropriate penalty.

¹¹³ For instance, under the former Criminal Code (the 'Zanardelli Code'), the whole framework of the legal determination of penalties was divided into two sub-parts: the *generic* and the *specific* determination of penalty. While the former was characterised by norms establishing the general characteristics of the various types of sanctions, the latter dealt with the specific determination of penalty for each single crime. See MELCHIONDA, A., *Le circostanze del reato*, cit., p.472 et ss.. See also: MANNOZZI, GRAZIA, *Razionalità e 'Giustizia' nella commisurazione della pena*, CEDAM, Padova, 1996, pp.3-18.

¹¹⁴ Article 132, Italian Penal Code: "Potere discrezionale del giudice nell'applicazione della pena: limiti – Nei limiti fissati dalla legge, il giudice applica la pena discrezionalmente; esso deve indicare i motivi che giustificano l'uso di tale potere discrezionale.

Nell'aumento o nella diminuzione della pena non si possono oltrepassare i limiti stabiliti per ciascuna specie di pena, salvi i casi espressamente determinati dalla legge."

¹¹⁵ Article 133, Italian Penal Code: "- Gravità del reato: valutazione agli effetti della pena.

Nell'esercizio del potere discrezionale indicato nell'articolo precedente, il giudice deve tenere conto della gravità del reato, desunta:

- 1) dalla natura, dalla specie, dai mezzi, dall'oggetto, dal tempo, dal luogo e da ogni altra modalità dell'azione;
- 2) dalla gravità del danno o del pericolo cagionato alla persona offesa dal reato;
- 3) dalla intensità del dolo o dal grado della colpa.

Il giudice deve tener conto, altresì, della capacità a delinquere del colpevole, desunta:

- 1) dai motivi a delinquere e dal carattere del reo;
- 2) dai precedenti penali e giudiziari e, in genere, dalla condotta e dalla vita del reo, antecedenti al reato;
- 3) dalla condotta contemporanea o susseguente al reato;
- 4) delle condizioni di vita individuale, familiare e sociale del reo."

To sum up, in determining the appropriate sentence, the Italian judge must take into account a number of elements: first, the penalty must be proportionate to the gravity of the crime and to the degree of culpability of the accused; second, the penalty must favour the re-socialisation of the accused; third, the penalty must contribute to general prevention and therefore be perceived as ‘just’ and ‘appropriate’.

Spain

The Spanish Criminal Code contains some general rules to be applied by judges in the process of determining the final sentence, although no specific provision is devoted to the issue of individualisation of penalties; rather, general criteria are to be inferred from the rules regarding the application of penalties.

First, the range of penalties to be applied to different offences in different circumstances is fairly precise, therefore guiding judges in the decision between the most appropriate ‘type’ of penalty to the case at hand. Maximum and minimum lengths are also indicated for each penalty, and precise indications are provided for when circumstances of crime are relevant. Penalties of imprisonment, for instance, are divided into two groups depending on whether aggravating and mitigating circumstances are present; where not present, the actual penalty to be imposed must remain within the legally predetermined ranges, taking into account the personal circumstances of the accused and the seriousness of the offence. On the other hand, when aggravating circumstances are present, the final penalty is increased according to variations indicated by law; this is also the case when mitigating circumstances occur: the final penalty is reduced accordingly.

A particular provision amongst those concerning the application of penalties is Article 73, requiring the imposition of consecutive sentences to offenders found guilty of two or more crimes committed simultaneously: all single penalties imposed for each offence must therefore be applied consecutively and cannot be cumulated in a global sentence.¹¹⁶ The rule allows a degree of mitigation when the various offences derive from the execution of a unique plan or when they all violate the same provision or

¹¹⁶ Article 73, Spanish Penal Code: ‘Al responsable de dos o más delitos o faltas se le impondrán todas las penas correspondientes a las diversas infracciones para su cumplimiento simultáneo, si fuera posible, por la naturaleza y efectos de las mismas’.

different provisions of similar nature: in such cases, the only penalty applicable is that prescribed for the most serious offence (Article 74).

The principle of proportionality seems to find ample recognition in the process of individualisation of penalty according to established jurisprudence.¹¹⁷ Another fundamental factor is that judges must give reasons for their choices in deciding upon a certain length of the sentence in the process of individualisation of penalty (Article 120(3), Spanish Constitution).

England and Wales

The principal sources of English sentencing law are legislation, sentencing guidelines and judicial decisions. Statutes passed by Parliament establish the framework of English sentencing law.¹¹⁸ These Statutes lay down maximum sentences for almost every offence. The role of legislation as a source of English sentencing law has largely been to provide powers and set limits to their use. Within those limits, sentencing practice is characterised by considerable *discretion*, subject to the general supervision of the Courts of Appeal.¹¹⁹

At the level of magistrates' courts in particular, decisions have increasingly been influenced (since 1970) by sentencing guidelines issued by the Magistrates' Association. These guidelines, which have changed over time, indicate the likely sentence for an average case of a certain type and a list of indicative factors that may increase or decrease the seriousness of the offence (and the penalty for that type of crime).¹²⁰ The Crime and Disorder Act of 1998 created the Sentencing Advisory Panel (SAP) with the aim of developing a more systematic approach to sentencing guidelines. The Criminal Justice Act (CJA) 2003¹²¹ established (ss.167-173) a new Sentencing

¹¹⁷ STS of 20 November 2002 (RJ 2002, 10491), which cites also other decisions: SSTS of 12 May 1999 (RJ 1999, 4666), and of 1 June 2000 (RJ 2000, 4150).

¹¹⁸ The major statutes modifying the sentencing structure were the following: - the Criminal Justice Act 1991; - the Criminal Justice Act 1993; - the Crime (Sentences) Act 1997; - the Crime and Disorder Act 1998; - the Criminal Justice and Court Services Bill, and the Powers of Criminal Courts (Sentencing) Bill 2000; - the Criminal Justice Act 2003.

¹¹⁹ See ASHWORTH, A., *Sentencing and Criminal Justice*, Butterworths, London, 3rd edition, 2000, pp.26-27. Courts of Appeal can develop sentencing principles and are meant to provide a mechanism for shaping and guiding sentencing policies in lower courts, thus providing for a minimum degree of internal consistency.

¹²⁰ See, for samples of guidelines, DAVIES, M., *Criminal Justice – An Introduction to the Criminal Justice System in England and Wales*, 3rd edition, Pearson Education Limited, 2005, pp.315-318.

¹²¹ For an in-depth analysis of the CJA 2003, see KEOGH, A., *Criminal Justice Act 2003*, The Law Society, London, 2004; WARD R., DAVIES O.M., *The Criminal Justice Act 2003*, Jordans, 2004; VON

Guidelines Council (effective since April 2004) to produce sentencing guidelines for all criminal courts. The courts are now obliged to take those guidelines into account when determining penalties and to give reasons for any departure from the recommended sentence. The introduction of similar bodies is clearly intended to foster consistency in sentencing decision-making, and the development of a coherent policy framework.

The English sentencing process involves several distinct phases. Before the delivery of the final sentence, the procedure followed by English Courts is as follows: establishing the facts of the offence for the purpose of sentencing; establishing the defendant's previous criminal record; receiving reports on the offender's background and mental state; a special hearing for submissions in mitigation.¹²² The primary concern of the judicial determination of a sentence is, in any case, to assess the seriousness of the offence and individualise the 'just penalty'. According to section 143(1) of the CJA 2003:

In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

In determining the sentence, the judge has firstly to take into account the initial tariff generally prescribed for the case at hand; the penalty may subsequently be reduced by taking into account secondary tariff principles, such as mitigating circumstances. In any case, the length of prison sentences must be proportionate to the harm caused, to the culpability of the offender, and to the effect of the offence upon the victim.

As already specified, no lower limits of sentences are pre-established by law in the English system of criminal justice (except for the offence of homicide for which a minimum penalty is established). The court is only bound by the maximum penalty and has broad discretion as regards the final sentence, with the possibility of choosing from a wide range of other penalties that are alternatives to custody, such as community service, fines, probation, etc., depending on the seriousness of the individual offence.

Ultimately, a fundamental element of the sentencing process and its outcome is that judges must give reasons for their decisions so that offenders are informed of the

HIRSCH ANDREW, ROBERTS JULIAN, 'Legislating Sentencing Principles: the Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions', *Criminal Law Review*, 2004, pp.639-652.

¹²² See DAVIES, M., *Criminal Justice – An Introduction to the Criminal Justice System in England and Wales*, 3rd edition, Pearson Education Limited, 2005, pp.310-314.

rationale behind the penalty imposed on them. This duty is established by section 174 of the CJA 2003, which provides that every court must state in open session the reasons for which a specific sentence has been passed and explain to the offender the effects of the sentence.

United States of America

Currently, sentencing at the federal level is governed by *Federal Sentencing Guidelines* periodically updated.¹²³ The decision to adopt sentencing guidelines can be traced back to 1984, when the Congress enacted a radical reform of the sentencing process through the so-called *Sentencing Reform Act*. The goals of this Act were to promote consistency in sentencing, reduce unwarranted disparity, increase certainty and uniformity, and correct past patterns of undue leniency for certain categories of serious offences. The main problem was that, until then, federal judges had virtually had unlimited discretion to impose any sentence they considered appropriate in a given case; in fact, besides statutory maximum penalties imposed by law, there were very few constraints on judges in the sentencing process.¹²⁴ Since the Federal Sentencing Guidelines were passed, judicial discretion has largely been replaced by a highly regulated system of sentence-calculation. Sentencing guidelines have had the aim of prescribing proportional individualised sentences by taking into account both the seriousness of the offence, including relevant offence characteristics, and important information about the offender such as the role in the commission of the crime, personal circumstances, criminal record, and so on.

¹²³ For an historical reconstruction of the law of sentencing and its developments in the US, see: CAMPBELL, ARTHUR W., *Law of Sentencing*, 3rd edition, West, Thomson, 2004; DERSHOWITZ, ALAN M., 'Criminal Sentencing in the United States: An Historical and Conceptual Overview', *Annals of the American Academy of Political and Social Science*, Vol.423, Crime and Justice in America, January 1976, pp.117-132. Besides the Sentencing Guidelines at the Federal Level, sentencing guidelines legislation is also under consideration, or has been already adopted, in many states.

¹²⁴ In order to achieve those goals, Congress created the *United States Sentencing Commission* as an independent, permanent agency of the judicial branch to monitor sentencing practice in the federal courts. One of the mandates to the Commission was to determine the appropriate type(s) and length of sentence(s) for each of the more than 2,000 federal offences. The Sentencing Commission was appointed in 1985; the first set of guidelines was submitted to Congress in April 1987 and became law in November 1987. Full nationwide implementation of the federal sentencing guidelines began in late January 1989. See LOW, PETER W., *Federal Criminal Law*, 2nd edition, Foundation Press, New York, 2003, pp.1046, 1083 ff.. The 1987 'sentencing guidelines' promulgated by the US Sentencing Commission brought an end to the broad discretion that judges enjoyed in determining sentences until then. See: SILVERMAN, E., 'United States of America', in SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.2: Country Reports, Edition Iuscrim, Freiburg im Breisgau, 2004.

The central element of the US Sentencing Guidelines (USSG)¹²⁵ is a grid that establishes sentencing ranges which corresponds to a certain amount of imprisonment. On the vertical level, the grid is composed of 43 levels of crime seriousness ('offence levels'); on the horizontal level there are six categories for prior criminal history ('criminal history points'). Each guideline-cell prescribes a sentencing range expressed in terms of months of imprisonment (minimum and maximum terms), within which the judge must decide the actual penalty to impose.

The sentencing process includes the decision of the judge concerning the sentencing range applicable and at the same time – once the judge has decided this by consulting the grid – the decision of the judge upon the actual sentence to be applied in the case at hand. The US sentencing process of determination of penalty can be summed up in five steps:¹²⁶ 1. *Determination of the base offence level* (the USSG classify each offence in a 'group' and provide for a corresponding guideline that establishes a base offence level and also provides for increases or reductions of the basic penalty due to the presence of so-called 'specific offence characteristics'); 2. *Application of 'adjustments'* (the judge must consider whether certain generic adjustments to the offence level apply. These are known as the 'Chapter three adjustments' and serve the purpose of further individualising the sentence. The base offence level may be adjusted according to victim-related factors – whether a 'vulnerable' victim was involved, for example – the defendant's role in the commission of the offence, whether the defendant was convicted of multiple counts, whether the defendant showed an acceptance of responsibility through restitution, admissions, surrender to authorities, cooperation, etc.);¹²⁷ 3. *Assessment of the defendant's criminal history* (a defendant's prior record is considered an important element in the process of individualisation of penalty. Depending on the defendant's previous criminal history, more or less points are awarded in aggravation or mitigation, thus determining the precise category of criminal

¹²⁵ These Guidelines are often updated; the latest version consulted is dated November 2007: 'Federal Sentencing Guidelines Manual and Appendices', available at:

<http://www.ussc.gov/2007guid/TABCON07.html>

¹²⁶ See, for more details, SILVERMAN, E., 'United States of America', in SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.2: Country Reports, Edition Iuscrim, Freiburg im Breisgau, 2004.

¹²⁷ See §3 'Adjustments' of the USSG, Guidelines Manual, 1 November 2007, pp.330 ff., available at: <http://www.ussc.gov/2007guid/TABCON07.html>

history);¹²⁸ 4. *Determination of the applicable sentencing range* (the USSG grid provides the judge with the applicable sentencing range which is calculated by combining the applicable offence level and the criminal history category); 5. *Determination of the actual sentence within the guideline range* (the judge has to determine the penalty to apply within the range identified. Ranges are relatively narrow and within prescribed limits, the judge has discretion to decide upon the final sentence. In determining it, the judge may consider any information concerning the background, character and conduct of the accused).

Further, the Federal Code requires the court to state openly the reasons for the imposition of the actual sentence (18 USSG §3553c).

b) *The discipline of mitigating and aggravating factors*

Within the legislative framework of norms and principles guiding the decision-making process in sentencing at the national level, one fundamental feature common to both civil law and common law traditions is the predetermination of the ‘*circumstances of the crime*’ (events or facts that surround the commission of the crime), in other words: aggravating and mitigating factors. These elements represent one of the most significant influential factors on sentencing and are also highly important in the sentencing jurisprudence of the ad hoc Tribunals. As will be seen shortly, they may vary considerably across different national jurisdictions, depending at times on the chosen legal framework and principle of approach, and have the effect of increasing or decreasing the harshness of penalties, although without altering the essential features of the crime and of its commission.

Relevant doctrines regarding circumstances of crime in various national legal systems have generally distinguished between the different technical characteristics of such factors derived from their normative qualification and discipline. There certainly is a varied panorama comprising, on the one hand, legal systems based on a predetermined number of circumstances that modify the penalty, and, on the other hand, systems that lack an explicit discipline for such circumstances, or that provide for aggravation and mitigation of the penalty but do not have a specific legal framework for defining such

¹²⁸ For more detail see, §4 ‘Criminal history and criminal livelihood’ of the USSG, Guidelines Manual, 1 November 2007, pp.364 ff..

circumstances.¹²⁹ Specific and mandatory reductions of the penalty are also treated differently in different countries. For instance – taking the case of accomplice liability – in England, France, and Italy the decision on the reduction is at the discretion of the judge; in Germany and Spain judges must follow statutory requirements to operate the reduction (that is, $\frac{3}{4}$ less, 3 years less, 1 grade less than the maximum penalty, etc.); in the USA judges are bound by the sentencing guidelines when regulating the effect of certain circumstances on the final penalty.¹³⁰

The following pages will describe the types of aggravating and mitigating circumstances provided for by the domestic systems of criminal justice under review.

France

Before 1994, the concept of ‘*circumstances of crime*’ in the French legal system mainly consisted of the discipline of *circonstances atténuantes*, in the determination of which the role of judiciary discretion was most relevant.¹³¹ On the contrary, the *circonstances aggravantes* (or *causes d’aggravation*) were rigidly predetermined by law and had a mandatory influence on the penalty, causing an increase of its *quantum* in the exact proportion specified by law. They were therefore considered as ‘*legal/normative causes*’ of modification of penalty. Besides providing for these categories, the French system did not contain a complete and organic theory of the circumstances of modification of penalty.

The discipline introduced by the 1994 Criminal Code has significantly modified the *status quo* of the whole system previously in force, abolishing the category of the *circonstances atténuantes*, broadening that of the *circonstances aggravantes*, and

¹²⁹ For a detailed analysis of the theory of circumstances in various national legal systems see, for instance: MELCHIONDA, A., *Le circostanze del reato – Origine, sviluppo e prospettive di una controversa categoria penalistica*, CEDAM, Padova, 2000; GONZÁLES CUSSAC, JOSÉ LUIS, *Teoría general de las circunstancias modificativas de la responsabilidad criminal*, Valencia, 1988.

¹³⁰ It is opportune to specify that, given the scope of this comparative overview, the discipline related to the extension of circumstances to accomplices will not be dealt with here in detail.

¹³¹ Their scope of application was regulated by Article 463 of the *Code Pénal* of 1810 and was based on a general clause which made it possible for judges, at their own discretion, to reduce the penalty – outside any normative scheme – for cases in which some mitigating circumstances were recognised in favour of the accused. These circumstances were therefore characterised by a structure which was not pre-defined and their application was discretionary. They were thus considered as ‘*judicial causes*’ of modification of the penalty. See MELCHIONDA, A., *Le circostanze del reato, cit.*, pp.133 *et ss.*

transforming the entire concept of the *excuses atténuantes*, which is now replaced by the new and different category of '*causes d'atténuation de la responsabilité*'.¹³²

With regard to aggravating circumstances, the changes made concern: an increase in the number of circumstances provided for; the effects derived from the presence of such circumstances; the distinction between general aggravating factors and special aggravating factors.

The fact that the legislation of 1994 decided to increase the number of aggravating circumstances shows a clear preference for a model based upon a predetermined enumeration of cases. Aggravating circumstances in the French system have in fact well defined characteristics: they are specifically predetermined by law; they imply a predefined increase of the penalty, prescribed by law; they modify the nature of the offence for cases in which their presence causes the application of a different type of penalty (*peine criminelle* instead of *peine correctionnelle*).

Articles 132-71 to 132-75¹³³ enumerate the aggravating circumstances, namely: the fact of having constituted an organised criminal group (*bande organisée*); premeditation; the fact of having used burglary, force or destruction; use of weapons; commission of the crime for racial, ethnic, national, religious or gender considerations.

Within the aggravating circumstances, the *récidive* (the offender is recidivist and has a prior criminal record) is a circumstance of a general character, meaning that it is defined by law and can be applied to all cases and situations; it is therefore not necessarily linked to a particular type of offence. There are also *special* aggravating circumstances which are connected to certain specific offences by law and which entail – if present – an automatic increase of the penalty prescribed for the basic offence. These circumstances are of a varied nature and can be related to the victim (e.g. his vulnerability, age, profession, ethnic origin or religious belief, etc.), to the offender (profession, background, etc.), to the type of relationship between offender and victim, to the means used to perpetrate the crime (use of weapons, aggression, cruelty, etc.), to motives or aims pursued through commission of the crime, to the consequences of the

¹³² The category of the so-called *excuses atténuantes* consisted of circumstances for which the effect of the reduction of penalty was expressly provided for as an automatic and mandatory consequence of the existence of a particular condition prescribed by the law. These *excuses* were also considered as 'legal causes' of modification of penalty.

¹³³ See Section III of Chapter II of Title III, 1994 Criminal Code, section that is entitled '*De la définition de certaines circonstances entraînant l'aggravation des peines*'.

crime. It is thus possible to distinguish between *subjective* or *personal* circumstances (when they refer to the author of the offence) and *objective* or *material* circumstances (when they refer to the conditions or way in which the offence was committed).¹³⁴

To respect the principle of *ne bis in idem*, a judge cannot consider the same fact as a constitutive element of two distinct aggravating circumstances. Moreover, it is not possible to consider the same fact both as a constitutive element of an offence and as an aggravating circumstance of another offence.¹³⁵

Regarding the modifications introduced for mitigating circumstances, the category of the *excuses atténuantes* has been replaced with that of '*causes d'atténuation de la responsabilité*'. The number of hypothesis provided for has been reduced, thus rendering the new category of *causes d'atténuation* more restricted than that of *excuses atténuantes*. Under the previous Criminal Code, the circumstances regarded as mitigating were of various types: the youth of the accused, the personal or professional situation of the accused, the degree of involvement in the commission of the offence, eventual remorse, etc. The judge was basically free to take into account a wide range of circumstances: all those appearing relevant to the case. In the system introduced in 1994, mitigating circumstances were no longer included. This was a consequence of the elimination of minimum levels of penalty, implying that judges can apply whichever minimum they deem opportune. The only 'old' provision retained in the Code of 1994 is that enshrined in Article 132-18, which states that when the penalty provided for is criminal imprisonment or criminal detention for life, judges cannot apply a penalty of less than 2 years imprisonment, while when the penalty provided for is criminal imprisonment for a specific term, then the minimum penalty cannot be less than 1 year imprisonment.¹³⁶

¹³⁴ Aggravating circumstances which are related to the person of the offender (such as being a repeat offender, already having a criminal record, or having a special relationship with the victim, etc.) are *personal* and cannot be extended to others, for instance they do not affect the accomplice, and the same is true in case of mitigating circumstances (the accomplice cannot benefit from reductions in the sentence due to the personal characteristics of the principal offender, such as the fact that s/he is a minor). Objective aggravating circumstances, which relate to the offence rather than to the individual, are on the other hand *impersonal* and can apply to the accomplice. See RENOUT, HARALD, *Droit Pénal Général*, Editions Paradigme, 9th ed., 2004, pp.303-304.

¹³⁵ See Crim. 6 janvier 1999, Bull. Crim. N.6 ; Crim. 20 février 2002, Bull. Crim. N.38, where the Court specified that the circumstance of the death of the victim cannot be considered both as the constitutive element of the crime of murder and as an aggravating circumstance for the crime of kidnapping.

¹³⁶ Cf. Article 132-18 : « Lorsqu'une infraction est punie de la réclusion criminelle ou de la détention criminelle à perpétuité, la juridiction peut prononcer une peine de réclusion criminelle ou de détention criminelle à temps, ou une peine d'emprisonnement qui ne peut être inférieure à deux ans.

The main causes of mitigation of penalty can be now identified in the following three areas: youth (being a minor always implies a reduction of the penalty if the offender was less than 16 years old at the time of the commission of the crime); the individual circumstances of the accused or his/her behaviour during and/or after commission of the crime; the behaviour of the victim (for instance, in cases of incitement or provocation).¹³⁷ As discussed earlier with regard to aggravating circumstances, it is also possible to identify some ‘*special*’ circumstances for mitigating factors. These are ‘special’ because they are explicitly provided for by the legislation and are linked to specific crimes and offences. Some of these mitigating circumstances are, for example, provided for the offences of murder and poisoning (Article 221-5-3), torture and inhumane acts (Article 222-6-2), drug trafficking (Article 222-43), kidnapping (Article 224-5-1), robbery, extortion and organised gangs (Article 311-9-1 and Article 312-6-1).

Germany

The German Penal Code (*StGB*) contains at §46 a general provision on principles for the determination of punishment whereby a certain number of *neutral* circumstances are mentioned, without specification of their ‘character’, in other words, whether they should have a mitigating or an aggravating influence on the final sentence. The judge is required to consider those circumstances in order to individualise the penalty and to weigh them ‘*in favour of and to the detriment of the offender*’.¹³⁸ Some of the listed circumstances are: the offender’s motives and aims; the state of mind and wilfulness of the offender; the way in which the offence was committed and the consequences resulting from the offence; the harm inflicted and damage caused by the crime; the offender’s past history; the offender’s personal and economic circumstances; the offender’s behaviour after committing the offence and efforts to compensate for the damage. Further, paragraph 3 of §46 *StGB* specifies that those circumstances which are

Lorsqu'une infraction est punie de la réclusion criminelle ou de la détention criminelle à temps, la juridiction peut prononcer une peine de réclusion criminelle ou de détention criminelle pour une durée inférieure à celle qui est encourue, ou une peine d'emprisonnement qui ne peut être inférieure à un an. »

¹³⁷ See DESPORTES F., LE GUNEHÉC F., *Le Nouveau Droit Penal*, Tome 1, Part Général, Economica Paris, 1994, p.626.

¹³⁸ Cf. §46 para.2, of the German Penal Code. It must be specified that the list contained in para.2 is not exhaustive.

already statutory elements of the offence shall not be considered for aggravation or mitigation.

In particular, concerning aggravating circumstances, it should be noted that a section of the 1975 Penal Code (§48) previously provided for a mandatory increase of the penalty in cases of repeated offences and offenders with a criminal record. This aggravating circumstance had been vigorously criticised on the basis that it reflected an 'old' idea of culpability not relevant to nor concerned with the concrete circumstances of the offence at hand, but based on the previous 'life-style' of the accused; the circumstance was subsequently abolished by a law of 13 April 1986.

Special mitigating circumstances are provided for where the accused has completely or substantially made restitution to the victim(s) (§46a). Finally, it is important to observe that, in order to ensure a substantial uniformity of variations in penalty, the German Penal Code (at §49) explicitly predetermines the exact amount of the applicable penalty reductions when special statutory mitigating circumstances occur.¹³⁹

Italy

The issue of the circumstances of crime is remarkably important in Italian criminal doctrine and has been attributed a substantial role by Italian legislation through a detailed discipline contained in the first book of the Penal Code. Notwithstanding such a detailed discipline, there is no normative definition of the concept of 'circumstances of crime', although some commentators have tried to elaborate on the essence and nature of such factors.¹⁴⁰ In any case, what commentators acknowledged was not only the

¹³⁹ For instance, it is established that for life imprisonment a reduction cannot lead to the imposition of a sentence of less than 3 years, and that for temporary imprisonment the reduction of the penalty can be up to $\frac{3}{4}$ of the maximum applicable penalty.

¹⁴⁰ See, for example, PAGLIARO, A., *Principi di Diritto Penale, Parte Generale*, 8° ed., Milano, 1998, p.457: "...in conclusione, tutto quello che si può dire sulla natura delle circostanze del reato può compendiarsi nell'assunto che le circostanze sono elementi del reato, dai quali dipende l'integrazione di quella particolare forma di manifestazione del reato che, oltre ad essere caratterizzata da un aumento o una diminuzione di pena rispetto alla pena base, è sottoposta al regime giuridico proprio delle figure circostanziate"; FIANDACA, MUSCO, *Diritto Penale, Parte Generale*, 3° ed., Bologna, 1995, p.371: "...le circostanze sono elementi – per ripetere la definizione tradizionale – che stanno intorno (*circum stant*) o accedono ad un reato già perfetto nella sua struttura, e la cui presenza determina soltanto una modificazione della pena: o in termini quantitativi, sotto forma di modifica proporzionale della pena edittale (aumento o diminuzione, di norma fino ad un terzo della pena prevista per il reato-base), o in senso qualitativo (ad esempio, reclusione in luogo della multa). ...Si parla anche di *accidentalialia delicti* per sottolineare, appunto, che le circostanze sono elementi contingenti che possono mancare senza che il

difficulty or impossibility of identifying rigorous criteria regarding the constitutive elements of the circumstances of crime, but also the difficulty of identifying specific features which are common to all circumstantial elements.¹⁴¹

There have always been numerous and variegated opinions regarding the function of circumstances. These range from an insistence on their relevance in the process of ‘individualization’ of penalties,¹⁴² to an emphasis on their importance with regards to the culpability¹⁴³ or the individual danger represented by the accused.¹⁴⁴ It has been pointed out that legislation uses the category of circumstances to try to fit the offence to the offender, by taking into account the objective characteristics of the crime committed by the particular agent and the circumstances of the case at hand.¹⁴⁵

The discipline of circumstances adopted by the Criminal Code of 1930 (*Codice Rocco*) was surrounded by a long and complex debate. The idea which prevailed in the end accepted the circumstances of crime as ‘*accessory elements*’ of the offence.¹⁴⁶ In fact, it can be said that the very nature of the circumstances of crime represents something variable and unsettled. The etymological meaning of the word ‘*circostanza*’ (from Latin *circum stat...*) recalls the idea of a *quid* which is attached to another element. The problem is that this ‘*quid*’ can be identified with a very wide range of

reato venga meno; mentre se manca un ‘elemento essenziale’ del reato, a far difetto è la stessa figura criminosa”; MANTOVANI, F., *Diritto Penale, Parte Generale*, 3° ed., Padova, 1992, p.397: “Come risulta dalla etimologia (*circum-stare*), le circostanze sono elementi accidentali, accessori, del reato. Come tali non sono necessari per la sua esistenza, ma incidono sulla sua gravità o rilevano come indici della capacità a delinquere del soggetto, comportando una modificazione della pena. La loro presenza trasforma il reato semplice in reato circostanziato, aggravato o attenuato”.

¹⁴¹ See MELCHIONDA, A., *Le circostanze del reato, cit.*, pp.576-577.

¹⁴² Their function is summarised well by the words of Professor Fiore: “...mediante la previsione di una circostanza aggravante o attenuante il legislatore mira, semplicemente, ad adeguare la pena applicabile al maggiore o minore disvalore del fatto tipico che si ritiene consegua ad una particolare modalità esecutiva del fatto o, più in generale, alla presenza di determinate circostanze del suo realizzarsi”. See FIORE, C., *Diritto Penale, Parte Generale*, vol.II, Napoli, 1995, p.4 and ff.

¹⁴³ See, for ex., DE MARSICO, A., *Diritto penale, Parte generale*, Napoli, 1969, p.487.

¹⁴⁴ See, for ex., SANTORO, A., *Le circostanze del reato*, 2nd ed., Torino, 1952, p.30; MALINVERNI, A., *Circostanze del reato*, EDD, vol.VII, 1961, p.69.

¹⁴⁵ See MARINI, G., *Le circostanze del reato. Parte generale*, Milano, 1965, p.64; MARINI, G., *Lineamenti del sistema penale*, Torino, 1988, p.640.

¹⁴⁶ See, for all, SANTORO, A., *Teoria delle circostanze del reato*, Roma, 1933, p.25 et ss., where the author linked the notion itself of ‘circumstance’ to a subordinate and dependent (accessory) relation with the offence. For a reconstruction of the historical origins and of the discipline of circumstances of crime under the Zanardelli Code, see MELCHIONDA, A., *Le circostanze del reato, cit.*, p.468 et ss. Also: CONTI, U., *La pena e il sistema penale del codice italiano*, Enciclopedia del diritto penale italiano, ed. by E. Pessina, vol.IV, Milano, 1910. See also, concerning the ‘accessory’ nature of such circumstances, PADOVANI, T., *Circostanze del reato*, DDP, 1988, vol.II, p.189.

situations, acts, and facts of different kinds. This does not therefore permit a precise and predetermined normative definition of all the various possible circumstances of crime.

Article 70 of the Italian Criminal Code distinguishes between ‘objective’ and ‘subjective’ circumstances. The former are represented by those factors related, for instance, to the nature, type, modalities, time and place of the criminal action; to the gravity of the damage created by the offence; to the personal characteristics of the victim(s). The latter reflect the degree of *mens rea* of the offender, the personal circumstances of the offender, and the relation between the offender and the victim.¹⁴⁷

Article 61 of the Criminal Code spells out general aggravating factors, such as: futile motives; the fact of having committed the crime in order to cover or facilitate another crime; the fact of having acted recklessly notwithstanding the foreseeability of the crimes; cruelty and other brutalities in the commission of the crime; abuse of powers, of trust or public belief/faith, of hospitality.

The category of general mitigating circumstances (the so-called *circostanze attenuanti comuni*) is enshrined in Article 62 and comprises, for instance: the fact of having acted for particular moral or social reasons; the fact of having acted out of rage caused by an injustice; the fact of having caused very little damage (when fiscal or property crimes are concerned); or the fact of having completely repaired the damage caused. Furthermore, Article 62*bis* refers to other types of mitigating circumstances (the so-called *circostanze attenuanti generiche*), entitling the judge to take into account other mitigating factors neither explicitly mentioned nor defined by the law, when determining the penalty. These circumstances are distinguished by the fact that they give broad discretion to judges as to both their identification and evaluation.¹⁴⁸ In both cases, the circumstances listed in Articles 61 and 62 cannot be considered in aggravation or in mitigation when they are already constitutive elements of the offence.

Finally, Article 99 (*‘Recliva’*) introduces the possibility of increasing the basic penalty by up to one sixth or one third, when the offender is a recidivist and has already been sentenced for other crimes.

¹⁴⁷ The distinction is relevant especially to distinguish between those circumstances that can be applied also to accomplices (*‘circostanze oggettive’*) and those that are applicable only to the offender (*‘circostanze soggettive’*). Cf. ANTOLISEI, F., *Istituzioni di Diritto Penale*, Giuffrè, Milano, 2000, pp.240-241.

¹⁴⁸ For an in-depth analysis of these and other circumstances of crime under Italian law, see: ZAZA, C., *Le circostanze del reato*, CEDAM, Padova, 2002.

The Italian Criminal Code also contains very detailed indications regarding how to increase or decrease the penalty in practice when one or more circumstances are present, and provides for limits to the highest and lowest adjustment of the penalty.¹⁴⁹

Spain

The two main aspects of the discipline introduced by the Criminal Code of 1995 are a predetermined list of all the single mitigating and aggravating circumstances, and the predetermination of the functional links between the existence of aggravating and mitigating circumstances and the correlated system of penalties.¹⁵⁰

The historical reasons for the recent discipline can be traced back to the first Spanish Code of 1848, which contained a general ‘catalogue’ of all the most important circumstances and the effects linked to their presence. Depending on the number and type of circumstances occurring, for each crime a selection of different levels of penalties was established in addition to that of the single basic crime.¹⁵¹ The current discipline still uses a descriptive technique for the various *circunstancias atenuantes y agravantes*. There are also catalogues of the most common cases of circumstances in Articles 21-22 of the 1995 *Código Penal*. For instance, under Article 21, the following are, *inter alia*, considered mitigating circumstances: the fact of having acted out of rage or emotional passions; the fact that the accused confessed the crime(s) before knowing about judicial proceedings against him/her; reparation by the accused of the damage caused to victims; any other similar circumstance. Under Article 22, the following, *inter alia*, are considered aggravating circumstances: the particular heinous way or means

¹⁴⁹ Cf. Articles 63-69. For instance, it is specified that the penalty provided for the basic offence can be increased up to one third when one aggravating circumstance recurs; or that, if there are several aggravating circumstances, there is no accumulation but only the penalty for the gravest circumstance is applied; the same rule applies to mitigating circumstances.

¹⁵⁰ For more details about aggravating and mitigating circumstances in the Spanish legal system, see MUÑOZ CUESTA J., ARROYO DE LAS HERAS A., *Las Circunstancias Agravantes en el Código Penal de 1995*, Editorial Aranzadi, 1997; MUÑOZ CUESTA J., ARROYO DE LAS HERAS A., *Las Circunstancias Atenuantes en el Código Penal de 1995*, Editorial Aranzadi, 1997; PUENTE SEGURA, L., *Circunstancias eximentes, atenuantes y agravantes de la responsabilidad criminal*, Madrid, 1997.

¹⁵¹ Article 74 of the *Código Penal* of 1848 provided for the application of the maximum, medium or minimum level of penalty depending – respectively – on whether one or more aggravating circumstances were present, no circumstances at all were applicable, or one or more mitigating circumstances were present. The Criminal Code of 1848 also entitled the judge to take into consideration, besides the aggravating and mitigating circumstances expressly provided for, other circumstances, with mitigating or aggravating effect, not already expressed in the legislation but similar to the listed ones. This element favoured a shifting of the model from the scheme of the so-called *numerus clausus* of circumstances to the opposite, *numerus apertus*, by using a technique that has been recently called ‘*método ejemplificante*’. See MELCHIONDA, A., *Le circostanze del reato*, *cit.*, p.232.

with which the crime was committed, treachery, perfidy (*alevosia*); abuse of trust or abuse of authority (for instance, public positions of authority); the fact of having committed the crime in order to gain money or other personal advantages; racial motivation or discrimination linked to race, ethnicity, nationality, personal beliefs, religion, sex, physical disabilities, etc.; additional and unnecessary suffering caused to the victim(s) (*ensañamiento*); criminal record and repeated offences of the same nature/type (*reincidencia*).

Depending on the case at hand, the effect that each single circumstance will have in determining the penalty will be to increase or diminish the severity of the final punishment compared to that foreseen for the basic crime.¹⁵² Furthermore, Article 23 of the 1995 Criminal Code introduces another particular type of circumstance that ‘*atenuan o agravan la responsabilidad criminal, segun los casos*’. This is a particular category of ‘neutral’ circumstances which, depending on the specific details of the case, can have an aggravating or mitigating effect on the final penalty.¹⁵³

Besides the above-mentioned circumstances (called *circunstancias genéricas*, in view of their general scope of application), the Code also provides for other particular circumstances attached to specific crimes. The so-called *circunstancias específicas* are characterised by the fact that they can only apply to the crimes for which they are provided.¹⁵⁴

Other new aspects contained in the 1995 Criminal Code are represented by a simplification of the regime devoted to the effects of such circumstances. The previous system of ‘gradual levels’ of penalties had the characteristic of providing for strictly predetermined modifications of the penalty depending on the concrete offence and on the presence of circumstantial elements; this detailed discipline has partially been changed in 1995 with the suppression of the numerous ‘gradual levels’ of penalties and their replacement with a more general classification of all the penalties in three groups,

¹⁵² For more details on aggravating and mitigating circumstances in the Spanish Code and on the system of their application, see: MUÑOZ CONDE F., GARCÍA ARÁN M., *Derecho Penal – Parte General*, 4^a edición, Tirant Lo Blanch, 2000, pp.551-561; QUINTERO OLIVARES, GONZALO, *Manual de Derecho Penal – Parte General*, Editorial Aranzadi, 1999, pp.722-735; SERRANO BUTRAGUEÑO, I., *Las Penas en el Nuevo Código Penal*, Editorial Comares, 1996, pp.124-132.

¹⁵³ Article 23 mainly consists of the so-called ‘*circunstancia de parentesco*’ according to which, depending on the case at hand, a particular marital or family status can aggravate or mitigate the offence and the responsibility of the accused.

¹⁵⁴ More specifically on the issue, see: MUÑOZ CONDE F., GARCÍA ARÁN M., *Derecho Penal – Parte General, - Parte Especial*, 4^a edición, Tirant Lo Blanch, 2000; QUINTANO RIPOLLES, A., *Comentarios al Código Penal*, 2^a ed., Madrid, 1996.

distinguishing between ‘serious penalties’, ‘less serious penalties’ and ‘light penalties’ (Article 33), and maintaining a general indication of how to graduate penalties depending on the circumstances of the case.¹⁵⁵ Article 66 then defines the specific discipline concerning the modalities of application of circumstances, identifying quite precise guiding criteria for the judge, as in the Italian Criminal Code.¹⁵⁶

As observed also in relation to the other civil law systems analysed so far, the Code specifies (Article 67) that the listed circumstances are no longer considered in aggravation or in mitigation when they already form part of the constitutive elements of a crime.

England

The large number and the range of aggravating and mitigating circumstances that are held relevant to sentencing in the English system implies that judges enjoy quite wide discretion in imposing punishment.

The CJA 2003 introduced some mandatory aggravating factors at section 143 (2) and (3): previous convictions for relevant and recent offences;¹⁵⁷ an offence committed on bail; racial or religious aggravation;¹⁵⁸ aggravation related to disability or sexual

¹⁵⁵ See, for instance, MELCHIONDA, A., *Le circostanze del reato – Origine, sviluppo e prospettive di una controversa categoria penalistica*, CEDAM, Padova, 2000, pp.246-254; MUÑOZ CONDE F., GARCÍA ARÁN M., *Derecho Penal, Parte General*, 2nd edition, Valencia, 1996, pp.513, 519 et ss.; QUINTERO OLIVARES, G., *Curso de Derecho Penal, Parte General*, Barcelona, 1996, pp.542 et ss..

¹⁵⁶ For instance, it is provided that, when there is just one mitigating factor, the penalty should be reduced of half its normal duration; when one or two aggravating circumstances are present, the penalty should be increased by half its normal length, etc.. See also Article 68. Furthermore, on the discipline of extension of circumstances to accomplices and co-perpetrators, see for instance: SALINERO ALONSO, C., *Teoría General de las Circunstancias Modificativas de la Responsabilidad Criminal y Artículo 66 del Código Penal*, Editorial Comares, Granada, 2000, pp.86, 95.

¹⁵⁷ In the past, previous convictions were only exceptionally available to courts as aggravating circumstances. After the introduction of this aggravating factor by the CJA 2003, critics have often argued that such a circumstance increases the risk of miscarriages of justice as the court would put more weight on the accused’s past convictions instead of focusing on the gravity of the facts and case at hand and on the circumstance related to that rather than to the past. See, for instance, ELLIOTT C., QUINN F., *English Legal System*, 5th ed., Pearson Education Limited, 2004, p.339. On the role of previous convictions see also: VON HIRSCH ANDREW, ROBERTS JULIAN, ‘Legislating Sentencing Principles: the Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions’, *Criminal Law Review*, 2004, pp.647-652.

¹⁵⁸ The court must treat an offence as being racially or religiously aggravated if at the time of the commission of the act the offender demonstrated hostility towards the victim because of her/his actual or presumed belonging to a racial or religious group, or if the offence is motivated by hostility towards members of such a group based on their membership therein. The CJA 2003 (ss.145-146) now makes it an explicit statutory aggravating factor when an offence is motivated or accompanied by hostility based on race, religion, sexual orientation or disability. SANDERS, YOUNG, *Criminal Justice*, 2nd ed., 2000.

orientation.¹⁵⁹ Other general aggravating factors can include: planning and premeditation of an offence; personal gain or profit from the offence; targeting of vulnerable victims; abuse of power, abuse of position or trust, use of violence of an excessive or unnecessary nature; futile motives.¹⁶⁰ If the victim is very young, then the sentence is likely to be more severe; the same holds true if the victim is an elderly or handicapped person. Another circumstance justifying a more serious penalty in certain cases is the use of sexual harassment or violence by the accused. In such cases, courts are allowed to impose a longer sentence than that normally commensurate with the seriousness of the offence. The statutory maximum of the offence must not however be exceeded.

With reference to mitigating factors, these are more numerous and heterogeneous. Mitigation might include, for instance, the need to determine an appropriate sentence discount when the offender has entered a guilty plea. This is the only statutory factor that judges are required to take into account. In order to assess the proper weight to be given to a guilty plea, section 144 CJA 2003 specifies that the judge must take into account at what stage of the proceedings the plea is entered and the circumstances in which it is offered. Other mitigating factors can be the following, for example: the youth of the accused (in their teens); the previous good character of the offender;¹⁶¹ family problems; health problems (physical or mental);¹⁶² absence of direct physical

¹⁵⁹ For a fuller discussion on these factors, as well as for examples of other general aggravating factors, see ASHWORTH A., *Sentencing and Criminal Justice*, 4th edition, Cambridge University Press, 2005, pp.153-157.

¹⁶⁰ See, for more details: WALKER N., PADFIELD N., *Sentencing – Theory, Law and Practice*, 2nd edition, Butterworths, London, 1996, pp.42-49; Sentencing Guidelines Council, *Overarching Principles: Seriousness*, para.1.22.

¹⁶¹ See, for instance, *R v. Fraser* (1982), 4 Cr App R(S) 254, where it was thus recognised: "...it is wrong to make any increase in sentence because of the offender's previous bad record. It is equally wrong to allow any substantial mitigation in the case of a man with a bad record. However, where the record is good, it may provide substantial mitigation.' Generally speaking, the effect of the good character on sentence is substantial in the English system and can result in the fact that an offender who should receive imprisonment is in fact condemned to non-custodial sentence (or a significantly shorter sentence than normal) due to previous good character and possibility of re-socialisation. See, for example, *R v. Scott* (1983), 5 Cr App R(S); *R v. Jacob* (1981), 3 Cr App R(S) 298.

¹⁶² With regard to the effect that a serious medical condition of the convicted person could have on the sentence to be imposed, reference should be made to the leading case of *Bernard* (1997), where the Court of Appeal stated that, even in presence of a serious medical condition which is difficult to treat in prison, the offender is not automatically entitled to a lesser sentence than that which would otherwise be appropriate. Nevertheless, such a condition might enable a court, as an act of mercy in exceptional circumstances, to impose a lesser sentence than would be otherwise appropriate. See: *R v Bernard* [1997] 1 Cr.App.R.(S)135.

harm to victims;¹⁶³ cooperation by the accused with the authorities (police, judge, and prosecutor).¹⁶⁴ Another mitigating circumstance can be represented by voluntary reparation made by the offender after the commission of the crimes, for instance, by paying compensation or making reparation to the victim(s) before the case arrives at trial.

Of course for cases of serious gravity, such as murder or rape, the impact on the sentence of a mitigating factor such as previous good character or first offender cannot be expected to have any significance.¹⁶⁵

Section 174(2) CJA 2003 requires judges to give reasons for the specific penalty they chose to pass and, in doing so, to mention ‘any aggravating or mitigating factors which the court has regarded as being of particular importance’.

United States of America

The US Code (18 USC, para.3553 (1)) determines that, in imposing a sentence, the court should consider ‘the nature and circumstances of the offence and the history and characteristics of the defendant’; para.3661 later specifies that ‘no limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offence which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence’.

Specific adjustments to penalties (in aggravation and in mitigation) are then specified by the Sentencing Guidelines (USSG),¹⁶⁶ where not only are concrete mitigating and aggravating factors spelled out, but also the modifications they cause to the penalty are indicated (through ‘levels’ of increase or decrease in the offence levels of the sentencing grid).

Amongst the aggravating factors, those related to the victim are of great importance such as their vulnerability (§3A1.1b), or the fact of having selected any individual as the object of the offence because of their actual or perceived race, colour, religion, national

¹⁶³ See DAVIES, M., *Criminal Justice – An Introduction to the Criminal Justice System in England and Wales*, 3rd edition, Pearson Education Limited, 2005, pp.310-312.

¹⁶⁴ Cf.: *R v A and B* [1999] 1 Cr.App.R.(S) 52; *R v Guy* [1999] 2 Cr.App.R.(S) 24; *R v X* [1999] 2 Cr.App.R.(S) 294; and *R v R (Informer: Reduction in sentence)* [2002] EWCA Crim.267.

¹⁶⁵ As recognised in the *Turner* case: ‘...the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the court is dealing with cases of this gravity’. *Turner* (1975), 61 Cr.App.R67, at 91.

¹⁶⁶ Latest version of 1 November 2007, p.330 ff., consulted at <http://www.ussc.gov/2007guid/GL2007.pdf>

origin, ethnicity, gender, disability, or sexual orientation (§3A1.1). These circumstances increase the sentence by two or three levels.

A second group of aggravating circumstances is represented by those factors related to the role the defendant played in committing the offence. Considerations of the issue of principal or accomplice liability become relevant here. In fact, as already mentioned, according to the USSG, the role of the defendant is a factor in determining the offence level, and, therefore, the sentencing range. If, for instance, the offender played a leading role in the crime or if s/he abused a position of trust, the basic offence level is increased by 2 to 4 levels (USSG §3B1.1 ‘Role in the offence: aggravating rule’ – USSG §3B1.3 ‘Abuse of position of trust’). On the other hand, if the defendant was a minimal or a minor participant in the criminal activity, a decrease (from 2 to 4 levels) of offence level is prescribed (§3B1.2 ‘Mitigating Role’).

Mitigation of the basic offence level is foreseen by the USSG if the defendant clearly demonstrates acceptance of responsibility (§3E1.1). Under this heading, the following are considered relevant forms of behaviour demonstrating acceptance of responsibility: truthfully admitting the conduct comprising the offence(s); voluntary payment of restitution prior to adjudication of guilt; voluntary surrender to the authority promptly after commission of the offence; voluntary assistance to and cooperation with the authorities; the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility. It is also under this section (§3E1) that any reduction of penalty due to the guilty plea of the accused is considered. The Guidelines explicitly recognise that the entry of a plea of guilty prior to the commencement of trial, combined with truthfully admitting the conduct representing the offence charged, does constitute significant evidence of acceptance of responsibility, but the subsequent conduct of the defendant must then be consistent with such recognition of responsibility, otherwise the defendant will not be entitled to any reduction for the guilty plea.¹⁶⁷

Chapter 4 of the Sentencing Guidelines is then devoted to ‘Criminal History and Criminal Livelihood’ of the offender. The Guidelines make clear that a defendant with a record of prior criminal behaviour is ‘more culpable’ than a first offender and thus deserves greater punishment. They consider, in fact, that repeated criminal behaviour is an indicator of the limited likelihood of successful rehabilitation of the particular

¹⁶⁷ See, for more details, Chapter 3, Part E ‘Acceptance of Responsibility’ of the USSG, Guidelines Manual, 1 November 2007, pp.361 and ff..

offender; therefore, in order to protect the public from further crimes, recidivism is severely considered in the determination of penalty. The offence level is increased accordingly depending on the number, type, and length of prior sentences of imprisonment (§4A1.1). In short, criminal history is certainly considered by the Federal Sentencing Guidelines as a relevant factor in the determination of the sentence.

Once the sentencing range has been identified by the judge, the US Code permits a court to depart from a sentence specified in the guidelines only when it finds that ‘there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines’ and that therefore justifies a final sentence different from that prescribed (18 USC §3553b). In such cases, the judge must clearly provide specific reasons for the departure.

c) *Provisions concerning confession, guilty plea or plea-bargaining*

The use of the guilty plea is more typical of common law systems where, amongst other functions, it is intended to facilitate a more efficient administration of justice. In fact, if at the beginning of trial proceedings, when the court asks the accused whether s/he pleads guilty or not guilty, the accused enters a plea of guilty, there are no further proceedings and the court can directly move to the sentencing phase. Often the guilty plea procedure is the result of ‘plea-bargaining’ between the prosecution and the defence (or the accused). The outcome of a plea-bargaining procedure is the same as above: the accused enters a plea of guilty, proper trial proceedings are avoided, moving directly to the sentencing stage, and the final penalty is generally mitigated. The difference, however, is that in plea-bargaining procedures the prosecutor normally accepts that a charge will be dropped (in general a more serious one than that entered) or will agree to recommend a certain sentence (clearly reduced) in exchange for the offender’s guilty plea to other (generally less serious) charges. This is the ‘bargain’ aspect of the procedure. In most common law countries (and particularly in those analysed here: England and the United States) a large number of criminal cases is solved and concluded through negotiated proceedings. Thus an important objective is achieved as the workload of courts is reduced, and simplicity, speed and efficiency of the criminal justice system are promoted.

However, similar procedures do not exist *as such* in civil law countries, where complete trial proceedings are conducted even when the accused confesses or admits his/her culpability, as such a plea is considered together with the other evidence collected and presented. On the other hand, trials where a guilty plea is entered are normally shorter than they would be and a certain reduction of the penalty is generally granted.

In the following overview, the substantial differences that exist between guilty plea procedures in common law systems and ‘simple’ confession in civil law countries will appear clear.¹⁶⁸

France

Law no.2004-204 of 9 March 2004, the ‘*Perben 2*’ or ‘AJEC’ (‘*Loi portant adaptation de la justice aux évolutions de la criminalité*’) introduced to the French system the new procedure of “*comparution sur reconnaissance préalable de culpabilité*”,¹⁶⁹ which is not very dissimilar to the common law models of guilty plea and plea bargaining.

This procedure is only limited to “*délits*” punished by five years of imprisonment or less (Article 495-7). It can be initiated by the Prosecution, on his own motion or at the request of the accused when the accused admits his guilt. The Prosecution proposes a sentence that cannot exceed one year of imprisonment or half of the penalty that would normally be applicable. It is mandatory that the accused be assisted by a lawyer (Article 495-8). One of the duties of the judge is to verify the juridical qualification of the facts that occurred and to examine the accused with regard to the circumstances of the offence, his/her real knowledge of what happened, and his/her recognition of the facts.

The judge presented with a “*comparution sur reconnaissance préalable de culpabilité*” is not obliged to comply with the request of the defence and the prosecutor on the guilty-plea; Article 495-9, para.2, specifies that the judge ‘may’ decide to grant the penalty proposed by the parties. For instance, the judge could ascertain that the recognition of guilt by the accused with regard to crime is not complete, or realise that

¹⁶⁸ On the various issues arising from forms of negotiated justice, see for instance: TULKENS, F., in DELMAS-MARTY, M., *European Criminal Procedures*, Cambridge University Press, 2002, pp.641 and ff.; CHIAVARIO, M. “La justice négociée: une problématique à construire”, *Arch. pol. crim.*, (15) 1993, pp.26 ff.; DELMAS-MARTY M., CHIAVARIO M., *Procedure Penali d’Europa*, Cedam, Padova, 2001, pp.619-662.

¹⁶⁹ The procedure is regulated by Articles 495-7 / 495-16, of the Section VIII ‘*De la comparution sur reconnaissance préalable de culpabilité*’, of the Code of Criminal Procedure.

further knowledge of the facts would in fact qualify the offence as one carrying a penalty of more than 5 years of imprisonment. If the judge does not approve the request by the parties, then proceedings are reopened and continue in the regular way (Article 495-12). However, if the judge decides to accept the request, s/he cannot modify the penalty proposed. The order of homologation handed down by the judge has all the effects of a judgement of conviction and is immediately executable (Article 495-11).

Article 495-13 contains a further interesting provision which refers to the role of the victim(s) of the offence when the perpetrator pleads guilty. This states that if the victim is known, then s/he must be promptly informed of the fact that the perpetrator decided to plead guilty. In such circumstances, the victim is invited to be present at the hearing before the judge, and – if s/he wants – s/he can file an action as *partie civile*; in this case the judge will decide on both, the *action publique* and the *action civile*. If, on the other hand, the exercise of the *action civile* is not possible (for example because it was impossible to notify the victim), then the Prosecutor is in any case obliged to notify the victim of his/her right to bring the perpetrator before the *tribunal correctionnel*. In this case the judge will decide only the *action publique*.¹⁷⁰

Finally, Article 495-16 specifies that the procedure for a guilty plea is not applicable when the accused is a minor of 18 years, or for certain offences, such as political ‘*délits*’ or involuntary homicide.

Germany

In the German system of criminal justice the inquisitorial principle stating the duty of the authority to seek the truth (*Instruktionsmaxime*) in theory clashes with any possible negotiation in the judicial process, therefore no special provision regarding guilty plea or plea bargaining is given.¹⁷¹ However, a certain practice similar to plea bargaining, consisting of informal arrangements (*informelle Absprachen*), is becoming quite common in Germany too in order to speed up lengthy procedures. The procedure was introduced in §153a of the German Code of Criminal Procedure (*StPO*) after the

¹⁷⁰ See for more detail, PRADEL, J., *Manuel de Procédure Pénale*, Editions Cujas, Paris, 2004, p.774-776.

¹⁷¹ See for more details, KUHNE, H.H., ‘Germany’, in VAN DEN WYNGAERT, C., *Criminal Procedure Systems in the European Community*, Butterworths, Brussels, 1993. In the Code of Criminal Procedure, the only provision in which ‘confession’ by the accused is mentioned is §254 which simply affirms the possibility - for the purpose of taking evidence regarding a confession - to read out statements of the defendant contained in judicial records.

reforms of 1965 and 1975, and gives the prosecutor autonomy to decide upon the penalty to be pursued when the defendant's consent exists. When 'less serious offences' are involved and the degree of culpability of the accused is not severe, the Prosecutor has the possibility of proceeding with 'conditional' penalties that are alternative to those applicable under the normal procedure of public charges. The consent of the competent court and of the accused is obviously necessary.

Besides this procedure, guilty pleas have practical relevance especially for cases where life imprisonment is not mandatory and when adjustments in the penalty range are thus allowed. According to the Supreme Court (BGHSt), guilty pleas must be taken into account even when there is no clear remorse or repentance, although in such cases the plea has only a very limited mitigating effect.¹⁷² In any case, a guilty plea can never lead to a change in the prescribed range: adjustments can operate only within the range indicated by law.¹⁷³

Some informal forms of 'bargaining' also exist – though not expressly regulated by law but allowed by jurisprudential practice – involving the defendant, the prosecution, and the judge all together. In these cases, which are more common for financial and drug related crimes, the judge is free to decide upon the final penalty and, when s/he does not agree with the penalty proposed by the parties but wants to increase it, s/he can decide to proceed to trial.¹⁷⁴

Italy

A radical innovation introduced by the Italian Code of Criminal Procedure of 1988 (CCP) was the procedure leading to a negotiated sentence, the so-called 'application of penalty on request of the parties' (*applicazione della pena su richiesta delle parti*), provided for by Articles 444-448 CCP. This special procedure, which was substantially influenced by the common law model of plea bargaining, for the defendant consists of the possibility of entering into an agreement (bargain) with the Prosecutor, in order to avoid a full trial, in return for a reduction of up to one third of the applicable penalty for

¹⁷² BGHSt 43, 185 [209 and ff.]. See, GROPENGIESSER H., KREICKER H., 'Germany', in SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.2: Country Reports, Edition Iuscrim, Freiburg im Breisgau, 2004.

¹⁷³ As already observed above, in para.5(b), according to §46a of the German Criminal Code, acts of repentance by the accused tending to achieve mediation with the victim(s) and to offer reparation/restitution for the harm caused can be considered by the court in mitigation of the punishment.

¹⁷⁴ The guiding judicial decision on plea bargaining is BGHSt 43, 195 and ff.

the crime charged. At present, some of the conditions for the application of this procedure are the following: the applicable sentence for the charged crimes, after reduction, shall not exceed 5 years imprisonment; the agreement must be entered into at any time before the presentation of the conclusive arguments at the preliminary hearing; and it must be submitted before a judge for verification.¹⁷⁵ The so called *patteggiamento* is thus a special abbreviated procedure that can lead to a maximum reduction of the penalty of one-third. It only applies to cases involving offences that are not severe: although originally it was applicable to sentences of up to two years imprisonment after reduction, in 2003 it was extended (by Law n.134 of 12 June 2003) to sentences of up to 5 years (also after reduction of one third).¹⁷⁶

The ‘active’ parties in this procedure are the offender (or defence lawyer) and the Prosecutor: both have to give their consent to the ‘*patteggiamento*’ and have to present a request to the judge, containing the proposed penalty to be applied. The content of the request can be freely determined by the parties, while the judge must ascertain its admissibility and legitimacy, that the procedure has been fully respected, the existence of a factual basis, and the congruity of the penalty requested.

As G. Mannozi points out, the Italian Prosecutor – who has to give his/her consent to the ‘*patteggiamento*’ – derives no advantages from a negotiated sentence except that he does not have to proceed further with the case, nor gather evidence, nor conduct a trial.¹⁷⁷ In fact, sentence discount under the procedure at Articles 444 and ff. is not in exchange for an admission of guilt, nor is it a ‘reward’ for a confession; this is the main difference between the ‘*patteggiamento*’ and the common law procedure of plea bargaining. The sentence concluding the abbreviated trial, although a punishment in itself, is not a conviction equivalent to an admission of guilt on the part of the accused.

¹⁷⁵ Furthermore, there are certain categories for which the possibility of requesting the procedure at Articles 444 and ff. is precluded. In particular, the procedure is not applicable to: habitual offenders, professional offenders and reiterated offenders. The legislator clearly did not want to allow these categories of particular gravity (and non-recoverable offenders) to benefit from a reduced sentence.

¹⁷⁶ More precisely, Article 444, para.1, states that the penalty to be taken into account: ‘...tenuto conto delle circostanze e diminuita fino a un terzo, non supera cinque anni soli o congiunti a pena pecuniaria’. For a more detailed analysis of the ‘*patteggiamento*’, see for instance: CRISTOFANO, L., *I riti alternativi al giudizio penale ordinario*, UTET, Torino, 2005; DE CARO, A. (a cura di), *Patteggiamento allargato e sistema penale*, Giuffrè, Milano, 2004; DI DEDDA, E., *Il consenso delle parti nel processo penale – I riti alternativi al dibattimento dopo la legge 12.6.2003 n.134*, CEDAM, Padova, 2003; FILIPPI, P., *Il patteggiamento*, CEDAM, Padova, 2000; VIGONI, D., *L’applicazione della pena su richiesta delle parti*, Giuffrè, Milano, 2000; PITTARO P., DI CHIARA G., SPANGHER G., *Il patteggiamento*, Giuffrè, Milano, 1999.

¹⁷⁷ MANNOZZI, G., *Razionalità e ‘Giustizia’ nella commisurazione della pena*, CEDAM, Padova, 1996.

Significantly, there is in fact no requirement for an express acceptance of guilt, although it seems that the defendant *implicitly* accepts guilt by requesting a negotiated sentence and renouncing to the right to defence. By virtue of Article 445, para.1*bis*, the penalty is regarded as ‘comparable to a judgement of guilty’, but it does not have the same effects and the same significance as, for instance, it does not entail the payment of trial expenses or the application of accessory penalties or the registration of the sentence in the criminal record of the accused.¹⁷⁸ Moreover, Article 445, para.1*bis*, provides that the sentence pronounced after ‘patteggiamento’ cannot be used in civil or administrative proceedings.

Since there is no formal plea of guilty, under Article 444 it remains possible for the judge to reject the bargain and find the defendant ‘not guilty’. The judge’s powers are limited to accepting or refusing the bargain, whereas s/he cannot modify the penalty requested. Another limitation deriving from the reduction of penalty by up to a third granted by the ‘patteggiamento’ is that no mitigating circumstances can additionally be recognised in order to reduce the penalty further.

Criticism concerning the ‘application of the penalty on request of the parties’ has focused in particular on the unconstitutionality of the procedure with regards to the presumption of innocence that must be guaranteed to any accused (Article 27, Italian Constitution). Many commentators have in fact argued that through ‘patteggiamento’ the accused seems to renounce to the presumption of innocence which, however, is not a ‘disposable’ right.¹⁷⁹ In a significant decision of the Italian Constitutional Court,¹⁸⁰ it

¹⁷⁸ For long time, doctrine and jurisprudence have debated over the nature of the sentence pronounced after a ‘patteggiamento’. Some commentators believed it to be a genuine sentence of condemnation, a verdict of guilt; others believed it is only comparable to a judgement of guilt but of a different nature, and therefore does not lead to findings of responsibility. For more detail, see: FILIPPI, P., *Il patteggiamento*, CEDAM, Padova, 2000, pp.195-197.

¹⁷⁹ The United Sections of the Italian Court of ‘Cassazione’ have solved the problem of the nature of the request for the application of penalty in that they seemed to favour an approach that recognises an implicit admission of guilt by the fact that the accused requests the application of a penalty and renounces opposing the charges sustained by the prosecution. See, Cass., Sez. Un., 27 February 1992, in *Foro Italiano*, 1993, II, c.9. The same approach was, nonetheless, adopted some years before by the Constitutional Court called to pronounce on the nature of the sentence for ‘patteggiamento’ and on the compatibility of Article 444 with the constitutional values protecting the rights of the accused. See: Constitutional Court, Judgement no.313 of 3 July 1990, in *Cassazione Penale*, II, 1990, p.221.

¹⁸⁰ Judgement no.313 of 3 July 1990, *Corte Costituzionale* 35, *Giurisprudenza Costituzionale*, 1990. For extensive commentary on this judgement, see: DOLCINI, E., ‘Razionalità nella commisurazione della pena: un obiettivo ancora attuale? Note a margine dell’art.444 c.p.p.’, *Rivista Italiana di Diritto Processuale Penale*, 1990, pp.797 *et ss.*; FIANDACA, G., ‘Pena patteggiata e principio rieducativo: un arduo compromesso tra logica di parte e controllo giudiziale’, *Foro Italiano*, 1990, I, c.2386 *et ss.*; LOZZI,

was held that provisions at Articles 444-448 CCP may violate the presumption of innocence guaranteed by the Constitution, considering that no provisions existed for judicial review of the bargain in order to ensure a balance between the crime and the negotiated sentence imposed.¹⁸¹ Therefore, the Constitutional Court held that the judge, who is not entitled to change the terms of the agreement presented to the court by the defence and the prosecution, when s/he has doubts about the compatibility of the request under Article 444 with Article 27 of the Italian Constitution, must reject the request and proceed to trial in order to guarantee the maximum respect of the rights of the accused. The judge should act in the same manner also in cases when s/he believes that the requested penalty is not proportionate or adequate to respect the constitutional principle of re-education and re-socialisation of the accused.

On a final note, it should be pointed out that the pre-trial summary procedure available under Article 444 of the Italian Code of Criminal Procedure is not dissimilar to the English *plea before venue procedure*. In that procedure, if the accused pleads guilty before the magistrates' court, the court may then proceed directly to sentence, provided that certain conditions are met.¹⁸² The procedure under US law of the so-called *nolo contendere* has more or less the same effect as the Italian 'application of penalty on request of the parties', in the sense that the sentence resulting from such a procedure cannot be used in civil or administrative proceedings which have the aim of ascertaining the same set of facts.

Concerning 'pure' and spontaneous guilty pleas, they are not explicitly regulated by the Italian Codes of Criminal Law and Criminal Procedure, although the possibility of confessing is naturally available to the accused and may, for instance, entail the special abbreviated procedure regulated at Articles 449-452 of the Code of Criminal Procedure (the so-called *giudizio direttissimo*). Furthermore, Article 374 CCP regulates the case where the accused decides to spontaneously present him/herself to the authorities and to confess, but no mandatory reduction of penalty is provided for.¹⁸³

G., 'La legittimità costituzionale del c.d. patteggiamento', *Rivista Italiana di Diritto Processuale Penale*, 1990, pp.1600 *et ss.*

¹⁸¹ It should be noted that, according to Law no.134 of 12 June 2003, a judicial revision of the sentence that imposes the requested penalty is currently possible.

¹⁸² See FINDLAY M., HENHAM R., *Transforming International Criminal Justice*, Willan Publishing, 2005, p.184.

¹⁸³ It should be recalled, however, that appreciation of a confession by the accused can be considered a 'general' mitigating factor under Article 62*bis* ('Attenuanti Generiche') of the Criminal Code, and that

Spain

There are some similarities between the Italian system of ‘patteggiamento’ and the Spanish model of ‘conformidad’, a particular procedure introduced by *Ley Organica 7/1988* of 28 December 1988.

The procedure of ‘conformidad’ finds ample application, as it is permitted for crimes punished with penalties of imprisonment up to six years, and provides the accused and the prosecution an opportunity to request – before evidence is presented during the trial – a *sentencia de conformidad*, i.e. validation by the judge of the penalty agreed by the two parties and indicated in the indictment (Article 787, *Ley de Enjuiciamiento Criminal* (LECrIm)). After having verified that the penalty applicable does not exceed 6 years imprisonment and that the consent of the accused was given freely and with full awareness of its legal consequences, the judge can pronounce a sentence of ‘strict conformity’ to the penalty accepted by the parties, thus validating it (Article 787, para.2). The judge also has the power, where s/he finds the legal qualification of the offence is incorrect or that the penalty agreed upon is not appropriate, to ask the parties for modifications and, if such modifications are accepted and entered into, to ask the accused to give again his/her consent (*conformidad*) (Article 787, para.3).¹⁸⁴

As in the ‘patteggiamento’ procedure seen above, the procedure for ‘conformidad’ does not imply a guilty plea by the accused, who seems only to give his/her consent to the charges and to the consequent application of the penalty requested.

In some ways similar to a guilty plea, the ‘confession’ of the accused before the beginning of judicial proceedings is provided for by Article 688 LECrim, which specifies that the judge must ask the accused whether s/he pleads guilty or not guilty. Article 21 of the Spanish Criminal Code recognises ‘confession’ as one of those circumstances entailing mitigation of the final sentence. A confession does not imply a different procedure, as happens in common law systems, therefore trial proceedings follow their due course, although an abbreviated one; the only entitlement that a confession of culpability generates for the accused is a discounted penalty. Doctrine and

repentance through reparation and restitution offered to the victim(s) of the offence is considered to mitigate the punishment according to Article 62, n.6, (‘Circostanze Attenuanti Comuni’), Criminal Code.

¹⁸⁴ To read more about these procedures, see: VIGONI, D., *L’applicazione della pena su richiesta delle parti*, Giuffrè, Milano, 2000, pp.34-41.

jurisprudence are unanimous in recognising that the confession must be true, real, voluntary and sincere.¹⁸⁵

Another recent law (Ley 38/2002) of 28 October 2002 has introduced modifications to the so-called *procedimiento abreviado*, now regulated by Articles 757-768 LECrim. This is a special abbreviated procedure (alternative to that for *conformidad*), provided for crimes punishable with imprisonment for no more than 9 years, which does not imply an admission of guilt by the accused.

England and Wales

The English system of criminal justice depends to a large extent on the efficiency and economies that derive from the practice of guilty pleas and plea bargaining, especially as such practice avoids seriously over-loading courts at all levels.

The accused may plead guilty to the charge(s) in the indictment at any time. A plea of guilty must be unequivocal and must be made freely, without any pressure from counsel or court, and in the knowledge and understanding of the elements of the offence.¹⁸⁶ The decision whether to accept a guilty plea or not is primarily one for the prosecuting counsel, although the final approval of the judge is necessary as well. Once the plea of guilty is accepted, there are no further trial proceedings. In fact, individual responsibility of the accused is proved and there is no need for admission and acquisition of further evidence; the judge no longer has the opportunity to hear evidence. A plea of guilty is considered as one of the highest forms of proof and leads to a sentence that is equivalent to a conviction entered after trial. It is necessary, however, to ascertain the spontaneity and the quality of the plea of the accused, which must be freely made, genuine, and not influenced by any external agent. If the guilty plea is genuine and unambiguous, then it may entail a reduction of the length of the sentence up to 30 per cent of the original penalty. The incentive for the accused to plead guilty is therefore the fact that, according to a well-established practice, guilty pleas attract a 'discounted' sentence, certainly lower than that applicable for the same offence,

¹⁸⁵ See for instance, judgements of 15 March 1989 (RJ 1989, 2634), of 30 May 1990 (RJ 1990, 4595), and of 8 November 1994 (RJ 1994, 8796). See also: MUÑOZ CUESTA J., ARROYO DE LAS HERAS A., *Las Circunstancias Atenuantes en el Código Penal de 1995*, Editorial Aranzadi, 1997, p.66.

¹⁸⁶ These, amongst others, are some of the so-called 'Turner Rules' derived from the first case in which English courts had to deal with the problems posed by guilty pleas and plea bargaining: *R v. Turner*, (1970) 2 QB 321.

after a regular conviction by the court.¹⁸⁷ The circumstances under which the plea is entered are important, and the stage at which the decision of entering a plea is taken is particularly relevant, as an early plea saves courts more time and effort than a later one.¹⁸⁸

Concerning the weight to give to the guilty plea of the accused, the Criminal Justice Act 2003 (at s. 144), which replaced Section 152 of the Powers of Criminal Courts (Sentencing) (PCC(S)) Act 2000, now provides that:

- (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence before that or another court, a court must take into account:
- (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and
 - (b) the circumstances in which this indication was given.

The amount of the discount is therefore not precisely stated, however some indications are given and recent sentencing guidelines are rather precise on the issue of guilty pleas and the discount entailed.¹⁸⁹ Cases in which a guilty plea would have no effect at all are those where the sentence is fixed by law, thus leaving no space for judicial discretion (for instance, in cases of murder).

With regard to *sentencing bargaining* (negotiations between judge and counsel on reductions in sentence as consequence of a guilty plea), it is not explicitly admitted by law, although it has become an endemic and well-established phenomenon in England. There are, in fact, informal ways in which bargains can be conducted within the English system. Discussions frequently take place between the prosecution and the defence in relation to the charge(s) brought against the accused. The accused may negotiate as regards the different counts/charges contained in the indictment, in which case the judge

¹⁸⁷ See DELMAS-MARTY M., CHIAVARIO M., *Procedure Penali d'Europa*, Cedam, Padova, 2001, pp.254-256; VAN DEN WYNGAERT, C., *Criminal Procedure Systems in the European Community*, Butterworths, 1993, p.92.

¹⁸⁸ See WALKER N., PADFIELD N., *Sentencing – Theory, Law and Practice*, 2nd edition, Butterworths, London, 1996, p.43.

¹⁸⁹ See for instance, Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Guidelines*, 16 December 2004. For more details on sentence discount rates for guilty pleas, see ASHWORTH A., REDMAYNE M., *The Criminal Process*, Oxford University Press, 2005, pp.275-277. It should be noted, in any case, that there have been past cases in which, notwithstanding the guilty plea entered by the accused, he was then condemned to life imprisonment. See *Case C.R. v. Scott* (1981), 3 Cr App R(S) 334, where the accused pleaded guilty to two offences of arson with the motive of killing his wife. He was aged 26, with no previous convictions, and suffering from schizophrenia. In another case: *Case E.R. v. Wilkinson* (1983) 5 Cr.App. R(S) 105, the accused pleaded guilty to four acts of robbery and seven burglaries. The accused had a very long record of dishonesty and violence, and a difficult family background. The Crown Court imposed life imprisonment. For more detail see, EMMINS, J. C., *A Practical Approach to Sentencing*, Financial Training, London, 1985, p.136.

is usually asked to express his/her view as to the suitability of the arrangement achieved. The term ‘charge bargaining’ also indicates the case in which the prosecution agrees to drop a serious charge in exchange for a plea of guilty to a less serious charge.¹⁹⁰

United States of America

Guilty pleas have become a crucial factor in the administration of justice in the United States, especially if considering that almost ninety per cent of all criminal prosecutions result in guilty pleas.¹⁹¹

Pleas, in general, are regulated by Rule 11 of the US Federal Rules of Criminal Procedure (FRCP). Where the accused decides to enter a plea of guilty, two types are foreseen: the normal, genuine plea, and the ‘negotiated plea’ whereby the accused enters a plea of guilty in return for some concessions (drop of charges, reduction in the sentence, etc.). The ‘genuine’ plea of guilty does not raise particular problems; it is a formal admission of guilt before the court and in the normality of cases is followed by a verdict of guilt.¹⁹² The defendant may plead guilty to any offence; the court cannot refuse it even in capital cases. The defendant’s guilty plea may provide some evidence of acceptance of responsibility, but does not automatically entitle the defendant to a sentencing adjustment.¹⁹³ The document proving the guilty plea is written in the form of an agreement between the prosecutor and the defence which must be approved by the

¹⁹⁰ For more detail: MC CONVILLE M., WILSON G., *The Handbook of the Criminal Justice Process*, Oxford University Press, 2002, p.353 ff. See also: ASHWORTH A., REDMAYNE M., *The Criminal Process*, Oxford University Press, 2005, pp.269-292, where Ashworth comments, in relation to the practice of sentence discount in English courts and to the significant amount of the discount (often one-third of the total sentence), that the mechanism supports a number of perverse incentives that are likely to distort ‘both the pursuit of truth and the protection of rights’ and that, in particular, would be against some of the fundamental rights recognised by the European Convention on Human Rights: the presumption of innocence, the privilege against self-incrimination, the right to equal treatment and the right to a fair and public hearing. He suggests a fairer system consisting of a smaller reduction of no more than a 10 per cent of the total penalty.

¹⁹¹ On guilty pleas and plea bargaining in the US, see for instance: AMODIO E., BASSIOUNI M. CHERIF, *Il processo penale negli Stati Uniti d’America*, Giuffrè Editore, Milano, 1988, pp.131-177; MC DONALD W., CRAMER J., *Plea Bargaining*, Lexington Books, D.C. Heath and Company, 1980; MILLER HERBERT S., MC DONALD WILLIAM F., *Plea Bargaining in the United States*, National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, 1978.

¹⁹² However, there is also the possibility that the accused withdraws the plea before the sentence is pronounced, or that the court, in its discretion, refuses the guilty plea. See HAINES ROGER W., BOWMAN FRANK O., *Federal Sentencing Guidelines Handbook*, West Group, Thomson, 2004, pp.1220-1223.

¹⁹³ In some cases, Courts denied reduction even though the accused pleaded guilty because the defendant did not express remorse. See *U.S. v. Castillo-Garcia*, 205 F.3d 887 (6th Circ. 2000). On the other hand, Courts generally grant reduction where the guilty plea shows acceptance of responsibility.

judge. In general, the role of the judge is limited to a verification of the awareness of the accused, the voluntary nature of the plea, and the factual basis justifying the plea. This is then followed immediately by the sentencing phase, with no need to proceed to the presentation and discussion of evidence.

According to the US Guidelines, the acceptance of responsibility by the accused (by timely notification to the authorities of the intention to enter a plea of guilt) is applicable to all the offences and may lead to a downward adjustment of the offence level, which may be reduced by two or three levels (USSG §3E1.1).

A bargained plea, on the other hand, involves some arrangements between the prosecutor and the defence whereby the prosecutor agrees to make some concession and, in return, the defendant agrees to enter a mutually acceptable guilty plea. Initially used only unofficially, the practice of plea bargaining has subsequently become entirely legal (Rule 11, FRCP) and broadly recognised by courts for its importance and relevance.¹⁹⁴

Two forms of plea bargaining are generally identifiable: charge bargaining and sentencing bargaining. The former is a bargain which leads to modifications of the charges which are normally reduced vis-à-vis the original charges in exchange for the guilty plea of the accused to some of them;¹⁹⁵ the latter is a bargain whereby the defendant and the prosecution (or judge) agree upon the imposition of a lighter sentence than that normally applicable.¹⁹⁶

¹⁹⁴ For instance, during the '70s, in the well-known case of *Santobello*, when plea bargaining was for the first time recognised and admitted before American courts, the Supreme Court thus affirmed: '...the disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining", is an essential component of the administration of justice; properly administered, it is to be encouraged'; and: '...plea bargaining is not only an essential part of the criminal process but a highly desirable part for the reasons that (1) it leads to prompt and largely final disposition of most criminal cases, (2) it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial, ... (4) by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned...' (cf., *Santobello v. New York*, 404 United States Supreme Court Reports (U.S.), at 257, 1971).

¹⁹⁵ The Federal Sentencing Guidelines (§6B.1.2.(a)) provide that, in the case of a plea agreement that includes 'charge bargaining' (dismissal of any charges or an agreement not to pursue other potential charges), the court may accept the agreement only if it determines that the remaining charges adequately reflect the seriousness of the offence behaviour and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.

¹⁹⁶ The Federal Sentencing Guidelines (§6B1.2.(b)) state that, in case of sentence bargaining, the court may accept the specific sentence agreement offered by the parties only when certain conditions are present such as: the agreed sentence is within the applicable guideline range; or the agreed sentence departs from the applicable guideline range for justifiable reasons.

Another alternative solution to trial is the so-called procedure for *nolo contendere* (or ‘no contest’), allowed for non-capital offences, whereby the accused accepts the penalty without entering recognition of guilt. It is considered an advantageous procedure for the defendant who is in this way not considered ‘responsible’ for the offence(s); in fact, the judge is not even required to verify the factual basis of the crime (however, s/he can refuse to accept the *nolo contendere* when s/he deems the penalty too lenient); moreover, the sentence resulting from this procedure cannot be used in other criminal or civil proceedings. This plea is expressly included in Rule 11 of the Federal Rules of Criminal Procedure, which also specifies that the accused may plead guilty or not guilty.

2.9 International crimes in the national legal systems considered

National prosecution of international crimes must be regarded as fundamental to the system of international criminal justice, especially in the perspective of the complementarity regime promoted by the ICC, which assigns to national criminal jurisdictions the primary responsibility for the enforcement of the prohibition of genocide, crimes against humanity and war crimes.¹⁹⁷ This regime certainly constitutes an incentive to national implementation of norms permitting prosecution and punishment of international crimes. In order to be able to bring perpetrators of international crimes before justice, States must in fact provide for legal norms authorizing their national courts to prosecute and punish the alleged offenders, although in some rare instances international treaties exist that provide for grounds of jurisdiction over international crimes.¹⁹⁸

Generally speaking, there are two ways of enacting a rule of international law in the domestic sphere. National States can either directly incorporate international rules, or transform those rules into national laws that mirror the contents of international

¹⁹⁷ On the issue of complementarity and national jurisdictions, see for instance: KLEFFNER, JANN K., ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, *Journal of International Criminal Justice*, 1 (2003), pp.86-113; BROWN, BARTRAM S., ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, *Yale Journal of International Law*, vol.23 (1998), pp.383-436.

¹⁹⁸ It is opportune to specify that principles justifying assertion of national jurisdiction on international crimes as well as the duty or discretion to prosecute them according to the national systems under study, will not be analysed herein as exceeding the scope of the comparative sentencing analysis.

provisions.¹⁹⁹ On the basis of national laws, international crimes can be prosecuted either as ordinary crimes (like murder or other serious offences) or as specific crimes of an international character.

Recently, international crimes have been prosecuted under special national legislations such as those enacted in the UK, France, Belgium, and Germany. Especially after the establishment of the ad hoc Tribunals, national courts have started resorting to the system of the 1949 Geneva Conventions, which allows for universal jurisdiction of any State party over the grave breaches prescribed by the Conventions. For instance, German and French courts have thus recently prosecuted and tried individual perpetrators of grave breaches of the Geneva Conventions in the territory of the former Yugoslavia.²⁰⁰ With regard to crimes against humanity, French courts have tried some individuals responsible for such crimes committed during the Second World War (the *Barbie*, *Papon* and *Touvier* cases).²⁰¹

However, many national systems are still incomplete in their laws²⁰² as they do not provide for the complete range of international crimes, leaving for instance the

¹⁹⁹ For an in-depth analysis of the application of international criminal law by domestic systems, see FERDINANDUSSE, WARD N., *Direct Application of International Criminal Law in National Courts*, TMC Asser Press, The Hague, 2006.

²⁰⁰ In Germany, the *Djajic*, the *Jorgic* and *Sokolovic* cases; in France the *Javor* and the *Munyeshayka* cases. See CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, pp.295-297. For more details on the German cases, see: AMBOS K, WIRTH S., 'Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts', in FISHER H., KRESS C., (eds), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.769-797.

²⁰¹ France, Court of Cassation, *Barbie* (No.3), 3 June 1988, Bull.crim. no.246; and France, Court of Cassation, *Barbie* (No.1), 6 October 1983, Bull.crim. no.239; France, Court of Cassation, *Papon*, 23 January 1997, Bull.crim. no.32; France, Court of Cassation, *Touvier*, 1 June 1995, Bull.crim. no.202.

²⁰² This is the case of Italy, whose criminal code does not provide for international crimes as such, and where laws meant to fully implement the obligations stemming from the ratification of the Rome Statute of the ICC are still drafts (as of 31 December 2007). See FRONZA, E., 'Italia', in AMBOS, KAI, (ed.) *Cooperacion y Asistencia Judicial con la Corte Penal Internacional – Contribuciones de America Latina, Alemania, Espana e Italia*, Göttingen: Georg-August-Universität: Konrad-Adenauer-Stiftung, 2007, pp.351-353; ROSCINI, M., 'Great Expectations: the Implementation of the Rome Statute in Italy', *Journal of International Criminal Justice*, vol.5, issue 2 (2007), pp.493-512. See also: ZAPPALÁ, S., 'Droit italien', in CASSESE A., DELMAS-MARTY M., *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 2002, pp.193-215. The Italian Criminal Military Code for War Time of 1941 (with modifications introduced in 2002 and 2003) is still the only legislation containing reference to war crimes. For more details on the issue of war crimes under Italian legislation, see: GAETA, P., 'War Crimes Trials Before Italian Criminal Courts: New Trends', in FISHER H., KRESS C., (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.751-768. While crimes against humanity are not regulated as such, the crime of genocide is punished by Law no.962 of 9 October 1967, which provides for various ranges of the penalty of imprisonment depending on the genocidal acts.

punishment of crimes against humanity to general or ordinary laws.²⁰³ Of the countries included in this comparative analysis, Germany, Spain and England have recently enacted specific legislation for the punishment of international crimes.

Many issues arise from the interplay between national and international criminal law. Besides the problem that national laws very often are lacking with regard to the inclusion of international crimes, on other occasions – although regulated – they are not in full accordance with international law, diverging from it as to the formulation of those crimes. These problems, and in particular the issue of the different definition of international crimes by national laws will not be dealt with here as it falls outside the scope of the present analysis; attention will therefore be paid only to the sentencing aspects of the national criminalisation of international crimes, with the aim of identifying, where these exists, relevant national norms providing for international crimes and the type and quantum of penalties associated with them.

France

In France, international crimes were subject to prosecution and punishment as ordinary crimes since the aftermath of World War II.²⁰⁴

Currently, the first crimes listed in the 1994 French Penal Code (*Livre Deuxième – Des Crimes et Délits contre les Personnes*) at Articles 211-1 / 212-2 are genocide,

²⁰³ Cf. SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, Edition Iuscrim, Freiburg im Breisgau, 2004, p.90, note 65. See also, more generally on the problems created by the national implementation of ICC provisions: BACIO TERRACINO, J., 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', *Journal of International Criminal Justice*, vol.5, issue 2, 2007, pp.421-440.

²⁰⁴ Cf. Court of Cassation, *Touvier (No.1)*, 6 February 1975, Bull.crim. no.42, where the Court accepted that crimes against humanity were offences that could be heard by ordinary courts: « Crimes contre l'humanité ... sont des crimes de droit commun commis dans certaines circonstances et pour certains motifs précisés dans le texte qui les définit ». Paul Tauvier, who was the chief of the Militia for the Lyonnaise region during the German occupation of France, was convicted on 20 April 1994 for complicity in crimes against humanity for having assassinated 7 Jewish hostages during WW II, and was sentenced to life imprisonment. The other trials against *Barbie* and *Papon* have already been recalled. It will suffice here to say that *Klaus Barbie*, a German Nazi who had worked in Lyon during the French occupation, was convicted and sentenced to life imprisonment on 4 July 1987 for crimes against humanity for having, as Gestapo chief in Lyon during WW II, arrested and deported Jews to the concentration camp Auschwitz-Birkenau. *Maurice Papon*, who had been during the Second World War the secretary general of the prefecture of Gironde under the Vichy government, was convicted on 2 April 1998 for complicity in crimes against humanity for having permitted deportation of Jews to Nazi-concentration camps during WW II. He was sentenced to 10 years of imprisonment, given that it was recognised that he played a secondary role in the illegal arrests, detentions and deportations of July, August and October 1942, and January 1944.

crimes against humanity, and war crimes.²⁰⁵ Such crimes were introduced for the first time into the French Criminal Code in 1994, with the condition that crimes of that type committed before 1 March 1994 remained subject to the law existing prior to the codification.²⁰⁶

The definition of genocide is now contained in Article 211-1, inspired by Article 2 of the 1948 UN Convention on Genocide; ‘other crimes against humanity’ are regulated in Article 212-1, inspired by Article 6(c) of the Nuremberg Statute; finally, Article 212-2 refers to the same type of crimes but when committed in times of war.

The penalty provided for genocide, crimes against humanity, and war crimes is life imprisonment, whether they result in death or not. No mandatory discount or clemency is provided for in the case of a guilty plea by the accused.²⁰⁷

Germany

On 30 June 2002, the Federal Republic of Germany introduced the ‘Code of Crimes against International Law’ (*Völkerstrafgesetzbuch*, VStGB), which codifies genocide, crimes against humanity and war crimes. Until the introduction of this Code the only international crime that could be prosecuted in Germany was genocide, which was inserted in the German Criminal Code after the ratification of the Genocide Convention.²⁰⁸ Crimes against humanity and war crimes became subject to prosecution and trial only after the entry into force of the German Code of International Crimes.²⁰⁹

²⁰⁵ To read more on the relation between the French legal system and international crimes, see for instance: BENILLOUCHE, M., ‘Droit Français’, in CASSESE A., DELMAS-MARTY M., *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 2002, pp.159-191.

²⁰⁶ In order to convict for those offences, national courts were, in the past, relying on a range of international texts, in particular the Statute of the International Military Tribunal of Nuremberg (Article 6). Moreover, Act no.64-1326 of 26 December 1964 introduced into French law the inapplicability of the limitation period (*‘constate l’imprescriptibilité’*) to crimes against humanity.

²⁰⁷ See SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.2: Country Reports, *France*, Edition Iuscrim, Freiburg im Breisgau, 2004.

²⁰⁸ See Section 220a of the German Criminal Code. For more details about the new German International Criminal Code: WERLE G., JESSBERGER F., ‘International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law’, *Criminal Law Forum*, 13 (2002), pp.191-223; SATZGER, H., ‘German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law’, *International Criminal Law Review*, 2 (2002), pp.261-282; WIRTH, S., *International Criminal Law in Germany Case-Law and Legislation*, Presentation to the Conference *Combating International Crimes Domestically* (3rd Annual War Crimes Conference, Ottawa, 22-23 April 2002) hosted by the Canadian Department of Justice.

²⁰⁹ In truth, war crimes were punishable as ‘ordinary crimes’ when consisting for example of murder, manslaughter, bodily injury or coercion, that is every time the underlying offence constituting a war crime was punishable under the German Code. For more details concerning the punishment of international crimes before German courts before 2002, see: AMBOS K, WIRTH S., ‘Genocide and War Crimes in the

At the very beginning of this Code is an interesting general clause (§2) which declares that all general principles and rules of criminal law established by the German Penal Code are applicable to international crimes regulated by the Code of International Crimes (VStGB), unless it contains a *lex specialis* provision under sections 1 (scope of application), 3 (acting upon orders), 4 (superior responsibility of military and civilians) and 5 (statute of limitations).

Section 6 of the 2002 VStGB criminalises genocide and imposes the penalty of life imprisonment, which is to be considered mandatory for genocide resulting in death (para.1 n.1), whereas it can be reduced for other cases of a less serious nature (para.1, nn.2-5), although the minimum punishment cannot be inferior to 5 years (para.2).

The subsequent §7 VStGB contains the discipline for crimes against humanity; the penalty to be imposed changes depending on the underlying crime: murder and imposition of conditions leading to the destruction of a population are punished with life imprisonment; traffic in human beings, forcible transfer, torture, rape and sexual abuses, and enforced disappearance are punished with imprisonment for no less than 5 years; physical and mental harm, deprivation of physical liberty and restriction of rights as persecutory policy towards a certain group are punished with imprisonment for no less than 3 years. Other specific cases (and appropriate ranges) for a less serious hypothesis of the crimes indicated are contained in paragraphs 2-5 of §7.

When life imprisonment (or other maximum penalties) is not provided for, the maximum penalty thus remains the standard 15 years of imprisonment established by the German Criminal Code while, as seen already, minimum penalties are specifically indicated for each offence.

Provisions concerning war crimes are very detailed and organised in different categories.²¹⁰ The highest penalty provided for is imprisonment for life in cases of murder or death intentionally caused (§12, para.2) as a war crime. Other offences constituting war crimes are punished with different ranges with minimums between one

Former Yugoslavia Before German Court', in FISHER H., KRESS C., (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.769-797. See also, on the relation between the German legal system and international crimes: ROTH R., JEANNERET Y., 'Droit allemand', in CASSESE A., DELMAS-MARTY M., *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 2002, pp.7-29.

²¹⁰ §8 'War Crimes Against Persons' - §9 'War Crimes Against Property and Other Rights' - §10 'War Crimes Against Humanitarian Operations and Emblems' - §11 'War Crimes Consisting of the Use of Prohibited Methods of Warfare' - §12 'War Crimes Consisting of Employment of Prohibited Means of Warfare'.

year and 5 years (whereas the maximum penalty is always 15 years, when no other maximum limit is established, such as the maximum of 10 years imprisonment in §9 for crimes involving property).

The German Code of Crimes against International Law also contains specific provisions regarding the punishment of commanders and superiors (§4, para.1). It establishes that a military commander or a civilian superior who omits to prevent subordinates from committing an international crime shall be punished with the same penalty provided for the perpetrator. Section 13 VStGB punishes violations of the duty of supervision by military commanders or civilian superiors with imprisonment for not more than 5 years for intentional violations of duty, and with imprisonment for not more than 3 years for negligent violations. In addition, §14 VStGB criminalises the omission to report a crime by commanders or superiors, and punishes it with imprisonment for not more than 5 years.

As observed above, in the case of crimes committed on the territory of the Former Yugoslavia several countries have exercised their criminal jurisdiction. One of these countries is Germany, where over 100 preliminary investigations have been initiated since 1993. Most of these investigations were subsequently dropped, but five cases went to trial and resulted in four convictions²¹¹ [Novislav Djajic, sentenced to 5 years imprisonment for aiding and abetting murder as a war crime;²¹² Nicola Jorgic, found guilty of genocide and sentenced to life imprisonment;²¹³ Maksim Sokolovic, sentenced to 9 years for aiding and abetting genocide and war crimes and for committing war crimes (murder);²¹⁴ Diuradi Kuslic, convicted of genocide and war crimes (murder), and sentenced to life imprisonment, for participating in ‘ethnic cleansing’ actions against Muslims in the summer of 1992 as the commander of a police station in Bosnia²¹⁵].

²¹¹ See for more details: SIEBER, U., *The Punishment of Serious Crimes, cit.*, vol.I, pp.123-125.

²¹² Bavarian Higher Regional Court, BayObLG, Judgement, 23 May 1997, 3 St 20/06, NJW 1998, 392-395, also reported by Safferling, International Decision: *Public Prosecutor v. Djajic*, 92 AJIL (1998), 528-532. See SIEBER, U., *The Punishment of Serious Crimes, cit.*, vol.I, p.125.

²¹³ Higher Regional Court of Düsseldorf, OLG Düsseldorf, Judgement, 26 September 1997, 2 StE 8/96. The decision, the first to concern a conviction for genocide in Germany, was then confirmed by both the BGH (BGH, Judgement, 30 March 1999, 3StR 215/98, NStZ 1999, 396-404) and the German Constitutional Court (BVerfG, Decision, 12 December 2000, 2 BvR 1290/99, NJW 2001, 1848-1853).

²¹⁴ OLG Düsseldorf, Judgement, 29 November 1999, 2 StE 6/97.

²¹⁵ BayObLG, Judgement, 15 December 1999, 6 St 1/99.

Spain

While genocide²¹⁶ and war crimes were already criminalised in the Spanish legal system, only recently has the Penal Code been complemented by a provision which also renders crimes against humanity a distinct punishable offence under Spanish domestic law. Originally not mentioned in the Spanish Penal Code, crimes against humanity were inserted as Article 607*bis* by virtue of Organic Law 15/2003 of 25 November 2003, which entered into force on 1 October 2004.²¹⁷

The Spanish *Código Penal* now contains a complete criminalisation of international crimes.²¹⁸ For the crime of genocide, Article 607 provides for different ranges of penalties depending on the underlying crime and on the different modalities in the commission of genocide: for instance, when murder is committed the penalty ranges from 15 to 20 years imprisonment (which is a higher penalty than that prescribed for murder: imprisonment from 10 to 15 years), but is increased to 20 and 30 years when two or more aggravating circumstances are present (this would correspond to ‘aggravated murder’ which is punished as an ordinary crime with a lighter penalty ranging from 15 to 20 or from 20 to 25 years of imprisonment); if genocide is committed through sexual aggression the penalty is imprisonment from 15 to 20 years; in cases of forced displacement, genocide is punished with imprisonment from 8 to 15

²¹⁶ The crime of genocide was introduced for the first time in the Spanish legal system by Law no.44 of 15 November 1971, following the ratification by Spain of the UN Convention for the Prevention and Suppression of the Crime of Genocide of 1949. In its original version, genocide was criminalised by Article 137*bis* of the former Criminal Code; it was then included in Article 607 of the 1995 Criminal Code.

²¹⁷ The *Audiencia Nacional* judgement 16/2005 in the *Scilingo case* (dated 19 April 2005) constitutes the first conviction in Spain for crimes against humanity reached through the application of the new Article 607*bis* introduced by the LO 15/2003. Scilingo was sentenced to 640 years’ imprisonment for the perpetration of crimes against humanity. The sentence was achieved by the addition of the penalties corresponding to each conviction, that is by the sum of 32 crimes against humanity.

²¹⁸ It should be specified, however, that Art.23(4) of the Spanish Organic Law of the Judicial Power of 1985 (*Ley Organica del Poder Judicial* 6/1985, 1 July 1985) already established universal jurisdiction of Spanish Courts over international crimes. For a more detailed reading on international crimes in the Spanish system, see for instance: GIL GIL, ALICIA, ‘Bases para la persecución penal de crímenes internacionales en España’, in ESER, SIEBER, KREICKER (eds.), *National Prosecution of International Crimes*, vol.5, Duncker & Humblot Humblodt, Berlin, 2005, pp.100-223, which also contains useful tables of comparison between all the underlying offences of the international crimes as defined in the Rome Statute and the correspondent crimes, penalties and legal provisions applicable under Spanish law (pp.211-218); AMBOS K., MALARINO E., *Persecución Penal Nacional de Crímenes Internacionales en América Latina y España*, Konrad-Adenauer-Stiftung, 2003; BUCK, V., ‘Droit espagnol’, in CASSESE A., DELMAS-MARTY M., *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 2002, pp.121-158.

years; if personal damages/injuries are procured, the penalty is from 4 to 8 years imprisonment.²¹⁹

The same principle is applied by Article 607*bis* to crimes against humanity, thus the maximum penalty provided for is imprisonment from 15 to 20 years when murder is committed as a crime against humanity, and other different ranges (the lowest being from 4 to 8 years of imprisonment) are indicated for the commission of other offences as crimes against humanity.²²⁰

Finally, war crimes (both against individuals and objects) are regulated in detail by Articles 608-614 and are punished with several different ranges of penalties depending on the protected juridical value. The maximum penalty applicable for war crimes is imprisonment for 15 years, while other ranges are specified for different types of underlying war crime offences.

In addition, a number of interesting ‘disposiciones comunes’ are applied to genocide, crimes against humanity and war crimes as enshrined in the Spanish Criminal Code.²²¹ Of particular significance amongst these for the purpose of this analysis is the provision at Article 615*bis* which refers to military commander or other superiors and renders their omission in preventing crimes by the forces under their control punishable with the same penalty provided for perpetrators;²²² on the other hand, for the fact of having failed to punish the commission of crimes by subordinates, the penalty applicable to military commanders and other superiors shall be reduced compared to that prescribed for the perpetrators.²²³

England and Wales

In the English legal system, international crimes have recently been defined by the International Criminal Court Act 2001 (ICC Act 2001), which entered into force on 1 September 2001 and had the aim of giving effect to the Statute of the ICC and of filling

²¹⁹ See Article 607, Spanish Criminal Code, for a more complete distinction of all the underlying offences constituting genocide.

²²⁰ For more detail see Article 607*bis*, Spanish Criminal Code.

²²¹ Articles 615-616*bis*, Spanish Criminal Code. For instance, Article 616 provides for the penalty of total disqualification from public offices for 10 to 20 years for perpetrators of international crimes.

²²² See paragraphs 1 and 4 of Article 615*bis*.

²²³ See paragraphs 3 and 5 of Article 615*bis*.

eventual gaps in British criminal law concerning international crimes. In fact, prior to this act, the domestic legislation covering international crimes was fragmentary.²²⁴

The offences of genocide, crimes against humanity and war crimes are enshrined in Part 5 of the Act (ss.50-74) by reference to the definitions contained in the ICC Statute. The maximum sentence provided for is 30 years imprisonment,²²⁵ unless the offence involves the commission of murder, in which case the situation is regulated as an offence of murder under English criminal law, therefore attracting a mandatory life sentence (the penalty provided for the domestic offence of murder).²²⁶

Section 53, which refers to penalties for war crimes and crimes against humanity, seems to recognise in this field the so called 'same interest approach' in penalties. This means that, as Section 53(5) and (6) seems to support, the offence of murder or any other offence common to crimes against humanity and war crimes will attract the same level of penalties. The approach, in fact, favours consideration of the underlying offences rather than the categorization under one heading or the other (i.e. classification of the offence either as a crime against humanity or as a war crime). In other words, the element which acquires more importance under this approach is the offence itself and not its qualification.

Section 65 of the ICC Act 2001 is related to the responsibility of commanders and other superiors and establishes their liability for crimes committed by forces under their control and authority when those crimes are the result of a failure to exercise proper control. It is interesting to note paragraph 4 of the provision, as it establishes that a

²²⁴ Genocide and grave breaches of the Geneva Conventions and Additional Protocol I were already crimes under UK law: Genocide Act 1969, Geneva Conventions Act 1957 (as amended in 1995), War Crimes Act 1991. SIEBER, *cit.*, vol.2, England/Wales, p.17. See also: CRYER R., BEKOU O., 'International Crimes and ICC Cooperation in England and Wales', *Journal of International Criminal Justice*, vol.5, issue 2, 2007, pp.441-459, at 442-443; JONES, J.R.W.D., 'Droit anglais', in CASSESE A., DELMAS-MARTY M., *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 2002, pp.31-67; TURNS, D., 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom', *Journal of Armed Conflict Law*, no.4 (1999), pp.1-40. One of the few English cases dealing with international crimes is the *Sawoniuk* case, in 1999, where the accused was sentenced to life imprisonment for the murder of two civilians, considered a violation of the laws and customs of war under the War Crimes Act 1991. The sentence was then upheld on appeal one year later (*R. v. Sawoniuk*, Court of Appeal (Criminal Division), 10 February 2000, in [2000] 2 *Criminal Appeal Reports* 220).

²²⁵ Section 53(6), ICC Act 2001.

²²⁶ Section 53(5), ICC Act 2001. Before the enacting of the ICC Act 2001, under the Genocide Act of 1969 (Chapter 12, §1) genocide was punished with life imprisonment when resulting in death, or with no more than 14 years of imprisonment when not resulting in death, for conspiracy, and for attempt to commit genocide.

person responsible for an offence under section 65 is regarded as aiding, abetting, counselling or procuring the commission of the offence.

United States of America

The US system provides for domestic offences comparable to those of genocide and war crimes included in Articles 6 and 8 of the Rome Statute. In fact, in recent years, the Congress has enacted legislation prohibiting torture (in 1994), war crimes (in 1996), and genocide (in 1998), while no references exist so far to crimes against humanity.

As a general rule, a person cannot be tried in the federal courts for offences that violate international law, unless the Congress has adopted a Statute to define and punish the offence. Therefore, the lack of a federal statute corresponding to some offences enshrined in the Rome Statute of the ICC could make it difficult to find an appropriate federal offence under which to charge the fact/international crime which occurred, and might even – in some cases – result in non-prosecution.²²⁷

Punishment prescribed by the US Codes is, in general, harsher than that envisioned by the Rome Statute or by the ad hoc Tribunals for the former Yugoslavia and Rwanda. Firstly, in the United States the death penalty is both imposed and utilized; secondly, persons can be sentenced to life imprisonment without any possibility of parole (18 USC §3594), and very long-term imprisonment is frequently imposed.

The United States ratified the 1948 Genocide Convention in 1986 and subsequently enacted the implementing legislation in November 1988, when the Congress passed the *Genocide Convention Implementation Act*, also known as ‘Proxmire Act’. With regard to the legal consequences attached to crimes, genocide is punished (18 USC §1091b) by the death penalty or life imprisonment (and a fine of not more than \$1,000,000, or both), where death results from criminal acts; in other cases punishment is imprisonment for no more than twenty years (or a fine of not more than \$1,000,000, or both). Incitement to kill members of a particular group can be punished by a \$ 500,000 fine, imprisonment for no more than 5 years, or both (18 U.S.C. §1091c).

²²⁷ SILVERMAN, E., ‘Prosecution of International Crimes in the United States of America’, in ESER, SIEBER, KREICKER (eds.), *National Prosecution of International Crimes*, Vol.5, Duncker & Humblot Humboldt, Berlin, 2005, pp.411-508.

War crimes are also enshrined in the US Criminal Code (18 USC §2441). They were introduced to the Federal Criminal Code in 1996, when the Congress passed the War Crimes Act. The acts criminalised do not correspond entirely to the acts prohibited in Article 8 of the Rome Statute and a large number of acts remain unpunished under US legislation. Punishment for offences constituting war crimes can be a fine and life imprisonment or imprisonment for a number of years. The death penalty may be imposed if the crime causes the death of the victim(s) (18 U.S.C. §2441a).

As anticipated above, crimes against humanity are not codified as such in US domestic law and are therefore not punishable in the American legal system for lack of an explicit provision.²²⁸

It is worth mentioning the domestic offence of torture which, despite the fact that it is not referred to as a crime against humanity, corresponds closely to torture as defined in the Rome Statute. The offence dates back to 1994, when the Congress enacted legislation implementing the 1984 UN Convention Against Torture. Penalties provided for the commission of torture or its attempt are as follows: a fine, imprisonment for not more than 20 years, or both. If torture resulted in the death of the victim, the death penalty or life imprisonment may be imposed (see 18 U.S.C. §2340Aa).

The above analysis has shown that a number of countries have recently enacted provisions on international crimes in their national systems of criminal justice, often as an implementing measure following the ratification of the Rome Statute of the ICC.

Whereas the ICC Statute itself contains only general provisions on sanctioning and sentencing,²²⁹ in domestic legislations ranges of penalties with minimum and maximum sentences are, on the contrary, attached to each crime to respect the principle of legality and legal certainty. In this way the seriousness of different crimes can be better

²²⁸ However, some scholars have recognised that most offences constituting crimes against humanity, when committed on US territory or by a US military member, would violate US domestic criminal laws or military laws against murder, aggravated assault and similar; if committed outside the territory of the United States, such crimes could be still prosecuted as ‘ordinary crimes’ in US civil courts if they involve torture or attempted torture, or certain forms of international terrorism. Therefore, to a certain extent, crimes against humanity would be punishable under US law. See: CASSEL, DOUGLASS, ‘Empowering United States Courts to hear Crimes within the Jurisdiction of the International Criminal Court’, *New England Law Review*, no.35, 2001, p.421.

²²⁹ Articles 77 and 78 of the Rome Statute. These provisions will be more fully analysed in Chapter 5.

distinguished. To recapitulate, it appeared that in almost all the six countries analysed, genocide, crimes against humanity and war crimes attract the highest penalty of life imprisonment (or death penalty in the US) when death results from the crime. In some countries (France, Germany, England, US), the imposition of a life sentence is even mandatory in such cases.

It is thus evident that international crimes are punishable with the highest penalties available, and that such penalties are in some cases also higher than those applicable to the corresponding 'ordinary' offences (*i.e.* ordinary torture, rape, violence, and so on) in national legal systems.

The findings of the aforementioned Max-Planck Institute's Report on the punishment of serious crimes in national laws are of assistance on these issues.²³⁰ The Report shows that, in the 23 countries analysed, murder attracts the most severe penalties (up to the death penalty) and that there is no substantial difference in penalty for international crimes.²³¹ The comparison between sentencing ranges for general criminal offences and sentencing ranges for crimes against humanity is valuable insofar as it shows that the choice between classifying certain serious offences as ordinary crimes or as international crimes can have significant consequences. It appears that the applicable penalties are not substantially different only when crimes of murder are concerned: in fact, sentencing ranges applied for murder as an ordinary criminal offence are not too dissimilar from those applied to international crimes codified at the national level. This holds equally true for the six countries taken into consideration. The explanation of this phenomenon is that, generally speaking, homicide is already punished with the highest penalty in all national systems. However, besides the case of murder, differences become evident when considering other crimes (non-homicidal crimes). For instance, in countries that punish torture, sexual violence or persecution both under general criminal law and under special laws on crimes against humanity, the Expert Report shows that differences exist and that sentencing ranges derived from general criminal norms are considerably lower than those provided for the same offences when considered as crimes against humanity.²³²

²³⁰ SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, Edition Iuscrim, Freiburg im Breisgau, 2004.

²³¹ For more details on the 23 countries included in the investigation, see: SIEBER, U., *The Punishment of Serious Crimes...*, vol.1: Expert Report, cit., pp.90-124.

²³² *Ibid.*, pp.99, 103, 107, 118, 122.

The conclusive inference to be drawn from these remarks should be that international crimes are regarded by the international community as crimes of the utmost seriousness and are considered to be the gravest forms of criminality. Consequently, they are punished not only with the most severe penalties prescribed at the national level, but also more severely than serious ‘ordinary’ crimes. In addition, the fact that domestic systems assign statutory minimum and/or maximum penalties to each category of international crime fosters respect of the principle of legality of penalties and can be taken as an instructive example to future progress and new developments in international criminal law in the area of ‘comparative seriousness’ and hierarchy of international crimes. The attribution of a specific sentencing range to each offence requires that the relative seriousness of the crime be established, both in relation to other offences constituting international crimes and to ‘ordinary’ offences under national criminal codes.

These observations will be taken into account in the next chapters when assessing the sentencing process in international criminal justice and the developments which are deemed necessary for future improvements.

PART II – SENTENCING LAW AND PRACTICE IN INTERNATIONAL CRIMINAL LAW

The first part of this study presented the law of sentencing in its international and national dimension, taking into account the current *status* of sentencing in international criminal law, the traditional theories of punishment and the most important principles of law applicable to the sentencing process. Furthermore, the overview of national systems of criminal justice enriched the analysis with the main characteristics of sentencing law at national level.

Part 2 is entirely devoted to existing sentencing practice in international criminal law, and focuses on the jurisprudence of the two UN ad hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). This represents the core of the thesis and provides an in-depth analysis, both doctrinal and empirical, of the complex and increasing case-law of the ad hoc Tribunals as far as sentencing is concerned. The examination which follows is not intended to be exhaustive or complete, rather it aims at providing the reader with an ample overview which takes into consideration the most significant cases before the ad hoc Tribunals, and thus enables a clear identification of the major critical issues for sentencing as they have arisen from ICTY and ICTR case-law.

The analysis of the sentencing practice of the ad hoc Tribunals is of paramount importance, I believe, especially if this research into sentencing hopes to be ‘future-oriented’ – in that it attempts to provide useful assistance and guidance in future sentencing issues (in the system of the ICC, for instance). Given this perspective, the relevant work produced so far in this field must be considered, and the case-law of the ICTY and ICTR certainly represent the most valuable examples.

Finally, the ICC will most probably refer to the jurisprudence of the ad hoc Tribunals for guidance, and this provides another reason why qualitative and quantitative analysis of their jurisprudence is crucial in order to achieve a better understanding of it, identify elements of strength and weakness, and controversial and uncontroversial influential factors on sentencing.

CHAPTER 3.

THE SENTENCING JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

A. Relevant provisions of the Statutes and Rules of Procedure and Evidence

The Statutes of the ICTY and ICTR contain few provisions for the determination of sentences. The relevant articles of the Statutes are Article 24 for the ICTY and Article 23 for the ICTR. The Rules of Procedure and Evidence (RPE), adopted by the judges of the Tribunals and substantially identical for both the ICTY and the ICTR, are also relevant as they provide greater detail regarding how to determine sentences. These norms will be analysed in the following paragraphs.

3.1 Applicable penalties

Article 24, paragraph 1, ICTY St. and Article 23, paragraph 1, ICTR St. prescribe that penalties imposed by Chambers of the Tribunals shall be limited to imprisonment and that, in determining the terms of imprisonment, Trial Chambers shall have recourse to the '*general practice regarding prison sentences*' in the courts of the former Yugoslavia and Rwanda. Additionally, paragraph 3 of Article 24 ICTY (and of Article 23 ICTR) provides that the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their legitimate owners.¹

It is questionable that further specifications regarding the length of imprisonment (more 'substantive' than 'procedural' in nature) are to be found in the Tribunals' Rules of Procedure and Evidence, as these are only meant to deal with procedural and evidentiary matters.² In any case, Rule 101, letter A, of the RPE specifies that a

¹ The provision at para.3 of Articles 24 and 23 has never been applied in practice by either Tribunal, probably due to the practical difficulties involved in the process of identification and acquisition of stolen property. Rule 105 regulates in more detail the 'restitution of property' for cases where the Trial Chamber makes a specific finding in the judgement as to the unlawful taking of property by the accused, and thus orders restitution (Rule 98*ter*, letter B).

² It is known that the RPE were adopted by judges of the two Tribunals pursuant to Articles 15 ICTY St. and 14 ICTR St. which empower judges to adopt such rules '...for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.'

convicted person may be sentenced to imprisonment for a term up to and including ‘the remainder of the convicted person’s life’.³

The Security Council, in approving the ICTY and ICTR Statutes, specified that penalties were to be limited to imprisonment, expressly excluding the possibility of imposing the death penalty, a form of punishment which is difficult to reconcile with the prohibition of cruel, inhuman and degrading punishment.⁴

In the Statutes and in the RPE there is no other indication regarding penalties: no specific ranges for the crimes falling under the jurisdiction of the ad hoc Tribunals, no differentiation between the various crimes. Thus, in theory, for genocide, crimes against humanity and war crimes the penalties are all equal and consist of a maximum sentence of life imprisonment.

A controversial point is whether – notwithstanding the formulation of Article 24 – the ICTY can in effect impose life imprisonment given that judges should have recourse to the sentencing practice of the countries of the former Yugoslavia where, at the relevant times when crimes were committed, life imprisonment did not exist. The crucial point in resolving the dilemma (some commentators have in fact argued that the ICTY cannot impose imprisonment for life) is whether life imprisonment can be considered the functional equivalent of a death penalty which in some cases still existed in the former Yugoslavia, or whether this equivalence should be excluded, based on the reasoning that life imprisonment can even be a worse penalty than death or equal to that. The same situation does not arise before the ICTR given that life imprisonment was permitted in Rwanda in 1994. These aspects will be analysed in more detail later.

³ The interpretation of the expression ‘imprisonment for the remainder of his life’ according to the ICTR (*Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, para.31 ‘Sentence’) is that it is distinct from life imprisonment and simply implies that the accused should stay in prison until the end of his days.

⁴ This proves the influence of human rights law and of the contribution it made to the debate on penalties. See for instance, the *Second Optional Protocol to the International Covenant on Civil and Political Rights* seeking abolition of the death penalty worldwide. Clearly it would have been inconceivable for the UN Secretary General to recommend the inclusion of the death penalty amongst the penalties to be imposed by the ad hoc Tribunals, given the progress made within UN organisms and bodies towards global abolition of the death penalty. The significant influence of human rights law on the regime of penalties in international justice is also visible throughout the jurisprudence of the ad hoc Tribunals: for instance, it was in the *Erdemovic* case that an ICTY Trial Chamber observed that the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity established by human rights law, and made reference to the relevant provisions of human rights instruments (*Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Trial Judgement, 29 November 1996, paras.74-75).

3.2 Gravity of the offence, aggravating and mitigating circumstances

Article 24, paragraph 2, ICTY St. and Article 23, paragraph 2, ICTR St. provide that, in imposing sentences, the Trial Chamber ‘should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person’.

The RPE of the two Tribunals provide slightly more details and specify that, in determining the sentence, Trial Chambers shall take into account – besides the factors mentioned in Articles 24 and 23 – aggravating and mitigating circumstances, the general practice regarding prison sentences (respectively, in the courts of the former Yugoslavia and Rwanda), the extent to which for the same act the convicted person has already served penalties imposed by national courts.⁵ The list contained in Rule 101, letter B, is not exhaustive but is only intended to provide some guidance.⁶ It has been contended that such a vague reference to aggravating circumstances as that contained in Rule 101 is contrary to the principle of legality of penalties: similar factors concretely affect the determination of the sentence, and therefore amount to a penalty that is not specifically defined.⁷ This approach adopted in the RPE seems to confirm the limited scope that the *nulla poena sine lege* principle holds in international criminal law. It also creates problems at the sentencing stage, given that judges are not provided with any indication as to the circumstances to be taken into account, and as to the weight that should be attributed to them.

While judgements by the IMTs at Nuremberg and Tokyo (and the sentences pronounced by other national military Tribunals in the aftermath of the Second World War) did not address aggravating and mitigating circumstances in detail, on the other hand, in practice, the ad hoc Tribunals have referred to quite a wide range of both

⁵ By Rule 101, Trial Chambers are also required to take into account any prior penalty already served for convictions by a national court relating to the same fact, and any period of time during which the accused has already been in custody for pre-trial detention or detention pending appeal.

⁶ Rule 101, letter B, using the expression ‘such factors as’, does not intend to be exhaustive.

⁷ See ZAPPALA, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.201; SCALIA, DAMIEN, ‘Constat sur le respect du principe nulla poena sine lege par les tribunaux pénaux internationaux’, *Revue internationale de droit comparé* (2006), vol.58, issue 1, pp.185-209, at p.199.

mitigating and aggravating factors.⁸ These factors are examined in depth and described in the following sections of this chapter.

By way of introduction, examples of aggravating circumstances include the number of victims and the extent of human suffering, physical or psychological consequences of the crime on victims, premeditation by the accused, the accused's willing or whole-hearted participation in the crime(s), the use of cruelty, sadism, humiliation, ethnic or religious discrimination, the methodical and systematic execution of crimes, the role of the accused, the abuse and misuse of authority, political or military leadership. Personal motives for the commission of crime(s), such as vengeance, are also considered as aggravating factors. The participation of a hierarchical 'superior' in the commission of a crime is also seen as an aggravating factor and entails enhanced punishment of the person holding such position.⁹ Overall, the category of aggravating circumstances comprises various factors either related to the crime and its commission, to the accused and his/her behaviour, or to the victims.

Circumstances considered in mitigation by the Chambers of the ad hoc Tribunals often included those elements rejected by the court as defence in a particular charge, such as superior orders, necessity, duress, insanity and self-defence. One of the few mitigating factors directly recognised by and inserted into the Statutes of the ad hoc tribunals is the fact of having received an order from a hierarchic superior. Article 7.4 ICTY Statute (Article 6.4 ICTR Statute) thus provides:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

In the practice of the ad hoc Tribunals, mitigating circumstances include for instance: the accused's youth, remorse, admission of guilt, acts of assistance or benevolent attitude towards victims, personality traits, previous good character, family circumstances, poor health, absence of prior convictions, no personal participation in the

⁸ Nevertheless, it should be noted that – at the very beginning of its work – the ICTY in the *Erdemovic* case, clearly ignoring the specific and unambiguous reference to aggravating circumstances contained in Rule 101B, ruled that 'when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration...' (*Prosecutor v. Erdemovic*, Sentencing Judgement, Case No.IT-96-22-T, 29 November 1996, para.45). The practice changed later, however, and assumed ample consideration of aggravating factors.

⁹ Article 7, para.2, ICTY St. (and correspondingly Article 6, para.2, ICTR St.) expressly states that: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

crime(s), the timely entry of a guilty plea, voluntary surrender, good conduct while in detention, and cooperation with the office of the Prosecutor. Cooperation with the Prosecutor by the convicted person before or after conviction is the only mitigating factor expressly mentioned by Rule 101B. In order to be considered in mitigation, cooperation must be substantial.

The weight to be given to aggravating and mitigating circumstances is again not mentioned nor specified by the Statutes of the ad hoc Tribunals; therefore judges are basically free to attribute to such factors the mitigating or aggravating weight they deem most opportune.¹⁰

As to the standard and burden of proof with respect to aggravating and mitigating factors, the Trial Chamber in the *Kunarac et al.* case held that the burden of proof for aggravating factors is on the Prosecutor and the standard is that of ‘beyond any reasonable doubt’, while for mitigating circumstances the Defence needs to prove them only on the balance of probabilities.¹¹

¹⁰ In the *Kupreskic* Appeal case, it was held that: ‘The weight to be attached to mitigating circumstances lies within the discretion of a trial chamber, which is under no obligation to set out in detail each and every factor relied upon.’ (*Prosecutor v. Kupreskic*, Case No.IT-95-16-A, Appeal Judgement, 23 October 2001, para.430). See also: *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.145: ‘In determining sentence, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances, but the weight to be given to the aggravating and mitigating circumstances is within the discretion of the Trial Chamber.’

¹¹ See *Prosecutor v. Kunarac et al.*, Case No.IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 February 2001, paras.846-847. The same had already been recognised by the Appeals Chamber in the *Delalic* case (*Prosecutor v. Delalic et al.*, Case No.IT-96-21-A, Appeals Judgement, 20 February 2001, para.763: “The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be [...] taken into account in aggravation of that sentence.”) Also: *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.145; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, paras.495, 501. Similarly, in the ICTR case-law: *Prosecutor v. Kajelijeli*, Case No.ICTR-98-44A-A, Appeals Chamber, 23 May 2005, para.294; *Prosecutor v. Serugendo*, Case No.ICTR-2005-84-I, Sentencing Judgement, 12 June 2006, para.40; *Prosecutor v. Nzabirinda*, Case No.ICTR-2001-77-T, Trial Chamber, Sentencing Judgment, 23 February 2007, para.53.

3.3 General practice regarding prison sentences in the former Yugoslavia and Rwanda

As recalled above, the ICTY and ICTR Statutes specify that, in deciding upon the terms of imprisonment, Trial Chambers shall have recourse to the ‘*general practice regarding prison sentences*’ in the courts of the former Yugoslavia and Rwanda.

The interpretation of this provision by ICTY and ICTR Chambers will receive due attention in the following pages, whereas some preliminary observations of a general character are discussed here.

The ‘general practice’ provision appears to be a way of complying with the prohibition of retroactive punishment, thus assuring respect of the principle of legality. The underlying idea seemed to be that, if international tribunals were to be guided by the existing sentencing practice in the territories where the crimes took place, then the principle of *nulla poena sine lege* would not be offended. Articles 24 and 23 of the Statutes were thus inspired by the *nulla poena* principle, and this can clearly be seen in the *travaux préparatoires*, in some early drafts and State-proposals regarding the ICTY Statute.¹² In particular, the proposals from Italy,¹³ Russia,¹⁴ and the Netherlands,¹⁵ all expressed concerns for the issue of retroactivity of sanctions.

¹² See, for instance, *Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General*, U.N. SCOR, art.7, U.N.Doc.S/25300; *Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, U.N. SCOR, art.22, U.N.Doc.S/25537(1993); *Note Dated 30 April 1993 from the Permanent Representative of The Netherlands to the United Nations Addressed to the Secretary-General*, U.N. SCOR, at 5, U.N.Doc.A/25716 (1993); *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993, para.36.

¹³ *Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General*, U.N. SCOR, art.7, U.N.Doc.S/25300, paras.1-2: “All war crimes and those against humanity provided for under Article 4 are considered international crimes as set forth by international law or far-ranging conceptions. However, these international law sources do not envisage any penalties for such crime; the need to respect the principle ‘*nullum crimen, nulla poena sine lege*’, the basis of fundamental human rights, has induced the Italian Commission to decide in favour of the penalties set forth by the criminal law of the State of the *locus commissi delicti* ... If the principle is inapplicable (because the crime has been committed in a place which is not subject to the sovereignty of any State), recourse shall be made to the principle of active or passive personality in order to determine the law to be enforced.”

¹⁴ See SCHABAS, W., ‘Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals’, *European Journal of International Law*, vol.11, no.3, 2000, p.526.

¹⁵ Note Verbale of 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General, Annex, para.6, U.N. Doc. S/25716, 4 May, 1993.

Nevertheless, doubts have been expressed about the validity of issues such as retroactivity and legality, given that these matters were already addressed in detail at Nuremberg, and thereby firmly established: none of the defendants who maintained violations of the principle of legality during those trials was successful.¹⁶

On a preliminary note with regard to the effectiveness of referring to such practice, it should be recognised that the initial difficulty is to identify what exactly constitutes domestic 'general practice'. Firstly, neither the Statutes nor the Rules of Procedure and Evidence suggested a timeframe for it, nor did they specify whether the reference was to the law in force at the time of the crimes or at the time of the trial, or on the other hand at the time of the establishment of the ad hoc Tribunals, or before or after the dissolution of the former Yugoslavia. Secondly, there had been very few useful precedents in the jurisprudence of the courts of the former Yugoslavia and Rwanda (in the sense of cases similar to those held by ad hoc Tribunals) which could thus have been used for guidance.¹⁷ Therefore, reference to the practice of the former Yugoslavia and Rwanda seems inevitably flawed by the absence of case-law concerning international crimes.¹⁸ It would probably be not pertinent to take into consideration the sentencing practice for the underlying crimes of murder, rape, or assault, as crimes within the

¹⁶ SCHABAS, W., 'Sentencing by the International Tribunals: A Human Rights Approach', *Duke Journal of Comparative and International Law*, 7(1997), pp.469-470. The author concludes that: '...Indeed, the *nullum crimen nulla poena* principle did not prejudice the post-World War II trials, and it is troubling to see the issue return half a century later. The judgments at Nuremberg and Tokyo and of the various successor tribunals provide ample authority for custodial sentences up to and including life imprisonment...' (p.474). The Trial Chamber in the *Erdemovic* case returned to the teleological view of the *nulla poena* principle that was accepted during the post-World War II trials, thus stating: '...no accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them...' (Sentencing Judgement, *cit.*, 29 November 1996, para.40).

¹⁷ W. Schabas specifies that the only two significant trials for genocide in the former Yugoslavia, those of *Milhailovic et al.* in 1946 and of *Artukovic* in 1986, had resulted in death sentences. With regard to the situation in Rwanda, prior to 1994 there was no provision to deal with international crimes falling within the jurisdiction of the ad hoc tribunal: the Geneva Conventions and their Protocols of 1977, together with the Genocide Convention, had all been ratified, but no implementing legislation was ever enacted. See SCHABAS, W., 'Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals', *European Journal of International Law*, vol.11, no.3, 2000, pp.526-527.

¹⁸ SCHABAS, W., 'Sentencing by the International Tribunals...', *cit.*, pp.477-479. A Report on the sentencing practice in the former Yugoslavia between 1982-1990, prepared by two Yugoslav jurists in 1994, affirmed that the national case-law regarding cases of genocide or war crimes in the Yugoslav countries during the above-mentioned period of time was so insufficient as to render vain a comparative analysis of, and the attempt to take into account, the sentencing practice of the former Yugoslavia. See JANKOVIC I., VASILJEVIC V., *Sentencing Policies and Practices in the former Yugoslavia: A Report presented to the ICTY*, Belgrade, July 1994, p.1 (report available at the ICTY library, The Hague). See also: APTEL, C., 'La fixation des peines par les juridictions pénales internationales', *cit.*, at p.174.

jurisdiction of the ad hoc Tribunals are inherently more serious than the underlying ‘ordinary’ offences committed in peacetime. However, it would seem that recourse to the way in which underlying ‘ordinary’ offences were regulated and punished by national criminal codes is in fact the only way to comply with the provision requiring reference to national criminal practice, especially considering that Articles 24 ICTY and 23 ICTR mention ‘*general practice*’ regarding imprisonment, with no restriction to cases involving crimes of the same nature (i.e. international crimes). Nevertheless, Chambers of the ad hoc Tribunals did not interpret the reference to ‘*general practice*’ in this way and considered it unfair to regard a single homicide and a homicide committed in the framework of a policy of killings and perpetration as being similar.¹⁹

With regard to the timeframe, considering that – according to the principle of legality – the retroactive application of a sanction is not admissible, reference to the national practice of the former Yugoslavia and Rwanda has been interpreted as referring to the provisions in force at the time of the commission of the relevant crime(s).²⁰ What is thus at stake is the identification, often difficult, of the specific legislation concerned, especially in the case of the former Yugoslavia where crimes were committed in the space of almost 12 years and in a country divided into several states and republics.

Some scholars considered that the different range of sentences emerging from the ICTY and the ICTR is due to the fact that the ad hoc Tribunals must follow the practice regarding prison sentences respectively in the former Yugoslavia and Rwanda.²¹

¹⁹ See, for instance, the Trial Chamber in the *Erdemovic* case: ‘It might be argued that the determination of penalties for a crime against humanity must derive from the penalties applicable to the underlying crime. In the present indictment, the underlying crime is murder (Article 5(a) of the Statute). The Trial Chamber rejects such an analysis. Identifying the penalty applicable for a crime against humanity ... cannot be based on penalties provided for the punishment of a distinct crime not involving the need to establish an assault on humanity’ (*Prosecutor v. Erdemovic*, Sentencing Judgement, *cit.*, 29 November 1996, para.32).

²⁰ See for instance, the *Tadic* case, where the Trial Chamber stated to have taken into account: ‘...the sentencing practice of courts of the former Yugoslavia at the date of the commission of the offences for which Dusko Tadic was found guilty, the practices in effect as of the date of the adoption of the Statute by the Security Council on 25 May 1993, as well as changes in those sentencing practices which would necessitate the imposition of a less severe punishment consistent with internationally recognised human rights standards, and the effect of the Statute and international law more generally...’ (*Prosecutor v. Tadic*, Case No.IT-94-1-T, Sentencing Judgement, 14 July 1997, para.9).

²¹ It is known that, while the ICTR has so far imposed a large number of life sentences (for example in the *Akayesu*, *Kambanda*, *Kayishema*, *Musema*, and *Rutaganda* cases), the ICTY meted out its first life sentence only in the *Stakic* case (*Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003), sentence which was subsequently dismissed on appeal and turned into 40 years imprisonment (*Prosecutor v. Stakic*, Case No.IT-97-24-A, Appeal Judgement, 22 March 2006); and, very recently, in the *Galic* appeal case (*Prosecutor v. Galic*, Case No.IT-98-29-A, Appeal Judgement, 30 November 2006).

Accordingly, it was maintained that the ICTY did not deviate very much from the sentencing ranges in the former Yugoslavia and subjected each defendant to more or less the same penalty that would have been encountered in the domestic setting.²² The appreciable disparity between sentences pronounced by the ICTY and those meted out by the ICTR would thus be explained by the fact that there is a great difference in the ‘general practice’ that the ad hoc Tribunals have to take into account in the two countries of reference (former Yugoslavia and Rwanda).²³

If we analyse the situation in the two countries more specifically, starting with the former Yugoslavia, the main problem when referring to ‘general practice’ regarding prison sentences is the absence of the penalty of life imprisonment under Yugoslav law.

At the federal level, the Criminal Code of the FRY came into force on 1 July 1977. After the collapse of the Federation in 1992, the new countries initially maintained both the Federal Criminal Code of 1977 and the regional codes enacted locally during the same year. Soon after, between 1994 and 1998, the new republics and autonomous regions (with the exception of the Federal Republic of Yugoslavia) decided to approve new legislation and therefore new codes, which presented some changes with respect to the previous codes enacted between 1976 and 1977.²⁴

Under the old Criminal Code of the FRY, penalties provided for were the following: capital punishment, fines, confiscation of property and imprisonment for a term (Article 34). The death penalty was prescribed for the most serious criminal acts (Article 37)²⁵ but never for pregnant women or persons under 18 years of age. The general range of imprisonment was from 15 days to 15 years (Article 38), although if a criminal offence was eligible for the death penalty, the court could alternatively impose a punishment of imprisonment for a term of 20 years. The same term of imprisonment could be imposed for particularly harsh crimes which already entailed a sentence of up

²² See PENROSE, ‘Lest We Fail: The Importance of Enforcement in International Criminal Law’, *American University International Law Review*, vol.15, no.2(2000), pp.321-394, at 376.

²³ *Ibid.*, PENROSE, at pp.377-378.

²⁴ See, for more details: SIEBER, ULRICH, *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, Edition Iuscrim, Freiburg im Breisgau, 2004, pp.26-28; CORS D., FISHER S., ‘National Law in International Criminal Punishment: Yugoslavia’s Maximum Prison Sentences and the United Nations War Crimes Tribunal’, *Parker School Journal of East European Law*, vol.3 (1997), pp.637-711, at 653 ff..

²⁵ Article 37(2) states clearly: ‘The death penalty may be pronounced only for the most harsh instances of the severe crimes for which it is prescribed by law’.

to 15 years imprisonment, or when the criminal act was perpetrated under particularly aggravating circumstances or had caused especially grave consequences (Article 38, para.3).²⁶

With reference to specific sentencing ranges for international crimes, according to Article 141 of the FRY Criminal Code, genocide was punishable by imprisonment for no less than 5 years or by the death penalty. According to Articles 142-144, war crimes were punishable with at least 5 years imprisonment or with the death penalty. If the death penalty was not imposed, the maximum term of imprisonment for serious violations remained the general one of 20 years. There was no special provision for crimes against humanity in the FRY Criminal Code.²⁷ Major changes occurred from 1992 onwards.²⁸

It thus appears clear that, while the imposition of the death penalty was a possible option in some republics, though only up to a certain point in time,²⁹ the possibility of handing down life imprisonment was not provided for anywhere. The Yugoslav legislator evidently considered the penalty of life imprisonment an inhumane and degrading treatment and did not include it within the penalties available. Thus, were the ICTY to strictly adhere to the 'general practice' of the former Yugoslavia, its sentencing powers should be limited to the imposition of maximum sentences of 15 years or, in particularly serious cases, 20 years imprisonment. Accordingly, commentators have

²⁶ SIEBER, U., *cit.*, vol.1, at pp.30-31; CORS D., FISHER S., *cit.*, pp.656-657. An example of aggravating circumstance causing a possible increase in punishment was the existence of two or more previous convictions of the accused for other crimes, and a demonstrated propensity to commit criminal acts again.

²⁷ Although Articles 154 and 155 punished, respectively, 'racial discrimination' and 'enslavement'; see for more details, JANKOVIC I., VASILJEVIC V., *Sentencing Policies and Practices in the former Yugoslavia: A Report presented to the ICTY*, Belgrade, July 1994.

²⁸ For a detailed analysis of the current legal situation in the countries of the former Yugoslavia after the enactment of the new Criminal Codes, see: SIEBER, ULRICH, *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, Edition Iuscrim, Freiburg im Breisgau, 2004, p.35 ff.. Briefly, it can be said that under the new regional codes the general range of imprisonment for ordinary crimes now reaches the limit of 20 years (15 years in Croatia), with long-term imprisonment from 20 to 45 years (40 years in Croatia; life imprisonment in Macedonia) for the gravest forms of serious criminal offences; the range of imprisonment for international crimes has been increased to a term of not less than 10 years (5 years in Croatia, Serbia and Montenegro), with the possibility of applying long-term imprisonment (for example, life imprisonment in Macedonia).

²⁹ Capital punishment was in fact abolished in Slovenia, Croatia and Macedonia in 1990 and 1991. Furthermore, the FRY abolished it as of 31 December 1993 for crimes provided for by federal laws, retaining it only in Serbia and Montenegro for serious crimes such as murder and aggravated robbery. In the period between 1982 and 1990, however, the death penalty was imposed 17 times for cases of murder, robbery leading to loss of life and war crimes against civilians. See JANKOVIC I., VASILJEVIC V., *Sentencing Policies and Practices in the former Yugoslavia: A Report presented to the ICTY*, Belgrade, July 1994, pp.5, 19.

argued that the ICTY should not adopt a sentencing policy which authorises life imprisonment or any prison sentence higher than 20 years, in view of the fact that in the former Yugoslavia life imprisonment was rejected as a penalty in 1959 and that – since then – no sentence longer than 20 years has ever been imposed.³⁰

On the other hand, the possibility of using life imprisonment has been supported by arguing that a life sentence would replace the death penalty initially applicable in the former Yugoslavia.³¹ When the death penalty is not available as a sentencing option, then life imprisonment is a legitimate penalty to ensure protection of citizens through the permanent removal of the offender from society.³²

However, this is exactly the point at stake: it is not at all obvious that an automatic substitution of the death penalty with life imprisonment can be justified. In fact, there are many states that have abolished capital punishment without replacing it with life imprisonment in the belief that perpetual detention is also a form of cruel, inhuman and degrading punishment (this is the case of Spain, for example, as seen in Chapter 2). In addition, commentators have argued – taking a rigorous position on the *nulla poena sine lege* principle – that allowing for life imprisonment before the ICTY may ‘violate the principle of legality and the prohibition against ex post facto laws’, and have thus suggested that the RPE should be amended in order to limit sentences to 20 years imprisonment.³³

In brief, the provision at Article 24 St. creates a dilemma for the ICTY Chambers. By restricting the sentencing practice to penalties of no more than 20 years, the Tribunal would rigorously conform to the principle of legality of penalties and respect the ‘general practice’ provision with due regard to the legal system of the former

³⁰ See CORS D., FISHER S., *cit.*, at pp.642-643.

³¹ This was held in the *Tadic* case, in the first sentencing judgement: “...for crimes which, in the courts of the former Yugoslavia, would receive the death penalty, the International Tribunal may only impose imprisonment but it may impose a maximum penalty of life imprisonment in its stead, consistent with the practice of States which have abolished the death penalty and with the commitment by States progressively to abolish the death penalty under the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty...” (*Prosecutor v. Tadic*, Case No.IT-94-1-T, Sentencing Judgement of 14 July 1997, para.9). The *Tadic* case represents one of the few where the general practice regarding prison sentences in the courts of the former Yugoslavia was interpreted as binding, analysed in detail and taken into account.

³² Before the Security Council, the United States Permanent Representative declared that the US government considered life imprisonment to be applicable as the maximum penalty because it replaced the death penalty. See: *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, UN SCOR, UN Doc. S/PV.3217 (1993).

³³ BASSIOUNI M.CH., MANIKAS P., *The Law of the International Tribunal for the former Yugoslavia*, Irvington-on-Hudson, Transnational Publishers, 1996, pp.701-702.

Yugoslavia; on the other hand, similar sentences could be perceived as unduly lenient or inappropriate in relation to perpetrators of the most heinous crimes known to the international community.

My personal assessment of the issue at hand is that, although the provision regarding recourse to the 'general practice' for prison sentences in the former Yugoslavia would formally be violated by sentences lengthier than 20 years' imprisonment, a violation does not occur in substance, in view of the fact that the penalty of life imprisonment can legitimately be considered as a substitute for the death penalty (initially provided for under former Yugoslav law). A confirmation of this reasoning, within the system of the former Yugoslavia, can be found in the transitional Criminal Code of 1947, approved after World War II, which expressly permitted, at Article 32, the substitution of the death penalty with life imprisonment when the circumstances of the criminal act and personal characteristics of the perpetrator were believed to permit attenuation of the prescribed penalty (i.e. the death penalty).³⁴ Similarly, the subsequent Criminal Code of 1951 also permitted, at Article 29, substitution of the death penalty with life imprisonment, when 'justifying reasons' existed for not imposing the death penalty and when the general maximum term of 20 years' imprisonment was not considered sufficient to correspond to the severity of the crime.³⁵ Although that regime was amended in 1959 and replaced with a twenty-year penalty as a substitute for the death penalty – thus completely abolishing life imprisonment as a potential sanction in the former Yugoslavia criminal system – its previous existence can prove that the scheme of replacing the death penalty with life imprisonment as the second 'highest penalty' available in a given jurisdiction is in theory correct and can therefore be legitimately applied by the ICTY without any infringement of the principle of legality or the prohibition against ex post facto laws.³⁶ Furthermore, a violation of the principle of legality insofar as it forbids the application of a heavier penalty than that applicable at the time of the commission of the crime(s)

³⁴ See CORS D., FISHER S., 'National Law in International Criminal Punishment: Yugoslavia's Maximum Prison Sentences and the United Nations War Crimes Tribunal', *Parker School Journal of East European Law*, vol.3 (1997), pp.637-711, at 664.

³⁵ *Ibid.*, pp.665-666.

³⁶ The possibility of substituting the death penalty with life imprisonment without violating the principle of legality, insofar as life imprisonment can be considered more lenient than the death penalty, has recently been confirmed by the ECtHR in a decision of 2006 (see ECtHR, *Karmo v. Bulgaria*, Application no. 76965/01, Decision on Admissibility, 9 February 2006, p.10, C).

does not even occur, considering the exception provided for by international instruments when international crimes are concerned.³⁷

The situation is different for recourse to the ‘general practice regarding prison sentences in the courts of Rwanda’.

Prior to the events of 1994, Rwanda had no domestic law on genocide. This was enacted entirely *ex post facto*. The reference can thus only be to the most serious crimes included in the national criminal code. For the most serious offences, such as murder, Rwanda’s *Code pénal* provided for life imprisonment or capital punishment.³⁸ For other serious crimes, the general term was for sentences of up to a maximum of twenty years imprisonment or, exceptionally, thirty years imprisonment in cases of concurrent offences.³⁹

National legislation on genocide was introduced subsequently. Rwanda’s Organic Law no.8/96 of 30 August 1996,⁴⁰ adopted two years after the genocide, contains four distinct categories of offenders for genocide-related crimes. Categories One and Two refer to the most serious offenders, including ‘planners, organizers, instigators, supervisors, and leaders of the crime of genocide or of a crime against humanity’, and individuals who perpetrated or conspired to commit intentional homicide or serious assault ending in death. The Organic Law prescribes the death penalty only for offenders falling into Category One, whose sentence cannot even be mitigated by pleading guilty.⁴¹ Perpetrators convicted under the other categories, however, are entitled to receive a reduced sentence as part of a guilty-plea agreement.⁴² Life imprisonment is provided for with regards to Category Two perpetrators who pleaded

³⁷ See Article 7, para.2, ECHR, and Article 15, para.2, ICCPR. See also Chapter 1, section 1.2.

³⁸ Code Pénal (Rwanda), Arts. 311-317.

³⁹ Code Pénal (Rwanda), Arts. 35, 93.

⁴⁰ Organic Law no.08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, J.O., 1996, Year 35, no.17.

⁴¹ Articles 14, and 15-16, Organic Law no.08/96. Before the ICTR, Jean Kambanda – Prime Minister of the interim government during the genocidal campaign – received a life sentence after pleading guilty to six counts, including genocide and crimes against humanity. The ICTR did not take into consideration as a mitigating factor the fact that the accused had pleaded guilty. See *Prosecutor v. Kambanda*, Judgement and Sentence, Case No.ICTR-97-23-S, 4 September 1998. Commentators argued that the reason for this choice by the ICTR was probably the fact that, if convicted under domestic law, Kambanda would have been considered a ‘Category One’ defendant and, therefore, sentenced to death. See PENROSE, ‘Lest We Fail...’, *cit.*, pp.377 ff..

⁴² Articles 15-16, Organic Law no.08/96.

not guilty and were convicted at trial.⁴³ Trials of persons charged under the Organic Law of 1996 are all conducted within and according to the Rwandan judicial system. The law established special Chambers to deal with acts of genocide committed in 1994; by the year 2003 the system had dealt with an average of 9,000 individual suspects of genocide, imposing the death penalty which has not been carried out since 1998.⁴⁴

Moreover, on 19 June 2004, Organic Law no.16/2004⁴⁵ defined the ‘Organisation, Competence and Function of Gacaca Courts charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, committed between October 1, 1990 and December 1, 1994’. This recent legislation gives the ‘gacaca’ (small courts based on indigenous models of local justice) jurisdiction on genocide and crimes against humanity for a broad time period, starting from 1990;⁴⁶ their temporal jurisdiction therefore overlaps with that of the ICTR only for the period 1 January/31 December 1994. The *gacaca* courts cannot exercise jurisdiction on individuals accused of the most serious crimes according to Category One of Organic Law no.8/96: those individuals fall under the jurisdiction of ordinary courts.⁴⁷ The sanctions that can be imposed by the *gacaca* courts and by the ordinary domestic courts can vary from the death penalty (for the gravest form of committing genocide and crimes against humanity belonging to Category One offences) to civil reparation (for property offences) (Articles 51-52).

⁴³ See Articles 15-16 of Organic Law No.08/1996.

⁴⁴ That year 23 public executions (22 men and 1 woman) shocked the international community and caused general outrage. See Amnesty International, ‘Death Penalty News’, AI Index: ACT 53/003/1998, 1 June 1998; Amnesty International, ‘Rwanda: The Enduring Legacy of the Genocide and War’, AI Index: AFR/47/008/2004, 6 April 2004. The last executions took place in 1998, although death sentences continued to be imposed up to 2003. See Amnesty International, Annual Report 2007, *Rwanda*, available at: <http://www.amnesty.org/en/region/africa/central-africa/rwanda> Rwanda recently abolished the death penalty in July 2007 by Law no.31/2007 of 25 July 2007 (Loi Organique N° 31/2007 du 25/07/2007 portant abolition de la peine de mort).

⁴⁵ This Law replaced Organic Law no.40/2000, of 26 January 2001, and Organic Law no.33/2001, of 22 June 2001, which had previously introduced the *gacaca* courts, but had barely been implemented.

⁴⁶ For more details on the *gacaca* courts, see FIERENS, JACQUES, ‘Gacaca Courts: Between Fantasy and Reality’, *Journal of International Criminal Justice*, 3(2005), pp.896-919; SCHABAS, W., ‘Genocide Trials and Gacaca Courts’, *Journal of International Criminal Justice*, 3(2005), pp.879-895; SARKIN, J., ‘The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide’, *Journal of African Law*, 45(2001), p.143; GAPARAYI, I.T., ‘Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the Gacaca Tribunals’, *African Human Rights Law Journal*, 1(2001), p.78; OOMEN, B., ‘Rwanda’s Gacaca: Objectives, Merits and their Relation to Supranational Criminal Law’, in HAVEMAN R., OLUSANYA O., *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp – Oxford, 2006, pp.161-184.

⁴⁷ Article 2(2), Organic Law no.16/2004.

In any case, in consideration of the penalties prescribed for serious crimes in the Rwandan legal system (life imprisonment and, formerly, the death penalty), certainly no defendant could legitimately raise before the ICTR questions related to violation of the principle of legality of penalties, as the penalties imposed by Rwandan law were more severe than the maximum penalty of life imprisonment applicable by the ICTR.

The way in which the jurisprudence of the ICTY and ICTR interpreted and applied the provision regarding general practice of prison sentences in the former Yugoslavia and Rwanda will be illustrated later on.

3.4 The structure of the sentencing process

When the ad hoc Tribunals began their work, the structure of proceedings was different, as far as sentencing is concerned, from the present procedure. The RPE originally provided for a separate hearing on sentencing issues, where evidence relating to the sentence and the determination of punishment could be heard. The hearing took place only after the verdict of guilt was pronounced by the Chamber, therefore only after the decision on the accused's guilt or innocence had been made.⁴⁸ Separate sentencing hearings were, for example, held in the early cases of the ad hoc Tribunals (e.g. the *Tadic* case before the ICTY and the *Akayesu* case before the ICTR). Later, the RPE were amended⁴⁹ to eliminate the possibility of a separate sentencing hearing and to unify the process by anticipating the presentation of evidence on sentencing matters to the trial stage and during the closing arguments of the parties,⁵⁰ in other words *before* the verdict on guilt or innocence. The reasons for this modification were mainly linked to the need to expedite the trial process. The presentation of relevant evidence on mitigating and aggravating factors is now regulated by Rule 85(A)(vi), RPE of the two Tribunals, which provides the possibility to present 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty...', after all other evidence has been presented by the Prosecutor and the Defence.

⁴⁸ See former Rule 100, Rules of Procedure and Evidence, Rev.6, 6 October 1995: 'If a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.'

⁴⁹ See Rules of Procedure and Evidence, Revision n.13, 9-10 July 1998.

⁵⁰ See Rule 85 'Presentation of Evidence', letter A (vi), and Rule 86 'Closing Arguments', letter C.

From a human rights perspective – considering both the rights of the accused and the rights of the victims of crimes, who clearly deserve to be heard in sentencing matters – it is maintained that the possibility of holding a separate sentencing hearing is without doubt a more appropriate option, given that all elements that might influence sentencing can be better presented and therefore more appropriately evaluated by judges. In fact, without a specific hearing, submissions concerning sentencing run the risk of being vague and very limited, especially in lengthy trials where the Prosecution and the Defence are more concerned with presenting a large amount of evidence in support of their cases; sentencing issues very often remain only an afterthought. The fact that evidence in mitigation may not be presented could prove dangerous and prejudicial to the accused when the appropriate penalty is assessed by judges, given that they will be faced with no systematic information in mitigation regarding the accused, his personality, status, family, and so on; if this information has to be retrieved from the overall evidence presented during the course of the proceedings, a danger exists that, when mitigating factors are not clearly evident, they may be omitted from the evaluation. The same holds true for aggravating factors. In a victim-oriented perspective, without a hearing devoted to sentencing, relevant information on the role of the perpetrator, the use of cruelty or sadism, the exceptional suffering of victims or survivors and so on, could be lost or misrepresented during the trial proceedings. Conversely, a better idea of all the circumstances related to the accused and the crime(s) is certainly favoured by a devoted hearing. I share the idea, already supported by several commentators,⁵¹ that separate sentencing hearings better serve the need for more detailed and comprehensive submissions on sentencing, aggravating and mitigating factors.

In relation to the pronouncement of sentences, the RPE of the ad hoc Tribunals state that the judgement must be pronounced in public and when possible in the presence of the accused; the judgement shall be rendered by a majority of the judges

⁵¹ See HENHAM, R., 'Procedural Justice and Human Rights in International Sentencing', *International Criminal Law Review*, vol.4 (2004), pp.185-210, at 191; HARMON, MARK B., GAYNOR FERGAL, 'Ordinary Sentences for Extraordinary Crimes', *Journal of International Criminal Justice*, vol.5, issue 3 (2007), pp.683-712, at 708; SLOANE, ROBERT D., 'Sentencing for the "Crime of Crimes" - The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda', *Journal of International Criminal Justice* (2007), vol.5, issue 3 (2007), pp.713-734, at 734.

and be accompanied or followed by a reasoned opinion in writing, including eventual separate or dissenting opinions.⁵²

Ultimately and briefly, in relation to the appeal against a judgement on the grounds of alleged errors related to the sentence,⁵³ given the absence of specific tariffs and the broad discretion in sentencing matters with which Trial Chambers are vested, as a general rule the Appeals Chamber will not revise the sentence unless ‘it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law’. The Appeals Chamber ‘will only intervene if a Trial Chamber ventures outside its “discretionary framework” in imposing a sentence and commits a “discernable” error’.⁵⁴

In this regard, I submit that – when the Appeals Chamber quashes the Trial Chamber’s sentence by finding that the Chamber has completely ventured outside the limits of its discretion in sentencing matters, for instance by imposing an inadequate sentence – the imposition of a new sentence consistent with the Appeals Chamber’s findings should be remitted to the Trial Chamber in order to preserve the right of the accused to appeal against sentence.⁵⁵ This is essential when the sentence imposed at trial is considered to inadequately reflect the accused’s responsibility and the gravity of the crimes committed, and when the new sentence recommended is substantially different from that previously imposed.⁵⁶ Only a reassessment of the sentence by the Trial Chamber can guarantee respect of the accused’s right to appeal against the sentence.

⁵² See Rule 98ter, letter A and C.

⁵³ The relevant articles about appellate proceedings are Article 25 ICTY St., and Article 24 ICTR St..

⁵⁴ *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Appeal Judgement, 27 November 2007, para.306. See also *Delalic et al.*, Appeal Judgement, para.725. The fact that the Trial Chamber committed a discernible error in sentencing was found by the Appeals Chamber in several cases, see for instance: *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001; *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006.

⁵⁵ There are cases in the ICTY jurisprudence where the Appeals Chamber remitted the imposition of a new sentence to another Trial Chamber: *Prosecutor v. Tadic*, Case No. IT-94-01, Appeals Judgement, 15 July 1999, para.327; *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, paras.851-854.

⁵⁶ This happened in the following cases, where the Appeals Chamber imposed life imprisonment on the appellants: *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006. See also: Partially Dissenting Opinion of Judge Pocar, para.3, *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, where Judge Pocar argued that the new sentence should have been reassessed by the Trial Chamber, rather than imposed *ex novo* by the Appeals Chamber, in order to uphold the accused’s right to appeal.

Conversely, if the new sentence is pronounced by the Appeals Chamber, the right of the accused to eventually appeal against this new (increased) sentence is substantially denied.

3.5 Modes of liability and multiplicity of offences

Two issues deserve a separate mention in the framework of these remarks on relevant provisions for sentencing in the system of the ad hoc Tribunals: modes of liability and multiplicity of offences (or *concursum delictorum*).

With regard to modes of liability, these are provided for at Article 7 ICTY St. and Article 6 ICTR St., which enumerate the various forms that the criminal conduct may take.⁵⁷ These articles reflect the fact that criminal responsibility for any crime is incurred not only by individuals who physically commit the crime, but also by individuals who participate in and contribute to the commission of the crime in other ways. In this sense, participation in a joint criminal enterprise (JCE) is – in the jurisprudence of the ad hoc Tribunals – an established form of liability within the meaning of ‘commission’ under Articles 7(1)/6(1) of the Statutes.⁵⁸

In the case of aiding and abetting or any other form of accessory liability, the *actus reus* of the crime is not physically performed by the accused, who is an accessory to the crime, but by another person, whereas the accused’s participation may take place at the planning, preparation or execution stage and may be in the form of a positive act or an omission. Criminal responsibility is also entailed when a superior fails to act in order to

⁵⁷ In particular, paragraphs 1 and 3 of Articles 7 ICTY and 6 ICTR are relevant here: ‘1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. ... 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’

⁵⁸ *Tadic*, Appeal Judgement, para.190; *Prosecutor v. Milutinovic, Sainovic and Ojdanic*, Case No.IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras.20, 31; *Stakic* Appeal Judgement, para.62; *Brdanin* Appeal Judgement, para.364; *Martic*, Trial Judgement, para.435 ff. and the jurisprudence cited therein. Three categories of JCE have been identified in customary international law (see *Tadic*, Appeal Judgement, para.220; *Brdanin* Appeal Judgement, para.364 ff.). See also: CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, pp.181-188; METTRAUX, GUENAEL, *International Crimes and the ad hoc Tribunals*, Oxford University Press, 2005, pp.287-293.

prevent or to punish crimes by his subordinates, if he knew or had reasons to know that they were about to commit or had committed crimes (Articles 7(3)/6(3) of the Statutes).

There are two problems related to the aforementioned provisions on modes of liability. First, they do not differentiate between the various categories nor do they ascribe any distinct legal relevance to the fact that the criminal conduct falls under one heading or another. Therefore, at the sentencing level, in theory there are no distinctions between different modes of liability, leaving judges once again with no guiding criteria to establish of the actual ‘seriousness’ of the accused’s criminal conduct. As already observed in Chapter 2 in the comparative analysis of the sentencing process in national criminal law jurisdictions, some systems assign by statute the same degree of seriousness to all persons involved in the commission of the crime notwithstanding their role (principal, accessories, etc.); other systems differentiate between principal or direct offenders and accessories, aider and abettors or instigators, providing more lenient punishment for the latter categories. In any case, in both situations the given legal system expresses a choice between one of these approaches, thus giving a clear indication to judges and guiding them in the decision-making process in sentencing; a similar choice does not appear to exist in international criminal law. This certainly constitutes one of the numerous flaws of an evolving system of criminal justice, and can exercise a negative impact on the consistency of the international sentencing process. Further research on this particular issue is definitely needed and could hopefully lead to a precise definition of this subject-matter.

As modes of liability may influence sentencing and the final penalty meted out, the empirical analysis of ICTY and ICTR sentencing data conducted in the next chapter tackles the issue of convictions entered under Article 7.1/6.1 or 7.3/6.3. The underlying aim is to verify whether the fact of convicting an accused of 7.1/6.1 liability or 7.3/6.3 liability has any influence on the extent of the final penalty. Moreover, the doctrinal examination presented in this chapter will try to show the different importance that judges attach to various criminal conducts, and the way in which different modes of liability are *de facto* considered in the sentencing practice of the ad hoc Tribunals.

The second problem created by modes of liability is linked to cumulative charging and multiple offences. In this context, the relevant issue is cumulative charging under

different modes of liability.⁵⁹ It is not uncommon for the Prosecution to charge an accused person with various crimes and modes of liability under both Articles 7.1/6.1 and 7.3/6.3, in light of the fact that, prior to the trial and the presentation of evidence, it is not easy to determine the specific type of responsibility that will be proven.⁶⁰ Although forms of responsibility under 7.1/6.1 and 7.3/6.3 are in theory alternatives as regards liability for acts and omissions, an individual could be convicted under both provisions: Chambers of the ad hoc Tribunals have in fact recognised that ‘in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate.’⁶¹

Thus, when an accused person is charged and then found guilty under both forms of liability but based on the same conduct, the problem at the sentencing stage is to avoid the imposition of a ‘double sentence’. ICTY Chambers have suggested that, in order to avoid this, when the accused is found guilty pursuant to both Article 7.1 and 7.3, only one form of responsibility should be chosen while the other should be regarded as an aggravating factor in sentencing (for instance, if convictions are entered under Art.7.1, the accused’s position as a superior should then be regarded as an aggravating factor).⁶²

⁵⁹ Another aspect of cumulative charging, which I will not deal with, regards cases where the convicted person is charged with different crimes (under the same or different Articles) that are based on the same criminal conduct or on the same set of facts. This is due to the fact that different offences under the jurisdiction of the ad hoc Tribunals criminalise the same conduct: for instance, murder (as a violation of the laws or customs of war) and wilful killing (as a grave breach of the Geneva Conventions). For more details on this issue and the way it has been addressed by the ad hoc Tribunals see literature indicated in footnote 63 of this chapter.

⁶⁰ The possibility of cumulative charging was also explicitly recognised and admitted by the Appeals Chamber of the Tribunals: *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.400.

⁶¹ See *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1222, and the examples cited therein. Similarly: *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-T, Trial Judgement, 25 June 1999, para.138. See also: METTRAUX, GUENAEL, *International Crimes and the ad hoc Tribunals*, Oxford University Press, 2005, pp.311-312.

⁶² *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.183; *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.745; *Prosecutor v. Krnojelac*, Case No.IT-97-25-T, Trial Judgement, 15 March 2002, para.173; *Prosecutor v. Naletilic and Martinovic*, Case No.IT-98-34-T, Trial Judgement, 31 March 2003, para.81; *Prosecutor v. Blaskic*, Case No.IT-95-14-A, Appeals Judgement, 29 July 2004, para.91. This principle has also been followed by ICTR Chambers. See, recently: *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No.ICTR-99-52-A, Appeal Judgement, 28 November 2007, para.487; *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.566.

Another interesting aspect, which has an influence on sentencing, is the occurrence of a multiplicity of offences leading to cumulative convictions.⁶³ There may be cases of several offences (for example, rape followed by the murder of the same victim, killing of numerous civilians, etc.) committed by the same defendant and adjudicated at the same time, during the same trial. This is likely to have a certain impact on sentencing; however, once again, the law concerning a multiplicity of offences adjudicated at the same time (*concursum delictorum*) is barely regulated at all in international criminal law. The guiding sentencing principle for the case in which the accused has received cumulative convictions is known as the ‘*totality principle*’: the final penalty should reflect the entire criminal conduct of the offender and his overall culpability. This was recognised in a number of cases before the ad hoc Tribunals.⁶⁴ In particular, the *Delalic et al.* Appeals Chamber affirmed that the goal of ensuring that the final sentence reflects the totality of the criminal conduct of the accused can be achieved ‘through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.’⁶⁵

As far as sentencing is concerned, in cases of multiple crimes leading to a unique global sentence the problem that seems to be emerging from the practice of the ad hoc

⁶³ The issue of cumulative convictions is only mentioned here for the manner in which it impacts on sentencing. Other issues relating to cumulative convictions, such as the extent to which they are permissible when based on the same criminal conduct, and the consequent test established by the Tribunals’ case-law, will not be analysed here. To read more about those issues, see: CASSESE, A., *International Criminal Law*, Oxford University Press, 2003, pp.212-218; METTRAUX, GUENAE, *International Crimes and the ad hoc Tribunals*, Oxford University Press, 2005, pp.315-319; AZARI, HADI, « Le critère "Celebici" du cumul des déclarations de culpabilité en droit pénal international: observations à la lumière de la jurisprudence récente des tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda », *Revue de science criminelle et de droit pénal comparé*, issue 1(2007), pp.1-22 ; BOGDAN, A., ‘Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the former Yugoslavia and Rwanda’, *Melbourne Journal of International Law*, vol.3(2002), pp.1-32. Also, for a detailed exemplification of various cases of *concursum delictorum* in international criminal law, see: FISCHER HORST, KRESS CLAUS, (eds), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.559-604; PALOMBINO, FULVIO MARIA, ‘The Overlapping Between War Crimes and Crimes Against Humanity in International Criminal Law’, *The Italian Yearbook of International Law*, vol. XII (2002), pp.123-145, at 130 ff.. As to the jurisprudence, see for instance the statements of the Appeals Chamber in the recent Media case: *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No.ICTR-99-52-A, Appeal Judgement, 28 November 2007, paras.1017-1036.

⁶⁴ *Prosecutor v. Kunarac et al.*, Case No.IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 February 2001, para.551; *Prosecutor v. Vasiljevic*, Case No.IT-98-32-T, Trial Judgement, 29 November 2002, para.266; *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.429.

⁶⁵ *Prosecutor v. Delalic, et al., cit.*, Appeal Judgement, 20 February 2001, para.430.

Tribunals is that the precise *quantum* of punishment for each count/crime is not clear: all the various convictions are in fact merged into the final sentence, which is supposed to reflect the total culpability of the accused. I would suggest that this practice lacks clarity and fairness towards the accused and does not entirely allow to for verification that the basic rationales have been respected in meting out the final sentence, such as: ensuring that the penalty reflects the overall culpability of the accused; avoiding counting the same conduct twice; avoiding disproportionate punishment (both in the sense of unduly harsh and unduly lenient penalties).

The lack of clarity was probably favoured by the fact that in the initial system of the ad hoc Tribunals, former Rule 101, letter C, only prescribed that Trial Chambers would indicate whether multiple sentences were to be served consecutively or concurrently.⁶⁶ The common practice was therefore to impose a global sentence with no specification of the amount of the single underlying penalties imposed for each crime. Rule 101 was then amended and, currently, no longer contains such a reference. A similar norm is still present at Rule 87 '*Deliberations*', which on the one hand again leaves discretion to Trial Chambers as to the imposition of concurrent or consecutive sentences, but on the other hand presents an interesting novelty introduced in December 2000: the obligation for judges to specify the penalty imposed for each charge on which the accused is found guilty, unless they decide to pronounce a single sentence.⁶⁷ In practice, in the majority of cases judges have in fact imposed a single sentence for the totality of findings regarding the criminal conduct of the accused, thus with no specification of the single penalties for each conviction. It is suggested that this practice has a negative impact on sentencing, as the specification of the actual penalty meted out in respect of each finding of guilt and of each crime is crucial to the issues of clarity, transparency and consistency in sentencing.

⁶⁶ Up to the version of 14 July 2000 of the RPE, Rule 101(C) stated thus: "... (C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently...". This provision was then eliminated in Rev.19 of 13 December 2000.

⁶⁷ See Rule 87(C): '...If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.'

B. Identification of influential factors on the decision-making process in sentencing

Against the background of the normative provisions contained in the Statutes and RPE of the ad hoc Tribunals, the following sections will identify other influential factors taken into account by judges during the decision-making process in sentencing.

In order to reconstruct the sentencing process in its entirety, it is in fact essential not only to analyse the few factors expressly mentioned by the Statutes and the RPE (i.e. the gravity of the offence, the individual circumstances of the convicted person, the general practice regarding prison sentences in the former Yugoslavia and Rwanda), but also to evaluate the judicial elaboration of sentencing and thus identify other elements that are consistently referred to in the sentencing practice of the ad hoc Tribunals. Judges have, in fact, extensive discretionary powers when dealing with sentencing issues. Their discretion is not confined to the factors mentioned in the Statutes and RPE, but allows them to evaluate all the facts and circumstances of the case, thus taking into account basically any other element they deem pertinent.

The categories hereby proposed and that I will take into account in this analysis derive, on the one hand, from a reflection upon the general process of sentencing and the ‘traditional’ elements of which it is composed (the comparative examination of the process of sentencing at the national level in Chapter 2 was pivotal to this identification); on the other hand, they are derived from an assessment of the ICTY and ICTR case-law broadly considered. What appears evident from an overall review of the jurisprudence is that factors taken into account in the determination of sentences are of a various nature but essentially are connected to: the purposes assigned to punishment, the influence exercised by general principles, the specific circumstances of the case and its procedural aspects.

The overview presented will therefore be based on the examination of three complexes of factors, each comprising other sub-categories. The complexes identified are the following: ‘general influential factors’, ‘case-related factors’, and ‘proceeding-related factors’. They encompass elements that are both of an objective and subjective nature (for instance, the ‘case-related factors’ include sub-categories comprising elements which are objective in nature, such as the number of victims or the age of the

accused, and other elements which are of a subjective nature – such as expression of remorse or cruelty – related as they are to the individual offender). The choice of classifying the influential factors according to their ‘field-characterization’ rather than their objective or subjective nature lies on the assumption that the former classification is more functional to the aim of providing a precise description of all the different elements that are relevant in sentencing. Grouping these factors into the two categories of objective and subjective factors alone is not thought to be sufficiently appropriate to present the large variety of circumstances considered. In addition, the consideration that some factors (such as purposes of punishment, guilty pleas or cooperation of the accused) clearly cannot be defined as only, or entirely, objective or subjective, contributed to the preference of a classification based on ‘field-characterization’.

The three groups of sentencing factors identified above – together with their sub-categories – will now be described in more detail.

3.6 General influential factors

Within this group, the categories of ‘principle of proportionality’, ‘purposes of punishment’ and ‘sentencing practice in the former Yugoslavia and Rwanda’ will be examined, as constituting general and preliminary factors exercising influence on sentencing. It has already been stressed that proportionality is a key issue in sentencing, and that the purposes and functions assigned to punishment in a given system shape the way of meting out sentences. Accordingly, the analysis hereby conducted will identify what are the purposes of punishment accepted by the judges of the ad hoc Tribunals and considered as the most appropriate to the mandate of such institutions. It has previously been recalled that neither the Statutes nor the Rules of Procedure and Evidence of the two Tribunals elaborate on the objectives sought by the imposition of sentences. In order to identify them in relevant documents, before conducting the same analysis with regards to the case-law, the Security Council’s Resolutions establishing the ICTY and ICTR must be taken into consideration, since they enshrine the Tribunals’ very objectives and purposes as they were perceived by Member States of the Security Council (SC).

The documents relevant here are thus SC Resolutions 808, 827 of 1993, 955 of 1994, and the two Reports of the Secretary-General on the establishment of the ICTY and ICTR.⁶⁸ In the wording of these documents, specific elements indicate that the establishment of the ad hoc Tribunals had, on the one hand, the purpose of prosecuting offenders⁶⁹ and, on the other hand, the purpose of deterring further atrocities. In the Preamble of Resolutions 808, 827 of 1993 and 955 of 1994, the SC expressed its belief that the establishment of an international tribunal would facilitate the aim of halting atrocities, and that the prosecution of persons responsible for such acts would contribute to the process of national reconciliation and to the restoration and maintenance of peace. The SC alludes to *retribution* when it says that the violations must be ‘effectively redressed’.

The purpose of *deterrence* is also recalled in the Secretary-General’s Report pursuant to Resolution 808(1993).⁷⁰ In the particular circumstances of the former Yugoslavia and Rwanda, the SC – compelled to take immediate action and unprecedented measures – acted to achieve peace and security in those territories through the deterrence of further crimes. This is corroborated by the declarations of Member States of the SC at the time when Resolution 827(1993) was adopted. These declarations show that the ICTY was also considered as a tool to deter parties to the conflict from perpetrating further crimes.⁷¹

In addition, it must be recalled that the ICTY’s First Annual Report noted that the threefold purposes of the Tribunal, laid down in Resolutions 808 and 827 of 1993, were ‘*to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace*’.⁷²

⁶⁸ *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993)*, U.N.Doc.S/25704, 3 May 1993; *Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955(1994)*, U.N.Doc.S/1995/134, 13 February 1995.

⁶⁹ Resolutions 827(1993), para.2, and 955(1994), para.1, refer to the decision of establishing the ad hoc Tribunals for the *sole purpose* of prosecuting persons responsible of serious violations. The same is recalled in the Report of the Secretary-General on the ICTY, *cit.*, para.12.

⁷⁰ *Report of the Secretary-General...*, S/25704, *op.cit.*, paras.10, 26.

⁷¹ See, in particular, declarations by France (p.12), Morocco (p.27-28), Pakistan (p.31), United Kingdom (pp.19-20), and United States (p.12) in *Provisional Minutes of the 3217th Session* (S/Trans. 3217, 25 May 1993).

⁷² *First Annual Report of the International Criminal Tribunal for the Former Yugoslavia*, 29 August 1994, U.N. Doc. A/49/342 – S/1994/1007, para.11.

The approach taken in practice by Chambers of the ad hoc Tribunals regarding the purposes of punishment will thus be analysed within the ‘general influential factors’ on sentencing, also in order to verify compliance with the Tribunals’ mandate.

3.7 Case-related factors

The second group of influential factors on sentencing is represented by all those circumstances that are specific to the case, as related to the commission of the crime or to the accused and his/her personal situation. This group encompasses the two sub-categories of ‘gravity of the offence’ and ‘individual circumstances of the accused’.

Personal circumstances have considerable weight on sentencing, given that the punishment should fit not only the crime but also the offender. Trial Chambers have a duty to identify and consider the factors that will assist in fitting the penalty to the case in hand. It follows that aggravating and mitigating circumstances acquire the utmost relevance in the whole decision-making process leading to the final sentence.

For the purpose of a comparison with influential factors on national sentencing, it may be useful to recapitulate those circumstances that the analysis in Chapter 2 showed may be considered in aggravation and mitigation of the final penalty in the six countries analysed. Amongst the circumstances considered only as *aggravating factors* the following were included: reprehensible or futile motives; premeditation; the way in which the offence is committed; intentional and inhumane increase of the suffering of victims; targeting of vulnerable victims; youth of the victims; malice or cruelty towards the victim in the commission of the offence; recidivism or relevant previous convictions; commission of the offence by misuse of a position of superiority or exploitation of trust; commission based on racist, ethnical, religious or gender motivated discrimination or any other form of bias.

The following appeared to be considered only as *mitigating factors*: acts resulting from provocation, violent anger, or delusion; effort toward compensation or restitution before or during the proceedings; confession/guilty plea; youth of the accused; previous

good character; personal situation and family status; cooperation with the authorities; surrender.⁷³

Upon reading the case-law of the ad hoc Tribunals, these or similar factors also appear to be taken into account by international judges in the decision-making process in sentencing and are thus relevant for international sentencing.

The two groups of ‘case-related’ factors are structured as follows: the ‘gravity of the offence’ includes aspects related both to the perpetration of the crime (such as the type of criminal act, the way in which the crime was perpetrated, cruelty or sadism in the perpetration, etc.) and to victimisation (harm and level of suffering caused to the victims, consequences for the survivors, physical and mental trauma suffered by the survivors); the ‘individual circumstances of the accused’ include individual characteristics such as good character, family status, previous conduct, individual role played in the commission of the crimes, superior responsibility and leadership level, age, health conditions, expression of remorse.

3.8 Proceeding-related factors

Finally, the last group of influential factors focuses on circumstances somehow related to the proceedings and their development. These circumstances have proven capable of exercising influence in the decision-making process in sentencing and thus on the final penalty imposed, in the sense that a mitigating or an aggravating value has been attached to them.

The categories identified in this group are as follows: voluntary surrender; cooperation with the office of the Prosecutor; guilty pleas and plea-bargaining; testimony or information provided (i.e. whether the accused testified in court, in relation to his case or other cases and whether s/he helped the Prosecution with other information on related cases or investigations); attitude of the accused during detention and trial proceedings.

As will be seen, some of the categories overlap or have blurred boundaries: for instance, Trial Chambers have often considered testimony or information provided by

⁷³ Of course these lists are not meant to be exhaustive, but only to help the identification of influential factors that are also relevant for international sentencing.

the accused as part of co-operation with the office of the Prosecutor, while at other times the two categories were treated independently.

The analysis shows the way in which each of the above factors was considered by the Chambers of the ad hoc Tribunals and the weight attributed to it (whether it was considered in mitigation, in aggravation or not relevant), without investigating the specific factual circumstances of each case.

A final remark is opportune before considering the case-law in detail. Given the enormous amount of jurisprudence produced so far by the ICTY and the ICTR and the limited extent of the present thesis, the following analysis focuses only on some selected cases deemed to be the most relevant in describing the various influential factors examined; although a complete review is not possible, it is hoped to provide as broad an examination as possible of the case-law of the ad hoc Tribunals.

C. ICTY and ICTR: Overview of the case-law

3.9 General influential factors

a) Purposes of punishment

The Statutes of the ad hoc Tribunals are laconic as to the criteria which should guide the sentencing process and do not mention any objective of punishment, thus failing to address the important issue of the overall purposes of sentencing that should guide judges in meting out penalties at the ICTY and ICTR.

As seen above, the main objectives that are identifiable from the SC Resolutions establishing the two Tribunals are *in primis* retribution and (general and specific) deterrence, and also national reconciliation and restoration of peace. These aims should provide guidance to Trial Chambers in determining the most appropriate sentence.

Proceeding to analyse the practice of the Tribunals in this respect, it should be noted that a handful of various goals were taken into account, although retribution and deterrence were deemed the most important purposes of sentencing.

Beginning with the ICTY, undoubtedly the majority of the Chambers have constantly recognised *retribution* and *deterrence* as the main purposes of punishment.⁷⁴ Some other Chambers acknowledged that one of the principal purposes for the establishment of the Tribunal was to deter future crimes and to combat impunity. For instance, in the *Erdemovic* case, Trial Chamber I, commenting on the declarations of Members of the SC, when Resolution 827 was adopted, stated that:

...they saw the International Tribunal as a powerful means for the rule of law to prevail, as well as to deter the parties to the conflict in the former Yugoslavia from perpetrating further crimes or to discourage them from committing further atrocities. ...The International Tribunal's objectives as seen by the Security Council – i.e. general prevention (or deterrence), reprobation, retribution (or 'just deserts') as well as collective reconciliation – fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia.⁷⁵

Judges therefore assumed that the objectives envisaged by the SC when creating the Tribunal, namely *deterrence*, *reprobation*, *retribution* and *collective reconciliation*, could be taken into account also for sentencing purposes. Yet no attempt was made to define the purposes identified or to try and explain their meaning in the trial context.

The purpose of deterrence has even been considered by the *Delalic et al.* Trial Chamber as the most important aim of punishment.⁷⁶ Conversely, in the *Tadic* case the

⁷⁴ See *Prosecutor v. Tadic*, Sentencing Judgement, Case No.IT-94-1-Tbis-R117, 11 November 1999, paras.7-9; *Prosecutor v. Erdemovic*, Sentencing Judgement, Case No.IT-96-22-T, 29 November 1996, paras.58, 64; *Prosecutor v. Kupreskic*, Trial Judgement, Case No.IT-95-16-T, 14 January 2000, para.848; *Prosecutor v. Blaskic*, Trial Judgement, Case No.IT-95-14-T, 3 March 2000, para.762; *Prosecutor v. Aleksovski*, Appeal Judgement, Case No. IT-95-14/1-A, 24 March 2000, para.185; *Prosecutor v. Delalic, et al.*, Appeal Judgement, Case No.IT-96-21-A, 20 February 2001, para.806; *Prosecutor v. Kunarac*, Trial Judgement, Case No.IT-96-23-T, 22 February 2001, para.838; *Prosecutor v. Stakic*, Trial Judgement, Case No.IT-97-24-T, 31 July 2003, paras.900-902; *Prosecutor v. Deronjic*, Sentencing Judgement, Case No.IT-02-61-S, 30 March 2004, paras.142-150; *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.817; *Prosecutor v. Strugar*, Trial Judgement, Case No.IT-01-42-T, 31 January 2005, para.458; *Prosecutor v. Limaj et al.*, Trial Judgement, Case No.IT-03-66-T, 30 November 2005, para.723; *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006, para.718; *Prosecutor v. Krajisnik*, Case No.IT-00-39&40-T, Trial Judgement, 27 September 2006, para.1134; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.31; *Prosecutor v. Martic*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.484; *Prosecutor v. Dragomir Milosevic*, Case No.IT-98-29/1-T, Trial Judgement, 12 December 2007, para.987.

⁷⁵ *Erdemovic*, 29 November 1996, *cit.*, para.58.

⁷⁶ *Prosecutor v. Delalic et al.*, Trial Judgement, Case No.IT-96-21-T, 16 November 1998, para.1234. Subsequently recalled by *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.761.

Appeals Chamber found that deterrence is a factor which ‘*must not be accorded undue prominence in the overall assessment of the sentences to be imposed*’.⁷⁷

Chambers have often distinguished between general and special deterrence: general deterrence expresses the aim to deter, through punishment of certain crimes committed, other individuals from committing similar crimes;⁷⁸ special deterrence focuses more on the accused and aims at deterring the individual defendant from re-offending.⁷⁹

In the *Furundzija* case, the ICTY asserted that punishment itself is an infallible tool for achieving retribution, stigmatization and deterrence. It stressed that the offender must be punished not only because he broke the law (*punitur quia peccatur*) but also in order to dissuade future possible criminals from offending (*punitur ne peccatur*).⁸⁰

The *Jelusic* Trial Chamber went so far as to affirm that – in order to achieve the objectives of retribution, deterrence and restoration of peace – Trial Chambers ‘must pronounce an *exemplary penalty* both from the viewpoint of punishment and deterrence’.⁸¹

Nevertheless, it should be remembered that the call for retribution was constantly interpreted not in the sense of pure ‘revenge’ but as justified in order to reassert the

⁷⁷ *Prosecutor v. Tadic*, Case No.IT-94-1-T and IT-94-1A-Bis, Appeals Judgement, 26 January 2000, para.56. The *Aleksovski* Appeals Chamber concurred with this finding (*Aleksovski*, 24 March 2000, *cit.*, para.185). Also sharing those findings: *Prosecutor v. Kordic & Cerkez*, Trial Judgement, Case No.IT-95-14/2-T, 26 February 2001, para.847; *Prosecutor v. Delalic, et al.*, Appeal Judgement, Case No.IT-96-21-A, 20 February 2001, para.801; *Prosecutor v. Kunarac et al.*, Trial Judgement, Case No.IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.840; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.484.

⁷⁸ *Prosecutor v. Furundzija*, Trial Judgement, Case No.IT-95-17/1-T, 10 December 1998, para.288; *Prosecutor v. Kunarac et al.*, Trial Judgement, *cit.*, 22 February 2001, para.839; *Prosecutor v. Krstić*, Trial Judgement, Case No.IT-98-33-T, 2 August 2001, para.693; *Prosecutor v. Stakić*, Trial Judgement, *cit.*, 31 July 2003, para.899; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.34.

⁷⁹ *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.822; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.33; *Prosecutor v. Kunarac et al.*, Trial Judgement, *cit.*, 22 February 2001, para.839. Special deterrence was considered of little significant as a sentencing aim before the ICTY by the *Kunarac* Trial Chamber, on the reasoning that the likelihood of persons convicted before the Tribunal ever being faced again with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches was too remote to render special deterrence worth of any significant consideration (*ibid.*, para.840).

⁸⁰ *Prosecutor v. Furundzija*, Trial Judgement, Case No.IT-95-17/1-T, 10 December 1998, para.288. See also para.290: “It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence”.

⁸¹ *Prosecutor v. Jelusic*, Trial Judgement, Case No.IT-95-10-T, 14 December 1999, para.116 (emphasis added).

fundamental values of humanity held by the international community.⁸² As the Appeal Chamber specified in the *Aleksovski* case:

...[retribution] is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes ... Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.⁸³

Trial Chambers of the ICTR also upheld the two purposes of *retribution* and *deterrence*.⁸⁴ As recalled in the *Kambanda* case, the penalties imposed must be directed both at retribution and deterrence. Through the former the accused must see that crimes are not left unpunished; the aim of the latter is to dissuade those who could in the future attempt to commit crimes.⁸⁵ In some cases, the ICTR Trial Chambers seemed to give some sort of priority to the objective of deterrence, considering it ‘*over and above*’ the purpose of retribution.⁸⁶ For instance, in the *Rutaganda* case, the Trial Chamber – when dealing with the purposes of retribution and deterrence – suggested that the underlying objective of retribution could be indeed deterrence, considering as overwhelming the need to ‘dissuade for ever others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the

⁸² See, for instance, *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.819: ‘...within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.’ See also *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006, para.719: ‘According to the jurisprudence of the Tribunal, retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. It is meant to reflect a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty must be proportionate to the wrongdoing; in other words, the punishment must fit the crime.’

⁸³ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.185. Subsequently recalled, among others, by: *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.140; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.484.

⁸⁴ *Prosecutor v. Kayishema and Ruzindana*, Trial Judgement, Case No.ICTR-95-1-T, 21 May 1999, para.2 ‘Sentence’; *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T, 2 September 1998, paras.2-19; *Prosecutor v. Kambanda*, Judgement and Sentence, Case No.ICTR-97-23-S, 4 September 1998, paras.28, 58-59; *Prosecutor v. Ruggiu*, Judgement and Sentence, Case No.ICTR-97-32-I, 1 June 2000, para.33; *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Case No.ICTR-96-10/96-17-T, Trial Judgement, 21 February 2003, para.882; *Prosecutor v. Rugambarara*, Case No.ICTR-00-59-T, Sentencing Judgement, 16 November 2007, para.11.

⁸⁵ *Kambanda, cit.*, Trial Judgement, 4 September 1998, paras.26-28.

⁸⁶ *Prosecutor v. Musema*, Trial Judgement, Case No.ICTR-96-13-T, 27 January 2000, para.986; *Prosecutor v. Serushago*, Sentencing Judgement, Case No.ICTR-98-39-S, 5 February 1999, para.20; *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.571.

serious violations of international humanitarian law and human rights'.⁸⁷ ICTR Chambers have also frequently implied, as in the *Serushago* case,⁸⁸ that there is a direct link between the objective of bringing impunity to an end, declared by the UN SC in Chapter VII of the UN Charter, and the moral justification for retributive and deterrent sentencing.

Regarding other purposes, punishment was at times also considered in the light of rehabilitation. In the *Erdemovic* sentencing judgement, for example, judges recognised that international principles of punishment may also include other purposes such as rehabilitation and reconciliation.⁸⁹ This appears consistent with the particular context of human rights violations in which international crimes are committed, and also with the fact that national reconciliation and maintenance of peace were mentioned by the SC in its Resolutions.

Similarly, in *Tadic*, the Trial Chamber – after having given equal emphasis to retribution and deterrence – further suggested that incapacitation of the dangerous individual and rehabilitation were also desirable objectives of punishment, implying that the latter promoted the ‘modern philosophy of penology that the punishment should fit the offender and not merely the crime’.⁹⁰

There is no uniform approach, however, to the purpose of *rehabilitation*. While in some cases, especially recent ones, rehabilitation was recognised as an important goal of sentencing,⁹¹ in other cases it did not have any particular influence, as it was affirmed that such a purpose should not be given undue weight.⁹² For instance, the Appeals

⁸⁷ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement and Sentence, 2 February 1999, para.455.

⁸⁸ *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentencing Judgement, 5 February 1999, para.19-20.

⁸⁹ *Erdemovic, cit.*, Sentencing Judgement, 29 November 1996, para.21.

⁹⁰ *Prosecutor v. Tadic*, Case No. IT-94-1-S, Sentencing Judgement, 14 July 1997, para.61.

⁹¹ *Kupreskic, cit.*, Trial Judgement, 14 January 2000, para.849; *Delalic, cit.*, para.1233; *Kayishema, cit.*, para.2 ‘Sentence’; *Serushago, cit.*, para.39; *Ntakirutimana, cit.*, para.887; *Prosecutor v. Momir Nikolic*, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003, para.93; *Prosecutor v. Galic*, Trial Judgement, Case No. IT-98-29-T, 5 December 2003, para.757; *Prosecutor v. Obrenovic*, Sentencing Judgement, Case No. IT-02-60/2-S, 10 December 2003, paras.48-49; *Prosecutor v. Cesic*, Sentencing Judgement, Case No. IT-95-10/1-S, 11 March 2004, para.27; *Prosecutor v. Deronjic*, Sentencing Judgement, Case No. IT-02-61-S, 30 March 2004, Separate Opinion of Judge Mumba, paras.2-3; *Prosecutor v. Mrdja*, Sentencing Judgement, Case No. IT-02-59-S, 31 March 2004, paras.18-19; *Prosecutor v. Babic*, Sentencing Judgement, Case No. IT-03-72-S, 29 June 2004, para.43; *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No. IT-02-60-T, 17 January 2005, para.817.

⁹² *Prosecutor v. Delalic, et al.*, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para.806; *Jelusic, cit.*, para.116-117; *Prosecutor v. Banovic*, Sentencing Judgement, Case No. IT-02-65/1-S, 28 October 2003, para.35; *Prosecutor v. Zelenovic*, Case No. IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.35; *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Judgement, 12 June

Chamber in the *Delalic et al.* case acknowledged the significance of rehabilitation but, at the same time, stressed the fact that this factor should not ‘play a predominant role’ in the decision-making process and must be subordinated to deterrence and retribution as the main purposes of sentencing within the system of the ad hoc Tribunals.⁹³

At times the accused’s predisposition to rehabilitation has even been considered a mitigating factor, as in the *Obrenovic* case where the Trial Chamber found:

...where an accused has demonstrated that he has already taken affirmative steps on the path toward rehabilitation, and that the process of rehabilitation is likely to continue in the future, this should be recognised in mitigation of sentence.⁹⁴

Overall, the importance of rehabilitation as a purpose of sentencing and the extent to which it must influence the final sentence are still to be clarified. Commentators argue that further proof that rehabilitation has not been considered significant before the ad hoc Tribunals is the fact that judges failed to articulate the need for retributive punishment to comply with human rights norms.⁹⁵ In any case, there is no recognisable attempt by the ad hoc Tribunals to define the possible meaning of rehabilitation in the context of international justice and international crimes.

2007, para.484; *Prosecutor v. Dragomir Milosevic*, Case No.IT-98-29/1-T, Trial Judgement, 12 December 2007, para.987. See, in particular, the *Kunarac* case, where it was stated: “The Trial Chamber fully supports rehabilitative programmes, if any, in which the accused may participate while serving their sentences. But that is an entirely different matter to saying that rehabilitation remains a significant sentencing objective. The scope of such national rehabilitative programmes, if any, depends on the states in which convicted persons will serve their sentences, not on the International Tribunal. Experience the world over has shown that it is a controversial proposition that imprisonment alone – which is the only penalty that a Trial Chamber may impose – can have a rehabilitative effect on a convicted person. The Trial Chamber is therefore not convinced that rehabilitation is a significant relevant sentencing objective in this jurisdiction” (*Kunarac, cit.*, Trial Judgement, 22 February 2001, para.844).

⁹³ *Delalic*, Appeals Judgement, *cit.*, para.806. Similarly the Appeals Chamber in the *Media* case, where one of the Appellants, Barayagwiza, maintained that the Trial Chamber, in determining the final penalty, failed to give importance to the objectives of national reconciliation and rehabilitation. On the other hand, the Appeals Chamber recognized the primary importance of retribution and deterrence and stressed that the objective of rehabilitation of the accused should not play a major role in the determination of penalty. See *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No.ICTR-99-52-A, Appeal Judgement, 28 November 2007, paras.1056-1057.

⁹⁴ *Prosecutor v. Obrenovic*, Sentencing Judgement, Case No.IT-02-60/2-S, 10 December 2003, para.143.

⁹⁵ See HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, p.21; and SCHABAS, W., ‘Sentencing by the International Tribunals: A Human Rights Approach’, *Duke Journal of Comparative and International Law*, 7(1997), pp.503-504: the author points out that rehabilitation is generally recognised as an essential component of international humanitarian law.

Respect of the rule of law, national reconciliation, restoration of peace, and protection of society are amongst the other objectives which some Chambers considered as being relevant in determining the appropriate sentence.⁹⁶

In the *Erdemovic* case, for instance, the Trial Chamber recognised that the exercise of its judicial functions must contribute to accountability, reconciliation and the establishment of truth.⁹⁷ The importance of enforcement of law and respect of its rule by the international community was particularly emphasised in the *Deronjic* case:

One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.⁹⁸

The value of the fight against impunity was also recalled in various instances.⁹⁹

To summarise, from this brief review of case-law it can be said that a multiplicity of purposes was recognized in sentencing and that – in accordance with the main purposes of the founders of those international institutions – the ICTY and ICTR recognised mainly the principles of retribution and deterrence as the most important ones in sentencing. A critical remark is unavoidable with regard to the way in which the Chambers of the ad hoc Tribunals addressed sentencing principles. It appears they have failed to consistently tackle sentencing aims and to explore their meaning at the international level. The justifications of punishment adopted remain abstract and vague;

⁹⁶ *Tadic*, Sentencing Judgement, *cit.*, 14 July 1997, para.7; *Delalic*, Trial Judgement, *cit.*, para.1232; *Kupreskic*, *cit.*, Trial Judgement, 14 January 2000, para.848; *Kayishema and Ruzindana*, *cit.*, Trial Judgement, 21 May 1999, para.1 “Sentence”; *Prosecutor v. Rutaganda*, Judgement and Sentence, Case No.ICTR-96-3-T, 6 December 1999, para.455; *Prosecutor v. Dragan Nikolic*, Sentencing Judgement, Case No.IT-94-2-S, 18 December 2003, para.245; *Prosecutor v. Barayagwiza et al.*, Trial Judgement, Case No.ICTR-99-52-T, 3 December 2003, para.1095; *Prosecutor v. Kamuhanda*, Trial Judgement, Case No.ICTR-95-54A-T, 22 January 2004, para.753; *Prosecutor v. Blaskic*, Appeals Judgement, Case No.IT-95-14-A, 29 July 2004, para.678; *Prosecutor v. Nzabirinda*, Case No.ICTR-2001-77-T, Trial Chamber, Sentencing Judgment, 23 February 2007, para.49.

⁹⁷ *Prosecutor v. Erdemovic*, Case No. IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para.21: ‘...Discovering the truth is the cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process’.

⁹⁸ *Prosecutor v. Deronjic*, Sentencing Judgement, Case No.IT-02-61-S, 30 March 2004, para.149.

⁹⁹ See *Prosecutor v. Stakic*, Trial Judgement, para.899: ‘...The International Tribunal was set up to counteract impunity and to ensure a fair trial for the alleged perpetrators of crimes falling within its jurisdiction’. See also *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.814; *Prosecutor v. Nzabirinda*, Case No.ICTR-2001-77-T, Trial Chamber, Sentencing Judgment, 23 February 2007, para.49.

there is no effort towards systematizing or consistent examination of the rationale for punishment in international adjudication. Similarly, nothing is said as to the specific relevance that certain justifications for punishment could assume in guiding sentencing in particular cases. Some examples will be of further clarification. In *Ruggiu*, the ICTR merely referred to the fact that its jurisprudence ‘addressed the principal aims of sentencing, namely retribution, deterrence, rehabilitation and justice’, but it did not give any further description of these.¹⁰⁰ In *Rutaganda*, retributive and deterrent claims were made about sentencing, again without further explanations.¹⁰¹ In the *Todorovic* Sentencing Judgement, the ICTY – while reaffirming the appropriateness of a retributive approach – simply acknowledged that deterrence may be considered as another important purpose of sentencing with regards to international crimes, but such a claim was not supported by any appropriate reasoning. The Trial Chamber concluded that retribution and deterrence provided ‘the main principles in sentencing for international crimes’ and formed ‘the backdrop against which an individual accused’s sentence must be determined’.¹⁰²

Probably aware of the lack of elaboration on the issue and of the need to link the purported objectives of punishment to nationally and internationally recognised norms and principles, some Chambers recently went so far as to affirm their duty to discern ‘the underlying principles and rationales for punishment that respond to both the needs of the society of the former Yugoslavia and the international community.’¹⁰³ Thus, the purposes of punishment as enshrined in the Criminal Code of the Federal Republic of Yugoslavia were recalled as a point of reference.¹⁰⁴ But, once again, no organic theory related to the purposes of punishment was brought forward.

b) *Sentencing practice in the former Yugoslavia and Rwanda*

Since the beginning of their activity, Chambers of both the ICTY and ICTR were confronted with the provision prescribing recourse to the ‘*general practice regarding prison sentences*’ in the courts of the former Yugoslavia and Rwanda, and had to

¹⁰⁰ *Ruggiu, cit.*, Trial Judgement, 1 June 2000, para.33.

¹⁰¹ *Rutaganda, cit.*, Trial Judgement, 6 December 1999, para.456.

¹⁰² *Prosecutor v. Todorovic*, Sentencing Judgement, Case No. IT-95-9/1-S, 31 July 2001, paras.28-30.

¹⁰³ *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.816

¹⁰⁴ *Ibid.*, para.820. The former Criminal Code of 1976 of the FRY considered deterrence, both specific and general, and rehabilitation as the primary purposes of punishment (Article 33).

determine the extent to which their sentencing decisions should be influenced by that practice.¹⁰⁵ As already stated above in section 3.3, such provisions have proven difficult to apply for several reasons.

In the first sentencing judgement, the *Erdemovic* case, the Trial Chamber of the ICTY started by noting the difficulties in identifying a 'general practice' in the former Yugoslavia, considering – for instance – that no mention of crimes against humanity was contained in that law, and that there were no decisions, which might serve as precedents, relating to cases similar to those before the International Tribunal. Therefore, the Trial Chamber found it was unable to draw significant conclusions as to the general practice for prison sentences in the former Yugoslavia, and concluded that 'the reference to this practice can be used for guidance, but is not binding'.¹⁰⁶

The same conclusion was supported by the *Tadic* Trial Chamber, which shared the view that 'the sentencing practice in the courts of the former Yugoslavia may be used for guidance, but that it is not binding'.¹⁰⁷ This conclusion derived, once again, from the fact that there were no directly applicable provisions in Yugoslav law. In fact, Tadic had been convicted under Article 3 St. of serious violations of the laws and customs of war, and Yugoslav criminal law dealt only with grave breaches and not with war crimes in general. Therefore, the Chamber considered all the crimes under the ICTY Statute as falling under that part of the Yugoslav Penal Code dealing with 'Crimes Against Peace and International Law', and declared the Tribunal authorised to impose sentences up to and including life imprisonment, as this would not violate the *nulla poena* principle.¹⁰⁸ Further, the Trial Chamber observed that under the criminal code of the Socialist Federal Republic of Yugoslavia (SFRY) capital punishment (which in the opinion of the Chamber had, in the ICTY system, its equivalent in life imprisonment) existed, and, although it had been abolished in certain republics of the former Yugoslavia, was still applicable in Bosnia and Herzegovina (where Tadic had committed his crimes).

The issue of respect of the domestic sentencing practice was of great relevance also in the *Delalic et al.* case, where the Defence argued that a sentence of more than 15

¹⁰⁵ For an extensive description and comments on the case-law of the ad hoc Tribunals on this issue, see SCHABAS, W., 'Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals', *European Journal of International Law*, vol.11 no.3, 2000, pp.528-536.

¹⁰⁶ *Erdemovic, cit.*, Sentencing Judgement, 29 November 1996, para.39.

¹⁰⁷ *Tadic*, Sentencing Judgement, 11 November 1999, paras.11-12

¹⁰⁸ *Tadic*, Sentencing Judgement, 14 July 1997, para.9.

years imprisonment, exceeding the maximum sentence applicable in the former Yugoslavia when the offence was committed, would violate the *nulla poena sine lege* principle.¹⁰⁹ The Trial Chamber dismissed the argument by stating that the principle of legality does not require a specific sentencing tariff, but only the previous existence of punishment with respect to the offence charged.¹¹⁰ Therefore, it was argued that, as the citizens of the former Yugoslavia were aware or should have been aware of the fact that war crimes and crimes against humanity were at that time criminalized and punishable by the most severe penalties, there was no infringement of the *nulla poena sine lege* principle. Furthermore, the Trial Chamber rejected the argument that Rule 101B(iii) providing for life imprisonment was at odds with the *nulla poena sine lege* principle given that imprisonment for life was not permitted under Yugoslav law. The Chamber considered it as ‘an erroneous and overly restricted view’ of the principle of legality.¹¹¹

The same argument that a sentence of 15 or 20 years imprisonment (depending on the state of the former Yugoslavia where crimes were committed) is the highest possible sentence to be pronounced by the ICTY was at the basis of a number of appeals against sentences, but was also dismissed on each occasion.¹¹²

The implied consequence is that the ICTY can impose a sentence in excess of that which would be applicable under the law of the former Yugoslavia. This was explicitly recognised in a number of subsequent cases.¹¹³

The interpretation of the non-binding nature of the provision on domestic general practice has always found consistent support in the jurisprudence of the ICTY:¹¹⁴

¹⁰⁹ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1197 *et sequ.*

¹¹⁰ *Ibid.*, para.1211 *et sequ.*

¹¹¹ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, paras.1209-1210.

¹¹² Recently, see for instance, the *Galic* appeal case where the Appeals Chamber once again reiterated that the International Tribunal, while bound to take the sentencing law and practice of the former Yugoslavia into account, does not have to follow it strictly. *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeal Judgement, 30 November 2006, paras.398-399.

¹¹³ See, for instance, *Banovic, cit.*, para.89; *Prosecutor v. Momir Nikolic*, Sentencing Judgement, Case No.IT-02-60/1-S, 2 December 2003, para.100; *Prosecutor v. Dragan Nikolic*, Sentencing Judgement, *cit.*, para.165; *Deronjic, cit.*, para.170; *Cesic, cit.*, para.104; *Prosecutor v. Krstic*, Appeals Judgement, Case No.IT-98-33-A, 19 April 2004, para.262; *Strugar*, Trial Judgement, *cit.*, para.473; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.57.

¹¹⁴ See *Delalic*, Trial Judgement, *cit.*, para.1194, and Appeals Judgement, *cit.*, para.818; *Prosecutor v. Aleksovski*, Trial Judgement, Case No.IT-95-14/1-T, 25 June 1999, para.242; *Prosecutor v. Jelusic*, Appeals Judgement, Case No.IT-95-10-A, 5 July 2001, para.117; *Prosecutor v. Kunarac*, Appeals Judgement, Case No.IT-96-23&96-23/1-A, 12 June 2002, paras.347-349; *Stakic, cit.*, Trial Judgement, 31 July 2003, para.887; *Prosecutor v. Galic*, Trial Judgement, Case No.IT-98-29-T, 5 December 2003, para.761; *Cesic, cit.*, Sentencing Judgment, 11 March 2004, para.101; *Delalijic*,

evidently, ‘taking into account’ does not mean that the general practice is ‘binding’ on the Tribunal. Similarly, Trial Chambers of the ICTR have made analogous findings in respect of the equivalent Article 23(1) of the ICTR Statute.¹¹⁵ The Appeals Chamber in the *Serushago* case has confirmed the established view on the issue:

It is the settled jurisprudence of the ICTR that the requirement that ‘the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda’ does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.¹¹⁶

In the *Kayishema and Ruzindana* case, the ICTR applied the provision of having recourse to national law in the sense of justifying the imposition of a long sentence, given the very harsh penalties, including capital punishment, imposed by Rwandan law:¹¹⁷

...this Chamber finds that the general practice regarding prison sentences in Rwanda represents one factor supporting this Chamber’s imposition of the maximum and very severe sentences.¹¹⁸

The fact that the majority of the Chambers of the ad hoc Tribunals stated that the general practice regarding prison sentences in the courts of the former Yugoslavia and Rwanda was not to be considered as binding can be seen as an open denial of the letter of the law, as that element is clearly indicated by Articles 24 and 23 amongst the factors to be taken into consideration in the determination of the appropriate sentence. Such a requirement is not satisfied by a mere mention of the provisions of the FRY Criminal

Sentencing Judgement, 30 March 2004, para.158 ; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.57.

¹¹⁵ *Akayesu, cit.*, Trial Judgement, 2 September 1998, para.14; *Kambanda, cit.*, Trial Judgement, 4 September 1998, para.23; *Serushago, cit.*, Sentencing Judgment, 5 February 1999, para.18; *Musema, cit.*, Trial Judgement, 27 January 2000, para.984; *Prosecutor v. Semanza*, Trial Judgement, Case No.ICTR-97-20-T, 15 May 2003, para.560.

¹¹⁶ *Prosecutor v. Serushago*, Appeals Judgement, Case No.ICTR-98-39-A, 6 April 2000, *Reasons for Judgement*, para.30.

¹¹⁷ The same was upheld in the *Kamuhanda* case: *Prosecutor v. Kamuhanda*, Case No.ICTR-95-54A-T, Trial Judgement, 22 January 2004, para.766. Prof. Schabas highlighted the paradoxical effects resulting from the ‘national practice’ provision: a norm which was inspired by concerns about the *nulla poena sine lege* principle and was therefore supposed to protect the accused, has on the contrary turned into a tool used by judges to justify harsher penalties. This has occurred especially before the ICTR, where judges have often used the argument that, were the accused to be tried by national courts, then they would probably have been sentenced to the death penalty. See SCHABAS, W., ‘Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals’, *European Journal of International Law*, vol.11 n.3, 2000, p.522.

¹¹⁸ *Kayishema and Ruzindana, cit.*, Trial Judgement, 21 May 1999, para.7 “Sentence”. Similarly, also: *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.584.

Code and of Rwandan Law. The provision providing for ‘recourse’ obviously requires more than that.

It was probably considering this conflict that Chambers of the ICTY, in particular, have recently started to adopt a slightly different approach, which shows more respect of the ‘general practice’ provision and attempts to explain the reasons rendering an automatic and strict application of the rule impossible.¹¹⁹ For example, as recognised in the *Krstic* and, previously, in the *Kunarac et al.* case:

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. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.¹²⁰

Furthermore, in the recent case of *Prosecutor v. Mrksic et al.*, the Trial Chamber seemed to take that requirement into account seriously by undertaking an in-depth comparison and analysis of the relevant provisions of the SFRY Criminal Code and related case-law.¹²¹

Even considering the recent ‘adjustments’ to the interpretation constantly given by the Tribunals with regard to the ‘general practice’ provision, the overall trend can be summarised as follows: while being obliged to consider the sentencing practice in the courts of the former Yugoslavia and Rwanda, Trial Chambers of the ICTY and ICTR deemed that they were not bound to it, nor prevented from imposing a greater or lesser sentence than that which would have been imposed under the legal regime of the former Yugoslavia or Rwanda. They found that recourse to national sentencing practice is not required by the principle of *nulla poena sine lege* and only constitutes a non-binding guideline.

¹¹⁹ See, for instance, *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, paras.58-62.

¹²⁰ *Prosecutor v. Kunarac, Kovic and Vukovic*, Trial Judgement, Case No.IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.829; *Krstic*, Appeals Judgement, *cit.*, para.260; the same was also recalled in *Prosecutor v. Blaskic*, Appeals Judgement, Case No.IT-95-14-A, 29 July 2004, para.682, and in *Prosecutor v. Dragan Nikolic*, Appeals Sentencing Judgement, Case No.IT-94-2-A, 4 February 2005, para.69.

¹²¹ *Prosecutor v. Mrksic et al.*, Case No.IT-95-13/1-T, Trial Judgement, 27 September 2007, paras.706-708.

With regard to this *status quo*, it is suggested that there was no reason for Chambers to violate the explicit letter of the Statutes and to go as far as declaring the non-binding character of the provision on ‘general practice’ in the courts of the former Yugoslavia and Rwanda. In fact, sharing the view that the possibility for ICTY and ICTR Chambers to impose life imprisonment does not violate the principle of legality of penalties, for the reasons stated above I believe that this violation does not subsist in view of the fact that the death penalty was provided for in both cases (in the past, for the former Yugoslavia and Rwanda) therefore rendering all potential offenders aware of the imposition of very harsh penalties for heinous crimes of that nature.

c) *Proportionality of penalties*

The principle of proportionality as a general principle of criminal law and an important principle of the law of sentencing has also been recognised in a number of cases before the ICTY and the ICTR. The contents of the principle have already been illustrated in Chapter 1, paragraph 1.3. The following pages are now concerned with the interpretation of the principle by Chambers of the ad hoc Tribunals.

The importance of proportionality of penalties and individualization of sentences has been consistently recalled in the decisions of the ICTY and ICTR.¹²² For instance, in the *Deronjic* case, the Trial Chamber affirmed that ‘a sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.’¹²³

In the *Ntakirutimana* case, ICTR Trial Chamber I recognised the: ‘...overriding obligation to individualize the penalty, with the aim that the sentence be proportional to the gravity of the offence and the degree of responsibility of the offender’.¹²⁴ The same statement can be found in a number of other cases.¹²⁵

¹²² *Prosecutor v. Tadic*, Case No.IT-94-1-T, Sentencing Judgement of 14 July 1997, para.61, and Sentencing Judgement of 11 November 1999, para.25; *Prosecutor v. Todorovic*, Case No.IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para.29; *Prosecutor v. Obrenovic*, Sentencing Judgement, Case No.IT-02-60/2-S, 10 December 2003 para.46; *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.814, and 832; *Prosecutor v. Dragan Nikolic*, Judgement on Sentencing Appeal, Case No.IT-94-2-A, 4 February 2005, para.21, and Sentencing Judgement of 18 December 2003, paras.123-126.

¹²³ *Deronjic*, Sentencing Judgement, 30 March 2004, para.154.

¹²⁴ *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Case No.ICTR-96-10/96-17-T, Trial Judgement, 21 February 2003, para.883.

¹²⁵ For example, *Prosecutor v. Sikirica*, Case No.IT-95-8-S, 13 November 2001 (citing the *Celebici* Appeal Judgement, para.717): “...the overriding of the Trial Chamber in determining sentence is to

The necessity of adjusting the penalty to the individual offender and the circumstances surrounding the commission of the crime is labelled ‘*individualisation of penalty*’. One should distinguish between *legal* individualisation and *judicial* individualisation, depending on whether the process is regulated and ‘guided’ by law or, on the opposite, is almost completely left to the discretion and appreciation of judges. When the process is regulated by law, criminal codes generally prescribe (as seen above in Chapter 2) different types and categories of penalties associated with different crimes, mitigating and aggravating circumstances, and at times the quantum of modifications of penalty allowed.

The importance of the *individualisation* of penalties acquires a particular meaning in the unique context of international sentencing, where crimes are very often committed by a certain group against another and/or during armed conflicts. Therefore, the principle of individualisation plays an important role insofar as it limits the burden of guilt on the single individual and avoids the situation where the (few tried and convicted) accused might also be punished for the responsibility of others.

Issues of ‘unfair’, ‘inadequate’ or ‘disproportionate’ punishment (either in the sense of ‘too lenient’ or in the sense of ‘too harsh’) have been raised several times in the jurisprudence of the ad hoc Tribunals.¹²⁶ In considering whether a ‘disproportionate’ penalty had in fact been meted out, Chambers have taken into account both the seriousness of the offence and the characteristics of the offender. For instance, in the *Celebici* case, when considering the claim by the appellant Delic that the sentence imposed by the Trial Chamber had been excessive and disproportionate to the severity of the crimes committed by him, the Appeals Chamber confirmed that the standard of ‘proportionality’ to be applied to sentences is that existing between the gravity of the

‘individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime’” (para.231); *Prosecutor v Krnojelac*, Case No.IT-97-25-T, 15 March 2002: ‘... the overriding sentencing obligation considered by the Trial Chamber has been that of fitting the penalty to the individual circumstances of the Accused and to the gravity of the offences for which he has been found responsible’ (para.507); *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.182.

¹²⁶ *Prosecutor v. Tadic*, Case No.IT-94-1-T and IT-94-1A*bis*, Judgement in Sentencing Appeal, 26 January 2000; *Prosecutor v. Aleksovski*, Appeal Judgement, Case No.IT-95-14/1-A, 24 March 2000, paras.179, 183; *Prosecutor v. Delalic, et al.*, Appeal Judgement, Case No.IT-96-21-A, 20 February 2001, para.851; *Prosecutor v. Kamuhanda*, Case No.ICTR-99-54A-A, Appeal Judgement, 19 September 2005, paras.358-360; *Prosecutor v. Stakic*, Case No.IT-97-24-A, Appeal Judgement, 22 March 2006, paras.377, 394-395; *Prosecutor v. Simba*, Case No.ICTR-01-76-A, Appeals Judgement, 27 November 2007, paras.305-336.

crime and the individual culpability of the offender.¹²⁷ In the *Aleksovski* case, issues of manifestly disproportionate penalties were raised by the Prosecution in relation to the fact that disproportionate (too lenient) sentences would defeat one of the purposes of sentencing, namely to deter others from committing similar crimes.¹²⁸

In short, the importance of the principles of proportionality and individualisation of penalties was constantly recognised by the ad hoc Tribunals and, at least in theory, taken into account.

3.10 Case-related factors

a) Gravity of the offence

Articles 24(2) ICTY St. and 23(2) ICTR St. provide that the Tribunals should take into account the ‘gravity of the offence’. This is a very important factor in the determination of sentences, and is constituted by both the way in which the crime was perpetrated, and the effects of the crime on the victims.¹²⁹ Accordingly, the ‘gravity of the offence’ will be here examined through the two sub-categories of ‘perpetration’ and ‘victimization’.

It is possible to distinguish between gravity *in abstracto*, based on the legal definition of the crime (its subjective and objective elements) – which leads to the problem of a hierarchy of crimes – and gravity *in concreto*, which depends on the harm done in the particular case and on the degree of culpability of the offender.

How judges at the ad hoc Tribunals have evaluated and assessed this factor is a crucial element for sentencing issues.

¹²⁷ *Prosecutor v. Delalic et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001.

¹²⁸ *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.185.

¹²⁹ Several important issues are linked to the concept of ‘gravity of the offence’. For example, the question of whether offences should be ranked according to their seriousness, the question of whether the same act should be punished differently if charged as genocide, crime against humanity or war crime, and the relationship between the gravity of crimes and aggravating and mitigating circumstances. Considering that international criminal justice deals with the most serious crimes of international concern, the full scale of gravity used in national jurisdictions cannot be applied as such to the international level. Often the gravity level of crimes in international sentencing starts where the gravity level of national criminal justice leaves off. On these issues, see: CARCANO, A., ‘Sentencing and the Gravity of the Offence in International Criminal Law’, *International and Comparative Law Quarterly*, vol.51, July 2002, pp.583-609; HARMON, MARK B., GAYNOR FERGAL, ‘Ordinary Sentences for Extraordinary Crimes’, *Journal of International Criminal Justice*, vol.5, issue 3 (2007), pp.683-712, at 696.

The Appeals Chamber held on several occasions that the gravity of the offence is a primary consideration in sentencing.¹³⁰ In the *Delalic et al.* case, the Trial Chamber recognised that ‘by far, the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence’.¹³¹ The *Blaskic* Trial Chamber was also concerned with an attempt to suggest a method for assessing the seriousness of the offence, taking into account its gravity both *in abstracto* and *in concreto*.¹³² In the *Kordic* case, the Trial Chamber observed that the gravity of the offences can be deduced by the ‘nature, magnitude and the manner in which they were committed, the number of victims involved and the degree of suffering endured by the victims’.¹³³ Similarly, in the *Kupreskic* case, the Trial Chamber noted:

...the sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime....¹³⁴

The gravity of the offence should thus be the first parameter for fixing the sentencing margin; this should be then adjusted and individualized according to the other personal circumstances which do not affect directly the commission of the crime.

Regarding the relationship between the gravity of the offence and aggravating and mitigating circumstances, on the one hand Trial Chambers have hardly made any distinction between aggravating circumstances and gravity of the offence, often

¹³⁰ *Blaskic* Appeal Judgement, para.683; *Prosecutor v. Delalic, et al.*, Appeal Judgement, Case No.IT-96-21-A, 20 February 2001, para.73; *Kupreškić et al.* Appeal Judgement, para.442. See also *Aleksovski* Appeal Judgement, *cit.*, para.182.

¹³¹ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1225. The same was accepted by the Appeals Chamber in the *Aleksovski* case, *cit.*, 24 March 2000, para.182; see also *Prosecutor v. Delalic et al.*, Appeal Judgement, Case No.IT-96-21-A, 20 February 2001, para.731; *Todorovic, cit.*, Sentencing Judgement, 31 July 2001, para.31.

¹³² *Blaskic, cit.*, 3 March 2000, para.804: ‘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 not contrary to the principle of individualisation of the sentence to rely on a scale of seriousness of the crimes. The scale of sentences will follow from the relationship between, and the evaluation of, the objective seriousness, if relevant, and the subjective seriousness of the crimes. 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’.

¹³³ *Prosecutor v. Kordic & Cerkez*, Trial Judgement, Case No.IT-95-14/2-T, 26 February 2001, para.847. Also: *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1226.

¹³⁴ *Kupreskic, cit.*, Trial Judgement, 14 January 2000, para.852. Also: *Ruggiu, cit.*, Trial Judgement, 1 June 2000, paras.48-49; *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1227.

considering the inherent gravity of the crimes committed as an aggravating factor;¹³⁵ on the other hand, they have consistently differentiated between mitigating circumstances and gravity of the offence. In particular, it was recognised that – in principle – the application of mitigating circumstances and the consequent reduction of the penalty must not be considered in any way as diminishing the gravity of the offence, as mitigating circumstances mitigate the punishment not the crime.¹³⁶ However, in the *Kambanda case*, although the Trial Chamber found the presence of numerous mitigating circumstances (such as guilty plea and co-operation), nonetheless it sentenced the accused to life imprisonment, finding that the intrinsic gravity of the crime nullified the effect of any such circumstances.¹³⁷

Naturally, it is expected that aggravating and mitigating circumstances related directly to the commission of the crime (e.g., superior responsibility, cruelty, diminished responsibility of the accused, unwilling support, and so on) also affect – upwards or downwards – the gravity of the offence.

Given the scant legislative elaboration concerning the circumstances of crime in the Statutes of the ad hoc Tribunals, Chambers of the ICTY and ICTR have always taken into account various mitigating and aggravating factors not limiting themselves to the few factors mentioned by the Statutes and the Rules of Procedure and Evidence.¹³⁸ Generally, in numerous civil law countries and in the USA, almost all information regarding the accused can be considered as relevant for the decision upon the final penalty. Judges at the ad hoc Tribunals have derived from this practice the principle according to which they take into consideration all the factors and circumstances that they deem relevant for the decision of the final penalty to impose.

¹³⁵ For example, *Kambanda, cit.*, Trial Judgement, 4 September 1998, paras.42-44. Recently, however, Chambers of the ad hoc Tribunals have been more attentive to this particular issue and to the risk of considering the same factors as elements of both the gravity of the crime and as aggravating circumstances. See *Prosecutor v. Limaj et al.*, Case No.IT-03-66-T, Trial Judgement, 30 November 2005, para.731; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.500.

¹³⁶ *Erdemovic, cit.*, Sentencing Judgement, 29 November 1996, para.46; *Kambanda, cit.*, Trial Judgement, 4 September 1998, paras.37, 56; *Ruggiu, cit.*, Trial Judgement, 1 June 2000, para.80.

¹³⁷ *Kambanda, cit.*, Trial Judgement, 4 September 1998, para.62.

¹³⁸ See, for instance, the statement by the Trial Chamber in the *Tadić* case: ‘...the Trial Chamber has taken into account the foregoing provisions of the SFRY Penal Code in determining the sentencing of Dusko Tadić, together with such other matters of mitigation and aggravation, used in courts around the world, as have appeared to the Trial Chamber to be appropriate, as well as the individual circumstances of Dusko Tadić’ (*Prosecutor v. Tadić*, Sentencing Judgement, 14 July 1997, *cit.*, para.10).

Another aspect linked to the ‘gravity of the offence’ is that of a *ranking* or *hierarchy* of international crimes.¹³⁹

There is much dispute on this issue among judges of the Chambers of the ad hoc Tribunals.¹⁴⁰ From a legal perspective, in the Statutes of the ad hoc Tribunals there is no ranking of the types of crimes under their jurisdiction either regarding the categories of international crimes or the underlying crimes;¹⁴¹ no statutory gravity is assigned. As recognised by the *Kambanda* Trial Chamber:

Whereas in most national systems the scale of penalties is determined in accordance with the gravity of the offence, the Chamber notes that, as indicated supra, the Statute does not rank the various crimes falling under the jurisdiction of the Tribunal and, thereby, the sentence to be handed down. In theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment.¹⁴²

International customary law does not seem to suggest a distinction in severity for international crimes. Consequently, some judges argued that – rather than establishing some sort of hierarchy between the offences – the gravity of the crime should be determined by the intrinsic nature and seriousness of the underlying act, which reflects the accused’s criminal conduct, and not by an abstract legal distinction of the offences in terms of genocide, crimes against humanity or war crimes.¹⁴³ Conversely, in the *Aleksovski* case, Trial Chamber I stated that:

...in order to implement the Tribunal’s mandate, it is crucial to establish a gradation of sentences, depending mainly on the magnitude of the crimes committed and the extent of the liability of the accused.¹⁴⁴

¹³⁹ The issue has already been introduced in Chapter 1, section 1.6. See the literature referred to therein.

¹⁴⁰ For a more detailed reconstruction of the case law, see for instance: FRULLI, MICAELA, ‘Are Crimes Against Humanity more serious than War Crimes?’, *European Journal of International Law*, vol.12, 2(2001), pp.329-350, at 344-346; MAY RICHARD, WIERDA MARIEKE, ‘Is there a Hierarchy of Crimes in International Law?’, in VOHRAH L., POCAR F., *et al.* (eds.) *Man’s Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, 2003, pp.511-532; OLUSANYA, OLAOLUWA, ‘Do Crimes Against Humanity Deserve a Higher Sentence than War Crimes?’, *International Criminal Law Review*, 4(2004), pp.431-473.

¹⁴¹ J. Nemitz considered in particular the issue of whether an emerging ranking between the underlying offences of the crimes under the jurisdiction of the ad hoc Tribunals is discernible in the jurisprudence. See NEMITZ, J.C., ‘Sentencing in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda’, in FISCHER H., KRESS C. (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag, 2001, at pp.621-624.

¹⁴² *Kambanda*, *cit.*, Trial Judgement, 4 September 1998, para.12.

¹⁴³ See, for example, *Prosecutor v. Furundzija*, Appeal Judgement, Case No.IT-95-17/1-A, 21 July 2000, para.227.

¹⁴⁴ *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-T, Trial Judgement, 25 June 1999, para.243.

There is therefore no uniform approach to the issue of hierarchy of crimes in the practice of the ad hoc Tribunals. Chambers have repeatedly either favoured a ranking of crimes and attempted a ‘classification’ according to their respective seriousness,¹⁴⁵ or opposed such a hierarchy mainly on the basis that in law there is no distinction between the seriousness of genocide, crimes against humanity and war crimes.¹⁴⁶

With regard to the existence of a hierarchy between genocide and the other international crimes, it seems that there is less disagreement. In particular, numerous judgements of the ICTR have repeatedly affirmed that genocide is the most serious crime,¹⁴⁷ also considering the more severe and specific *mens rea* element. The *Kambanda* Trial Chamber constructed the very first scale of international crimes ever proposed, affirming that without doubt genocide was ‘the crime of the crimes’ and war crimes were less serious offences than crimes against humanity.¹⁴⁸

The ICTY had the occasion of taking a position in respect to genocide in the *Krstic* case, where the Trial Chamber recognised that genocide can be considered the most serious crime because of its *dolus specialis*.¹⁴⁹

¹⁴⁵ *Erdemovic*, Appeals Chamber, 7 October 1997, para.20; *Tadic*, Sentencing Judgement, 14 July 1997, para.73; *Tadic*, Trial Chamber Sentencing Judgement, 11 November 1999, para.28; *Tadic*, Appeals Chamber, 26 January 2000, Separate Opinion of Judge Cassese; *Furundzija*, Appeals Judgement, Declaration of Judge Vohrah; *Kambanda*, Trial Judgement, para.14; *Akayesu*, Trial Judgement, paras.6-10; *Serushago*, Trial Judgement, paras.13-14; *Kayishema and Ruzindana*, Trial Judgement, para.9. See also: *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, paras.797-802, where the Trial Chamber recalled all the ICTY and ICTR jurisprudence then available, with the respective position taken by the two Tribunals, on the issue of hierarchy of crimes.

¹⁴⁶ *Tadic*, Appeals Chamber Sentencing Judgement, 26 January 2000; *Tadic*, Trial Chamber Sentencing Judgement, 11 November 1999, Separate Opinion of Judge Robinson; *Erdemovic*, Trial Chamber, 5 March 1998, Separate Opinion of Judge Shahabuddeen; *Erdemovic*, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Li; *Furundzija*, Appeals Chamber, para.243; *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Appeals Judgement, 24 Mar 2000, para.69; *Delalic et al.*, Appeals Judgement, 20 February 2001, Separate and Dissenting Opinion of Judge Hunt; *Kunarac*, Trial Judgement, 22 February 2001, para.851; *Kayishema and Ruzindana*, Appeals Chamber, 1 June 2001, para.367; *Krnjelac*, Trial Judgement, 15 March 2002, para.511; *Kunarac*, Appeals Judgement, 12 June 2002, para.171; *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, para.83.

¹⁴⁷ See for instance, *Kambanda, cit.*, Trial Judgement, para.14 ff.; also *Akayesu, cit.*, Sentence, paras.3-11; *Rutaganda*, Judgement and Sentence, 2 February 1999, para.450; *Musema*, Trial Judgement, 27 January 2000, para.981; *Serushago, cit.*, Sentence, paras.12-16; *Kayishema and Ruzindana, cit.*, Sentence, para.9.

¹⁴⁸ *Kambanda*, Trial Chamber, Sentence, paras.10-16.

¹⁴⁹ *Prosecutor v. Krstic*, Trial Judgement, Case No.IT-98-33-T, 2 August 2001, para.700. In a previous case, the *Jelusic* case, where allegations of genocide were brought against the defendant, the Trial Chamber did not find that acts of genocide occurred or that the accused had any genocidal intent. See: *Prosecutor v. Jelusic*, Trial Judgement, Case No.IT-95-10-T, 14 December 1999, paras.107-108. The same was then upheld on appeal, although the Appeals Chamber did not share the Trial Chamber’s findings on the lack of genocidal *mens rea*: *Prosecutor v. Jelusic*, Appeals Judgement, Case No.IT-95-10-A, 5 July 2001, paras.57, 68, 73-77.

The major dispute regards the question of whether – all else being equal – crimes against humanity are intrinsically more serious than war crimes. To summarise, it can be said that two main different positions were held in the jurisprudence of the ICTY. In the *Erdemovic* case, crimes against humanity were considered to be intrinsically more serious than ordinary war crimes.¹⁵⁰ In fact, it seems that the Appeals Chamber declared that Erdemovic's first plea was not informed and was therefore null and void, also because it considered the offence of crimes against humanity (to which the accused had pleaded guilty) more serious than that of war crimes; accordingly, after Erdemovic's second guilty plea to war crimes instead of crimes against humanity, the Trial Chamber that pronounced the second sentencing judgement reduced the final penalty.¹⁵¹

Conversely, in the *Tadic* case, the majority of the Appeals Chamber found that '*there is in law no distinction between the seriousness of a crime against humanity and that of a war crime*'.¹⁵² Dissenting on the issue, in his Separate Opinion, Judge Cassese specified that in principle, at that stage in the development of international criminal law, no hierarchy of gravity amongst the crimes under the Statute could be outlined a priori, nonetheless a hierarchy of gravity with respect to each individual case should be recognised whenever *ceteris paribus* – all other circumstances being equal – the very same facts imputed to an accused person could be regarded as more serious depending on their classification. Where crimes against humanity are concerned, the accused must have knowledge of the widespread or systematic context in which the acts are inscribed. In particular, Judge Cassese brought attention to the two different elements of which a crime is composed: the objective element (*actus reus*) and the subjective one (*mens rea*). He observed that, if one looks at the statutory elements of crimes against humanity and war crimes, it is clear that crimes against humanity possess '*an objectively greater magnitude*' than war crimes.¹⁵³ The *actus reus* of crimes against humanity presents an

¹⁵⁰ *Prosecutor v. Erdemovic*, Appeal Judgement, Case No.IT-96-22-A, 7 October 1997, paras.17 ff. Judge Li dissented on the point that crimes against humanity can be considered as more serious than war crimes: Separate and Dissenting Opinion of Judge Li, 7 October 1997, paras.18-26.

¹⁵¹ See *Prosecutor v. Erdemovic*, Appeal Judgement, Case No.IT-96-22-A, 7 October 1997, paras.17 ff.; *Prosecutor v. Erdemovic*, Sentencing Judgement, Case No.IT-96-22-Tbis, 5 March 1998, paras.20 ff.. See also: Separate Opinion of Judge Shahabuddeen, 5 March 1998, expressing perplexity as to the possibility of implementing a distinction in seriousness between offences.

¹⁵² *Tadic*, Appeals Chamber, *cit.*, para.69, Judge Cassese dissenting; the same was also upheld in the *Furundzija* case, *cit.*, Appeals Chamber, para.243, Judge Vohrah dissenting. See also, for more detail: BOHLANDER, MICHAEL, '*Prosecutor v. Dusko Tadic: Waiting to Exhale*', *Criminal Law Forum*, 11 (2000), pp.217-248, at 240-248.

¹⁵³ *Tadic*, Appeals Chamber, *cit.*, Separate Opinion of Judge Cassese, paras.6-12, 15-16.

element which is not required for war crimes: the existence of a widespread and systematic practice of similar offences. It is thus the so-called ‘context element’ which is relevant for the distinction: for example, a murder as a crime against humanity can only be qualified as such if it is committed as part of a widespread or systematic practice (the so-called ‘system criminality’). As this element is not required for murder as a war crime, the *actus reus* of a crime against humanity would qualify as intrinsically more serious than the *actus reus* of a war crime. Judge Cassese observed that the same reasoning applies to the other element: the *mens rea*, which again appears to be of a greater scope for crimes against humanity than for war crimes, given that in order to commit a crime against humanity the perpetrator must have knowledge of the context element, that is of the fact that there is a widespread or systematic practice of similar crimes. The criminal intent of a perpetrator of a crime against humanity would thus be more serious than the intent of a war crime perpetrator.

This of course does not imply that crimes against humanity are *always* more serious offences than war crimes; there clearly exist situations in which war crimes can represent an identical or an even greater seriousness. But – if every other element is equal – then crimes against humanity present a greater inner gravity.

In relation to the other aspect of whether there is a possibility of ranking the different underlying criminal conducts *within* each category of international crimes, again the Statutes of the ICTY and ICTR do not contain any distinction in ‘seriousness’ of the underlying offences of genocide, crimes against humanity and war crimes. Also the case-law of the Tribunals did not make any explicit differentiation; therefore once again there is no guidance as to whether certain acts (e.g. murder) have to be punished more severely than others (e.g. deportation).¹⁵⁴

From this brief overview, what can generally be observed regarding the ‘gravity of the offence’ is that the ICTY case-law seems to concentrate more on the gravity *in concreto*, assessing the gravity of the crimes in relation to the concrete circumstances of the case and the culpability of the accused; conversely the ICTR case-law seems to pay more attention to the gravity *in abstracto*, expressing a preference for a ranking of

¹⁵⁴ See NEMITZ, J., in FISHER HORST, KRESS CLAUS, (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.622-625.

crimes, although considering at the same time the particular circumstances of the case.¹⁵⁵

Against this background, the two following sub-categories focus on ‘perpetration’ and ‘victimization’ as elements comprised in the overall gravity of an offence.

i) Perpetration

The way of perpetrating crimes is of relevant influence on sentencing. This factor – given its intrinsic characteristics – is logically more related to direct perpetrators than to indirect offenders or superiors.

In evaluating the manner in which the crime was perpetrated, one of the aspects taken into account by the Chambers was the level of brutality, zeal, cruelty or sadism used by the offender in carrying out the crime(s). The level of brutality can depend on additional severe suffering inflicted upon the victims, or be due to the heinous means of perpetration utilised in carrying out the crime(s). Both elements were considered as aggravating factors.¹⁵⁶

Particular cruelty and sadism in the perpetration of the crimes were consistently considered as significant aggravating factors by both the ICTY and ICTR.¹⁵⁷ For example, in the *Jelusic* case, the Trial Chamber pointed out at the ‘repugnant, bestial and sadistic nature of Goran Jelusic’s behaviour’;¹⁵⁸ while in the *Delalic* case it was highlighted that:

¹⁵⁵ CARCANO, A., ‘Sentencing and the Gravity of the Offence in International Criminal Law’, *International and Comparative Law Quarterly*, vol.51, July 2002, pp.583-609, at 607-609.

¹⁵⁶ *Tadic*, Sentencing Judgement, 14 July 1997, para.32; *Furundzija*, Trial Chamber, *cit.*, paras.281-283; *Kordic & Cerkez*, *cit.*, Trial Judgement, 26 February 2001, para.852; *Kayishema and Ruzindana*, *cit.*, Trial Judgement, 21 May 1999, para.18, thus stating: ‘This Chamber finds the heinous means by which Ruzindana committed killings constitutes one aggravating circumstance. To give but one example, this Chamber recalls the vicious nature of the murder of a sixteen-year old girl... Ruzindana ripped off her clothes and slowly cut off one of her breasts with a machete. ...’. See also, more recently, *Prosecutor v. Mikaeli Muhimana*, Case No.ICTR-95-1B-T, Trial Judgement, 28 April 2005, paras.610-613.

¹⁵⁷ *Delalic et al.*, Trial Chamber, paras.1268-1269; *Rutaganda*, *cit.*, Trial Judgement, 2 February 1999, para.469; *Prosecutor v. Vasiljevic*, Case No.IT-98-32-T, Trial Judgement, 29 November 2002, para.279; *Todorovic*, *cit.*, Sentencing Judgement, paras.63-65; *Blaskic*, *cit.*, Trial Judgement, para.783; *Prosecutor v. Niyitegeka*, Trial Chamber, Case No.ICTR-96-14-T, 16 May 2003, para.499; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.189; *Cesic*, *cit.*, Sentencing Judgement, 11 March 2004, para.51; *Prosecutor v. Bralo*, Case No.IT-95-17-S, Sentencing Judgement, 7 December 2005, paras.32-34; *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeals Chamber, 30 November 2006, paras.447, 455.

¹⁵⁸ *Jelusic*, *cit.*, Trial Judgement, 14 December 1999, para.130.

...the beatings and other forms of mistreatment which Mr. Landžo meted out to the prisoners detained in Hangar 6 and elsewhere in the prison-camp were inflicted randomly and without any apparent provocation, in a manner exhibiting some imaginative cruelty as well as substantial ferocity.¹⁵⁹

Also the zeal with which crimes were committed was constantly an aggravating factor taken into account in the determination of the appropriate sentence.¹⁶⁰

Furthermore, concerning the personal involvement of the accused, willingness in the commission or execution of the crime(s), voluntary participation in the offences,¹⁶¹ as well as premeditation¹⁶² were often considered factors in aggravation of the penalty. More generally, attention was paid to the motives related to the commission of the crimes, considering them not as an essential element of the criminal liability but rather as a factor to be evaluated in mitigation or in aggravation of the appropriate sentence *after* individual responsibility has been established.¹⁶³ In the *Tadic* Appeals Judgement,

¹⁵⁹ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1272.

¹⁶⁰ *Prosecutor v. Kvočka et al.*, Trial Judgement, Case No.IT-98-30/1-T, 2 November 2001, para.705; *Prosecutor v. Brđjanin*, Trial Judgement, Case No.IT-99-36, 1 September 2004, paras.1109-1110; *Kayishema and Ruzindana, cit.*, Trial Judgement, paras.14-16. See, in particular, *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.580, where the Trial Chamber noted that, although Karera did not perpetrate any of the killings with his own hands, according to the jurisprudence of the Tribunals 'attacking a place of safe haven such as a church constitutes a form of zeal'. This was thus considered an aggravating factor in sentencing the accused.

¹⁶¹ See, for example, *Tadic, cit.*, para.57; *Serushago, cit.*, para.30; *Kayishema and Ruzindana, cit.*, para.13, where the Trial Chamber thus found: 'Both Kayishema and Ruzindana voluntarily committed and participated in the offences and this represents one aggravating circumstance'. Conversely, see also: *Prosecutor v. Blagojevic and Jokic*, Trial Chamber, 17 January 2005, para.849, where the Chamber observed that, in reality, willingness or voluntary participation in the commission of the crime(s) should already be seen as part of the criminal responsibility of the accused in the element of *dolus*, therefore the same factor should not be considered again as an aggravating circumstance.

¹⁶² *Krstic, cit.*, Trial Judgement, 2 August 2001, para.711, where it was stated that: 'Premeditated or enthusiastic participation in a criminal act necessarily reveals a higher level of criminality on the part of the participant...'; *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeals Chamber, 30 November 2006, paras.450, 455; *Prosecutor v. Gacumbitsi*, Case No.ICTR-2001-64-T, Trial Judgement, 17 June 2004, paras.344-345; *Prosecutor v. Stakic*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para.914; *Blaskic, cit.*, Trial Judgement, 3 March 2000, para.785; *Jelusic, cit.*, Trial Judgement, 14 December 1999, paras.130-131; *Serushago, cit.*, Trial Judgement, 5 February 1999, para.30; *Prosecutor v. Kambanda*, Judgement and Sentence, Case No.ICTR-97-23-S, 4 September 1998, para.61.

¹⁶³ See for instance, *Delalic et al., cit.*, para.1235, where it was specified that: 'The motive for committing an act which results in the offence charged may constitute aggravation or mitigation of the appropriate sentence. For instance, where the accused is found to have committed the offence charged with cold, calculated premeditation, suggestive of revenge against the individual victim or group to which the victim belongs, such circumstances necessitate the imposition of aggravated punishment. On the other hand, if the accused is found to have committed the offence charged reluctantly and under the influence of group pressure and, in addition, demonstrated compassion towards the victim or the group to which the victim belongs, these are certainly mitigating factors which the Trial Chamber will take into consideration in the determination of the appropriate sentence'.

the Appeals Chamber approved the submission that motives become relevant at the sentencing stage in mitigation or aggravation of the sentence.¹⁶⁴

Concerning the different modes of liability and participation in criminal acts, as observed above there is no statutory distinction in gravity between direct perpetration, participation in a JCE, instigation, ordering, aiding and abetting, and so on. Nevertheless, Chambers of the ad hoc Tribunals have in some instances ruled on the subject matter. For example, the Appeals Chamber in the *Vasiljevic* case acknowledged that aiding and abetting is a form of responsibility generally attracting lower sentences than responsibility as a co-perpetrator.¹⁶⁵ In the *Krstic* case, the Trial Chamber thus observed:

...Indirect participation is one circumstance that may go to mitigating a sentence. An act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission.¹⁶⁶

The principle that secondary or indirect forms of participation warrant lower penalties has also been recognized by the ICTR in some cases.¹⁶⁷

However, the principle would not apply to liability under Articles 7(3) ICTY / 6(3) ICTR, in other words to cases of command responsibility. In fact, concretely, command responsibility consists of a failure to punish or prevent the commission of crimes by subordinates; therefore an accused person convicted under Articles 7(3) or 6(3) could not claim in mitigation that he did not actively participate in the crime. Precisely with regards to this case, the Appeals Chamber in the *Delalic* case thus held:

...It must also be recognised, however, that absence of such active participation is not a mitigating circumstance. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability...¹⁶⁸

¹⁶⁴ *Tadic, cit.*, Appeal Judgement, 15 July 1999, para.269.

¹⁶⁵ *Prosecutor v. Vasiljevic*, Case No.IT-98-32-A, Appeals Judgement, 25 February 2004, para.182. See also fn. no.291, where the Appeals Chamber accordingly cited, at that regard, the law of several common law and civil law jurisdictions. The same position was maintained by the Appeals Chamber in *Prosecutor v. Krstic*, Case No.IT-98-33-A, Appeals Judgement, 19 April 2004, para.268.

¹⁶⁶ *Prosecutor v. Krstic*, Case No.IT-98-33-T, Trial Judgement, 2 August 2001, para.714.

¹⁶⁷ *Prosecutor v. Kajelijeli*, Case No.ICTR-98-44A-T, Trial Judgement, 1 December 2003, para.963. Conversely, in the *Bisengimana* case, the Trial Chamber expressly rejected the principle that indirect forms of participation lead to more lenient sentences and thus did not accept as a mitigating circumstance the Accused's form of participation (aiding and abetting; the accused did not personally commit any violent act during the massacres at the Musha Church and Ruhanga Complex). See *Prosecutor v. Bisengimana*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.183.

¹⁶⁸ *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.737.

Conversely, it seems that Chambers of both Tribunals often considered certain modes of participation to crimes as aggravating factors. In particular, the *Krstic* Trial Chamber affirmed that ‘direct criminal participation under Article 7(1), if linked to a high-rank position of command, may be invoked as an aggravating factor’.¹⁶⁹ In some cases, both the ICTY and ICTR have held that forms of participation such as ‘planning, ordering, instigating’ can be considered as aggravating circumstances for highly ranked accused.¹⁷⁰

More explicit in considering modes of liability as aggravating factors were ICTR Trial Chambers. For instance, in the cases of *Serushago*,¹⁷¹ *Kayishema*,¹⁷² and *Musema*¹⁷³ the accused were convicted under both Article 6(1) and 6(3) of various crimes and, at the same time, their respective failure to prevent or punish those crimes was considered as an aggravating circumstance notwithstanding the command responsibility of the accused under Article 6(3). Furthermore, the *Bisengimana* Trial Chamber explicitly found that:

...the Accused’s participation in aiding and abetting extermination and murder as crimes against humanity constitutes a gross violation of international humanitarian law and is an aggravating factor.’¹⁷⁴

On the same issue, ICTY Trial Chambers have been less openly in favour of a similar reasoning,¹⁷⁵ although in some cases the accused’s position of authority was considered both as an element of criminal liability and as an aggravating factor.¹⁷⁶

¹⁶⁹ *Krstic*, *cit.*, Trial Judgement, 2 August 2001, para.708.

¹⁷⁰ *Kupreskic*, *cit.*, Trial Judgement, 14 January 2000, para.862; *Rutaganda*, *cit.*, Trial Judgement, 2 February 1999, para.468.

¹⁷¹ *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentencing Judgement, 5 February 1999, para.28.

¹⁷² *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, paras.14-15, ‘Sentence’.

¹⁷³ *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Judgement, 27 January 2000, paras.1003-1004. It is probably of interest to point out the same composition (same judges) of the Trial Chambers in the *Serushago* and *Musema* cases.

¹⁷⁴ *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, Trial Judgement, 13 April 2006, para.119.

¹⁷⁵ See, for example, the *Stakic* case where the Trial Chamber observed that, in cases where circumstances are such that judges could enter a conviction under both Article 7(1) and 7(3), but then in practice a conviction is entered only under Article 7(1), the Chamber should thus take into account as an aggravating factor the accused’s position as a superior. *Prosecutor v. Stakic*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para.912.

¹⁷⁶ For example, in the *Tuta and Stela* case, the Appeals Chamber found that the Trial Chamber erred in considering Martinovic’s position of authority as both an element of his convictions under Article 7(3) of the Statute and as an aggravating factor, thus double-counting his position of authority. See *Prosecutor v. Naletilic and Martinovic (Tuta and Stela)*, Appeals Chamber, Case No. IT-98-34-A, 3 May 2006, paras.610-613.

It is argued that a similar practice offends the principle prohibiting double jeopardy in view of the fact that the individual is punished twice for the same conduct: first on the basis of individual criminal responsibility under Articles 7(3)/6(3), for instance, and second by receiving an increased penalty on the basis of that same individual responsibility but this time considered as an aggravating factor.

ii) Victimization

Another factor related to the *gravity of the offence* is that of ‘victimization’, which comprises both harm to victims and all the various circumstances related to victims of crime(s).

The number of victims caused by the commission of the crime(s) is naturally a very important element and, very often, a significant indicator of the magnitude of the crimes(s). It has in fact been taken into consideration as an aggravating circumstance, particularly when the number of victims involved and of people to whom suffering has been caused was extremely high.¹⁷⁷ For example, in the *Kambanda case*, the Trial Chamber stated that:

...the magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating factor.¹⁷⁸

Clearly, the actual number to be considered as a factor in aggravation is left to the discretion of the judges. The number of victims has also been evaluated in relation to the length of time over which the crimes were perpetrated.¹⁷⁹

Other elements relating to the victims of crime(s) were also taken into account as aggravating factors: the atmosphere of terror and shock created,¹⁸⁰ the degree of

¹⁷⁷ *Erdemovic, cit.*, Sentencing Judgement, 5 March 1998, paras.15, 20; *Tadic, cit.*, Sentencing Judgement, 14 July 1997, para.56; *Blaskic, cit.*, Trial Judgement, 3 March 2000, para.784; *Prosecutor v. Galic*, Case No.IT-98-29-T, Trial Judgement, 5 December 2003, paras.758, 764; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.213(vii); *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeals Chamber, 30 November 2006, para.446; *Prosecutor v. Krajisnik*, Case No.IT-00-39&40-T, Trial Judgement, 27 September 2006, para.1150; *Prosecutor v. Simba*, Case No.ICTR-01-76-T, Trial Judgement, 13 December 2005, para.440; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.112, where the Trial Chamber thus held: ‘...the magnitude of the crimes committed in Rwanda in 1994, resulting in the killing of several thousand civilians within 100 days, shocks the collective conscience and constitutes an aggravating factor. Paul Bisengimana’s actions and omissions directly resulted in the massacre of many Tutsi civilians.’ See also *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.579.

¹⁷⁸ *Kambanda, cit.*, Trial Judgement, 4 September 1998, para.42.

¹⁷⁹ *Erdemovic*, Sentencing Judgement of 29 November 1996, para.85, and Sentencing Judgement of 5 March 1998, para.15; *Kambanda, cit.*, para.42; *Akayesu, cit.*, Trial Judgement, 2 September 1998, Sentence, para.26(iv).

suffering and humiliation inflicted,¹⁸¹ the vulnerability of the victims,¹⁸² the trauma suffered,¹⁸³ the age, infancy or youth of the victims,¹⁸⁴ the existence of surviving victims who continue to suffer from the consequences of the crimes.¹⁸⁵

The *Kunarac* Trial Chamber specified that if, on the one hand, the consequences of a crime upon its direct victim are always relevant factors in considering the appropriate punishment of the accused, on the other hand, when particular effects of the crime are an essential part of the same offence, then they should not be considered again as aggravating factors. As specified by the same Trial Chamber:

...for example, the fact that an offender took someone's life cannot be considered as a *separate* sentencing circumstance when imposing a sentence for a murder conviction – it is part and parcel of the crime charged.¹⁸⁶

However, the fact of having tried to alleviate the suffering of victims as well as having helped them or showed some kind of compassion towards victims was considered as a factor in mitigation of the sentence of the offender.¹⁸⁷

¹⁸⁰ *Tadic, cit.*, Sentencing Judgement, 14 July 1997, para.56; *Delalic et al., cit.*, Trial Judgement, 16 November 1998, paras.1266, 1272, 1276; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.206; *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeals Chamber, 30 November 2006, paras.448-449, 454.

¹⁸¹ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1267; *Krstic, cit.*, Trial Judgement, 2 August 2001, paras.702-703; *Kayishema and Ruzindana, cit.*, Trial Judgement, 21 May 1999, para.16; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.195-199; *Prosecutor v. Mrdja*, Sentencing Judgement, Case No.IT-02-59-S, 31 March 2004, paras.55-56; *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, paras.84-86.

¹⁸² *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1268; *Furundzija, cit.*, Trial Judgement, 10 December 1998, para.283; *Kunarac, cit.*, Trial Judgement, 22 February 2001, paras.874, 879; *Prosecutor v. Krstic*, Case No.IT-98-33-T, Trial Judgement, 2 August 2001, para.702; *Kvocka, cit.*, Trial Judgement, 2 November 2001, para.702; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.184-185; *Cesic, cit.*, Sentencing Judgement, 11 March 2004, para.49; *Rajic, cit.*, Sentencing Judgement, 8 May 2006, paras.118-119; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.490.

¹⁸³ *Furundzija, cit.*, Trial Judgement, 10 December 1998, para.287; *Jelusic, cit.*, Trial Judgement, 14 December 1999, para.132; *Blaskic, cit.*, Trial Judgement, 3 March 2000, para.786; *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, paras.92-95; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.491.

¹⁸⁴ *Kunarac, cit.*, Trial Chamber, 22 February 2001, paras.864, 874, 879, and Appeals Chamber, *cit.*, 12 June 2002, paras.381, 405; *Prosecutor v. Bralo*, Case No.IT-95-17-S, Sentencing Judgement, 7 December 2005, paras.26, 41.

¹⁸⁵ *Vasiljevic, cit.*, Trial Judgement, 29 November 2002, para.276; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.491.

¹⁸⁶ *Kunarac, cit.*, Trial Chamber, 22 February 2001, para.852. The fact that an element of the crime cannot constitute an aggravating circumstance was then reiterated by the Appeals Chamber, see: *Prosecutor v. Blaskic*, Appeal Judgement, Case No.IT-95-14-A, 29 July 2004, para.693; *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeal Judgement, 30 November 2006, para.408.

¹⁸⁷ *Erdemovic, cit.*, Sentencing Judgement, 5 March 1998, para.16.i; *Aleksovski, cit.*, Trial Chamber, 25 June 1999, para.238; *Prosecutor v. Kupreskic*, Case No.IT-95-16-T, Trial Judgement, 14 January 2000, para.860; *Prosecutor v. Krnojelac*, Trial Judgement, Case No.IT-97-25-T, 15 March 2002, para.518;

b) *Individual circumstances of the accused*

Before examining in detail the single factors related to the individual circumstances of the accused, it is important to stress that the ‘individualization’ of the penalty to be imposed on the accused, implements the principle that criminal responsibility is an *individual* form of responsibility at the sentencing stage. In this sense, individualizing the sentence gives protection to accused individuals against punishments that do not strictly address their own acts, and thus ensures fairness.

With regard to the range of factors that Chambers can take into account in order to determine the right penalty to impose, a closer look at the practice of the ad hoc Tribunals reveals that judges have taken into account a very large number and variety of factors. As emphasised at the very beginning by the ICTY:

...the individual circumstances of the convicted person, which the Statute mentions without providing any further details, cover many factors whose relevance varies according to those circumstances. ...the Trial Chamber does note that the individual circumstances of the accused may, in general, be characterised or affected by his behaviour at the time the offence was committed or shortly afterward and, more specifically, by his age, physical and mental condition, degree of intent, purposes, motives, state of mind, personality, previous conduct, remorse or contrition which he may have demonstrated since the time the crime was committed. The conclusions of a psychological and psychoanalytical evaluation or of a pre-sentencing report submitted to the Trial Chamber may prove particularly relevant...¹⁸⁸

The following sub-paragraphs will highlight the most important factors related to individual circumstances of the accused.

i) Role of the accused and leadership level

The degree of responsibility of the accused in the commission of the criminal offences is without doubt an essential element when considering the appropriate sentence to mete out. Besides the role played by the accused and the modalities of commission and participation (factors mentioned earlier while describing ‘perpetration’ and modes of liability), Trial Chambers of the ICTY and ICTR have always given great consideration to the accused’s position within a military hierarchy or a civilian structure.

Banovic, cit., Sentencing Judgement, 28 October 2003, para.82; *Cesic, cit.*, Sentencing Judgement, 11 March 2004, para.79; *Prosecutor v. Brdjanin*, , Case No.IT-99-36, Trial Judgement, 1 September 2004, paras.1119-1120; *Prosecutor v. Krajisnik*, Case No.IT-00-39/40-T, Trial Judgement, 27 September 2006, para.1163; *Rutaganda, cit.*, Trial Judgement, 2 February 1999, para.470; *Serushago, cit.*, Trial Judgement, 5 February 1999, para.38; *Ruggiu, cit.*, Trial Judgement, 1 June 2000, paras.73-74; *Niyitegeka, cit.*, Trial Judgement, 16 May 2003, para.494; *Prosecutor v. Serugendo*, Case No.ICTR-2005-84-I, 12 June 2006, paras.68-69; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, paras.75-77.

¹⁸⁸ *Prosecutor v. Erdemovic, cit.*, Sentencing Judgement, 29 November 1996, para.44.

Both the Tribunals have repeatedly held that an accused person holding a superior position deserves a harsher penalty than a direct perpetrator.¹⁸⁹ In the words of the *Stakic* Trial Chamber:

...as with white collar crimes, the perpetrator behind the direct perpetrator – the perpetrator in white gloves – might deserve a higher penalty than the one who physically participated depending on the particular circumstances of the case.¹⁹⁰

In this regard, however, it is interesting to note that, while the final sentence imposed on the accused Zdravko Mucic (commander of the Celebici prison-camp) for his superior responsibility in the commission of nine murders consisted of ‘only’ 7 years imprisonment, conversely the co-accused Hazim Delic (who acted in the capacity of deputy-commander in the same prison camp and who personally committed two of these murders) received a sentence of 20 years imprisonment.¹⁹¹ Opportunely, the Appeals Chamber remitted the case to the Trial Chamber for a reformulation of the sentence of Mucic, with the recommendation of giving greater consideration to his role in relation to his subordinates and to the commission of the crimes.¹⁹²

Conversely, in the *Tadic* case, the Appeals Chamber reduced the Appellant’s sentence on the basis that the term imposed by the Trial Chamber was excessive in light of his rather low level of responsibility in the command structure.¹⁹³

Throughout the ICTY case-law, the fact that an accused held a superior position within a military or civilian structure was without exception considered as a serious aggravating circumstance.¹⁹⁴

¹⁸⁹ As a general rule, the *Blaskic* Trial Chamber held that ‘a command position is more of an aggravating circumstance than direct participation’ (para.791) and, consequently, a position of command must ‘systematically increase the sentence or at least lead the Trial Chamber to give less weight to mitigating circumstances’(para.789). See *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000. The same in *Delalic et al., cit.*, Trial Judgement, 16 November 1998, paras.1250-1252; *Aleksovski, cit.*, Appeal Judgement, 24 March 2000, para.187: one of the reasons that led the Appeals Chamber to increase the Appellant’s sentence from two years and a half to seven years imprisonment was precisely the fact that the Trial Chamber erred in assessing the proper gravity of the accused’s conduct and failed to consider his superior position as an aggravating factor.

¹⁹⁰ *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.918.

¹⁹¹ *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1285.

¹⁹² *Prosecutor v. Delalic et al.*, Appeals Judgement, Case No.IT-96-21-A, 20 February 2001, para.853. In the second Trial Judgement, penalties for the accused Mucic and Delic consisted of, respectively, 9 and 18 years of imprisonment. See *Prosecutor v. Delalic et al.*, Case No.IT-96-21-Tbis, Trial Judgement, 9 October 2001, para.44.

¹⁹³ *Tadic*, Appeal Judgement, 26 January 2000, paras.56-57.

¹⁹⁴ See, for instance, *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, paras.1241-1243, 1268; *Prosecutor v. Kupreskic*, Case No.IT-95-16-T, Trial Judgement, 14 January 2000, para.852 (for the accused Zoran Kupreskic); *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, paras.788-789; *Aleksovski, cit.*, Appeal Judgement, 24 March 2000, para.183;

Factual authority was considered to be as decisive a factor as command authority. In the *Kunarac* case, for example, the Trial Chamber found that – although not constituting a ‘superior position’ – the leading organisational role played by the accused, and the substantial influence he had over some of the perpetrators, aggravated his sentence.¹⁹⁵

With reference to the ICTR case-law, judgements of the Rwanda Tribunal are also particularly important on the issue at hand, in view of the high level of authority held by some of the accused.

In the *Musema* case, the Appeals Chamber recognised that, as a general principle, sentences should be graduated with ‘those within the most senior levels of the command structure attracting the severest of sentences...’.¹⁹⁶ Accordingly, the ICTR meted out its highest sentences imposing life imprisonment on offenders holding key-positions in the Rwandan genocide of 1994,¹⁹⁷ and the fact of occupying a superior position in a military or civilian hierarchy was always considered as an aggravating circumstance.¹⁹⁸

Prosecutor v. Kordic & Cerkez, Case No.IT-95-14/2-T, Trial Judgement, 26 February 2001, paras.847, 853 (for the accused Dario Kordic), 855 (for the accused Mario Cerkez); *Prosecutor v. Krstic*, Case No.IT-98-33-T, Trial Judgement, 2 August 2001, para.708, 721; *Prosecutor v. Sikirica*, Case No.IT-95-8-S, 13 November 2001, para.140 (for the accused Dusko Sikirica); *Prosecutor v. Plavsic*, Case No.IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, para.57; *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, paras.912-913. In *Simic*, the accused’s position as President of the Crisis Staff and, later, his War Presidency, was considered as an aggravating factor: *Prosecutor v. Simic*, Trial Judgement, Case No.IT-95-9-T, 17 October 2003, para.1082. See also: *Prosecutor v. Galic*, Case No.IT-98-29-T, Trial Judgement, 5 December 2003, para.765, aggravating circumstance that was confirmed also in the appeal case: *Prosecutor v. Galic*, Case No.IT-98-29-A, Appeal Judgement, 30 November 2006, paras.411-412.

¹⁹⁵ *Prosecutor v. Kunarac et al.*, Case No.IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 February 2001, para.863.

¹⁹⁶ *Prosecutor v. Musema*, Case No.ICTR-96-13-A, Appeals Judgement, 6 November 2001, para.382.

¹⁹⁷ For instance, the following accused were sentenced to life imprisonment: Jean-Paul Akayesu, bourgmestre of the Taba commune from April 1993 until June 1994 (sentence confirmed on appeal); Jean Kambanda, Prime Minister (sentence confirmed on appeal); Georges Rutaganda, second vice-president of the *Interahamwe* at the national level (sentence confirmed on appeal); Alfred Musema, Director of the Gisovu Tea Factory (sentence confirmed on appeal); Clement Kayishema, Prefect of Kibuye (sentence confirmed on appeal); Jean de Dieu Kamuhanda, Minister for Culture and Education (sentence confirmed on appeal); Eliezer Niyitegeka, Minister of Information (sentence confirmed on appeal); Ferdinand Nahimana, Director of RTML (sentence reduced to 30 years on appeal); Emmanuel Ndindabahizi, Minister of Finance (confirmed on appeal).

¹⁹⁸ *Akayesu, cit.*, Trial Judgement, 2 September 1998, Sentence para.36; *Kambanda, cit.*, Trial Judgement, 4 September 1998, paras.44, 61-62; *Kayishema, cit.*, Trial Judgement, 21 May 1999, paras.14, 26; *Prosecutor v. Rutaganda*, Case No.ICTR-96-3, Judgement and Sentence, 2 February 1999, para.468; *Prosecutor v. Kamuhanda*, Case No.ICTR-95-54A-T, Trial Judgement, 22 January 2004, para.764; *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.577.

In the *Kambanda* case, the Trial Chamber was of the opinion that ‘the aggravating circumstances surrounding the crimes committed by Jean Kambanda negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post, at the time he committed the said crimes’.¹⁹⁹

It is, therefore, especially through the case-law of the ICTR, which has already judged a large number of high-level perpetrators, that it is possible to note that judges punish more severely the accused who – at the time when they committed the offences – exercised relevant governmental, political or administrative functions.

Abuse of authority is another aggravating circumstance consistently upheld by Chambers of the ICTY and ICTR.²⁰⁰

For example, in the *Ntakirutimana* case, the Trial Chamber, in determining the sentence, considered as relevant the accused’s status as a medical doctor and the fact that he abused his position by destroying lives instead of saving them; in committing the heinous crimes he was found responsible of, he betrayed an ethical duty owed to the community.²⁰¹ The reasoning was similar when the *Todorovic* Trial Chamber observed:

...Instead, in his position as chief of an institution that is responsible for upholding the law, Stevan Todorovic actively and directly took part in offences which he should have been working to prevent or punish. ... his abuse of his position of authority and of people’s trust in the institution clearly constitute an aggravating factor.²⁰²

Concerning the possibility that the existence of a superior order be regarded as a mitigating circumstance for the accused who had to follow that order (i.e., a form of ‘duress’), it should be specified that such a circumstance does not necessarily constitute a mitigating factor, and clearly does not grant a complete defence to soldiers charged

¹⁹⁹ *Kambanda, cit.*, Trial Judgement, 4 September 1998, para.62.

²⁰⁰ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1268; *Aleksovski, cit.*, Appeals Chamber, 24 March 2000, para.183; *Todorovic, cit.*, Sentencing Judgement, 31 July 2001, paras.61-62; *Krstic, cit.*, Trial Judgement, 2 August 2001, paras.708, 721; *Prosecutor v. Kvocka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001, paras.716, 740; *Prosecutor v. Banovic*, Case No.IT-02-65/1-S, Sentencing Judgement, 28 October 2003, para.55; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.183; *Mrdja, cit.*, Sentencing Judgement, 31 March 2004, paras.51-54; *Prosecutor v. Krajisnik*, Case No.IT-00-39/40-T, Trial Judgement, 27 September 2006, paras.1156-1160; *Akayesu, cit.*, Trial Judgement, 2 September 1998, Sentence, para.36; *Kambanda, cit.*, Trial Judgement, 4 September 1998, para.44; *Rutaganda, cit.*, Trial Judgement, 2 February 1999, para.468; *Kayishema, cit.*, Trial Judgement, 21 May 1999, paras.14, 26; *Serushago, cit.*, Sentencing Judgement, 5 February 1999, para.29; *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.48; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, 23 February 2007, paras.61-62; *Prosecutor v. Karera, cit.*, Trial Judgement, 7 December 2007, para.578.

²⁰¹ *Gerard Ntakirutimana, cit.*, Trial Judgement, 21 February 2003, para.910.

²⁰² *Prosecutor v. Todorovic*, Case No.IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para.61.

with international crimes.²⁰³ Certainly, for the case in which the accused was a subordinate but also a willing participant in the criminal conduct, there will be no mitigation to his/her sentence. The existence of a superior order qualifies as a mitigating circumstance only when the subordinate commits crime(s) not of his own will but under absolute coercion, as a result of the compulsory nature of the order received from his superior, disobedience to which could have endangered the accused's own life.²⁰⁴ Similarly, in some cases, forced participation in a crime can be considered as a mitigating circumstance.²⁰⁵

ii) "Good character"

The 'good character' evidence, comprising evaluation of aspects such as reputation, credibility, personality and social conduct of the accused, is usually intended to show that the crime committed is out of character and, on the whole, aims at providing judges with more complete information concerning the accused's life, background and characteristics. It is a very controversial factor and has been treated differently in the sentencing practice of the ad hoc Tribunals.

Chambers of both the ICTY and the ICTR have consistently taken into consideration the evidence concerning an accused's character, with the interesting peculiarity that elements supporting a good character, a balanced personality, or evidence of a strong and high educational and professional background, have been

²⁰³ This was explicitly recognised by the Appeals Chamber in the *Erdemovic* case: *Prosecutor v. Erdemovic*, Case No.IT-96-22-A, Appeal Judgement, 7 October 1997, para.19. Duress is therefore not considered as excusing the criminal behaviour except in very limited cases. In the majority of cases, it will however allow for some mitigation of the final sentence. See also Joint Separate Opinion of Judges McDonald and Vohrah, 7 October 1997, paras.66, 88, appended to the *Erdemovic* Appeal Judgement, and containing a survey of the treatment of duress in various national legal systems.

²⁰⁴ The only ICTY case where the existence of duress was recognised as a mitigating factor in favour of the accused was the *Erdemovic* case. *Prosecutor v. Erdemovic*, Case No.IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para.17. In the *Blaskic* case, the Trial Chamber recalled that: 'Duress, where established, does mitigate the criminal responsibility of the accused when he had no choice or moral freedom in committing the crime. This must consequently entail the passing of a lighter sentence if he cannot be completely exonerated of responsibility.' (*Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.769). Within the ICTR case law, the occurrence of duress was recognised in the *Rutaganira* case, where the Trial Chamber – upholding the principles affirmed in the *Erdemovic* case on the issue at hand – considered as a mitigating circumstance «...le risque réel pour Vincent Rutaganira où un membre de sa famille proche de se faire tuer s'il s'opposait aux tueries qui se déroulaient dans son secteur... ». *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, paras.159-162.

²⁰⁵ *Prosecutor v. Krstic*, Case No.IT-98-33-T, Trial Judgement, 2 August 2001, para.714.

considered sometimes as factors in *mitigation* of the sentence, sometimes as factors in *aggravation* of the penalty.

For instance, the *Aleksovski* Trial Chamber took into consideration as a mitigating factor the evidence given by the Defence as to the good character of the accused and the absence of any prior discriminatory behaviour.²⁰⁶ The Trial Chambers in the *Krnjelac*,²⁰⁷ *Kupreskic* and other cases did likewise.²⁰⁸ On the contrary, in the *Tadic* case the good character of the accused was considered as an aggravating factor, as the Trial Chamber found that, prior to the conflict, the accused was a law-abiding citizen, an intelligent, responsible and mature adult, and concluded that:

...however this, if anything, aggravates more than it mitigates: for such a man to have committed these crimes requires an even greater evil will on his part than that for lesser men.²⁰⁹

The Appeals Chamber in the *Delalic et al.* case adopted a more flexible approach and, taking into account guidelines and practice of national jurisdiction, held that:

²⁰⁶ *Aleksovski, cit.*, Trial Chamber, 25 June 1999, para.236. This finding was then rejected by the Appeals Chamber, which found no mitigating circumstances for the accused. See *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.184.

²⁰⁷ *Krnjelac, cit.*, Trial Chamber, 15 March 2002, paras.519 and 515, where the Chamber found: 'The Accused had been employed as a mathematics teacher for most of his working life. He was not well experienced, and perhaps not well suited, for the task he chose to undertake'.

²⁰⁸ *Kupreskic, cit.*, Trial Chamber, 14 January 2000, para.421, where the Chamber 'bears in mind the undisputed evidence as to the good character of the accused, the activities in the folklore society and the good relations with the Muslim neighbours and colleagues prior to the conflict'. The 'good character' evidence was considered a mitigating factor also in *Plavsic, cit.*, Sentencing Judgement, 27 February 2003, para.65; *Prosecutor v. Obrenovic*, Case No.IT-02-60/2-S, Sentencing Judgement, 10 December 2003, paras.130-134; *Strugar, cit.*, Trial Judgement, 31 January 2005, para.468; *Prosecutor v. Hadzhasanovic & Kubura*, Case No.IT-01-47-T, Trial Judgement, 15 March 2006, paras.2080, 2088-2089; *Ruggiu, cit.*, 1 June 2000, para.67; *Elizaphan and Gerard Ntakirutimana, cit.*, Trial Judgement, 21 February 2003, paras.895, 908; *Niyitegeka, cit.*, Trial Judgement, 16 May 2003, para.496; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, paras.122-127; *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.65; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, para.92.

²⁰⁹ *Tadic, cit.*, First Sentencing Judgement of 14 July 1997, para.59. The same reasoning was adopted by the Trial Chamber in the *Brdjanin* case, where the educational background of the accused, who was an intelligent, university-educated person fully aware of the significance and consequences of his actions, was considered as an aggravating factor (*Brdjanin, cit.*, Trial Judgement, 1 September 2004, para.1114). Similarly, on the evaluation of the 'good character' as an aggravating factor: *Simic, cit.*, Trial Judgement, 17 October 2003, para.103; *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.915. It is significant to point out that, conversely, the *Stakic* Appeals Chamber held that '...the Trial Chamber committed a discernible error in identifying the professional background of the Appellant as an aggravating factor. This error impacted on the Trial Chamber's determination of the sentence and therefore the Appeals Chamber will take it into account when revising the Appellant's sentence.' The consideration of 'good character' and professional background of the accused as aggravating factors was thus overturned by the Appeals Chamber. See *Prosecutor v. Stakic*, Case No.IT-97-24-A, Trial Judgement, 22 March 2006, para.416.

...trial courts exercise a broad discretion in the factors they may consider on sentence. This indicates that all information relevant to an accused's character may be considered. ... it is essential that the sentencing judge is in "possession of the fullest information possible concerning the defendant's life and characteristics".²¹⁰

It is interesting to note a Decision on the good character evidence, rendered in the course of the *Kupreskic* case, where Trial Chamber II of the ICTY argued that, generally speaking, evidence of the accused's character prior to the events for which he is indicted before the Tribunal is not a very relevant issue considering that war crimes and crimes against humanity – given their nature as crimes committed in the context of widespread violence and emergency – may be committed by persons with no prior convictions or history of violence, consequently:

...evidence of prior good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before the International Tribunal.²¹¹

In a subsequent finding, the Trial Chamber of the *Kvočka et al.* case described Miroslav Kvočka as a competent and professional policeman and affirmed that:

...His experience and integrity can be viewed as both mitigating and aggravating factor – 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.²¹²

The prior character and educational background of the accused have also been considered circumstances not directly related to the commission of the offence and, therefore, not treated as aggravating or mitigating factors.²¹³

With regards to the ICTR case-law, the *Ntakirutimana* Trial Chamber, when discussing the individual circumstances of the accused Gérard Ntakirutimana, held that '...it is particularly egregious that, as a medical doctor, he took lives instead of saving

²¹⁰ *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, paras.787-788, where the Appeals Chamber concluded that the Trial Chamber did not err in taking evidence as to the character of the accused into account in imposing sentence.

²¹¹ *Prosecutor v. Kupreskic*, 'Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque', Case No.IT-95-16-T, 17 February 1999. See also: *Prosecutor v. Babic*, Case No.IT-03-72-S, Sentencing Judgement, 29 June 2004, paras.90-92, where the Trial Chamber did not accept the previous 'good character' of the accused as a mitigating factor. The ICTR concurred with the findings that evidence of prior good character is of little or no probative value in *Prosecutor v. Bagilishema*, Case No.ICTR-95-1A-T, Trial Judgement, 7 June 2001, para.116; also: *Prosecutor v. Kamuhanda*, Case No.ICTR-95-54A-T, Trial Judgement, 22 January 2004, paras.757-758.

²¹² *Kvočka et al., cit.*, Trial Judgement, 2 November 2001, para.716.

²¹³ *Blagojevic and Jokic, cit.*, Trial Judgement, 17 January 2005, paras.846, 854.

them.²¹⁴ Similarly, in the *Kayishema and Ruzindana* case, the Trial Chamber considered the fact that Kayishema was an educated medical doctor who betrayed the ethical duty that he owed to his community to be an aggravating circumstance.²¹⁵ There were also cases where Trial Chambers evaluated the ‘good character’ of the accused both in aggravation and in mitigation of the sentence.²¹⁶

Other relevant aspects are those related to the behaviour of the accused after the commission of the crime: for instance, the conduct of the accused during trial proceedings – primarily ascertained through the judges’ perception of the accused – has also been considered as relevant in mitigating or aggravating the final sentence.

In the *Blaskic* case, the Trial Chamber took note of the ‘exemplary behaviour of the accused throughout the trial’.²¹⁷ Conversely, in the *Kayishema and Ruzindana* case, the Trial Chamber considered as aggravating factor:

...Ruzindana’s behaviour after the criminal act, and notably the fact that Ruzindana smiled or laughed as survivors testified during trial.²¹⁸

Similar considerations were put forward by the *Delalic* Trial Chamber in relation to the accused Zdravko Mucic.²¹⁹

²¹⁴ *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Case No.ICTR-96-10/96-17-T, Trial Judgement, 21 February 2003, para.910.

²¹⁵ *Prosecutor v. Kayishema and Ruzindana*, Trial Judgement, Case No.ICTR-95-1-T, 21 May 1999, para.26 ‘Sentencing’. See also, in the same sense of considering the previous ‘good character’ as an aggravating factor: *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.581: “The Chamber recalls that Karera was an educated person with an academic record and a role in the Rwandan education sector. In spite of this, he participated in the crimes. This is also an aggravating factor”.

²¹⁶ See, for example, *Prosecutor v. Bisengimana*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, paras.120, 149-150; *Prosecutor v. Nzabirinda*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, paras.63, 92.

²¹⁷ *Blaskic, cit.*, Trial Judgement, 3 March 2000, para.780. In the *Brdjanin* case, the Trial Chamber considered as mitigating factor the respectful conduct of the accused during the course of the proceedings and with respect to a particular Prosecutor witness (*Brdjanin, cit.*, Trial Judgement, 1 September 2004, para.1137).

²¹⁸ *Kayishema and Ruzindana*, Sentence, *cit.*, para.17.

²¹⁹ The behaviour of Mucic during trial proceedings was considered as an aggravating factor: *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1244: ‘The conduct of Mr. Mucic before the Trial Chamber during the course of the trial raises separately the issue of aggravation. The Trial Chamber has watched and observed the behaviour and demeanour of Mr. Mucic throughout the trial. The accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process. ... There have also been allegations that Mr. Mucic participated in the threatening of a witness in the courtroom. Such efforts to influence and/or intimidate witnesses are particularly relevant aggravating conduct, which the Trial Chamber is entitled to take into account in the determination of the appropriate sentence.’

Furthermore, the subsequent and overall behaviour of the accused may be relevant to the Trial Chamber's determination of the accused's sincere remorse for the acts committed or, on the contrary, of a total lack of compassion.²²⁰ However, the conduct or good behaviour of the accused during trial proceedings and/or while in the ICTY Detention Unit does not seem to be consistently evaluated: while in some cases it was considered as a mitigating factor,²²¹ in others it was not given any particular weight.²²²

iii) Lack of prior criminal convictions

The circumstance that an offender does not present previous criminal convictions (thus being a so-called *first offender*) is often considered a mitigating factor, on the assumption that an accused person who never committed crimes before has better rehabilitative prospects and responds more positively to the deterrent effect of the whole trial process. This can lead to a discount in sentencing for the accused. Being a first offender is also consistent with findings of a 'good character' prior to the offence(s), thus the two circumstances were often considered in conjunction. The significance of the accused's previous conduct is, however, a complex factor, as indicated above. Generally, it is accepted that the accused's prior criminal record can be of some influence in meting out the sentence and that an offender with a clean criminal record is entitled to a certain degree of mitigation in sentencing; however, in international

²²⁰ In the *Blaskic* case, the Trial Chamber affirmed that: '...The accused's conduct after committing the crimes says much about his personality insofar as it reveals both how aware the accused was of having committed crimes and, to some extent, his intention to "make amends" by facilitating the task of the Tribunal. Such conduct includes co-operation with the Prosecutor, remorse, voluntary surrender and pleading guilty.' (*Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.773).

²²¹ *Prosecutor v. Zelenovic Dragan*, Case No.IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para.55; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, para.92; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.164; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, para.131; *Prosecutor v. Kordic & Cerkez*, Case No.IT-95-14/2-A, Appeal Judgement, 17 December 2004, para.1091 (for the accused Cerkez); *Prosecutor v. Dragan Nikolic*, Sentencing Judgement, Case No.IT-94-2-S, 18 December 2003, para.268; *Prosecutor v. Galic*, Case No.IT-98-29-T, Trial Judgement, 5 December 2003, para.766; *Prosecutor v. Milan Simic*, Sentencing Judgement, Case No.IT-95-9/2-S, 17 October 2002, para.112; *Krnjelac, cit.*, Trial Chamber, 15 March 2002, para.519.

²²² *Prosecutor v. Jelusic*, Case No.IT-95-10-T, Trial Judgement, 14 December 1999, para.127; *Cesic, cit.*, Sentencing Judgement, 11 March 2004, para.86, where the Trial Chamber noted that every detainee is expected to behave well while in the Detention Unit. The same had previously also been maintained in the *Momir Nikolic* case: *Prosecutor v. Momir Nikolic*, Sentencing Judgement, Case No.IT-02-60/1-S, 2 December 2003, para.168. See also *Obrenovic, cit.*, Sentencing Judgement, 10 December 2003, para.138; *Prosecutor v. Deronjic*, Case No.IT-02-61-S, Sentencing Judgement, 30 March 2004, para.273; *Prosecutor v. Mrdja*, Case No.IT-02-59-S, Sentencing Judgement, 31 March 2004, paras.91-92; *Brdjanin, cit.*, Trial Judgement, 1 September 2004, para.1135.

sentencing, it is not entirely clear which aspects of the accused's criminal record should be regarded as relevant. Is it the absence of any previous criminal convictions at all or, more restrictively, only of crimes of a similar nature to those under the jurisdiction of the ad hoc Tribunals?

As in the case of evidence regarding 'good character', the previous conduct of the accused was also evaluated in various – and at times contrasting – ways.

The absence of previous criminal convictions was considered a mitigating factor in a number of cases before both the ICTY²²³ and the ICTR.²²⁴

At the same time, some Chambers decided either not to assign this factor any substantial mitigating weight²²⁵ or to mention it but without specifying whether it should be considered relevant or not in mitigation.²²⁶ For example, while in the *Furundzija* case the Trial Chamber was of the opinion that, in a case of such gravity, the fact that the accused had no previous convictions could not be given any significant weight,²²⁷ the Trial Chamber of the *Delalic et al.* case did not specify whether any aggravating value was attached to the finding that one of the co-accused, Hazim Delic, had a prior conviction for murder in Bosnia and Herzegovina.²²⁸

Concerning the 'type' of criminal convictions to be taken into account, the Trial Chamber in the *Kunarac* case affirmed that 'propensity to commit violations of international humanitarian law, or, possible crimes relevant to such violations' can be

²²³ *Aleksovski, cit.*, Trial Chamber, 25 June 1999, para.236; *Plavsic, cit.*, Sentencing Judgement, 27 February 2003, para.65; *Prosecutor v. Simic et al.*, Case No.IT-95-9-T, Trial Judgement, 17 October 2003, para.1089 (for the accused Blagoje Simic), 1100 (for the accused Miroslav Tadic), 1113 (for the accused Simo Zaric); *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.265; *Prosecutor v. Kordic & Cerkez*, Case No.IT-95-14/2-A, Appeal Judgement, 17 December 2004, para.1090; *Prosecutor v. Hadzihasanovic & Kubura*, Case No.IT-01-47-T, Trial Judgement, 15 March 2006, para.2080 (for the accused Hadzihasanovic), 2089 (for the accused Kubura); *Prosecutor v. Zelenovic Dragan*, Case No.IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para.55.

²²⁴ *Ruggiu, cit.*, 1 June 2000, paras.59-60; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, paras.129-130; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.165; *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.65; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, para.108.

²²⁵ See, for example, *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, paras.162-163. See also: *Milan Simic, cit.*, Sentencing Judgement, 17 October 2002, para.108, where it was specified that: 'The Trial Chamber treats Milan Simic's lack of prior criminal record as a mitigating factor, albeit not a significant one'.

²²⁶ See, for instance, *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1256; *Kayishema and Ruzindana, cit.*, Trial Judgement, 21 May 1999, Sentence, para.11.

²²⁷ *Furundzija, cit.*, Trial Chamber, 10 December 1998, para.284. Also in the *Brdjanin* case the lack of a prior criminal record was not considered as relevant in mitigation (*Brdjanin, cit.*, Trial Judgement, 1 September 2004, para.1128).

²²⁸ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, para.1256.

discerned only on the basis that an offender might have a record of previous criminal conduct ‘relevant to those committed during the armed conflict’ since ‘in practically all cases before the International Tribunal the convicted persons would be first time offenders *in relation to international crimes*’.²²⁹

This is, however, a rather isolated case and, in general, as seen above, the criminal record of an accused was taken into account as such and in relation to the existence of *any* prior convictions, without specification that the nature of similar convictions be of the same type or similar to that of international crimes.

iv) Personal and family situation

In general, due attention has been given to the ‘family situation’ of the accused, particularly if married and with children. This circumstance was taken into account in numerous cases and considered as a mitigating factor by both the ICTY and the ICTR.²³⁰ In particular, the fact of having young children or being the father of numerous children was given considerable mitigating weight in sentencing.²³¹

In some instances, for example in the *Blaskic* case, the family status of the accused was mentioned, but it is not clear whether any relevance was given to that element in sentencing.²³² Interestingly, in the *Strugar* case, the Trial Chamber gave significant weight, in mitigation of the accused’s sentence, to the delicate situation of his family, considering the fact that the accused’s wife required constant assistance, and concluded that:

²²⁹ *Prosecutor v. Kunarac*, Trial Judgement, Case No.IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.843.

²³⁰ *Aleksovski, cit.*, Trial Judgement, 25 June 1999, para.238; *Jelusic, cit.*, Trial Judgement, 14 December 1999, para.124; *Prosecutor v. Kunarac*, Case No.IT-96-23&96-23/1-A, Appeals Judgement, 12 June 2002, para.362; *Prosecutor v. Vasiljevic*, Case No.IT-98-32-T, Trial Judgement, 29 November 2002, para.300; *Gerard Ntakirutimana, cit.*, Trial Judgement, 21 February 2003, para.908; *Stakic, cit.*, Trial Judgement, 31 July 2003, para.923; *Prosecutor v. Banovic*, Case No.IT-02-65/1-S, Sentencing Judgement, 28 October 2003, para.82; *Babic, cit.*, Sentencing Judgement, 29 June 2004, para.89; *Brdjanin, cit.*, Trial Judgement, 1 September 2004, para.1130; *Blagojevic and Jokic, cit.*, Trial Judgement, 17 January 2005, para.855 (for the accused Dragan Jokic); *Prosecutor v. Hadzihasanovic & Kubura*, Case No.IT-01-47-T, Trial Judgement, 15 March 2006, paras.2079, 2088; *Prosecutor v. Muvunyi Tharcisse*, Case No.ICTR-2000-55A-T, Trial Judgement, 12 September 2006, para.543; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, paras.80-81.

²³¹ *Erdemovic, cit.*, Sentencing Judgement, 5 March 1998, para.16; *Kunarac, cit.*, Appeals Judgement, 12 June 2002, paras.362, 408; *Serushago, cit.*, Sentencing Judgement, 5 February 1999, para.39; *Elizaphan Ntakirutimana, cit.*, Trial Judgement, 21 February 2003, para.896; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, paras.141, 144.

²³² *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.779.

...in these circumstances, the Chamber is of the view that the absence of the accused while serving his sentence will be a particular hardship for his wife even though she is receiving some assistance from others...²³³

Another particular example of personal circumstances that were taken into account is to be found in the *Mrdja* case, where the Trial Chamber considered the fact that the accused would serve his sentence in a foreign country, far from his family and relatives, as a relevant factor in the determination of the sentence.²³⁴

In general, consideration of ‘family status’ as an influential factor is not problematic, as it has been interpreted quite consistently in mitigation throughout the case-law of the ICTY and ICTR. In very few instances did Chambers give little or no mitigating weight to this factor, arguing that family circumstances are in theory applicable to a great number of accused and should thus not be given undue weight.²³⁵ Recently, however, Trial Chambers reaffirmed the fact that ‘family concerns should, in principle, be a mitigating factor’²³⁶ and that the personal and family situation of the accused can be considered as a mitigating factor which leads judges to believe in the accused’s chances of rehabilitation.²³⁷

v) Expression of remorse

Amongst the other circumstances related to the person of the accused, ‘remorse’ acquires particular importance and represents a significant factor in mitigation.²³⁸ Remorse showed by the accused for the crime(s) committed, especially when it is more than a mere expression of sorrow but involves some practical demonstration of

²³³ *Prosecutor v. Strugar*, Case No.IT-01-42-T, Trial Judgement, 31 January 2005, para.469.

²³⁴ *Prosecutor v. Mrdja*, Case No.IT-02-59-S, Sentencing Judgement, 31 March 2004, paras.105-109, where the Trial Chamber confirmed that it took that factor into account in determining the length of imprisonment, but did not consider it as a mitigating circumstance.

²³⁵ *Prosecutor v. Semanza*, Case No.ICTR-97-20-T, Trial Judgement, 15 May 2003, para.575; *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-S, Sentencing Judgement, 2 December 2003, para.170; *Prosecutor v. Obrenovic*, Case No.IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para.140; *Mrdja, cit.*, Sentencing Judgement, 31 March 2004, paras.91-94; *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, para.162; *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.67; *Prosecutor v. Zelenovic Dragan*, Case No.IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para.55.

²³⁶ See, for instance, *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.492.

²³⁷ *Prosecutor v. Rugambarara*, Case No.ICTR-00-59-T, Sentencing Judgement, 16 November 2007, para.39.

²³⁸ On this issue, see for example: TIEGER, ALAN, ‘Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia’, *Leiden Journal of International Law*, 16(2003), pp.777-786.

repentance (e.g. giving details or other previously unknown information to the Prosecution) may afford a significant degree of mitigation in sentencing.

In order to accept remorse as a mitigating circumstance in the determination of the sentence, a Trial Chamber must be satisfied that the remorse expressed is sincere. This assessment is clearly difficult, considering that this factor is of a subjective nature, the truthfulness of which basically resides within the perpetrator. In some cases, as will be seen later, the remorse of the accused is associated with an early guilty plea or cooperation with the office of the Prosecutor.

In assessing the sincerity of the remorse expressed, Trial Chambers have relied upon circumstantial evidence enshrined in a number of different elements, such as specific statements made by the accused, his subsequent behaviour (also in courtrooms), the undertaking of positive actions, apologies to victims and witnesses, as well as cooperation with the Prosecutor. For instance, in the *Simic* case, the Trial Chamber took note:

...of the fact that Milan Simic ... apologised to two of his victims...[and]...of the statement made by Milan Simic at the sentencing hearing in which he expressed his “sincere regret and remorse” for what he had done to his “fellow citizens and friends at the elementary school”, and that he took the opportunity to “publicly extend apology to all of them”.²³⁹

Furthermore, in the *Serushago* case, the Trial Chamber stressed that:

...during the pre-sentencing hearing, Omar Serushago expressed his remorse at length and openly. He asked for forgiveness from the victims of his crimes and the entire people of Rwanda. In addition to this act of contrition, he appealed for national reconciliation in Rwanda.²⁴⁰

When the remorse expressed by the accused was recognised as being sincere and honest, it was considered as a substantial factor in mitigation of the penalty.²⁴¹

²³⁹ *Milan Simic*, Sentencing Judgement, *cit.*, para.94.

²⁴⁰ *Serushago*, *cit.*, Sentencing Judgement, 5 February 1999, para.40.

²⁴¹ See, for the ICTY, *Erdemovic*, Sentencing Judgement, 29 November 1996, *cit.*, paras.44, 96-98; *Todorovic*, *cit.*, Sentencing Judgement, 31 July 2001, paras.89-92; *Prosecutor v. Sikirica et al.*, Case No.IT-95-8-S, Trial Judgement, 13 November 2001, para.152 (for the accused Dusko Sikirica), 194 (for the accused Damir Dosen), 230 (for the accused Dragan Kolundzija); *Milan Simic*, *cit.*, Sentencing Judgement, 17 October 2002, para.94; *Prosecutor v. Plavsic*, Case No.IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, paras.70-73, 110; *Banovic*, *cit.*, Sentencing Judgement, 28 October 2003, paras.65-70; *Obrenovic*, *cit.*, Sentencing Judgement, 10 December 2003, para.121; *Prosecutor v. Miodrag Jokic*, Case No.IT-01-42/1, Sentencing Judgement, 18 March 2004, paras.89-92; *Prosecutor v. Mrdja*, Case No.IT-02-59-S, Sentencing Judgement, 31 March 2004, para.87; *Brdjanin*, *cit.*, Trial Judgement, 1 September 2004, para.1139; *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, paras.151-152; *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006, para.752; *Prosecutor v. Zelenovic Dragan*, Case No.IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para.56. For the ICTR: *Serushago*, *cit.*, Sentencing Judgement, 5 February 1999, para.40; *Ruggiu*, *cit.*, 1 June

However, in the *Momir Nikolic* case, the Trial Chamber, even though satisfied as to the sincerity of the remorse expressed by the accused, did not afford substantial weight to that factor.²⁴²

In a number of other cases, Trial Chambers were not satisfied that the accused had demonstrated any genuine remorse and, therefore, such a factor was not taken into account nor given mitigating relevance in sentencing.²⁴³

Chambers of the Tribunals also specified that the fact that the accused did not express any remorse or regret – independently of whether s/he pleaded guilty or not – cannot be used as an aggravating factor.²⁴⁴

vi) Age

Age is amongst the classic ‘personal circumstances’ to be considered in the determination of punishment.

In particular, the youth of the accused has often been taken into account as a mitigating factor by the ICTY²⁴⁵ and the ICTR;²⁴⁶ some Chambers even referred to this

2000, paras.69-72; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, paras.156-158; *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, paras.63-64; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, paras.69-70. It is worthy of note that in the *Musema* case, where the Trial Chamber took into account the expression of remorse and regret by the accused, the final sentence imposed was still imprisonment for life. See *Musema, cit.*, Trial Judgement, 27 January 2000, para.1005.

²⁴² *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-S, Sentencing Judgement, 2 December 2003, paras.159-161.

²⁴³ See, for example, *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1279 (for the accused Landzo); *Jelusic, cit.*, Trial Judgement, 14 December 1999, para.127; *Vasiljevic, cit.*, Trial Judgement, 29 November 2002, para.297; *Prosecutor v. Mrksic et al.*, Case No.IT-95-13/1-T, Trial Judgement, 27 September 2007, para.700. In the *Blaskic* case, while the Trial Chamber had not found the remorse expressed by the accused sincere (*Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.775), on the contrary the Appeals Chamber considered it real and sincere and thus accorded mitigating value to it in the determination of the final sentence (*Prosecutor v. Blaskic*, Case No.IT-95-14-A, Appeals Judgement, 29 July 2004, para.705).

²⁴⁴ *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.919, where the Trial Chamber thus specified: ‘...Contrary to the contention of the Prosecution, the Trial Chamber does not accept that the absence of a potential mitigating factor such as remorse can ever serve as an aggravating factor...’. Previously, in the *Krstic* case, the Trial Chamber thus observed in relation to the conduct of the accused: ‘Overall, his conduct during the proceedings evidences a lack of remorse for the role he played in the Srebrenica area in July 1995’ (*Krstic, cit.*, Trial Judgement, 2 August 2001, para.722). However, it was not explicitly stated that such a lack of remorse was to be considered as an aggravating circumstance.

²⁴⁵ *Erdemovic, cit.*, 29 November 1996, paras.109-111; *Delalic, cit.*, Trial Judgement, 16 November 1998, para.1283 (for the accused Landzo); *Furundzija, cit.*, Trial Chamber, 10 December 1998, paras.284, 291; *Jelusic, cit.*, Trial Judgement, 14 December 1999, para.124; *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001, paras.727-732 (for the accused Milojica Kos); *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.923; *Prosecutor v. Banovic*, Case No.IT-02-65/1-S, Sentencing Judgement, 28 October 2003, paras.75-76; *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006, para.757.

factor as enhancing the possibilities for the accused to be re-socialised and rehabilitated.²⁴⁷ In this respect, and to evaluate whether possibilities of rehabilitation existed, the Chambers have considered not only the age at the time the crimes were committed, but also the age of the accused at the time of the conviction. Generally speaking, two main circumstances were considered as mitigating factors: the young age of the accused at the time of the commission of crime(s), and the advanced age of the accused at the time of the sentence.

In relation to youth as a mitigating factor, the *Delalic et al.* Trial Chamber noted that, especially in times of war, young people are often manipulated and forced into serving as soldiers. They are often inexperienced, naïve and more fragile than adults and therefore much more easily influenced by their superiors. Accordingly, the Chamber considered those factors and gave them due mitigating weight in sentencing.²⁴⁸

Comparing the case-law of the ICTY and the ICTR, a very different approach to age as mitigating factor can easily be noted. In particular, there is no consistency in what the two Tribunals regard as a ‘young’ age.

Trial Chambers of the ICTY have averagely considered ‘young’ to be between 19 and 23 years at the time of the events, as in the *Delalic*, *Erdemovic*, *Furundzija* and *Jelusic* cases.²⁴⁹ In the *Cesic* case, the Trial Chamber did not accept the submission of the Defence that the age of the accused at the time of the commission of crimes (27 years) merited any leniency and stressed that it was not aware of any domestic system where the age of 27 years was treated as a ‘young’ age and considered as a mitigating factor.²⁵⁰ Similarly, the age of 30 years old was not taken into consideration in the *Kupreskic* case, and, in the *Mrdja* case, the age of 25 was not considered ‘to be such a young age that it would justify mitigation’.²⁵¹ Interestingly, in the *Kordic* case, where the accused was between 31-33 years at the time of the offences, such an age was

²⁴⁶ *Serushago, cit.*, Sentencing Judgement, 5 February 1999, para.39; *Prosecutor v. Kayishema and Ruzindana*, Case No.ICTR-95-1-T, Trial Judgement, 21 May 1999, Sentence, para.12 (for the accused Ruzindana); *Prosecutor v. Seromba Athanase*, Case No.ICTR-2001-66-T, Trial Judgement, 13 December 2006, para.399.

²⁴⁷ *Erdemovic, cit.*, Trial Judgement, 5 March 1998, para.16, *Serushago, cit.*, Trial Judgement, para.39; *Kayishema & Ruzindana, cit.*, Trial Judgement, para.12 (for the accused Ruzindana); *Seromba, cit.*, Trial Judgement, 13 December 2006, para.399.

²⁴⁸ *Delalic, cit.*, Trial Judgement, 16 November 1998, para.1283 (for the accused Landzo).

²⁴⁹ Landzo was 19 years old; Erdemovic, Jelusic and Furundzija were 23 years old at the time of the commission of the crimes.

²⁵⁰ *Cesic, cit.*, Sentencing Judgement, 11 March 2004, para.91.

²⁵¹ *Prosecutor v. Darko Mrdja*, Case No.IT-02-59-S, Sentencing Judgement, 31 March 2004, para.93.

regarded by the Trial Chamber as ‘a youthful age for the responsibilities of leadership which he undertook’, but was not subsequently taken into account as a mitigating factor.²⁵² Moreover, in the *Blaskic* case, the age of the accused (32 years) at the time of the crimes was only partly considered by the Trial Chamber, which argued that ‘his age is to some degree a mitigating circumstance’.²⁵³

On the other hand, ICTR Trial Chambers have considered as ‘young’ – for purposes of mitigation of the penalty – the age of 31,²⁵⁴ 32²⁵⁵ and 37 years.²⁵⁶ This is open to criticism as a person aged over 30 is supposed to have a more stable and developed personality, especially in countries such as Rwanda where life expectancy is definitely shorter than in countries like those of the former Yugoslavia.²⁵⁷

Another question is whether advanced age should influence sentencing. In this regard, only a few cases in the practice of the ad hoc Tribunals are relevant.

The most important is the *Plavsic* case, where the accused argued that her advanced age (72 years at the time of the trial judgement) constituted a significant mitigating factor.²⁵⁸ The Trial Chamber first argued that there was no authority in support of the argument that advanced age should constitute a mitigating factor in sentencing; however, it finally took the accused’s age into account in the determination of the sentence.²⁵⁹

The age of 62 years was considered relevant in sentencing in the *Krnojelac* case;²⁶⁰ conversely, in the *Jokic* Sentencing Judgement, the Trial Chamber rejected the argument that the accused’s age of 69 at the time of the sentence was to be considered a

²⁵² *Kordic & Cerkez, cit.*, Trial Judgement, 26 February 2001, paras.853-854.

²⁵³ *Blaskic, cit.*, Trial Judgement, para.778.

²⁵⁴ *Seromba, cit.*, Trial Judgement, 13 December 2006, para.399.

²⁵⁵ *Ruzindana, cit.*, Sentence, para.12.

²⁵⁶ *Serushago, cit.*, para.39.

²⁵⁷ See MUMBA, FLORENCE N.M., ‘Topics within the Sphere of Sentencing in International Criminal Law’, in VOHRAH L., POCAR F. (eds.), *Man’s Inhumanity to Man*, Kluwer Law International, 2003, p.593, where a reference to 61 years as life expectancy for Rwanda, and 71 years as life expectancy for Bosnia and Herzegovina can be found.

²⁵⁸ *Plavsic, cit.*, Sentencing Judgement, 27 February 2003, paras.74, 84-85.

²⁵⁹ *Ibid.*, paras.103, 106.

²⁶⁰ *Krnojelac, cit.*, Trial Judgement, 15 March 2002, para.533. Similarly, the fact that the accused Dragoljub Prcać was 64 years old at the time of the trial judgement was taken into account by the Trial Chamber in *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001, para.724. See also *Prosecutor v. Krajisnik*, Case No.IT-00-39&40-T, Trial Judgement, 27 September 2006, paras.1161-1162, where the Trial Chamber took into account as a mitigating factor the fact that the accused was 61 years old at the time of the trial.

factor in mitigation.²⁶¹ More recently, the Trial Chamber in the *Brdjanin* case took into account the age of the accused (56 years), although attaching only limited importance to that factor.²⁶² On the contrary however, it seems that a substantial mitigating weight to the advanced age of the accused (71 years), in conjunction with his poor health, was recognized and accorded in the *Strugar* case.²⁶³

Regarding findings of the ICTR, the age of 78 at the time of the conviction was considered as a mitigating factor for Elizaphan Ntakirutimana.²⁶⁴ Further, the age of 60 at the time of the trial proceedings was considered as a mitigating factor (together with the delicate health of the accused) in the *Rutaganira* case.²⁶⁵

Against this background, and considering the inconsistent interpretation of a ‘young age’ in particular by Chambers of the ad hoc Tribunals, the influential factor of ‘age’ will be investigated in more depth in the course of the quantitative analysis in Chapter 4, to analyse its actual influence on sentencing and to foster a higher degree of uniformity in the usage of this factor.

vii) State of health of the accused

The case-law is rather scant with regard to the factor of the accused’s state of health and, initially, was mostly concerned with issues of post-traumatic stress and personality disorders suffered by the offenders after the war. For instance, this was particularly the case for Drazen Erdemovic, whose status of post-war shock took the form of depressions accompanied by a feeling of guilt and incapacity to follow the trial for certain periods; these elements were taken into account by the Trial Chamber especially as a demonstration of the sincerity of the accused’s repentance.²⁶⁶

A post-traumatic stress syndrome, due to the experience lived throughout the war, was considered as a mitigating factor in the *Delalic et al.* case, in relation to the accused

²⁶¹ *Prosecutor v. Miodrag Jokic*, Case No.IT-01-42/1, Sentencing Judgement, 18 March 2004, paras.100-101.

²⁶² *Prosecutor v. Brdjanin*, Case No.IT-99-36, Trial Judgement, 1 September 2004, paras.1130, 1140.

²⁶³ *Prosecutor v. Strugar*, Case No.IT-01-42-T, Trial Judgement, 31 January 2005, para.469.

²⁶⁴ *Elizaphan and Gerard Ntakirutimana, cit.*, Trial Judgement, para.898.

²⁶⁵ *Prosecutor v. Rutaganira*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, paras.134-136. The same occurred in the *Bisengimana* case, where the age of the accused (57 years old) was considered together with his ill-health as a factor in mitigation of the sentence. See *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, paras.173-175.

²⁶⁶ *Erdemovic, cit.*, Trial Judgement, 29 November 1996, paras.96-98.

Hazim Delic;²⁶⁷ on the other hand, in the *Jelusic* case, the Trial Chamber did not agree that the personality disorders of the accused diminished his criminal responsibility.²⁶⁸

Similarly, in the *Krstic* case, the Trial Chamber – although expressing sympathy for the state of health and the medical complications suffered by Radislav Krstic, who had part of a leg amputated as a result of injuries caused to him by a landmine in 1994 – did not accept such a circumstance as a mitigating factor to be taken into account in determining the appropriate penalty.²⁶⁹

An interesting case regarded the health of the accused Milan Simic, who was rendered a paraplegic due to a gun-shot during the latter part of the war. The Trial Chamber, confronted with the request of considering his ill health as a mitigating circumstance, affirmed that only in rare or exceptional cases would ill health be a factor in mitigation of the sentence, as normally this should be a matter for consideration in carrying out the sentence, and thus concluded:

Although sympathetic with the medical complications that Milan Simic has suffered and his current medical condition, the Trial Chamber is not satisfied that the medical problems are present to such a degree as would justify a reduction of the sentence. Milan Simic's medical condition is not to be taken into account as a mitigating factor in the determination of sentence.²⁷⁰

Nonetheless, contrary to such an explicit and clear statement, it seems that in the end the poor health of the accused was indeed considered a mitigating circumstance, although of a 'special' nature, as the Trial Chamber recognised that:

...as a paraplegic, Milan Simic, who is wheelchair bound, requires full time medical attention including daily assistance with the most basic activities crucial for day to day subsistence. Although the Trial Chamber found that such condition does not qualify as a factor in mitigation of Milan Simic's sentence, Milan Simic's physical circumstances cannot be ignored. The Trial Chamber notes that in the history of the Tribunal there has not been an accused in similar medical circumstances. Such a condition poses an *exceptional circumstance* that obliges this Trial Chamber, for reasons of humanity, to accept that Milan Simic's medical condition ought to be a consideration in sentencing, as a *special circumstance*. Accordingly a lesser sentence than Milan Simic would have otherwise received will be imposed. This is not to say that a long custodial sentence cannot be

²⁶⁷ *Delalic et al., cit.*, Trial Judgement, 16 November 1998, paras.1258, 1270.

²⁶⁸ *Jelusic, cit.*, Trial Judgement, 14 December 1999, para.125. Similarly, the Trial Chamber in the *Todorovic* case: *Prosecutor v. Todorovic*, Case No.IT-95-9/1-S, Sentencing Judgement, 31 July 2001, paras.93-95; and in the *Sikirica* case: *Prosecutor v. Sikirica et al.*, Case No.IT-95-8-S, Trial Judgement, 13 November 2001, paras.198-199 (for the accused Damir Dosen).

²⁶⁹ *Prosecutor v. Krstic*, Case No.IT-98-33-T, Trial Judgement, 2 August 2001, para.723. These findings were not contested by the Appeals Chamber: *Prosecutor v. Krstic*, Appeals Judgement, Case No.IT-98-33-A, 19 April 2004, paras.264-265.

²⁷⁰ *Milan Simic, cit.*, Sentencing Judgement, 17 October 2002, paras.98, 101.

imposed on any accused in a similar state. Rather, each case must be treated according to its own circumstances.²⁷¹

The poor health of accused persons was also treated as a mitigating factor in the ICTR case-law.²⁷² In particular, the ill health of the accused was considered a substantial factor in mitigation of the sentence in the *Serugendo* case. Here, the Trial Chamber, having noted that the accused had been diagnosed with a terminal illness, even considered the hypothesis of a regime alternative to imprisonment and found that:

...the Accused's current state of health, as established by the Medical Report, constitutes a significant mitigating circumstance in sentencing. Further, the palliative care and ongoing treatment necessary to treat his condition requires a modified regime of detention.²⁷³

Although the weight that has been accorded to ill health has varied, it seems that Chambers of both Tribunals accepted that, when the medical conditions and ill health of the accused are proved to negatively impact on or are incompatible with detention, then judges must show consideration for similar circumstances and rule accordingly.

viii) Other individual circumstances

An extensive number of other circumstances were considered at times relevant to sentencing, either as aggravating or as mitigating factors. It is not possible to provide here a complete record of all other circumstances mentioned by the judges and deemed as relevant to sentencing; therefore only some of those factors will be mentioned.

At first, motives at the basis of a crime, or the discriminatory state of mind of the perpetrator, were at times considered as aggravating factors. Different aspects were taken into account as 'motives' for the crime: religious, ethnic or political

²⁷¹ *Ibid.*, para.116, emphasis added. The poor health of the accused was considered a mitigating circumstance also in the following cases: *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001, para.724 (for the accused Dragoljub Prcac); *Prosecutor v. Simić et al.*, Case No.IT-95-9-T, Trial Judgement, 17 October 2003, para.1099 (for the accused Miroslav Tadić); *Prosecutor v. Strugar*, Case No.IT-01-42-T, Trial Judgement, 31 January 2005, para.469; *Prosecutor v. Limaj et al.*, Case No.IT-03-66-T, Trial Judgement, 30 November 2005, para.732 (for the accused Haradin Bala); *Prosecutor v. Zelenović Dragan*, Case No.IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para.55.

²⁷² *Rutaganda, cit.*, 2 February 1999, para.471; *Prosecutor v. Elizaphan and Gerard Ntakirutimana, cit.*, 21 February 2003, para.898; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, para.136; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.175. On the other hand, the *Semanza* Trial Chamber did not find that the health conditions of the accused had any impact on the sentence: *Prosecutor v. Semanza*, Case No.ICTR-97-20-T, Trial Judgement, 15 May 2003, para.575.

²⁷³ *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, paras.70-74.

discrimination/persecution,²⁷⁴ feelings of revenge,²⁷⁵ sadism or cruelty.²⁷⁶ The possibility of considering the discriminatory state of mind of the accused as an aggravating circumstance was only allowed when not already an element of the offence.²⁷⁷ The Appeals Chamber emphasised several times the importance of distinguishing between motive and *mens rea*, the former being what causes a person to act, and the latter being the mental element or criminal intent required for a given offence.²⁷⁸ Considering that crimes of specific intent (such as persecution or genocide) by their very nature require the existence of a particular motive, in those cases the specific motives of the perpetrator can be considered as aggravating factors *only* when related to different elements than those typical of the crime at hand (for instance, the personal motive of obtaining economic benefits, gain or political advantages can obviously be combined with the specific intent of committing genocide and thus be considered as an aggravating circumstance).²⁷⁹ Additionally, the existence of personal motives does not by itself exclude criminal responsibility for a crime of specific intent such as genocide, when the required *mens rea* subsists and the criminal acts are committed with the necessary intent.²⁸⁰

²⁷⁴ See: *Prosecutor v. Tadic*, Case No.IT-94-1-T, First Sentencing Judgement of 14 July 1997, para.45; and *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.785.

²⁷⁵ *Prosecutor v. Delalic et al.*, Trial Judgement, 16 November 1998, para.1269 (for the accused Hazim Delic).

²⁷⁶ See, above, para.3.10-(i), fn.156, 157, 160.

²⁷⁷ For instance, the discriminatory intent is already a requisite element of the crime of persecution, therefore could not also be considered as a factor in aggravation for convictions of persecution. See *Prosecutor v. Vasiljevic*, Case No.IT-98-32-A, Appeals Judgement, 25 February 2004, paras.172-173.

²⁷⁸ *Prosecutor v. Kunarac*, Case No.IT-96-23&96-23/1-A, Appeals Judgement, 12 June 2002, para.153; *Prosecutor v. Krnojelac*, Case No.IT-97-25-A, Appeals Judgement, 17 September 2003, para.102; *Prosecutor v. Blaskic*, Case No.IT-95-14-A, Appeals Judgement, 29 July 2004, paras.693-694.

²⁷⁹ See, *Prosecutor v. Jelusic*, Case No.IT-95-10-A, Appeals Judgement, 5 July 2001, para.49; *Blaskic*, Appeals Chamber, *ibid.*, paras.694-695, where the Appeals Chamber thus recognised: ‘...The Appeals Chamber considers that the Trial Chamber in the instant case was entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence of any conviction which included that discrimination as an element of the crime of which he was convicted...’ (namely, persecution, of which the Trial Chamber found the Appellant guilty) ‘...The Trial Judgement’s wording does not make this clear, however, and the Appeals Chamber is left with no option but to conclude that the Trial Chamber may have erred in its application of the law in allowing the Appellant’s discriminatory intent to be used as an aggravating factor in calculating his sentence for persecutions. The Trial Chamber should have stated its reasoning more clearly in order to ensure that the legal requirements of sentencing the Appellant were respected’.

²⁸⁰ See the ICTR Appeals Chamber: ‘The Appeals Chamber notes that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2(2)(a) through to (e) were committed “with intent to destroy, in whole or in part a national, ethnic, racial or religious group”...’ (in *Prosecutor v. Kayishema and Ruzindana*, Case No.ICTR-95-1-A, Appeal Judgement, 1 June 2001, para.161; and *Prosecutor v. Niyitegeka*, Case No.ICTR-96-14-A, Appeal Judgement, 9 July 2004, para.52).

As far as other circumstances are concerned, a particular situation that was considered in mitigation of the penalty by the *Martic* Trial Chamber was the fact that the accused, Milan Martić, and his family were expelled and displaced during the war.²⁸¹

Furthermore, a circumstance considered in mitigation of the sentence of Vidoje Blagojević and Dragan Jokić was particularly interesting. The Trial Chamber considered in mitigation the fact that, after the Dayton Peace Accords, both the accused were actively engaged in planning, managing and organising a system of demining in the army of the Republika Srpska.²⁸²

The ample discretion enjoyed by Trial Chambers in determining factors in aggravation appears clear from various examples. For instance, in the *Vasiljević* case, the aggravating factor of ‘verbal abuses’, which were used by the accused against the victim(s), was taken into consideration for the first time. The *Vasiljević* Appeals Chamber thus recognised:

Verbal abuse has not been used previously at the International Tribunal as an aggravating factor. The Statute and the Rules provide the Trial Chambers with a wide [degree] of discretion in determining the sentence and in considering factors in aggravation. In the view of the Appeals Chamber, verbal abuse can be taken into account as an aggravating factor by Trial Chambers.²⁸³

In the *Stakić* case, the Trial Chamber considered the following behaviour as an aggravating factor: ‘Dr. Stakić’s unwillingness to assist certain individuals who approached him in times of need or indeed desperation’.²⁸⁴

Another unusual aggravating factor, taken into account by the Trial Chamber of the *Dragomir Milošević* case, was the use of modified air bombs. The Trial Chamber thus found:

...the Accused introduced to the Sarajevo theatre, and made regular use of, a highly inaccurate weapon with great explosive power: the modified air bomb. ... The modified air bombs could only be directed at a general area, making it impossible to predict where they would strike. Each time a modified air bomb was launched, the Accused was playing with the lives of the civilians in Sarajevo. The psychological effect of these bombs was

²⁸¹ *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.509.

²⁸² *Prosecutor v. Blagojević and Jokić*, Case No.IT-02-60-T, Trial Chamber, 17 January 2005, paras.858-860.

²⁸³ *Prosecutor v. Vasiljević*, Case No.IT-98-32-A, Appeals Judgement, 25 February 2004, para.161.

²⁸⁴ *Prosecutor v. Stakić*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.916.

tremendous. ... The repeated use of the blatantly inaccurate modified air bombs is an aggravating factor.²⁸⁵

These are only some examples of the wide range of ‘personal’ circumstances that were considered by the ad hoc Tribunals in the sentencing decision-making process.

3.11 Proceeding-related factors

After the analysis of the case-related factors, the following section offers an overview of the influential factors concerning procedural aspects of a case, specifying whether such factors were considered by judges in mitigation or in aggravation of the sentence.

As observed above, the behaviour of the accused after committing criminal acts has often been considered relevant to the assessment of the appropriate sentence. Cooperation of the accused in the proceedings, voluntary surrender, admission of guilt, all belong to the sphere of circumstances subsequent to the commission of the crimes and which also have an impact on case-proceedings.

a) *Voluntary surrender*

The continuous struggle of the ad hoc Tribunals in obtaining the presence of the accused persons is well known. Due to the intrinsic characteristics of international criminal adjudication and the fact that it relies heavily on inter-State co-operation, the surrender of indictees to international tribunals and courts is of vital importance to their proper functioning. This explains why the voluntary surrender of an accused person has had substantial relevance for the sentencing process at the ICTY and ICTR, and has thus been considered a factor in mitigation of the penalty. Trial Chambers assumed that voluntary surrender may inspire other indictees to act accordingly, and improve the effectiveness of the work of the ad hoc Tribunals.

In the *Erdemovic* case, the Trial Chamber noted that the accused’s desire to surrender to the Tribunal, together with the recognition of the role he played in the massacres committed, were to be considered as mitigating factors.²⁸⁶ Evaluation of this

²⁸⁵ *Prosecutor v. Dragomir Milosevic*, Case No.IT-98-29/1-T, Trial Judgement, 12 December 2007, para.1001.

²⁸⁶ This despite the fact that the accused did not in fact surrender because he was arrested before he had any opportunity to do so. *Erdemovic, cit.*, 29 November 1996, paras.55, 97, 111. The same consideration

element remained rather unclear in the *Blaskic* case, where the Trial Chamber recognised General Blaskic's surrender to be voluntary, but made no ruling on whether it considered this to be a mitigating circumstance or not.²⁸⁷

In general, the ICTY and the ICTR considered voluntary surrender as a mitigating factor in a number of cases;²⁸⁸ in the majority, surrender was linked to the accused's co-operation with the office of the Prosecutor. However, elements of ambiguity persist when at times Chambers mentioned the surrender of the accused without further specifying whether that circumstance was considered or not in mitigation of the sentence.²⁸⁹

An interesting case is represented by *Deronjic* where, in mitigation of the sentence, the Trial Chamber had to consider not a voluntary surrender as such, but the 'accused's willingness to surrender voluntarily', given the fact that – as argued by the Defence – the accused had not been given any opportunity to surrender, although he had expressed his intention to do so.²⁹⁰ The Trial Chamber considered the accused's willingness to surrender to be a factor in mitigation of his sentence, although little weight was attached to it.²⁹¹

appears in the *Obrenovic* case: *Prosecutor v. Obrenovic*, Case No.IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para.136: 'The Trial Chamber notes that Dragan Obrenovic was arrested even though he had offered to surrender voluntarily knowing of his status as a suspect. The Trial Chamber finds his offer to voluntarily surrender, as reflected in the record of an interview held with the Prosecution, to be a factor in mitigation of sentence.' The factor was in any case accorded only limited weight.

²⁸⁷ *Blaskic*, Trial Judgement, 3 March 2000, para.776.

²⁸⁸ *Kupreskic, cit.*, Trial Judgement, 14 January 2000, para.853: 'The fact that Zoran Kupreskic and Mirjan Kupreskic voluntarily surrendered [...] is a factor in mitigation of their sentence', plus paras.860 (for the accused Drago Josipovic) and 863 (for the accused Vladimir Šantic); *Kunarac, cit.*, Trial Judgement, 22 February 2001, para.868; *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-A, Appeal Judgement, 28 February 2005, para.713, where the Appeals Chamber found that the Trial Chamber committed an error in not considering Zigic's voluntary surrender to the Tribunal a mitigating factor (see *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001, para.746 where the Trial Chamber expressly denied any mitigating effect for the voluntary surrender of the accused Zigic); *Plavsic, cit.*, Sentencing Judgement, 27 February 2003, paras.65, 84; *Prosecutor v. Miodrag Jokic*, Case No.IT-01-42/1, Sentencing Judgement, 18 March 2004, para.73; *Babic, cit.*, 29 June 2004, para.86; *Serushago, cit.*, Trial Judgment, para.34; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, para.145, where the Trial Chamber appreciated the sign of respect for the international administration of justice showed by the accused with his voluntary surrender.

²⁸⁹ *Prosecutor v. Kordic & Cerkez*, Case No.IT-95-14/2-T, Trial Judgement, 26 February 2001, paras.845, 854, 856. The issue was also raised in appeals: *Kordic & Cerkez*, Case No.IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras.1046 ff..

²⁹⁰ Miroslav Deronjic was arrested in front of his house immediately after the indictment against him had been issued and before he was even aware that an indictment against him actually existed. See *Deronjic, cit.*, Sentencing Judgement, 30 March 2004, paras.265-267.

²⁹¹ *Deronjic, ibid.*, paras.266-267.

Recently, the voluntary surrender of the accused was considered a mitigating factor in the *Blagojevic and Jokic* case for the accused Dragan Jokic,²⁹² in the *Strugar* case²⁹³ and, before the ICTR, in the *Seromba* case.²⁹⁴

b) *Co-operation with the Office of the Prosecutor*

Substantial co-operation with the Prosecution is the only mitigating circumstance explicitly mentioned by the RPE (Rule 101B(ii)) of the two Tribunals.

Much attention has therefore been devoted to this circumstance by the jurisprudence of the ad hoc Tribunals. Co-operation can assume various forms, from merely facilitating the presentation of the Prosecutor's case,²⁹⁵ to testifying and providing evidence in other cases,²⁹⁶ to disclosing new information²⁹⁷ or corroborating known information,²⁹⁸ or also contributing to the identification of other perpetrators of crimes. As clarified in the *Blaskic* case:

The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused's cooperation depends both on the quantity and quality of the information he provides.

²⁹² *Blagojevic and Jokic, cit.*, Trial Judgement, 17 January 2005, paras.856-857.

²⁹³ *Strugar, cit.*, Trial Judgement, 31 January 2005, para.472.

²⁹⁴ *Prosecutor v. Seromba Athanase*, Case No.ICTR-2001-66-T, Trial Judgement, 13 December 2006, para.398.

²⁹⁵ *Milan Simic, cit.*, Sentencing Judgement, 17 October 2002, para.111.

²⁹⁶ *Todorovic, cit.*, Sentencing Judgement, 31 July 2001, paras.84, 87-88; *Kvočka et al., cit.*, Trial Judgement, 2 November 2001, para.716; *Serushago, cit.*, para.33. The testimony provided by the accused in other cases before the ICTY was considered a mitigating factor – and in support of the co-operation of the accused – also in the *Obrenovic* case (*cit.*, Sentencing Judgement, 10 December 2003, para.122) and in the *Deronjic* case (*cit.*, Sentencing Judgement, 30 March 2004, para.247). The fact of whether the accused testified and provided information to the Prosecutor is, therefore considered here in the category of 'co-operation', as it is strictly linked to it and has often been seen as a 'sign' of substantial co-operation.

²⁹⁷ A significant example in this respect is the *Todorovic* case, where the Trial Chamber recognised the quantity and quality of the information provided by the accused and acknowledged that 'some of the information that Stefan Todorovic has provided might not otherwise have been available' (*Todorovic, cit.*, para.87). Also relevant, the *Serugendo* case, where the Trial Chamber thus acknowledged: 'Both the Prosecution and Defence concur that Serugendo has provided substantial cooperation to the Prosecution. This co-operation is described as wide-ranging, leading to the clarification of many areas of investigative doubt, in relation also to crimes previously unknown by the Prosecution. Consequently, he can be seen as setting an example that may encourage others to acknowledge their personal involvement in the massacres that occurred in Rwanda in 1994' (*Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.61-62). See also: *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.258-260.

²⁹⁸ For example, in the *Deronjic* case, the Trial Chamber recognised that the information offered supported the accused's co-operation and found that 'Miroslav Deronjic provided unique information to the Prosecution, including information which corroborates evidence that is already in the Prosecution's possession' (*Deronjic, cit.*, para.246).

Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of cooperation, which must be lent without asking for something in return.²⁹⁹

In other cases, Chambers of the Tribunals stressed that the extent and quality of the information provided to the Prosecution are factors to take into account when determining whether the co-operation has been substantial.³⁰⁰

Once it has been ascertained that the co-operation provided is substantial, then this factor is generally considered as a significant mitigating circumstance, also due to the fact that it facilitates an expeditious trial.³⁰¹ On the other hand, when Chambers ascertained that co-operation was forthcoming reluctantly or was sporadic or not substantial, then they did not consider it of any mitigating value.³⁰²

In the case of *Prosecutor v. Bralo*, the Trial Chamber gave moderate consideration to the element of co-operation by noting that:

...there is not evidence of “substantial” co-operation from Bralo with the Prosecution. There is evidence of some co-operation, in the form of provision of documents and a willingness to give information, albeit in a prescribed format, and the Trial Chamber gives that appropriate weight as moderate co-operation.³⁰³

Furthermore, the ruling of the *Blaskic* Trial Chamber which twisted the provision regarding co-operation as a mitigating factor, and arrived at the conclusion that ‘failure to co-operate constitutes an *aggravating* circumstance’, was highly questionable.³⁰⁴ In fact, the finding was not upheld in subsequent judgements, where – conversely – it was made clear that failure to co-operate with the Prosecutor is not an aggravating circumstance and cannot be considered in aggravation of the punishment.³⁰⁵

²⁹⁹ *Blaskic, cit.*, Trial Judgment, 3 March 2000, para.774.

³⁰⁰ See, for instance, *Prosecutor v. Sikirica et al.*, Case No.IT-95-8-S, Trial Judgment, 13 November 2001, para.111; *Cesic*, Sentencing Judgment, 11 March 2004, para.62; *Deronjic*, Sentencing Judgment, 30 March 2004, para.244.

³⁰¹ *Erdemovic* Sentencing Judgment of 29 November 1996, paras.99-101, and Sentencing Judgment, 5 March 1998, para.16(iv); *Todorovic, cit.*, 31 July 2001, para.88; *Milan Simic, cit.*, 17 October 2002, para.112; *Kupreskic*, Appeal Judgment, 23 October 2001, para.461 and ff.; *Obrenovic, cit.*, 10 December 2003, paras.128-129; *Dragan Nikolic, cit.*, Sentencing Judgment, 18 December 2003, para.260; *Mrdja, cit.*, Sentencing Judgment, 31 March 2004, para.74; *Babic, cit.*, Sentencing Judgment, 29 June 2004, paras.74-75; *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgment, 8 May 2006, paras.155-158; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Sentencing Judgment, 4 April 2007, para.52; *Kambanda* Judgment and Sentence, 4 September 1998, para.47; *Serushago*, Trial Judgment, para.31; *Musema, cit.*, Trial Judgment, 27 January 2000, para.1007; *Ruggiu, cit.*, 1 June 2000, paras.56-58.

³⁰² *Prosecutor v. Jelusic*, Case No.IT-95-10-T, Trial Judgment, 14 December 1999, para.127; *Krstic, cit.*, Trial Judgment, 2 August 2001, paras.716, 722; *Vasiljevic, cit.*, Trial Judgment, 29 November 2002, para.299.

³⁰³ *Prosecutor v. Bralo*, Case No.IT-95-17-S, Sentencing Judgment, 7 December 2005, para.81.

³⁰⁴ *Blaskic, cit.*, Trial Judgment, para.774 (emphasis added).

³⁰⁵ *Plavsic, cit.*, para.64; *Banovic, cit.*, Sentencing Judgment, 28 October 2003, para.61.

Finally, an unusual case of co-operation is represented by the *Niyitegeka* case before the ICTR; here the Trial Chamber gave credit to the accused ‘for the extent to which his counsel co-operated with it and with the Prosecution in the efficient conduct of the trial’.³⁰⁶

c) *Guilty plea and plea agreement*

The most important factor within the elements that can impact on case proceedings is probably the plea of guilty, which has recurred increasingly in the latest practice of the ad hoc Tribunals and which has generally had substantial weight in mitigation of the sentences meted out.

Provisions regarding guilty plea and plea bargaining barely existed at first, only later (in 1997, during a revision of the RPE) were judges given significant powers in that regard, and certain conditions were introduced for the acceptance of a guilty plea by Trial Chambers (Rule 62*bis*).³⁰⁷ Similarly, initially there were no provisions in the RPE for explicit plea-agreements between the accused and the Prosecutor: the specific rule on ‘Plea Agreement Procedure’ was only introduced in December 2001 (Rule 62*ter*)³⁰⁸ in response to what seemed to have become a rather common practice. In fact, although

³⁰⁶ *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgement, 16 May 2003, para.498.

³⁰⁷ See Rule 62*bis* ‘Guilty Pleas’, adopted in Rev.12 of 12 November 1997:

‘If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- i. the guilty plea has been made voluntarily;
- ii. the guilty plea is informed; (so amended on 17 November 1999)
- iii. the guilty plea is not equivocal; and
- iv. there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing’ (so amended on 10 July 1998, and 4 December 1998).

³⁰⁸ Rule 62*ter* was adopted at the 25th Plenary Session on 12-13 December 2001 for the ICTY (Rev.22 of the RPE), and only at the 30th Plenary Session on 26-27 May 2003 for the ICTR. Its current formulation reads as follows:

‘(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.’

not regulated by any of the rules contained in the ICTY RPE, a certain form of plea-bargaining practice had been conducted at the Tribunal since its establishment.³⁰⁹

In brief, when an accused decides to enter a plea of guilty, a Trial Chamber may only accept that plea when it is satisfied that: the guilty plea has been made voluntarily; the plea is informed and not equivocal; there is a sufficient factual basis for the crime and the participation of the accused therein.³¹⁰ The latter requirement is particularly important and implies that a guilty plea cannot form the sole basis for the conviction of the accused: the Trial Chamber must also be satisfied that ‘there is a sufficient factual basis for the crime’. Once the guilty plea of the accused is accepted, then the determination of penalty follows a specific procedure, provided for by Rule 100 of the RPE.³¹¹

A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).

The other phenomenon, already discussed in Chapter 2 with regard to the differences between it and simple guilty pleas, is the practice of plea-bargaining, which enables the defendant and the Prosecutor to negotiate the charges or the sentence in return for an admission of guilt.³¹² The agreement reached is subject to review by the trial chamber

³⁰⁹ Plea agreements had in fact been reached between the Prosecution and the Defence in a number of cases, both before the ICTY and before the ICTR, when the accused pleaded guilty: *Prosecutor v. Erdemovic*, Case No.IT-96-22; *Prosecutor v. Jelusic*, Case No.IT-95-10; *Prosecutor v. Todorovic*, Case No.IT-95-9/1; *Prosecutor v. Dusko Sikirica, Damir Dosen and Dragan Kolundzija*, Case No.IT-95-8. The *Erdemovic* case, in particular, generated much criticism and a dissenting opinion from one of the judges with regard to the opportunity of using plea-agreements in the absence of specific statutory provisions. See, *Erdemovic, cit.*, 29 November 1996, Dissenting Opinion of Judge Cassese. For more details on the early guilty pleas before the ad hoc Tribunals, see also: COMBS, NANCY AMOURY, ‘Copping a Plea to Genocide: The Plea Bargaining of International Crimes’, *University of Pennsylvania Law Review*, 151(2002), n.1, pp.107-139.

³¹⁰ Rule 62bis ‘Guilty Pleas’, RPE.

³¹¹ Rule 100 ‘Sentencing Procedure on a Guilty Plea’ was adopted on 11 February 1994, then further amended on 10 July 1998 and, lastly, in December 2000.

³¹² For the ad hoc Tribunals, a detailed reconstruction of the significance and mechanisms of plea agreements can be found in the *Momir Nikolic* Sentencing Judgement of 2 December 2003, paras.46-56. For more details on plea-bargaining at the ICTY and ICTR, see also: COMBS, N. A., *Guilty Pleas in International Criminal Law - Constructing a Restorative Justice Approach*, Stanford University Press, 2007, pp.59-113.

which may inquire into the terms of the agreement to ensure respect of the law and of the proceedings, fairness and respect of the rights of the accused. The agreement does not bind the court although in practice judges are generally respectful of such an agreement.³¹³

Considering that the RPE of the two Tribunals specifically provide that substantial co-operation with the Office of the Prosecutor, before or after the conviction of the accused, must be considered a mitigating factor in sentencing, guilty pleas have accordingly been regarded as a form of co-operation, therefore allowing for mitigation in sentencing. A mitigating value was accorded to guilty pleas also on a number of other bases. For example, in the *Erdemovic* case the Trial Chamber, evaluating the accused's decision to enter a guilty plea, stated that:

An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.³¹⁴

The mitigating weight of guilty pleas is evident in numerous judgements, where it was recognised that guilty pleas should, in principle, give rise to a reduction in the sentence that the accused would otherwise receive.³¹⁵ Trial Chambers affirmed that guilty pleas are important for the purpose of reconciliation³¹⁶ and of establishing the truth in relation to a crime,³¹⁷ and as they contribute to the efficiency of the work of the ad hoc

³¹³ However, in some cases, the sentencing recommendations put forward by the Defence and the Prosecutor after a plea-agreement have not been accepted by Trial Chambers: cfr. *Momir Nikolic*, Sentencing Judgement, *cit.*, para.180; *Dragan Nikolic*, Sentencing Judgement, *cit.*, paras.279 ff., *Babic*, Sentencing Judgement, 29 June 2004, para.101, with the consequence that the Chambers imposed a sentence not falling within the ranges recommended by Prosecution and Defence.

³¹⁴ *Erdemovic*, Sentencing Judgement, 5 March 1998, p.16.

³¹⁵ See, for instance, *Todorovic*, *cit.*, Sentencing Judgement, 31 July 2001, para.80.

³¹⁶ For example, in the *Plavsic* case, the Trial Chamber recognised that: '...acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation' (*Prosecutor v. Plavsic*, Case No.IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, para.80). Also: *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.251-252. In the *Deronjic* case, the Trial Chamber recognized that the fact that the accused acknowledges responsibility for his actions undoubtedly tends to further a process of reconciliation and also protects victims from having to relive their experiences and reopen old wounds (*Prosecutor v. Deronjic*, Sentencing Judgement, 30 March 2004, para.134).

³¹⁷ See, for example, *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.232-233.

Tribunals, saving for example the time and effort of lengthy investigations and trials.³¹⁸ Moreover, it has been argued that, in this way, victims and witnesses are relieved from the possible stress of testifying at trial.³¹⁹

The extent of the mitigating value of guilty pleas depends also on the moment at which the plea is entered. Generally, an early plea is accorded more weight than a late one, as it is assumed to be more genuine and spontaneous, besides being more useful in procedural terms and within the economy of the trial.³²⁰ In fact, a plea of guilty is attributed little credibility if entered when the regular trial has already started and when victims have already been called to testify. For instance, in the *Milan Simic* case, where the accused pleaded guilty more than four years after his initial appearance and after the commencement of his trial, the Trial Chamber recognised that:

Milan Simic's plea of guilty is bound to weigh less in the sentencing process than if it had been made earlier or before the commencement of the trial.³²¹

Probably, the most relevant case in relation to guilty pleas, for the significant weight exercised by such a plea on the final sentence, is the *Plavsic* case, where the accused Biljana Plavsic, a member of the Bosnian Serb Presidency, pleaded guilty to crimes against humanity and – despite the prominent role she played – received the mild sentence of 11 years imprisonment.³²² Conversely, the accused's plea of guilty was accorded only relative weight in the *Jelusic* case, where the Trial Chamber sentenced Goran Jelusic to 40 years imprisonment, possibly due to the charges of genocide and the fact that the accused had demonstrated no remorse for his crimes.³²³ In fact, guilty pleas

³¹⁸ *Erdemovic, cit.*, 5 March 1998, para.16; *Todorovic, cit.*, paras.80-82; *Mrdja, cit.*, Sentencing Judgement, 31 March 2004, para.78; *Ruggiu, cit.*, 1 June 2000, para.53.

³¹⁹ *Mrdja, cit.*, Sentencing Judgement, 31 March 2004, para.78; *Plavsic*, Sentencing Judgement, 27 February 2003, para.66; *Banovic*, Sentencing Judgement, 28 October 2003, para.68.

³²⁰ For instance, the *Todorovic* Trial Chamber indicated that the timing of a guilty plea is crucial in securing the economic and bureaucratic advantages that can be derived from it. See *Todorovic, cit.*, para.81.

³²¹ *Prosecutor v. Milan Simic*, Sentencing Judgement, Case No.IT-95-9/2-S, 17 October 2002, para.85.

³²² Biljana Plavsic was a leading Bosnian-Serb political figure from 1990 until the end of the war, having held the following positions: member of the collective Presidency of Bosnia and Herzegovina; member of the three-member Presidency of the Serbian Republic; member of the Supreme Command of the armed forces of the Serbian Republic. On the *Plavsic* case, see for instance: COMBS, N. A., 'Prosecutor v. Plavsic', *American Journal of International Law*, 97(2003), pp.929-937.

³²³ *Jelusic, cit.*, Trial Judgement, 14 December 1999, para.127. Jelusic appealed against the judgement on the point that the Trial Chamber failed to give him any credit for his guilty plea, but the Appeals Chamber found that the Appellant did not demonstrate that the Trial Chamber had erred in exercising its discretion regarding how much weight to accord to the guilty plea. See *Prosecutor v. Jelusic*, Case No.IT-95-10-A, Appeals Chamber, 5 July 2001, paras.119-123.

have also been viewed as a sign of remorse on the assumption that this is implied by the acknowledgement of responsibility by the offender. It is clear from the *Jelusic* and subsequent cases³²⁴ that the ICTY acknowledged a connection between remorse and guilty plea entered by the accused.

All these different cases, however, do little to clarify the relation between remorse and guilty plea. The question is whether remorse is an integral part of a guilty plea (and therefore should not be considered as a separate mitigating factor where a plea of guilty is entered) or a separate mitigating factor which, although closely connected to the decision of the accused to plead guilty, is not necessarily a fundamental element in such a plea.

In this regard, R. Henham observes that the idea that remorse should be considered separately from the guilty plea in mitigation is consistent with aspects of both inquisitorial and adversarial criminal procedure.³²⁵ What should be noted is that there is certainly no evidence suggesting that entering a guilty plea is necessarily an act of remorse on the part of the accused, nor that the plea itself is clear evidence of remorse.

Guilty plea and remorse can also represent a link to the other important aspect of 'rehabilitation'. Some Chambers considered the fact that the accused pleaded guilty as an important step in the accused's rehabilitation³²⁶ and in the process of national reconciliation.³²⁷ For instance, in the *Obrenovic* case, the Trial Chamber found that the accused's guilty plea:

...is indeed significant and can contribute to fulfilling the Tribunal's mandate of restoring peace and promoting reconciliation. The recognition of the crimes committed...by a

³²⁴ See, for example, *Todorovic, cit.*, Trial Judgement, paras.89-92, and *Plavsic*, Sentencing Judgement, 27 February 2003, paras.66-67, 70.

³²⁵ HENHAM, R., *Punishment and Process in International Criminal Trials*, Ashgate, 2005, p.107.

³²⁶ *Momir Nikolic*, Sentencing Judgment, 2 December 2003, paras.93, 142 ff.; *Babic, cit.*, Sentencing Judgment, 29 June 2004, para.46; *Cesic, cit.*, Sentencing Judgement, 11 March 2004, para.28; *Mrdja*, Sentencing Judgement, 31 March 2004, paras.18-19, where it was recognised that '...punishment is also understood as having a rehabilitative purpose, for it underscores for the convicted person the seriousness with which society regards his or her criminal acts. ...The Trial Chamber is of the opinion that, when an accused pleads guilty, he or she takes an important step in these processes. This acknowledgement forms, among other things, an indication of the determination of an accused to accept his or her responsibility towards the aggrieved party and society at large'.

³²⁷ *Plavsic*, Sentencing Judgement, 27 February 2003, para.81; *Momir Nikolic*, Sentencing Judgment, 2 December 2003, paras.142 ff.; *Dragan Nikolic*, Sentencing Judgement, 18 December 2003, para.252; *Deronjic, cit.*, Sentencing Judgement, 30 March 2004, paras.234, 236; *Prosecutor v. Serugendo Joseph*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.89; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.201.

participant in those crimes contributes to establishing a historical record and countering denials of the commission of these crimes.³²⁸

Furthermore, justifications for the use of plea agreements by the ICTY were provided in the case of *Momir Nikolic*, which contained a principled discussion of arguments for and against the use of plea agreements and guilty pleas for serious violations of international humanitarian law.³²⁹

The principle that a guilty plea should be considered as a mitigating factor has also been acknowledged in several cases before the ICTR.³³⁰ For example, the *Serugendo* Trial Chamber stated that:

...the maximum sentence should in general not be imposed where an accused has pleaded guilty. The Chamber reiterates that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward.³³¹

The same was also recognised by the *Kambanda* Trial Chamber but, despite his guilty plea, the accused Jean Kambanda was sentenced to life imprisonment. The highest penalty was justified by the Trial Chamber in consideration of both the role and position of the accused (Prime Minister of the Interim Government of Rwanda from 8 April 1994 to 17 July 1994), and the intrinsic gravity of the crime of genocide.³³²

The frequent usage of plea agreements in the jurisprudence of the ad hoc Tribunals has attracted much criticism. R. Henham noted that the existence in both common law and civil law legal systems of the practice of plea bargaining threatens the balance between state, individual and society, typical of social contract theories and exemplified

³²⁸ *Prosecutor v. Dragan Obrenovic, cit.*, Sentencing Judgement, 10 December 2003, para.111.

³²⁹ *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-S, Sentencing Judgement, 2 December 2003, paras.57-73. The same detailed discussion can also be found in *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.226-237. See also *Deronjic, cit.*, Sentencing Judgement, 30 March 2004, para.135.

³³⁰ *Prosecutor v. Serushago*, Case No.ICTR-98-39-S, Sentencing Judgement, 5 February 1999, paras.35, 42; *Prosecutor v. Ruggiu*, Case No.ICTR-97-32-I, Judgement and Sentence, 1 June 2000, paras.53-55; *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005, paras.147-152; *Prosecutor v. Bisengimana Paul*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.201; *Prosecutor v. Nzabirinda Joseph*, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007, para.68.

³³¹ *Prosecutor v. Serugendo*, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006, para.89.

³³² *Prosecutor v. Kambanda*, Judgement and Sentence, Case No.ICTR-97-23-S, 4 September 1998, paras.61-62.

in notions of fair trial.³³³ In this perspective, the practice of tacit acceptance of plea agreements in international case-law is considered negative together with the fact that, as a result, the system depends on the bargaining competence of the defence, marginalising the role of the judiciary, which – on the contrary – should be of paramount importance at the international level. It is the notion of justice which becomes a ‘*negotiated*’ justice that is criticised and considered dangerous.³³⁴ Furthermore, the practice of negotiated justice should also be considered in the light of victims’ interests. In that sense, it is evident that a virtual conflict exists between victim-interests and the crime control-interest of encouraging and rewarding guilty pleas.

Although these elements certainly deserve more in-depth analysis, it can be observed that – when guilty pleas and plea bargaining are concerned – a proper assessment of the final penalty should also include the evaluation of a number of other circumstances ‘surrounding’ and related to the plea of guilty, such as genuineness of the assertion of guilty, the expression of remorse, the overall behaviour of the accused towards victims, and so on.

d) *Conduct of parties during trial proceedings*

On a conclusive note regarding circumstances related to the proceedings and of influence on sentencing, some other peculiar elements – which at times were taken into consideration by Chambers of the ad hoc Tribunals – should also be recalled.

In the *Vasiljevic* case, the Trial Chamber considered as a mitigating factor the behaviour and assistance of the lawyers of the accused, who helped to expedite the case without compromising their professional duties towards the accused.³³⁵ The same factor - the counsel’s commendable conduct during the trial - was however not considered in mitigation in the *Krnojelac* appeal case, where the Appeals Chamber found that the Trial Chamber erred by giving credit to the accused for the good conduct of his counsel

³³³ HENHAM, R., ‘Some Issues for Sentencing in the International Criminal Court’, *International and Comparative Law Quarterly*, vol.52 n.1(2003), pp.81-114, at 107.

³³⁴ *Ibid.* at 107.

³³⁵ *Vasiljevic*, Trial Chamber, 29 November 2002, para.297. The same happened in the *Niyitegeka* case, where an ICTR Trial Chamber gave credit to the accused for the extent to which his counsel co-operated with the Chamber and with the Prosecution in the efficient conduct of the trial (*Niyitegeka, cit.*, Trial Judgement, 16 May 2003, para.498).

during the trial. Such behaviour, noted the Appeals Chamber, should be expected by all counsels in ICTY trials.³³⁶

Again with reference to the conduct of counsels, the fact that in the *Semanza* case the defence was allegedly found guilty of ‘abusive’ conduct during the trial was not considered a factor in aggravation of the penalty of the accused.³³⁷

Finally, in the *Stakic* case, the Trial Chamber considered as a mitigating factor the accused’s consent (necessary under Rule 15*bis*) that a new judge be appointed, as his consent allowed the proceedings to continue and avoided the need to restart the trial, in the interest of justice.³³⁸

D. Preliminary findings regarding the sentencing practice of the ad hoc Tribunals

The ICTY and the ICTR have produced to date a considerable amount of case-law, completing more than 80 cases and rendering judgements for almost 100 individual accused.³³⁹ The ad hoc Tribunals certainly contributed to a very large extent to the current law and practice of international sentencing and – through their jurisprudence – it is possible to shed light on emerging patterns and trends as well as inconsistencies or disparities.

In the endeavour of expressing an overall assessment of what has so far been described, it must be recognised that there are some difficulties in comparing the sentencing practice of the two Tribunals. Although they stem from an identical mandate and are faced with similarly heinous crimes, yet they present a number of different features. For instance, and above all, the dissimilar average length of sentence established by the two Tribunals. As will be seen in more detail in the next chapter, while the ICTY sentencing practice is more lenient, sentences delivered by the ICTR present a totally different range, with a large majority consisting of life imprisonment. This seems to indicate that genocide is punished more severely than other international crimes, although this finding needs to be verified in the next chapter.

³³⁶ *Krnjelac*, Appeals Judgement, 17 September 2003, para.262.

³³⁷ *Semanza*, cit., Trial Judgement, 15 May 2003, para.572.

³³⁸ *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.921.

³³⁹ For the ICTY, see: <http://www.un.org/icty/glance-e/index.htm> - and for the ICTR, see: <http://www.ictt.org/default.htm>

A general overview of the most influential factors on sentencing according to judges' opinions and findings shows that sentences are obviously determined by the gravity of the offence and the degree of responsibility of the accused, considered together with relevant aggravating and mitigating circumstances. As seen above, the most important consideration in sentencing has generally been given to the *gravity of the offence*, consistently considered as a factor of primary importance and determined through the seriousness of the offender's participation in the crimes, and through the effects of those crimes on victims and survivors. If the primary relevance of the 'gravity of the offence' is indisputable before both Tribunals, other elements reveal themselves more problematic: namely, circumstances of crime in their mitigating or aggravating value. In fact, Chambers of the two Tribunals have at times diverged (not only between ICTY and ICTR but also within the same Tribunal) in the way they interpreted certain factors and in the weight they decided to assign to certain elements in mitigation or aggravation of the final penalty.

This is considered a structural problem given the lack of any normative indication in the Statutes or RPE concerning the circumstances of crime and their significance for the sentencing process. Conversely, as observed earlier during the comparative overview of the sentencing process in national legal systems, the implications of mitigating and aggravating circumstances are always specified and predetermined at the national level, in order to guide judges during the process of individualisation of penalties. Similar indications would have been opportune for international sentencing too, but given the embryonic stage of development of international criminal law some 15 years ago, and the particular circumstances which led to the establishment of the ad hoc Tribunals, it is not surprising that a high level of regulation of substantive and procedural norms for sentencing had not been established by then.

In some instances, judges of the ad hoc Tribunals have commented upon the different and most fundamental elements of the sentencing process, also trying to offer a certain systematisation of categories and influential factors. But such an attempt did not always lead to consistent and homogenous results.

A real and in-depth reflection on sentencing issues and on the role of international sentencing, however, began in the Tribunals in 2003 with the *Momir Nikolic* case and, immediately after, the *Dragan Nikolic* case, where the Trial Chamber not only

committed a comparative ‘Sentencing Expert Report’ to the Max-Planck Institute in Freiburg³⁴⁰ to evaluate sentencing practice at the national level, but also developed a more principled scheme for sentencing. It should be noted that the sentencing judgement in the case of *Prosecutor v. Dragan Nikolic* probably represents the most detailed and comprehensive judgement dealing with international sentencing law. The Trial Chamber addressed significant issues, such as what the applicable sentencing range would be if the accused were sentenced according to the criminal laws of the various republics of the former Yugoslavia in 1992 and 2003; what sentence would judges in the territory of the former Yugoslavia impose nowadays based on the current law; what would be the corresponding sentencing range in other European and non-European countries for the serious crimes to which the accused pleaded guilty; what criteria are decisive for aggravating and mitigating penalties within a given statutory sentencing range; and to what extent would the accused’s guilty plea be considered a mitigating factor in each of the legal systems taken into account.

The *Nikolic* Trial Chamber, and subsequently the *Nikolic* Appeals Chamber, relied upon the Sentencing Report for guidance in the determination of the appropriate sentence.³⁴¹ That judgement was therefore the first sentencing judgement of an international criminal tribunal to be based on a broad legal comparative study of sentencing practice in other countries. The Sentencing Report was then taken into account also in other cases.³⁴²

Subsequently, a growing attention to sentencing principles also emerged from other judgements. In the *Cesic* Sentencing Judgement, for example, the Trial Chamber carried out a comprehensive reasoning in the sentencing part, starting from an assessment of those factors relevant for establishing the gravity of the crimes, then proceeding to examine aggravating and mitigating circumstances, and finally taking into account the general sentencing practice of the courts of the former Yugoslavia.³⁴³

³⁴⁰ See above, Chapter 2. SIEBER, U., *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, vol.1: Expert Report, vol.2: Country Reports, Edition Iuscrim, Freiburg im Breisgau, 2004. See *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, paras.38-39.

³⁴¹ *Dragan Nikolic*, Sentencing Judgement, *cit.*, paras.150-156, 166-173. See also *Dragan Nikolic*, Appeals Sentencing Judgement, *cit.*, paras.67-71.

³⁴² See, for instance, *Deronjic*, *cit.*, Sentencing Judgement, 30 March 2004, para.159.

³⁴³ *Prosecutor v. Cesic*, Sentencing Judgement, Case No.IT-95-10/1-S, 11 March 2004.

In the *Blagojevic and Jokic* case, the Trial Chamber seemed to consider and reflect, in particular, upon the role of the ICTY as to the meting out of punishment.³⁴⁴ The *Krajisnik* case represents another example of a well developed sentencing part in the body of the judgement.³⁴⁵

Against the background of the case-law analysed above, the following section attempts, on the one hand, to reconstruct patterns and trends and, on the other hand, to identify disparities or inconsistencies.

3.12 Patterns and inconsistencies

a) *General purposes of punishment*

As noted at the beginning of this chapter, the ICTY and ICTR Statutes do not contain any indication as to the purposes to be sought through the infliction of penalties by the ad hoc Tribunals. Judges thus assumed that the objectives envisaged by the Security Council when creating the Tribunals were also relevant for sentencing purposes. In line with the ‘mandate’ of the Tribunals as enshrined in the documents establishing the ICTY and the ICTR, the threefold purposes laid down in the SC Resolutions – that is retribution, deterrence and reconciliation and maintenance of peace – were thus consistently recalled by Chambers of both Tribunals.

Especially in the early days – judges tended to attach more importance to deterrence and retribution than to other purposes (such as rehabilitation of the convicted person or reconciliation): the sentences meted out were *in theory* mainly inspired by the paradigm of the *retributive* and *stigmatizing* function of punishment.³⁴⁶ I say ‘in theory’ because the actual application of the purported retributive purpose has not been reflected in the penalties imposed, which – as seen already – have mostly been lenient, especially at the ICTY. In more recent cases, ICTY and ICTR Chambers have started taking into account and recognising as important other purposes such as *rehabilitation*

³⁴⁴ *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.814.

³⁴⁵ *Prosecutor v. Krajisnik*, Case No.IT-00-39&40-T, Trial Judgement, 27 September 2006, paras.1132-1180.

³⁴⁶ HENHAM, R., ‘The Philosophical Foundations of International Sentencing’, *Journal of International Criminal Justice*, 1(2003), pp.66-69.

and *restorative justice*, although these have not achieved the same importance as deterrence and retribution, and have not been elaborated or analysed in detail.

The Rwanda Tribunal definitely seems more ‘retributive’ in its approach, with a majority of life sentences; the purpose of reconciliation is often mentioned, but it appears more as a symbolic and formal statement than as a substantial factor influencing the sentencing process.

Although the predominant rationales for imposing punishment appeared to be retribution and deterrence, no justifications were given to explain such a choice, besides the consideration that punishment is to be regarded as a necessary response by the international community to the commission of gross violations of international humanitarian law. Therefore, the reasons for meting out punishment have often appeared confused and vague, showing the difficulty encountered by Chambers of the ad hoc Tribunals in clearly establishing the relevant objectives.³⁴⁷ However, the development of a more comprehensive theory of purposes of punishment in international sentencing should certainly have been expected from the ad hoc Tribunals, and would have guaranteed a more principled and uniform imposition of penalties.

There is one particularly significant example of how specific purported rationales for punishment can result in having a major influence on the sentencing process. On 3 March 2000, the ICTY rendered the trial judgement in the *Blaskic* case, and sentenced the accused (commander of the HVO in the Central Bosnian Operative Zone in 1992, then promoted to the rank of General and appointed Commander of the HVO in 1994) to 45 years imprisonment.³⁴⁸ Less than one year later, his ‘superior’ Dario Kordic (one of the leading political figures in the Bosnian Croat community: President of the Croatian Democratic Union of Bosnia and Herzegovina, Vice-President and member of

³⁴⁷ See, NEMITZ, J. CHRISTOPH, ‘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*, 4(2001), pp.87-127, at 89; BERESFORD, S., ‘Unshackling the Paper Tiger – The Sentencing Practices of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda’, *International Criminal Law Review*, 1 (2001), pp.33-90, at 46; BAGARIC MIRKO, MORSS JOHN, ‘International Sentencing Law: in Search of a Justification and Coherent Framework’, *International Criminal Law Review*, vol.6 issue 2 (2006), pp.191-255, at 193; HARMON MARK B., GAYNOR FERGAL, ‘Ordinary Sentences for Extraordinary Crimes’, *Journal of International Criminal Justice*, volume 5, issue 3 (2007), pp.683-712, at 691.

³⁴⁸ It should be noted that the Appeals Chamber, on 29 July 2004, reversed the verdict of the Trial Chamber on many aspects and supported the appellant on many grounds of appeal, thus sentencing Tihomir Blaskic to a final penalty of 9 years imprisonment. See *Prosecutor v. Blaskic*, Appeals Judgement, Case No.IT-95-14-A, 29 July 2004.

the Presidency of the Croatian Community of Herceg-Bosna), was sentenced to 25 years imprisonment for substantially similar crimes committed in various municipalities in the Lasva Valley.³⁴⁹ The sentence meted out by the Trial Chamber in the *Blaskic* case can be explained by examining the reasoning that the same Chamber gave for clarifying the harshest punishment ever imposed up to that date. While discussing the purposes of sentencing, the Chamber emphasised, above all, the deterrent function of punishment, considering it ‘*the most important factor in the assessment of appropriate sentences for violations of humanitarian law*’ and underlining that the determination of a ‘fair’ sentence depends on the purposes sought.³⁵⁰ Notwithstanding the presence of a number of mitigating factors, they were not considered sufficiently relevant to deserve a substantial mitigation of the penalty.³⁵¹ Upon reading the Trial Chamber’s judgement, it clearly appears that the objective of deterrence strongly guided and influenced the Chamber in meting out the final punishment.

Conversely, the majority of the Chambers of the two Tribunals have mainly focused on the ‘gravity of the offence’ and on the ‘personal circumstances’ of the accused in the process of sentencing, setting aside a purely purpose-based orientation of penalties.

It is suggested that to allow one single purpose of punishment to have such a significant influence on the final determination of the sentence can affect the ‘fairness’ of the punishment imposed and can be misleading in respect of past and future cases.

The undeveloped nature of the justifications of punishment for international sentencing can probably be seen to represent the difficulties encountered in finding international consensus on the subject. What is undoubtedly needed is a clear identification of the relevant aims and their significance in the particular context of international crimes.

³⁴⁹ *Prosecutor v. Kordic & Cerkez*, Case No.IT-95-14/2-T, Trial Judgement, 26 February 2001.

³⁵⁰ *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.761.

³⁵¹ For an in-depth analysis of the *Blaskic* Trial Judgement, see: DANA, S., ‘Revisiting the Blaskic Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY’, *International Criminal Law Review*, 4(2004), pp.321-348.

b) *Aggravating and mitigating circumstances*

With regard to aggravating and mitigating factors, Trial Chambers seem to have full discretion, especially in the absence of precise guidance from the Statutes and Rule 101, which limits itself to prescribing that – when determining the final penalty to be imposed – judges must take into account aggravating and mitigating factors. Commentators have argued that the vagueness of Rule 101 constitutes a violation of the principle of legality of penalties.³⁵²

More specifically, the problem concerns aggravating circumstances more than mitigating ones, as long as the latter bring a reduction of penalties and are therefore not problematic as far as the rights of the accused are concerned. On the other hand, any element which is likely to aggravate the position of the accused should in theory be specified and regulated explicitly, as happens in municipal law (as seen in Chapter 2). Insofar as Rule 101B establishes the relevance of aggravating factors in sentencing, substantial respect of the rights of the accused and of the principle of legality would require that such circumstances be explicitly indicated.

Besides this negative assessment regarding the normative framework, it should be stressed that overall a large number of aggravating and mitigating factors have been considered in the case-law of the ad hoc Tribunals.

A more complete assessment of the use and relevance of the individual circumstances of crime will certainly be possible following the empirical analysis in Chapter 4, devoted to verifying the practical impact exercised by those factors on the length of the sentence. However, a preliminary evaluation of patterns and discrepancies as they emerge from a doctrinal analysis of the ICTY and ICTR case-law is attempted in the following pages.

A consistent and recurrent link can be noted between lengthier sentences and the presence of factors such as the gravity or magnitude of crimes, victimization, cruelty, and superior position or abuse of authority. By treating these factors as especially aggravating the penalty, Chambers of the Tribunals have signalled that the extent and

³⁵² ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, at p.201.

manner in which international crimes are committed are important determinants in the sentencing process.

A direct correlation also exists between guilty pleas, remorse, cooperation and lower ranges of penalties. The *Jelusic* case (where the accused was sentenced to 40 years imprisonment) must be considered atypical in this respect, as the Trial Chamber did not attribute a significant mitigating value to the accused's guilty plea and did not recognise as sincere his plea or his remorse. Generally, however, those who pleaded guilty and demonstrated remorse received a more lenient sentence. This is true, however, only for the ICTY; the situation is rather different in the case-law of the ICTR, where guilty pleas were not attributed significant weight in sentencing.

Major inconsistencies in the use of aggravating and mitigating factors by Chambers of the ad hoc Tribunals can be observed in relation to the way some were applied, and the weight attached to their occurrence. A negative assessment also concerns the fact that Chambers of the ad hoc Tribunals never made any attempt to explain the significance of the factors they used in aggravation and in mitigation. They simply proceeded in identifying the circumstances relevant for the case at hand and in qualifying them as aggravating or mitigating, without any further explanation as to the reasons why those circumstances should be considered as legitimate influential factors in sentencing. This lack of clarity in the theory of circumstances of crimes resulted, I believe, in the inconsistent and – at times – incorrect use of them by the Tribunals.

To begin with, the diverse use of the influential 'age' factor in mitigation or aggravation has already been pointed out. There is no settled practice regarding what to consider as 'young' and what to consider as 'advanced' age.

The same has to be said for other individual circumstances, such as the health of the accused or 'good character'. In this respect, several accused have tried to argue that their education, intelligence, religiously and ethnically tolerant family background, and so on, should be considered in mitigation, as in fact happened in a majority of cases. On the other hand, some Chambers of the ad hoc Tribunals have considered those arguments not in mitigation but in aggravation, as seen for instance for the *Tadic* and *Simic* cases.

Overall, it seems that the 'good character' factor comprises two distinct areas: the more personal one regarding the innate character of the accused (moral conduct,

personality, qualities, etc.) and a more objective one regarding the accused's education and professional background. It appears that while the first category was quite constantly considered as a factor in mitigation, the second, related to the educational and professional background was, on the contrary, often considered as a factor in aggravation (when the accused had a good and high-level educational or professional background).

It is maintained that, to fully respect the rights of the accused and the right to a fair trial, these diversities should be solved. In fact, the accused has the right to know beforehand which factors are likely to be considered in aggravation.

An incorrect use of circumstances of crime is, for instance, evident in relation to 'voluntary participation/commission', a factor that has at times been considered as aggravating the final sentence of the accused.³⁵³ This is clearly not an aggravating circumstance, but simply an element of the crime and of the criminal responsibility of the offender; in fact, had the accused persons not acted voluntarily, they would not have been guilty of any crime at all. If it is true that the Appeals Chamber, in the *Kayishema and Ruzindana* case, in order to clarify this issue and the use of the factor 'voluntary participation', explained that in truth such an evaluation by the Trial Chamber was meant to highlight the fact that crimes were committed with some element of zeal,³⁵⁴ nevertheless such interpretation should have been made explicit by the Chamber of first instance and the wording 'voluntary participation' used to describe an aggravating circumstance is certainly inappropriate or at least unfortunate.

A negative assessment also regards all those cases where Chambers did not make any ruling concerning the weight of certain circumstances. In many instances, judges simply pointed out that a fact was relevant, but did not expressly identify it as neutral, mitigating or aggravating. For instance, in the *Galic* case, judges of the Trial Chamber – while analysing mitigating circumstances for the accused – pointed out the exemplary behaviour of the accused throughout the proceedings before the ICTY, but did not

³⁵³ See, for example, *Tadic, cit.*, para.57; *Serushago, cit.*, para.30; *Kayishema and Ruzindana, cit.*, para.13, where the Trial Chamber found as follows: 'Both Kayishema and Ruzindana voluntarily committed and participated in the offences and this represents one aggravating circumstance'.

³⁵⁴ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeal Judgement, 1 June 2001, paras.351, 354.

specify whether such a fact was to be considered in mitigation or not.³⁵⁵ The same occurred in a number of other cases.³⁵⁶

This practice is clearly not laudable in terms of clarity and fairness. The defendant and the international community should not be left guessing ‘how’ and ‘if’ a certain factor influenced a Trial Chamber’s sentence or not. Vagueness in the reasoning behind sentencing is always considered a negative feature.

With regard to other examples of a misleading use of aggravating and mitigating factors, it should be recalled that in some cases the purposes of sentencing were used in aggravation or mitigation and that, as already mentioned, especially in the ICTR case-law certain modes of liability were interpreted as aggravating circumstances. This practice offends the principle prohibiting double jeopardy, as the individual is essentially punished twice for the same conduct, considered first as a mode of liability, and second as an aggravating factor, thus further increasing the final sentence.

Once again this leads us to recognise the importance of developing a systematic theory of the use of aggravating and mitigating circumstances in international sentencing. Notwithstanding their relevance, such factors have attracted little close examination or theoretical discussion in the jurisprudence of the ad hoc Tribunals. The majority of the aforementioned circumstances has not received any comprehensive explanation by Trial Chambers as to their significance and the way in which they furthered the Tribunals’ mandate and objectives. As the ICTY and the ICTR have not yet ruled exhaustively on the principles that should be of guidance in the application of aggravating and mitigating circumstances, it is deemed important – also in the perspective of current and future work of the ICC – to find a more precise ‘orientation’ for their use, in order to achieve more uniformity in international sentencing.

The points which need to be analysed in more depth are several. First, it appears there is a need to define what constitute an aggravating or a mitigating circumstance. As the Trial Chamber ruled in the *Kunarac* case:

Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which

³⁵⁵ *Prosecutor v. Galic*, Case No.IT-98-29-T, Trial Judgement, 5 December 2003, para.766.

³⁵⁶ See, for example, *Prosecutor v. Mrksic et al.*, Case No.IT-95-13/1-T, Trial Judgement, 27 September 2007, paras.703, 705.

the offence was committed, may be considered in aggravation.³⁵⁷

This finding appears in contrast with a previous ruling by the Appeals Chamber in the *Delalic et al.* case, where it was stated that ‘*factors such as conduct during trial proceedings...have also been considered in both mitigation and aggravation of sentence*’.³⁵⁸

Therefore, a question to be answered is whether circumstances subsequent to the commission of the crimes can aggravate the sentence, considering that the general rule is that a defendant should be sentenced only for his criminal behaviour and not for conduct unrelated to the offence committed.

Concerning the type and nature of mitigating circumstances, an interesting approach was taken in the *Erdemovic* case, where the Trial Chamber – in relation to the applicable mitigating factors – distinguished between circumstances contemporaneous with the commission of the offence and circumstances following the perpetration of the offence.³⁵⁹ Unlike aggravating circumstances, mitigating ones may also include factors not directly related to the offence.³⁶⁰ The fact that a Trial Chamber has the discretion to consider any factor it deems opportune in mitigation of the sentence was upheld several times.³⁶¹

Chambers have had different opinions as to whether a mitigating circumstance must be related to the accused and his/her behaviour or may also be ‘external’. For instance,

³⁵⁷ *Kunarac, cit.*, Trial Judgement, 22 February 2001, para.850. The same was recognized and accepted in *Stakic, cit.*, Trial Judgement, 31 July 2003, para.911, *Brdjanin, cit.*, Trial Judgement, 1 September 2004, para.1096.

³⁵⁸ *Delalic et al, cit.*, Appeal Judgement, 20 February 2001, para.788, emphasis added. The *Delalic* Trial Chamber had previously taken into consideration Mucic’s lack of respect for the judicial process and the allegations that he participated in the threatening of a witness in the courtroom.

³⁵⁹ *Erdemovic*, 29 November 1996, *cit.*, para.86 *et sequ.*. Also *Stakic*, Trial Judgement, 31 July 2003, para.920; *Brdjanin*, Trial Judgement, 1 September 2004, para.1117.

³⁶⁰ *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.920; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.145; *Prosecutor v. Miroslav Deronjic*, Case No.IT-02-61-S, Sentencing Judgement, 30 March 2004, para.155; *Prosecutor v. Bisengimana*, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006, para.125; *Prosecutor v. Rugambarara*, Case No.ICTR-00-59-T, Sentencing Judgement, 16 November 2007, para.30.

³⁶¹ *Prosecutor v. Kordic & Cerkez*, Case No.IT-95-14/2-T, Trial Judgement, 26 February 2001, para.848; *Prosecutor v. Krstic*, Case No.IT-98-33-T, Trial Judgement, 2 August 2001, para.713; *Prosecutor v. Milan Simic*, Case No.IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para.41, where the Trial Chamber thus held: ‘Mitigating factors will vary with the circumstances of each case. In previous cases, Chambers of the Tribunal have found the following factors to be mitigating: voluntary surrender, guilty plea, co-operation with the Prosecution, youth, expression of remorse, good character with no prior criminal conviction, family circumstances, acts of assistance to victims, diminished mental capacity, and duress.’

as already pointed out, the *Krnojelac* Trial Chamber attached mitigating value to the cooperative behaviour of the Defence, not by the accused himself.³⁶² This finding was – rightly, in my opinion – challenged by the Prosecution during appeal, where the Prosecutor argued that:

...the efficient and cooperative conduct of defence counsel cannot be a mitigating factor warranting a reduced sentence for the accused, any more than the inefficient or uncooperative conduct of counsel may be considered an aggravating factor warranting an increased sentence.³⁶³

The Appeals Chamber appropriately reconsidered the conduct and behaviour of the defence counsel as one that any counsel should ordinarily demonstrate before a Trial Chamber; it therefore found that the Trial Chamber erred in giving credit to the Accused for his counsel's conduct.³⁶⁴

Chambers of the ICTR also questioned the possibility to consider elements that are not directly related to the accused as 'individual circumstances', in mitigation or aggravation.³⁶⁵

Additionally, Chambers of the ad hoc Tribunals did not consider or specify the distinction between circumstances that mitigate the personal responsibility of the accused (such as duress) and circumstances that do not affect the criminal responsibility but do have an impact on the final penalty to be imposed (such as guilty plea, remorse, cooperation with the Prosecution, and all the other mitigating circumstances analysed above).

³⁶² See para.520, *Prosecutor v. Krnojelac*, Case No.IT-97-25-T, Trial Judgement, 15 March 2002, where the Trial Chamber thus stated: '...the Trial Chamber has given credit to the Accused for the extent to which his Counsel co-operated with it and with the Prosecution in the efficient conduct of the trial. Counsel were careful not to compromise their obligations to the Accused, but the restriction of the issues which they raised to those issues which were genuinely in dispute enabled the Trial Chamber to complete the trial in much less time than it would otherwise have taken.' The same circumstance (cooperation by the defence counsel) was considered in mitigation of the accused's sentence in the *Vasiljevic* case as well (*Prosecutor v. Vasiljevic*, Case No.IT-98-32-T, Trial Judgement, 29 November 2002, para.297).

³⁶³ *Prosecutor v. Krnojelac*, Case No.IT-97-25-A, Appeals Judgement, 17 September 2003, para.261.

³⁶⁴ *Ibid.*, para.262.

³⁶⁵ See, for instance, *Prosecutor v. Gacumbitsi*, Case No.ICTR-2001-64-A, Appeals Chamber, 7 July 2006, para.198, where the Chamber thus ruled: "The Appeals Chamber finds that the Trial Chamber erred in considering that the good relationships of the Appellant's family with its neighbours constituted a factor in mitigation. While there is no exhaustive list of what constitutes a mitigating circumstance, the fact that the Appellant's family has good relationships with its neighbours of all ethnic groups cannot be considered to constitute an "individual circumstance" of the Appellant and should not be considered in sentencing. Nevertheless, it is unclear what weight, if any, the Trial Chamber gave to this factor. In these circumstances, the Appeals Chamber will not increase the Appellant's sentence as a result of the Trial Chamber's error".

On a conclusive note concerning the circumstances of crime, it should be recalled that the substantially unlimited discretion of judges in this area lead them to consider in mitigation or in aggravation certain ‘unusual’ facts or circumstances that in national jurisdictions or before domestic courts would probably never be attributed the same value.³⁶⁶

The empirical analysis presented in the next chapter focuses only on the principal and more ‘traditional’ categories of aggravating and mitigating factors, those which in practice also correspond to the circumstances that were cited or considered in the majority of cases. Many other factors considered by the Chambers in aggravation or in mitigation were to a large extent related to the actual case at hand and thus not subject to any possible ‘generalisation’ for other cases. In other words, considering that some categories (such as the demining activities undertaken by the accused, etc.) are relevant only for one or two cases, I chose not to include them in the empirical analysis, as they would have proved statistically irrelevant.

c) *Guilty pleas*

In general terms, it should be acknowledged that the guilty plea entered by the accused has always been considered a factor in mitigation. However, the concrete weight attributed to it changed quite frequently, especially if comparing the jurisprudence of the ICTY to that of the ICTR.

The ICTR case-law in relation to guilty pleas seems to show that the determination of the mitigating value to be assigned to such a factor varies considerably depending on the actual circumstances of the case. In some cases the guilty plea of the accused was considered of no mitigating value; in others it was assigned a significant weight in mitigation. There is, therefore, no universal or uniform yardstick, although a key factor in assessing the extent of the mitigating effect of a guilty plea seemed to be the existence of remorse and/or repentance shown by the accused.

The uncertainty regarding the evaluation by judges of such an important factor is considered to have a negative impact on consistency and uniformity in sentencing.

³⁶⁶ See, in this chapter, section 3.10, lett.b.viii).

Another questionable aspect of guilty pleas and plea agreements is that they often have an impact on the overall representation of the facts of the case. Pleading guilty – or bargaining upon the charges against the accused – often leads to a reduction in the factual basis underlying the conduct charged.

This appears evident from the case-law of the ad hoc Tribunals, in particular of the ICTY.

Consider, for instance, the case of Momir Nikolic. The defendant was originally indicted of numerous crimes and charges – including genocide – which were eventually dropped and limited to the lesser count of persecution as a crime against humanity; this followed the decision of the accused to plead guilty.³⁶⁷

The plea agreement in the *Plavsic* case also provides a valuable case for examining the costs and benefits of a negotiated justice in the international trial context. In return for her guilty plea to crimes against humanity (one count of persecution), the Prosecutor agreed to drop all the other charges (two counts of genocide and complicity in genocide; five other counts of crimes against humanity). As a result, no evidence was ever presented in relation to the dropped genocide charges, and Biljana Plavsic was never asked to give account for those facts in her guilty plea. The risk is that dropping charges might erroneously be viewed as recognition that those crimes did not take place. In the end, Biljana Plavsic was sentenced to only 11 years' imprisonment.³⁶⁸

Numerous crimes, or particularly heinous criminal conduct, are thus ignored or 'forgotten' when guilty pleas and plea bargaining are involved.

Furthermore, from the victim's point of view, sentence discounts resulting from guilty pleas may prove particularly unsatisfactory since the final penalty fails to reflect the degree of harm actually suffered by the victim. Numerous examples have already been cited of cases of particularly lenient sentences meted out after a guilty plea. These cases have raised doubts or criticism even amongst judges.

For example, in the 'highly disputed sentencing judgement'³⁶⁹ in the case of Miroslav Deronjic, the accused was sentenced to 10 years imprisonment, having

³⁶⁷ *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-S, Sentencing Judgement, 2 December 2003, paras.3-15.

³⁶⁸ *Prosecutor v. Plavsic*, Case No.IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003.

³⁶⁹ The judgement was so defined by the Presiding Judge: see *Prosecutor v. Deronjic*, Transcript, 30 March 2004, at 341.

pleaded guilty to persecution as a crime against humanity. In his strongly worded dissenting opinion, Judge Schomburg observed that, given the gravity of the crimes committed, the accused deserved in reality a sentence of no less than 20 years,³⁷⁰ and that the sentence imposed, recommended by the Prosecutor, was not within the mandate and spirit of the ICTY.³⁷¹ The judge harshly criticised what he considered to be the ‘arbitrary’ selection of charges and facts in the indictments against Deronjic and the fact that the judges eventually decided upon a ‘clinically clean compilation of selected facts by the Prosecutor’.³⁷² Conversely, Judge Mumba, in her separate opinion supporting the decision of the majority, stressed the importance of a guilty plea as a sign of the rehabilitation of the offender and an important step towards reconciliation of the offended community, concluding that the ICTY must not concern itself with unfair retribution nor vengeance, but that the emphasis should be on rehabilitation which ‘...after turmoil, may serve to reduce the incidence of political instability and conflict.’³⁷³

Additionally, other positive elements associated with guilty pleas – besides those related to a more efficient administration of justice – are the fact that those pleas bring about broader accountability and bring a higher number of perpetrators to trial.

All these examples demonstrate how delicate and unsettled is the issue regarding the proper weight to assign to guilty pleas and plea bargaining in international criminal justice.

d) *Length of sentences*

In evaluating the sentencing practice of the ad hoc Tribunals, commentators have pointed out their unfair disparity in punishment, especially with regard to the different treatment accorded to minor offenders and major war criminals, highlighted for instance

³⁷⁰ *Prosecutor v. Deronjic*, Case No.IT-02-61-S, Sentencing Judgement, 30 March 2004, Dissenting Opinion of Judge Schomburg, para.2: ‘The sentence is not proportional to the crimes it is based on and amounts to a singing from the wrong hymn sheet. The Accused deserves a sentence of no less than twenty years of imprisonment.’ Deronjic accepted responsibility for the killings of 65 civilians in the village of Glogova (Eastern Bosnia). He did not physically commit the murders but he ordered the attack on the village, ‘accepting’ the natural and foreseeable consequence that innocent civilians would be murdered.

³⁷¹ *Ibid.*, para.3.

³⁷² *Ibid.*, paras.9(c)-10.

³⁷³ *Prosecutor v. Deronjic*, Case No.IT-02-61-S, Sentencing Judgement, 30 March 2004, Separate Opinion of Judge Florence Mumba, paras.2-3.

by the *Tadic* and *Plavsic* cases: Dusko Tadic, a prison camp guard, was sentenced to 20 years imprisonment for war crimes and crimes against humanity, while Biljana Plavsic, a member of the Bosnian Serb Presidency during the 1992 Bosnian Serb campaign of ethnic cleansing, was sentenced to 11 years, after having pleaded guilty to crimes against humanity. Other examples of questionable sentences or remarkable discrepancies have already been highlighted.³⁷⁴

Commentators have thus maintained that the sentencing practice at the ICTY and ICTR has not been consistent or proportional,³⁷⁵ that the sentencing part of the judgements has been little more than an afterthought,³⁷⁶ and that the various sentences imposed have reflected more the personal views of judges than an attempt to establish a coherent sentencing policy or framework.³⁷⁷ It has been argued that – if the international community seeks to prosecute persons responsible for international crimes and bases its action on international principles and international customary law – then sentences meted out should not apply different theories of punishment and very different penalties but should try to be consistent with similar cases already judged.³⁷⁸ Although the

³⁷⁴ For instance, General Tihomir Blaskic was sentenced on first instance to 45 years imprisonment and then on appeal received a final sentence of 9 years, while his superior Dario Kordic received a sentence of 25 years imprisonment; Zdravko Mucic was sentenced to 7 years imprisonment on the basis of command responsibility for several beatings and murders committed by his subordinates, while Goran Jelusic, who pleaded guilty, was sentenced to 40 years imprisonment for violations of the laws or customs of war and crimes against humanity; General Radislav Krstic received on appeal a final sentence of 35 years for greater responsibilities, including aiding and abetting genocide, persecution and murder as crimes against humanity for his involvement in the massacres of 7,000/8,000 Bosnian Muslim men and boys in Srebrenica. See also other examples indicated in Chapter 1, at section 1.10.

³⁷⁵ With regard to the issue of proportionality in sentencing and its importance in the context of the ICTY, J. Meernik and K. King observed that: ‘it is crucial that the sentences meted out be generally viewed as proportionate, fair and understandable. If, at the end of the day, these punishments are perceived as inconsistent or biased and thus, inexplicable ... the verdict on the ICTY will be flawed.’ MEERNIK J., KING K., ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, *Leiden Journal of International Law*, 16(2003), pp.717-750, at 718.

³⁷⁶ SCHABAS, W., ‘International Sentencing: From Leipzig (1923) to Arusha (1996)’, in BASSIOUNI, M.C., *International Criminal Law*, 2nd ed., vol.III, Transnational Publishers, NY, 1999, pp.171-193, at 171. See also: SLOANE, ROBERT D., ‘Sentencing for the "Crime of Crimes" - The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda’, *Journal of International Criminal Justice* (2007), vol.5, issue 3 (2007), pp.713-734, at 716 where the author argues that ‘...the few paragraphs devoted to sentencing analysis tend to be highly formulaic, even perfunctory’.

³⁷⁷ See JONES J., POWLES S., *International Criminal Practice*, 3rd ed., Ardsley, NY, Transnational Publishers Inc., Oxford University Press, 2003, p.778.

³⁷⁸ See PENROSE, M., ‘Lest We Fail: The Importance of Enforcement in International Criminal Law’, *American University International Law Review*, vol. 15, no. 2 (2000), pp.321-394, at 380 ff..

importance of individualising the penalty is not under discussion, its benefits are certainly hampered by the lack of a coherent sentencing framework.³⁷⁹

Furthermore, with regard to the range of sentences of the two Tribunals, there is an appreciable disparity between the sentences pronounced by the ICTY and those pronounced by the ICTR. As will be seen in more detail in the next chapter, the ICTY has imposed life imprisonment only in two instances,³⁸⁰ while the majority of the accused have received sentences of less than 20 years; on the other hand, the ICTR has imposed life sentences more frequently and harsher sentences in general.³⁸¹ Judges at the Rwanda Tribunal did not hesitate in imposing life sentences even despite the guilty plea of the accused, as in the case of Jean Kambanda, Prime Minister of the Interim Government during the genocidal campaign, who pleaded guilty.³⁸²

Besides the consideration that almost all the convictions of the ICTR are for acts of genocide, and thus the inner gravity of the ‘crime of crimes’ is obviously reflected in sentencing, the different range of sentences between the two Tribunals also seems based on other considerations. It appears that ICTR Chambers – although maintaining in principle that references to the sentencing practice of Rwandan courts are only for purposes of guidance – have consistently referred to the domestic practice of Rwanda, in particular to Organic Law No.8/96 adopted two years after the genocide, and have tried to mete out penalties consisting with the hierarchical position of the accused. As specified by the Trial Chamber in the *Simba* case:

...Under Rwandan law, genocide and crimes against humanity carry the possible penalties of death or life imprisonment, depending on the nature of the accused’s participation. ... In this Tribunal, a sentence of life imprisonment is generally reserved to those who planned or ordered atrocities and those who participate in the crimes with particular zeal or sadism. Offenders receiving the most severe sentences also tend to be senior authorities.³⁸³

Notwithstanding the manifest leniency of some penalties meted out in particular by the ICTY, what is surprising is that such mild sentences are not due to a misrepresentation

³⁷⁹ DRUMBL, MARK A., *Atrocity, Punishment and International Law*, Cambridge University Press, 2007, at 59.

³⁸⁰ At trial, on Milomir Stakic, whose life sentence was then annulled on appeal and replaced with 40 years of imprisonment. On appeal, life imprisonment was imposed on General Stanislav Galic, who had been sentenced to 20 years of imprisonment at trial.

³⁸¹ The majority of the accused has received sentences above 20 years of imprisonment.

³⁸² Life imprisonment despite the guilty plea of the accused was also imposed in the *Akayesu* case.

³⁸³ *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Trial Judgement, 13 December 2005, para.434.

by Trial Chambers of the gravity of the crimes, the criminal responsibility of the accused or the suffering of the victims. All these elements, together with other aggravating or mitigating factors, were duly taken into account by judges. The decision-making process in sentencing in the jurisprudence of the ad hoc Tribunals appears, in a majority of cases, to be correctly followed;³⁸⁴ what is at stake is probably a different standard of sentencing in international criminal law in relation to the proportionality principle and the weight assigned to circumstances of crime (in particular to mitigating factors). This consideration leads, once again, to advocate the necessity of having clear guiding principles regarding the use of aggravating and mitigating factors.

3.13 The need for uniformity and proportionality in sentencing

From this review of judgements rendered by the ICTY and the ICTR, it is clear that some diversity exists in their sentencing practice, not only between the two Tribunals, but also *within* the same Tribunal. The intense debate arising from sentencing issues can also be seen through the proliferation of dissenting and separate opinions.

One of the main questions is whether non-uniformity of penalties handed down for accused in similar positions is prejudicial. In my opinion, the answer to this question must certainly be positive: uniformity and consistency in sentencing are highly

³⁸⁴ There have been, of course, some cases of misinterpretation of the gravity of the crime(s) and the circumstances of the case by Trial Chambers. Two examples are illustrative: the *Galic* case before the ICTY, and the *Gacumbitsi* case before the ICTR. In both cases, the sentence previously imposed at trial was increased to life imprisonment by the Appeals Chamber. In the *Galic* case, the Appeals Chamber held that the Chamber of first instance erred in sentencing Stanislav Galic to only 20 years imprisonment, considering the position held by the accused – Major General and commander of the corps of the Bosnian Serb Army based around Sarajevo – and the gravity and cruelty of the crimes for which he was found responsible, that is the campaign of sniping, shelling and terrorising of civilians during the siege of Sarajevo. Thus the Appeals Chamber found that the Trial Chamber failed to exercise its discretion properly (*Prosecutor v. Galic*, Case No.IT-98-29-A, Appeal Judgement, 30 November 2006, para.455). Similarly, in the *Gacumbitsi* case, the Appeals Chamber considered the sentence of 30 years imprisonment imposed on the accused inadequate for the gravity and horrible nature of the crimes committed and the role of the accused in them. It recalled that the Appellant played a central role in ‘planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his commune’, that he was found guilty of instigating rape as a crime against humanity, and that ‘he had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner’. Noting that the Trial Chamber’s margin of discretion in sentencing is not unlimited and that *Gacumbitsi* was convicted of extremely serious offences, the Appeals Chamber replaced the 30-year sentence with life imprisonment (*Prosecutor v. Gacumbitsi*, Case No.ICTR-2001-64-A, Appeal Judgement, 7 July 2006, paras.204-205). It is interesting to note that the two judgements were delivered close together (July and November 2006) and that the composition of the Appeals bench in these two cases was pretty much identical (four out of five judges of the Appeals bench adjudicated both cases).

desirable, and for several reasons. First, if there is no clear standard of punishment, sentences are not likely to effectively prevent future offenders from committing crimes, as a potential lawbreaker might hope or believe that in his/her particular case judges would apply a lenient sentence. Second, significant disparities in sentencing could undermine the acceptance and recognition of tribunals and courts' decisions by the international community and the general public. Thirdly, the fact that offenders in similar situations are punished differently violates both the principle of retribution and the principle of equality before the law. The Statutes of the Tribunals – at Articles 21.1 ICTY and 20.1 ICTR – enshrine the principle of equality by stating that: '*All persons shall be equal before the International Tribunal*'. This implicitly requires a certain degree of consistency. Ultimately, as happens at the national level, international jurisprudence is among the sources of international law, therefore uniformity is desirable when drawing guidance from precedent decisions.

However, it appears that judges at both Tribunals have been reluctant to develop any type of sentencing regime or sentencing guidelines that would make clear the factors determining punishment, and this despite the fact that explicit requests were put forward in this respect. For instance, in the *Furundzija* case, the Prosecution submitted that it would be appropriate for the Appeals Chamber to set out guidelines, based on the functions and purposes of sentencing, to be applied in the ICTY system. The Appeals Chamber, on the other hand, arguing that Chambers have to exercise a considerable amount of discretion, considered it inappropriate to list fixed factors to be taken into account.³⁸⁵ The same was reaffirmed by the Appeals Chamber in the *Delalic et al.* case, where – in replying to the Prosecution's submissions that the Appeals Chamber should determine basic sentencing principles to be applied by Trial Chambers – the Appeals Chamber found 'questionable' the benefits of such a definitive list, largely because of the obligation of a Trial Chamber to individualize the sentence, and concluded by ruling that 'it is inappropriate to set down a definitive list of sentencing guidelines'.³⁸⁶

Conversely, the need for consistency and fairness of approach received the favour and attention of the Appeals Chamber in the *Aleksovski* case and, subsequently, in the *Krnjelac* case, where the Trial Chamber emphasised that consistency in the imposition of punishment should be regarded '*as one of the fundamental elements in any rational*

³⁸⁵ *Furundzija, cit.*, Appeals Chamber, 21 July 2000, para.238.

³⁸⁶ *Delalic et al., cit.*, Appeals Chamber, 20 February 2001, paras.715-716, 719.

and fair system of criminal justice'.³⁸⁷ The judges even undertook a comparative analysis of other cases already adjudicated by the ICTY where the circumstances could be considered similar to those of the accused Krnojelac.³⁸⁸ Recently, however, the Appeals Chamber in the *Blaskic* case reiterated that:

...sentencing is a discretionary decision and it is inappropriate to set down a definitive list of sentencing guidelines. The sentence must always be decided according to the fact of each particular case and the individual guilt of the perpetrator.³⁸⁹

Despite the difficulty of setting down sentencing guidelines, the ad hoc Tribunals undoubtedly missed a significant opportunity to elaborate sentencing principles for the guidance of judges in the imposition of punishment in the international trial context. Consistency in sentencing is clearly in the interests of justice, and more assistance in such delicate matters was obviously to be expected from the ICTY and ICTR. The lack of any guidance in sentencing should certainly be considered one of the causes that favoured certain inconsistencies and disparities in the sentences meted out by the two Tribunals.

Another issue that is relevant for uniformity and consistency of sentences is the question of the value of prior decisions of the Tribunals (between themselves and within them) in relation to similar cases.

Are Chambers of the ad hoc Tribunals duty bound to follow patterns emerging from individual cases?

The ICTY Appeals Chamber in the *Jelusic* case agreed that:

... a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences.³⁹⁰

Many defendants based their grounds of appeal on the argument that the sentence imposed in their case was out of proportion and not consistent with sentences meted out on other accused convicted of similar crimes in similar circumstances; the Appeals

³⁸⁷ *Krnojelac*, Trial Judgement, 15 March 2002, para.526.

³⁸⁸ *Ibid.*, paras.526-532.

³⁸⁹ *Prosecutor v. Blaskic*, Case No.IT-95-14-A, Appeals Chamber, 29 July 2004, para.680. Similarly, also: *Prosecutor v. Krstic*, Appeals Judgement, Case No.IT-98-33-A, 19 April 2004, para.242.

³⁹⁰ *Prosecutor v. Jelusic*, Case No.IT-95-10-A, Appeals Judgement, 5 July 2001, para.96.

Chamber, however, invariably dismissed those appeals.³⁹¹ On many occasions the Appeals Chamber thus restated:

...the precedential effect of previous sentences rendered by the International Tribunal and the ICTR is not only “very limited” but “also not necessarily a proper avenue to challenge a Trial Chamber’s finding in exercising its discretion to impose a sentence.” The reasons for this are clearly set out in the case law of the International Tribunal: (1) such comparison can only be undertaken where the offences are the same and committed in substantially similar circumstances; and (2) a Trial Chamber has an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime.³⁹²

Although Chambers appear mindful of the importance of consistency in sentencing and of the obvious expectation that “two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences”,³⁹³ this awareness remained only theoretical and did not translate into concrete efforts by the ad hoc Tribunals to take or elaborate measures against possible inconsistencies; on the contrary, even if recognising that “a previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances”,³⁹⁴ the Appeals Chamber ruled that a Trial Chamber is “under no obligation to expressly compare the case of one accused to that of another”.³⁹⁵

All the considerations mentioned above lead us to the following chapter, which presents a quantitative analysis of the sentencing jurisprudence of the ad hoc Tribunals, including how aggravating and mitigating circumstances have been used by judges of both Tribunals in meting out punishment.

³⁹¹ *Prosecutor v. Jelusic*, Case No.IT-95-10-A, Appeals Judgement, 5 July 2001, paras.97, 101; *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, paras.40, 47, 48-54; *Prosecutor v. Naletilic & Martinovic (Tuta & Stela)*, Case No.IT-98-34-A, Appeal Judgement, 3 May 2006, paras.614, 616-618; *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No.ICTR-99-52-A, Appeal Judgement, 28 November 2007, paras.1046-1047, 1065-1066.

³⁹² *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-A, Appeals Sentencing Judgement, 4 February 2005, para.19; *Prosecutor v. Babic*, Case No.IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para.32; *Prosecutor v. Naletilic & Martinovic, cit.*, Appeal Judgement, 3 May 2006, para.615.

³⁹³ *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.719; *Prosecutor v. Furundzija*, Case No.IT-95-17/1-A, Appeal Judgement, 21 July 2000, para.250; *Prosecutor v. Milan Simic*, Case No.IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para.114.

³⁹⁴ *Prosecutor v. Furundzija*, Case No.IT-95-17/1-A, Appeal Judgement, 21 July 2000, para.250; *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, para.38; *Prosecutor v. Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007, para.482.

³⁹⁵ *Prosecutor v. Kupreskic*, Case No.IT-95-16-A, Appeal Judgement, 23 October 2001, para.443.

CHAPTER 4.

QUANTITATIVE ANALYSIS OF SENTENCING DATA IN THE CASE-LAW OF THE AD-HOC TRIBUNALS

4.1 Theoretical framework and research questions

The empirical study of the sentencing practice of the ICTY and ICTR described in the following pages aims at deconstructing the decision-making process in sentencing at the ad hoc Tribunals, and investigating the way in which judges have considered and evaluated the determinants of sentencing. The analysis of data retrieved from the sentences imposed up to December 2007 should improve the understanding of factors considered to be the most relevant and influential in the sentencing process.

Previous appraisals of current international sentencing have resulted in rather distinct conclusions. While some commentators have found patterns and overall consistency in the sentencing practice at the ICTY¹ and ICTR,² others have criticised various aspects of it, emphasising in particular the following points: 1. the gravity and magnitude of the crimes under the jurisdiction of the Tribunals are misrepresented by the sentences meted out, which appear far too lenient; 2. sentences handed down have not taken into consideration the sentencing practice in the former Yugoslavia and in Rwanda; 3. persons occupying high ranks of leadership have not been punished correspondingly nor appropriately.³

Critics mainly questioned whether the sentences imposed were proportionate to the gravity of the crimes committed. How can offenders found guilty of the murder of

¹ MEERNIK J., KING K., 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis', *Leiden Journal of International Law*, 16(2003), pp.717-750, at 718, 747-749; MEERNIK, J., 'Equality of Arms? The Individual versus the International Community in War Crimes Tribunals', *Judicature*, 86 (2003), p.312; MEERNIK J., KING K., 'The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study', *International Criminal Law Review*, vol.1 (2001), pp.343-372, at 369.

² MEERNIK, J., 'Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda', *International Criminal Law Review*, vol.4(2004), pp.65-81, at 66 and 80.

³ See KELLER, A.N., 'Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR', *Indiana International and Comparative Law Review*, 12 (2001), pp.53-74; PENROSE, M.M., 'Lest We Fail: The Importance of Enforcement in International Criminal Law', *American University International Law Review*, vol.15 no.2 (2000), pp.321-394, at 381-387.

hundreds of people be sentenced to less than 20 years imprisonment, whereas at the national level perpetrators may receive a higher punishment for a single murder alone?

The disapproval concerning excessive leniency has been stronger regarding ICTY judgements, given that, conversely, penalties for life imprisonment have more frequently been imposed before the ICTR.⁴

Sentence outcomes at the ICTY have also been considered inconsistent and characterised by disparity, since judges seem to apply influential factors differently and not always in a consistent manner. Thus, similar cases can result in rather different sentence outcomes; this would favour the perception of sentences as ‘unjust’, as opposed to ideal ‘just sentences’ that are characterised by the consistent application of legitimate influential factors in all cases.⁵ The ‘legitimacy’⁶ of sentences meted out by the ad hoc Tribunals is not questioned, the problem at stake is to clarify whether there are patterns of ‘consistent’ or ‘inconsistent’ sentences.

By virtue of a statistical analysis of sentencing, it is possible to verify empirically whether the aforementioned criticism is justified and supported by data or not.

So far only a few empirical studies have been conducted into the case-law of the ad hoc Tribunals;⁷ therefore, the quantitative analysis illustrated here should represent an

⁴ As of December 2007, out of 30 individual cases at the trial level before the ICTR, 13 convictions resulted in trial sentences of imprisonment for life. Conversely, before the ICTY only one sentence of life imprisonment was meted out at the trial stage but was then converted into a 40 years sentence by the Appeals Chamber (*Stakic* case, cit.); as already mentioned, a sentence of life imprisonment was recently imposed by the Appeals Chamber in replacement of a Trial sentence of 20 years imprisonment (*Galic* case, cit.).

⁵ The conceptual approach to sentencing based on a differentiation between legitimate and illegitimate sentencing criteria and, accordingly, on the characterisation of sentence outcomes in terms of ‘just penalty’ and equality or disparity and discrimination, was developed in the context of the sentencing reforms in the United States during the ‘80s. See the landmark work of BLUMSTEIN A., COHEN J., MARTIN S.E., TONRY M., *Research on Sentencing: The Search for Reform*, National Academy Press, Washington D.C., 1983.

⁶ In the sense that the decision-making process in sentencing is based upon legitimate and legal influential factors; the way in which these legitimate sentencing criteria are applied determines whether the final outcome is in terms of ‘just sentences’ (consistent application of influential factors) or ‘disparity’ in sentencing (inconsistent application of the influential factors by judges).

⁷ MEERNIK J., KING K., ‘The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study’, *International Criminal Law Review*, vol.1 (2001), pp.343-372; MEERNIK, J., ‘Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda’, *International Criminal Law Review*, vol.4(2004), pp.65-81; MEERNIK J., KING K., ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, *Leiden Journal of International Law*, 16(2003), pp.717-750. This more recent study of 2003 by J. Meernik and K. King takes into account only ICTY cases (the sentencing practice of the ICTR is not included) and only up to 2003, for a total of 37 individuals (2 of them found innocent of all charges), which is not an entirely statistically significant sample. See, *ibid.*, pp.718, 732. Moreover, being in the form of an article, the

interesting contribution to the current literature on international sentencing. I consider this empirical exercise valuable insofar as it helps to achieve a more precise understanding of relevant factors in the sentencing process at the *ad hoc* Tribunals, and a subsequent evaluation of the concrete ‘weight’ that each factor exercises.

Chapter 3 served the purpose of analyzing the provisions of the ICTY and ICTR Statutes and RPE, as well as the case-law, in order to identify substantial and procedural elements relevant to sentencing, and the most influential factors in the opinion of judges. The present chapter will analyze those factors empirically.

My model of the sentencing process at the *ad hoc* Tribunals is ‘internally related’, in the sense that it focuses only on cases tried by the two Tribunals and on the sentencing factors as observed in their jurisprudence. I thus take into account only the influence of ‘internal’ factors on the sentencing process and do not analyze the influence that ‘external’ factors such as political, financial or policy-oriented ones might have on the decision-making process in sentencing.

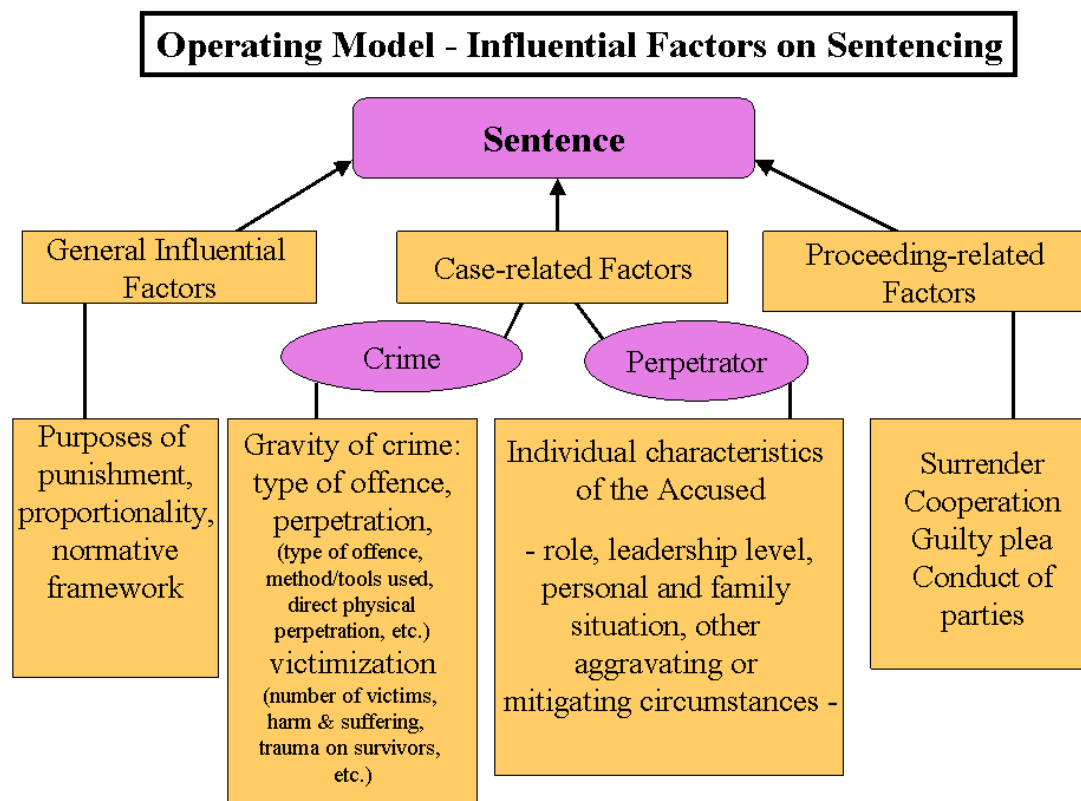
I considered it useful to group influential factors into three main areas, as follows:

- ‘general influential factors’ (purposes assigned to punishment, principle of proportionality of penalties, influence exercised by general principles and the normative framework);
- ‘case-related factors’, comprising:
 1. factors related to the offence (gravity of the crime, type of offence, perpetration and *modus operandi*, victimization in term of numbers, suffering caused to the victims, persistent trauma of the survivors, vulnerability of victims, and so on);
 2. factors related to the accused (role of the accused, superior position, abuse of authority, cruelty, zeal, willingness in the commission of the crime, criminal record/previous conduct, duress or superior orders, good character, family status, age, health conditions, remorse, help offered to victims);
- ‘proceeding-related factors’ (comprising ‘mixed factors’ related to the accused *and* the proceedings, such as co-operation with the Office of the

study could not, by virtue of its scope, present an in-depth analysis of all the correlations between sentencing determinants and length of penalties.

Prosecutor, testimony or information provided to it, voluntary surrender of the accused, guilty plea/plea-agreement, conduct of the accused during trial proceedings and in the detention unit, and so on).

These factors have been identified on the basis of the (few) relevant statutory provisions and of the ‘narrative’ of the judgments rendered by the ICTY and ICTR. They proved to be ‘influential factors’ in the sense of their aggravating or mitigating influence and weight on the final penalty – at least at the theoretical level. This conceptual approach to describing the decision-making process in sentencing, which is represented by the following diagram, constitutes the operating model that has guided my quantitative study on sentencing data retrieved from the case-law of the ad hoc Tribunals:



Each of these three groups of factors comprises sub-categories that include elements both of an objective and subjective nature. Furthermore, not only are factors considered by judges as aggravating or mitigating (thus the ‘opinions’ of judges) analysed, but also some broader objective data, such as the type of crime committed (genocide, crimes against humanity or war crimes), the type of responsibility incurred (by virtue of Article 7.1/6.1 or 7.3/6.3), the rank of the accused in the military or civilian structure, whether

guilty pleas or plea agreements occurred, specific information concerning the composition of the trial or appeal bench that adjudicated the case, and other information related to judges, such as their gender, professional background, legal system of provenance (common law or civil law).

The empirical analysis of these factors will serve two purposes: to verify which factors have a significant impact (statistically speaking) on the length of penalties, and to understand sentencing patterns at the ad hoc Tribunals (whether we can speak of consistent and proportionate sentences or, on the contrary, of inconsistent and disproportionate sentences).

The discretion of judges in evaluating mitigating and aggravating factors is a relevant element also fundamentally recognized in every domestic jurisdiction, where however, a certain degree of guidance is present to 'direct' judges in the correct assessment of sentencing factors, and to ensure their consistent application case by case. Before the ad hoc Tribunals, judges enjoy wider discretion due to their unrestricted authority in selecting which factors are most relevant to the case in hand, and in deciding upon their importance and 'weight' in the sentencing process. When these evaluations differ from case to case and lead to substantial differences or inconsistencies in similar cases, criticism is inevitable and legitimate. Issues of legality and equality before the law require that defendants in similar situations, convicted of similar crimes under comparable circumstances, be sentenced to similar penalties and with a consistent weight attributed to mitigating or aggravating factors. Substantially dissimilar sentence outcomes should not be permitted.

This study also intends to explore the relevance of one of the most important actors in the sentencing process: the judges. In fact, international sentencing presents characteristics which are rather different from those encountered at the national level as far as judges, and the composition of the bench, are concerned.

International judges come from very different social, educational and professional backgrounds. They may be magistrates, prosecutors or defence counsels at the national level, or also academic professors in a variety of different fields of law; furthermore, they come from different systems of law: adversarial, inquisitorial, or mixed systems based either on a combination of common law and civil law elements, or of common law and religious law (for instance Islamic law), and so on. These factors are very likely

to influence the judges' way of determining the final penalty and sentence, although the plurality of the composition of both Trial and Appeals Chambers at the ad hoc Tribunals (respectively composed by 3 and 5 judges) should avoid any too prominent influence of an individual judge upon the final decision of a sentence. In order to verify whether and/or to what extent the composition of the bench is influential on the length of sentences meted out in different cases, I have collected data regarding judges, their professional background, legal system of provenance, and so on; this will be better explained in the following pages.

In sum, the major objectives of this study can be summarized as follows:

- to describe sentencing at the ICTY and ICTR through the judgments rendered so far (as of December 2007);
- to determine the most influential factors on sentencing;
- to measure the influence of each factor on the final penalty meted out;
- to verify whether the particular composition of the bench, and therefore certain characteristics of judges, have an impact on the length of sentences;
- to determine patterns of consistency or inconsistency in sentencing at the ICTY and ICTR.

In order to achieve the aforementioned objectives, the following research questions are tackled by the empirical analysis:

1. Is there a pattern in the ICTY and ICTR sentencing practice by which a certain length of penalty is associated with a certain gravity of the crime(s) committed (types of crime)?
2. Is there a pattern of consistent sentencing?
3. Have influential factors been treated and applied consistently or not?
4. Which aggravating/mitigating circumstances have been used more frequently?
5. Which aggravating/mitigating circumstances appear to have a significant influence (increasing or decreasing) on the final penalty?
6. Is there any relation among the variables? or any significant correlation (co-occurrence) between any of the aggravating/mitigating circumstances?
7. Is there a significant correlation between a certain composition of the bench and the final length of sentences?

4.2 Operationalization and identification of relevant variables

The empirical analysis contained in the following pages concentrates on the influence exercised on sentencing by two groups of factors out of the three identified above in the operating model. Only ‘case-related factors’ and ‘proceeding-related factors’, in other words circumstances related to the offence, to the accused and to the proceedings, will be taken into account in this quantitative analysis of sentencing. In fact, those are the only factors which it is possible to ‘measure’ in some way, and to treat as aggravating or mitigating. ‘General influential factors’, such as the purposes of punishment or the proportionality principle, certainly have an impact on sentencing, but are difficult to measure in terms of their influence on the final penalty. They are very much integrated into the ‘narrative’ of a judgement and thus better suited to analysis and evaluation from a theoretical point of view, given that in mentioning them judges do not always specify what weight the selected purposes eventually have on the overall punishment imposed.

For the purpose of structuring the data retrieved from the case-law of the ad hoc Tribunals, the two groups of ‘case-related factors’ and ‘proceeding-related factors’ have been divided into three main categories (A, B, C): the first includes factors that have been considered by judges only as aggravating circumstances, the second includes factors that have been considered only as mitigating circumstances, and the third category includes factors that have been considered both in aggravation and in mitigation. For each category, I have identified specific factors that represent the variables considered in the empirical study.

The first category (A) of factors is composed as follows:

A) *Factors which occur only as aggravating circumstances* =

- gravity of the crime (the intrinsic seriousness, magnitude and gravity of the crimes committed, when expressly mentioned and considered by judges);
- victimization (the suffering and humiliation caused to victims, and/or eventual discrimination against them);
- trauma (the trauma suffered by victims and survivors);
- vulnerability of victims;
- premeditation (when the accused acted with premeditation);

- cruelty (cruelty or sadism used by the perpetrator while committing the crimes);
- willingness (particular willingness, enthusiasm or support expressed by the perpetrator in the commission of the crime);
- direct participation (in the sense that the offender directly participated in the commission of the crime/personally executed the crime, so called 'dirty-hand perpetrators');
- superior position (the accused held a high-ranking position in a military or civilian structure);
- abuse of authority/trust (the accused abused his position and/or the trust that people had in him/her);
- criminal record (the accused has a criminal record, in the sense that s/he had already been convicted of previous offences).

The second category (B) of factors is composed as follows:

B) *Factors which occur only as mitigating circumstances =*

- superior order (the accused committed the crime under duress/constraints/orders of a hierarchical superior);
- first offender (the accused has a clean criminal record and had never before been convicted of other crimes);
- family status (including whether the accused is married and/or has children, plus particular family conditions);
- age (mitigating value attributed to the youth of the accused at the time of the commission of crimes, or to the advanced age of the accused when the judgement is rendered);
- state of health of the accused (including documented psychological disorders);
- remorse expressed by the accused;
- unwillingness in the commission of the crime (in the sense that the accused was reluctant to commit the crimes and/or not an enthusiastic supporter of the criminal plan/during the commission of the offences);

- indirect participation (the accused did not personally take part in the commission of the crimes/was not personally involved, so called ‘clean-hand perpetrators’);
- help offered to victims;
- co-operation with the Office of the Prosecutor (substantial co-operation of the accused with the Prosecution);
- voluntary surrender of the accused;
- guilty plea/plea-agreements;
- testimony/information provided (the accused accepted to testify in other proceedings and/or disclosed relevant information to the Prosecution).

Finally, the third category (C) of factors is composed as follows:

C) *Factors which occur both as aggravating and mitigating circumstances =*

- good character (the ‘good character’ and personality of the accused, which have been considered at times as mitigating circumstances, and at times as aggravating);
- conduct of the accused during trial proceedings/detention (similarly, the behaviour of the accused during the proceedings or while in the UNDU has been considered at times in mitigation, at times in aggravation).

In quantitative models, the variables are divided into two groups: *endogenous* (or dependent) variables and *exogenous* (or independent) variables. The dependent variables represent the events that are explained by the model. In our case, the only dependent variable is represented by the sentence meted out, in particular by the years of imprisonment imposed by Chambers (Trial and Appeals) on each single accused person found guilty of the crimes under the jurisdiction of the ad hoc Tribunals. All the other factors listed above are independent variables.

The data-set that I have compiled presents all the accused before the ICTY and ICTR on the vertical level (*units of observation*) and all the selected sentencing factors on the horizontal level (*units of variation/variables*).⁸ Each aggravating and mitigating factor within the above-mentioned categories has been assigned the following values:

⁸ A detailed ‘code-book’ containing the list of all the variables used in the data-set, with the specification of their meaning and significance, can be found in the Annex of this thesis, at pp.i-vi.

- **0**= the aggravating/mitigating factor is not present;
- **1**= the aggravating/mitigating factor is present **but** is **not** considered by the Chamber in aggravation/mitigation of the final sentence;
- **2**= the aggravating/mitigating factor is present **and** is considered in aggravation/mitigation of the final sentence.

This choice is due to the fact that, in the absence of a prescriptive list of factors to be taken into account in aggravation or mitigation, judges are free to evaluate those circumstances and decide whether in practice they have any relevance in aggravating or mitigating the penalty. Sometimes, however, even when a certain aggravating or mitigating factor was present, judges have disregarded it and stated that in the specific case they did not deem that specific factor as aggravating or mitigating. Thus, the fact of entering different values (0, 1 or 2) to distinguish between a case in which the circumstance is not present and a case in which the circumstance is present but is not considered by the judges in aggravation or mitigation of the sentence, is important to the extent that it permits us to establish a correlation between the effective recurrence of a factor and the fact that the same factor has been used and considered by judges. This will also provide an indication of the use (whether uniform and consistent or not) of the specific mitigating and aggravating factors analysed.

In addition to the above-mentioned distinction between consideration and non-consideration of circumstances (which should verify whether factors have been applied consistently or not), each aggravating and mitigating factor has been measured as a dichotomous (dummy) variable (that is: present/not present)⁹ in order to verify if – in the overall system and relationship between the dependent and the independent variables – penalties are influenced by the presence or absence of aggravating and mitigating circumstances.

A number of remarks are opportune in relation to some of the factors mentioned above. The factor ‘victimization’ (in category A) only refers to those cases where judges considered the suffering and humiliation caused to victims as an aggravating factor, whereas it is not intended to comprise the exact or approximate number of victims

⁹ For this purpose, cases where an aggravating or mitigating circumstance was present but was not considered relevant by judges have been assimilated to cases where the circumstance was not present.

involved in each case. The factor ‘number of victims’ has deliberately not been included in the analysis and, therefore, the correlation between number of victims and harshness of penalty will not be evaluated in this empirical study. This choice has been made for a number of reasons: the difficulty in objectively ‘measuring’ the element of victimization, the fact that the precise number of victims is not always stated in the judgments, and the fact that the information on victims and the number of victims available from the trial process is mainly derived from testimonies of witnesses, and is often incomplete.

Another factor intentionally excluded from the analysis is the ‘duration of perpetration/crimes’. In fact, from a preliminary overview of this factor based on doctrinal analysis of the case-law, it has been estimated that, as a variable, it would be very difficult to classify this element in a coherent and uniform manner for the following reasons: only rarely is the time period and/or duration of the commission of crime(s) expressly mentioned in the judgement; very often it must be inferred from various circumstantial elements; sometimes Trial Chambers simply refer to the time-period mentioned in the indictment; other times they specify the duration of the criminal act itself; at times it is not clear whether the Chamber refers to the time of the commission of crimes or to the duration of the participation of the accused therein (for instance, participation in the criminal plan, which may also depend on the modes of liability considered and, in particular, on the presence of the JCE).

Moreover, in correlation with duration and participation, a further element of future research and analysis could be a study of the relation between modes of liability (i.e. aiding and abetting, perpetration by means, instigation, JCE, etc.) and length of sentences; this potential correlation was not analyzed here. The influence of modes of liability on the length of sentences has not been included in this study as, in this case too, it is very difficult to ‘measure’ it, given the lack of a precise categorization of the subject-matter even on the theoretical level and the fact that, in the majority of cases, judges did not specify the precise *quantum* of penalty associated with any specific conduct, but only imposed a single and global sentence reflecting the overall culpability of the accused. The issue of modes of liability could certainly be an interesting aspect to tackle more in depth in the future, especially considering its relevance also for the ICC jurisprudence.

As well as the factors that have been considered by judges as aggravating or mitigating, the data-set also includes for each individual accused some general and objective information, that is: name of the accused and case number; ICTY or ICTR case; type of judgement rendered (whether trial or appeal); years of imprisonment (i.e. the sentence received in number of years and, eventually, months);¹⁰ age of the accused (both the age at the time of crimes, and the age at the time of the pronouncement of the judgement); type of crime of which the accused has been convicted (whether war crimes, crimes against humanity or genocide); type of responsibility incurred (whether under Articles 7.1/6.1 or 7.3/6.3); leadership level of the accused in the military or civilian hierarchy; direct or indirect commission of the crime(s); guilty plea (that is whether, *in concreto*, a guilty plea or a plea agreement was entered or not).

Finally, in order to evaluate the effect that a particular composition of the Trial or Appeals Chamber may exercise on the length of sentences, I have collected data concerning the judges involved in each case. As the total number of cases adjudicated by each single judge is too small to be statistically significant, I did not consider individual judges as such; rather I was more concerned with verifying whether the presence, for instance, of a majority of common-law judges or, on the other hand, civil-law judges is of influence or not on the length of sentences. Therefore, for each case and accused, the data-set specifies the number of judges from a common law or civil law legal system,¹¹ their professional background, and their gender. The intention was to ascertain, firstly, whether the bench was composed of a majority of common law or civil law judges, by a majority of academics or practitioners, by how many men and how many women; and secondly, to verify whether this composition has any influence on the length of sentence.

4.3 Methodology of the quantitative study

In order to retrieve data and information on the influential factors used by judges at the ICTY and ICTR, a total of 156 individual cases – that is all the Trial and Appeals

¹⁰ To indicate numerically sentences consisting of the penalty of life imprisonment, I have chosen the symbolic value '100'.

¹¹ I have not considered mixed systems of law, such as common law and religious law, and so on. The relative data were therefore not inserted in the data-set.

judgements rendered in relation to the individual accused convicted by the ICTY and by the ICTR up to and including December 2007 –¹² have been taken into account and analysed with the objective of inserting information regarding the variables identified into the data-set.

The data collected include all the judgements (Trial judgements and Appeals judgements) delivered by Chambers of the ICTY and ICTR. Both sentences of first and second instance were included in the data-set; appeal judgements, in fact, often contain a different evaluation on sentencing determinants and, especially, are important as they confirm or overturn the penalty imposed by Trial Chambers. Thus, when analysing sentencing data in the following pages, a distinction is made between the trial and the appeals level. For some data, however, the analysis is mainly relevant at the trial stage.

The data were organised per individual accused found guilty by a Trial or Appeals Chamber in chronological order; individuals acquitted on all charges were not included in the data-set as no penalty was meted out in their cases.

A separate data-set was created to collect all relevant information relating to the judges of the ad hoc Tribunals who have taken part in the decision making process for the individual cases analysed. In relation to each single judge, the following information was collected: age, gender, nationality, legal system of provenance (common law, civil law, mixed system), and profession (practitioners or academics).

Overall, the sample-size can be considered as statistically significant, given not only the high number of cases included (more than 150), but mostly the fact that the data represent the entire case-law available so far from the ICTY and ICTR; thus the study obviously permits a statistically significant analysis of data related to these Tribunals and, to a certain extent, a generalization of the findings obtained.

¹² The data-set does not include the acquittals and those judgements that do not contain any relevant finding in relation to sentencing and to the variables considered. For instance, judgements of the Appeals Chamber that simply remitted the case to a Trial Chamber for adjustments in sentencing (such as the Appeals Judgement of 20 February 2001 in the *Delalic et al.* case), or that did not address any of the sentencing factors included in the data-set and simply limited themselves to reconfirm the verdict of the Trial Chamber (such as the second Appeals Judgement of 8 April 2003 in the *Mucic, Delic et al.* case) were not included, and are thus not counted in the total number of judgements included in this empirical study. Consideration of these cases would have produced 'missing values' in the quantitative analysis, given the lack of observation for almost all the variables considered. It was thus deemed more opportune to omit them and not to insert them in the data-set. Finally, as specified at the very beginning of this research, judgments pronounced in relation to cases of contempt were not taken into consideration.

The following steps were taken to organize this quantitative analysis:

- conceptualisation of the process of international sentencing and identification of the relevant influential factors on sentencing;
- creation of the dependent variable (years of imprisonment) and of independent variables (factual observations, objective elements, mitigating and aggravating factors, etc.);
- collection of information from ICTY and ICTR Trial and Appeals judgements and insertion of data in an excel matrix;
- statistical analysis of data through STATA/SE 10.¹³

All the variables collected were statistically analysed to verify whether significant correlations existed between the harshness of the sentence and the relevant sentencing determinants. The following statistics were considered: the average harshness of the penalty in presence of each objective factor and aggravating or mitigating circumstances; the deviation (if any/small or large deviation) of the penalty in absence of the relevant influential factor; the range of penalties in which the influential factor is present; the general regression including influential factors, the *correlation* between each influential factor and the length of sentences (meaning the type of relationship between two variables: high and strong or low and weak).¹⁴

4.4 Analysis and empirical interpretation: descriptive statistics

As of December 2007, the ICTY has rendered judgements in the cases of 71 individuals (9 of whom have been acquitted of all charges) for a total of more than 110 individual pronouncements (considering both Trial judgements and Appeals judgements).

¹³ The 'do-file' containing all the calculations for the statistical analysis conducted in this chapter is available upon request.

¹⁴ It should be specified that a correlation between two factors is deemed statistically significant when it presents the value of at least +/- 0.5; therefore correlations above that number (but also from 0.35 upwards) are strong, whereas correlations that are significantly below that value are weak or not relevant. A perfect negative correlation between two variables is represented by the value '-1'; a perfect positive correlation between two variables is represented by the value '+1'. Another way of looking at the strength of correlations is their 'P' value, which should be equal to zero ('P'= 0), or close to it (maximum 0.05), to be significant. The threshold of significance for the 'P' value can vary and could also be situated between 0.05 and 0.1, where 0.1 indicates a fairly weak relationship. In social science, 90 or 95% of certainty as to the significance of a relation between variables is accepted. Generally, 'P' values below 0.05 are considered indicative of a strong correlation between the factors analysed.

The ICTR has so far (also as of December 2007) rendered judgements in the cases of 35 individuals (5 of whom have been acquitted and found innocent of all charges), for a total of more than 50 individual pronouncements (considering both Trial judgements and Appeals judgements).

Some of these cases remain at appeal. I will refer to them as ‘not finalised sentences’, as opposed to ‘final sentences’ – i.e. cases upon which the Appeals Chamber has rendered its judgement.

Therefore, a total of 92 individuals (before both the ICTY and ICTR) have been found guilty and sentenced, while a total of 14 individuals (considering both the ICTY and ICTR) were acquitted.¹⁵ A total of 156 individual cases (considering both trial and appeal for each accused, and sometimes even a second judgement by the Trial Chamber) were included in the data-set, not including the acquittals and those appeal judgements that did not contain any findings on sentencing or that disposed that the case be remitted to another Trial Chamber for a new sentencing decision.¹⁶

a) *Length of sentences*

Considering a total of 100 trial convictions, with 70 individual convictions before the ICTY and 30 before the ICTR, the overall picture of Trial Chamber sentences shows a higher concentration of sentences around the range 11-25 years imprisonment (42 cases), a significantly high number of cases at the lower level (between 1 to 10 years of imprisonment: 32 cases), 14 cases in the range of sentences between 26 to 50 years and life imprisonment, and 12 cases in the range between 26 to 50 years of imprisonment.

In particular, before the ICTY, 28 individuals received prison sentences ranging from 1 to 10 years; 32 individuals, sentences between 11 and 25 years; 9 individuals, sentences between 26 and 50 years imprisonment; 1 accused received a sentence for life

¹⁵ Before the ICTY, 9 accused have been acquitted of all charges: Zejnil Delalic, Dragan Papic, Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Sefer Halilovic, Fatmir Limaj, Isak Musliu, and Miroslav Radic. Before the ICTR, 5 accused have been acquitted for all charges: Ignace Bagilishema, André Ntagerura, Emmanuel Bagambiki, Jean Mpambara, André Rwamakuba.

¹⁶ For instance: *Prosecutor v. Erdemovic*, Case No.IT-96-22-A, Appeal Judgement, 7 October 1997; *Prosecutor v. Tadic*, Case No.IT-94-1-A, Appeal Judgement, 15 July 1999; *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001; *Prosecutor v. Tadic*, Case No.IT-94-1-R, Decision on Motion for Review, 30 July 2002; *Prosecutor v. Mucic, Delic, and Landzo*, Case No.IT-96-21-Abis, Judgement on Sentence Appeal, 8 April 2003.

imprisonment at the trial stage.¹⁷ The average trial sentence before the ICTY is **16** years imprisonment; the most lenient sentence imposed is 2 years imprisonment.¹⁸

Before the ICTR however, the concentration of trial sentences at the lowest level (1-10 years) is very limited, with only 4 cases; a similar situation appears at the medium level (11-25 years) and upper level (26-50) with, respectively, only 10 accused and 3 accused; the majority of trial cases are concentrated at the highest level, with 13 individuals sentenced to life imprisonment.¹⁹ The average trial sentence before the ICTR is **53** years imprisonment; the most lenient sentence imposed is 6 years imprisonment.²⁰

Sentences meted out by the Appeals Chamber (a total of 56 individual cases in appeal, of which 35 cases before the ICTY and 21 before the ICTR) also show a higher concentration of cases around the range 11-25 years of imprisonment (25 cases); the subsequent higher group (11 cases) is correlated to sentences between 51 years and life imprisonment, 10 cases are concentrated in the lower range of sentences (1 to 10 years), and again 10 cases in the range between 26 and 50 years imprisonment.

In particular, before the ICTY, 9 individuals were sentenced to a term of imprisonment ranging from 1 to 10 years; 20 accused received a penalty ranging from 11 to 25 years imprisonment; 5 individuals a sentence between 26 to 50 years; 1

¹⁷ This is the *Stakic* case, whose sentence was then modified to a 40 years imprisonment by the Appeals Chamber. See *Prosecutor v. Milomir Stakic*, Appeal Judgement, Case No.IT-97-24-A, 22 March 2006.

¹⁸ This sentence was imposed in first instance on the accused Naser Oric. See, *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006. The case is currently pending before the Appeals Chamber (as of December 2007).

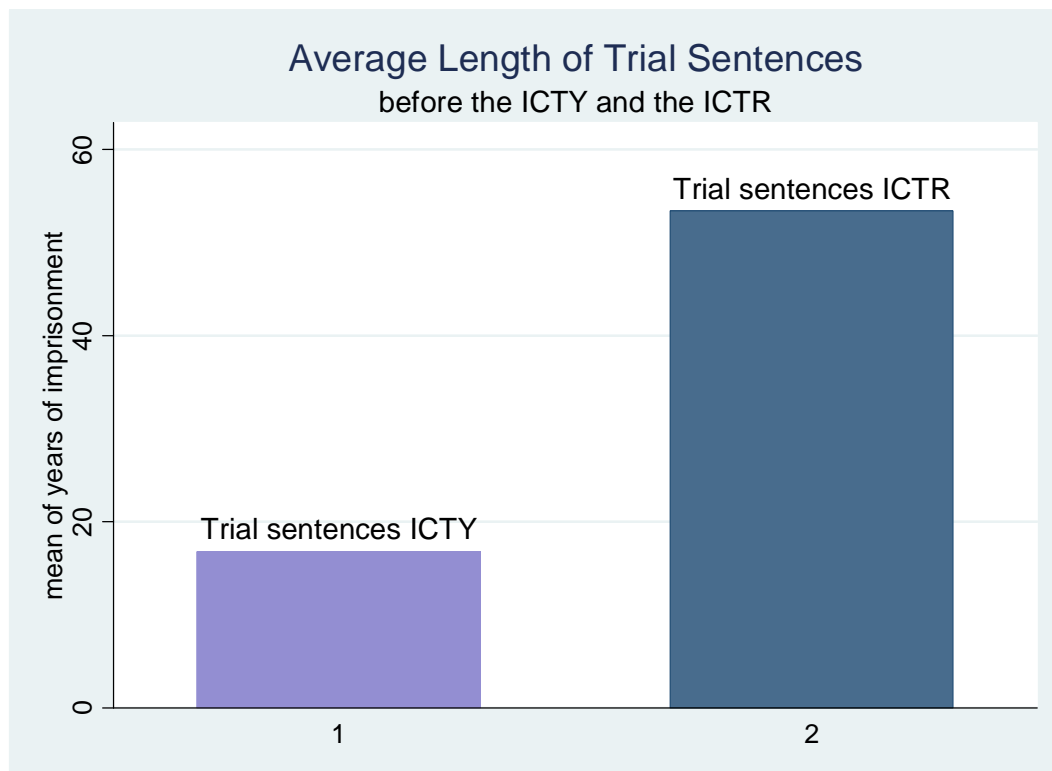
¹⁹ The ICTR has frequently imposed life sentences on persons convicted of genocide: *Kambanda* Trial Judgement (confirmed on appeal); *Akayesu* Trial Judgement (confirmed on appeal); *Kayishema & Ruzindana* Trial Judgement, imposing on Clement Kayishema a life sentence (confirmed on appeal); *Rutaganda* Trial Judgement (confirmed on appeal); *Musema* Trial Judgement (confirmed on appeal); *Kamuhanda* Trial Judgement (confirmed on appeal); *Niyitegeka* Trial Judgement (confirmed on appeal); *Kajelijeli* Trial Judgement (reduced to 45 years imprisonment by the Appeals Chamber, due to the violation at the trial stage of the defendant's rights in relation to his arrest and detention. The Appeals Chamber found *proprio motu* such violations and, in compensation, reduced the final sentence accordingly. See *Prosecutor v. Kajelijeli*, Case No.ICTR-98-44A-A, Appeal Judgement, 23 May 2005); *Ngeze & Nahimana* Trial Judgement (both sentenced to life imprisonment; on appeal their sentences were reduced to respectively 35 and 30 years imprisonment); *Ndindabahizi* Trial Judgment (confirmed on appeal); *Muhimana* Trial Judgment (confirmed on appeal); *Karera* Trial Judgement (appeal pending).

²⁰ This sentence – which is a final sentence – was imposed at trial on the accused Vincent Rutaganira. See, *Prosecutor v. Rutaganira Vincent*, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005.

accused was sentenced to life imprisonment on appeal.²¹ The average appeal sentence before the ICTY is **20** years imprisonment (more precisely 19.8 years).

Before the ICTR, the highest concentration of appeal cases is around harsh penalties, with 10 individuals receiving a sentence for life imprisonment; only 1 accused in the lowest range of appeal sentences (1-10 years);²² 5 accused who received a sentence in the range between 11 and 25 years imprisonment; 5 individuals in the upper range of 26 to 50 years. The average appeal sentence before the ICTR is **61** years imprisonment.

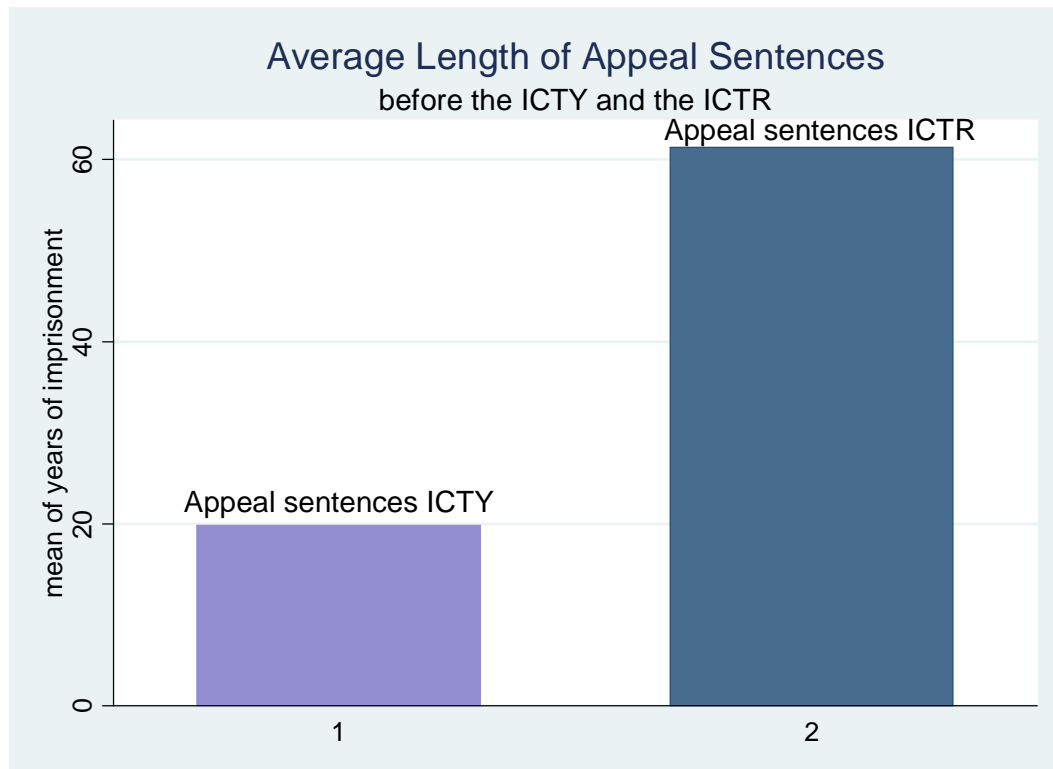
Comparing the average trial and appeal sentences before the two Tribunals, it appears clear that penalties are higher before the ICTR than before the ICTY.²³



²¹ This is the *Galic* case, where the Appeals Chamber increased the previous sentence of 20 years meted out by the Trial Chamber, and condemned the accused to life imprisonment.

²² This is the case of Elizaphan Ntakirutimana, whose trial sentence of 10 years of imprisonment was then upheld also in appeals.

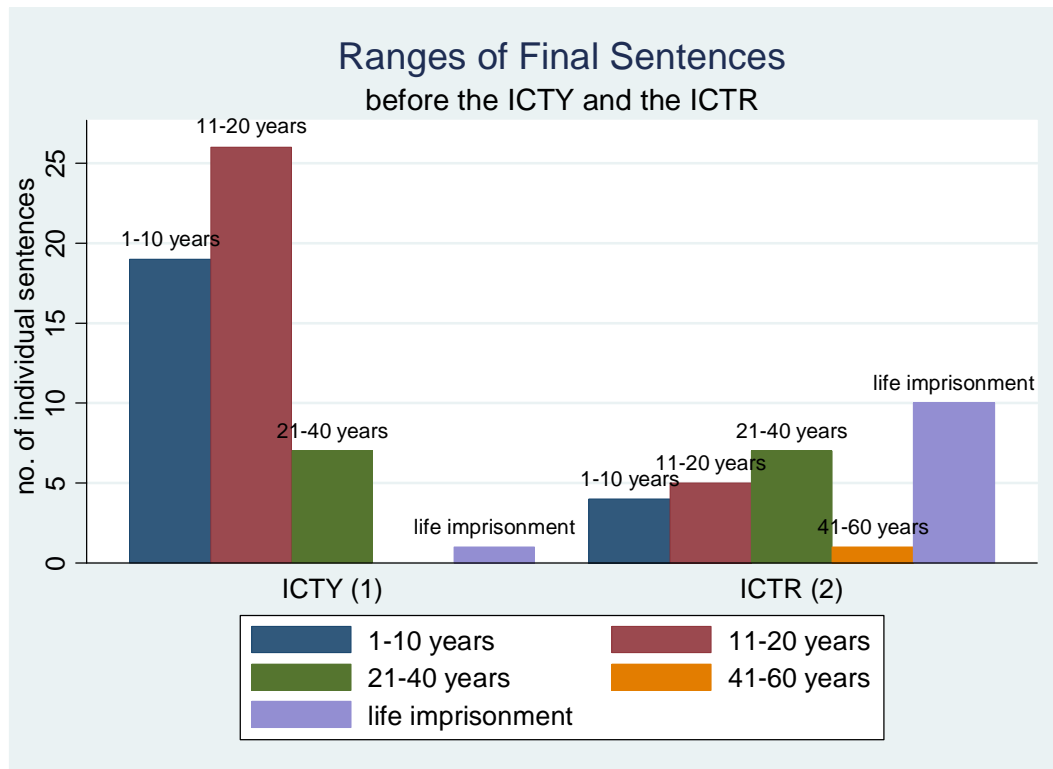
²³ The Annex contains tables showing not only the mean sentence at the trial and appeal stage but also the median sentence, which at the trial stage is 15 years imprisonment for the ICTY and 28.5 years imprisonment for the ICTR. For appeal cases, the median sentence is 15 years imprisonment at the ICTY, and 45 years imprisonment at the ICTR. See Annex, tables nos.2-3, p.vii.



Even when taking into account only ‘final sentences’,²⁴ the substantial difference between the harsher sentences meted out by the ICTR and the more lenient ones imposed by the ICTY does not change. The ICTY shows, in fact, a majority of final sentences (26 cases) in the range between 11 to 20 years imprisonment, with 19 final sentences of less than 10 years imprisonment. At the ICTR, the majority of final sentences is represented by life sentences (10 cases), and only 4 sentences are for less than 10 years imprisonment.

The following graph helps visualize the number of final sentences before both Tribunals comprised in the ranges: 1-10 years imprisonment; 11-20 years imprisonment; 21-40 years imprisonment; 41-60 years imprisonment; life imprisonment.

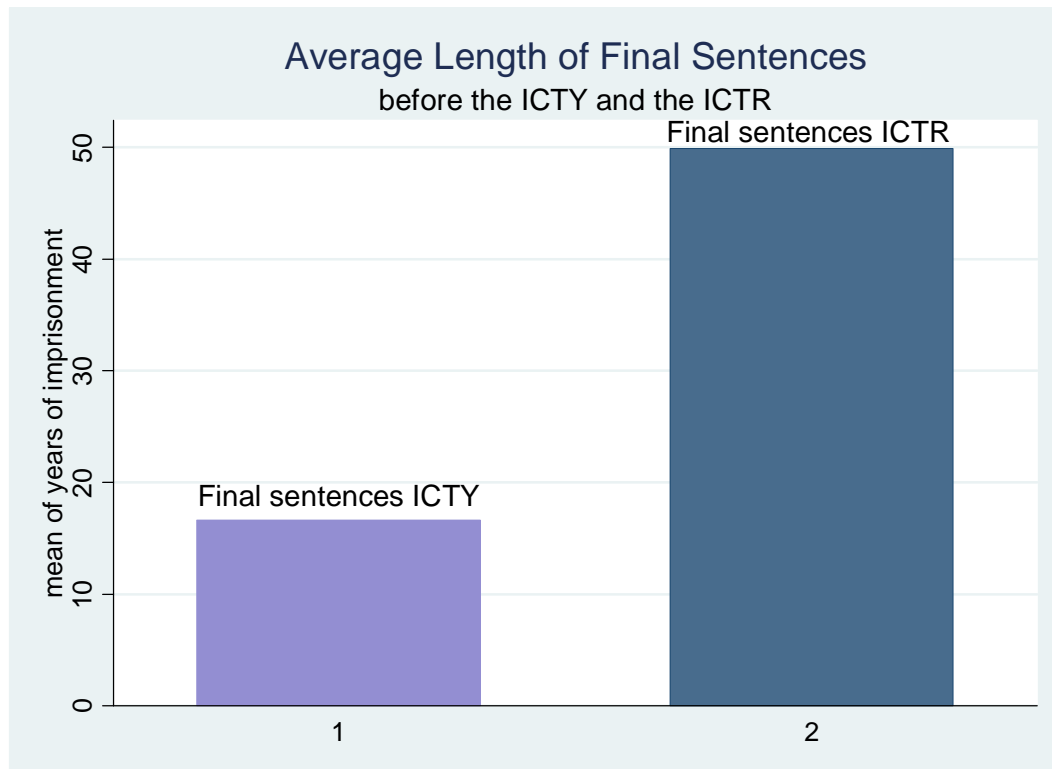
²⁴ As of December 2007, they represent a total of 80 individual cases, with 53 final sentences at the ICTY, and 27 final sentences at the ICTR.



Of those sentences that have become final and definitive, the average is of **16,6** years imprisonment at the ICTY,²⁵ and **49,8** years imprisonment at the ICTR, as illustrated by the following graph:²⁶

²⁵ A number of lengthy sentences issued by ICTY Trial Chambers have then been reduced on appeal, see for instance: the *Stakic* appeal case (where the trial sentence of life imprisonment was turned into 40 years imprisonment), the *Kristic* appeal case (the 46 years sentence was reduced to 35 years imprisonment by the Appeals Chamber), the *Blaskic* case (Blaskic's sentence of 45 years imprisonment was reduced to only 9 years on appeal, due to the fact that the Appeals Chamber *inter alia* quashed most of the convictions related to his command responsibility considering that they had not been established).

²⁶ The Annex contains a table which, besides the mean final sentence, also shows the median final sentence, which is 15 years imprisonment for the ICTY, and 32 years imprisonment for the ICTR. See Annex, table n.4, p.vii.



These indications regarding the average length of penalties and the differences in harshness of penalties before the two ad hoc Tribunals could already allow for several considerations, for instance the inference that ICTR sentences are probably lengthier due to the fact that they are associated with convictions of genocide. This should be verified in the following paragraph.

b) Type of crime and harshness of penalties

Is it possible to verify, from the sentences meted out by the ad hoc Tribunals, the precise correlation between the crime(s) of which the accused has been convicted and the harshness of the penalty received? An attempt is made in this paragraph, although numerous elements exist that produce slightly artificial findings.

For each individual accused found guilty of crimes under the jurisdiction of the ad hoc Tribunals, information related to the type of crime for which the offender was convicted and the length of the sentence received was collected. A caveat should be put forward: in consideration of the fact that the majority of offenders was convicted of several counts related to more than one type of crime (i.e. at the same time, violations of different types of crimes: war crimes plus crimes against humanity, crimes against

humanity plus genocide, and so on), some individual accused who committed, for instance, war crimes *and* crimes against humanity are naturally taken into consideration twice - both amongst offenders convicted of war crimes and amongst offenders convicted of crimes against humanity. To relate the nature and type of crime to the actual *quantum* of penalty is a difficult exercise, mainly due to the fact that this relationship is already of an ambiguous nature at the doctrinal and theoretical level. Many descriptive factors are concerned when nature and type of crime are at stake: elements related to victimization, to the modalities of commission, to the perpetrator, and so on. It is therefore a relationship that cannot fully be controlled statistically.

A further problem encountered when calculating the average length of sentences associated to the different types of crime is that, as already observed in Chapter 3, when convictions are entered for violations of more than one type of crime, very rarely do judges specify the amount of penalty for each crime; on the contrary, in the majority of cases, they simply pronounce the amount of the single sentence imposed for all the crimes committed. Therefore, it is not possible to precisely calculate the average amount of punishment meted out for war crimes, crimes against humanity and genocide, given that almost all cases present convictions entered for two or three categories of those crimes, and data relating to the 'pure' quantity of penalty imposed 'only' for war crimes, 'only' for crimes against humanity, and 'only' for genocide are not available.

However, when trying to give a general picture of the type of convictions entered, we can observe that the ICTY imposed – at the trial stage – a majority of convictions for crimes against humanity (in the case of 52 individuals), while 47 cases concerned war crimes in general (including both Article 2 and Article 3 ICTY St.),²⁷ and only 2 cases resulted in convictions for genocide.²⁸ At the appeals stage, the picture is proportionally similar. Out of 35 individual appeal cases, 30 convictions are for crimes against

²⁷ More specifically, 43 convictions of violations of the laws or customs of war (Article 3 ICTY St.), and 15 convictions of grave breaches of the Geneva Conventions of 1949 (Article 2 ICTY St.).

²⁸ These are the cases of General Radislav Krstic (*inter alia*, found guilty by the Trial Chamber of genocide under Article 4 ICTY St. for his participation in two criminal plans: initially to ethnically cleanse the Srebrenica enclave of all Muslim civilians, and later to kill men of an age for military service in Srebrenica); and Vidoje Blagojevic (convicted on trial of complicity to commit genocide by aiding and abetting genocide, under Article 4 St.). The Appeals Chamber quashed Blagojevic's conviction of genocide and reduced the sentence of eighteen years imprisonment imposed by the Trial Chamber to a sentence of fifteen years imprisonment (See *Prosecutor v. Blagojevic and Jokic*, Case No.IT-02-60-A, Appeal Judgement, 9 May 2007, 'Disposition', at p.137).

humanity, 28 for war crimes in general (including both Article 2 and Article 3 ICTY St.),²⁹ and only one conviction is for genocide.³⁰

Before the ICTR, at the trial stage, the majority of defendants was convicted of crimes against humanity (27 cases) and of genocide (26 cases); while only 1 accused was convicted of war crimes, in particular violations of common Article 3 to the Geneva Conventions (Article 4 ICTR St.).³¹ The judgements rendered by the Appeals Chamber are also similar: out of 21 appeals, a large majority of convictions were for genocide (20 individual convictions) and crimes against humanity (19 individual convictions), and very few cases of war crimes under Article 4 ICTR St. (3 convictions for violations of common Article 3 of the Geneva Conventions).³²

When considering only ‘final sentences’, out of 53 final individual cases at the ICTY and 27 at the ICTR, the majority of convictions are still for crimes against humanity before both Tribunals,³³ followed by a very large number of final convictions for genocide at the ICTR,³⁴ and for war crimes at the ICTY.³⁵

The following graph summarises the distribution of cases per type of crime before the ICTY and the ICTR, only in relation to ‘final sentences’:

²⁹ More specifically, 27 convictions of violations of the laws or customs of war (Article 3 ICTY St.), and 8 convictions of grave breaches of the Geneva Conventions of 1949 (Article 2 ICTY St.).

³⁰ This is the *Krstic* case, where the Appeals Chamber confirmed the conviction for genocide but overturned the findings in relation to the mode of liability: it set aside Krstic’s conviction as a participant in a joint criminal enterprise to commit genocide, and found him guilty of ‘aiding and abetting genocide’. See *Prosecutor v. Krstic*, Appeal Judgement, Case No.IT-98-33-A, 19 April 2004, ‘Disposition’. On the other hand, as already stated, Blagojevic’s Trial conviction for genocide was quashed by the Appeals Chamber.

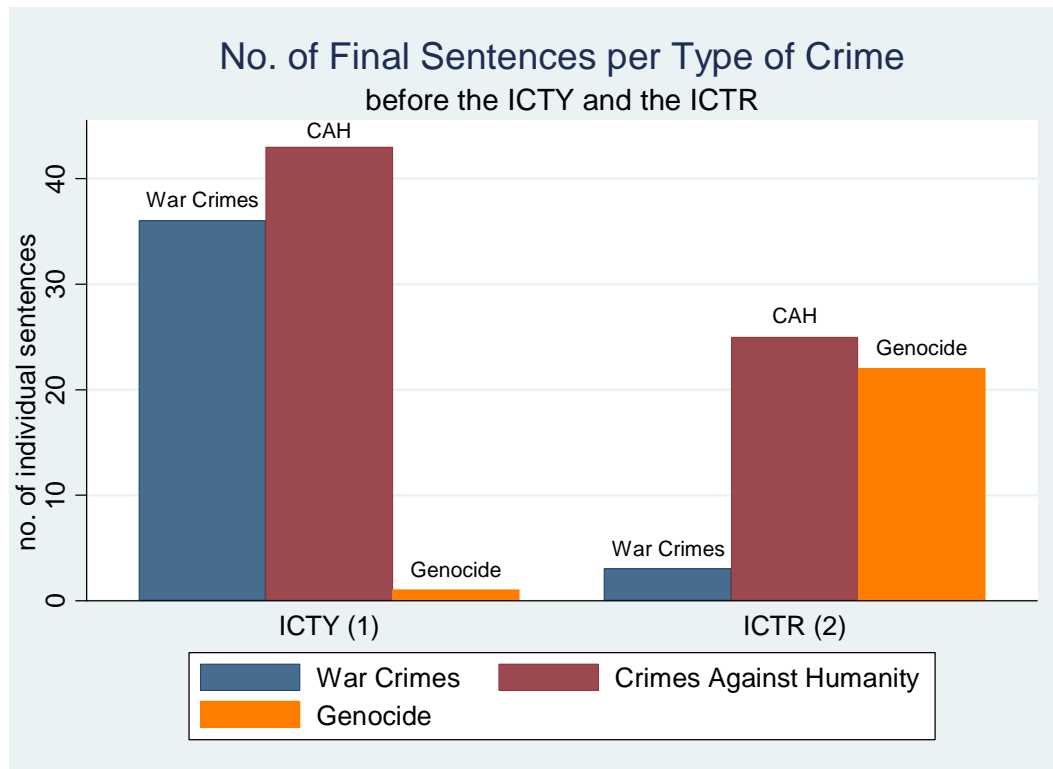
³¹ This was the case of Samuel Imanishimwe, who was convicted *inter alia* of murder, torture and cruel treatment as serious violations of common Article 3 to the Geneva Conventions. See *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*, Trial Judgement, Case No.ICTR-99-46-T, 25 February 2004, paras.806, 824-826.

³² Besides the *Imanishimwe* case already mentioned, the other 2 convictions for war crimes under Article 4 ICTR St. were entered directly at the appeal stage. This is true for the following two accused: Georges Rutaganda, for whom the Trial Chamber did not enter convictions of war crimes (*Prosecutor v. Rutaganda*, Case No.ICTR-96-3, Judgement and Sentence, 2 February 1999, ‘Verdict’), whereas the Appeals Chamber – maintaining the sentence of life imprisonment – also convicted the accused of violations of common Article 3 of the Geneva Conventions (*Prosecutor v. Rutaganda*, Case No.ICTR-96-3-A, Appeal Judgement, 26 May 2003, ‘Dispositif’); Laurent Semanza, whose sentence was increased by the Appeals Chamber from 25 to 35 years imprisonment, and also convictions for serious violations of Common Article 3 of the Geneva Conventions were entered for several counts (ordering murder; aiding and abetting murder; instigating rape, torture and murder; and committing torture and intentional murder). See *Prosecutor v. Semanza*, Case No.ICTR-97-20-A, Appeal Judgement, 20 May 2005, ‘Disposition’.

³³ More precisely, 43 final convictions at the ICTY, and 25 final convictions at the ICTR.

³⁴ Twenty-two cases out of 27 final individual convictions.

³⁵ Thirty-six convictions for war crimes in general (including both Article 2 and Article 3 ICTY St.), out of 53 final individual convictions.



Against this background, we can now consider the relation between type of crime and length of sentence.³⁶ Considering sentences imposed by Trial Chambers, at the ICTY the average prison term for war crimes is **18.7 years** imprisonment;³⁷ the average sentence for crimes against humanity is **19.2 years** imprisonment; the highest average is for genocide cases (average prison term: **32 years** imprisonment).

At the ICTR, we can observe the highest average prison term for cases of genocide (**60 years** imprisonment), followed by an average sentence of **54 years** imprisonment for cases involving crimes against humanity, and an average sentence of **27 years** for convictions involving war crimes as violations of common Article 3 to the Geneva Conventions (Article 4 ICTR St.).

When considering only ‘final sentences’, results are fairly similar, although with some minor divergences at the level of war crimes and crimes against humanity. Starting with the ICTY, the average prison term for war crimes is **18.9 years**

³⁶ Tables related to mean and median sentences (trial, appeals, and final sentences) of both Tribunals in relation to the different types of crime can be found in the Annex, at pp.x-xi (tables nos.5-7).

³⁷ In particular, the average prison term for war crimes as grave breaches of the Geneva Conventions (Article 2 ICTY St.) is **19.7 years** imprisonment, followed by **19.2 years** imprisonment as the average prison term for war crimes as violations of the laws or customs of war (Article 3 ICTY St.).

imprisonment;³⁸ the average sentence for crimes against humanity is **18 years** imprisonment; and the highest average penalty is for genocide cases (**35 years** imprisonment), which is actually represented by only one case.³⁹

At the ICTR, again the highest average sentence is for genocide cases (**58.8 years** imprisonment), followed by an average sentence of **48.8 years** imprisonment for convictions for crimes against humanity, and an average prison term of **23.5 years** for war crimes as violations of common Article 3 to the Geneva Conventions (Article 4 ICTR St.).⁴⁰

The findings above thus seem to show that genocide is punished more severely than crimes against humanity and war crimes, and also that crimes against humanity are punished with (slightly) more severe sentences than war crimes.

It should be reiterated that, in the absence of a systematic imposition of specific penalties in relation to each crime/category of crime by the Chambers, it is not possible to infer the precise number of years ‘allocated’ to war crimes, crimes against humanity or genocide from the single and global sentence imposed. The average penalty imposed for each type of crime is therefore not ‘pure’, in the sense that when the accused is found guilty of war crimes and crimes against humanity at the same time – and a global sentence is meted out without specification of the number of years imposed for the two different convictions – then that individual case has necessarily been considered to calculate both the average sentence for war crimes, and the average sentence for crimes against humanity.

In any case, in addition to calculating the average sentence in relation to the various categories of crimes, other statistical methods can help to confirm and reinforce the above findings on harshness of penalties and type of crimes.

³⁸ The average prison term for war crimes as grave breaches of the Geneva Conventions (Article 2 ICTY St.) is **16.8 years** imprisonment, followed by **20 years** imprisonment as the average prison term for war crimes as violations of the laws or customs of war (Article 3 ICTY St.).

³⁹ That is the final sentence of 35 years imprisonment imposed by the Appeals Chamber on General Radislav Krstic.

⁴⁰ This has been calculated by omitting the appeal sentence for life imprisonment in the *Rutaganda* case, where more substantial convictions were also entered for crimes against humanity and genocide. The sentence of life imprisonment would in fact have altered the result and avoided a more realistic representation of the average penalty for war crimes. Thus, only the 3 other cases were considered, namely the sentence of 35 years in the *Semanza* appeal case, the sentence of 27 years in the *Imanishimwe* trial case, and the sentence of 12 years in the *Imanishimwe* appeal case.

We could try to calculate the average sentence for convictions of only one type of crime (e.g., only war crimes, only crimes against humanity, only genocide), although the number of observations is certainly modest.⁴¹

For instance, considering all trial judgements before both Tribunals (in order to have a greater number of observations), convictions for only genocide (excluding the contemporary presence of convictions for other types of crime) represent only 3 cases, with an average sentence length **45 years** of imprisonment.

In 27 cases (again all trial judgements before both Tribunals) the sentence was meted out only on the basis of convictions for crimes against humanity (again excluding the contemporary presence of convictions for other types of crime), with an average sentence length of **12.3 years** imprisonment.

With regard to war crimes (grave breaches of the Geneva Conventions [Art.2 ICTY], including violations of Article 3 common to the Geneva Conventions [Art.4 ICTR], and violations of the laws or customs of war [Art.3 ICTY]), there were 18 cases where convictions were entered at the trial stage only for war crimes, with an average sentence length of **9.7 years** imprisonment.

The main disadvantage of this method is that the number of observations is too modest to produce significant results.

In order to run a further verification of how significant is, in terms of length of sentence, the type of crime of which an accused is convicted, we can also consider three different aggregates: 1. war crimes plus crimes against humanity; 2. crimes against humanity plus genocide; 3. genocide plus war crimes.⁴²

If the average sentence is higher for the second group and the third group than for the first, then we would have further confirmation that, in the case-law of the ad hoc Tribunals, genocide is punished with the most severe sentences, immediately followed by crimes against humanity and then war crimes.

Considering all trial judgements before both Tribunals, data show that the average sentence when crimes against humanity and war crimes are present at the same time is **24.4 years** imprisonment. The average sentence when genocide and crimes against

⁴¹ A table illustrating the number of cases (at the trial level), mean and median sentences of both Tribunals (considered together) in relation to convictions for only one type of crime can be found in the Annex, at p.xi (table n.8).

⁴² See table n.9, Annex, p.xi.

humanity are present at the same time is **59.6 years** imprisonment. The average sentence for the aggregate genocide plus war crimes is **30.3 years** imprisonment.

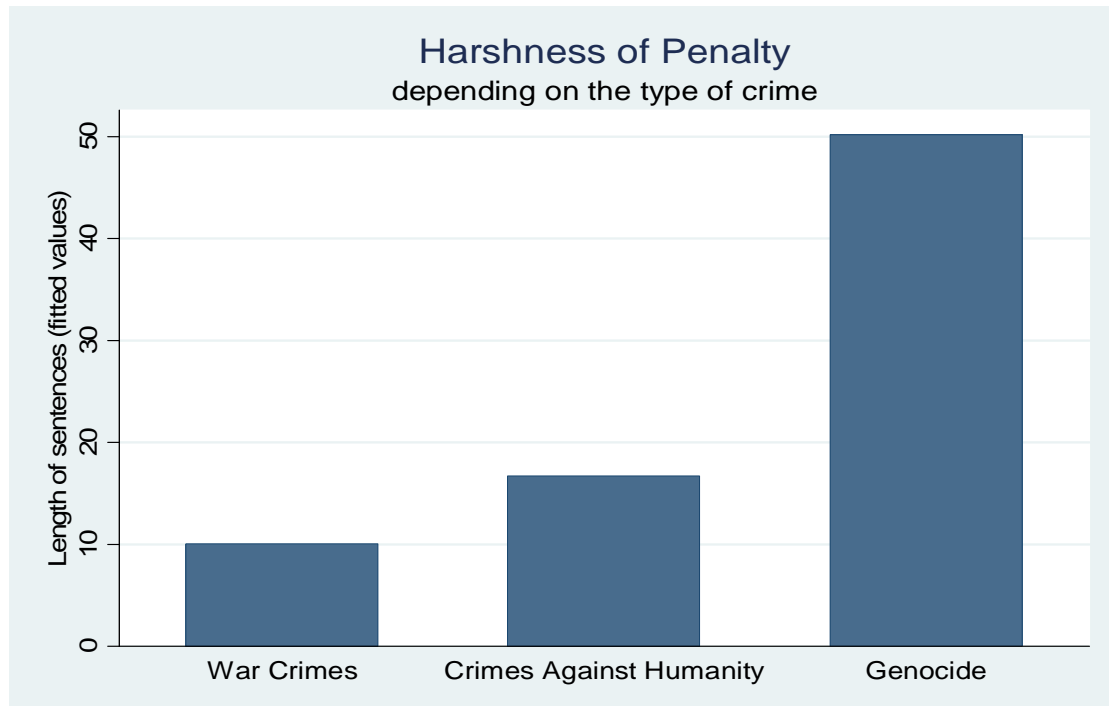
It thus appears that the relative seriousness attached to the three types of crimes is again respected. Therefore, this result represents an additional confirmation of the factual hierarchy of international crimes in the sentencing jurisprudence of the ad hoc Tribunals.

Furthermore, the general regression run on the influence that the three different types of crimes exercise on the length of the final sentence (both before the ICTY and the ICTR) show that there is an apparent gradation between the different crimes according to which war crimes (i.e. grave breaches of the Geneva Conventions [Art.2 ICTY], including violations of Article 3 common to the Geneva Conventions [Art.4 ICTR]) attract the lowest sentences, whilst genocide attracts the harshest penalties.⁴³ Crimes against humanity are associated with sentences lower than those imposed in genocide cases but higher than those imposed for different types of war crimes.⁴⁴ The regression indicates a significant impact of the type of crime on the length of sentence especially for crimes against humanity and genocide.⁴⁵ This is summarized by the following graph:

⁴³ More specifically, the regression shows that convictions for genocide attract an average of 43 more years of imprisonment. See Annex, p.xii.

⁴⁴ Convictions for crimes against humanity attract an average of 10 more years of imprisonment. See Annex, p.xii.

⁴⁵ They present, in fact, a perfect correlation with a 'P' value equal to 0 ($P = 0.00$) for genocide, and a significant correlation for crimes against humanity, with a 'P' value equal to 0.056. See Annex, p.xii.



In addition, for crimes against humanity and genocide, the index of correlation between the gravity of the crime and the length of the sentence is positive and significant, demonstrating a high correlation especially between the length of sentence and the crime of genocide:⁴⁶ this proves the fact that the more severe the crime (genocide), the longer the sentence. It further confirms the important role of the ‘gravity of the crime’ factor on sentencing.

To summarise, the above results – differently combined and related to various tests conducted on the length of sentences in association with different types of crimes – seem quite significant and unequivocal, revealing higher sentences associated with convictions for genocide, immediately followed by medium sentences when crimes against humanity are committed, and terminating with war crimes, associated with the most lenient penalties.

It thus appears that – contrary to assertions by the majority of Chambers at the ad hoc Tribunals – there is in fact a hierarchy between the different types of crime under their jurisdiction. The statistical analysis shows a clear differentiation of the average penalty for genocide, crimes against humanity and war crimes, and the difference is

⁴⁶ The index of correlation between length of sentences and genocide is in fact 0.62, with a ‘P’ value equal to 0 (P=0). See Annex, p.xiii.

especially evident between genocide and the other crimes, confirming genocide as ‘the crime of crimes’.

A doctrinal difference between the categories of crimes has been made by several scholars, whereas the only prior ‘quantitative’ and statistical investigation concerning the way in which different types of crime relate to different penalties is represented by the study of J. Meernik and K. King, who analysed the correlation between the type of crime (war crimes, crimes against humanity, and genocide) and the length of the sentence.⁴⁷

The analysis conducted here arrives at the same results reached by the study of Meernik and King, who found that the average sentence for genocide was higher than that for other crimes, and that the average penalty for crimes against humanity was higher than that for war crimes. Furthermore, given the inclusion in this present study of the sentencing jurisprudence of the ICTR, and given the presence of more than one case of conviction for genocide,⁴⁸ the results achieved can certainly be considered as sufficiently representative and statistically significant.

c) Modes of liability

When collecting data for each individual accused, a distinction has been made between offenders convicted under Articles 7(1) or 6(1) of the ad hoc Tribunals’ Statutes, offenders convicted under Articles 7(3) or 6(3), and offenders convicted under both.

The analysis will now clarify whether there is a relationship between the type of responsibility for which the accused has been found guilty and the length of sentence.

Firstly, at the descriptive level it should be said that almost all cases present convictions entered under paragraph 1 of Articles 7 and 6: more precisely, 49 cases out of 51 before the ICTR, and all cases but 4 before the ICTY (101 out of 105 individual cases). On the other hand, we find 18 cases before the ICTY where convictions were also entered under Article 7(3) - therefore the accused was convicted under both 7(1)

⁴⁷ MEERNIK J., KING K., ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, *Leiden Journal of International Law*, 16(2003), at pp.734-736.

⁴⁸ In the study by Meernik and King, as stated at p.735 of their article, only the ICTY case-law was analyzed and therefore only one case of genocide (General Krstic on trial proceedings) was included, thus rendering the analysis not effectively statistically significant in this regard.

and 7(3) - and 4 cases where individuals were convicted only under Article 7(3).⁴⁹ Before the ICTR, we have 13 cases of convictions entered under both Article 6(1) and 6(3), and 2 cases of convictions for only Article 6(3) responsibility.⁵⁰

We can now consider the average sentence associated with the various options possible (that is with convictions for only 7(1)/6(1), only 7(3)/6(3), or both).⁵¹

Before the ICTY, the average trial sentence for convictions entered only under Article 7(1) is **18.7 years** imprisonment, whereas before the ICTR the mean penalty for the same case (convictions under only Article 6(1)) is higher: **50 years**.⁵²

When considering only 'final sentences', the results are similar: at the ICTY, the average final sentence for convictions entered under only Article 7(1) is **17.8 years** imprisonment; at the ICTR, the average final sentence is **47 years** imprisonment.

With regard to convictions entered under only Article 7(3) or 6(3), the number of observations is very limited. At the ICTY, in the 4 cases where convictions were entered under only Article 7(3), the average trial sentence is **4.3 years** imprisonment; while at the ICTR, in the only case (the *Rugambarara* case) where convictions were entered under only Article 6(3), the penalty imposed by the Trial Chamber was **11 years** imprisonment. As the number of cases of this kind is very low, this result is not considered significant or indicative of a particular trend before the ICTY, although it is true that in the few cases considered the sentences meted out were rather lenient.⁵³

⁴⁹ This is the case of: Pavle Strugar (Trial sentence), Enver Hadzihasanovic (Trial sentence), Amir Kubura (Trial sentence), and Naser Oric (Trial sentencing judgement). As of December 2007, these cases are pending before the Appeals Chamber.

⁵⁰ These two cases are represented by: Juvenal Rugambarara (Trial sentence); and Ferdinand Nahimana (Appeal sentence), where the Appeals Chamber quashed the previous convictions of the accused under Article 6.1 and confirmed only those convictions entered under Article 6.3. It also substituted the penalty of life imprisonment imposed by the Trial Chamber with a 30 year-term of imprisonment. See *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, 'Dispositif'.

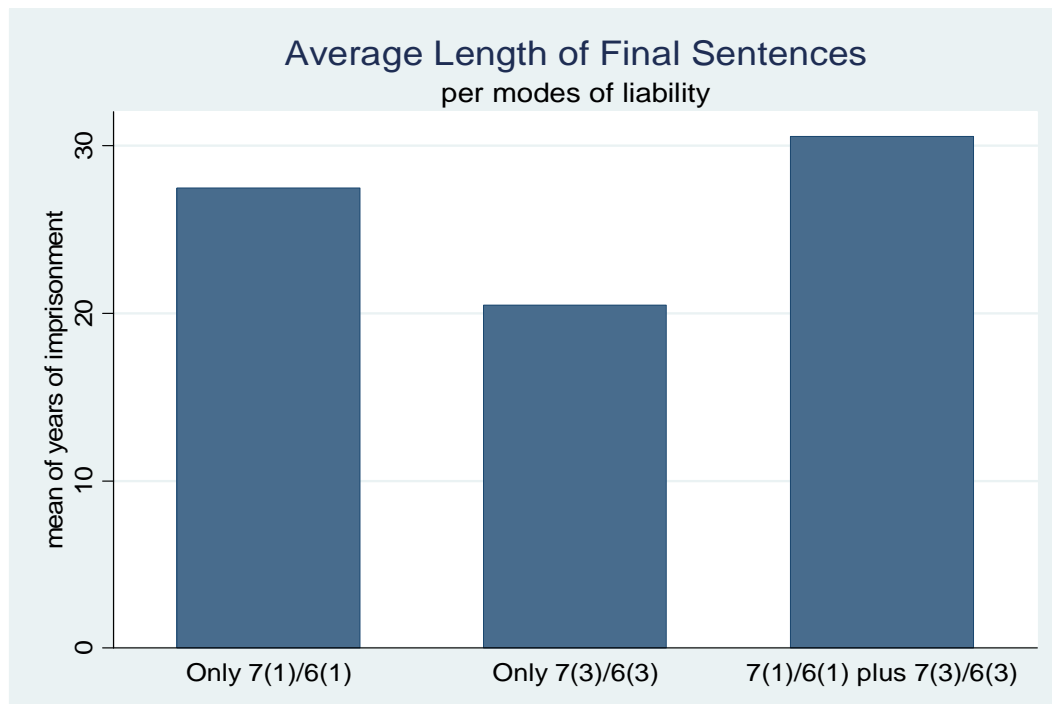
⁵¹ Tables illustrating the number of cases, mean and median sentences of both Tribunals in relation to trial, appeals, and final convictions for only Art.7(1)/6(1), only Art.7(3)/6(3), or both, can be found in the Annex, pp.xiii-xiv (tables nos. 10-12).

⁵² The proportion is also confirmed when analysing the average sentence for appeal cases. At the ICTY, the mean appeal sentence for convictions entered only under Article 7(1) is 20.8 years imprisonment, whereas at the ICTR the average sentence for convictions under only Article 6(1)) is again higher: 59 years.

⁵³ In the *Strugar* case, the accused was sentenced to 8 years imprisonment; in the *Hadzihasanovic and Kubura* case, the two accused were sentenced, respectively, to 5 and 2 and a half years; in the *Oric* case, the accused was sentenced to 2 years imprisonment. As already stated, these cases are not finalized as they are still pending before the Appeals Chamber.

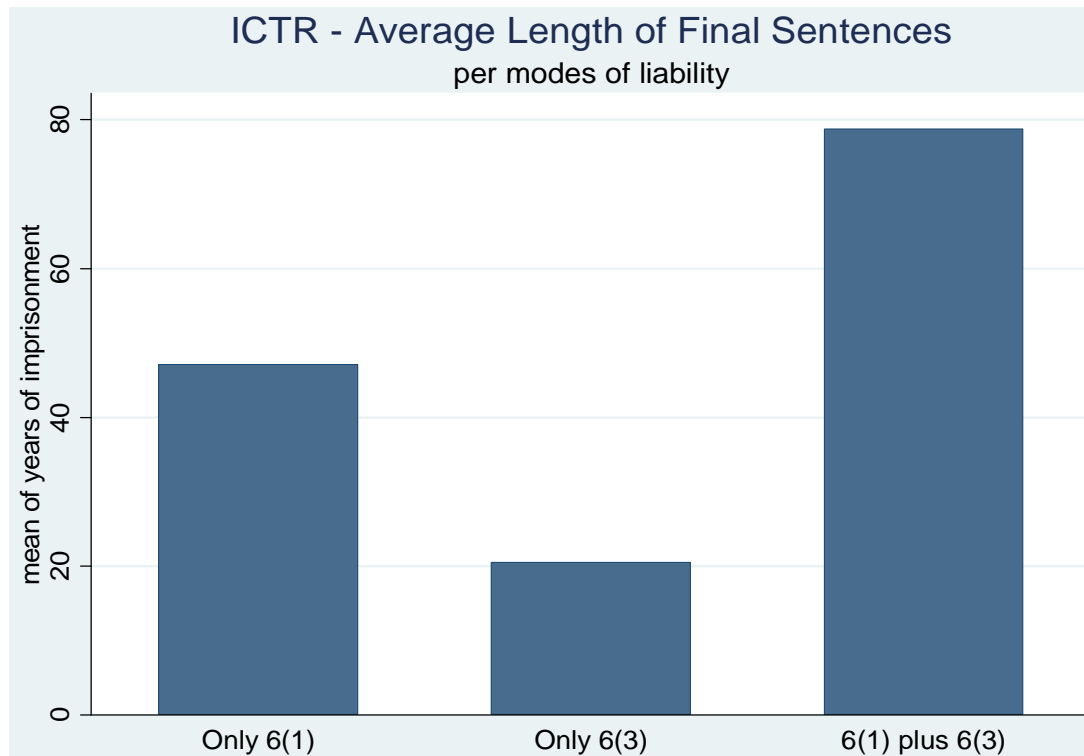
Cases regarding convictions for both paragraph 1 and 3 of Articles 7 and 6 present – at the trial stage – a higher average sentence before the ICTR (**65.4 years** imprisonment) than before the ICTY (**12.7 years**).⁵⁴ Final sentences for convictions under both paragraphs 7(1)/6(1) and 7(3)/6(3) present an average of **11.3 years** imprisonment at the ICTY, and an average of **78.7 years** imprisonment at the ICTR.

It thus appears that, in general terms, convictions for modes of liability under Article 7(1) or 6(1) attract higher penalties than convictions for modes of liability under only Article 7(3) or 6(3), as visualised by the following graph:

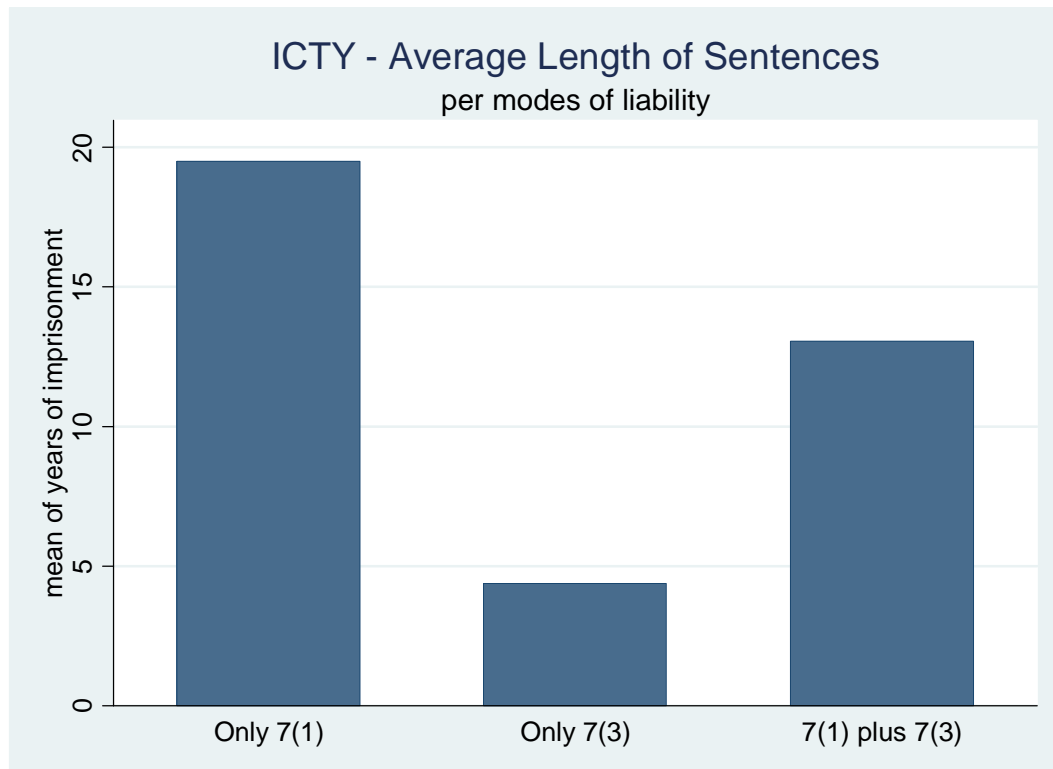


Furthermore, it is interesting to note that – only before the ICTR – convictions under both Article 6(1) and 6(3) seem to produce lengthier final penalties compared to convictions entered only under Article 6(1):

⁵⁴ At the appeal stage, the average sentence for convictions entered under both paragraphs (1) and (3) of Articles 7 and 6, is of 78.7 years imprisonment at the ICTR, and of 13.8 years imprisonment at the ICTY. See Annex, p.xiv, table no.11.



In fact, what can be inferred from these data related to the ICTR is precisely a confirmation of what has been observed in Chapter 3 in the course of the doctrinal analysis of the sentencing jurisprudence of the ad hoc Tribunals. The fact that Chambers of the ICTR have frequently used modes of liability as aggravating factors was thereby highlighted and criticised. In some instances ICTR judges, after having entered convictions under both Article 6(1) and 6(3), also considered the responsibility of superiors under Article 6(3) as an aggravating factor. This is reflected in the above results derived from the statistical analysis, especially when comparing the same situation with ICTY cases, where a similar phenomenon is not present, and convictions for both paragraphs of Art.7 are on average more lenient than convictions entered for liability under only Art.7(1), although still harsher than those meted out for cases of liability under Art.7(3), as shown by the following graph:



Given that the resulting increased number of years for convictions under both paragraphs of Article 6 is particularly significant before the ICTR, this would prove – also in numerical terms – that modes of liability have been used incorrectly as aggravating factors. It is therefore again maintained that this practice endangers the rights of the accused and misinterprets the proper and distinct role that modes of liability and circumstances of crime should have in a correctly formulated law of sentencing.

Besides these considerations, the general regression run between the variables ‘years of imprisonment’ and ‘modes of liability’ (in relation to final sentences before both Tribunals) shows that there is no particularly significant correlation between the length of sentences and modes of liability under Article 7(1)/6(1) or 7(3)/6(3).⁵⁵

⁵⁵ The regression between length of final sentences and responsibility under Article 7(1)/6(1) presents a ‘P’ value substantially different from 0 (P= 0.66). The ‘P’ value of the regression between length of sentences and responsibility under Article 7(3)/6(3) is (P= 0.73). See, Annex, pp.xvi-xvii, where the regression for trial and appeals sentences is also indicated.

This is further demonstrated by running a pair-wise correlation between the variables. In relation to final sentences, the correlation is very low between years of imprisonment and both 7(1)/6(1) responsibility⁵⁶ and responsibility under 7(3)/6(3).⁵⁷

Meernik and King, in their empirical analysis based on 35 individual cases before the ICTY, already found that there was no significant correlation between modes of liability and sentence length, and thus no reason to expect harsher penalties for those accused found guilty of both individual and superior responsibility, or more lenient sentences for accused found guilty of only one type of responsibility.⁵⁸

The analysis conducted here shows overall similar results, and these are probably even more revealing given the broader sample, although still numerically scant in relation to convictions entered only under 7(3) or 6(3) modes of liability.

However, a more conclusive result was found in respect of the increased harshness in sentencing deriving, before the ICTR, from entering convictions under both Article 6(1) and 6(3) and then considering superior responsibility as a further aggravating factor.

d) *Perpetrator – Characteristics*

i) Type of participation

An important element in sentencing appears to be the physical involvement of the perpetrator in the commission of crimes. The doctrinal analysis in Chapter 3 demonstrated that the manner in which crimes are committed, whether through direct or indirect perpetration/participation and by which means, is a relevant factor in sentencing. In fact, in the opinion of judges, having ‘dirty’ or ‘clean’ hands seems to have a substantial impact on the length of the penalty imposed. It is now possible to verify this by statistical means.

The variables chosen to corroborate empirically that assumption are: ‘direct participation’ and ‘indirect participation’ as *objective* factors describing whether the accused committed the crimes with ‘dirty’ or ‘clean’ hands. The former refers to all

⁵⁶ The index of correlation is 0.03, with a ‘P’ value of P= 0.73. See p.xvii of the Annex.

⁵⁷ The index of correlation is 0.02, with a ‘P’ value of P= 0.83. See p.xvii of the Annex.

⁵⁸ MEERNIK J., KING K., ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, *Leiden Journal of International Law*, 16(2003), at p.738.

cases in which there has been personal involvement by the perpetrator in the commission of the acts of the crime, in the sense that the accused personally and physically perpetrated the offence (personal execution of the crime, for instance murder, torture, beatings, etc.); the latter refers to all other cases (including aiding and abetting), in which the perpetrator was not physically involved ('clean hands') in the commission of the crime. The category 'direct participation' does not include situations where the accused ordered, helped, was present or approved the commission of a specific crime.

I did not classify the various means of 'participation' in the commission of crimes, in the sense that I only made a distinction between direct and indirect participation, subsuming a number of different behaviours (aiding and abetting, instigation, approval, moral support, and so on) into these two main categories. It might therefore be interesting, for future research, to draw a more detailed distinction between different forms of participation and different types of 'proximity' to the commission of the crime(s). The fact of taking into account various patterns of participation may allow the individuation of more variables and a differentiation between various degrees of physical participation.

In addition, for the purposes of this analysis, in this section I will also consider the aggravating circumstance 'direct participation' and the mitigating circumstance 'indirect participation' as *subjective* factors according to the evaluation (in aggravation or in mitigation) that judges gave to the type of participation of the accused in the crimes.

Firstly, to start with some descriptive statistics, when analysing the data for trial cases before the ICTY, we observe 39 individual cases of indirect participation in the commission of crimes, and 31 cases of direct perpetrators. At the Appeals level, we have 20 cases of indirect participation and 15 cases of direct participation.⁵⁹

Before the ICTR, on the other hand, at the trial level 18 cases involved indirect participation, and 12 cases direct participation in the commission of the crime. On appeal, there were 9 cases of indirect and 12 of direct participation.⁶⁰

⁵⁹ When taking into account only final sentences at the ICTY, 28 individual cases are of indirect participation, and 25 of direct participation in commission of the crime.

⁶⁰ When taking into account only final sentences at the ICTR, 15 individual cases are of indirect participation, and 12 of direct participation in commission of the crime.

Upon verifying the relation between type of participation and length of sentence at the ICTY, there appears to be no appreciable difference in sentencing for direct or indirect perpetrators.⁶¹ In fact, the average trial sentence associated with indirect participation is **16.8 years** imprisonment, while the average trial sentence associated with direct participation is **16.7 years** imprisonment. In relation to appeal sentences and final sentences, results are similar and show a substantial equivalence in the length of sentences for direct and indirect participation in the commission of crimes.⁶²

Conversely, before the ICTR, there is a more substantial difference in sentencing between cases involving direct perpetrators, where the average trial sentence is **68 years** imprisonment, and cases involving indirect perpetrators, where the average trial sentence is **43 years** imprisonment. The difference is also maintained for appeal and final sentences.⁶³

These results thus seem to indicate that while for ICTY Chambers there is no direct or automatic link between harsher penalties and perpetrators with ‘dirty hands’, conversely ICTR Chambers have sentenced direct perpetrators more severely than indirect ones.

However, there is a very low statistical correlation, especially for the ICTY, between the two variables of ‘years of imprisonment’ and ‘type of participation’ (whether direct or indirect), and this seems to indicate that the factor ‘type of participation’ in the commission of crimes exercises very little influence on the final length of sentences. At the ICTR results are slightly different and more indicative of a certain correlation between length of sentences and direct or indirect participation to the commission of crimes.⁶⁴

⁶¹ See related tables with mean and median sentences for trial, appeals, and final cases: Annex, p.xviii, (tables nos. 13-15).

⁶² At the appeal stage, the average sentence for cases of indirect participation is 19.6 years imprisonment, and the average sentence for cases of direct participation is 20 years imprisonment. When considering only final sentences, the average sentence length is 16.5 years imprisonment for indirect participation, and 16.7 years for direct participation. See Annex, p.xviii, tables 14 and 15.

⁶³ At the appeal stage, the average sentence for cases of indirect participation is 49 years imprisonment, and the average sentence for cases of direct participation is 70.4 years. When considering only final sentences, the average sentence length is 33.4 years imprisonment for indirect participation, and 70.4 years for direct participation. See, Annex, p.xviii, tables 14 and 15.

⁶⁴ See Annex, p.xix. The index of correlation is 0,0007 (with a ‘P’ value of 0.99) for the ICTY, and 0.29 for the ICTR (with a ‘P’ value of 0.032).

This preliminary finding is further confirmed by the analysis of the two circumstances ‘direct participation’ and ‘indirect participation’.

Firstly, on a descriptive level, we should note that, when considering trial judgements, the aggravating factor ‘direct participation’ was used by judges at the ICTY in 29 cases out of 70, and by judges at the ICTR in 11 cases out of 30. The mitigating circumstance ‘indirect participation’ was used in only 5 cases by each Tribunal.

Secondly, the regression and the pair-wise correlations run between the two circumstances and the length of penalties (i.e. the variable ‘years of imprisonment’) show no significant or high relation between them,⁶⁵ meaning that there is no strong link between direct perpetration of crimes and harsher penalties, or between indirect perpetration and more lenient penalties. This should be a further argument in support of the view that direct or indirect participation are factors more properly related to assessment of the elements of crime and the participation of the accused therein, and should not be considered as circumstances of crimes, thus double counting the type of participation/commission of the offences by the accused.

ii) Leadership level

As highlighted in Chapter 3, one of the factors which acquires a fundamental importance in relation to a correct determination of the deserved penalty is the role of the accused in the commission of the crime and, in particular (in the case-law of the ad hoc Tribunals), the hierarchical position occupied by the accused in the civilian or military structure.

Chambers of the ICTY and ICTR have repeatedly affirmed that command responsibility or, in other words, the role of leadership exercised by the accused, should increase the final sentence meted out. In particular, they have also held that offenders who acted in a superior capacity, occupying a position of authority, deserve a harsher penalty than direct perpetrators.⁶⁶

⁶⁵ Details about the precise values of pair-wise correlations and regressions can be consulted in the Annex, at p.xxviii (tables nos.25-26), and pp.xxix-xxxiii (for the regressions).

⁶⁶ See, e.g. *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, paras.1250-1252; *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.788: ‘...In the case-law of the two Tribunals, there can be no doubt that command position may justify a harsher sentence, which must be that much harsher because the accused held a high position within the civilian or military command structure’; para.789: ‘...Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating

It should be ascertained, through the quantitative analysis of data, whether that assumption is true in practice, and whether there is an established pattern in the case-law of the ICTY and ICTR in relation to the influence exercised on the final penalty by the hierarchical position occupied by the accused. If statements of Chambers of the ad hoc Tribunals are true, then the findings of the empirical analysis should show that the harshest sentences correspond to cases where the accused occupied the highest ranks in the military or political structure.

To verify whether this correlation exists, two different variables can be compared and analysed: the ordinal variable indicating the ranking of the accused in the military or political hierarchy, and the variable indicating the type of participation of the accused in the commission of crime(s) (indirect participation or direct participation, i.e. perpetrators with ‘clean hands’ or ‘dirty hands’). In addition, a cross-check will also be done through the analysis of the aggravating circumstance ‘superior position’ in subparagraph f) of this chapter.

The overall scale of hierarchy constructed to classify the different accused according to their ranks is based on the following four categories:

- 1= low level offenders (mainly soldiers, prison-camp guards, simple civilian officers, etc.);
- 2= medium level offenders (mainly mid-level officials, such as camp commanders, lieutenant, local politician and so on, *Bourgmestre*, Pastor, medical doctor, *Conseiller*, etc.);
- 3= high-level offenders (such as colonels, generals, Chief-of-Staff of an Army, General of an Army, high level civilian officers, Prefect, Director, etc.);
- 4= high level politicians (such as Prime Minister, Minister, President of political parties, etc.).⁶⁷

circumstances, independently of the issue of the form of participation in the crime’; para.791: ‘...it can be concluded that command position is more of an aggravating circumstance than direct participation. This holds true insofar as, although direct participation by the commander does constitute an aggravating circumstance, the fact that he does not participate directly may not conversely justify a reduction in the sentence.’

⁶⁷ A more detailed classification of the hierarchical levels (military and civilian sectors) considered in the analysis, and of their differentiation between the ICTY and the ICTR, is offered in the Annex to this thesis, at pp.ii-iii.

In particular, I have created three ordinal variables (one for the military hierarchy, one for the civilian hierarchy, and a third one for the overall leadership level of the accused) to measure the various degrees of responsibility and power held by the accused. This classification proceeds per groups of hierarchy and does not entail a detailed distinction between each and every role occupied by the various accused; however, it is certainly useful for an immediate grasping of the substantial differences in importance between individual accused. Moreover, the distinction made between the two categories of the military and the civilian sectors (with the subsequent distinction between some different roles: 3 categories for the military sector and 4 categories for the civilian sector) is also useful to provide a picture of the roles and positions involved.

Starting with the ICTY, the overall picture of trial sentences shows a majority of individuals belonging to the military structure (58 cases), while 12 cases involve accused in the civilian sector. As specified above, within the variable ‘military rank’ three hierarchical levels were identified: low, medium, and high. With respect to those levels, the ICTY shows – for the military sector – a concentration of accused at the median hierarchical level (30 cases where military rank=2), 20 cases at the very low level of the hierarchy, and only 8 cases at the highest hierarchical military level.⁶⁸ As to the concentration of cases within the hierarchy of the civilian sector, there are three cases at level 2 of the civilian hierarchy, three cases at level 3, and six cases at level 4.⁶⁹

Continuing to the analysis of the leadership scale before the ICTR, the overall picture of trial cases analysed shows, contrary to what was observed for the ICTY, a majority of individuals belonging to the civilian/political sector (26 cases), with only 4 cases involving accused in the military structure.

Within the variable ‘civilian rank’, 4 hierarchical levels were identified: low level civilian officers/functions; a medium level including for instance the functions of *bourgmestre*, Pastor, medical doctor, *conseiller*, etc.; a higher level including for instance the civilian functions of Prefect, Director, etc.; a high hierarchical level

⁶⁸ These cases, belonging to the highest military hierarchy, are represented by the following accused: Tihomir Blaskic, Radislav Krstic, Mladen Naletilic, Stanislav Galic, Dragan Obrenovic, Miodrag Jokic, Mile Mrksic, Dragomir Milosevic.

⁶⁹ These cases, belonging to the highest spheres of the civilian structure, are represented by the following accused: Dario Kordic, Biljana Plavsic, Milan Babic, Radoslav Brdjanin, Momcilo Krajisnik, Milan Martic.

represented by politicians with the functions of Prime Minister, Minister, President of political parties, and so on. With respect to these levels, the ICTR shows a concentration of accused at the median hierarchical level of the civilian sector (13 cases), four cases at the lowest level, five cases at level 3, and four cases at level 4 of the civilian hierarchy.⁷⁰ As to the military hierarchy, there are only 4 cases where the accused occupied a median position (rank military = 2).⁷¹

The relation between the rank occupied by the accused and the length of the sentence meted out should now be clarified. According to the findings of Chambers of the ad hoc Tribunals, the results should demonstrate that the higher the position occupied by the accused in the hierarchical structure the lengthier the penalty imposed.

Starting with the ICTY, data shows that in effect the highest penalties are associated with the highest ranks occupied by the accused in the military or civilian structure.

Firstly, considering the military hierarchy, an average trial sentence of **26 years** is associated with level 3 (i.e. the highest level); more lenient penalties are associated, again at the trial stage, with level 2 (**13.4 years** imprisonment) and level 1, which is the lowest (**11.9 years** imprisonment).⁷² As to final sentences, an average sentence of **31.3 years** imprisonment is associated with level 3 of the military hierarchy, an average sentence of **14.6 years** is associated with level 2, and an average sentence of **12 years** imprisonment is associated with level 1.

Secondly, considering the civilian hierarchy, results differ insofar as the highest hierarchical level (level 4= high level politicians) of the civilian structure is associated with an average trial sentence of **23.8 years** imprisonment, which is only slightly higher than the average trial sentence for accused occupying positions at level 2 of the civilian hierarchy (**23.3 years** imprisonment), and is actually lower than the average trial sentence associated with accused at level 3 of the hierarchy (**42.3 years**

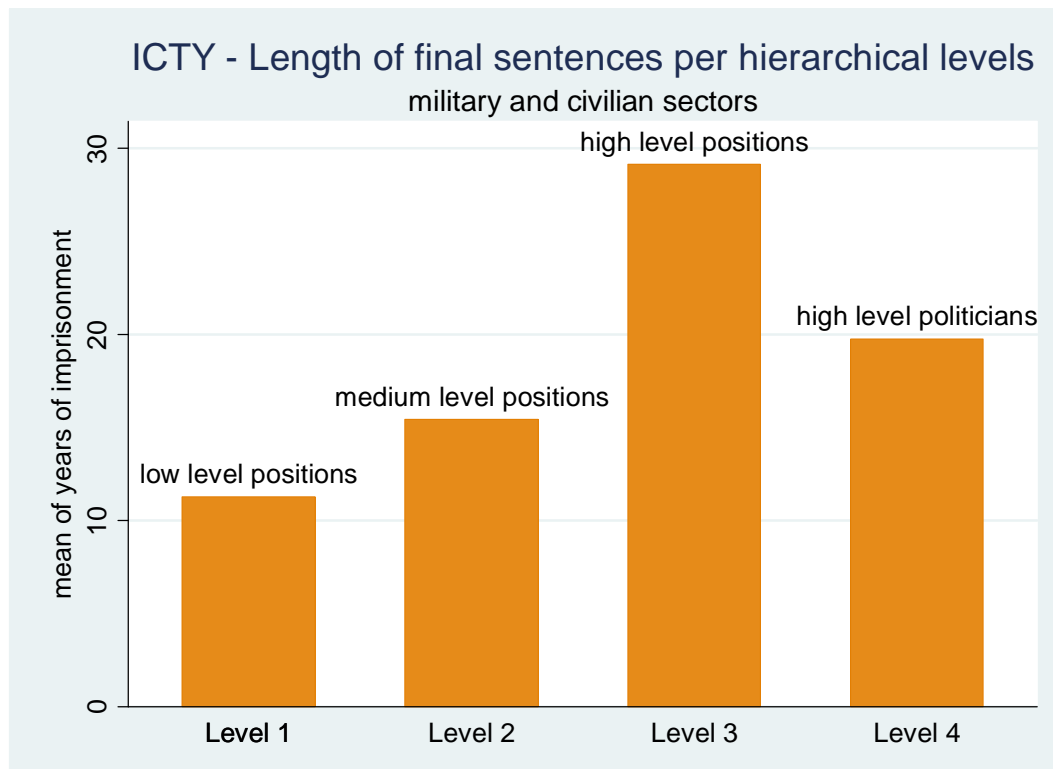
⁷⁰ The highest ranked accused in the civilian sector are the following: Jean Kambanda, Eliezer Niyitegeka, Jean de Dieu Kamuhanda, and Emmanuel Ndindabahizi.

⁷¹ Those are: Omar Serushago, Samuel Imanishimwe, Aloys Simba, and Tharcisse Muvunyi.

⁷² See Annex, p.xix, table no.16. The proportion is maintained also at the appeal stage, where the lengthiest penalties are imposed on the accused occupying the highest ranks of the military hierarchy (level 3): 34 years imprisonment; lower penalties are associated with level 2 (an average of 16.8 years), and level 1 of the military hierarchy (an average of 14.6 years). See Annex, p.xx, table no.18.

imprisonment).⁷³ As to final sentences, results even show an inverse relation in that the highest penalties are those associated with accused occupying positions at level 2 of the civilian hierarchy (with an average sentence of **22.5 years** imprisonment), immediately followed by an average sentence of **21.6 years** imprisonment for level 3 perpetrators, whereas accused occupying the highest positions in the civilian hierarchy (level 4) received more lenient penalties (with an average sentence of **19.7 years**).

However, when considering the results overall, it appears that there is a gradation in penalties depending on the hierarchical position occupied by the accused, whereby accused at levels 3 and 4 of the military and civilian sectors have been sentenced more harshly. The following graph visualises this relationship between harsher sentences and higher ranks, considering both the military and the civilian structure together:



Proceeding to analyse cases at the ICTR, as mentioned above only 4 cases involve accused who occupied a median position in the military hierarchy, and these received an

⁷³ See Annex, p.xix, table no.17. Results are different for sentences meted out by the Appeals Chamber: the average sentence for level 4 perpetrators is the highest (with an average of 22.6 years imprisonment), immediately followed by an average sentence of 22.5 years for level 2 perpetrators, and an average sentence of 21.6 years imprisonment for level 3 perpetrators. See Annex, p.xx, table no.19.

average trial sentence of **19.7 years** of imprisonment, an average appeal sentence of **17.3 years** imprisonment, and an average final sentence of **17.3 years** imprisonment.⁷⁴

By contrast, the majority of the accused belonged to the civilian sector, with a concentration of cases at the middle level of the hierarchy.

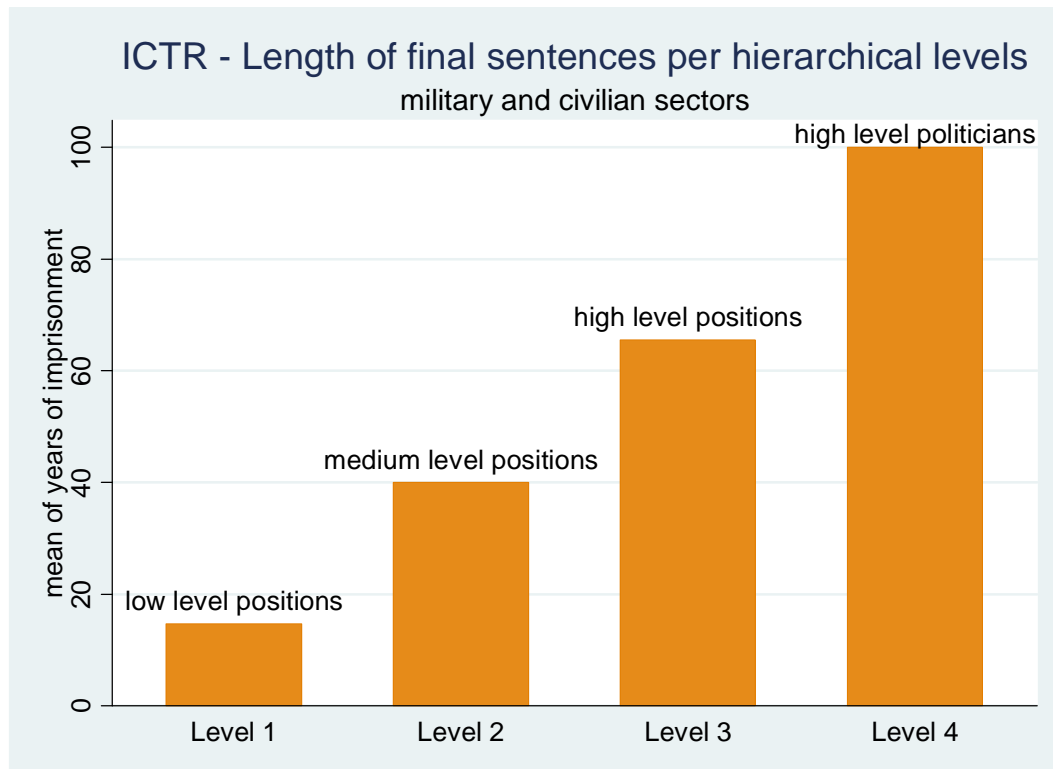
The analysis confirms that the lengthiest sentences are associated with the highest leadership levels. For instance, life imprisonment is the average trial sentence for cases involving the highest levels of political leadership (level 4), meaning that politicians, prime ministers, ministers of government, and so on, all received a sentence of imprisonment for life at trial.⁷⁵ Very harsh penalties (an average trial sentence of **87 years** imprisonment) also correspond to the second highest level of the civilian hierarchy (level 3, including the figures of Prefect, Director of companies/societies, etc.), as well as to the median level (an average trial sentence of **48.3 years** is associated with level 2, which includes for example the functions of *bourgmestre*, Pastor, medical doctor, *conseiller*, etc.), while more lenient penalties (an average of **14,7 years** imprisonment) correspond to the lowest level of the civilian hierarchy (level 1). The same results are achieved in the case of appeal sentences and final sentences.⁷⁶

When considering the results overall (i.e. the hierarchical positions in the military and civilian sectors), it is confirmed that a gradation of penalties exists depending on the hierarchical position occupied by the accused, with the harshest penalties meted out for accused occupying the highest hierarchical levels (levels 3 and 4), as shown by the following graph:

⁷⁴ See Annex, pp.xix-xx, tables nos.16, 18.

⁷⁵ In fact, the following accused persons were all sentenced to life imprisonment: Jean Kambanda (Prime Minister), Eliezer Niyitegeka (Minister of Information), Jean de Dieu Kamuhanda (Minister for Culture and Education), Emmanuel Ndindabahizi (Minister of Finance).

⁷⁶ See Annex, pp.xix-xx, tables nos.17, 19. At the appeal stage, the average sentence associated with level 4 of the civilian hierarchy is life imprisonment; the average sentence for level 3 perpetrators is 65.5 years of imprisonment, immediately followed by an average sentence of 61 years of imprisonment for accused occupying positions at level 2; the most lenient average sentence is that of 25 years of imprisonment for accused at the lowest level (level 1) of the civilian hierarchy. When considering only final sentences, again life imprisonment was imposed for all the accused at the highest level (level 4) of the civilian hierarchy, followed by an average sentence of 65.5 years imprisonment for accused at level 3 of the civilian hierarchy, an average sentence of 45.2 years imprisonment for level 2 perpetrators, and finally an average sentence of 14.6 years imprisonment for the lowest level of the hierarchy (level 1).



It thus seems that, as far as the leadership level is concerned, a certain degree of consistency exists in the sentencing jurisprudence of the ad hoc Tribunals, in the sense that the theoretical stance of judges (i.e. that the high hierarchical position occupied by the accused should increase the final sentence) is confirmed by the empirical analysis of sentencing data.

Furthermore, fairly positive results in terms of correlations are shown by correlating the variables ‘years of imprisonment’ and ‘leadership level’ (considering the different ranks within the two categories of military and civilian hierarchy together), in relation to final sentences. The correlation is, in fact, positive and quite high (0.45).⁷⁷

This seems to confirm previous findings: when analysing correlations between the hierarchical level of the accused and the length of the sentence, Meernik and King found a high correlation (correlation coefficient: 0.43) between higher level of responsibility and harsher sentences. Their results showed that low-level and mid-level perpetrators were punished with lighter sentences than high-level perpetrators (the four ‘big fishes’ in their sample were sentenced to an average of months of imprisonment

⁷⁷ The ‘P’ value is also equal to 0, showing a significant correlation. See Annex, p.xxii, lett.c). The correlations are also significant when considering the two Tribunals separately (p.xxi, lett. a), b)).

much higher than the rest of the perpetrators). They concluded that ‘...those who were ultimately responsible for the most harm in the Balkan wars have generally been punished the most severely.’⁷⁸

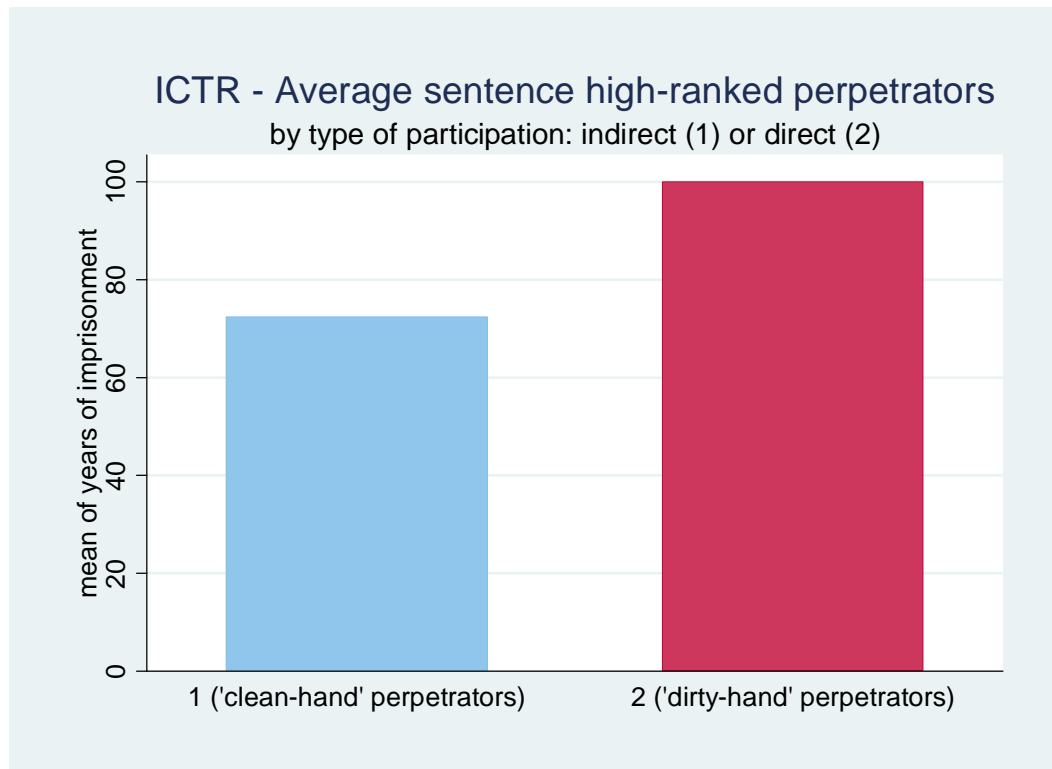
Another aspect to be verified is the statement of several Chambers of the ad hoc Tribunals that direct participation in the commission of crimes (i.e. ‘dirty-hand’ perpetrators) when linked to a high-ranking position in the military or civilian hierarchy aggravates the final sentence.⁷⁹

However, that statement cannot be proved true or false when considering ICTY cases given that there are no cases of high-ranking perpetrators (levels 3 and 4) who are also ‘direct’ or ‘dirty-hand’ perpetrators. Conversely, when considering final sentences at the ICTR, in three cases high-ranking perpetrators were also direct perpetrators.⁸⁰ When calculating the average sentence meted out for high-ranking direct and indirect perpetrators, we observe that – as Chambers of the ad hoc Tribunals stated – in effect ‘dirty-hand’ perpetrators received harsher penalties (**life imprisonment** in all cases) than ‘clean-hand’ perpetrators (who show an average sentence of **72 years** imprisonment), as illustrated by the following graph:

⁷⁸ MEERNIK J., KING K., ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, *Leiden Journal of International Law*, 16(2003), at pp. 738-739.

⁷⁹ *Krstic, cit.*, Trial Judgement, 2 August 2001, para.708; *Kupreskic, cit.*, Trial Judgement, 14 January 2000, para.862; *Rutaganda, cit.*, Trial Judgement, 2 February 1999, para.468.

⁸⁰ These cases concerned the following accused: Clément Kayishema, Alfred Musema, and Eliezer Niyitegeka.



Overall, it seems that direct perpetrators received harsher sentences than indirect perpetrators in relation to the different hierarchical levels.

Looking at the ICTY, and considering only final sentences, when calculating the average penalty for individuals at hierarchical level 1, we observe higher penalties (**12.8 years** imprisonment) for cases of direct participation than for cases of indirect participation (**7 years** imprisonment) in the commission of crime(s). The same holds true for hierarchical level 2, where the average sentence is **19.7 years** imprisonment for direct perpetrators, and **10.3 years** for indirect perpetrators.

As observed above, there are no cases of direct perpetrators at the highest levels of the military and civilian hierarchies (levels 3 and 4), where high-ranking officials, generals, politicians and so on are generally responsible for having planned, ordered, directed, instigated crimes rather than for having committed offences 'with their own hands'.

Turning to the ICTR case-law, and again considering only final sentences, data show that at the lowest hierarchical level (level 1), the average sentence for indirect perpetrators is **9.5 years** imprisonment, while the average sentence for direct

perpetrators is **25 years**. When considering level 2, the average sentence for indirect perpetrators is **15 years** imprisonment, while the sentence for direct perpetrators is significantly higher: **65 years** imprisonment. At the second highest level of hierarchical positions (level 3), the average sentence for indirect perpetrators is again lower than for direct perpetrators: **31 years** imprisonment versus **life imprisonment**.

Finally, the highest hierarchical level (level 4) presents even higher averages for both cases, with life imprisonment imposed both for indirect and direct perpetrators. This means that all cases comprised in those categories are cases where the penalty of life imprisonment was imposed.⁸¹

In conclusion, the above findings have shown that a globally significant correlation exists between the leadership/hierarchical level of the accused and the length of sentences, and between a high-ranking accused who was also a direct perpetrator and the harshness of penalties. These findings confirm what has already been observed in the doctrinal analysis of the ICTY and ICTR case-law, which thus proves consistent in respect of how the hierarchical position of the accused influences final sentencing outcomes.

iii) Age

The age of the offender at the time the crime was committed was included amongst the influential factors on sentencing, given that youth, especially, has often been considered in mitigation of the penalty.

When considering the age of the accused at the time of the commission of crimes, before the ICTY the youngest offender was 19 years old,⁸² and the oldest was 61 years old.⁸³ On average, the age of ICTY defendants at the time of the crimes was 35 years old.

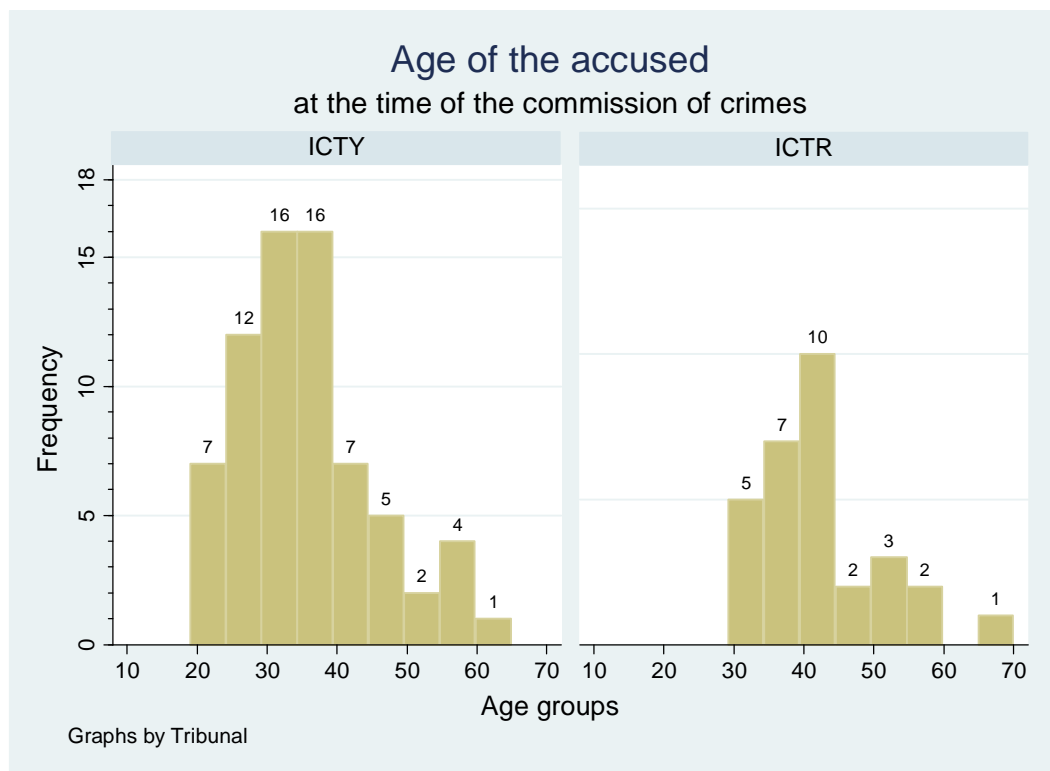
⁸¹ These cases are the following: *Kambanda* case (indirect perpetratorship), *Niyitegeka* case (direct perpetratorship), *Kamuhanda* case (indirect perpetratorship), and *Ndindabahizi* case (indirect perpetratorship). The only case of direct perpetratorship is represented by the *Niyitegeka* case, where the accused was sentenced to life imprisonment. This explains the equivalence between penalties for direct and indirect perpetrators at hierarchical level 4.

⁸² This refers to the accused Esad Landzo, in the *Celebici (Delalic et al.)* case.

⁸³ This refers to the accused Biljana Plavsic.

Before the ICTR, the lowest age at the time of the commission of crimes is higher than before the ICTY, with the youngest defendant aged 31 years,⁸⁴ and the oldest 70 years,⁸⁵ while the average age at the time of the crimes was higher (42 years).

The following graph sums up the occurrence of the variable related to the age of the accused at the time of the commission of crimes, considering only trial cases before the ICTY and the ICTR; it can be seen that at both Tribunals the dominant age group is between 30 and 40 – i.e. relatively young.



It is interesting to now correlate this factor with the hierarchical rank of defendants before the ad hoc Tribunals. Generally speaking, the age of an individual would be correlated to his rank in the military or civilian hierarchy; it is thus expected that if a low/medium age-group is dominant at the Tribunals, then also the rank of accused persons should show a tendency to be rather low (i.e., low-level or medium-level military or civilian officers). Therefore, considering that the majority of the accused was between 30 and 40 years old at the time of the commission of crimes (with a second

⁸⁴ This refers to the accused Athanase Seromba.

⁸⁵ This refers to the accused Elizaphan Ntakirutimana.

concentration of cases also around the ages 23-27), the expected dominant group of accused should be located at the medium level (immediately followed by a low-level group) of the military and civilian hierarchies.

As seen above when dealing with the factor of ‘leadership level’, the information resulting from the composition of the different hierarchical levels at the ICTY and ICTR seems to be in line with the predominant age group (between 30 and 40) identified above. In fact, both before the ICTY and the ICTR, the dominant leadership group is located at the middle level of the military and civilian hierarchy, with the ICTY also showing a second substantial group of accused occupying the lowest hierarchical levels (21 cases).

Moving on to analyse in more detail the relation between age groups and length of trial sentences, we can observe that – at the ICTY – the age group 18-29 (19 cases) is associated with an average sentence of **13 years** imprisonment.⁸⁶

The age group 30-40 (34 cases), which is also the dominant age group, is associated with an average trial sentence of **18.7 years** imprisonment;⁸⁷ while the age group 41-55 (14 cases) corresponds to an average sentence length of **18.6 years**.⁸⁸ Finally, the age group 56-70 (only 3 cases) is associated with the lower average sentence of **8.6 years** imprisonment.⁸⁹

This means that, in relation to age of the accused at the time of the commission of the offences and length of penalties, more lenient sentences were imposed on offenders who were either ‘young’ (meaning between 18 and 29 years of age) or with an ‘advanced’ age (between 56 and 70 years) when they committed the crimes charged.⁹⁰

⁸⁶ For the same age group the average appeal sentence is 22 years of imprisonment, and the average final sentence is 15 years.

⁸⁷ For the same age group the average appeal sentence is 16.6 years of imprisonment, and the average final sentence is 15 years.

⁸⁸ For the same age group the average appeal sentence is 29 years of imprisonment, and the average final sentence is 24.7 years.

⁸⁹ These three cases are represented by the *Plavsic* case (where the accused was 61 years old at the time of the commission of the offences, and was sentenced to 11 years imprisonment, final sentence), the *Miodrag Jokic* case (where the accused was 56 years old at the time of the commission of crimes, and was sentenced to 7 years imprisonment, confirmed on appeal), and the *Strugar* case (where the accused was 58 years old at the time of the offences, and was sentenced to 8 years imprisonment; as of December 2007 the case is pending before the Appeals Chamber).

For the same age group (56-70 years), the average appeal sentence is 7 years imprisonment, and the average final sentence is 9 years.

⁹⁰ See Annex, p.xxiii, table no.20.

At the ICTR (where the youngest accused was 31 years old), when considering trial cases, the age group 30-40 (13 cases) is associated with an average trial sentence of **49 years** of imprisonment;⁹¹ the age group 41-55 (14 cases) is associated with an average sentence of **59 years**;⁹² and the age group 56-70 (only 3 cases)⁹³ is associated with an average sentence of **45 years** imprisonment.⁹⁴

It therefore appears that, before the ICTR, the most lenient sentences are not associated with the young age of the perpetrator at the time of the commission of the crimes; rather, penalties are slightly less harsh for the age group 56-70 years.⁹⁵

In any case, the overall correlation between the two variables 'years of imprisonment' and 'age at the time of crimes' is, for both Tribunals, rather low and does not demonstrate any significant relation between the length of sentences and the age of the accused at the time of the commission of the offences.⁹⁶

Furthermore, if we take into account the age of the accused at the time the sentence was pronounced, it is interesting to examine whether lenient sentences are associated with 'old age', given that in some cases the advanced age of the accused at the time of the trial was considered a factor in mitigation of the penalty by both the ICTY and the ICTR.

At the ICTY, the youngest accused at the time of the pronouncement of the trial sentence was 25 years old, whereas the oldest accused was 73 years old. Before the ICTR, the youngest accused at the time of the pronouncement of the trial sentence was 37 years old, while the oldest was 79 years old.

Firstly, in relation to the ICTY, we can observe that, when considering trial cases, the age group 50-65 years (15 cases) is associated with an average sentence of **19.3**

⁹¹ For the same group, the average appeal sentence is 56.8 years imprisonment, and the average final sentence is 45 years.

⁹² The average appeal sentence is 74.2 years imprisonment, and the average final sentence is 59 years.

⁹³ The three cases are the following: *Ntakirutimana* case (where the accused Elizaphan Ntakirutimana was 70 years old at the time of the commission of crimes, and was sentenced to 10 years imprisonment; sentence confirmed on appeal), the *Simba* case (where the accused Aloys Simba was 56 years old at the time of the commission of crimes, and was sentenced to 25 years imprisonment; sentence confirmed on appeal), and the *Karera* case (where the accused was 56 years old at the time of the commission of crimes, and was sentenced by the Trial Chamber to life imprisonment).

⁹⁴ The average sentence is 17.5 years of imprisonment both for appeal sentences and for final sentences.

⁹⁵ See Annex, p.xxiii, table no.20.

⁹⁶ Details about the precise values of the pair-wise correlations can be consulted in the Annex, at pp.xxiii-xxiv.

years imprisonment;⁹⁷ whereas the age group 66-80 years (4 cases) is associated with an average sentence of **8.5 years** of imprisonment.⁹⁸

Secondly, in relation to the ICTR, the age group 50-65 (14 cases) is associated with an average trial sentence of **52.5 years** of imprisonment,⁹⁹ whereas the age group 66-80 (3 cases) is associated with an average trial sentence of **45 years** imprisonment.¹⁰⁰

To summarise, we can observe that the length of sentences decreases as the age of the accused at the time of the trial increases,¹⁰¹ but – once again, as seen above for the variable ‘age at the time of the commission of the offence’ – when running a pair-wise correlation between the variable ‘years of imprisonment’ and the variable ‘age_trial’ (age of the accused at the time of the pronouncement of the sentence), we note again a very low correlation between the two variables, even lower than that resulted for the variables ‘years of imprisonment’ and ‘age_crime’.¹⁰²

The overall conclusion to be inferred from the above analysis concerning the factor ‘age of the accused’ (both at the time of the commission of the crime and at the time of the pronouncement of sentences) is that the age of the accused has no significant influence on the length of sentences meted out.

This finding will be further confirmed by the analysis of mitigating circumstances in subparagraph g) of this section, where the mitigating factors ‘young age’ and ‘old age’ of the accused are also examined. Again, the analysis will show a lack of significant influence of those circumstances on the length of penalties.

What should be recalled in this regard is that, as seen in Chapter 3, the young age of the accused as a mitigating factor has been applied in a significantly different manner throughout the case-law of the ad hoc Tribunals, in relation to the actual age that judges qualified as ‘young’.¹⁰³ This aspect is open to criticism for at least two reasons: it causes

⁹⁷ The average appeal sentence is 25 years imprisonment, and the average final sentence is 23.6 years.

⁹⁸ The average appeal sentence is 6 years imprisonment, and the average final sentence is 7.7 years.

⁹⁹ The average appeal sentence is 67.7 years imprisonment, and the average final sentence is 50.7 years.

¹⁰⁰ The average sentence is 17.5 years imprisonment for both appeal sentences and for final sentences.

¹⁰¹ See Annex, p.xxiv, table no.21.

¹⁰² Details about the precise values of the pair-wise correlations can be consulted in the Annex, at pp.xiv-xv.

¹⁰³ Chambers of the ICTY and ICTR considered very different ranges of age as ‘young’. At the ICTY, *Delalic* case: 19 years old (for the accused Landzo) was considered as a young age and thus in mitigation; *Furundzija* case: 23 years was considered as a ‘young age’ and thus in mitigation of the penalty to impose on the accused; *Cesic* case: 27 years was not considered as a young age; *Blaskic* case: 30 years was considered ‘...to some degree a mitigating circumstance...’; *Kupreskic* case: 30 years was not considered

uncertainty on the part of the accused in relation to whether ‘age’ could be a relevant factor in his/her case; it misrepresents the inner significance of this mitigating factor, which should be granted only when the objective condition of a truly young and perhaps immature age is at stake and present. It is very doubtful that an average individual of more than 30 years of age can still be considered as not fully capable of understanding the gravity of crimes s/he is committing. A more precise assessment of this mitigating factor is thus needed.

e) *Guilty pleas / plea agreements*

With regard to each individual case, an amount of ‘objective’ information was collected including whether the accused entered a plea of guilty and/or a plea agreement occurred between the Prosecution and the Defence.¹⁰⁴

Guilty pleas and plea agreements have been analysed at length in Chapter 3, during the doctrinal analysis of the sentencing jurisprudence of the ad hoc Tribunals, and it was thus clarified that they have always been considered as factors in mitigation of the sentence, thus entailing a more or less substantial reduction of the penalty to be imposed depending, of course, on the circumstances of the case in hand.

It should now be verified whether a statistically significant relation exists between the presence of guilty pleas/plea agreements and the length of sentences, in particular whether more lenient sentences are associated with cases where a guilty plea was entered and/or a plea agreement occurred. The observations presented in Chapter 3 should lead us to expect a positive result in that the statistical analysis should confirm a correlation between lenient sentences and guilty pleas/plea agreements.

Starting from a description of the data available up to and including December 2007, and considering only trial judgements (those only relevant for guilty pleas), we observe a total of 21 cases of guilty pleas at the ICTY, and a total of 9 cases at the ICTR.

as a ‘young age’. At the ICTR, *Serushago* case: 32 years (at the time of the crime) and 37 years (at the time of the judgement) were considered in mitigation as a ‘young age’; *Ruzindana* case: 32 years was considered as ‘young’; *Seromba* case: 31 years was considered as ‘young’ and in mitigation.

¹⁰⁴ I have considered the two categories together as they entail a similar procedure leading to the same effect: a possible reduction of the penalty to impose on the accused.

If we compare the penalties imposed for guilty plea cases to those imposed for non guilty plea cases, the outcome confirms the fact that submission of a guilty plea had a certain mitigating effect on the final sentence meted out.

At the ICTY, the average trial sentence for cases involving guilty pleas/plea agreements is **13.8 years** imprisonment, while the average trial sentence for cases where the accused did not plead guilty is **18 years** imprisonment.¹⁰⁵

At the ICTR, penalties are obviously lengthier, but are slightly more lenient where guilty pleas are concerned. In fact, the average trial sentence imposed in cases where the accused pleaded guilty is **30.2 years** imprisonment versus an average sentence of **63.2 years** imprisonment for cases where the accused did not plead guilty.¹⁰⁶

Proceeding to analyse the relation between the variable 'guilty plea' and the variable 'years of imprisonment', we observe that the correlation is negative but not high (-0.15), with a 'P' value of 0.060.¹⁰⁷ The index of correlation is also negative but again rather low if we consider the two Tribunals separately.¹⁰⁸

The fact that the correlation is a negative one confirms that the presence of guilty pleas is inversely related to the length of sentences, in the sense that a guilty plea causes a more lenient penalty; however, the correlation observed is low, and this means that not always are guilty pleas and lenient sentences associated.

In other words, guilty pleas and plea agreements certainly have a mitigating effect on the penalty meted out, but only to a certain extent; the overall effect is not *substantial* mitigation, as might have been expected. These results need to be analysed further also in light of the findings related to aggravating and mitigating circumstances,

¹⁰⁵ See Annex, p.xxv, table no.22. The proportions are also maintained at the appeal level and for final sentences. Appeal sentences for guilty plea cases show an average of 18 years imprisonment, while appeal sentences for non guilty plea cases present an average of 20.3 years imprisonment. When considering final sentences, the average penalty is 13.5 years when the accused pleaded guilty, and 18.5 years when the accused did not plead guilty. See Annex, pp.xxv-xxvi, tables nos.23-24.

¹⁰⁶ See Annex, p.xxv, table no.22. At the appeal stage the relation is different and sentences for guilty plea cases show a higher average (71.6 years imprisonment) than sentences for non guilty plea cases (59.6 years imprisonment). When considering final sentences, the average penalty is again lower for cases where the accused pleaded guilty (30.2 years imprisonment) than for cases where the accused pleaded not guilty (an average of 59.6 years imprisonment). See Annex, pp.xxv-xxvi, tables nos.23-24.

¹⁰⁷ See Annex, p.xxvi.

¹⁰⁸ The index of correlation is -0.11 for the ICTY, and -0.22 for the ICTR, with some differences in the weight of the correlation depending on the type of sentences considered (whether trial, appeal, or final sentences). See Annex, pp.xxvi-xxvii.

where the actual use by judges of a guilty plea as a mitigating circumstance will be verified.

f) *Aggravating circumstances*

The category of factors considered by Chambers of the ad hoc Tribunals as aggravating the final penalty is very wide and diversified. Given the lack of a prescriptive list, a large number of factors were taken into account by judges.

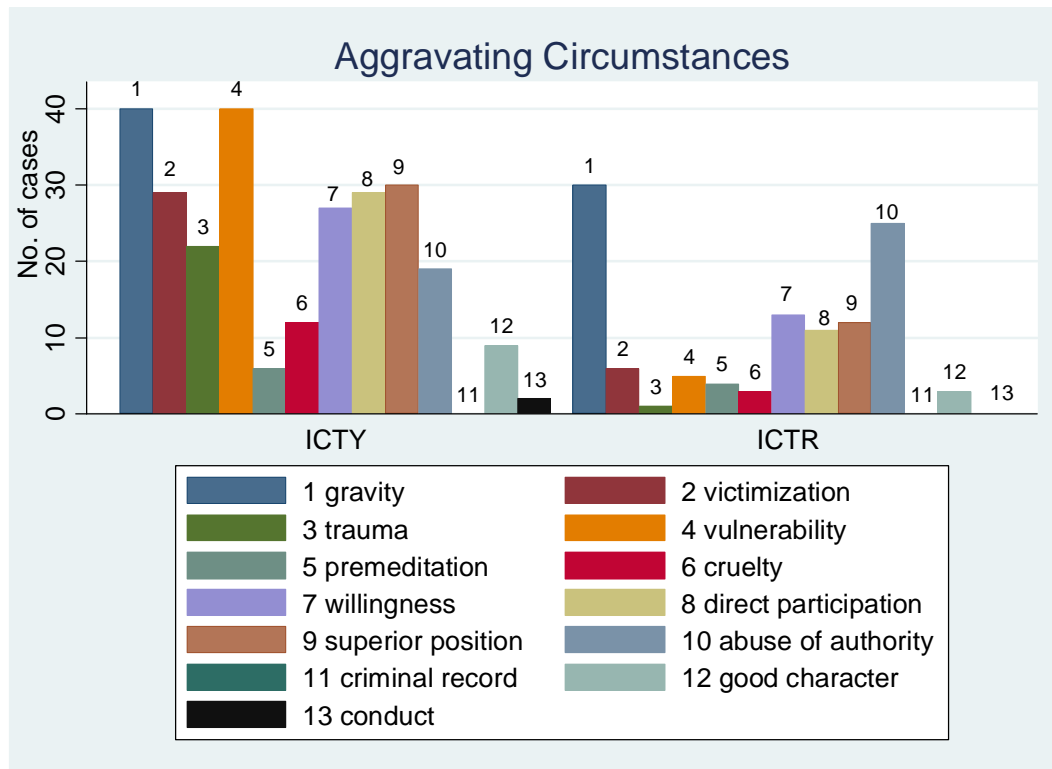
The aggravating circumstances that have been included in the analysis have already been specified above in the operating model underlying this study (and in section 4.2), and mainly derive from the comparative overview in Chapter 2 and from the doctrinal analysis of the ad hoc Tribunals' case-law in Chapter 3, which helped to identify the most relevant circumstances of crime. More precisely, while examining trial and appeals judgements of the ad hoc Tribunals, for each case I have taken into account (and included in the data-set) the aggravating factors most frequently mentioned by the judges and considered to be relevant in sentencing. It was not possible to include all the aggravating factors referred to by Trial Chambers, especially in light of the fact that some were mentioned and utilised by judges only once or twice and therefore result as not significant for the scope and purposes of this statistical analysis. In brief, a total of 13 aggravating circumstances were considered.

It should now be possible to verify which circumstances were used most frequently by the ICTY and ICTR, and whether some specific aggravating factors lead to higher penalties.

On the descriptive level, the following graph shows the overall use by ICTY and ICTR Trial Chambers of all 13 aggravating circumstances that I have selected for this analysis:¹⁰⁹

(the numbers on the bars of the graph indicate the 13 aggravating circumstances)

¹⁰⁹ The number of observations is constituted by 70 individual cases at the trial level for the ICTY, and 30 individual cases at the trial level for the ICTR.



With reference to the ICTY,¹¹⁰ it appears that the two factors most frequently used are the aggravating circumstances ‘gravity of crime’ and ‘vulnerability of victims’, which both appear in 40 cases out of the 70 considered. The second most frequent variable is the aggravating circumstance ‘superior position’, which recurs in 30 cases.

Other frequent aggravating circumstances are: victimisation (29 cases); direct participation in the commission of crimes (29 cases); willingness/enthusiasm in the commission of crimes (27 cases); trauma suffered by victims and survivors (22 cases).

The aggravating factor ‘cruelty’ occurred in 12 cases; ‘criminal record’ was basically never used as an aggravating circumstance and was present only in 2 cases, when the Prosecution brought to the attention of the Trial Chamber the fact that the accused had previous criminal convictions and that this factor should be regarded as an aggravating circumstance. However, this was not considered in aggravation of the final

¹¹⁰ Table 25, at p.xxviii of the Annex, summarises (in relation to trial cases) the number of cases in which each aggravating circumstance recurred, the average and median sentences for cases when each aggravating circumstance was present and for cases when not present, the index of correlation between each aggravating circumstance as used by ICTY judges and the length of sentences, and the respective ‘P’ values.

sentence by the relevant Chamber.¹¹¹ The good character of the accused was considered as an aggravating factor in 9 cases.

The use of aggravating factors is different at the ICTR,¹¹² although the circumstance ‘gravity of crime’ still predominates and recurs basically in all cases at the trial level (30 individual cases out of 30). The second dominant variable is the aggravating circumstance ‘abuse of authority’ (25 cases), immediately followed by willingness in the commission of the crime (13 cases) and superior position (12 cases). The direct participation of the accused in the commission of the crimes was considered an aggravating factor in 11 cases. Surprisingly, aggravating circumstances connected to the trauma and suffering of victims were considered in very few cases: the factor ‘trauma of victims and survivors’ was considered only in 1 case; ‘vulnerability’ only in 5 cases; ‘victimization’ only in 6 cases.

The ‘good character’ of the accused was considered as an aggravating factor in 3 cases; the circumstance ‘cruelty’ recurred only in 3 cases; there are no cases for the circumstance ‘criminal record’.

It is interesting at this point to verify the impact – if any – of the aggravating circumstances considered above on the length of penalties. We would expect that the presence of any of the aggravating factors would increase the length of the sentence.

The general regression run between the dependent variable ‘years of imprisonment’ and all the influential factors (including aggravating and mitigating circumstances) demonstrates that, generally speaking, the presence of aggravating circumstances causes an increase in the length of penalties, although there appears to be no significant relation between these and the length of sentences.¹¹³

¹¹¹ These two cases concern the accused: Zoran Zigic (in the *Kvočka et al.* case, see *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-T, Trial Judgement, 2 November 2001, para.746, where the Trial Chamber did not enter any finding in relation to the previous criminal convictions of the accused), and Vinko Martinovic (in the *Naletilic & Martinovic*, aka *Tuta & Stela* case, see *Prosecutor v. Naletilic and Martinovic*, Case No.IT-98-34-T, Trial Judgement, 31 March 2003, paras.755, 762, where the Trial Chamber did not find it appropriate to consider the prior criminal conduct in aggravation of the penalty).

¹¹² Table 26, at p.xxviii of the Annex, summarises (in relation to trial cases) the number of cases in which each aggravating circumstance recurred, the average and median sentences for cases when each aggravating circumstance was present and for cases when not present, the index of correlation between each aggravating circumstance as used by ICTR judges and the length of sentences, and the respective ‘P’ values.

¹¹³ See, for the tables of these regressions: Annex, pp.xxix-xxxi.

Overall, aggravating factors result not statistically significant, in the sense that the relation they present to the dependent variable ‘years of imprisonment’ is not constant or strong enough to allow for future statistical predictions in relation to the same (aggravating) outcome. Only when the regression analysis is restricted to final sentences does some significant influence on the length of penalties appear for the aggravating factors ‘superior position’ and ‘premeditation’.¹¹⁴

However, results are more significant – in that more aggravating factors acquire significance in relation to the length of sentences – if we consider the two Tribunals separately and thus run the regression for each of them. More precisely, at the ICTY, the aggravating factors that result significant are: ‘gravity of the crime’; ‘victimization’; and ‘premeditation; at the ICTR, the aggravating factors that appear significant are: ‘trauma’; and ‘cruelty’.¹¹⁵

Proceeding to consider direct correlations (pair-wise) between each aggravating factor and the dependent variable ‘years of imprisonment’ (length of sentences), in general we can observe high correlations between the length of penalties and the following aggravating circumstances: gravity/magnitude of crime, premeditation, willingness in the commission of the crime, superior position, and abuse of authority/trust.¹¹⁶

More specifically, when analysing pair-wise correlations for ICTY judgements, strong correlations appear between the length of penalties and the following aggravating circumstances: gravity/magnitude of crime, victimization, trauma suffered by victims, premeditation, cruelty, willingness in the commission of the crime, superior position, and abuse of authority/trust.¹¹⁷

Concerning the ICTR case-law, strong correlations are proven between the length of sentence and the following aggravating circumstances: gravity/magnitude of crime,

¹¹⁴ For those two aggravating circumstances the regression shows, in fact, a significant ‘P’ value (P = 0.006). See Annex, p.xxx.

¹¹⁵ See Annex, pp.xxxii-xxxiii.

¹¹⁶ The index of correlation and the ‘P’ value for all the pair-wise correlations are illustrated in the Annex at p.xxxiv.

¹¹⁷ For the index of correlation and the ‘P’ value of these pair-wise correlations for the ICTY, see Annex, p.xxviii, table no.25.

willingness in the commission of the crime, direct participation, and superior position.¹¹⁸

The high and significant correlation between the aggravating factor ‘superior position’ and the length of penalties confirms the findings above (sub-para.d)-ii on leadership level) regarding the importance that the position occupied by the accused in the military or civilian hierarchy exercises on the determination of the sentence.

Furthermore, it is interesting to note that some circumstances correlate highly between each other: ‘trauma of victims’ and ‘victimization’, ‘vulnerability of victims’ and ‘victimisation’, ‘vulnerability’ and ‘trauma’, ‘cruelty’ and ‘victimisation’, ‘cruelty’ and ‘willingness’, ‘direct participation’ and ‘willingness’. These correlations show that those sets of factors often occur together. This is logical especially if considering the nature of those aggravating circumstances: it is in fact very likely that particularly severe suffering inflicted upon victims (victimisation) also results in trauma for the same victims/survivors; or that willingness/enthusiasm in the commission of crimes is associated with cruelty used during the commission of crimes, and so on.

In relation to some of the aggravating circumstances which seem to have a higher influence on the length of sentences (gravity/magnitude of crime, willingness in the commission of the crime, superior position, abuse of authority/trust), we can also calculate the average sentence meted out in cases where that specific circumstance is present, and the average sentence for cases where the same circumstance does not occur.

In doing so, we observe that the average sentence is higher for cases where the aggravating circumstance ‘gravity/magnitude of crime’ was taken into account than for cases where the same aggravating circumstance did not occur, and the result is confirmed both for trial sentences and for final sentences.¹¹⁹

The same holds true also in relation to the other significant aggravating circumstances: ‘willingness in the commission of the crime’, ‘superior position’, and

¹¹⁸ For the index of correlation and the ‘P’ value of these pair-wise correlations for the ICTR, see Annex, p.xxviii, table no.26.

¹¹⁹ At the ICTY, the mean trial sentence for cases where the aggravating circumstance ‘gravity of crime’ was taken into account is 19.5 years imprisonment, while the mean trial sentence for cases where the circumstance did not occur is 13 years imprisonment. The same occurs for final sentences: 18 years imprisonment v. 14 years imprisonment. At the ICTR, in all cases the circumstance ‘gravity/magnitude of crime’ was taken into account as an aggravating factor, therefore it is not possible to compare the two average sentences.

‘abuse of authority’. The same result is found: the average sentence is higher for cases where the specific circumstance is present, and more lenient when absent.¹²⁰

If we carry out the same operation for other factors, the results are similar - the average sentence when the aggravating circumstance is present will always be higher than the average sentence for cases when it is not present.¹²¹

For instance, with regards to the aggravating factor ‘cruelty’, before the ICTY the average final sentence when the factor is present is **26.6 years** imprisonment, while the average sentence for cases involving ‘cruelty’ is **14 years** imprisonment.

Generally speaking, aggravating circumstances are therefore influential on sentencing and their presence renders the final penalty harsher.

With regard to the study of Meernik and King – the only comparable study conducted so far on similar sentencing determinants – although some of the aggravating factors taken into account were different,¹²² the authors also found that the average sentence was higher for those cases where a certain aggravating factor was present (compared to the average sentence for cases in which the specific aggravating factor was not cited). They observed that this indicates that reference to the relevance of a particular aggravating circumstance increases the sentence length for the individual accused. Thus, generally, the correlation between the presence of aggravating factors and the severity of punishment is positive. Moreover, they found that, in particular, two aggravating circumstances were positively correlated to harsher penalties: the magnitude of the crime and the zeal with which the accused committed the crime.¹²³ The former (‘gravity of crime’) was also considered here, and the results achieved were

¹²⁰ For instance, in relation to the aggravating factor ‘superior position’, before the ICTY the average trial sentence for cases where the aggravating circumstance recurred is 21.5 years imprisonment, while the average trial sentence for cases where it is absent is 13 years imprisonment. The same is true for the ICTR, where the average trial sentence is 71.6 years imprisonment when the aggravating circumstance ‘superior position’ is present, and 41 years imprisonment when the aggravating factor is not present. See, Annex, p.xxviii, tables nos.25-26.

¹²¹ Tables nos. 25 and 26, at p.xxviii of the Annex, show all these data in detail.

¹²² The aggravating factors they considered were the following: magnitude of crimes; zeal in committing crimes; heinousness of crimes; duration of crimes; discriminatory intent; vulnerability of victims; youth of victims; trauma of surviving victims; abuse of trust or personal authority; failure to punish those committing crimes; intimidation of witnesses/courtroom demeanour; personal gain. See MEERNIK J., KING K., ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’, *Leiden Journal of International Law*, 16(2003), at p.741.

¹²³ MEERNIK J., KING K., *ibid.*, at p.741.

in fact similar: a high and strong correlation between ‘gravity/magnitude of crime’ and sentence length.

Finally, another aspect of the use of aggravating circumstances should be verified: whether it is possible to determine a consistent application of these factors by judges or not. It has been mentioned above (section 4.2) that – lacking a prescriptive list of factors to be taken into account in aggravation or mitigation – at times, although aggravating or mitigating factors were present, they were disregarded by judges and were not considered relevant in the determination of the sentence.

In verifying whether aggravating factors have been treated uniformly and consistently throughout the case-law of the ad hoc Tribunals, we can observe that patterns of consistency appear in the application of aggravating circumstances, and that controversial cases were almost absent. At the ICTY, the only circumstances that – when occurring – were nonetheless not considered in aggravation of the penalty were: ‘superior position’ (not considered in 2 cases),¹²⁴ and the previous ‘criminal record’ of the accused, which occurred in only two instances and in both cases was not taken into consideration by the relevant Chamber in aggravation of the sentence. Given that essentially this circumstance was never considered by either the ICTY or the ICTR, we should conclude that it is not a relevant aggravating factor in the context of the sentencing case-law of the ad hoc Tribunals.

At the ICTR, there is only one case of a different evaluation of an aggravating circumstance: this concerns the factor ‘superior position’ which in one case was not considered to be a factor in aggravation of the sentence, although present.¹²⁵

The instances mentioned above however become perfectly clear when those particular cases are analysed in more detail and if we investigate the reasoning behind the judges’ decision not to consider those factors in aggravation notwithstanding the fact that, in general, such circumstances would indeed be aggravating factors. For instance, taking the example of the *Obrenovic* case – where the accused was in fact in a position of authority, being the Acting Commander and Deputy Commander of the

¹²⁴ These cases are represented by the accused Dragan Obrenovic (see *Prosecutor v. Obrenovic*, Case No.IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para.99), and Ivica Rajic (see *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, paras.106-108).

¹²⁵ This occurred in the case of Juvenal Rugambarara (see *Prosecutor v. Rugambarara*, Case No.ICTR-00-59-T, Sentencing Judgement, 16 November 2007, paras.25-28).

Zvornik Brigade – the fact that the Trial Chamber did not take into account his ‘superior position’ as an aggravating factor, although recognising it, is perfectly legitimate given that, as recalled by the Chamber:

Dragan Obrenovic’s criminal liability arises in large measure from this responsibility as a commander pursuant to Article 7(3) of the Statute. The Trial Chamber finds it would be inappropriate to use the same conduct to both establish liability and to establish an aggravating circumstance in this case.¹²⁶

A similar consideration was made by the *Rajic* Trial Chamber when it decided not to consider Ivica Rajic’s position of authority as a superior in aggravation of the sentence.¹²⁷

Overall, we can therefore confirm consistent treatment of aggravating factors by both Tribunals.

g) Mitigating circumstances

The observations made above in relation to the category of aggravating circumstances concerning their selection, categorization and analysis are also valid for mitigating circumstances. A total of 16 mitigating factors have been taken into account for the purposes of this empirical analysis.

The circumstances which were used more frequently by the ICTY and ICTR may now be verified, as well as whether there are some specific mitigating factors which lead to more lenient penalties.

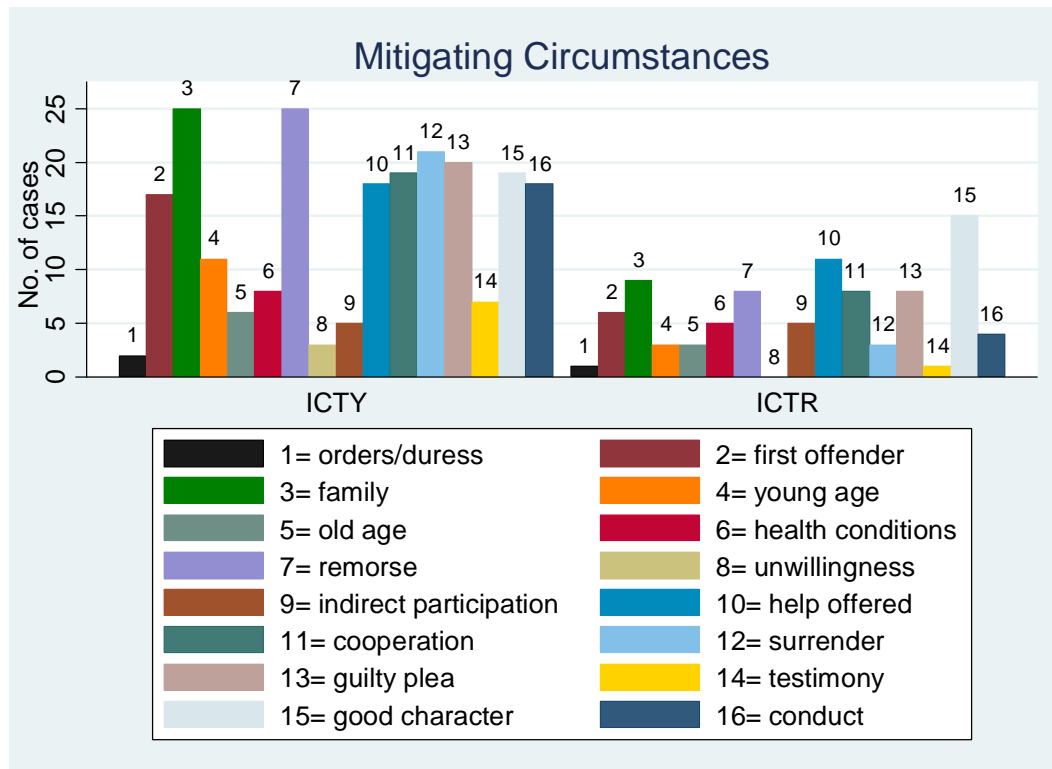
On the descriptive level, the following graph reveals the overall use by ICTY and ICTR Trial Chambers of all 16 mitigating circumstances that I have selected for this study:¹²⁸

(the numbers on the bars of the graph indicate the 16 mitigating circumstances)

¹²⁶ *Prosecutor v. Obrenovic*, Case No.IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para.99.

¹²⁷ See *Prosecutor v. Rajic*, Case No.IT-95-12-S, Sentencing Judgement, 8 May 2006, paras.107-108.

¹²⁸ The number of observations consists of 70 individual cases at the trial level for the ICTY, and 30 individual cases at the trial level for the ICTR.



With reference to the ICTY,¹²⁹ it appears that the two factors most frequently used are the mitigating circumstances of ‘family status’ (recurring in 25 cases out of 70), and ‘remorse’ (also 25 cases), immediately followed by ‘surrender’ (21 cases), ‘guilty plea’ (20 cases), and ‘cooperation with the Office of the Prosecutor’ (19 cases).

Other mitigating circumstances frequently used are: ‘good conduct during detention/trial proceedings’ (18 cases); ‘first offender’ (17 cases), and the previous ‘good character’ of the accused which was considered a mitigating circumstance in 19 cases (whereas in 9 cases the same factor was considered in aggravation, as seen above).

Less frequent mitigating circumstances are: the existence of superior orders/duress (only 1 case),¹³⁰ ‘unwillingness’ in committing crimes (2 cases),¹³¹ and ‘indirect participation’ (5 cases).

¹²⁹ Table 27, at p.xxxvi of the Annex, summarises (in relation to trial cases) the number of cases in which each mitigating circumstance recurred, the average and median sentences for cases when each mitigating circumstance was present and for cases when this was not present, the index of correlation between each circumstance as used by ICTY judges and the length of sentences, and the respective ‘P’ values.

¹³⁰ This is the *Erdemovic* case.

¹³¹ These are represented by the accused Drazen Erdemovic (*Erdemovic* case), and Haradin Bala (in the *Limaj et al.* case).

The youth of the accused at the time when the offence(s) were committed was considered a relevant factor in mitigation of the sentence in 11 cases, while the advanced age of the accused at the time of the sentence was considered a mitigating circumstance in 6 cases.¹³²

At the ICTR,¹³³ the most frequently used mitigating circumstance is the good character of the accused (15 cases out of 30), followed by help to victims (11 cases), family circumstances (9 cases), cooperation with the office of the Prosecutor (8 cases), and remorse (8 cases). Mitigating circumstances that were taken into account only a few times were the following: good conduct during detention/trial proceedings (4 cases), surrender (3 cases), superior orders/duress (only 1 case),¹³⁴ and testimony given (only 1 case).¹³⁵ The youth of the accused at the time of the commission of crimes and the advanced age of the accused at the time of the sentence were each taken into consideration in 3 cases. The factor ‘unwillingness’ in the commission of crimes was never taken into consideration as a mitigating circumstance by judges of the ICTR.

Proceeding to verify the impact of the mitigating circumstances considered above on the length of penalties, we would expect that the presence of any of these mitigating factors would decrease the length of the sentence.

The general regression run between the dependent variable ‘years of imprisonment’ and all mitigating circumstances before both Tribunals demonstrates that in general the presence of mitigating circumstances causes a decrease in the length of penalties, although no significant relation between those circumstances and the length of sentences is proved.¹³⁶

Mitigating factors are therefore not statistically significant, in that their relation to the dependent variable ‘years of imprisonment’ is not constant or strong enough to allow for future statistical predictions in relation to the same (mitigating) outcome. Only

¹³² These cases are represented by the following accused: Dragoljub Prcac (in the *Kvočka et al.* case), Milorad Krnojelac, Biljana Plavsic, Radoslav Brdjanin, Pavle Strugar, and Momcilo Krajisnik.

¹³³ Table 28, at p.xxxvi of the Annex, summarises (in relation to trial cases) the number of cases in which each mitigating circumstance recurred, the average and median sentences for cases when each mitigating circumstance was present and for cases when the same was not present, the index of correlation between each circumstance as used by ICTR judges and the length of sentences, and the respective ‘P’ values.

¹³⁴ The *Rutaganira* case.

¹³⁵ The *Serushago* case.

¹³⁶ See, for the tables of these regressions, Annex, at pp.xxix-xxxi.

when the regression analysis is extended to include all types of sentences (i.e. both trial and appeal sentences), is the length of penalties significantly influenced by the mitigating factors ‘surrender’ and ‘guilty plea’.¹³⁷

However, results are more significant – in the sense that more mitigating factors acquire significance in relation to the length of sentences – when we consider the two Tribunals separately. In particular, at the ICTR the following factors result significant in mitigation: ‘orders/duress’; ‘first offender’; ‘family circumstances’; ‘cooperation’; and ‘testimony’.¹³⁸

When measuring direct correlations (pair-wise) between each mitigating factor and the dependent variable ‘years of imprisonment’ (length of sentences), in general we can observe high correlations between the length of penalties and the following mitigating circumstances: ‘first offender’, ‘family’, ‘remorse’, ‘surrender’, ‘guilty plea’, ‘testimony’, and ‘good conduct’.¹³⁹

More specifically, when analysing pair-wise correlations for ICTY judgements, there appear strong correlations between the length of penalties and the following mitigating circumstances: remorse, indirect participation, cooperation, and guilty plea.¹⁴⁰

On the whole, with regard to the ICTR case-law, strong correlations are proven between the length of sentence and almost all the mitigating circumstances (with the exception of ‘orders/duress’, ‘health conditions’, ‘help offered to victims’, and ‘testimony’).¹⁴¹

It is also interesting to note that some mitigating circumstances are highly correlated between each other, in the sense that they often recur together. This was observed, for instance, between the following sets of mitigating factors: a young age and duress/orders received;¹⁴² duress/orders received and unwillingness in the

¹³⁷ For these two mitigating circumstances the regression in fact shows a significant ‘P’ value of, respectively, P = 0.052, and P = 0.010. See Annex, p.xxxi.

¹³⁸ See Annex, pp.xxxii-xxxiii.

¹³⁹ The index of correlation and the ‘P’ value for all the pair-wise correlations are illustrated in the Annex at pp.xxxvii-xxxviii.

¹⁴⁰ For the index of correlation and the ‘P’ value of these pair-wise correlations for the ICTY, see Annex, p.xxxvi, table n.27.

¹⁴¹ For the index of correlation and the ‘P’ value of these pair-wise correlations for the ICTR, see Annex, p.xxxvi, table n.28.

¹⁴² The correlation presents a significant ‘P’ value of 0.0034 (Annex, p.xxxvii).

commission of the crime;¹⁴³ advanced age and health conditions;¹⁴⁴ advanced age and indirect participation in the commission of crimes;¹⁴⁵ remorse and help offered to victims;¹⁴⁶ remorse and cooperation with the OTP;¹⁴⁷ remorse and guilty plea;¹⁴⁸ cooperation and testimony/information provided;¹⁴⁹ cooperation and guilty plea;¹⁵⁰ guilty plea and testimony/information provided;¹⁵¹ good conduct during trial or detention and surrender.¹⁵²

All the above correlations amongst mitigating circumstances are perfectly logical: it is in fact very probable that ‘duress/orders received’ will be associated with ‘young age’ (as in the *Erdemovic* case), given the likelihood of the fact that soldiers put under duress or being forced to execute orders would also be quite young;¹⁵³ further, the correlations between remorse and a guilty plea, or cooperation and a guilty plea also show a very logical link: an accused person who pleads guilty is generally ready to cooperate, and in the majority of cases will also show remorse for the crimes committed.

In this regard, given the significance shown by the mitigating circumstance ‘guilty plea’, it is interesting to verify whether individuals who pleaded guilty also cooperated with the OTP or expressed remorse in a majority of cases, given that in practice this would seem to be a natural propensity.

This tendency is confirmed both at the ICTY and at the ICTR. Considering trial cases at the ICTY, data show that every time an accused pleaded guilty s/he also expressed remorse (thus a perfect co-occurrence between ‘remorse’ and ‘guilty plea’),¹⁵⁴ and that – in a large majority of cases (16 out of 20) – when the accused pleaded guilty s/he also cooperated with the OTP.

¹⁴³ The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxvii).

¹⁴⁴ The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxvii).

¹⁴⁵ The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxvii).

¹⁴⁶ The correlation presents a significant ‘P’ value of 0.0003 (Annex, p.xxxviii).

¹⁴⁷ The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxviii).

¹⁴⁸ The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxviii).

¹⁴⁹ The correlation presents a significant ‘P’ value of 0.0017 (Annex, p.xxxviii).

¹⁵⁰ The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxviii).

¹⁵¹ The correlation presents a significant ‘P’ value of 0.0004 (Annex, p.xxxviii).

¹⁵² The correlation presents a significant ‘P’ value of 0.0000 (Annex, p.xxxviii).

¹⁵³ It has already been observed in section 4.4.d.iii) above that lower age groups are associated with low hierarchical levels.

¹⁵⁴ This is significant and appears to mean that all the accused who pleaded guilty at the ICTY demonstrated at the same time a sense of remorse for the criminal acts committed.

Considering trial cases at the ICTR, in 7 cases out of 8 the accused also expressed remorse when pleading guilty, while in 4 cases out of 8 the accused also cooperated with the OTP.

This is a significant tendency and might also serve to explain the mitigating value mostly attributed to cases of a guilty plea: as the majority of those pleas were also supported by an expression of remorse and by cooperation, judges were probably more inclined to assign a substantial mitigating value to the guilty plea of the accused. The analysis of ‘guilty plea’ as a mitigating factor thus shows that this is a relevant influential factor on sentencing.

Continuing to examine mitigating circumstances, in order to verify whether the average sentence is higher in the absence of mitigating factors, we can calculate the average sentence meted out in cases where a specific mitigating circumstance is considered, and compare it with the average sentence for cases where the same circumstance does not occur.

We should consider, for instance, in view of the relevance that they seem to exercise on the final sentence, the circumstances of remorse and guilty plea.

Starting with ‘remorse’ at the ICTY, we observe an average trial sentence of **12 years** of imprisonment for the cases where ‘remorse’ was considered as a circumstance in mitigation of the penalty; conversely, the average sentence is higher (**18 years** imprisonment) when the mitigating circumstance of remorse is not present. This holds equally true before the ICTR and also in relation to final sentences (naturally with different average sentences).

When the mitigating circumstance of ‘guilty plea’ is present, we note an average trial sentence of **12.5 years** of imprisonment at the ICTY; whereas a higher average sentence of **18.5 years** is found for cases where the mitigating factor ‘guilty plea’ does not occur. This is again valid for both Tribunals.¹⁵⁵

¹⁵⁵ If we try the same operation for other factors, the results are similar, in the sense that the average sentence meted out when a specific mitigating circumstance is present is, in the majority of cases, more lenient than the average sentence for cases when the same circumstance is not present. The fact that, in some instances, this is not true and, on the contrary, the presence of certain mitigating factors does not entail lighter sentences, can be explained by the inconsistent use that has at times characterised the application of mitigating factors by both Tribunals, as will be explained later in this section. Tables nos. 27 and 28, at p.xxxvi of the Annex, show in detail all these data, including mean and median sentences.

Furthermore, given the assumption that the mitigating weight of guilty pleas is more significant when that factor is also associated with the presence of remorse, it is interesting to note that sentences appear less harsh when the presence of a guilty plea and the presence of the mitigating factor 'remorse' co-occur. In fact, data show that, taking into account trial sentences at the ICTR,¹⁵⁶ the average penalty meted out is 10 years imprisonment when both mitigating circumstances 'remorse' and 'guilty plea' were considered, while it is life imprisonment for the only case where a guilty plea was not associated with an expression of remorse.¹⁵⁷

In brief, a relation exists between more lenient sentences and the presence of mitigating factors, in that when mitigating factors occur the final penalty is more lenient.

This confirms previous findings of a similar nature. In their empirical study on the sentencing determinants at the ICTY, Meernik and King also analysed mitigating circumstances to investigate their impact on sentence length.¹⁵⁸ Generally speaking, they found that when a mitigating factor is cited and considered by judges, then the average penalty imposed on the accused is shorter than that imposed on individuals for whom the mitigating factor was not present or not recognised. Further, they found negative correlations between almost all the mitigating circumstances analysed and the sentence length.¹⁵⁹ In addition, with regard to the relation between number of mitigating circumstances cited and length of sentences, Meernik and King found a negative and statistically significant correlation indicating that the more mitigating factors considered by the judges, the less the sentence.¹⁶⁰

¹⁵⁶ The same observation is not possible for the ICTY, where there is a perfect co-occurrence between the two factors 'remorse' and 'guilty plea'; therefore no cases exist where an accused who pleaded guilty did not show remorse at the same time.

¹⁵⁷ This is represented by the *Kambanda* case.

¹⁵⁸ The mitigating factors they considered were as follows: guilty plea, cooperation, remorse, surrender, no prior criminal record, assistance to victims, not active participation, family, youth, old age, not a threat, redeemable, subordinate rank, sentence served in a distant country, context of actions, cooperation, and post-conflict conduct. See MEERNIK J., KING K., 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis', *cit.*, at p.745.

¹⁵⁹ See MEERNIK J., KING K., 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis', *cit.*, at pp.744-745.

¹⁶⁰ *Ibid.*, p.746.

Finally, we should verify whether it is possible to speak of a consistent application of these factors by judges of the ad hoc Tribunals, as previously done for the aggravating factors.

While it was seen that, in relation to aggravating factors, we can generally speak of a consistent and uniform application, conversely mitigating circumstances appear more controversial, in that very often and for a large number of mitigating factors, cases in which a ‘different’ evaluation was given to those factors appear. These cases are more frequent at the ICTY than at the ICTR.¹⁶¹ The following table summarises these cases, in relation to trial sentences, highlighting when certain circumstances – although present – were not considered by judges in mitigation of the penalty, contrary to the general trend.

Mitigating circumstances ICTY	Present and considered in mitigation	Present and NOT considered in mitigation
Testimony/info offered	7 cases	1 case
Young age	11 cases	2 cases
Help offered to victims	18 cases	2 cases
Indirect participation	5 cases	3 cases
Guilty plea	20 cases	3 cases
Cooperation	19 cases	3 cases
Health conditions	8 cases	4 cases
Surrender	21 cases	4 cases
Remorse	25 cases	5 cases
Family status	25 cases	7 cases
First offender	17 cases	7 cases
Good character	19 cases	7 cases
Conduct during trial/in detention	18 cases	8 cases
Mitigating circumstances ICTR	Present and considered in mitigation	Present and NOT considered in mitigation
Family status	9 cases	1 case
Health conditions	5 cases	1 case
Indirect participation	5 cases	2 cases
Good character	15 cases	3 cases

¹⁶¹ Before the Rwanda Tribunal, only a few cases of a ‘different’ evaluation of mitigating factors were observed: for instance, the mitigating factor ‘good character’, although present, was not considered in mitigation in 3 cases, and the mitigating factor ‘indirect participation’, although present, was not considered in 2 cases.

Although those cases where a given mitigating circumstance was present but was not taken into consideration are a minority, and, conversely, in the majority of cases, the aforementioned factors were indeed treated as mitigating circumstances, their application seems less consistent than that of aggravating circumstances. In a number of cases judges have given a different weight to mitigating factors. The most controversial cases are represented by the circumstances of ‘post-offence conduct’ of the accused, ‘good character’, ‘first offender’, and ‘family status’.

Instances where the remorse shown by the accused was not considered by judges as a mitigating factor (5 cases before the ICTY) can, however, be explained. Taking just one of those cases, in *Delalic et al.* the Trial Chamber did not consider appropriate or significant the expression of remorse of the accused Esad Landzo, especially considering the circumstances in which it was made:

Mr. Landžo did address a written statement to the Trial Chamber after the end of his trial, stating that he was sorry for his conduct in the Čelebići prison-camp and that he wished to express his regrets to his victims and their families. Such expression of remorse would have been more appropriately made in open court, with these victims and witnesses present, and thus this ostensible, belated contrition seems to merely have been an attempt to seek concession in the matter of sentence.¹⁶²

It is thus understandable why the factor was not considered in mitigation. The same can be said for the *Jelusic* case, where the Trial Chamber was not convinced of the sincerity of Goran Jelusic’s remorse and thus did not consider it as a mitigating circumstance.¹⁶³ Also the Trial Chamber of the *Blaskic* case did not take into account Tihomir Blaskic’s remorse in mitigation of the penalty, as it considered it ‘dubious’.¹⁶⁴

Overall, it seems that the application of mitigating factors has led to greater divergences than the application of aggravating factors. This may be indicative of the need for more guidance in the subject-matter.

To recapitulate, the general conclusion concerning the effect of aggravating and mitigating circumstances on the length of sentences is that they surely are *influential* factors in sentencing, and their presence renders the final penalty harsher (when

¹⁶² *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1279.

¹⁶³ *Prosecutor v. Jelusic*, Case No.IT-95-10-T, Trial Judgement, 14 December 1999, para.127.

¹⁶⁴ *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.775. Conversely, the Appeals Chamber that heard the case on appeal rejected the Trial Chamber’s finding in relation to remorse and considered it a relevant mitigating factor. See *Prosecutor v. Blaskic*, Case No.IT-95-14-A, Appeals Judgement, 29 July 2004, para.705.

aggravating circumstances are cited by judges) or more lenient (when mitigating circumstances are cited by judges). This thus confirms the findings of the doctrinal analysis in Chapter 3, which already highlighted a certain significance of aggravating and mitigating factors in the decision-making process of sentencing. The ‘weight’ of each factor varies, of course, and some circumstances are more ‘influential’ than others.

4.5 Data analysis on judges

The important and particular role that judges exercise in international sentencing has been pointed out before in Chapter 1. The composition of the judicial bench at the ad hoc Tribunals is by nature variegated and ‘multicultural’, given that judges come from a large number of different countries in the world and from very diverse legal traditions. The relevant provisions of the ICTY and ICTR Statutes in this regard have already been recalled in section 1.8,¹⁶⁵ as well as the fact that a multicultural composition of the Chambers at the ad hoc Tribunals is explicitly prescribed by the Statutes.¹⁶⁶

To verify whether the composition of the bench is of any influence on the length of sentences, I have collected data regarding the legal (common law or civil law)¹⁶⁷ and professional (academics, professors or practitioners, judges, attorneys, and so on) background of judges, as well as their gender, and linked these data to the composition of the judicial bench in each single case analyzed.

Firstly, descriptive statistics reveal that both at the ICTY and at the ICTR, when considering all types of sentences (trial and appeals), in most cases the bench (which is composed of 3 members at trial, and of 5 members at appeal) was composed by a majority of civil law judges.¹⁶⁸ As to the professional background of judges, it appears that – for both the ICTY and the ICTR – the large majority of judges composing the trial and appeals benches were ‘practitioners’¹⁶⁹ (in other words, they are professional

¹⁶⁵ See Article 12, ICTY St., Article 11, ICTR St.. See also Rules 17, 27 and 29 of the RPE.

¹⁶⁶ See Article 13 ICTY St. (and Article 12bis ICTR St.), which regulates ‘qualifications and election of judges’ and explicitly states that the Security Council, in establishing a list of candidates from the nominations received, shall take ‘due account of the adequate representation of the principal legal systems of the world’ (para.2.c).

¹⁶⁷ As mentioned in section 4.2, I have not considered mixed systems of law, thus reducing the distinction only to common law and civil law systems.

¹⁶⁸ More precisely, 67 cases out of 105 at the ICTY, and 41 cases out of 51 at the ICTR.

¹⁶⁹ More precisely, 95 cases out of 105 at the ICTY, and 50 cases out of 51 at the ICTR.

judges, magistrates, prosecutors, attorneys, counsels, lawyers, in their national countries). Finally, gender-wise, still considering trial and appeal cases, the majority of the judges on the bench were men. At the ICTY, in only 5 cases out of 105 the bench was composed of a majority of women; at the ICTR, in only 9 cases out of 51. Furthermore, at the ICTY no female judge was present in the bench in 30 cases (out of 105); at the ICTR no female judge was present in the bench in 17 cases (out of 51). These data are summarized by the following table:

Composition of the bench	ICTY	ICTR
Majority of civil law judges	67 cases	41 cases
Majority of common law judges	34 cases	6 cases
Majority of practitioners	95 cases	50 cases
Majority of academics	8 cases	1 case
Majority of men	100 cases	42 cases
Majority of women	5 cases	9 cases

Proceeding to analyze correlations between the composition of the bench in trial and appeal cases and the length of sentences, no significant results appear from the pair-wise correlations between factors.¹⁷⁰ The only element which appears to have a strong and negative correlation with the length of sentences is the composition of the judicial bench when presenting a majority of common law judges.¹⁷¹ This would indicate that the presence of common law judges is generally associated with more lenient sentences and, thus, that when the bench is so composed, lighter sentences could be expected.

However, all the other factors (i.e. all other possible compositions of the bench) have, in statistical terms, no strong or high correlation with the length of penalties meted out. This may in itself be considered an interesting finding, as it would

¹⁷⁰ Details about the precise values of pair-wise correlations can be consulted in the Annex, at p.xxxix.

¹⁷¹ The correlation presents a significant 'P' value = 0.0133. See Annex, p.xxxix.

demonstrated that no particular composition of the bench has any significant or undue influence on the length of sentences.¹⁷²

4.6 Summary of empirical findings

The objective of the empirical analysis presented in this chapter was to describe sentencing factors used by judges of the ad hoc Tribunals, to identify the most influential factors on sentencing, and to ascertain whether we can speak of a consistent or inconsistent sentencing practice.

The results achieved throughout the analysis show that there is a certain degree of consistency in the sentencing practice of the ad hoc Tribunals, and that certain factors are more influential than others on sentence length.

Firstly, as regards the sentence length, it is clear that sentences imposed by the ad hoc Tribunals are more 'lenient' if compared to national sentencing, where harsh penalties such as life imprisonment are frequently imposed for one murder alone.

Penalties meted out by the ICTR are significantly lengthier than those meted out by the ICTY. The ICTR has in fact more frequently imposed life imprisonment. Considering the inherent seriousness of the crimes and the magnitude – also in numeric terms – of the genocide the ICTR dealt with, we should observe that the Rwanda Tribunal overall imposed adequate sentences.¹⁷³ It is not always possible to arrive at the same conclusion as far as the ICTY is concerned.

It seems that this difference depends partly on the fact that, at the ICTR, the majority of convictions were for genocide and related acts. This would therefore imply that – amongst international crimes – genocide is indeed the '*crime of crimes*' entailing the harshest sentences.

¹⁷² The obvious *caveat* in relation to this analysis on the influence of judges' characteristics or background in the sentencing process is that the study is by nature limited given that few factors have been taken into account and that only the analysis of 'aggregates' of judges in the composition of the bench was possible. A more tailored study was not feasible given the overall low number of cases adjudicated by each single judge, and the fact that decisions are taken collectively and cannot be imputed to individual judges.

¹⁷³ As R. Sloane argues, the ICTR has appropriately sentenced the principal perpetrators of the genocide in Rwanda from a 'quantitative' point of view, in the sense that the sentences the Tribunal meted out have not been 'quantitatively' incorrect. See SLOANE, ROBERT D., 'Sentencing for the "Crime of Crimes" - The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda', *Journal of International Criminal Justice* (2007), vol.5, issue 3 (2007), pp.713-734, at 733-734.

Thus higher sentences were observed in relation to convictions for genocide; the differences in penalty ranges observed between crimes against humanity and war crimes were not as marked as those between genocide and the other international crimes, nevertheless they uphold the existence of a hierarchy of crimes under the jurisdiction of the ad hoc Tribunals, contrary to affirmations by judges in their reasoning.

Secondly, in order to provide an overview of the results obtained, the following observations should be retained:

Significant and high correlations:

- between length of sentences and convictions for the crime of genocide;
- between length of sentences and leadership level (i.e. higher penalties are associated with the highest ranks occupied by the accused in the military or civilian structure);
- between length of sentences and leadership level associated with type of participation (i.e. harsher sentences are associated with high-ranking perpetrators who were also ‘direct perpetrators’);
- between length of sentences and the following aggravating circumstances: ‘gravity/magnitude of crime’, ‘premeditation’, ‘willingness in the commission of the crime’, ‘superior position’, and ‘abuse of authority/trust’;
- between length of sentences and the following mitigating circumstances: ‘family status’, ‘remorse’, ‘surrender’, and ‘guilty plea’.

Not significant and low correlations:

- between length of sentences and modes of liability (i.e. convictions entered under para.1 of Articles 7 ICTY/ 6 ICTR; or under para.3 of Articles 7 ICTY / 6 ICTR);
- between length of sentences and type of participation of the accused in the commission of the crime (whether direct/‘dirty hands’, or indirect/‘clean hands’);
- between length of sentences and age of the accused (both at the time of the commission of crime and at the time of the sentence);
- between length of sentences and composition of the judicial bench.

With regard to aggravating and mitigating circumstances, the empirical analysis confirmed, respectively, the positive (i.e. harsher penalties) and negative (i.e. more lenient penalties) influence that, considered overall, those factors exercise on sentencing. There are in fact, positive correlations between aggravating circumstances and length of sentences, and negative correlations between mitigating circumstances and length of sentences. However, the aggravating or mitigating ‘value’ of each single circumstance may vary considerably. The analysis also showed that, while aggravating circumstances were treated and applied consistently throughout the case-law of the ad hoc Tribunals, on the other hand mitigating circumstances were more controversial and in a number of cases did not receive a uniform or consistent application.

In conclusion, to respond to the questions posed at the beginning of this chapter, and particularly in relation to issues of consistency and proportionality in sentencing, the empirical analysis conducted here allows me to conclude that fair standards and consistent criteria are followed by judges of the ICTY and ICTR. There is therefore no doubt that sentences meted out by the ad hoc Tribunals tend to show general patterns of consistency and to satisfy general criteria of legitimacy. This should therefore reassure critics of the sentencing practice of the ad hoc Tribunals.

What emerges, however, is that this practice reveals leniency in penalties at the ICTY, and is at times flawed by instances of inconsistencies at both Tribunals, especially with regard to the application of aggravating and mitigating circumstances throughout the case-law. It is considered that this is due to the lack of guiding principles in sentencing which – if existed – could have assisted judges in the application of influential factors.

In view of the fact that the debate surrounding the sentencing practice of the ad hoc Tribunals is increasingly animated and the question of whether sentencing guidelines would be opportune or not has been put forward, the study conducted here can therefore contribute to the present debate and offer some guiding principles. These principles are elaborated in more detail in the conclusive chapter.

CHAPTER 5.

THE SENTENCING SYSTEM OF THE INTERNATIONAL CRIMINAL COURT

The Rome Treaty of 17 July 1998, establishing the permanent International Criminal Court (ICC) is one of the most important achievements of the international community in the area of international justice in recent years, and represents a fundamental development both for international humanitarian law and human rights law.¹ The treaty itself is the product of a common effort by diplomats, academics and scholars, practitioners, NGOs and civil society to achieve – in the words of Professor Bassiouni – ‘*peace with justice and justice with peace*’.²

The greatest innovation of the ICC may be considered the very fact of its existence. The Court has the potential to achieve the status of a genuine ‘human rights tribunal’,³ and could represent a model for national courts to emulate. By ratifying the Rome Treaty – and given the principle of complementarity contained in it – countries commit themselves to trying offenders of the most serious crimes of international concern according to ICC standards. Therefore, the Court could conceivably strengthen the enforcement of human rights by national courts within domestic legal systems.

The sentencing practice of the ICC will be of the utmost importance as its legal rules and judicial proceedings are likely to have a normative significance in international justice.

During the work of the ICC Preparatory Committee, the question of sentencing and penalties arose several times.⁴ In particular, some delegations argued in favour of precise sentencing provisions containing minimum and maximum penalty-ranges for

¹ In this respect, it has been argued that the ICC institutes a clear link between two branches of international law: humanitarian law and human rights law. See: POCAR, F., *The Rome Statute of the International Criminal Court and Human Rights*, in POLITI M., NESI G., *The Rome Statute of the International Criminal Court – A challenge to impunity*, Ashgate, Dartmouth, 2001, p.68.

² See TRIFFTERER, O., *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlag, 1999, at p.XIX, Preface by M. Cherif Bassiouni.

³ See, in this sense, SMITH, THOMAS W., ‘Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism’, *International Politics*, no.39, June 2002, pp.175-192, at 176.

⁴ On the issue of penalties and sentencing in the ICC Statute, see for instance: ROLF E. FIFE, ‘Penalties’, in LEE, R. (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague, 1999, pp.319-344; KING FAIZA P., LA ROSA ANNE-MARIE, ‘Penalties under the ICC Statute’, in LATTANZI F., SCHABAS W., *Essays on the Rome Statute of the ICC*, Il Sirente ed., 2000, pp.311-338.

each crime, while others were more in favour of a flexible approach allowing for judicial discretion. During the session of December 1997, a compromise was reached and a short and illustrative list of sentencing factors was included in the Statute.⁵

All the indications which concern the sentencing process are provided in only a very few articles of the ICC Statute and Rules of Procedure and Evidence (RPE). These provisions will be analysed in the following pages.

A. Relevant provisions of the Statute and Rules of Procedure and Evidence

5.1 Applicable penalties

During the Rome Conference, the Working Group on Penalties debated at length whether the ICC Statute should specify a range of penalties (i.e. a minimum and a maximum sentence) or not; the final text agreed upon opted for flexibility and does not specify detailed ranges of penalties.

The relevant section devoted to penalties is Part 7 of the Rome Statute. Article 77 ‘Applicable Penalties’ establishes the power of the ICC to impose penalties on persons convicted by the Court for one of the crimes under its jurisdiction.

The first paragraph of the article provides for two types of imprisonment: imprisonment for a specific number of years, not exceeding thirty years, and life imprisonment, when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.⁶ Reflecting the current status of international law of human rights, the ICC Statute excludes capital punishment.

There was an animated debate during the Rome Conference with regard to the scope of the penalties to be imposed. In particular, States in favour of the death penalty – stressing that the penalties under consideration were related to the most serious and heinous crimes of international concern and that, hence, they should be commensurate to the extreme gravity of those crimes – tried to obtain as harsh a provision as possible for custodial sentences, arguing that life imprisonment at least should be recognized and

⁵ See, for more details, BASSIOUNI, M.CH., *Introduction to International Criminal Law*, Transnational Publishers, New York, 2003, pp.328-331. See also ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N.GAOR 51st Sess., Supp.no.10 (A/51/22), vol.I.

⁶ See Article 77, ICC St., para.1 (a), (b).

provided for if the death penalty was not to be an option. Other States (mainly European and Latin American), on the other hand, emphasising the limitations that human rights law places on the types of punishment available, were opposed in principle not only to the death penalty but also to life imprisonment, and to its imposition without the possibility of parole or conditional release. Many States considered life imprisonment as a cruel, inhuman and degrading form of punishment.⁷

The final compromise was therefore to provide for life imprisonment but only ‘*when justified by the extreme gravity of the crime and the individual circumstances of the convicted person*’ and to allow for mandatory parole review but only after a certain period of time.⁸

Paragraph 1 of Article 77 was also a compromise between those delegations that insisted on clarity as to the maximum sentence to be pronounced, and those that advocated for the need to leave a certain degree of flexibility to judges, in view of the impossibility of foreseeing all the possible situations they might be confronted with in practice. Therefore, although not introducing precise penalties for specific crimes, Article 77 presents a certain degree of specificity (compared to the sentencing provisions of the ad hoc Tribunals) and forces judges to make a clear choice between two distinct alternatives regarding imprisonment: imprisonment for no more than 30 years, or life imprisonment.⁹ Such a distinction originated from proposals initially submitted by France and other countries of civil law tradition which attempted to improve as far as possible legal certainty regarding the ranges of imprisonment, while at the same time preserving a degree of discretion for judges.

⁷ See SCHABAS, W., *An Introduction to the International Criminal Court*, 2nd ed., Cambridge University Press, 2004, p.166. Spain, for example, proposed that life imprisonment be imposed only if one or more aggravating circumstances had been established and if there was a total absence of mitigating factors (See ‘Proposal submitted by Spain on the Rules of Procedure and Evidence relating to Part 7 of the Rome Statute’, UN Doc. PCNICC/1999/WGRPE(7)/DP2, p.2, para.7). See also TRIFFTERER, O., *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlag, 1999, pp.986-987.

⁸ This compromise constitutes the background for the provision in Article 110 (‘Review by the Court concerning reduction of sentence’) of the Rome Statute, as well as the reference to the latter at the very beginning of Article 77. Article 110 will be analyzed later on in this chapter.

⁹ During the Preparatory Committee and the Rome Diplomatic Conference, several proposals were made with regard to what should be the maximum term for the penalty of imprisonment for a specified number of years. Proposals had ranged from 20 to 40 years, substantially reflecting the maximum terms in different national systems. See ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, Vol. II (*Compilation of Proposals*), UN GAOR, 51st Sess., Supp. No.22, UN Doc A/51/22 (1996), pp.227-234; ‘Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997’, UN Doc A/AC.249/1997/L.9/Rev.1 (1997), pp.81-90.

While maximum penalties were established, no provisions for minimum terms of imprisonment were included in the Statute, although the specification ‘*number of years*’ seems to indicate that the minimum penalty is also conceived of as a number of years.

With reference to life imprisonment, it is true that this is only foreseen ‘when justified by the extreme gravity of the crime and the individual circumstances of the convicted person’, but in practice judges have an ample degree of discretion to decide whether to impose life imprisonment or not. In any case, the two requirements indicated in paragraph 1(b) are to be considered cumulative. The nature and circumstances of the crime as well as those of the individual accused must be taken into account in the determination of sentences also according to the letter of Article 78, para.1.

Article 77 reflects the widely shared view that additional penalties, such as fines or confiscation, should be available in the case of convictions. In effect, paragraph 2 of the article states the power of the Court to inflict – but only in addition to a period of imprisonment or life imprisonment – a fine or forfeiture of proceeds, property and assets derived directly or indirectly from that crime. The imposition of a fine is therefore possible only as an additional penalty. This provision is related to the traditional rationale of criminal law that the offender should not profit from the wrongful actions committed. During the Rome Diplomatic Conference, some delegations stressed that an important deterrent element should be seen in the possibility of imposing fines and forfeitures.¹⁰

In the RPE (Rule 146 ‘Imposition of fines under article 77’), we find a specification of the monetary penalty and the criteria to quantify it. Rule 146 states that the Court – in determining the amount of a fine – shall give due consideration to the financial capacity of the convicted person and shall also take into account, in addition to the factors listed in Rule 145 and related to the determination of the sentence, whether and to what degree the crime was motivated by personal financial gain. The Rule then provides quite precise indications for establishing the fine to be imposed at an appropriate level. Rule 147 (‘Orders of forfeiture’) further specifies the modalities for such orders by the Court.

Considered overall, the ICC Statute (as already seen for the Statutes of the ad hoc Tribunals) is not very detailed as far as sentencing is concerned, and does not specify

¹⁰ TRIFFTERER, O., *Commentary on the Rome Statute...*, cit, p.993.

how to determine the exact penalty to be imposed. In particular, the vagueness of the criteria established by Article 77 for deciding between term-imprisonment and life imprisonment is of concern. The gravity of the crime is recalled, to be evaluated together with the personal circumstances of the accused, but those criteria are too broad and not detailed enough to be valuable guiding criteria, with the result that they leave too much leeway for discretionary evaluations by judges. Moreover, the penalty regime is again formulated in a generalized way for all the crimes specified in Article 5 of the Statute, without indicating penalties for different categories of crimes. Once more, therefore, this represents a failure or unwillingness to rank the international crimes falling under the jurisdiction of the ICC and to distinguish between the inner gravity of the underlying offences contemplated by each category of international crime.

Moving on to analyze Article 78 ‘Determination of the sentence’, according to this the ICC, in determining the sentence, shall take into account the *gravity of the crime* and the *individual circumstances of the convicted person*. This general rule raises the question of aggravating and mitigating factors to be considered by the Court.

The first paragraph of Article 78, in emphasizing the importance of the individualization of sentences, fails to indicate what factors should determine the relative weight to be accorded to these principles. The article is very general leaving open numerous questions to be tackled in the RPE, and does not indicate whether there should be an exhaustive list of aggravating and mitigating factors, how they should be proved, the respective weight they should exercise on the final sentence, and so on.

Paragraph 2 of Article 78 generated less debate in affirming the well-established principle according to which any time previously spent in detention in accordance with an order of the Court shall be deducted from the final sentence. Delegations were also willing to give the Court discretion in deducting any time otherwise spent in detention in connection with conduct(s) underlying the main offence.¹¹

The third and final paragraph of Article 78 deals with the issue of *cumulative sentences*, that is with the situation in which the accused has been convicted of more than one crime; the provision requires the Court, in such cases, to pronounce a separate

¹¹ See Article 78 of the Rome Statute, para.2: “...In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.”

sentence for each crime and then a joint sentence specifying the total period of imprisonment.¹² It also requires that the maximum sentence ‘shall be no less than the highest individual sentence pronounced and shall not exceed 30 years’ imprisonment or a sentence of life imprisonment’.¹³ It is suggested that this is more correct than the very liberal approach adopted by the Statutes of the ICTY and ICTR, which not only leave the choice between consecutive or concurrent sentences entirely to judges, but also the possibility of imposing a single and global sentence without specification of the penalty imposed for each charge of which the accused is found guilty.¹⁴

Article 78, para.3, provides for a mechanism very similar to that developed in the English legal system, where – according to the so called *totality principle* – Courts do not have to undertake a precise mathematical operation when pronouncing convictions for more crimes, summing up the amount of penalty for each single sentence, but – rather – have to globally consider the criminal behaviour of the accused in its entire seriousness and mete out an appropriate sentence: a *single* and *joint* sentence.

It is also interesting to recall the provision at Article 80 of the Statute, ‘Non-prejudice to national application of penalties and national laws’. The article establishes that the provisions on penalties in Part 7 of the Statute do not affect the application by States of penalties prescribed by their national laws, nor the law of States which do not provide for penalties prescribed by the Rome Statute.

Some commentators observed that this provision was inserted to satisfy the demands of a number of delegations seeking reassurance that the penalty provisions in the ICC Statute would not be interpreted as having an influence on national laws in the area of punishment, in particular for those States whose national laws still provide for the application of the death penalty. Those delegations wanted assurance that the

¹² See Article 78, para.3: “...When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).”

¹³ To give an example, if the Court imposes 3 separate sentences of 20 years imprisonment for crimes against humanity and 1 sentence of 10 years imprisonment for war crimes, then it may not impose a joint sentence for a length inferior to 20 years. On the other hand, for the same case, it may decide to impose a joint sentence of a total of 30 years motivated by the serious nature and number of the crimes.

¹⁴ ICTY RPE, Rule 87(C): ‘...If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.’

provisions of the Rome Statute would not be used to try to limit the types and ranges of penalties available and applicable in their national legal systems.¹⁵ It is against this background that the non-prejudice clause contained in Article 80 was introduced. The provision also confirms the uniform penalty regime applied to all persons convicted by the ICC, a regime which makes no reference to national laws of the accused persons.¹⁶ This must be considered as opportune considering the marked differences regarding penalties in national laws – and the absence of unified standards – which would have caused significant difficulties (and disparities) in the application of penalties by the ICC, if they had to be taken into account while meting out punishment.

Article 80 does not, however, ensure that disproportion in punishment between the penalties that an accused could receive under national law and those s/he could receive under the ICC Statute is avoided. A similar paradoxical situation was already observed for the relationship between the ICTR and the national trials conducted in Rwanda before the recent abolition of the death penalty.

The problem of the relative unfairness between national and international sentences – in cases of countries applying capital punishment – is therefore still present and will remain so as long as a uniform system of penalties is not globally developed and enacted, or at least as long as the death penalty survives as a legitimate punishment.

5.2 Aggravating and mitigating circumstances

The debate within the Preparatory Committee on aggravating and mitigating factors was a lengthy and complex one.¹⁷ One of the major points of discussion was whether an illustrative or exhaustive list of factors should be included in the Rome Statute. The final compromise was that only a short and illustrative list of factors would be appropriate and viable for inclusion in the RPE of the Rome Statute.¹⁸

¹⁵ See ZAPPALÁ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.200; TRIFFTERER, O., *Commentary on the Rome Statute...*, *cit.*, p.1010.

¹⁶ The issue of relevance of national law among applicable laws for the Court is nonetheless discussed in the framework of Article 21, para.1(c).

¹⁷ See, for instance, PEGLAU, J., 'Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence', in FISHER H., KRESS C., (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.142-147.

¹⁸ See TRIFFTERER, O., *Commentary on the Rome Statute...*, *cit.*, pp.999-1000.

It is interesting to read in detail the position expressed on this issue in the final Report of the Preparatory Committee:

...It may be possible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.¹⁹

Proposals made by different national delegations with regard to formulation of the specific rule on aggravating and mitigating factors were numerous and of very various kinds. For instance, the Australian, Canadian and German proposal was in favour of guidelines with the indication of factors relevant for the determination of the sentence, with no division between mitigating and aggravating factors but with only a descriptive list of 'neutral' factors and categories of circumstances.²⁰ Similarly, the French proposal suggested an open list of factors to be taken into account;²¹ the Spanish delegation proposed a more precise list with the indication not only of categories but, more specifically, of mitigating (open and not exhaustive list) and aggravating (exhaustive list) factors.²²

The outcome of the very intense and animated negotiations was a compromise between all the different proposals just outlined.

Article 78, paragraph 1, when requiring the Court to take into account in the determination of the sentence such factors as the 'gravity of the crime' and the 'individual circumstances of the convicted person', states that the Court must do so in

¹⁹ *Final Report of the Preparatory Committee*, UN Doc.A/CONF.183/2/Add.1 (1998), at p.122, fn. no.13.

²⁰ This is basically the 'neutral factors' approach already discussed in Chapter 2 when presenting the structure of mitigating and aggravating circumstances under the German legal system. See, for more details on the joint proposal, PEGLAU, J., 'Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence', in FISHER H., KRESS C., (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, at pp.142-143.

²¹ See UN Doc. PCNICC/1999/WGRPE(7)/DP.2.

²² To give the ICC discretion also in relation to aggravating factors was deemed in violation of the principle of *nulla poena sine lege*. It is interesting to note that the Spanish proposal also regarded cases of attempt or mere collaboration as mitigating factors. See PEGLAU, J., 'Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence', *cit.*, at pp.144-145.

accordance with the RPE; some mitigating and aggravating circumstances are laid down therein.

In its first paragraph Rule 145 provides some indications as to how the Court should determine the final sentence. For instance, attention is given to the following factors: the totality of any sentence must reflect the culpability of the convicted person;²³ all relevant factors (i.e. mitigating and aggravating factors and circumstances related both to the accused and to the crime) must be mutually balanced; consideration must also be given to –amongst other factors – the extent of the damage caused (in particular, the harm caused to the victims and their families), the nature of the unlawful behaviour, the means employed to execute the crime, the degree of participation of the accused in the crime(s) committed, the degree of intent, and the personal circumstances of the accused (such as age, education, social and economic condition of the convicted person).²⁴

In addition to the statements of paragraph 1(c), mitigating and aggravating circumstances are then addressed by paragraph 2 of the Rule. For instance, according to para.2, letter(a), the Court shall take into account mitigating circumstances such as: ‘*circumstances falling short of constituting grounds for exclusion of criminal responsibility*’ (e.g. substantially diminished mental capacity or duress);²⁵ and ‘*the*

²³ This is the first time that the *principle of culpability* is explicitly mentioned in the regulating norms of an international court. Neither the Statutes nor the RPE of the ad hoc Tribunals contained such a statement. The recognition that there must be a proportion between the penalty imposed and the culpability of the convicted person is a welcome addition to the provisions on sentencing as, in practical terms, it means that in fact it is the degree of culpability of the offender which sets the upper limit for the determination of the penalty. On the principle of culpability in the Rome Statute, see: SICURELLA, R., « Le principe *nulla poena sine culpa* dans le statut de la cour pénal internationale », in CHIAVARI, M., (sous la direction de), *La justice pénale internationale entre passé et avenir*, Dalloz, Giuffrè, 2003, pp.259-294.

²⁴ See Rule 145, para.1(c).

²⁵ Regarding this point, it has been argued that cases of ‘preventive torture’, for instance, could fall under para.2(a), in the sense that the provision would allow for consideration, in determining the sentence, of special circumstances such as the ‘life saving’ motivation of a ‘preventive torturer’ accused of torture. The *Daschner* judgement of 20 December 2004 by the *Landgericht* Frankfurt a.M. provides an interesting example in this sense. See FLORIAN, J., ‘Bad Torture – Good Torture?’, *Journal of International Criminal Justice*, vol.3 (2005), no.5, pp.1059-1073. The author argues that the absolute ban on torture under both international and national law implies that grounds for excluding criminal responsibility of the torturer, such as defence of another person or necessity, cannot be based on the life-saving motives of the perpetrator. ‘Preventive torture’ is always unreasonable, however ‘good’ the motives of the torturer may be. However, the specific and altruistic motivation of the perpetrator may only be taken into consideration in determination of the sentence, probably leading to a lenient penalty (or to a ‘guilty, but not to be punished’ verdict as actually happened in the *Daschner* case). Since the ICC Statute does not provide for fixed sentences or sentencing ranges, this theoretically would allow – in situations similar to that of ‘preventive torture’ in the *Daschner* case – for fairly lenient punishment.

convicted person's conduct after the act, including any effort by the person to compensate the victims and any cooperation with the Court'. The factors listed as mitigating have only the purpose of providing some guidance, but the Court clearly has discretion to consider other factors besides those explicitly mentioned.

The discretion of the Court is more restricted where aggravating factors are concerned. Aggravating circumstances listed in letter (b) of paragraph 2 include: prior criminal convictions of crimes of a similar nature to those under the jurisdiction of the Court; abuse of power or official capacity; victimization; use of cruelty or motives of discrimination.

The list is not exhaustive, but – in order for the Court to consider other aggravating factors not listed in the rule – any other factors must be similar in nature to those explicitly mentioned. The final clause contained in para.2(b)(vi) has generated much debate. In effect, paragraph 2(b)(vi) seems to reintroduce the same defect of the very vague provisions of the ad hoc Tribunals – and therefore to leave the door open to abuse – as it adds a blank reference to *'other circumstances...not enumerated above'* which could also be taken into consideration as additional aggravating circumstances in sentencing. The drafters, probably conscious of the fact that such a blank reference was too wide, added the requirement that other circumstances not specifically mentioned might be taken into account only when *'by virtue of their nature they are similar to those mentioned'*. I share the opinion that this additional requirement is not satisfactory in terms of certainty of the law.²⁶

Finally, paragraph 3 of Rule 145 recalls that life imprisonment can be imposed only when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, and specifies that such a case would be characterised, for example, by the existence of one or more aggravating circumstances. This final provision, which supposedly has the aim of helping judges in the identification of cases deserving the imposition of life imprisonment, is indeed too vague to be able to effectively provide guidance in meting out the final punishment.

With reference to other circumstances mentioned in the Rome Statute, it should be pointed out that Article 27, para.1, specifies that the official capacity or position of the

²⁶ See ZAPPALÁ, S., *Human Rights in International Criminal Proceedings, cit.*, at p.202, where the author argues that the entire provision should be deleted and no aggravating circumstances, other than circumstances specifically listed, should be taken into account at the sentencing stage.

accused shall not ‘*in and of itself*’ constitute a ground for reduction of sentence.²⁷ In truth – as can also be appreciated from the case-law of the ad hoc Tribunals – the fact that a convicted person holds a position of responsibility or particular relevance in a civilian or military hierarchy is usually considered as an aggravating factor.

To summarise, although the ICC RPE (Rule 145) constitutes an already significant step towards a more comprehensive ‘theory’ of circumstances of crime, substantial gaps persist in relation to the general principles to apply to those circumstances, the lack of criteria to evaluate them, the relative weight to attribute to them, and the ‘open list’ of factors to be considered in aggravation of the penalty.

B. Substantive issues

5.3 Purposes of punishment in the ICC system

For its importance and legal relevance in the entire system established by it,²⁸ the Preamble of the ICC Statute constitutes a fundamental starting-point for the analysis of the purposes of punishment in the system of the Court. In fact, it enshrines the main aims of the ICC and reiterates the obligations of States Parties of the international community.

In the Preamble – which at the very beginning acknowledges the gravest atrocities committed over the last century – States ‘*recognizing that such grave crimes threaten the peace, security and well-being of the world*’, considered themselves ‘*determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*’ and affirmed ‘*that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured...*’.²⁹

²⁷ Article 27, paragraph 1, thus states: “...official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

²⁸ According to Article 31 of the Vienna Convention on the Law of Treaties, the preamble to a treaty must be considered part of the context within which a treaty should be interpreted. The Preamble, therefore, is an integral part of the Rome Statute and must be taken into consideration when interpreting articles and provisions of the ICC Statute itself.

²⁹ Preamble of the Rome Statute of the International Criminal Court, paras.3-5 (emphasis added).

These few lines seem to encompass the purposes of *retribution* and *general prevention* within the main objectives and mission of the ICC. Further, they could be seen as containing the ‘basis’ for international justice, in the sense of defining the emerging discipline as being the criminal law of the community of nations, with the function of protecting the highest legal values of this community against the grave international crimes which ‘*threaten the peace, security and well-being of the world*’ (paragraph 3). It is interesting to note – in para.3 – the new formula ‘well-being of the world’ added to what, until now and for a long time, was considered the traditional expression used to summarize the inherent values of the community of nations: ‘peace and security of mankind’. In this perspective, international criminal law becomes an important means of addressing grave violations and criminal behaviours of international concern.

Paragraph 4 further affirms an objective of criminal policy (*‘the most serious crimes...must not go unpunished’*): the fight against impunity, which has always been one of the main aims of international justice. Considering also the principle of complementarity on which the entire ICC system is based, the recourse to effective prosecution at the national level becomes an essential part of the international fight against impunity.

The objective expressed in paragraph 4 leads to the other criminal policy aim stated in paragraph 5: *‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’*. This should be interpreted not only in light of the repressive function to which the ICC is called, but also as a strong *deterrent* signal to all potential perpetrators by the fact that international crimes will not go unpunished.³⁰ Thus commentators have put an emphasis on the purpose of general deterrence, arguing that “to prevent crimes under international criminal law is the main purpose and the mission of the Court, in order to guarantee ‘lasting respect for the enforcement of international justice’ ”.³¹

³⁰ TRIFFTERER, O., *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, pp.2-12; TRIFFTERER, O., ‘The Preventive and Repressive Functions of the ICC’, in POLITI, NESI, *The Rome Statute of the International Criminal Court*, Ashgate, 2001, at pp.143-144; MCGOLDRICK, ROWE, *The Permanent International Criminal Court*, Hart Publishing, 2004, p.456.

³¹ TRIFFTERER, O., ‘The Preventive and Repressive Functions of the ICC’, in POLITI M., NESI G., *cit.*, 2001, at p.143.

The reference in the following paragraph 6 to ‘*the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*’ confirms that the objectives of criminal law mentioned above can be achieved only through the cooperation and active participation of all national States in the repression of international crimes, and further underlines the fact that criminal law is seen as an *ultima ratio* means of protecting the highest values and interests of the international community.

It is also important to recall paragraph 10 of the Preamble, which refers to the principle of complementarity, an essential feature of the ICC system. This paragraph affirms that the national criminal justice systems of the States Parties have jurisdictional primacy *vis-à-vis* the Court, which plays a subsidiary role only for cases where national systems are unable or unwilling to genuinely investigate and prosecute the most serious crimes of international concern. The complementarity principle is then further developed in Article 17 of the Rome Statutes, but its inclusion in the Preamble is interesting to the extent that it seems to attribute another function to international criminal law: to protect, in a subsidiary way, legal values that primarily belong to the national legal order. The protection of such values by international justice will be essential especially for cases where State organs or Government officials are the primary bodies responsible for serious violations of human rights or the international order and are therefore not in a position to properly prosecute such offences and behaviour.

The Preamble of the Rome Statute thus seems to enshrine the two classic functions of criminal law: *repression* and *prevention*.

However, the recognition of such aims in the Preamble cannot be considered as the equivalent of a provision proposing a specific sentencing policy related to the purposes of punishment; one should expect to find such a provision in the body of norms of the Rome Statute. This expectation is not fulfilled as, besides the vague and brief mention of such aims in the Preamble, no other provisions of the Rome Statute are devoted to a description of the purposes to be pursued in meting out sentences within the ICC system. The Statute is virtually silent with regard to the purposes and principles that should inform the imposition of sentences before the Court.

The purposes and objectives of international sentencing remain – even after the establishment of the ICC – still largely implicit and are to be derived from a process of deduction.

The omission of a section dealing with the objectives and principles of international justice constitutes a significant failure in the ICC system, in light of the fact that the drafting of the Rome Statute represented a unique occasion to finally address similar fundamental issues.³²

Moreover, at a first glance, it appears that there is no mention at all in the Rome Statute of the *rehabilitative* and *re-socializing purposes* of punishment. However, it is questionable whether rehabilitation is completely outside the scope of the Court's competence. In fact, on looking closer it is possible to recognize some references to the *rehabilitative character* of punishment in the provisions devoted to the execution of penalties. For instance, as seen already, Article 110 of the Rome Statute places importance – in reduction of the sentence – on the subsequent good conduct and cooperation of the convicted person, and to 'factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence'; Rule 223 ('Criteria for review concerning reduction of sentence') of the RPE establishes that judges – when deciding upon a request for reduction of the penalty to be executed – must also take into account the prospect of the *re-socialization* and successful resettlement of the sentenced person.

Above all, the ICC's foremost aim must surely be to end what former Prosecutor of the ICTY/ICTR Louise Arbour called the "entrenched 'culture of impunity' where enforcement of humanitarian law is the rare exception and not the rule".³³ Although the ICC's effectiveness remains to be seen, the very fact that a *permanent* institution has been created to deter future crimes, to hold individuals accountable for atrocities and to bring them to justice is a remarkable step forward from the past 'culture of impunity'.

³² See: HENHAM, R., 'Some Issues for Sentencing in the International Criminal Court', *International and Comparative Law Quarterly*, vol.52 no.1(2003), pp.81-114, at p.87. The author contends that the absence of penological justifications in the ICC Statute should be seen as a significant omission weakening the claims of the Rome Conference that the ICC will exercise and apply democratic principles of criminal justice.

³³ See ARBOUR, L., 'Access to Justice – The Prosecution of International Crimes: Prospects and Pitfalls', *Washington University Journal of Law and Policy*, vol.1, 1999, p.23.

5.4 The principle of legality of penalties in the Rome Statute

The principle of legality, while not explicitly referred to in the Statutes of the ICTY and ICTR, is enshrined in the Rome Statute.³⁴

Part III of the Statute, under the heading ‘General Principles of Criminal Law’, contains a number of articles (Articles 22 to 33) enumerating fundamental principles common to any criminal justice system. It is worth mentioning that for the first time in the history of international law the drafters of a treaty decided to delineate general principles of international criminal law to be included in the Statute of an international court. This decision indicated a resolute willingness by the drafters to specify the fundamental principles that were to guide the ambitious project of creating a new and permanent institution in the field of international justice.

The section begins with Article 22 devoted to the principle of *nullum crimen sine lege*, which codifies the classic principle of legality for what concerns the fact that behaviour for which a person is held criminally responsible must have already been regarded as constituting a crime at the time when the specific act took place.³⁵

What is of interest, however, is the other component of the principle of legality: the principle of *nulla poena sine lege*. This principle is enshrined in Article 23 of the Statute, which simply states: “A person convicted by the Court may be punished only in accordance with this Statute.”

Article 23 is the final compromise reached by the Rome Conference and which replaced an original provision containing references to the national law of the state of

³⁴ See, on the issue of the principle of legality in the Rome Statute, LAMB, S., ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, in CASSESE, A., *et al.*, *The Rome Statute of the International Criminal Court – A Commentary*, Oxford University Press, 2002, at pp.756-765; MARTINI, A., “Il principio *nulla poena sine lege* e la determinazione delle pene nel sistema della Corte Penale Internazionale”, in CASSESE A., CHIAVARIO M., *Problemi attuali della giustizia penale internazionale*, Giappichelli Editore, Torino, 2005, pp.215-249; MANTOVANI, F., “Sui principi generali del diritto internazionale penale”, in *Rivista italiana di diritto e procedura penale*, vol.46, 2003, p.40; SCHABAS, W., ‘Article 23’, in TRIFFTERER, O., *Commentary on the Rome Statute...*, *cit.*, pp.463-466; OLÁSOLO, H., ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, *Criminal Law Forum*, vol.18, issue 3-4, 2007, pp.301-319, at 303-313.

³⁵ For more detail on the principle of *nullum crimen sine lege* in the negotiations of the Rome Statute and in the ICC system, see: BROOMHALL, B., *International Justice and the International Criminal Court – Between Sovereignty and the Rule of Law*, Oxford University Press, 2003, pp.30-40.

which the offender was a national or where the crime was committed.³⁶ At the Rome Conference, only a few states spoke in favour of some recognition of national practice in determining sentences. The majority suggested that the proposed reference to national law should only be a residual source defined in the provision on applicable law.³⁷ Thus, the provision referring to national practice was ultimately deleted from the Rome Statute, and such references were inserted in subparagraph 1(c) of Article 21, devoted to the ‘Applicable Law’.

The provision at Article 23, which prohibits the ICC from imposing retroactive punishment as well as penalties not prescribed by the Rome Statutes, should find actual implementation throughout the Statute, for instance in the provision referring to the applicable penalties for the crimes under the jurisdiction of the Court, namely Article 77. Article 23 thus serves as a limit to the discretionary powers of the ICC which is therefore not allowed to impose punishment that is not already defined in the Statute. As seen above, Article 77 does provide for penalties to be applied by the Court³⁸ – and thus gives application to the *nulla poena sine lege* principle – but the provision is rather generic and does not provide for ranges of penalties (establishing only the 30 years’ limit or life imprisonment), nor does it prescribe precise criteria or correlate crimes and *poena*. While efforts to define and specify the elements of crimes under the jurisdiction of the ICC have been more substantial and have thus given a *real* application to the *nullum crimen sine lege* principle, the same cannot be said in relation to the determination of penalties.

It is thus legitimate to wonder whether the principle of *nulla poena sine lege* in the ICC Statute is *in concreto* and in all aspects fully respected or not,³⁹ and whether it is in line with the way in which the principle of legality is traditionally formulated.

With regard to this, it has been observed that – compared to the traditional formula of the *nulla poena* principle in national legal orders – the rule in Article 23 shows some

³⁶ The question of the relevance of national practice in the determination of sentences was discussed at the December 1997 session of the Preparatory Committee for the establishment of an international criminal court. See UN Doc.A/AC.249/1997/WG.6/CRP.9.

³⁷ For an in-depth reconstruction of the discussion on this point during the Rome Conference, see SCHABAS, W., ‘Perverse Effects of the *nulla poena* principle: National Practice and the ad hoc Tribunals’, *European Journal of International Law*, vol.11 no.3, 2000, pp.536-537.

³⁸ Namely: imprisonment for a term, life imprisonment, fines, and forfeitures (see Art.77, paras.1-2).

³⁹ It has been argued that detailed penalties are not necessary for the fulfilment of Article 23, and that the existence of Article 77 is sufficient to satisfy the requirement of a pre-existing punishment. See CALVO-GOLLER, KARIN N., *The Trial Proceedings of the International Criminal Court*, Martinus Nijhoff Publishers, 2006, at p.190.

peculiarities, in that it seems to leave out one of the basic guarantees of the principle: the fact that penalties must be predetermined by ‘laws’ and thus issued only by a ‘legislative’ power, the sole organ that can legitimately make laws.⁴⁰ On the other hand, this aspect reflects one of the characteristics of the international system of criminal law: the absence of a legislator, the lack of a legislative source which – as in national systems – would have the sole and exclusive task of establishing law. Given this peculiarity of international criminal law, the drafters of the Rome Statute found that they were required to adjust the *nulla poena* principle to the lack of an ‘external’ and pre-established legislative power at the international level, thus declaring that respect of the principle will be ensured *within* the framework of the penalties established by the ICC Statute itself.

Certainly this would be sufficient; the problem is that those penalties have not been specified in precise terms by Article 77. Article 23 seems to leave out an important characteristic of the principle of legality of penalties: the fact that the imposition of a penalty should be defined with precision by the law (*lex certa*). In fact, if we consider how the provisions on penalties have been formulated, it is easy to recognise that the norms are rather scant, as they limit themselves to prescribing a maximum penalty, and do not attempt any distinction between ranges of penalties in relation to the different crimes under the ICC’s jurisdiction, or to the different levels of seriousness of offences. The solution adopted in Article 77 will by necessity imply the use of ample discretion for the ICC and for its judges both in order to establish the actual gravity of the crime committed, and to decide upon an appropriate level of penalty to be inflicted.

In conclusion, even the Rome Statute seems to confirm that in practice the scope of the principle of legality of penalties is reduced in international criminal law.

⁴⁰ See PALAZZO, F., *Introduzione ai principi del diritto penale*, Torino, 1999, p.199. See also MARTINI, A., “Il principio *nulla poena sine lege* e la determinazione delle pene nel sistema della Corte Penale Internazionale”, *cit.*, pp.220-221.

C. Procedural issues

5.5 The sentencing hearing

Article 76 ‘Sentencing’ introduces in its paragraph 2 the idea of a distinct sentencing phase during the trial process.

The provision was inserted in the ICC Statute without much debate and derived from a very similar provision contained in the 1994 Draft Statute by the International Law Commission.⁴¹

The first paragraph of Article 76 requires the Trial Chamber, in the event of a conviction, to consider the appropriate sentence to be imposed on the accused by taking into account the evidence presented and the submissions made, in relation to sentencing, during the trial proceedings.

The provision in paragraph 2 of Article 76 creates the possibility of a distinct sentencing hearing before completion of the trial, in order to hear any additional evidence or submissions relevant to sentencing. This hearing may be triggered at the request of the Prosecutor or the accused, or by the Trial Chamber on its own motion. Therefore, at the end of the trial – and after all the pleadings regarding the determination of guilt or innocence – parties are also allowed to present evidence on sentencing issues and to plea for what they believe should be the most appropriate penalty. The Statute does not specify how the application is to be made, what the time-frame should be, and so on; additionally, there is no indication in this regard in the works of the Preparatory Committee.⁴²

A separate hearing is not compulsory and this places the defence in a difficult position in the case of a conviction. In fact, should a further sentencing hearing not be considered necessary, the accused will have to present eventual witnesses and evidence in mitigation in advance, as well as other relevant information on the circumstances surrounding the commission of the crime(s).

⁴¹ See Article 46, para.1, in *Report of the International Law Commission on the Work of its Forty-Sixth Session*, ‘Draft Statute for an International Criminal Court’, 2 May-22 July 1994, UN Doc A/49/10 (1994), at p.123.

⁴² See SCHABAS, W., ‘Article 76’, in TRIFFTERER, O., *Commentary on the Rome Statute...*, cit, at pp.980-981.

The provision does not operate in the case of guilty pleas and is expressly excluded by the same Article 76, para.2; although Article 65 ‘Proceedings on an admission of guilt’ (to which paragraph 2 refers) does not establish any particular mechanism for the presentation of evidence relevant to sentencing.

By way of comparison, with regard to the system and practice of the ad hoc Tribunals, a similar procedure with a separate hearing to address matters concerning sentencing was initially provided for, as seen above, with the difference that a Trial Chamber would hear evidence on sentencing issues only after having pronounced its decision on guilt.⁴³ There were, therefore, two distinct decisions: one on the determination of guilt or innocence and another on the penalty to impose.⁴⁴

This practice was allowed only up to July 1998, when the RPE of the two Tribunals were amended in order to speed up the procedure, to eliminate the distinct sentencing phase and to have both the determination of guilt and the establishment of penalties together in a single judgement. The separate sentencing hearing no longer existed by November 1998 when the *Celebici* judgement was made.⁴⁵

The model of a sentencing hearing appears to be followed in the ICC Statute under Article 76. However, it has been argued that failure to hold a separate sentencing hearing, especially if after conviction, may constitute a disadvantage for the accused, who could be deprived of the possibility to submit relevant evidence, for example in mitigation of the sentence.⁴⁶ Without doubt, the sentencing hearing can also be to the advantage of the Prosecutor, since during such a hearing s/he could easily present proof of bad character or prior convictions, which might be deemed inadmissible at trial but acceptable for a sentencing hearing. Considering the overall advantages of a sentencing hearing, for instance in allowing submissions of additional evidence relevant to

⁴³ As seen already in Chapter 3, former Rule 100 of the RPE, under the heading of ‘Pre-sentencing Procedure’ thus provided: ‘If a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.’ The Rule was then amended during Revision 13 of the RPE, in July 1998.

⁴⁴ Such a procedure was followed for instance in: *Prosecutor v. Tadic*, First Sentencing Judgement of 14 July 1997, Case No.IT-94-1-T-S; *Prosecutor v. Jean Paul Akayesu*, Trial Judgement, Case No.ICTR-96-4-T, 2 September 1998.

⁴⁵ In fact the accused were found guilty and sentenced immediately, without any specific sentencing hearing. See *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998.

⁴⁶ See SCHABAS, W., ‘Article 76’, in TRIFFTERER, O., *Commentary on the Rome Statute...*, *cit.*, at p.981. See also ZAPPALÀ, S., (*Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.198), who argues that a *two step procedure* with first a decision on guilt or innocence and then a decision, after a compulsory sentencing hearing, on the penalties to be imposed would better protect the rights of the accused, because it would allow for a better plea in the sentencing phase.

sentencing, it seems appropriate that such hearings should thus be guaranteed in all cases.

5.6 Admission of guilt

The procedure for ‘admission of guilt’ contained in the Rome Statute is quite strict and clearly rests on the fundamental principle of the presumption of innocence. The rules of the ICC Statute on the proceedings for admission of guilt seem much more detailed than the corresponding provisions of the ad hoc Tribunals’ system on guilty pleas, and it has been argued that they represent an attempt to adapt the traditional rules regarding guilty pleas to the specific demands of international criminal justice.⁴⁷

Under national laws, ‘guilty plea’ procedures generally seek to reduce the number of trials, and the overall burden on the judicial system. The same objectives seem to be behind the reasoning expressed by many delegations in support of the practice of guilty pleas during the discussions of the Preparatory Committee in August 1996:

...The view was expressed that the accused should be allowed to enter a plea of guilty, which would have the procedural effect of obviating the need for a lengthy costly trial: the accused would be allowed to admit his/her wrongdoing and accept the sentence; the victims and witnesses would be spared any additional suffering; and the Court would be allowed to take the guilty plea into account in sentencing the convicted person....⁴⁸

Moreover, it has been argued that international criminal justice is not an ordinary system for prosecuting serious violations of humanitarian law and human rights law, and should consequently not be overloaded with cases.⁴⁹

One of the main risks of guilty plea procedures is that, when a plea of guilty is entered, there is generally no longer any determination of the ‘judicial truth’, nor is there any presentation of evidence. However, it is interesting to note that Article 65, paragraph 4, of the ICC Statute entitles the Trial Chamber to ask the Prosecutor to present additional evidence, including the testimony of witnesses, where the interest of justice – and in particular the interests of victims – so require. The Trial Chamber may

⁴⁷ See ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.88. For more details on the procedure for ‘admission of guilt’ before the ICC, see for instance: BOSLY, HENRI-D., ‘Admission of Guilt before the ICC and in Continental Systems’, *Journal of International Criminal Justice*, 2 (2004), pp.1040-1049.

⁴⁸ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st session, Supp No. 22, UN Doc A/51/22 (1996), vol.I, p.56, para.261.

⁴⁹ See ZAPPALÀ, S., *cit.*, p.89.

advance such a request if it is of the opinion that a more complete presentation of the facts of the case is required.⁵⁰ Another risk is excessive leniency in sentencing: often guilty pleas lead to substantial sentence discounts, whereas crimes of international concern, and thus those under the jurisdiction of the ICC, would deserve harsh penalties.⁵¹

The ICC system seems to promote the view that an international criminal trial is a fundamental instrument in the hands of the international community to reconstruct the judicial truth and understand why and in what circumstances international crimes were committed. In fact, by providing that the presentation of evidence cannot be completely averted by a guilty plea, the ICC Statute shows the importance of the trial itself as an official fact-finding tool and does not limit it to the adversarial concept of the trial as a dispute between two parties, the prosecution and the accused. In the ICC system even the terminology is different: the Statute speaks of ‘admission of guilt’ not of ‘guilty plea’. This admission of guilt will be considered by the Chamber together with all the other evidence presented.

In terms of procedure, Article 65 can be considered a compromise between the classic ‘common law’ approach to guilty pleas and the classic ‘civil law’ approach. In fact, the provision presents interesting elements common to both civil law summary or abbreviated procedures and common law rules on guilty pleas.⁵² Already the initial statement contained in paragraph 1 (‘...where the accused makes an admission of guilt...’) is a hybrid formula between the common law definition of ‘plea of guilty’ and the civil law ‘admission of the facts’.

The very first paragraphs of Article 65 are already indicative of a significant difference in respect to the common law model of guilty plea: in case of an admission of

⁵⁰ See Article 65, para.4: “...Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
 (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.”

⁵¹ ZAPPALÀ, S., *cit.*, pp.88-89. The author observes that guilty plea procedures may not be appropriate for high-level criminality, where no sentence discount is really possible (*ibid.*, p.89, fn. no.28).

⁵² See TRIFFTERER, O., *Commentary on the Rome Statute...*, *cit.*, at p.825.

guilt before the ICC, such a statement is not binding on the Court and does not allow a Trial Chamber to move automatically to the sentencing stage.

Article 65, in fact, provides that – when the accused has entered an admission of guilt pursuant to Article 64, paragraph 8(a) – the Trial Chamber must satisfy itself as to the voluntary nature of the admission (which must be free from any form of threat, coercion or duress), to the fact that the accused understands the consequences of the plea and that the admission is supported by factual evidence available to the Chamber. Article 65, para.3, then states that if the Trial Chamber is not satisfied that such conditions are established, it can decide to proceed to trial. If, on the other hand, the Trial Chamber is satisfied as to the existence of the conditions required by paragraph 1, it shall consider the admission of guilt together with any additional evidence, and may convict the accused. A plea that does not meet all the requirements prescribed by Article 65 cannot be entered.

A problematic issue – with regard to the duties of a Trial Chamber in ascertaining the validity of a plea of guilt – is related to the scope of the information that the accused should receive about the charges and, more specifically, about the applicable penalty in case of a conviction. As has already been seen in the comparative analysis of sentencing law in national legal systems, some systems demand that the court inform the defendant about the minimum and maximum penalties that can be imposed.⁵³ It would be problematic if Trial Chambers of the ICC were to provide the accused with the same details given that Article 77 does not provide for minimum penalties but only for maximum penalties, which should in any case be explained to the accused, together with any other accessory punishment that might be imposed under paragraph 2 of the same Article 77.

It is then interesting to note the wording of the last paragraph of Article 65, para.5:

Any discussion between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

This final clause was not originally included in the draft of Article 65, as the Report of the Preparatory Committee shows.⁵⁴ It was inserted only at the final stage of the approval of the Rome Statute in order to ease the concerns of some delegations worried

⁵³ See, for example., US Federal Rules, Rule 11(c).

⁵⁴ See *Report of the Preparatory Committee, cit.*, Vol. II, p.174.

that the guilty plea procedure in the Statute would also open the way to the introduction of plea bargaining. Unfortunately, the language of paragraph 5 seems to presuppose as a normal practice exactly the situation it was intended to avoid: negotiations between the Prosecutor and the Defence on charges and penalties.

Furthermore, the ICC Statute and the RPE provide no guidelines with regard to the impact of an admission of guilt on the sentence, and there is no specific mention of whether such an admission should be considered as a mitigating factor or of what principles should govern the impact of a 'guilty plea' on the final sentence. For instance, Article 76(1) refers only to the obligation of the Trial Chamber to 'take into account the evidence presented and the submissions made', but nowhere (neither in Article 78 nor in Rule 145) is it indicated whether an admission of guilt should count as a mitigating factor and what conditions, circumstances or principles should govern the impact that it has or should have on the determination of the final sentence.

Thus, yet again, the ICC Statute is laconic as to the weight and relevance of certain determinants on the sentencing process.

5.7 Appeal and revision

Part 8 of the Rome Statute is devoted to 'Appeal and revision'.⁵⁵ Articles 81-83 of the Statute are the main provisions on appellate proceedings before the Court,⁵⁶ and they also address the possibility of an appeal for unjust and disproportionate sentences. In that respect, Article 81, paragraph 2(a), thus provides:

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence.

⁵⁵ For more details on appellate proceedings at the ICC, see for instance: BRADY, HELEN J., 'The Rules of Procedure and Evidence on the Appeal', in FISCHER HORST, KRESS CLAUS, (eds.), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.235-259.

⁵⁶ Article 81 'Appeal against decision of acquittal or conviction or against sentence' is the main provision dealing with appeals against a final judgement or sentence of a Trial Chamber; Article 82 'Appeal against other decisions' allows for appeals to be brought against other interlocutory and against other decisions issued by a Pre-Trial Chamber or a Trial Chamber; Article 83 'Proceedings on appeal' regulates the powers and procedures of the Appeals Chamber. The provision which is of more interest here is contained in paragraph 2(a) of Article 81.

Only one ground for appeal against a sentence is provided for, namely that of *disproportion* between the crime(s) committed and the final sentence imposed on the convicted person.

It should be noted that it will most likely be problematic to demonstrate a *disproportion* between the offence and the final sentence since the Statute does not provide for a hierarchy of international crimes and their underlying offences. Clearly, an immediate task for the Court will be to develop a test for determining whether a sentence is ‘disproportionate’ or not.

No other grounds of appeal were introduced in subparagraph 2(a) for sentencing issues, although it is possible to envisage numerous potential errors in this area: procedural errors (for instance, failure to hold a hearing under Article 76, para.2, despite a request by the Prosecutor or by the Defence), errors of fact (where, for example, the Trial Chamber in determining the sentence relied on matters which were factually incorrect), or errors of law (for example, if the Trial Chamber in determining sentence misconstrued a provision of the Statute or of the Rules).⁵⁷ On the other hand, such cases seem to be taken into account by Article 83, para.2, by which the Appeals Chamber can reverse or amend the decision and sentence, or order a new trial before a different Trial Chamber if it finds that the decision or sentence under appeal was materially affected by error of fact or law or procedural error.⁵⁸

The ICC Statute also establishes a review mechanism concerning the reduction of sentences, by virtue of Article 110 ‘Review by the Court concerning reduction of sentence’. The article indicates, first of all, that only the Court is entitled to decide upon any reduction of the sentence, after having heard the convicted person. Secondly, Article 110, para.3, prescribes that the convicted person is entitled to obtain a review of the sentence, in order to determine whether the penalty should be reduced, only when

⁵⁷ See STAKER, C., ‘Article 81’, in TRIFFTERER, O., *Commentary on the Rome Statute...*, *cit.*, at pp.1020-1021.

⁵⁸ See Article 83, para.2: “...If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment”.

s/he has served two thirds of the sentence, or 25 years in the case of life imprisonment. It is also specified that the review shall not be conducted before the time indicated has passed; therefore the minimum periods of imprisonment before a review may take place are quite lengthy, especially in the case of life imprisonment (25 years). The revision can not be conducted before the prescribed time limit but – after that has expired – it becomes a ‘mandatory’ review.

Paragraph 4 of the same article specifies that, in its review, the Court may reduce the sentence if it finds that one or more of the following factors are present:

- (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
- (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
- (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

These should be read together with the further criteria specifically established, in addition to those at Article 110, by Rule 223 ‘Criteria for review concerning reduction of sentence’, i.e.: the conduct of the person while in detention; the prospect of re-socialisation and resettlement of the convicted person; any significant action undertaken by the convicted person for the benefit of the victims and their families; the individual circumstances of the individual, including the state of physical or mental health and advanced age.

It appears that all these criteria take into account issues of rehabilitation, re-socialization and social reintegration of the offender.

Should the Court not deem it opportune to reduce the sentence and to release the offender earlier, then the eventual reduction of sentence shall be reviewed every three years, unless a shorter interval is established in the decision pursuant to Article 110, para.3.⁵⁹

Considered overall, Article 110 can be read as a clear indication of the penitentiary primacy of the ICC during the phase of the enforcement of sentences. Besides formulating the minimum terms of enforcement to be observed by the Court, the

⁵⁹ See paragraph 3 of Rule 224, ‘Procedure for review concerning reduction of sentence’, ICC RPE.

provision makes clear that any decision concerning the commutation or reduction of sentence lies with the Court.

Furthermore, the provision on judicial review by the Court in order to reduce sentences acquires particular importance especially in the light of its possible use to reduce and compensate inequality in the treatment of prisoners, given that sentences will be served in different States and convicted persons will thus be subject to different treatments. However, it should be recalled that Article 106, para.1, of the Statute states that the enforcement of sentences of imprisonment ‘shall be consistent with widely accepted international treaty standards governing treatment of prisoners’. It is unfortunate that drafters of the Rome Statute did not deem it opportune to be more explicit about those standards, but it is safe to assume that they clearly include treaty provisions such as Articles 7 and 10 of the ICCPR, Article 5 of the American Convention on Human Rights, or Article 14 of the UN Convention Against Torture, that expressly mention the re-educative function of penalties and of the penitentiary system.⁶⁰

D. Sentencing guidelines for the ICC?

An attempt to suggest sentencing guidelines for the ICC, by considering the type of crimes under its jurisdiction, can be found in the literature as early as 1997.⁶¹

Pickard undertook a comparative study examining the domestic laws of twelve different legal systems: the permanent members of the UN Security Council; one nation from Western Europe; two nations from Asia; one nation each from South America, Eastern Europe, Africa and the Middle East. He then elaborated the arithmetic mean of sentences that would be imposed in those legal systems by averaging the minimum and maximum ranges of penalties available therein. Based on the results achieved, he suggested numeric sentencing guidelines, or rather tariffs, for the ICC.⁶²

⁶⁰ On the issue of enforcement of sentences pronounced by the ICC, see for instance: MARCHESI, A., ‘The Enforcement of Sentences of the International Criminal Court’, in LATTANZI F., SCHABAS W., *Essays on the Rome Statute of the ICC*, Il Sirente ed., Rome, 2000, pp.427-446.

⁶¹ See PICKARD, D. B., ‘Proposed Sentencing Guidelines for the International Criminal Court’, *Loyola of Los Angeles International & Comparative Law Journal*, vol. 20 (November 1997), pp.123-157.

⁶² In the system elaborated by Pickard, the death penalty, when found, was incorporated as a life sentence. If the majority of nations authorised a life sentence for a particular crime, then life imprisonment became the proposed maximum for penalties to be imposed by the ICC. Sentence-ranges were given in whole

According to the sentencing guidelines elaborated by Pickard, the proposed sentence for genocide resulting in death shall be life imprisonment. The proposed sentence for genocide not resulting in death shall be a prison term from twelve to twenty years. An individual guilty of conspiracy to commit genocide or attempt to commit genocide would be subject to imprisonment for twelve to twenty years.⁶³

The proposed sentence for crimes against humanity and war crimes resulting in death shall be life imprisonment. For torture as a crime against humanity or war crime the penalty shall be imprisonment from 7 to 17 years. An individual who commits rape as a crime against humanity or a war crime would be subject to imprisonment for ten to twenty-eight years.⁶⁴

Although the author himself acknowledges that he simply intended to suggest a model to create guidelines for the ICC,⁶⁵ it appears that both the analysis conducted and the system thereby elaborated remain too simplistic to satisfy the complexity of issues with which sentencers are presented at the end of a trial. Moreover, Pickard does not incorporate his model into a broader sentencing policy nor does he specify which sentencing principles should guide the decision-making process. Further, he does not deal with the problem of individualisation of penalties, and with the weight that aggravating and mitigating circumstances should exercise on the final determination of sentences. The imposition of penalties is not a mathematical exercise, but a complex human process in which numerous factors and circumstances are of influence; circumstances and events that are often not quantifiable in pure arithmetical terms.

For this reason I do not wish to propose sentencing tariffs or rigid sentencing guidelines for international sentencing, and thus for the future work of the ICC. Although the most obvious way to attenuate judicial discretion might be to introduce a fixed penalty regime, this may not be the most appropriate solution for international sentencing, given that fixed and excessively rigid penalties might not be sufficiently

years, therefore the number of years was rounded down when being less than one-half of a year, and rounded up in the opposite case. For countries not providing for the same type of international crimes than those under the ICC jurisdiction, Pickard selected those offences that most closely approximated the substance and nature of the international crimes concerned. See PICKARD, D.B., 'Proposed Sentencing Guidelines for the International Criminal Court', *cit.*, pp.140-141.

⁶³ *Ibid.*, pp.147-149.

⁶⁴ *Ibid.*, pp.153-163.

⁶⁵ *Ibid.*, p.123.

flexible to accommodate the vast range of combinations and possibilities that could emerge from the categories and sub-categories of international crimes, as well as all the relevant sentencing variables that come into consideration with them. Moreover, it is believed that they would prove inadequate to address all the subjective features of both the crime and the offender. While a system of fixed penalties would very probably achieve the objective of treating similar cases in a similar way, the same is not true for the opposite case: such a system would be too restrictive to adequately treat different cases in different ways. Under a fixed sentencing regime there is no alternative to standard mandatory penalties for each specific offence.

However, it is possible to develop an alternative that could be more appropriate to international sentencing by establishing a range of penalties (with ample minimums or maximums) related to the different sub-categories of international crimes. This would provide an indicative threshold established by law, still leaving appropriate discretion to judges.

The Rome Statute seems to represent a first step towards creating a pre-established range of penalties by providing a general maximum term of imprisonment of 30 years and, in addition, the possibility of imposing life imprisonment in particular circumstances. This is of course still a very embryonic system, given that no further guidance is provided and no distinction is made not only between the gravity of international crimes, but also between the underlying offences that constitute genocide, crimes against humanity and war crimes. A hierarchy of international crimes is suggested in this thesis, and the opportunity for future research to develop indicative ranges of penalties for the underlying offences is maintained.

My proposal, developed in the next chapter, does not consist of a rigid sentencing grid or of sentencing guidelines, but rather a system of guiding principles for international sentencing, to be read in conjunction with the existing provisions on sentencing in the ICC Statutes and RPE. The joint application of these principles and rules should favour a more coherent decision-making process in sentencing, and ultimately more consistent and uniform sentencing outcomes.

PART III. TOWARDS THE CONSTRUCTION OF GUIDING PRINCIPLES FOR INTERNATIONAL SENTENCING

Sentences meted out by international courts and tribunals are the final and public acts through which the work and efficacy of those international institutions, and consistency with their mandate, will be evaluated.

International tribunals and courts operate, on behalf of the international community, as a response to the commission of atrocities and other heinous acts which, for their scale and seriousness, concern the entire humankind. It is thus evident that the ‘final products’ of those tribunals and courts, namely the sentences imposed, acquire special significance and are certainly the object of a great deal of attention. This is why, above all, it is important that those sentences be perceived as ‘fair’, proportionate and consistent.

This is all the more true in relation to the ICC and its future sentencing practice, as this aspect acquires great importance for attaining the goals of international criminal justice. The ICC’s effectiveness might be increased if the Court succeeds in establishing recognized credibility associated with the warning of punishment, thus representing a credible threat to possible and future tyrants. This can certainly be fostered by a sound sentencing practice.

Proportionality and consistency in sentencing are only achievable if a coherent system of ‘guiding principles’ is developed and put at the disposal of international sentencers for the purposes of guidance and uniformity.

Against the background of the analysis conducted so far throughout this thesis, the following chapter offers my personal assessment in relation to what I consider to be the major issues at stake in international sentencing, with a view to suggesting more defined criteria and ‘guiding principles’ in this matter.

CHAPTER 6.
ASSESSMENT OF SOME IMPORTANT LEGAL ISSUES FOR
INTERNATIONAL SENTENCING

6.1 The principle of legality of penalties

The first chapter, at section 1.2, illustrated the problems encountered by a full application of the principle of legality of penalties in international criminal law and, particularly, in international sentencing. Statutes of past and present international tribunals/courts are, in fact, unsatisfactory as to the provisions concerning sentencing and penalties: they do not contain detailed penalties, do not explain how these should be determined, and do not correlate crimes and *poena*. Consequently, the principle of legality in relation to the *nulla poena sine lege* part is not fully implemented.

As anticipated in Chapter 1 when analysing the principle of legality of penalties in relation to international sentencing, there is a fundamental issue at stake: a different notion of *law* at the international level. In fact, this seems to be the main problem that the principle encounters in the international sphere. Undeniably, a normative system of a supranational character, such as international criminal justice, presents some peculiarities which render it very different from national legal systems: no apparatus exists in international law similar to the legislative, executive and judicial structures at the national level. The traditional points of reference that apply to any national legal system have different connotations in the international sphere.

As observed by S. Zappalà, it would not therefore be coherent to contend that the notion of law at the international level is that of *law in the formal sense*, for example a statute approved by a parliament.¹ There are, in fact, no parliaments in the international legal order, and there is no ‘legislator’ as in domestic legal systems. It thus seems necessary to adopt a broader notion of *law* which would correspond, for instance, to

¹ ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.195.

‘what is established according to the law’, i.e. *in accordance with the rule of law*.² This is the notion of ‘law’ adopted by the Appeals Chamber in the *Tadic* case, where the Chamber held that, as far as international law is concerned, the expression ‘established by law’ must be interpreted in the sense of ‘*in accordance with the rule of law*’.³

Similarly, Bassiouni and Manikas maintain that the particular character that the principle of legality assumes in international criminal law would probably be better expressed by the formula *nullum crimen nulla poena sine iure* – rather than ‘sine lege’ – the former being less strict than the rigid approach expressed by ‘sine lege’.⁴ In this formulation, the rule would simply require the existence of a legal provision prohibiting certain conducts and establishing punishment for them, under conventional or customary international criminal law.

This more ‘flexible’ interpretation of the expression *sine lege* in fact seems also to be confirmed by the jurisprudence of the ECtHR, which specified that: ‘...when speaking of “law”, Article 7 alludes to...a concept which comprises written as well as unwritten law...’.⁵

It follows that, once the concept of ‘law’ in the international sphere is intended in this more flexible and broad sense, even the principle of *nulla poena sine lege* assumes a different aspect and should not have as strict a meaning as in national systems.

Many commentators agree upon the fact that the principle of *nulla poena sine lege* is applicable in international criminal law only in a limited way. In *national* law, the principle has always implied precise definitions of crimes and the penalties to be applied given that, historically, the principle was used to limit and control the power of States and thus to protect individuals against discretionary powers and abuses; conversely in *international* law, where a different concept of sovereignty and the interests of the whole international community are at stake, the principle is less strict: a specific penalty framework is not even associated with each different crime. However,

² See ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.195. See also STERN, B., « De l’utilisation du temps en droit international pénal », in *Le Droit International et le Temps, Actes du Colloque de la SFDI*, Paris, Pedone, 2001, pp.253-255, at p.255 where the author explains that in international law the principle *nulla poena sine lege* should be interpreted as *nulla poena sine iure*.

³ *Prosecutor v. Tadic*, Case No.IT-94-1-AR-72, Appeals Chamber, Decision on the Motion of the Defence of Lack of Jurisdiction, 2 October 1995, paras.42-48.

⁴ BASSIOUNI, M. CH., and MANIKAS P., *The Law of the International Tribunal for the former Yugoslavia*, Irvington-on-Hudson, NY, Transnational Publishers, 1996, at pp.268, 289.

⁵ ECtHR, *S.W. v. United Kingdom*, Application no.20166/92, Ser.A 335B, Judgement of 22 November 1995, para.35.

given that international crimes have always attracted the highest penalties available at the national level, one cannot claim that penalties were not already provided for in the case of such atrocities.

Schabas cautions against an excessively rigid application of the *nulla poena sine lege* principle in international criminal law, agreeing with an interpretation of the principle not in absolute terms but rather oriented towards its functions of justice. Accordingly, and recalling the writing of Hans Kelsen at the time of Nuremberg, it should be stressed that the *nullum crimen nulla poena* is a principle of justice and – as such – it should not impede the exercise of justice when it is so required.⁶

In conclusion, it should be recognised that the principle of *nulla poena sine lege* does apply in international criminal law and before international criminal tribunals, but only to a certain extent (*lex praevia*, but not *lex certa*). Thus application of the principle should be viewed differently in the international sphere:⁷ while the concept that an individual cannot be punished if a penalty was not already provided for at the time of the commission of the offence (*lex praevia*) is fully and strictly implemented, the other implication that an individual is entitled to be aware in advance of the exact quantity of penalty that s/he would face if committing a crime (*lex certa*) is less established and not strictly required.

The principle is therefore violated only in cases where the accused person can legitimately claim that neither national nor international law attached *any penalty at all* to the acts of which s/he is accused. As long as a penalty (although not specified in its *quantum*) is provided for the specific crime at stake, then the principle of legality is deemed as respected and satisfied. In relation to sentencing, this would imply that the current absence of ranges of penalties for international crimes does not endanger the principle of legality of penalties *per se*. Thus, the fact that the ICC Statute, at Article 77, does not articulate detailed penalties is sufficient for the fulfilment of Article 23 of the Rome Statute and to satisfy the requirement of a pre-existing punishment (*lex praevia*). However, as already acknowledged in Chapter 5, the elaboration of flexible ranges of

⁶ KELSEN, H., 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?', *International Law Quarterly*, 1947, 153, at 165, where Kelsen noted that *nullum crimen nulla poena* is a principle of justice and that justice required the punishment of the Nazi criminals.

⁷ See also, in this respect, the dissenting opinion of Judge Cassese to the Appeals Chamber Judgement of 26 January 2000, in *Prosecutor v. Tadic*, Case No.IT-94-1-A.

penalties – although not essential for the fulfilment of the principle of legality of penalties – would certainly serve the purpose of clarity and transparency, and foster consistency in sentencing. It is thus maintained that such a system of flexible ranges of penalties should be developed, more in order to ensure consistency than for legality purposes.

6.2 The principle of proportionality of penalties

International law does not provide detailed criteria to determine the appropriate penalty to be imposed for an international crime, although the general principle of proportionality of penalties is clearly applicable and provides some guidance.

As seen above in section 1.3, a first condition required by this principle is that punishment should be proportionate to the gravity of the crime for which it is meted out, thus calling for a correlation between the seriousness of the crime committed and the harshness of the penalty imposed for its commission. Moreover, punishment should be proportionate to the degree of responsibility and the personal circumstances of the offender.

It should be recalled that criticism of the sentencing practice of the ad hoc Tribunals concerned precisely the fact that the sentences handed down have not been *proportionate* to the gravity and magnitude of the crimes under the jurisdiction of the ICTY and ICTR, and that perpetrators of those heinous crimes have not received their ‘just deserts’.⁸ This criticism is understandable, especially when considering that offenders found guilty of murdering hundreds of people have been sentenced on average to no more than 20 years of imprisonment, while – in a comparison with domestic systems of criminal law – an accused may receive the same punishment or even a lengthier sentence for comparatively smaller responsibilities.

I have already argued, in Chapter 1, that the difficulties encountered in the application of the principle of proportionality in international sentencing are, in my opinion, linked to the fact that, where international crimes are concerned, the degree of

⁸ See PENROSE, M.M., ‘Lest We Fail: The Importance of Enforcement in International Criminal Law’, *American University International Law Review*, vol. 15, no. 2 (2000), pp.321-394, at p.375 ff.; see also *Report: Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, University of California, Berkeley, International Human Rights Law Clinic and University of Sarajevo Human Rights Centre, 2000, at p.34.

harm and suffering caused through the crimes, and the ‘gravity’ of these, are incommensurable with the suffering to be imposed on the accused through penalties.

Considering the fact that international courts and tribunals have to impose sentences for the most serious violations of human rights, it is clear that no sentence can ever be commensurate with these crimes. When taking into account the atrocity and extreme gravity of international crimes, it is difficult to imagine *proportionality* between the final penalty imposed and the crime(s) committed. To look for a proportion – in the common meaning attributed to the word – would probably imply the application of very severe penalties going well beyond 30 or 40 years of imprisonment.

It is against this background that the need to ‘revisit’ the *principle of proportionality* in international criminal law is proposed: a new concept of proportionality could in fact facilitate the understanding of international sentencing and its peculiarities, thus leading to the acceptance of a different scale of punishment in international justice, a scale which is bound to be ‘lenient’ if compared to national standards.

A revised idea of the principle of proportionality should restate the terms of correlation between the elements that should be *proportionate*. Where international crimes are concerned, it is not possible to equate the degree of harm caused by the offender with the degree of suffering to be imposed in punishment on the offender. Therefore, the proportionality principle should be reassessed to correlate more strongly the personal culpability of the offender and his individual circumstances with the degree of punishment imposed, rather than attempting to make the punishment meted out proportionate to the harm caused by the offence. In this perspective, the ‘adjusted’ formula for the international context should be that the penalty imposed should match *primarily* the degree to which the offender is culpable for the crime(s) committed, and his personal circumstances. The element of the gravity of the offence should be tempered by paying substantial attention to the individual accused, not only in the traditional perspective of individual circumstances, but also considering the context of reconciliation and re-pacification in which international sentencing operates.

I would thus argue that the principle of proportionality should focus more on the *accused person* than on the crimes committed. Only if ‘proportionality’ is intended in

this sense, can the sentences imposed by international tribunals and courts be more comprehensible.

Moreover, I believe this is the direction in which the ICC Statute seems to go, given that Rule 145, para.1(a) states that “the totality of any sentence...must reflect the culpability of the convicted person”. The focus seems rather on the *accused* and his personal responsibility than on the crimes and their gravity. The principle of culpability can thus support the revised concept of proportionality for international sentencing.

The fact that sentences should be formulated and shaped especially upon the accused consequently implies the importance of the role of aggravating and mitigating circumstances, and of their consistent and uniform application.

Within the system of the ad hoc Tribunals, the problem of *proportionality* also concerns another issue: the internal coherence of the penalties imposed in relation to other similar cases before the same Tribunals. One of the underlying assumptions of the principle of proportionality of penalties is that – for a sentence to be considered as ‘just’ and ‘fair’ – the penalty imposed must be *proportionate* also to other penalties meted out in similar cases. The principle of equality of treatment also requires that offenders in similar circumstances should be treated alike and not sentenced to very different penalties. Substantial diversity in sentences imposed in cases which do not appear to be very different from each other is a frequent criticism towards international sentencing. The fact that for the same offence, or for offences of comparable seriousness, unequal sentences are imposed obviously offends the common sense of justice, especially when this happens without any clear and understandable justification.

By the same token, the principle of equality of treatment should also apply between persons judged for similar crimes by the two ad hoc Tribunals. In effect, the ICTY and the ICTR apply the same criminal procedure, share the same Appeals Chamber, and have almost identical provisions in their Statutes and RPE. They should therefore apply penalties more uniformly, in a similar and coherent manner. The guiding principle should be a sort of ‘equality of consideration’, in the sense that – in similar situations – judges should consider similar factors and develop similar reasoning to decide upon the most appropriate penalty to be imposed.

This leads once more to the importance of consistency and uniformity in sentencing, often advocated throughout this thesis. Guiding principles are necessary if

those objectives are to be achieved. One of the primary aims of establishing ‘guiding principles’ in sentencing is in effect to reduce disparities between similar cases, and thus to promote consistency and uniformity in sentencing.

6.3 Purposes of punishment in international justice

Among the crucial questions to be addressed in relation to general issues of international sentencing, is the fundamental problem of which are the most appropriate and opportune purposes that international courts and tribunals should pursue in international sentencing.

As seen in Chapter 5, the question remains open even after the adoption of the Rome Statute for the ICC, whose drafters missed the opportunity of finally addressing the issue of purposes of punishment in a coherent and comprehensive manner. Besides mention of the purposes of *retribution* and *general prevention* in the Preamble of the Rome Statute, there is no further reference to the subject-matter. Against the background of the overview on sentencing purposes discussed in Chapter 1 and of the purposes of punishment upheld by judges at the ad hoc Tribunals, this section aims at evaluating the significance of the philosophical justifications for punishment in international sentencing. One of the assumptions on which the analysis is based is the circumstance that, as Garland acknowledges,⁹ the phenomenon of punishment – whether at national or international level – needs to be considered in the context of the social, political, historical and cultural background of a given legal system.

Purposes of international sentencing should thus be discussed within their particular and specific context. It was therefore deemed important to analyse the sentencing practice of the ad hoc Tribunals, as it is only possible to understand the scope of international punishment in the light of its ideological and institutional dimension.¹⁰

One of the important points to take into account when considering the purposes of sentencing in international justice is that international punishment should be able to

⁹ GARLAND, DAVID, *Punishment and Modern Society: A Study in Social Theory*, Oxford, Clarendon Press, 1990.

¹⁰ As argued by R. Henham, a recognition of the legal, social and political context in which international sentencing takes place is necessary to identify and understand the competing interests involved and to provide valid justifications for punishment in such a context. See HENHAM, RALPH, *Punishment and Process in International Criminal Trials*, Ashgate, 2005, at p.126.

convey the message that the behaviours it deals with and punishes are morally blameworthy and of international concern; condemnation and stigmatization of those types of criminal behaviour should thus be achieved. In effect, the success of an international tribunal or court and the efficacy of its message and mandate also depend on the way in which the aims of sentencing are explained and applied.¹¹

The comparative overview on sentencing in national legal systems, presented in Chapter 2, showed that the majority of the systems analysed presents a mixed theory of purposes of punishment, which includes the aims of retribution, general and special prevention, re-education, and social defence. Re-education and re-socialisation of offenders are thereby fundamental and guiding aims of punishment that cannot be forgotten in the process of sentencing and individualisation of penalties (this is the case, in particular, of Italy and Spain).

As seen in Chapters 1 and 3, the general aims of international sentencing can also be identified in: deterrence, retribution, rehabilitation, social defence, restoration and maintenance of peace.

It is not surprising to note that international criminal justice seems to recognise the same purposes adopted at the domestic level, naturally with some adjustments and differences due to the ‘international’ or ‘supranational’ dimension of international justice. For instance, a difference can be appreciated in the objectives of ‘restoration and maintenance of peace’, which acquire a particular significance in the international sphere and within the context of serious violations of international humanitarian law. Another important differential function of international justice is to document the history of a conflict or of certain events, thus contributing to preserve the historical memory of the international community.

Moving on to suggest a principled approach to the purposes of punishment in international sentencing, I will argue for the need to contextualise international sentencing, in order to highlight its message and importance, and for the opportunity to distinguish between the objectives of the whole system of international criminal justice (ICJ) and the purposes of international punishment as such, i.e. punishment meted out

¹¹ It has been stated that, without the necessary social underpinnings, the most carefully crafted international tribunal would be little more than “*an array of wigs and gowns vociferating in emptiness*”. (See ZIMMERN, ALFRED, *The League of Nations and the Rule of Law, 1918-1935*, London, Macmillan, 1936, at p.125).

by international courts or tribunals on individual offenders. This leads to a mixed theory of punishment, not oriented to a single major purpose but to a combination of different functions and aims, such as retributive concerns, elements of general deterrence, the fight against impunity and reconciliation.

Firstly, in relation to its contextualisation, I believe that the whole debate regarding the most appropriate purposes of international justice could properly be inserted into a broader reflection concerning the role of the international community with regard to atrocities, the basis for collective action against international crimes, and the relation between international justice and the promotion/maintenance of peace.

In its Report of December 2001,¹² the ‘International Commission on Intervention and State Sovereignty’ (ICISS) – established in the year 2000 in order to bridge the apparently contradictory positions of defenders of the notion of sovereignty and advocates of new norms on humanitarian intervention – recognised the existence of a special and primary *responsibility to protect* the rights and safety of citizens of the international community. The ICISS Report argues that States are the primary actors responsible for the protection of citizens. However, when a State is unable or unwilling to fulfil its responsibilities of protecting its citizens, the duty would then shift to the international community. The notion of *responsibility to protect* advanced by the Commission embraces three specific elements: *responsibility to prevent*, *responsibility to react*, and *responsibility to rebuild*.

I believe these three notions of *responsibility* mirror the functions of international justice in relation to atrocities and international crimes, finding close correspondence with the major goals of general deterrence, retribution and fight against impunity, reconciliation and maintenance of peace. In particular, the *responsibility to react* represents a fair and legitimate basis for collective action by the international community (through sanctions, international prosecution, tribunals and courts, and so on) against the commission of international crimes.

Secondly, regarding a more precise indication of purposes, considering that the international sphere of justice involves numerous and different interests (punishment of

¹² *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, December 2001, available at: <http://www.iciss.ca/report-en.asp>

individuals responsible for the most serious crimes, fight against impunity, deterrence and prevention of future atrocities, reconciliation, reconstruction of historical facts, re-establishment of international peace and security, maintenance of peace), it seems to me opportune to distinguish between, on the one hand, the objectives of the whole system of ICJ which are by their nature more directed to the international community as a whole and, on the other hand, the purposes of international punishment, which are more closely related to individual criminal responsibility and the appropriate penalty to impose on individual offenders.¹³

In the first case, in the framework of protecting the fundamental values of the international community, I believe the following should be amongst the primary goals of ICJ and constitute the most appropriate objectives that the entire system should pursue:

- promotion and maintenance of peace;
- fight against impunity and general deterrence;
- reconciliation;
- historical record and reconstruction/acknowledgement of facts.

In the second case, regarding the purposes of international punishment where individual criminal responsibility and individualization of penalties are concerned, rationales such as retribution, individual deterrence and, eventually, rehabilitation are at issue.

I believe it is important to distinguish between the two levels in order to avoid identifying the purposes of punishment exclusively in reference to the more general objectives of ICJ. Such an approach may be risky as it could legitimate the extension of the scope of punishment of individuals beyond the personal responsibility of the accused for the crimes committed. If, on the one hand, it is clearly opportune to take into account the general objectives of the system of reference, on the other hand, it is also necessary to consider the personal circumstances of the accused and of the case at hand, and to formulate and ‘shape’ the sentence and the actual penalty in terms of the accused rather than the objectives of the whole system of international criminal justice.

¹³ International criminal justice necessarily presents a more ample scope of application than international criminal law and – within it – international sentencing in particular. These differences should thus be accounted in evaluating or assessing their respective objectives.

The ‘gravity of the crime’ and the ‘individual circumstances’ of the accused in relation to the case at hand should be the primary considerations in meting out punishment.

A simple statement of purposes of punishment for international sentencing is not sufficient. They must also be more specifically evaluated and assessed in relation to each other. Merely enumerating a variety of sentencing aims does nothing to inform judges on the ‘relative’ importance of those goals. If multiple purposes are available, then there should also be adequate guidance on how sentencers are to choose amongst those goals, which in any case are not mutually exclusive. As far as possible a degree of prioritization is pivotal to consistency and uniformity in sentencing. This is rendered even more relevant given that the ad hoc Tribunals have failed so far in prioritizing the weight to attribute to purposes of punishment, considering them equally important in the majority of cases.¹⁴

I believe priority should be given to retribution, mitigated by considerations of the reconciliatory function of ICJ. The value of deterrence is also important, but only in conjunction with and in subordination to retribution, in the sense that pursuing the prosecution of perpetrators of international crimes and atrocities ultimately impacts on general and individual deterrence as well. Finally, rehabilitation, finally, still has a marginal role in international sentencing and is mainly a concern for the phase of execution of sentences.

Firstly, with regard to retribution, I believe a retributive approach can be maintained and is still justified in ICJ and international sentencing by the consideration that the egregious nature of international crimes requires that the criminalised behaviour be perceived as serious, wrong, blameworthy, and necessarily implying punishment.

The moral worth of retributive punishment is justified on the basis of the moral obligation which exists on the part of the international community to put an end to the culture of impunity. In this sense, retributive punishment is the appropriate response by the international community to the commission of gross violations of human rights.¹⁵

¹⁴ Some exceptions to this tendency have already been highlighted above in Chapter 3.

¹⁵ FINDLAY M., HENHAM R., *Transforming International Criminal Justice – Retributive and Restorative Justice in the Trial Process*, Willan Publishing, 2005, p.258; VON HIRSCH, ANDREW, *Censure and Sanctions*, Oxford, Clarendon Press, 1993, pp.24-25. See also NEMITZ, J. CHRISTOPH, ‘The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the

Retribution conveys the message that there can be no justification and no tolerance for grave violations of human rights.

When war criminals or persons responsible for the gravest atrocities known to mankind are brought to justice, few people will agree that they have to be convicted mainly for preventive reasons; rather, the majority expects that perpetrators should be punished for the wrong done and the suffering inflicted, in a retributive perspective. Retribution has complex legal, moral and social underpinnings. Public trials and their final sentencing outcomes assume a relevant social meaning in so far as they demonstrate that perpetrators will not be left unpunished. This will be a fundamental task of 'retributivism' in the context of the ICC sentencing practice, which will have to ensure that neither justification nor tolerance for serious violations of human rights and humanitarian law are admissible.¹⁶

However, the form of 'retributivism' recognized and applied by international tribunals/courts requires respect of the fundamental principle of proportionality, with a particular focus on the offender and his/her individual circumstances.

Furthermore, in order to reconcile this retributive conception of criminal punishment with the aspiration of penalty as a social peace-making process in international justice, retribution clearly should not be considered as 'vengeance' and should not rule out the goal of re-education and re-socialization of the convicted persons.

With regard to the other 'classic' aim of punishment, *prevention/deterrence* appears more difficult to apply fully in ICJ, given the 'special' situation in which offenders of international crimes operate.

I believe deterrence should only be pursued in conjunction with retribution and the fight against impunity, and not *per se* as the primary goal of international criminal trials and sentencing.

For instance, a first evaluation of the *sole* deterrent effect of the ad hoc Tribunals appears rather pessimistic. Although it is very difficult to judge precisely the deterrent

Determination of the Sentence', *Yearbook of International Humanitarian Law*, 4(2001), pp.87-127, at 120, where he considers that the most important sentencing purposes in international criminal law are 'the pursuit of just deserts, encompassing the repressive goal of retribution' and general prevention.

¹⁶ See NEMITZ J. C., WIRTH S., 'Some Observations on the Law of Sentencing of the ICC', online at: <http://www.ishr.org/ice/detail/nemitz.htm>

value of the ad hoc Tribunals and, therefore, to assess whether they have contributed to post-conflict peace and reconciliation, it seems that the assessment regarding *specific* deterrent effects exercised by the Tribunals is a negative one. Regarding the ICTY in particular, it would be unrealistic to affirm that it was successful in achieving the aim of specific deterrence within the territory of the former Yugoslavia, as mass violations and atrocities were committed well after the establishment of the Tribunal. The atrocities in Srebrenica – where Serbs massacred thousands of Muslims living in the area – took place in July 1995, when the Tribunal was fully operative; the same has to be said with regard to Kosovo, where the ethnic cleansing undertaken by Serbia against the Kosovo-Albanians occurred in 1998/99.

On the other hand, it should be recognised that it is unrealistic to assume that such ad hoc institutions would deter crimes instantaneously, especially when considering the particular situation of devastation and cruel interethnic conflict in the territories of the former Yugoslavia and Rwanda, within which the Tribunals operated.¹⁷

Moreover, so far perpetrators of international crimes – because of their official capacity and the lack of a permanent international court – have gone unpunished and have not been held criminally responsible for the abuses committed. This has rendered general and individual deterrence of little value, internationally speaking.

Other reasons can be identified to explain the Tribunals' failure in their preventive function. The fact of being *ad hoc* Tribunals, created on an exceptional basis, had the effect of expressing the 'threat of punishment' only *ex post facto*, only *after* the actions they were meant to deter. This also furthered the belief that they were more 'political' creatures than judicial organs, and that similar institutions are unlikely to be created in

¹⁷ For a comprehensive evaluation of the deterrent effect of the UN Tribunals, see AKHAVAN, P., 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *American Journal of International Law*, vol.95(2001), pp.7-31. As rightly stressed by Akhavan: 'The threat of punishment...has a limited impact on human behaviour in a culture already intoxicated with hatred and violence...Once mass violence has erupted, threats of punishment can do little to achieve immediate deterrence' (pp.9-10). See also: PENROSE, M., 'Lest We Fail...', *cit.*, pp.321-394. More specifically on the Rwanda case, see: AKHAVAN, P., 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the ICTR', *Duke Journal of Comparative and International Law*, 7(1997), pp.325-348. According to the author: 'It is apparent that ex post facto punishment of genocide is no substitute for effective preventive action. The establishment of the Rwanda Tribunal cannot undo the damage that resulted from the failure to intervene. Nor can it now bring instantaneous relief through justice and reconciliation to a society traumatized beyond imagination' (p.332). See also: CARROLL, 'An Assessment of the Role and Effectiveness of the ICTR', *Boston University International Law Journal*, vol.18 (2000), pp.163-200; MAOGOTO, 'The International Criminal Tribunal for Rwanda: a Paper Umbrella in the Rain', *Nordic Journal of International Law*, vol.73, no.2(2004), pp.187-221.

the future for every conflict or for crimes not committed during a war. The ‘absence’ of any deterrent effect, especially in the case of former Yugoslavia, is probably also linked to the Tribunal’s lack of initial credibility, and its lack of full international cooperation and political support, which resulted, for example, in limited financial resources and no own means for apprehending fugitives and indictees. This can undermine deterrence very easily, especially when combined with a lack of effective domestic prosecution, and with the fact that a large number of war crimes perpetrators are still (and will probably remain) at large.

In any case, by punishing individuals culpable of genocide, crimes against humanity and war crimes, the ad hoc Tribunals have sent a strong message of *general deterrence* to future tyrants. Undoubtedly, these institutions have made a significant contribution to ending the culture of impunity, conveying the message that similar atrocities are wrong and, contextually, expressing the disapproval of the international community.¹⁸

As to the ICC, the fact that it was established on the basis of the consent of States Parties to the Rome Statute is likely to give the Court a greater legitimacy and, as to deterrence, some advantages that the ad hoc Tribunals did not have. Its *permanence* and its broad temporal and geographic jurisdiction can empower the ICC with a potentially greater deterrent impact on society.

In short, there are several undeniable difficulties in evaluating deterrence and its effectiveness. Deterrence is very often elusive and inherently difficult to ‘measure’. The success of the preventive function of international criminal justice is hard to estimate as it is marked by the *absence* of an event (*i.e.* violence, crimes, atrocities, etc.). Similarly, the practical question of whether international criminal courts and tribunals are actually capable of deterring people is bound to remain unanswered. To demonstrate something through the absence of something else is a very difficult theoretical exercise. It is thus probably fair to assume that if the value of an international court is seen only in its deterrent power, then expectations are very likely to be unfulfilled. If, on the other hand, deterrence is seen as *only one* of the functions and benefits of international courts,

¹⁸ Akhavan argues that, by combating the culture of impunity, the ICTY and ICTR ‘have “mainstreamed” accountability in international relations and thus instilled long-term inhibitions against international crimes in the global community.’ AKHAVAN, P., ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, *American Journal of International Law*, *cit.*, at p.27.

pursued together with retribution, and aiming at reinforcing the fight against impunity, then the chances of a positive evaluation are higher. A single aim of sentencing is unlikely to be exhaustive and to encompass all the important principles pursued in the judicial process. Therefore, it is again emphasised that only a mixed or combined theory of purposes of punishment can be useful in explaining and legitimizing international sentencing. When deterrence, effective prosecution, the fight against impunity and retribution are linked together, long term effects can be positive and help transform society. The fact of trying perpetrators has a stigmatizing and educational function, and the effective application of sanctions appears to be essential for the credibility of ICJ.

As regards the purpose of rehabilitation, assessment must take into consideration the question of whether rehabilitation can in fact represent an important goal of international sentencing, as much as it does for national sentencing, as seen in Chapter 2.

As observed above, the requirement of individualization of penalties and the need to take into account the personal circumstances of the accused would seem to favour rehabilitation as an important factor at the sentencing stage.¹⁹ However, as mentioned earlier, so far the purpose of rehabilitation has been treated only as a subsidiary rationale, and the ad hoc Tribunals have not strongly articulated the need for this to have a substantial impact on sentencing. Nor does the ICC Statute contain any mention of rehabilitation as a specific purpose, except in conjunction with other criteria to be taken into account in reducing sentences during the phase of their execution.²⁰

The issue at stake here is whether convicted persons before international tribunals/courts have a specific right to rehabilitation. The practice of the ICTY and ICTR does not seem to show that the Tribunals have so far considered rehabilitation as a right of the convicted person. Furthermore, considering 'rehabilitation' more in general, I concur with the view that it is not possible to conclude that – at this stage in the development of ICJ – consideration of rehabilitation at the sentencing stage is a

¹⁹ See ZAPPALÁ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.206.

²⁰ Article 110 ICC St., and Rule 223 ICC RPE. See also Chapter 5.

‘right’ of the convicted person.²¹ It is, rather, a legitimate or mandatory concern related to the phase of *execution* of penalties.

For instance, in the system of the ad hoc Tribunals, an express reference to rehabilitation is only contained in Rule 125 ICTY RPE and Rule 126 ICTR RPE, which deal with the general standards for granting pardon or commutation of sentences. The Rule seems to indicate that rehabilitation plays an important role at the stage of execution of sentences, and it states that, in determining whether pardon or commutation is appropriate, ‘*the President shall take into account, inter alia,... the prisoner’s demonstration of rehabilitation*’.²²

However, as we are aware, the execution of sentences is outside the control of the Tribunals, although they should supervise the manner in which sentences are implemented.²³

Given these preliminary considerations, and taking also into account the limited powers of international tribunals and courts in the execution of sentences, I believe and share the opinion that rehabilitation is a more appropriate goal for the penitentiary system implementing sentences and criminal convictions than for international sentencing as such. The ICCPR considers in fact reformation and social rehabilitation as primary aims of the treatment of prisoners.²⁴ Rehabilitation should therefore be taken into account during the execution of penalties.

Another element that I believe prevents rehabilitation constituting a main and primary purpose of international sentencing is that perpetrators of international crimes are a particular category of offenders, often consisting of politicians and leaders who exercise authority and occupy high ranks in the civilian or military structures: they are

²¹ ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.207.

²² Emphasis added. Rule 125: ‘In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.’

²³ See Article 27 ICTY St. and Article 26 ICTR St. (‘...imprisonment shall be in accordance with the applicable law of the state concerned, subject to the supervision of the Tribunal’...). Also the ICC lacks its own prisons and must therefore rely on State parties for the enforcement of prison sentences. Article 103(1) of the ICC Statute provides that sentences shall be served in a State designated by the ICC from a list of States which have indicated their willingness...etc.. See also Rule 201 ICC RPE: states parties should share the responsibility for enforcing sentences of imprisonment in accordance with principles of equitable distribution.

²⁴ Article 10, para.3, ICCPR: “...The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation...”.

therefore not in need of ‘re-socialisation’ or ‘re-education’, at least not to the same extent as perpetrators of crimes in national jurisdictions.²⁵ The probability that similar kinds of offenders will commit crimes again, and in the same context, is rather low.

Thus, for all these reasons, I believe rehabilitation should not be accorded substantial weight in international sentencing, but should rather be a concern for the phase of execution of sentences.

The important function of international trials in providing a historical acknowledgement and record of crimes and atrocities perpetrated has been already highlighted in Chapter 1.

There is another fundamental expectation linked to ICJ: this regards victims. An implicit or explicit function of the international justice system is in fact expected to be the redressing of harm suffered by victims. However, it is questionable whether this is a realistic aim for international criminal trials, considering the enormous amount of resources that would be necessary in order to redress all victims of international crimes in a proper manner. It is probably more suitable for transitional justice²⁶ to deal with issues of reparation, restoration, reconciliation, etc., and it is not for international criminal trials to fully achieve these aims. A broad range of responses are considered in transitional justice: individual accountability through criminal prosecutions; truth finding commissions; reparation for victims through compensation of individual damages; institutional reforms at the political and judicial level of the State concerned; reconciliation through truth commissions and education to peace.

In conclusion, the overall aim of ICJ is essentially to maintain and help restore international peace and security by punishing those responsible for international crimes. International criminal law is, *inter alia*, an essential instrument to protect human rights:

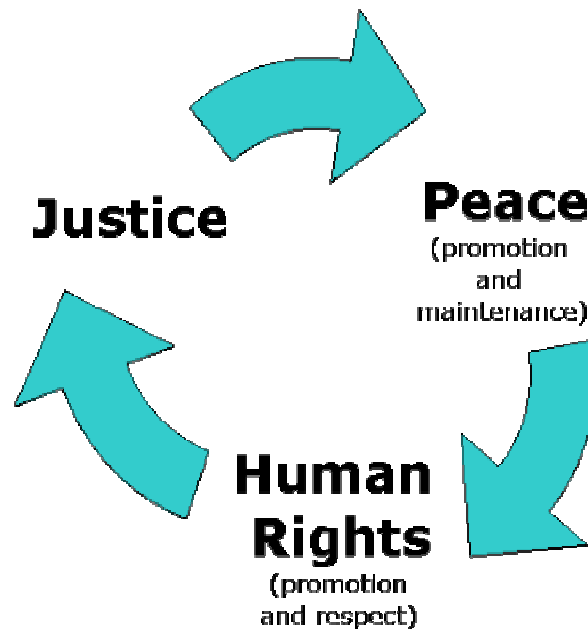
²⁵ In March 2006, the Registrar of the ICTY requested the Swedish Government to appoint a group of experts in order to conduct an independent audit into prison conditions at the United Nations Detention Unit (UNDU) in The Hague, where accused are held in custody. The experts’ Report showed that ICTY detainees are a particular group of offenders, pointed out the ‘relatively high social skills of most of the detainees and their strong internal discipline’, and the fact that they were ‘characterised by a lack of a sense of criminal identity’.

See: ‘Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia’, 4 May 2006, available at: <http://www.un.org/icty/pressreal/2006/DU-audit.htm>

²⁶ This can be defined as ‘processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.’ See: Report of the Secretary-General to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616, 23 August 2004, para.8.

it responds in fact to massive violations of fundamental rights. The objectives of the overall system of ICJ and the specific purposes of penalties imposed by an international tribunal/court should together strengthen the clearly existent link between justice and peace.

The broad concept of peace upon which ICJ is based also conveys the connection between respect of human rights, justice and peace. Justice is certainly related to peace and is also fundamental to human rights development. In fact, I believe there can be no future development without peace and no genuine peace can co-exist with injustice.²⁷ A world committed to promoting peace and human rights should promote justice at the same time. Ultimately, in a virtuous cycle, international justice also serves the purpose of promoting and enhancing peace and human rights.



6.4 Hierarchy of international crimes

The analysis presented in Chapter 3 has showed that Trial Chambers and the Appeals Chamber of the ICTY and ICTR have been reluctant in developing a ranking of crimes under their jurisdiction. In particular, judges have argued that there is no written

²⁷ Justice is, in fact, one of the various means of achieving peace. As F. Hegel stated in his work of 1821 'Elements of the Philosophy of Right': '*fiat justitia ne pereat mundus*', justice should be done so that the world will not perish.

principle of law providing for a different level of gravity between war crimes and crimes against humanity, all things being equal. In contrast to this opinion, a minority of judges have held that – *ceteris paribus* – crimes against humanity are inherently more serious than war crimes, due to their constituent elements.

As to the relevant literature and scholarly work produced so far on the issue, the question of whether the ad hoc Tribunals have distinguished between the different categories of international crimes – and whether a hierarchy in fact exists – has been tackled by many distinguished commentators. It is useful to briefly recall their arguments and points of view as, by and large, they all conclude by advocating the establishment of a hierarchy of international crimes.

Bassiouni's proposal for a distinction in terms of gravity between international crimes is based on an assessment of the severity of harm suffered by the international community, considering the protected social interest, the intrinsic seriousness of the violation of law, the degree of general deterrence sought, and so on.²⁸ In grouping offences into the three categories of 'international crimes', 'international delicts', and 'international infractions', Bassiouni proposes a hierarchy of international crimes with aggression and genocide as the most serious crimes, followed by crimes against humanity and then war crimes and other international crimes.²⁹

A.M. Danner's proposal for a hierarchy between crimes against humanity and war crimes is based on a consideration of the different backgrounds and approaches behind those crimes: 'widespread and systematic attack v. isolated acts' and 'persecution-type v. murder-type approach'. In this perspective, the author suggests that crimes against humanity should be punished with higher penalties in comparison with war crimes, since they are committed in a widespread and systematic fashion, and involve large scale premeditated attacks, as opposed to war crimes that are perpetrated on a smaller scale and in an isolated manner.³⁰ Danner acknowledges that the weakness of this approach manifests itself especially in cases where different offences are concerned (e.g. killings of hundreds of people as a war crime *vis-à-vis* torture of one victim as a crime against humanity) and constitute the basis of comparison: in such cases the

²⁸ BASSIOUNI, M.CH., *International Criminal Law*, vol.I, 2nd ed., Transnational Publishers, NY, 1999, pp.95-100 ('The Need for Distinguishing Between International Crimes').

²⁹ BASSIOUNI, M.CH., *ibid.*, at p.98.

³⁰ DANNER, ALLISON MARSTON, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', *Virginia Law Review*, vol.87 (May 2001), pp.415-501, at 472-483.

penalty for a war crime should be higher than that for a crime against humanity when the latter involves less loss of life.

In short, the majority of scholars who analysed the differences between international crimes suggested a hierarchy with genocide as the ‘crime of crimes’, followed by crimes against humanity and then war crimes.³¹ Olusanya also translated that difference into penalty ranges and attempted to suggest a sentencing tariff for the ICTY in relation to war crimes and crimes against humanity.³²

Conversely, some commentators argued that the debate as to whether a hierarchy of international crimes exists or not is of little relevance to sentencing.³³ If that is true when mass atrocities and a large number of victims are involved, the existence of a relative gravity of international crimes may prove useful for other cases where similar crimes are committed in similar circumstances. I agree that the legal characterization of the offence (*gravity in abstracto*) should never have priority over the actual seriousness of the offence at hand, that is the circumstances in which it is committed, the specific harm caused by the offence and the suffering inflicted on victims (*gravity in concreto*); nevertheless, the normative aspect of international crimes is an important element for a proper assessment of the gravity of crimes in certain cases and can help the practical commensuration of punishment.

It is generally agreed that in theory all international crimes are very serious offences, but when attempting to assess the circumstances of the case at hand, and at the sentencing stage in particular, the existence of a hierarchy of international crimes may prove essential to solve specific issues of overlapping of crimes and to favour consistency and uniformity in sentencing. In cases where the *actus reus* of the crimes is

³¹ See, amongst others, BASSIUNI, M.CH., *International Criminal Law*, vol.I, 2nd ed., Transnational Publishers, NY, 1999, pp.95-100; DANNER, A. M., ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’, *Virginia Law Review*, vol.87 (May 2001), pp.415-501; FRULLI, M., ‘Are Crimes Against Humanity More Serious than War Crimes?’, *European Journal of International Law*, vol.12, no.2(2001), pp.329-350, at 349; MAY R., WIERDA M., ‘Is there a Hierarchy of Crimes in International Law?’, in VOHRAH L., POCAR F., *et al* (eds.) *Man’s Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, 2003, pp.511-532, at 512; NEMITZ, J. C., ‘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*, 4(2001), pp.87-127, at 114.

³² OLUSANYA, OLAOLUWA, *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia*, *cit.*, pp.127-129.

³³ HARMON MARK B., GAYNOR FERGAL, ‘Ordinary Sentences for Extraordinary Crimes’, *Journal of International Criminal Justice*, vol.5, issue 3 (2007), pp.683-712, at 696-697.

the same (e.g. the killing of one or more persons), when the contextual element and the *mens rea* are different then the relative gravity or seriousness of the crimes concerned must be specified. I thus support the plea for the establishment of such a rank of international crimes.

I believe that a number of elements exist both in theory and in practice to facilitate the development of a hierarchy of international crimes. The quantitative analysis of sentencing data conducted in Chapter 4 further confirmed (section 4.4.b) that – in the actual application of punishment for international crimes – judges of the ad hoc Tribunals have in effect sentenced cases involving the crime of genocide more severely, and cases involving war crimes more leniently.

As to the theoretical level, I share the opinion of Judge Cassese that an intrinsic difference exists between genocide, crimes against humanity and war crimes. It was noted earlier that a hierarchy of international crimes should be based on the fact that each crime presents different constituent elements, has a diverse scope, and protects different values. The intrinsic characteristics of international crimes offer a possibility to rank them. On the basis of their respective *mens rea* and *actus reus*, genocide, crimes against humanity and war crimes should be ranked accordingly.

First, with regard to genocide, it seems that the factor which renders the crime *per se* more serious is the presence of the *dolus specialis* required for the crime, ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such’. Perpetrators of genocide are thus more blameworthy because of their specific *mens rea* and the ‘object’ of their criminal actions: the partial or total destruction of a group as such.

Second, in relation to crimes against humanity and war crimes, while the former must necessarily be part of a wider context of violence, the latter can also consist of isolated acts.³⁴ War crimes are normally perpetrated in order to achieve some objectives of war, whereas the policy or practice behind crimes against humanity is exclusively intended to harm civilians. It seems therefore that the *ratio* of criminalising crimes against humanity has the additional aim of protecting civilians from policies and/or

³⁴ However, the possibility that war crimes too may be committed in a context of widespread and systematized violence is always present, as highlighted by Article 8, para.1, of the ICC Statute, which provides that: ‘The Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes’ (emphasis added).

attacks planned, for instance at the state level, and directed to harm them beyond any connection with a war context. The provisions on crimes against humanity elevate the protection of civilians above all other values, including military necessity;³⁵ further, the category extends beyond the limitations of armed conflicts and protects civilians in times of peace as well as of war.

Moreover, as to the *mens rea* element, the *dolus* required for crimes against humanity is more specific and more serious than that of war crimes: in fact, the perpetrator of crimes against humanity must know that those crimes are part of a widespread or systematic attack against civilians, thus showing awareness of a large scale pattern of violence targeting the civilian population. This is not required for war crimes, as they can be committed for a number of reasons, also personal motives, and to achieve objectives of war.

Overall, considering the different elements of these crimes, it is suggested that the punishment meted out for genocide and crimes against humanity should reflect their greater inner gravity and heinousness, and the specific values they protect.

The proposed hierarchy of international crimes, with genocide being the most serious, directly followed by crimes against humanity and then war crimes, reflects the trend observed through the statistical analysis of the case-law of the ad hoc Tribunals, and is not in contrast with current international law, given that – for a number of reasons – international law makes no explicit distinction in severity between those crimes.

A *caveat* is essential at this point: even after such a hierarchy has been established, it should be recalled that there are necessarily cases where comparison in terms of gravity would be impossible (for example persecution or deportation as crimes against humanity and bombing of a town as a war crime). Thus the possibility of applying a hierarchy between the crimes under the jurisdiction of international tribunals and courts is *de facto* reduced to cases that present similarities in the types of crimes charged (e.g.

³⁵ In support of the major gravity of crimes against humanity compared to war crimes, it is interesting to note that Article 33 of the ICC Statute allows the defence of superior orders only in the case of war crimes, for orders which are not manifestly unlawful, but rejects it in the case of other crimes, establishing that orders to commit genocide or crimes against humanity are always manifestly unlawful (see para.2 of Art.33). See also, for the congruity of this provision with customary international law: GAETA, P., 'The Defence of Superior Orders: The Statute of the International Criminal Court *versus* Customary International Law', *European Journal of International Law*, vol.10 (1999), no.1, pp.172-191.

murder as a crime against humanity and murder as war crime). *All else being equal*, then a crime against humanity can be considered as deserving a higher penalty than a war crime.

Furthermore, the existence of an established hierarchy should not impede overall evaluation of the case at hand. A hierarchy of crimes does not exclude the importance of taking into account the particular circumstances of the case at the sentencing stage and thus individualising the sentence and penalty. In practice, the maximum penalty of life imprisonment can clearly also be imposed for war crimes, when the nature of those crimes, or the aggravating factors attached to them (e.g. the widespread nature of the crimes, the severity of victimization and suffering inflicted, and so on), justify such a choice; conversely, life imprisonment or very harsh penalties should not automatically be imposed in any case of genocide if the circumstances of the case do not require so. However, with the existence of a hierarchy of international crimes, the process of determination of penalty should finally be clearer as to the relevance attached to each crime, element of the offence and circumstance of the case at hand, thus favouring a more understandable, structured and eventually consistent approach to sentencing.

The second aspect of the issue at hand is whether a ranking exists or is in theory possible between the underlying acts of each international crime (murder, torture, rape, deportation, assaults against physical integrity, hostage taking, attacks on towns and villages, etc.). It has already been pointed out that there is no indication in the Statutes of the ad hoc Tribunals and the ICC that certain forms of conduct should be punished more severely than others.

Attempts to establish some parameters for an ordinal proportionality between the underlying acts of each offence suggested taking into account the different interests protected and thus distinguishing large categories such as crimes against life (murder, wilful killing, persecution resulting in death, etc.), crimes against physical integrity (torture, rape, infliction of serious injuries, etc.), and crimes against personal dignity (including outrage, public humiliation, use of persons as human shields and other degrading and inhuman acts against the psychological integrity and honour of the victims).³⁶

³⁶ See NEMITZ, J. C., 'Sentencing in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda', in FISCHER H., KRESS C., (eds.), *International and National Prosecution*

Also from the perspective of taking into account the interests violated by the standard crime, and in an attempt to establish proportionality parameters, Von Hirsch and Ashworth identified the following four categories of protected interests: 1. physical integrity (health, safety, avoidance of physical pain); 2. material support and amenity (nutrition, shelter and other basic amenities); 3. freedom from humiliation or degrading treatment; 4. privacy and autonomy.³⁷

The quantitative analysis conducted in Chapter 4 has not dealt with the average penalty meted out by Chambers of the ad hoc Tribunals in relation to the various offences within each category of international crimes. One of the reasons for excluding that aspect from my analysis is the tendency by the ad hoc Tribunals, already highlighted in Chapter 3, to impose a global sentence for all the crimes for which an accused is convicted, without any explanation of how the actual penalties for each single offence have been calculated. It has already been argued that the imposition of a single and global sentence without specification of the precise amount of penalty meted out in relation to each crime creates problems, as well as a lack of transparency in the sentencing process, as it is consequently difficult to distinguish the harm associated with each category or act of the crimes ascertained. Very few judgements have implemented Rule 87(C) in the part where it prescribes that the Trial Chamber shall impose a sentence in respect of each finding of guilt,³⁸ while in the majority of cases judges have chosen to impose a single sentence reflecting the totality of the criminal conduct of the accused.³⁹ This tendency of the ad hoc Tribunals has rendered impossible the effort to measure the average penalty meted out in respect of the various underlying acts of

of *Crimes under International Law – Current Developments*, Berlin Verlag Spitz, 2001, pp.605-625, at 621-624.

³⁷ VON HIRSCH A., ASHWORTH A., *Proportionate Sentencing*, Oxford University Press, 2005, at p.145.

³⁸ For example, *Prosecutor v. Delalic et al.*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1285; *Prosecutor v. Furundzija*, Case No.IT-95-17/1-T, Trial Judgement, 10 December 1998, ‘Disposition’; *Prosecutor v. Semanza*, Case No.ICTR-97-20-T, Trial Judgement, 15 May 2003, paras.585-590; *Prosecutor v. Kamuhanda*, Case No.ICTR-99-54A-T, Trial Judgement, 22 January 2004, paras.770-771.

³⁹ See, for instance, *Prosecutor v. Krnojelac*, Case No.IT-97-25-T, Trial Judgement, 15 March 2002, paras.504, 534-536; *Prosecutor v. Galic*, Case No.IT-98-29-T, Trial Judgement, 5 December 2003, para.769; *Prosecutor v. Cesic*, Case No.IT-95-10/1-S, Sentencing Judgement, 11 March 2004, para.111; *Prosecutor v. Seromba Athanase*, Case No.ICTR-2001-66-T, Trial Judgement, 13 December 2006, ‘Disposition’; *Prosecutor v. Karera*, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007, para.585; *Prosecutor v. Dragomir Milosevic*, Case No.IT-98-29/1-T, Trial Judgement, 12 December 2007, paras.1006-1008.

international crimes. The issue of a ranking of the different acts within each international crime thus remains open, and should be resolved by future research.

However, as seen in Chapter 5, it seems that a lesson has been learned from the past given that Article 78(3) ICC St. provides that the Court shall pronounce a sentence for each crime and then a joint sentence specifying the total period of imprisonment. Each offence should therefore receive a specific penalty and the Court shall not be able to impose a single term of imprisonment for a number of offences without the specification of the quantum of penalty for each crime. It is thus probable that, as the sentencing jurisprudence of the ICC develops, the different degrees of gravity of the underlying acts of each international crime (murder, torture, rape, deportation, assaults against physical integrity, hostage taking, attacks on towns and villages, etc.) will also become clearer or will be defined. This is pivotal to the possibility of elaborating future ranges of penalties for the sub-categories of international crimes.

6.5 Influential factors on sentencing

a) *Aggravating and mitigating circumstances*

It has already been pointed out that no theory of aggravating and mitigating circumstances exists in international criminal law, and Statutes of current international tribunals and courts do not contain detailed provisions for such circumstances.⁴⁰ I believe some ‘guiding principles’ are therefore needed in this subject matter.

As discussed in Chapter 2, national systems of criminal law offer at least two different models in relation to aggravating and mitigating circumstances: in some countries (for instance Italy and Spain) such circumstances are already qualified by law and listed as aggravating or mitigating, therefore leaving the judge only the power of ascertaining whether a specific circumstance recurs or not in the case at hand; other countries (e.g. Germany), on the other hand, provide for certain *neutral* factors or criteria (‘ambivalent’ factors) which are not pre-classified, thus leaving judges to

⁴⁰ Rule 145, para.2, of the ICC RPE provides a good departure point for a better framed theory of circumstances of crime and, to a certain extent, it lists aggravating and mitigating circumstances, although not comprehensively, and does not offer guidance as to the weight and type of assessment to give to those circumstances. Thus, the proposal in this section in relation to aggravating and mitigating circumstances tries to complement and finalise the not exhaustive discipline contained in the ICC Statute.

determine whether those criteria have an aggravating or mitigating effect in the particular case at hand.

In international sentencing, a classification of aggravating and mitigating circumstances could be advanced by taking into account the type of elements that give rise to aggravation or mitigation, thus qualifying circumstances as either aggravating or mitigating at the outset.

For instance, aggravating circumstances could be divided into the following categories:

- circumstances related to the offender and indicating a particular status or position (superior position in a hierarchical structure, abuse of authority or trust, recidivism for international crimes, etc.);
- circumstances related to the perpetration of crimes (cruelty, premeditation, heinous means of perpetration, direct participation), including particularly reprehensible motivations (ethnic, racial, sexual or other forms of discrimination, personal gain, etc.);
- circumstances related to the particular status of victims (additional suffering caused to victims, youth of victims, vulnerability of victims, etc.).

A similar classification can also be advanced for mitigating circumstances, thus distinguishing between the following categories:

- circumstances related to the offender (remorse, guilty plea, good character, clean criminal record, family status, age, health, diminished mental capacity, duress, cooperation, etc.);
- circumstances related to the commission of crimes (indirect participation, duress, etc.);
- circumstances related to victims and the behaviour of the accused towards them (reparation of the damage caused, help offered to victims, compensation, public expression of remorse, etc.).

I also intend to suggest an indicative list of circumstances to be used in mitigation or aggravation of the sentence, and to indicate the approximate weight that each circumstance should have on the penalty to be imposed.

The analysis carried out in Chapter 4 on the use of aggravating and mitigating circumstances by the ad hoc Tribunals has shown that, generally speaking, when such circumstances are present sentences are in fact, respectively harsher or more lenient. Not all factors considered in the empirical analysis, however, resulted significant or frequently used.

For instance, the aggravating factor ‘previous criminal record’ of the accused was basically never used either by the ICTY or the ICTR. At the ICTY, in the only two cases where the circumstance was mentioned – where, that is, the Prosecution brought to the attention of the Trial Chamber the fact that the accused had previous criminal convictions and that such a factor should be regarded as an aggravating circumstance – the Trial Chambers concluded that it was inappropriate to consider such previous convictions in aggravation of the penalty to be imposed.⁴¹

On the contrary, as observed in Chapter 2, the ‘previous criminal record’ of the accused is a relevant aggravating circumstance in domestic law. It is there considered to be ‘recidivism’ and limits the possibility of taking into account previous crimes as aggravating circumstances in cases where those crimes are of a similar nature to those for which the accused is under trial.

Conversely, the lack of prior convictions has frequently been taken into consideration by Chambers of both Tribunals. This seems to show that the fact that the offender has a ‘clean record’ should be regarded in mitigation and that, in case of other/subsequent convictions, there will be a ‘progressive loss of mitigation’.

From the outset, I think a general rule should be followed when referring to circumstances of crime: aggravating circumstances – as they are to the detriment of the accused and likely to cause harsher penalties – should be specifically predetermined and not subject to analogical interpretation.⁴² Moreover, only those circumstances strictly

⁴¹ See, for instance, *Prosecutor v. Naletilic and Martinovic*, Case No.IT-98-34-T, Trial Judgement, 31 March 2003, para.762 where the Trial Chamber, in relation to the previous criminal convictions of Vinko Martinovic, thus stated: “Vinko Martinovic has previously been convicted of two criminal offences in 1985 and 1986 for grand larceny and looting. The Chamber finds it inappropriate to take these prior convictions into account in determining the sentence for the serious violations of international humanitarian law he is convicted for.”

⁴² In this sense, the final clause contained in para.2(b)(vi) of Rule 145 of the ICC RPE, which refers to ‘*other circumstances...not enumerated above*’ and that can also be taken into consideration as additional aggravating circumstances in sentencing, is open to criticism insofar as it reproduces the same elements of vagueness deplored in the provisions of the ad hoc Tribunals.

related to the crimes and their commission should be considered as aggravating, so that the offender is aware of the possible types of behaviour that can aggravate his position; on the other hand, mitigating circumstances can be evaluated more broadly and can also include subsequent behaviour, efforts made after the crimes, in a reconciliatory perspective. Judges at the ad hoc Tribunals have in fact taken into account many cases of ‘meritorious’ conduct of the accused not related to the offence committed. Additionally, this is also consistent with the general framework, inclined to favour reconciliation and peace, in which ICJ operates.

Considering the 13 aggravating circumstances analysed in Chapter 4, my personal assessment is as follows:

- The factor ‘gravity/magnitude of crime’ (which was used in a large number of cases by both Tribunals) should not be an additional aggravating circumstance given that it is already part of the overall evaluation of the seriousness of the crimes committed. Also in light of the proposed hierarchy of international crimes, this factor should be subsumed in the evaluation of the gravity of crime at the outset, as the primary element on which to assess the responsibility of the accused.
- Factors involving consideration of the victims of crime (‘victimisation’, ‘trauma suffered’, ‘vulnerability’) should be retained as significant aggravating circumstances likely to cause the imposition of harsher penalties.
- Premeditation (a factor rarely used by judges of the ad hoc Tribunals) should be retained to be an aggravating factor.
- The use of cruelty in the perpetration of crimes should be retained as a significant aggravating factor linked to the role of the accused in the commission of crimes and demonstrating particular evil towards the victims.
- The factor ‘willingness/enthusiasm’ in the commission of crimes is not considered a legitimate aggravating factor as it regards elements more properly related to the necessary *mens rea* for the crime(s) committed. The degree of involvement of the accused is already assessed (and accordingly weighed) in relation to the mental element, with no need to consider it in aggravation a second time.

- Factors related to the position and role occupied by the accused in the commission of crimes (such as ‘superior position’, ‘abuse of authority or trust’) should be retained to be the most significant aggravating circumstances (as already done by judges of the ad hoc Tribunals). However, the circumstance ‘direct participation’ is a factor that relates more to the elements of the offence and the participation of the accused therein. A correct assessment of the participation of the accused in the commission of crimes should distinguish between different forms of individual liability, issues that have not yet been dealt with in international criminal law and for which future research would be opportune.
- The previous criminal record of the accused, as already pointed out, should not be considered in aggravation of the penalty, unless it refers to other convictions for international crimes.⁴³
- The ‘good character’ of the accused should not be considered as a factor in aggravation of the sentence, as Chambers of the ad hoc Tribunals have done in a few cases. Traditionally, in domestic systems the prior good character of the accused is considered relevant in *mitigation* of the penalty because it shows that the criminal conduct is not part of a regular pattern/behaviour by the accused. The factor is also taken into account by courts as to the possibility of rehabilitation of the accused. I believe that to consider this factor to the detriment of the accused instead of to his/her benefit is misleading.
- Conduct of the offender subsequent to the crimes (the conduct of the accused during trial proceedings was at times considered by the ad hoc Tribunals to be an aggravating circumstance) should not be considered in aggravation, as the responsibility of the accused is limited to the crimes committed. Rather, when appropriate, particularly exemplary conduct by the accused after the commission of crimes will be relevant as a mitigating factor.

With regard to the 16 mitigating circumstances analysed in Chapter 4, my personal assessment is the following:

⁴³ Rule 145, para.2(b)(i), of the ICC RPE also indicates that any relevant previous conviction (as an aggravating factor) should be for crimes under the jurisdiction of the Court or of a similar nature.

- The factor ‘orders received/duress’ should be retained as a mitigating circumstance, although weighed according to the actual circumstances of the case.
- The factor ‘first offender’ indicating a clean criminal record of the accused should be retained as a mitigating factor, as previously observed.
- All factors relating to the personal circumstances of the accused (such as family status, health conditions, age) should be retained as mitigating circumstances. In relation to ‘youth’ and ‘old age’ as circumstances likely to mitigate the penalty, it should be stressed that they are appropriate mitigating factors only when confined to defined age groups. This means that the age of 32 or 37 (as in the *Serushago* case)⁴⁴ considered as ‘young’ in mitigation, or the age of 56 (as in the *Brdjanin* case)⁴⁵ considered as ‘advanced age’ in mitigation are open to criticism as based on a misrepresentation of what is a ‘young’ and what is an ‘advanced’ age. Similar mitigating circumstances should be better tailored and – most of all – applied uniformly. For instance, to properly assess the factor of a ‘young age’ elements such as an inexperienced, fragile, immature or naïve personality should be taken into account; similarly, the factor of an ‘advanced age’ should be assessed in conjunction with health, infirmities, diseases, and so on.
- Expression of remorse by the accused is certainly a significant mitigating circumstance, especially in international sentencing. In fact, it represents an acknowledgement of the victims’ sufferance and can thus assist them in healing their wounds and pain. Remorse can certainly facilitate the important purpose of reconciliation in ICJ, and is therefore linked to the overall objectives of ICJ and international sentencing. In this sense, guilty pleas acquire relevance in mitigation only when indisputably linked to remorse, as explained in greater detail in section 6.5.b) below.
- Indirect participation of the accused in the commission of crimes should be linked to a better formulated theory of modes of liability, rather than being a mitigating circumstance.

⁴⁴ *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentencing Judgement, 5 February 1999, para.39.

⁴⁵ *Prosecutor v. Brdjanin*, Case No. IT-99-36, Trial Judgement, 1 September 2004, para.1130.

- Unwillingness in the commission of crimes (a factor seldom used by the ad hoc Tribunals) cannot be a legitimate mitigating factor, for the same reasons set out above in relation to ‘willingness’ as an aggravating circumstance. These kinds of evaluation relate to the assessment of the *mens rea* of the accused in the perpetration of crimes.
- The ‘good character’ of the accused should be retained as a mitigating circumstance (and not an aggravating one), as observed above.
- Conduct of the offender subsequent to the crimes is a relevant mitigating factor, especially within the ‘reconciliatory framework’ of ICJ and international sentencing, and especially when such conduct consists of efforts to compensate victims and cooperate with the international tribunal/court in the judicial process. In this sense, the following circumstances acquire relevance in mitigation of the penalty: cooperation, surrender, help offered to victims, testimony, good conduct during trial proceedings or in the detention unit.

As regards the weight to assign to the aforementioned aggravating and mitigating circumstances, those related to the accused and to victims should have greater influence on the final assessment of the penalty. This means that judges should regard the following aggravating circumstances with the utmost attention: ‘victimisation’, ‘trauma suffered by victims’, ‘vulnerability of victims’, ‘cruelty in the commission of crimes’, ‘direct participation’, ‘superior position’, ‘abuse of authority or trust’; and the following mitigating circumstances: ‘expression of remorse’, ‘cooperation’, ‘help offered to victims’, ‘indirect participation’, ‘duress’, ‘health conditions’. All these factors should be taken into account as substantial circumstances in aggravation or in mitigation.

Conversely, circumstances which have more limited relevance are the following: ‘previous criminal record’, ‘clean criminal record’, ‘age’, ‘good character’, ‘family status’, ‘posterior conduct’.

I further believe it is necessary to establish some maximum limits for increasing or reducing penalties depending on the presence of aggravating and mitigating circumstances. I would therefore suggest that, when one or more aggravating circumstances occur, the penalty could be increased up to one third of the sentence otherwise deserved by the accused; when one or more mitigating circumstances occur, the penalty could be reduced up to one third of the sentence otherwise deserved. This

would serve two purposes: to make the accused aware of the amount of increase or reduction to be expected,⁴⁶ and to avoid assigning excessive and undue weight to circumstances of crime.

Other elements related to the theory of circumstances of crime should be clarified. First, the application of aggravating and mitigating factors should be linked to and coherent with the primary rationale(s) identified for international sentencing. Thus, in the perspective of a retributive approach, circumstances linked to the role of the accused in the commission of crimes and to the harm inflicted on victims should prevail. This would encourage, for example, harsher sentences for crimes in which a position of trust or authority was abused, and for crimes perpetrated with cruelty, sadism, or motivated by prejudice, discrimination or hate towards particularly vulnerable victims; or, taking into account the 'reconciliatory' framework of ICJ, to impose less severe sentences in connection with sincere remorse, and cooperation of the accused with the office of the Prosecutor and the judicial authorities.

Second, mitigating circumstances should not outweigh the gravity of the crimes committed. It is considered dangerous that mitigating circumstances, which are only established on the balance of probabilities, could have an extremely significant impact on the final sentence imposed on the accused. Their weight should be assessed more carefully by Chambers.

Third, factors that are already constituent elements of crime (such as the mode of liability under Articles 7.3 /6.3 of the ICTY and ICTR Statutes) should not be taken into consideration again as aggravating circumstances.

A further problem in the approach of the ad hoc Tribunals to mitigating and aggravating factors is, especially at the ICTR, the fact that Chambers have weighed mitigating factors against aggravating factors and have concluded that the latter were more serious than, and consequently outweighed, the former. Mitigating factors were often not taken into consideration in the determination of penalty given their 'irrelevance'. It is proposed that this reasoning is not correct and that all relevant circumstances should be taken into consideration. What should be then 'adjusted' is the weight attributed to them in the reduction of penalty. It is more correct to conclude that

⁴⁶ This would also allow for a better or more tailored defence and prosecution strategy when deciding upon the circumstances to be proved during the trial proceedings and/or the sentencing hearing.

their relevance is not considerable on the final penalty, than to completely exclude them from the determination of penalty at the outset.

b) *Guilty plea*

The pros and cons of a ‘negotiated justice’ in the sphere of international criminal law have already been highlighted in Chapter 1 (section 1.9) and in Chapter 3 (section 3.11.c). To recall some of these, the positive features of guilty pleas concern the fact that a sincere admission of guilt shows repentance and can facilitate the process of (national) reconciliation; it contributes to the establishment of historical facts; it can provide an example to other offenders; moreover it avoids victims undergoing the traumatic experience of testifying and re-living the ordeal they went through. From the point of view of the administration of justice, guilty pleas also avoid possible lengthy and costly trials and help procure evidence and expedite proceedings. From the point of view of the defence, the accused may expect that the court recognise his repentance and attitude by reducing the penalty it would have imposed, had there not been a plea of guilty.

On the other hand, some negative aspects of negotiated justice at the international level include, for instance, the risk that the lack of in-court examination of evidence undermines the accuracy of fact-finding; the risk of not assuring the satisfaction of victim’s interests; the unsuitability of bargaining over international crimes, which represent the most reprehensible forms of criminality.

The question of whether negotiated justice is opportune and appropriate at the international level has no single answer. It is undoubtedly difficult to solve the paradox of how to reconcile the leniency of sentences arising from negotiated justice with the need to satisfy retributive demands for punishment.

I agree that in various ways guilty pleas contribute to the public advantage and should be welcome especially in a system that operates under constraints and is, by nature, temporary and with limited resources, like the system of the ad hoc Tribunals. Increasing the number of offenders who are brought before justice and face criminal sanctions is central to the fight against impunity and the credibility of international justice. Moreover, the fact that perpetrators accept responsibility and acknowledge the

atrocities committed certainly represents a significant step on the path of peace and national reconciliation.

What I question is the substantial weight in terms of sentencing discount that guilty pleas have been warranted by the ad hoc Tribunals, the ICTY in particular. The seriousness of international crimes should outweigh any procedural benefit or bargain concerning the sentence.

The empirical analysis in Chapter 4 has demonstrated that there is a correlation between guilty plea and more lenient sentences, in that – when a ‘guilty plea’ is made – penalties are on average shorter than those meted out for non-guilty plea cases.

In my opinion, the mitigating value of guilty pleas has been misinterpreted by Chambers of the ad hoc Tribunals, and has been unduly influenced by practical utility and necessities. Initially, in fact, when there was no time-pressure on the Tribunals, the ICTY was stricter as to guilty pleas; very few defendants pleaded guilty and those who did were mostly genuinely remorseful. The crimes within the jurisdiction of the Tribunal were simply considered too serious to permit any bargaining. The ICTR followed this trend, sentencing Jean Kambanda to life imprisonment despite the fact that he pleaded guilty to genocide.

Over time, it became clear that it would not be possible to complete all the trials, considering the limited time-frame and financial resources. As the caseloads of the Tribunals increased exponentially, the use of guilty pleas – and plea-bargaining as well – became more common. It was only in 2001, in fact, that the RPE were amended to incorporate Rule 62ter, which sets forth the plea agreement procedure.

As negotiated justice has proved indispensable to international criminal law and the ad hoc Tribunals in particular, it is submitted that the weight to accord it should have been assessed more carefully. Considering that the ICTY and ICTR have jurisdiction over the most heinous crimes, in my opinion a guilty plea can not detract from the gravity of international crimes, and should not warrant a substantial mitigating weight in sentencing.

This conclusion appears to be supported by the analysis of national legal systems conducted in Chapter 2. This highlighted that guilty pleas are more typical of common law systems, whereas in countries of a civil law tradition it is more frequent to speak of ‘confession’. In those countries where a guilty plea is regulated by law or exists in

practice, it is generally accepted as a mitigating factor leading to a reduction of the sentence, especially if credible and spontaneous, and if entered at the beginning of trial proceedings. In England, a guilty plea warrants a reduction of up to one-third of the sentence; in the United States, a decrease of the offence level by two levels is applied for acceptance of responsibility and, additionally, by one level for providing timely information or early notification of the intention to enter a plea of guilty.

If in the Anglo-American system, guilty pleas and plea bargaining are permitted for all crimes, in the continental system – on the contrary – they are not allowed in the case of the most serious offences, as it is held that heinous crimes must be subject to the full process of justice.

Moreover, in the majority of the countries analysed, guilty pleas or confessions do not affect the maximum statutory penalty and do not apply to serious offences, such as first degree murder, but are allowed only for minor crimes. Therefore, in cases of mandatory life sentences or mandatory sentences for a fixed term of years (as in England and the USA) a substantial reduction of the penalty for a guilty plea is not possible.⁴⁷

I believe that, in light of the goals and functions of international justice, it would have been better to conceive the guilty plea/plea bargaining procedure according to the continental model of ‘confession’. The civil law approach to the issue seems in fact more appropriate as it represents better both the seriousness of international crimes and respect for the victims’ interests in the proper adjudication of international justice.

In this sense, the current regime envisaged by the ICC Statute at Article 65 already provides a good approach to the use of negotiated justice in the international context. In fact, as seen in Chapter 5, Article 65 can be considered to be a compromise between the classic ‘common law’ approach to guilty pleas and the classic ‘civil law’ approach, with a rapprochement of the procedure to the continental ‘in-court confession’ model.

Probably the ICC will not find it necessary to use the guilty plea/plea-bargaining procedure as much as the ICTY, considering also the absence of temporal limits to the work of the Court. However, the only possible step to ensure that the gravity of the

⁴⁷ See also the Sentencing Report of the Max-Planck-Institute, which shows that – in the majority of the countries considered – little weight is given to guilty pleas in relation to serious crimes. See SIEBER ULRICH, *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice*, Edition Iuscrim, Freiburg im Breisgau, 2004, vol.1: Expert Report, pp.82-83.

crimes committed is not disregarded is to ensure that guilty pleas and plea bargaining are not given undue or excessive weight when deciding upon the appropriate penalty. A guilty plea should not lead to a 'reduction' of the seriousness of the offences committed.

Further, I maintain that the degree of mitigating value warranted by a guilty plea should also depend on the co-occurrence of other mitigating circumstances such as remorse, repentance, steps taken towards reconciliation, cooperation, etc.. In the framework of peace and reconciliation, which are amongst the most important objectives of ICJ, genuine remorse is certainly an important element to be taken into account. When such elements are present, then the mitigating value of guilty pleas can be more substantial; on the contrary however, when not accompanied by remorse or genuineness, guilty pleas should be accorded little weight in mitigation of the final sentence.

6.6 A system of 'guiding principles' for international sentencing

All the above findings and suggestions aim at creating a comprehensive and integrated body of 'guiding principles' for international sentencing with a view to rendering the sentencing process at the international level (especially in light of the future sentencing practice of the ICC) not only more uniform and consistent, but also more predictable and understandable.

As observed in Chapter 2 through the analysis of six domestic systems of criminal justice, each national legal system is provided with a general set of criteria, principles and legal provisions intended to be of support to judges in the process of individualisation of penalties and determination of sentences, thus offering judges some guidance and setting the limits of judicial discretion. Even common law countries which traditionally left more flexibility to judges in sentencing, and where few statutory provisions existed to guide the process of individualisation of penalty, have in the last 30 years resorted to sentencing guidelines and similar criteria to provide judges with better guidance and solve the problem of inconsistencies and excessive discretion in sentencing.

Without doubt this scenario is quite different from that described for the sentencing process at the international level, where only very general and obvious guiding criteria are provided to help judges in the difficult process of individualisation of penalties.

The purpose of my work was to shed some light on those areas of international sentencing and to propose a general set of criteria and principles to be of guidance during the decision-making process in sentencing.

To recapitulate, the system of ‘guiding principles’ proposed in this work includes: 1) the enactment of a statement of purposes for international sentencing; 2) the establishment of a hierarchy of international crimes; 3) the proposition of an indicative list of aggravating and mitigating circumstances; 4) the proposition of the approximate weight to attribute to aggravating and mitigating circumstances; 5) the suggestion to develop indicative ranges of penalties for the underlying offences of international crimes; 6) the suggestion to introduce different scales of responsibility depending on the form and degree of participation of the accused to the crimes (whether direct perpetration, co-perpetration, perpetration by means, instigation, aiding and abetting, indirect perpetration, and so on...), so that at the sentencing level different sentences will correspond to the different modes of perpetration identified;⁴⁸ 7) the opportunity to implement the following issues: - the necessity of a separate sentencing hearing, - the necessity to state the actual punishment imposed for each count, - the opportunity to remit the case to the Trial Chamber for a *de novo* reassessment of the sentence when the Appeals Chamber finds that the Chamber of first instance completely abused its discretion in sentencing matters.

In relation to the issues arising from point 7), it should be recalled that the ICC Statute already provides for the possibility of holding a separate sentencing hearing (Article 76, para.2), and prescribes that, when the accused has been convicted of more than one crime, the Court shall pronounce a separate sentence for each crime and then a joint sentence specifying the total period of imprisonment (Article 78, para.3). This last provision is praiseworthy as it promotes clarity and transparency in the sentencing

⁴⁸ Rule 145, para.1(c), ICC RPE, prescribes that – in the determination of the sentence – consideration must be given to the degree of participation of the accused in the commission of the crime(s), but does not elaborate further on the point, nor distinguishes different levels of punishment associated with different levels of responsibility/participation of the accused. This is therefore still to be developed.

process. The provision regarding a separate sentencing hearing is, however, not compulsory; it is thus suggested that the provision be implemented in all cases.

Two final points remain open: the length of sentences meted out by international tribunals and, consequently whether sentencing tariffs or ranges of penalties for international crimes should be established.

Regarding the first point, it should be clear by now that international criminal law cannot expect to rely on the same length and ranges of penalties that we are used to in national legal systems. The two scales of punishment, the context and the crimes concerned are simply not comparable; inevitably, sentences imposed by international tribunals will appear lenient if compared to those meted out by national courts. The particular characteristics of the international context, issues of reconciliation of the affected communities, and the need to individualise the penalty as regards the accused, are all factors that can help in understanding the different scope of punishment in international sentencing.

Regarding the second point, sentencing ranges could prove useful and essential for the uniformity and internal consistency of sentences, but – in practice – they remain a task for the future. Certain preconditions necessary for establishing sound penalty ranges are in fact still lacking, such as a distinction of gravity for the underlying offences of international crimes, and a distinction between the various forms of liability. It would be reasonable to have differentiated penalties that depend on the modes of liability or commission at stake: direct or indirect commission, aiding and abetting, instigation, attempt, and so on. Considering that Article 25, para.3, of the ICC Statute criminalises different forms of participation in the commission of crimes, a similar differentiation concerning the penalties to be applied when different forms of commission/modes of liability are at stake would have been a welcome innovation for the sentencing system of the ICC.

The same can be said in relation to a distinction in gravity between the underlying offences of international crimes. An obstacle in this area may be represented by the fact that war crimes and crimes against humanity are constituted by a multitude of different acts that are difficult to categorise; however, as mentioned above, this problem could be overcome by grouping the underlying offences in broad categories divided along the lines of the protected interest: in this way it would at least be possible to distinguish

between offences involving death, offences involving injuries, and offences to goods or properties.

It is thus hoped that future research will tackle these unresolved issues in more depth and that their finalisation will help to ultimately bring into being a comprehensive law of sentencing for international criminal justice.

Conclusions

These final pages will draw together all the 'guiding principles' and suggestions proposed in the previous chapters, and thus summarise the concluding remarks.

In relation to general sentencing principles, I have argued for the following:

- a distinction between the objectives of the overall system of international criminal justice and the specific purposes of punishment for international sentencing;
- a different concept of the principle of proportionality, whereby the element of the gravity of the offence is mitigated by taking into account the individual accused and his/her personal circumstances;
- a hierarchy of international crimes, on the basis of which the appropriate sentence should then be individualised.

In relation to the *quantum* of punishment and ranges of penalties, I have highlighted the following:

- the importance of avoiding inconsistency and disparity in sentencing;
- the importance of internal consistency, in relation to how similar cases are treated and punished by a same international tribunal/court;
- the opportunity to indicate general ranges of penalties for the underlying offences of international crimes, as well as to distinguish between different levels of gravity and responsibility in the commission of crimes and to respect these differences at the sentencing stage.

As regards aggravating and mitigating circumstances:

- they should be predetermined and classified according to the type of elements that give rise to aggravation or mitigation;
- only those circumstances directly related to the commission of the crime charged and to the offender himself at the time s/he committed the crime may be considered in aggravation, and the list of aggravating factors should be definitive and not subject to analogical interpretation;

- mitigating circumstances are a broader category and can also include elements not directly related to the crime committed but referring more in general to the post-offence conduct of the accused;
- an indicative list of aggravating and mitigating circumstances (and the respective weight they should have in sentencing) has been proposed;
- the reduction or increase of the final penalty due to the presence of mitigating or aggravating factors should be subject to maximum limits: up to one third of the penalty that would have been imposed otherwise;
- a guilty plea as a mitigating factor should not be accorded substantial weight towards discount of the penalty, unless it is accompanied by sincere remorse and the accused has cooperated throughout the trial proceedings;
- factors that are already constituent elements of crime (such as the mode of liability under Articles 7(3) / (6)3 of the ICTY and ICTR Statutes) should not be considered again as aggravating circumstances.

In relation to the sentencing process, I have stressed the importance of implementing the following in order to achieve a better regulated decision-making process in sentencing:

- a separate sentencing hearing: sentencing submissions should take place after the conviction of the accused has been entered;
- the pronouncement of a specific penalty for each count instead of global sentences: the common practice of imposing a single and global sentence for all the crimes ascertained leads to uncertainty as to the *quantum* of penalty deserved by the accused in relation to each crime. The fact of not considering each count individually, nor specifying the term of imprisonment appropriate to each offence, endangers the transparency of the sentencing process and does not indicate the gravity of each crime committed by the accused. In the case of multiple convictions leading to a global sentence, this global sentence should be imposed only after specification of the single sentences attached to each crime;
- transparent increase/reduction of penalties: when deciding upon the appropriate penalty to impose, Trial Chambers should indicate the general amount of punishment deserved and then, on that basis, operate the increase or reduction of penalty due to the eventual presence of relevant mitigating or

aggravating circumstances; in this way the entire process would appear more transparent and clear. Increases and discounts need to be specified and quantified;

- sentencing following appeal: the Appeals Chamber – when finding that the Trial Chamber committed a discernible error in the exercise of its discretion in sentencing and/or completely abused its discretion in assessing all the relevant sentencing factors to the extent that the sentence should be entirely reassessed – should remit the case to the Trial Chamber for re-determination of the sentence in compliance with the Appeals Chamber’s decision. Only in this way can the right of the accused to appeal against the sentence be ensured.

Future research could focus on the following issues, which remain unresolved in international criminal law:

- the multiplicity of offences and rules regulating the *concursum delictorum*;
- modes of liability and their respective weight on sentencing (for instance, whether ordering or personally committing the crime is a ‘more serious’ mode of liability than aiding and abetting);
- a distinction in gravity between the underlying offences of each international crime, which could serve to develop different penalty ranges.

Considering the role that law can play in promoting justice and combating atrocities, I believe the suggestions developed throughout this work can foster continuous and strengthened progress in sentencing law within a more mature international community increasingly aware of the need for international justice.

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Prosecutor v. Elizaphan and Gerard Ntakirutimana, Case No.ICTR-96-10/96-17-T, Trial Judgement, 21 February 2003

Prosecutor v. Semanza, Case No.ICTR-97-20-T, Trial Judgement, 15 May 2003

Prosecutor v. Niyitegeka, Case No.ICTR-96-14-T, Trial Judgement, 16 May 2003

Prosecutor v. Rutaganda, Case No.ICTR-96-3-A, Appeal Judgement, 26 May 2003

Prosecutor v. Kajelijeli, Case No.ICTR-98-44A-T, Trial Judgement, 1 December 2003

Prosecutor v. Barayagwiza et al., Case No.ICTR-99-52-T, Trial Judgement, 3 December 2003

Prosecutor v. Kamuhanda, Case No.ICTR-99-54A-T, Trial Judgement, 22 January 2004

Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe, Case No.ICTR-99-46-T, Trial Judgement, 25 February 2004

Prosecutor v. Gacumbitsi, Case No.ICTR-2001-64-T, Trial Judgement, 17 June 2004

Prosecutor v. Niyitegeka, Case No.ICTR-96-14-A, Appeal Judgement, 9 July 2004

Prosecutor v. Ndindabahizi Emmanuel, Case No.ICTR-2001-71-I, Trial Judgement, 15 July 2004

Prosecutor v. Elizaphan and Gerard Ntakirutimana, Case No.ICTR-96-10/96-17-A, Appeal Judgement, 13 December 2004

Prosecutor v. Rutaganira Vincent, Case No.ICTR-95-1C-T, Trial Judgement, 14 March 2005

Prosecutor v. Muhimana Mikaeli, Case No.ICTR-95-1B-T, Trial Judgement, 28 April 2005

Prosecutor v. Semanza, Case No.ICTR-97-20-A, Appeal Judgement, 20 May 2005

Prosecutor v. Kajelijeli, Case No.ICTR-98-44A-A, Appeal Judgement, 23 May 2005

Prosecutor v. Kamuhanda, Case No.ICTR-99-54A-A, Appeal Judgement, 19 September 2005

Prosecutor v. Simba, Case No.ICTR-01-76-T, Trial Judgement, 13 December 2005

Prosecutor v. Bisengimana Paul, Case No.ICTR-00-60-T, Trial Judgement, 13 April 2006

Prosecutor v. Serugendo Joseph, Case No.ICTR-2005-84-I, Trial Judgement, 12 June 2006

Prosecutor v. Imanishimwe et al., Case No.ICTR-99-46-A, Appeal Judgement, 7 July 2006

Prosecutor v. Gacumbitsi, Case No.ICTR-2001-64-A, Appeal Judgement, 7 July 2006

Prosecutor v. Muvunyi Tharcisse, Case No.ICTR-2000-55A-T, Trial Judgement, 12 September 2006

Prosecutor v. Seromba Athanase, Case No.ICTR-2001-66-T, Trial Judgement, 13 December 2006

Prosecutor v. Ndindabahizi Emmanuel, Case No.ICTR-2001-71-A, Appeal Judgement, 16 January 2007

Prosecutor v. Nzabirinda Joseph, Case No.ICTR-2001-77-T, Trial Judgement, 23 February 2007

Prosecutor v. Muhimana Mikaeli, Case No.ICTR-95-1B-A, Appeal Judgement, 21 May 2007

Prosecutor v. Rugambarara, Case No.ICTR-00-59-T, Sentencing Judgement, 16 November 2007

Prosecutor v. Simba, Case No.ICTR-01-76-A, Appeals Judgement, 27 November 2007

Prosecutor v. Barayagwiza, Nahimana, Ngeze, Case No.ICTR-99-52-A, Appeal Judgement, 28 November 2007

Prosecutor v. Karera, Case No.ICTR-01-74-T, Trial Judgement, 7 December 2007

ANNEX

I. CODE BOOK – STRUCTURE OF VARIABLES

The following pages contain a detailed list of all the different components of the data-set used for the quantitative analysis of the ICTY and ICTR case-law illustrated in Chapter 4 of this thesis. For each variable, the meaning and the numeric values used in the data-set are explained.

The first part (Part 1) contains a number of general and objective information concerning the specific case at hand.

The second part (Part 2) contains all the influential factors that have been considered by judges in aggravation, in mitigation (or both) of the final sentence.

The third part (Part 3) relates to the composition of the Trial and Appeals bench and thus, for each accused, contains information as to the number of judges from common law or civil law legal systems, their professional background, and their gender.

All the observations retrieved from the judgements of the two ad hoc Tribunals have been inserted in a data-set (Excel format), where each single column refers to the data collected on a particular variable, whereas each single row corresponds to the data collected on a particular accused (*Erdemovic, Tadic, Akayesu, Kambanda*, etc.) for all the variables. Acquittals have not been inserted in the data-set.

Structure of the data-set – Variables

Part 1. General Info :

ID = it indicates the case (name of the accused, case number, date of the judgement);

T_ID = (Tribunal_ID) it indicates if the case is an ICTY or an ICTR case (1= ICTY; 2= ICTR);

Type_J = it indicates the type of judgment rendered (1= Trial Judgment, 2= Appeals Judgment);

Final_sent = cases for which the sentence is final (1= not final; 2= final);

Y_Impris = number of years of imprisonment imposed on the accused (to indicate numerically the penalty of life imprisonment, the symbolic value of 100 was chosen);

Age_Born= year in which the accused was born;

Age_Crime= age of the accused at the time of the commission of the crime(s);

Age_Trial= age of the accused at the time when the judgement was rendered/at the time of the sentence;

Type= type of crime committed (**Type_A**= grave breaches of the Geneva Conventions [Art.2 ICTY] -including violations of Article 3 common to the Geneva Conventions [Art.4 ICTR]; **Type_B**= violations of the laws or customs of war [Art.3 ICTY]; **Type_AB**= war crimes in general; **Type_C**= crimes against humanity [Art.5 ICTY – Art.3 ICTR]; **Type_D**= genocide [Art.4 ICTY – Art.2 ICTR]);

Art.7(1) ICTY /6(1) ICTR= it indicates the type of responsibility of which the accused was convicted, in particular whether s/he was sentenced for 7.1/6.1 responsibility (planning, instigating, ordering, committing or otherwise aiding and abetting) or not (**1**= yes; **0**= not);

Art.7(3) ICTY /6(3) ICTR= it indicates the type of responsibility of which the accused was convicted, in particular whether s/he was sentenced for 7.3/6.3 responsibility (command responsibility for acts committed by subordinates – failure to prevent such acts or to punish the perpetrators) or not (**1**= yes; **0**= not);

Sector_Type= it indicates whether the accused was occupying an official position in the military sector or in the civilian/political sector (**1**= military; **2**= civilian);

Leadership Level = it indicates the overall hierarchical position of an accused (considering together both the civilian and military structures) according to **4** levels of responsibility, where 1 indicates the lowest and 4 the highest (according to the specifications below);

Rank_Military = it indicates the level of leadership within the military system (armed forces, military, paramilitary and private armed groups, police forces and prison or detention camp personnel) according to the following values: **0**= no position in the military hierarchy; **1**= low level military officer (ex.: simple soldier, camp guard, sub-commander, etc.); **2**= medium level military officer (ex.: commander, local commander, camp commander, lieutenant, colonel, etc.); **3**= high level military officer (ex.: Chief-of-Staff of an Army, General of an Army, etc.);

Rank_Civilian = it indicates the level of leadership within the civilian/political sector, according to the following values: **0**= no position in the civilian hierarchy; **1**= low level civilian officer/functions; **2**= medium level civilian officer/functions (ex. ICTY: local politician; ICTR: Bourgmestre, Pastor, medical doctor, Conseiller, etc.); **3**= high level civilian officer/functions (ex.: Prefect, Director, etc.); **4**= high level politician (ex.: Prime Minister, Minister, President of political parties, etc.);

Type_Part= it indicates the type of involvement of the accused in the crimes (**1**= indirect participation, meaning instigators, mere aiders and abettors, 'clean-hand' perpetrators; **2**= direct participation, meaning direct perpetration of the crime, co-perpetration or perpetration by means, 'dirty-hand' perpetrators);

Guilty Plea/Plea Agreement= it indicates whether any guilty plea or plea agreement occurred (**0**= NO guilty plea/plea agreement; **1**= YES guilty plea/plea agreement).

Part 2. Influential Factors:

- A) Factors which occur only as aggravating circumstances
- B) Factors which occur only as mitigating circumstances
- C) Factors which occur both as aggravating and mitigating circumstances

Group A) =

- **A_Grav**= *Aggravating factor_gravity* of the crime (the intrinsic seriousness, magnitude and gravity of the crimes committed, when expressly mentioned and considered by judges);
- **A_Vict**= *Aggravating factor_victimization* (the suffering and humiliation caused to the victims, and/or eventual discrimination against them);
- **A_Trau**= *Aggravating factor_trauma* suffered by victims and survivors;
- **A_Vuln**= *Aggravating factor_vulnerability* of the victims;
- **A_Prem** = *Aggravating factor_premeditation* (when the accused acted with premeditation);
- **A_Cruel** = *Aggravating factor_cruelty* (cruelty or sadism used by the offender while committing the crime(s));

- **A_Will**= *Aggravating factor* willingness (particular willingness, enthusiasm or support expressed by the perpetrator in the commission of the crime);
- **A_DirP** = *Aggravating factor*_Direct Participation in the commission of the crime (the perpetrator personally executed the crime(s));
- **A_Sup**= *Aggravating factor*_Superior or Official position (the accused held a high-ranked position in a military or civilian structure);
- **A_Ab_Au**= *Aggravating factor*_Abuse of Authority/trust (the accused abused his position and/or the trust that people had in him/her);
- **A_Crimrec**= *Aggravating factor*_criminal record (the accused has a criminal record, in the sense that s/he had already been convicted of previous crimes).

Group B) =

- **M_Ord**= *Mitigating factor*_superior orders/duress/constraint (the accused committed the crime under duress/constraints/orders of a hierarchical superior);
- **M_FO**= *Mitigating factor*_first offender (the accused has a clean criminal record and had never been convicted before of other crimes);
- **M_Fam**= *Mitigating factor*_family status (including whether the accused is married and/or has children, plus particular family conditions);
- **M_YA**= *Mitigating factor*_young age (of the accused at the time of the crimes);
- **M_OA**= *Mitigating factor*_old age (of the accused at the time of the sentence);
- **M_Heal**= *Mitigating factor*_health conditions (of the accused, including documented psychological disorders);
- **M_Rem**= *Mitigating factor*_Remorse (whether the accused expressed remorse for what had happened and for what s/he had done);
- **M_Unwill**= *Mitigating factor*_unwillingness in the commission of the crime (in the sense that the accused was not an enthusiastic supporter of the criminal plan/during the commission of the offences);
- **M_IndP**= *Mitigating factor*_indirect participation in the commission of the crime (the accused did not personally take part in the commission of the crimes/was not personally involved, so called ‘clean-hand perpetrators’);
- **M_Help**= *Mitigating factor*_help offered to victims
- **M_Coop**= *Mitigating factor*_cooperation with the Office of the Prosecutor (substantial cooperation of the accused with the Prosecution);

- **M_Surr**= *Mitigating factor*_voluntary surrender of the accused;
- **M_GPlea**= *Mitigating factor*_guilty plea/plea-agreements (considered as mitigating factor by judges);
- **M_Test**= *Mitigating factor*_testimony/information provided (the accused accepted to testify in other proceedings and/or disclosed relevant information to the Prosecution).

Group C) =

- **A_GChar**= *Aggravating factor*_good character;
- **M_GChar**= *Mitigating factor*_good character;
- **A_Cond**= *Aggravating factor*_conduct of the accused during trial proceedings/detention;
- **M_Cond**= *Mitigating factor*_conduct of the accused during trial proceedings/detention.

Each aggravating and mitigating factor within the above-mentioned categories (A, B and C) has been assigned the following values:

0= the aggravating/mitigating factor is not present;

1= the aggravating/mitigating factor is present **but** is **not** considered by the Chamber in aggravation/mitigation of the final sentence;

2= the aggravating/mitigating factor is present **and** is considered in aggravation/mitigation of the final sentence.

Each aggravating and mitigating factor has also been measured as a dummy variable (that is: present/not present)¹⁰⁷² and thus has been assigned the following values:

0= the aggravating/mitigating factor is not present;

1= the aggravating/mitigating factor is present

Part 3. Composition of the bench:

J_CommonL= it indicates, amongst the judges composing the bench, how many judges come from a common law system (in numerical order, **0**= none, **1**= one judge, **2**= two judges, etc.);

¹⁰⁷² For this purpose, cases where an aggravating or mitigating circumstance was present but was not considered relevant by judges have been assimilated to cases where the circumstance was not present.

J_CivilL= it indicates, amongst the judges composing the bench, how many judges come from a civil law system (in numerical order, **0**= none, **1**= one judge, **2**= two judges, etc.);

Gender_Female= it indicates, amongst the judges composing the bench, how many of them are women (in numerical order, **0**= none, **1**= one woman, **2**= two women, etc.);

Gender_Male= it indicates, amongst the judges composing the bench, how many of them are men (in numerical order, **0**= none, **1**= one man, **2**= two men, etc.);

Profess_Academic= it indicates, amongst the judges composing the bench, how many judges come from an academic professional background (in numerical order, **0**= none, **1**= one judge, **2**= two judges, etc.);

Profess_Practitioner= it indicates, amongst the judges composing the bench, how many judges come from a professional background of magistrates, lawyers, counsels, attorneys, etc. (in numerical order, **0**= none, **1**= one judge, **2**= two judges, etc.).

[NB: data have been collected from the ICTY and ICTR's websites, and relative information available therein.]

II. STATISTICS

The following pages contain the statistical calculations which are at the basis of the quantitative analysis of ICTY and ICTR sentencing factors, illustrated in chapter 4. In particular, they refer to paragraph 4.4 ('Analysis and empirical interpretation: Descriptive statistics') of chapter 4, and they are organised according to the sub-points of paragraph 4, so that 'sub-paragraph a) *Length of sentences*' contains all the statistical calculations supporting the analysis and the findings presented in that sub-paragraph, and so on for all the other sub-parts of paragraph 4.

a) *Length of sentences* (pp.274-279, Chapter 4)

- Overall range of Trial and Appeals judgments before both Tribunals:

Table 1.

Ranges of sentences	ICTY		ICTR	
	Trial	Appeals	Trial	Appeals
1-10 years	28 cases	9 cases	4 cases	1 cases
11-25 years	32 cases	20 cases	10 cases	5 cases
26-50 years	9 cases	5 cases	3 cases	5 cases
51-life imprisonment	1 case	1 cases	13 cases	10 cases

- Average length of Trial sentences before both Tribunals:

Table 2.

Length of Trial sentences	ICTY		ICTR	
	Average/mean sentence	Median sentence	Average/mean sentence	Median sentence
Number of years of imprisonment	16.8 years	15 years	53.3 years	28.5 years

- Average length of Appeals sentences before both Tribunals:

Table 3.

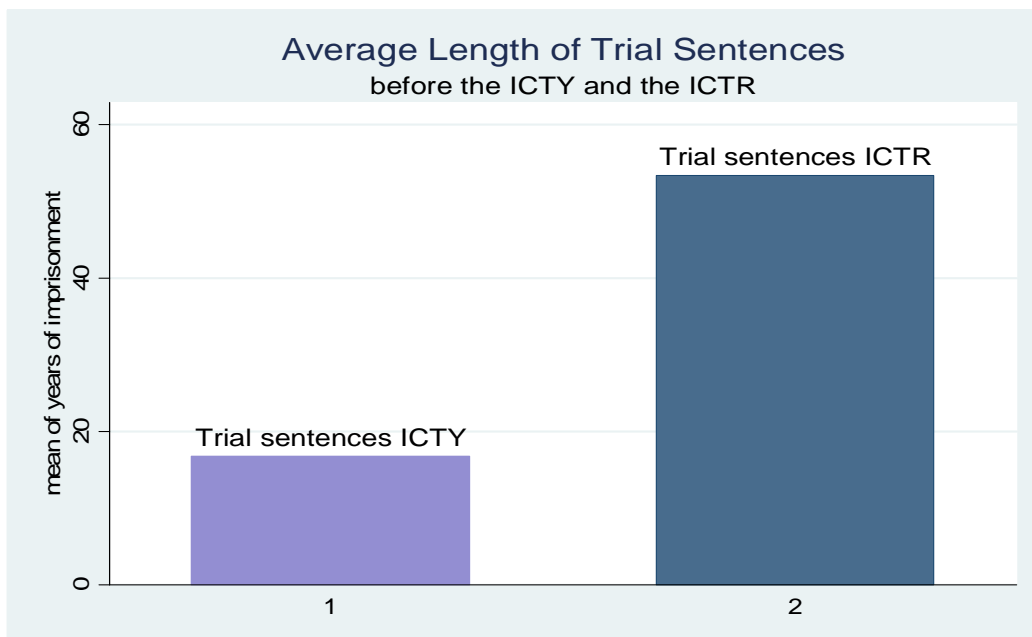
Length of Appeals sentences	ICTY		ICTR	
	Average/mean sentence	Median sentence	Average/mean sentence	Median sentence
Number of years of imprisonment	19.8 years	15 years	61.3 years	45 years

- Average length of final sentences before both Tribunals:

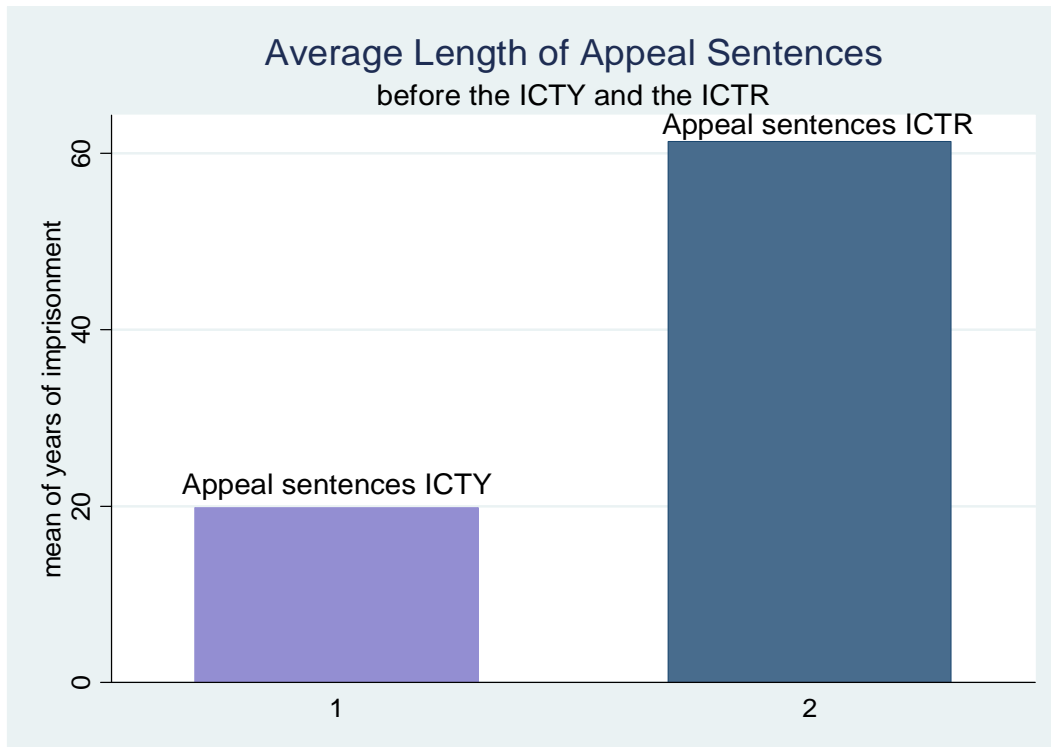
Table 4.

Length of final sentences	ICTY		ICTR	
	Average/mean sentence	Median sentence	Average/mean sentence	Median sentence
Number of years of imprisonment	16.6 years	15 years	49.8 years	32 years

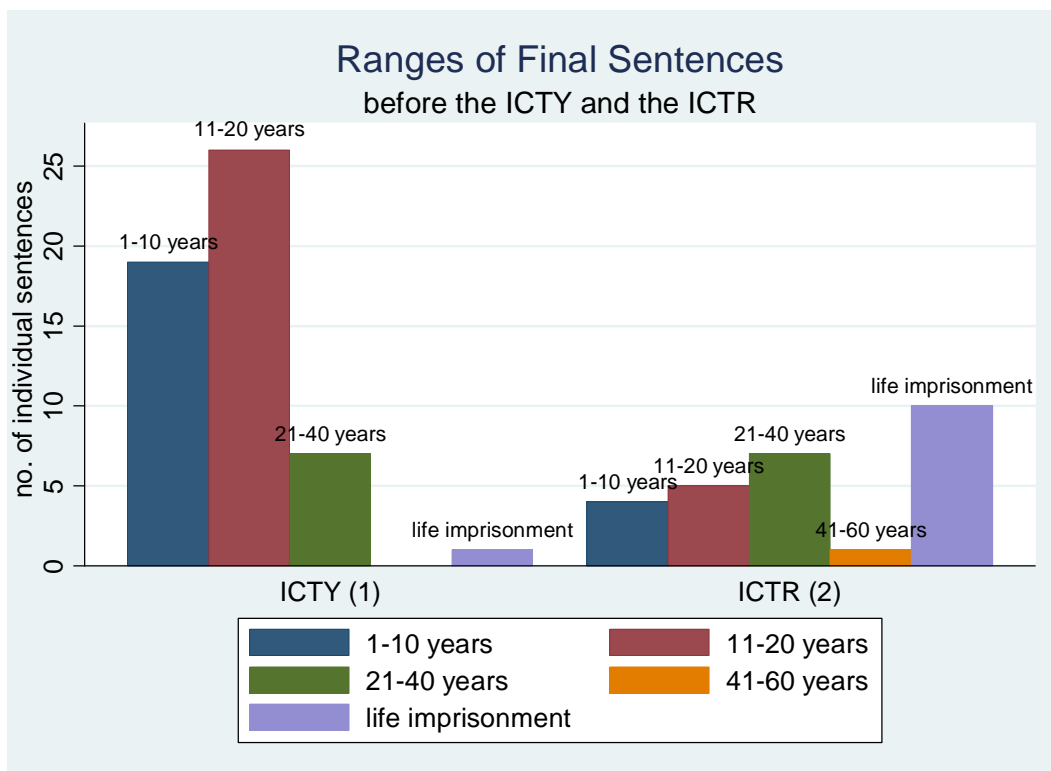
- Bar chart 'Average Length of Trial Sentences':



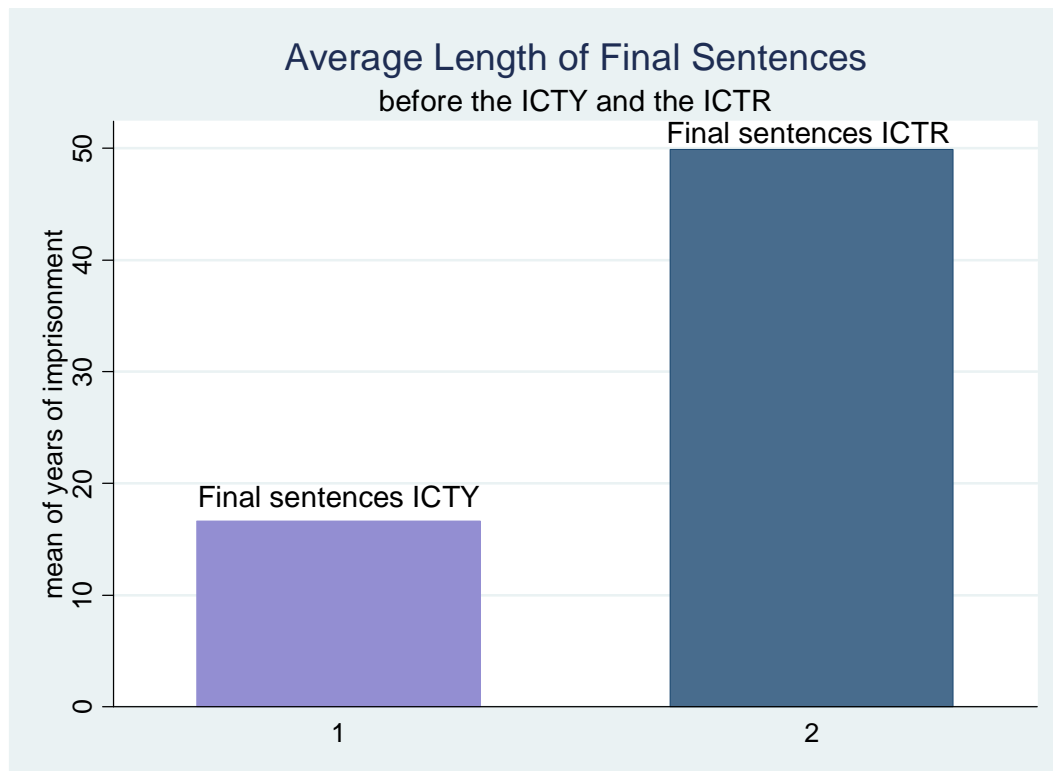
- Bar chart 'Average Length of Appeal Sentences':



- Bar chart 'Ranges of final sentences':

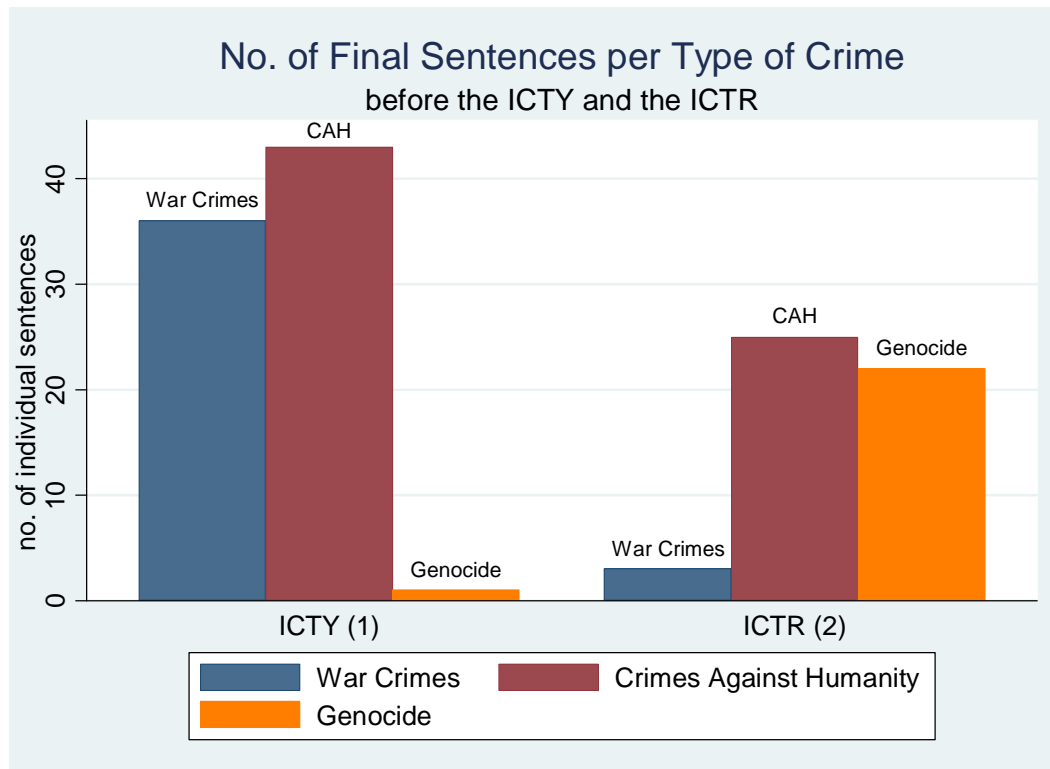


- Bar chart Average 'final sentence' before the ICTY and the ICTR:



b) *Type of crime and harshness of penalties* (pp.279-287, Chapter 4)

- Bar chart 'Number of final sentences per type of crime':



- Average length of Trial sentences before both Tribunals, per type of crime:

Table 5.

Category of crime	ICTY		ICTR	
	Average/mean sentence	Median sentence	Average/mean sentence	Median sentence
War crimes	18.7 years	18 years	27 years	27 years
Crimes against humanity	19.2 years	17 years	54 years	30 years
Genocide	32 years	32 years	60 years	67.5 years

- Average length of Appeals sentences before both Tribunals, per type of crime:

Table 6.

Category of crime	ICTY		ICTR	
	Average/mean sentence	Median sentence	Average/mean sentence	Median sentence
War crimes	20.8 years	16.5 years	49 years	35 years
Crimes against humanity	21.6 years	19 years	61 years	45 years
Genocide	35 years	35 years	63.8 years	72.5 years

- Average length of final sentences before both Tribunals, per type of crime:

Table 7.

Category of crime	ICTY		ICTR	
	Average/mean sentence	Median sentence	Average/mean sentence	Median sentence
War crimes	18.9 years	15 years	23.5 years	23.5 years
Crimes against humanity	18 years	15 years	48.8 years	32 years
Genocide	35 years	35 years	58.8 years	40 years

- Average Trial sentence for convictions of only one type of crime:

Table 8.

Category of crime	Number of observations	Average/mean sentence	Median sentence
'only' War crimes	18	9.7 years	8.5 years
'only' Crimes against humanity	27	12.3 years	10 years
'only' Genocide	3	45 years	24 years

- Average Trial sentence for aggregates of type of crime:

Table 9.

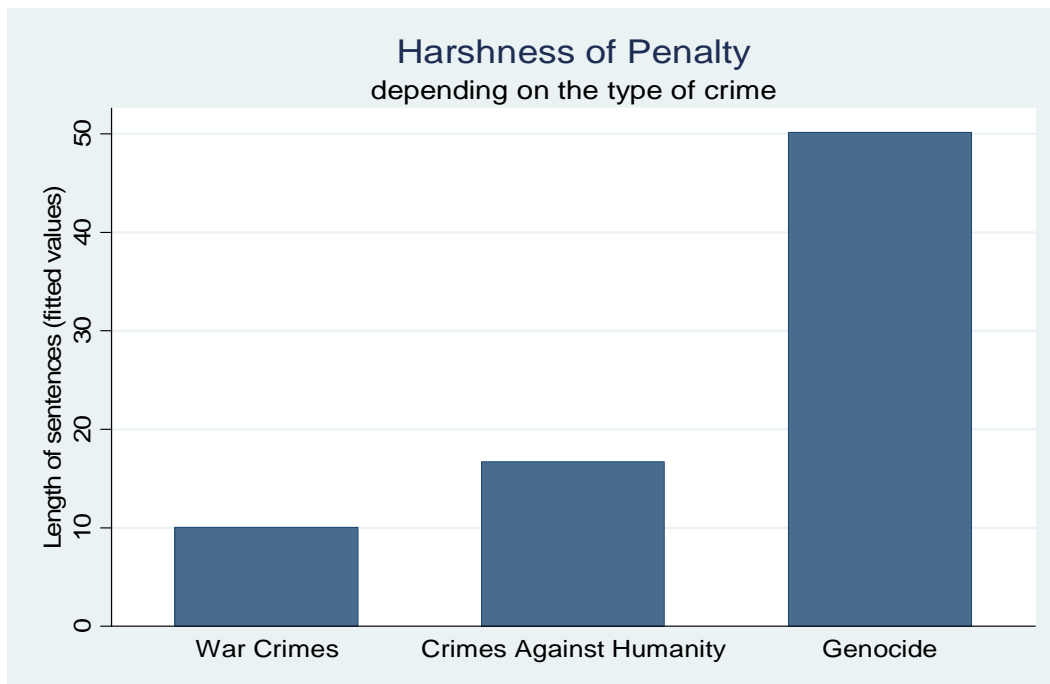
Category of crime	Number of observations	Average/mean sentence	Median sentence
War crimes + Crimes against humanity	30	24.4 years	20 years
Crimes against humanity + Genocide	25	59.6 years	46 years
Genocide + War crimes	3	30.3 years	27 years

- Regression between length of sentences and type of crime:

Source	SS	df	MS			
Model	64245.4553	3	21415.1518	Number of obs =	156	
Residual	92627.7546	152	609.393122	F(3, 152) =	35.14	
				Prob > F =	0.0000	
				R-squared =	0.4095	
				Adj R-squared =	0.3979	
				Root MSE =	24.686	
Total	156873.21	155	1012.08523			

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
type_ab	3.724325	4.797875	0.78	0.439	-5.754807	13.20346
type_c	10.40044	5.390695	1.93	0.056	-.2499252	21.0508
type_d	43.83699	4.985148	8.79	0.000	33.98786	53.68611
_cons	6.326985	6.453123	0.98	0.328	-6.42241	19.07638

- Fitted values and graph on ‘Harshness of penalty depending on the type of crime’:



- Direct correlations between length of sentence and type of crime:

1) War crimes:

```
. pwcorr y_impris type_ab, sig
```

	y_impris	type_ab
y_impris	1.0000	
type_ab	-0.3118	1.0000
	0.0001	

2) Crimes against humanity:

```
. pwcorr y_impris type_c, sig
```

	y_impris	type_c
y_impris	1.0000	
type_c	0.1962 0.0141	1.0000

3) Genocide:

```
. pwcorr y_impris type_d, sig
```

	y_impris	type_d
y_impris	1.0000	
type_d	0.6283 0.0000	1.0000

c) *Modes of liability* (pp.287-292, Chapter 4)

- Trial cases per modes of liability, before the ICTY and the ICTR:

Table 10.

Modes of liability	ICTY			ICTR		
	Number of observations	Average/mean sentence	Median sentence	Number of observations	Average/mean sentence	Median sentence
Art.7(1) / 6(1)	53	18.7 years	17 years	20	50 years	25 years
Art.7(1) /6(1) + Art.7(3) / 6(3)	13	12.7 years	9 years	9	65.4 years	Life imprisonment
Art.7(3) / 6(3)	4	4.3 years	3.75 years	1	11 years	11 years

- Appeal cases per modes of liability, before the ICTY and the ICTR:

Table 11.

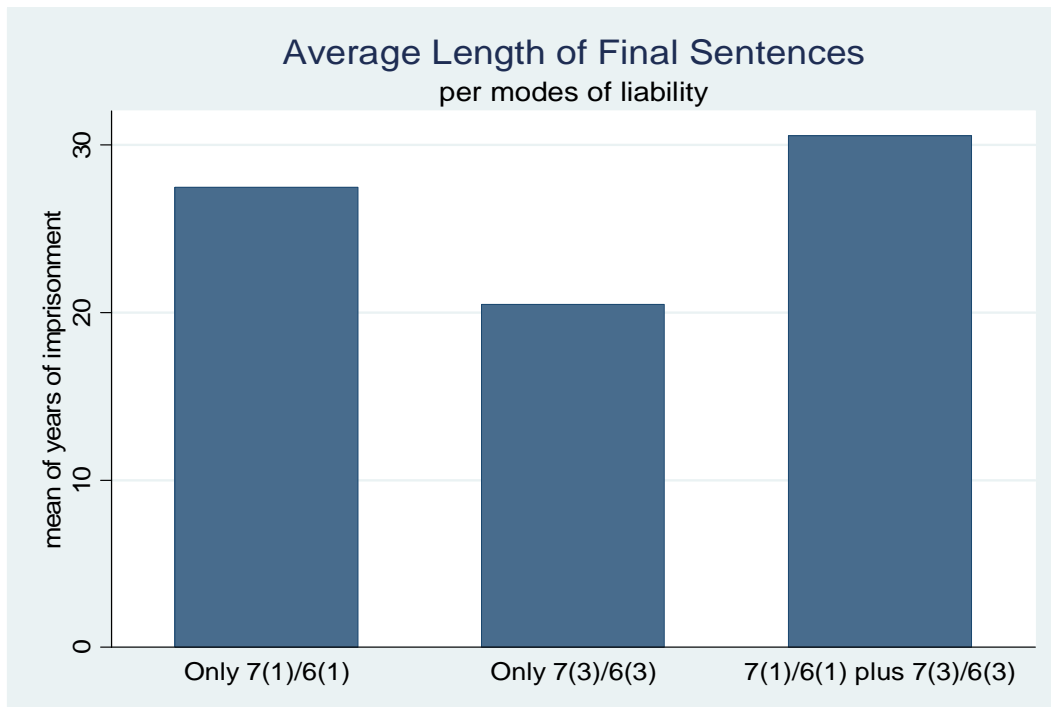
Modes of liability	ICTY			ICTR		
	Number of observations	Average/mean sentence	Median sentence	Number of observations	Average/mean sentence	Median sentence
Art.7(1) / 6(1)	30	20.8 years	16.5 years	16	59 years	40 years
Art.7(1) /6(1) + Art.7(3) / 6(3)	5	13.8 years	15 years	4	78.7 years	Life imprisonment
Art.7(3) / 6(3)	0	0	0	1	30 years	30 years

- Final sentences per modes of liability, before the ICTY and the ICTR:

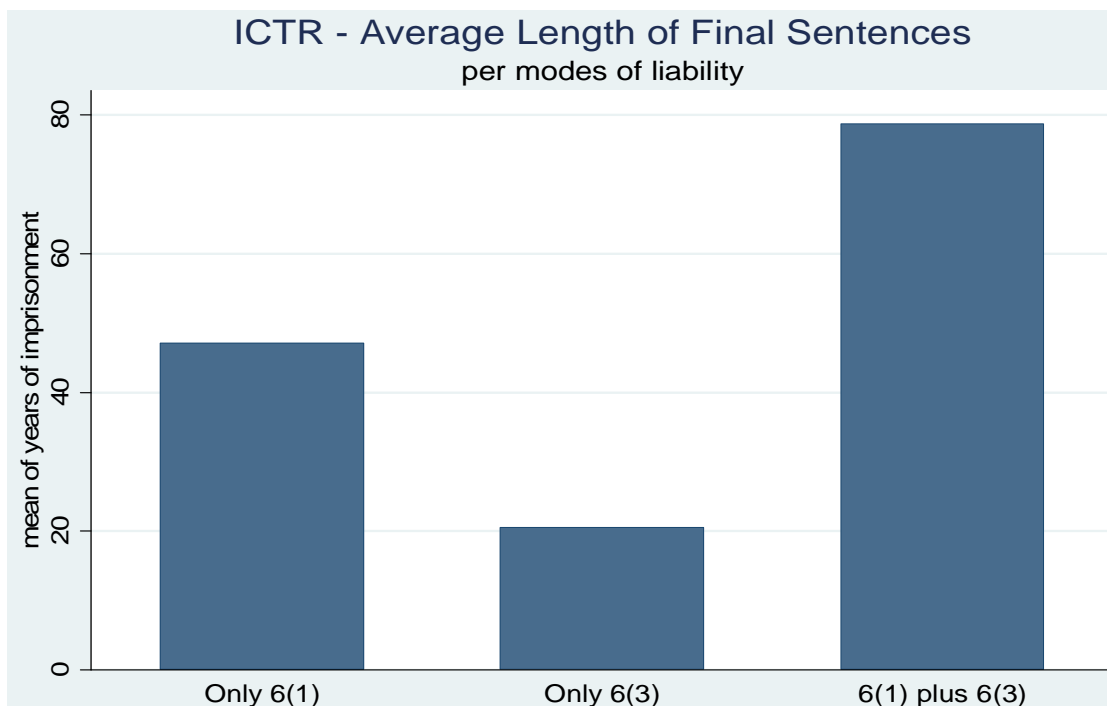
Table 12.

Modes of liability	ICTY			ICTR		
	Number of observations	Average/mean sentence	Median sentence	Number of observations	Average/mean sentence	Median sentence
Art.7(1) / 6(1)	43	17.8 years	15 years	21	47 years	32 years
Art.7(1) /6(1) + Art.7(3) / 6(3)	10	11.3 years	9.5 years	4	78.7 years	Life imprisonment
Art.7(3) / 6(3)	0	0	0	2	20.5 years	20.5 years

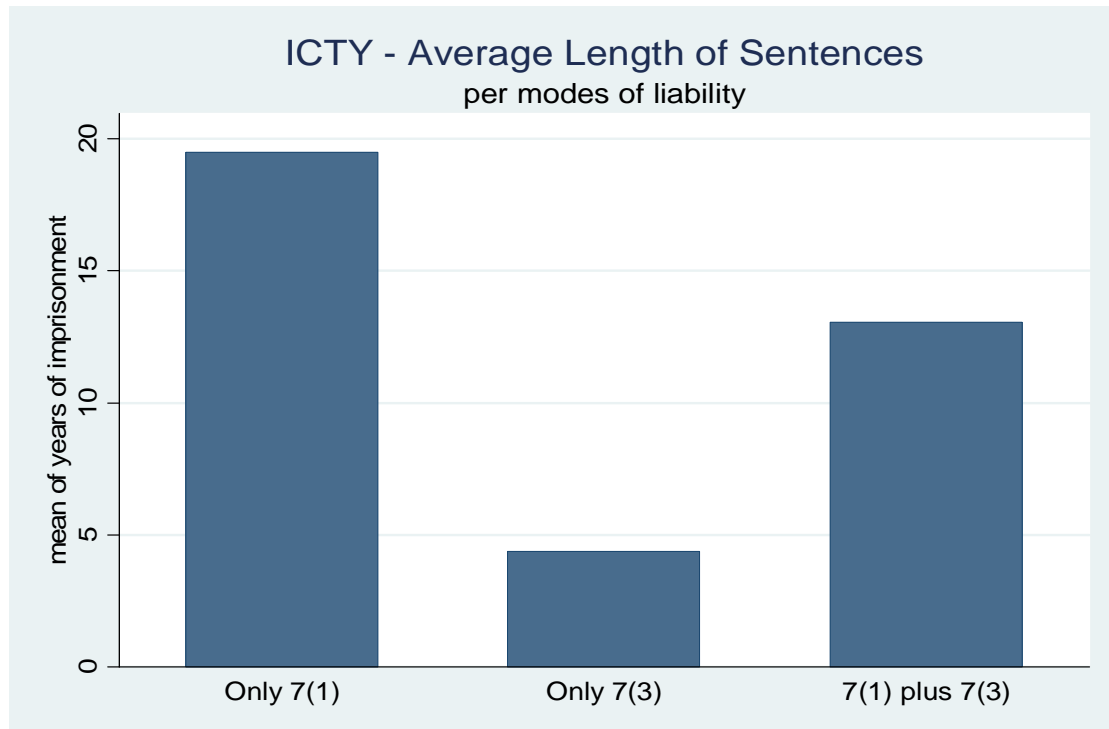
- Graph bar average length of final sentences per modes of liability:



- Graph bar average length of final sentences per mode of liability, ICTR:



- Graph bar average length of sentences per mode of liability, ICTY:



- Regression between length of final sentences and modes of liability:

Source	SS	df	MS			
Model	220.287054	2	110.143527	Number of obs =	80	
Residual	72617.9129	77	943.089779	F(2, 77) =	0.12	
Total	72838.2	79	922.002532	Prob > F =	0.8899	
				R-squared =	0.0030	
				Adj R-squared =	-0.0229	
				Root MSE =	30.71	

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
_7_1_	10.07143	23.2144	0.43	0.666	-36.15435	56.29721
_7_3_	3.087054	9.060868	0.34	0.734	-14.95544	21.12955
_cons	17.41295	23.52965	0.74	0.462	-29.44056	64.26646

- Regression between length of Trial sentences and modes of liability:

Source	SS	df	MS			
Model	1364.24964	2	682.12482	Number of obs =	105	
Residual	22056.8789	102	216.243911	F(2, 102) =	3.15	
Total	23421.1286	104	225.203159	Prob > F =	0.0469	
				R-squared =	0.0582	
				Adj R-squared =	0.0398	
				Root MSE =	14.705	

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
_7_1_	8.680556	8.128624	1.07	0.288	-7.442532	24.80364
_7_3_	-6.43842	3.823467	-1.68	0.095	-14.02225	1.145408
_cons	10.81342	8.287332	1.30	0.195	-5.624464	27.2513

- Regression between length of Appeals sentences and modes of liability:

Source	SS	df	MS	Number of obs = 51		
Model	5020.63034	2	2510.31517	F(2, 48) =	1.57	
Residual	76614.703	48	1596.13965	Prob > F =	0.2180	
Total	81635.3333	50	1632.70667	R-squared =	0.0615	
				Adj R-squared =	0.0224	
				Root MSE =	39.952	

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
_7_1_	49.03846	30.34551	1.62	0.113	-11.97527	110.0522
_7_3_	15.51068	12.92738	1.20	0.236	-10.48156	41.50293
_cons	4.989316	31.06746	0.16	0.873	-57.476	67.45463

- Pair-wise correlations between length of sentences and modes of liability:

```
. pwcorr y_impris _7_1_ if final_sent ==2, sig
```

	y_impris	_7_1_
y_impris	1.0000	
_7_1_	0.0390	1.0000
	0.7312	

```
. pwcorr y_impris _7_3_ if final_sent ==2, sig
```

	y_impris	_7_3_
y_impris	1.0000	
_7_3_	0.0242	1.0000
	0.8310	

```
. pwcorr y_impris _7_1_, sig
```

	y_impris	_7_1_
y_impris	1.0000	
_7_1_	0.1310	1.0000
	0.1032	

```
. pwcorr y_impris _7_3_, sig
```

	y_impris	_7_3_
y_impris	1.0000	
_7_3_	0.0325	1.0000
	0.6870	

d) *Perpetrator – Characteristics*

i) Type of participation (pp.292-295, Chapter 4)

- Trial cases per ‘type of participation’, before the ICTY and the ICTR:

Table 13.

Type of participation	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Direct participation	31 cases	16.7 years	17 years	12 cases	68 years	Life imprisonment
Indirect participation	39 cases	16.8 years	10 years	18 cases	43 years	20 years

- Appeal cases per ‘type of participation’, before the ICTY and the ICTR:

Table 14.

Type of participation	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Direct participation	15 cases	20 years	20 years	12 cases	70.4 years	Life imprisonment
Indirect participation	20 cases	19.6 years	14 years	9 cases	49 years	32 years

- Final sentences per ‘type of participation’, before the ICTY and the ICTR:

Table 15.

Type of participation	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Direct participation	25 cases	16.7 years	18 years	12 cases	70.4 years	Life imprisonment
Indirect participation	28 cases	16.5 years	10.5 years	15 cases	33.4 years	15 years

- Correlation between type of participation and length of sentences:

```
. pwcorr y_impris type_partic if t_id ==1, sig
      | y_impris type_p~c
-----+-----
      y_impris | 1.0000
      |
      type_partic | 0.0007 1.0000
      | 0.9944

. pwcorr y_impris type_partic if t_id ==2, sig
      | y_impris type_p~c
-----+-----
      y_impris | 1.0000
      |
      type_partic | 0.2995 1.0000
      | 0.0328
```

ii) Leadership level (pp.295-304, Chapter 4)

Table 16. Military Hierarchy - Trial

Leadership levels	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Low level	20 cases	11.9 years	12 years	0	0	0
Medium level	30 cases	13.4 years	10 years	4 cases	19.7 years	20 years
High level	8 cases	26 years	20 years	0	0	

Table 17. Civilian Hierarchy - Trial

Leadership levels	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Low level	0	0	0	4 cases	14.7 years	13.5 years
Medium level	3 cases	23.3 years	25 years	13 cases	48.3 years	25 years
High level	3 cases	42.3 years	17 years	5 cases	87 years	Life imprisonment
High level politicians	6 cases	23.8 years	26 years	4 cases	Life imprisonment	Life imprisonment

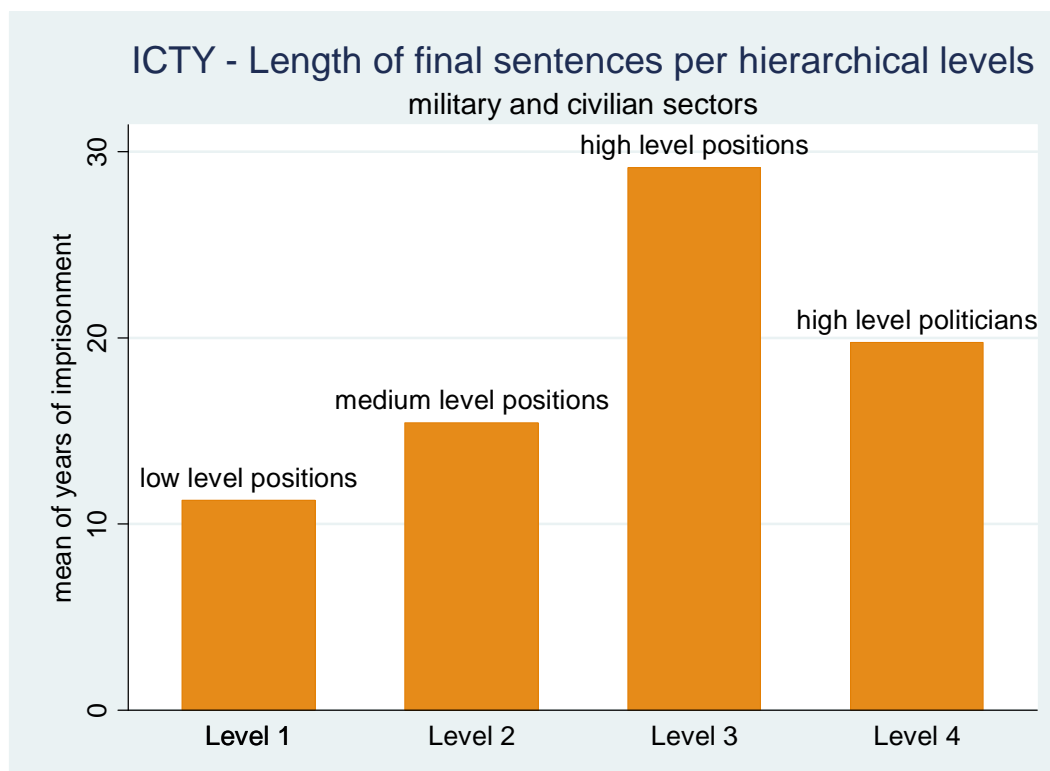
Table 18. Military Hierarchy - Appeal

Leadership levels	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Low level	8 cases	14.6 years	14 years	0	0	0
Medium level	15 cases	16.8 years	18 years	3 cases	17.3 years	15 years
High level	5 cases	34 years	20 years	0	0	0

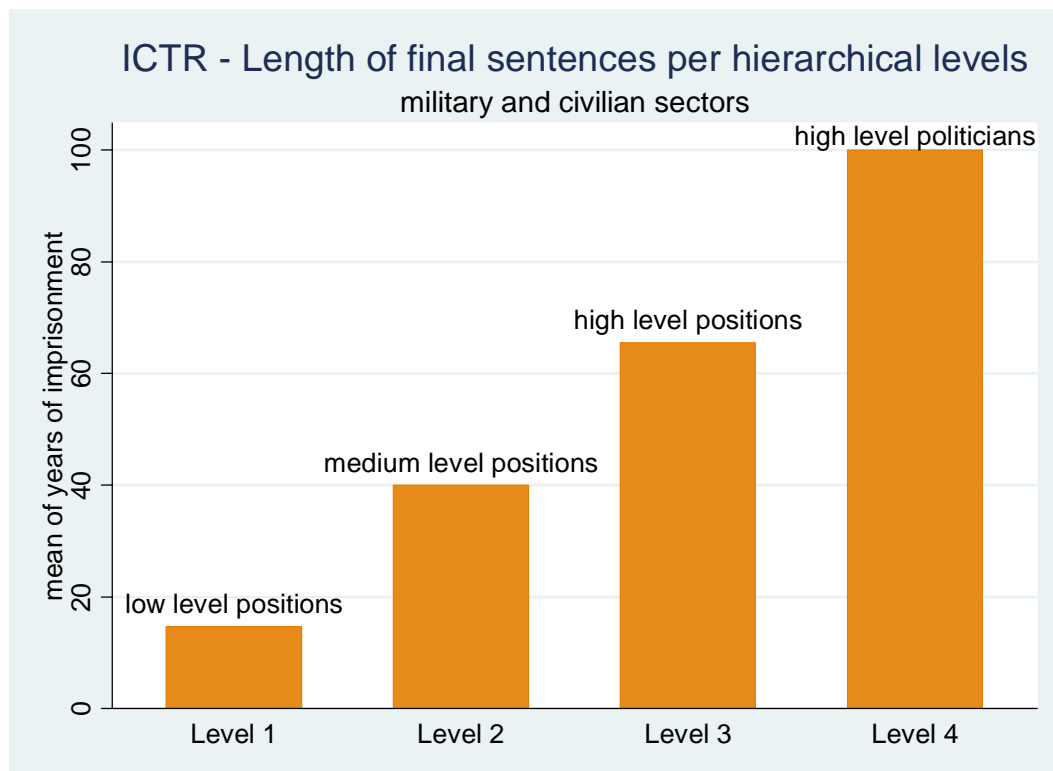
Table 19. Civilian Hierarchy - Appeal

Leadership levels	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Low level	0	0	0	1 case	25 years	25 years
Medium level	2 cases	22.5 years	22.5 years	9 cases	61 years	45 years
High level	3 cases	21.6 years	15 years	4 cases	65.5 years	66 years
High level politicians	3 cases	22.6 years	25 years	4 cases	Life imprisonment	Life imprisonment

- ICTY: graph bar average final sentence per hierarchical level (both military and civilian)



- ICTR: graph bar average final sentence per hierarchical level (both military and civilian)



- Correlations between length of sentences and leadership level (for final sentences):

a) ICTY:

```
. pwcorr y_impris leadership_level if (t_id ==1) & (final_sent ==2), sig
      | y_impris leader~1
-----+-----
      y_impris | 1.0000
leadership~1 | 0.3157 1.0000
      | 0.0213
```

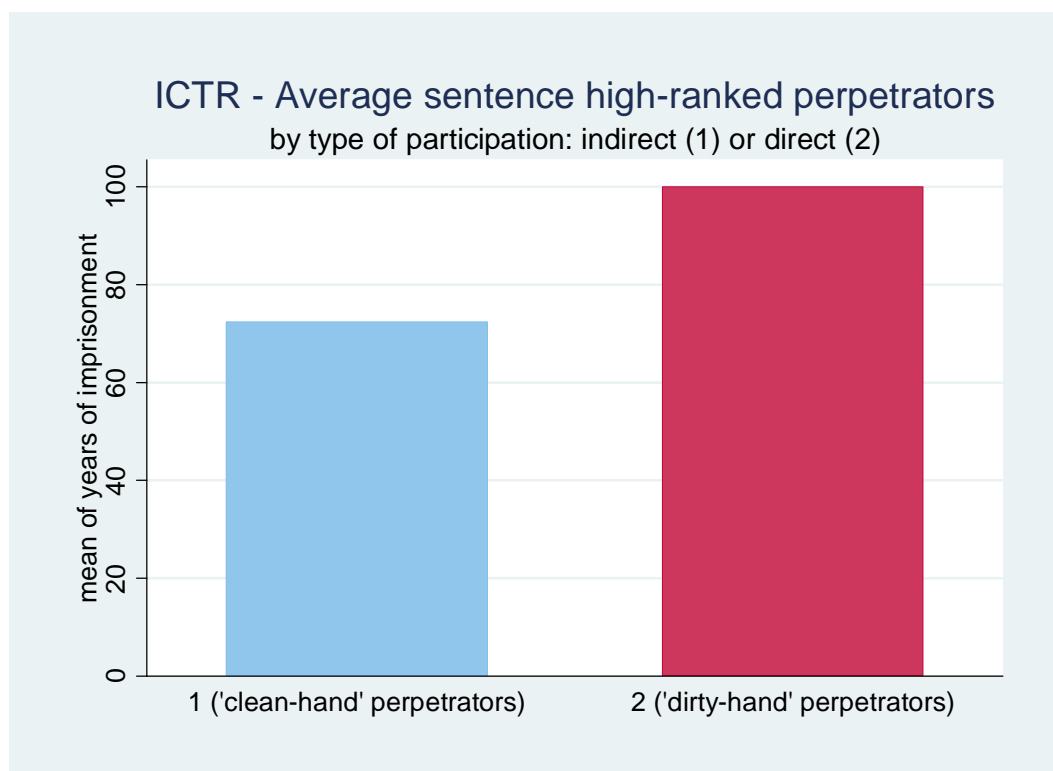
b) ICTR:

```
. pwcorr y_impris leadership_level if (t_id ==2) & (final_sent ==2), sig
      | y_impris leader~1
-----+-----
      y_impris | 1.0000
leadership~1 | 0.6193 1.0000
      | 0.0006
      |
```

c) Both Tribunals:

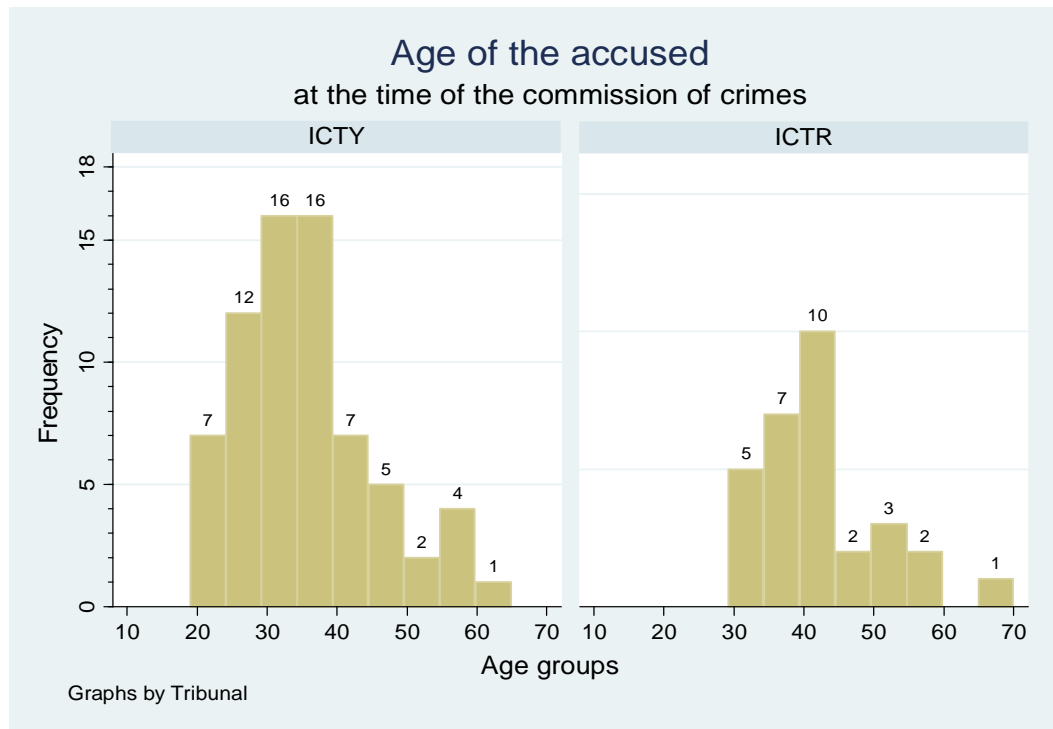
```
. pwcorr y_impris leadership_level if (final_sent ==2), sig
      | y_impris leader~1
-----+-----
      y_impris | 1.0000
leadership~1 | 0.4571 1.0000
      | 0.0000
```

- ICTR: high-ranked perpetrators (levels 3 and 4) with 'dirty hands':



iii) Age (pp.304-309, Chapter 4)

- Age of the accused at the time of the commission of crimes (by Tribunal):



- Relations between age groups (at the time of the crimes) and length of trial sentences:

Table 20. Age of offenders at the time of the commission of crimes

Age-groups	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
18-29	19 cases	13 years	15 years	0	0	0
30-40	34 cases	18.7 years	15 years	13 cases	49 years	25 years
41-55	14 cases	18.6 years	19 years	14 cases	59 years	67.5 years
56-70	3 cases	8.6 years	8 years	3 cases	45 years	25 years

- Correlations between ‘years of imprisonment’ and ‘age at the time of crimes’:

```
. pwcorr y_impris age_crime if t_id ==1, sig
```

```

      | y_impris age_crime
-----+-----
y_impris | 1.0000
age_crime | 0.0197 1.0000
          | 0.8416

```

```
. pwcorr y_impris age_crime if t_id ==2, sig
      | y_impris age_crime
-----+-----
y_impris | 1.0000
      |
age_crime | -0.0906 1.0000
      | 0.5273
```

```
. pwcorr y_impris age_crime, sig
      | y_impris age_crime
-----+-----
y_impris | 1.0000
      |
age_crime | 0.1475 1.0000
      | 0.0661
```

- Relations between age-groups (at the time of the sentence) and length of trial sentences:

Table 21. Age of offenders at the time of the pronouncement of the trial sentence

Age-groups	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
50-65	15 cases	19.3 years	20 years	14 cases	52.5 years	32.5 years
66-80	4 cases	8.5 years	8 years	3 cases	45 years	25 years

- Correlations between 'years of imprisonment' and 'age at the time of the sentence':

```
. pwcorr y_impris age_trial if t_id ==1, sig
      | y_impris age_trial
-----+-----
y_impris | 1.0000
      |
age_trial | 0.0442 1.0000
      | 0.6545
```

```
. pwcorr y_impris age_trial if t_id ==2, sig
```

```

          | y_impris age_trial
-----+-----
y_impris | 1.0000
          |
age_trial | -0.1645 1.0000
          | 0.2486

```

```
. pwcorr y_impris age_trial, sig
```

```

          | y_impris age_trial
-----+-----
y_impris | 1.0000
          |
age_trial | 0.0832 1.0000
          | 0.3019

```

e) *Guilty pleas / plea agreements* (pp.309-311, Chapter 4)

- Average sentence length for guilty plea-cases and non guilty plea-cases before both Tribunals:

Table 22. Average length of trial sentences – Guilty plea-cases v. non guilty plea-cases

	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Guilty plea-cases	21 cases	13.8 years	12 years	9 cases	30.2 years	12 years
Non guilty plea-cases	49 cases	18 years	15 years	21 cases	63.2 years	Life imprisonment

Table 23. Average length of appeal sentences – Guilty plea-cases v. non guilty plea-cases

	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Guilty plea-cases	8 cases	18 years	17.5 years	3 cases	71.6 years	Life imprisonment
Non guilty plea-cases	27 cases	20.3 years	15 years	18 cases	59.6 years	40 years

Table 24. Average length of final sentences – Guilty plea-cases v. non guilty plea-cases

	ICTY			ICTR		
	Number of cases	Average/mean sentence	Median sentence	Number of cases	Average/mean sentence	Median sentence
Guilty plea-cases	20 cases	13.5 years	12.5 years	9 cases	30.2 years	12 years
Non guilty plea-cases	33 cases	18.5 years	15 years	18 cases	59.6 years	40 years

- Correlations between the presence of guilty pleas and the length of sentences:

```
. pwcorr y_impris guiltypleaa, sig
```

	y_impris	guiltypleaa
y_impris	1.0000	
guiltypleaa	-0.1507 0.0604	1.0000

a) ICTY :

```
. pwcorr y_impris guiltypleaa if t_id ==1, sig
```

	y_impris	guiltypleaa
y_impris	1.0000	
guiltypleaa	-0.1150 0.2428	1.0000

```
. pwcorr y_impris guiltypleaa if t_id ==1 & type_j ==1, sig
```

	y_impris	guiltypleaa
y_impris	1.0000	
guiltypleaa	-0.1373 0.2569	1.0000

```
. pwcorr y_impris guiltypleaa if t_id ==1 & final_sent ==2, sig
```

	y_impris	guiltypleaa
y_impris	1.0000	
guiltypleaa	-0.1682 0.2287	1.0000

b) ICTR :

```
. pwcorr y_impris guiltypleaa if t_id ==2, sig
```

	y_impris guiltypleaa	
y_impris	1.0000	
guiltypleaa	-0.2230 0.1158	1.0000

```
. pwcorr y_impris guiltypleaa if t_id ==2 & type_j ==1, sig
```

	y_impris guiltypleaa	
y_impris	1.0000	
guiltypleaa	-0.3667 0.0462	1.0000

```
. pwcorr y_impris guiltypleaa if t_id ==2 & final_sent ==2, sig
```

	y_impris guiltypleaa	
y_impris	1.0000	
guiltypleaa	-0.3509 0.0727	1.0000

f) *Aggravating circumstances* (pp.311-318, Chapter 4)

- Descriptive graph: aggravating circumstances as used by both Tribunals

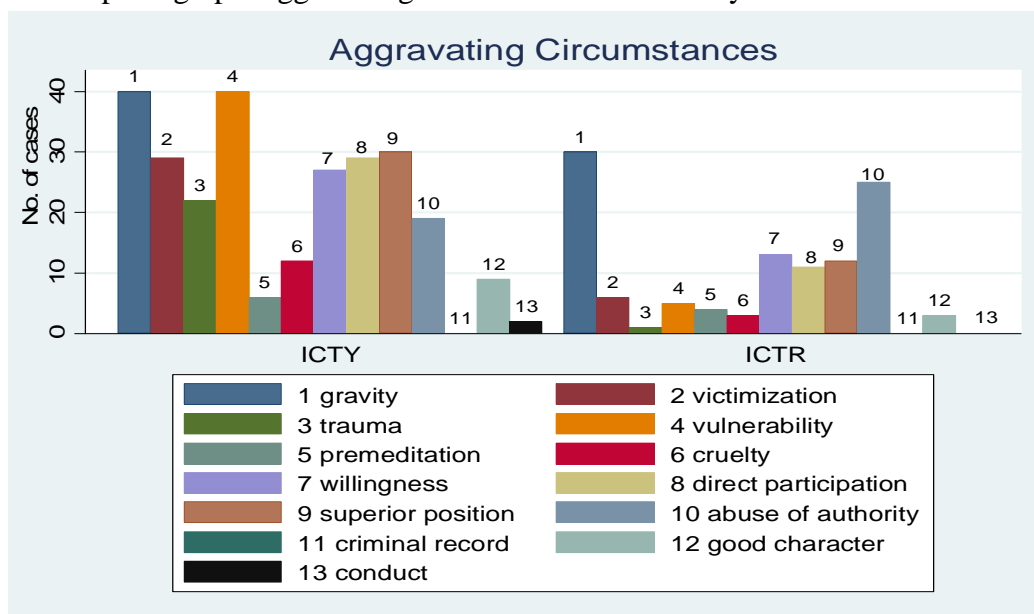


Table 25. ICTY – Aggravating circumstances and average length of trial sentences

Aggravating circumstances	Number of cases	Average sentence with	Average sentence without	Median sentence with	Median sentence without	Index of correlation	'P' value
Gravity/Magnitude	40 cases	19.5 years	13 years	17 years	12.5 years	0.20	0.0372
Victimization	29 cases	23.5 years	12 years	20 years	10 years	0.36	0.0001
Trauma suffered	22 cases	26.7 years	12 years	20 years	10 years	0.28	0.0030
Vulnerability	40 cases	17 years	16 years	17 years	10 years	- 0.08	0.3664
Premeditation	6 cases	28.4 years	15.7 years	19 years	15 years	0.39	0.0000
Cruelty	12 cases	19 years	16 years	19 years	12.5 years	0.21	0.0252
Willingness	27 cases	20 years	14.7 years	20 years	11 years	0.24	0.0114
Direct participation	29 cases	17 years	16 years	15 years	12 years	- 0.00	0.9959
Superior position	30 cases	21.5 years	13 years	17 years	12.5 years	0.24	0.0129
Abuse of authority/trust	19 cases	19.5 years	15.7 years	20 years	13 years	0.19	0.0479
Criminal record	0	-	-	-	-	-	-
Good character	9 cases	24 years	15.6 years	17 years	15 years	0.12	0.1977
Conduct	2 cases	8 years	17 years	8 years	15 years	- 0.09	0.3529

Table 26. ICTR – Aggravating circumstances and average length of trial sentences

Aggravating circumstances	Number of cases	Average sentence with	Average sentence without	Median sentence with	Median sentence without	Index of correlation	'P' value
Gravity/Magnitude	30 cases	53.3 years	-	28.5 years	-	.	0.0000
Victimization	6 cases	60.8 years	51.5 years	62.5 years	28.5 years	0.05	0.6775
Trauma suffered	1 case	Life impris.	51.7 years	Life impris.	27 years	0.21	0.1229
Vulnerability	5 cases	63.6 years	51 years	Life impris.	27 years	0.17	0.2253
Premeditation	4 cases	61 years	52 years	65 years	26 years	0.14	0.3147
Cruelty	3 cases	75 years	50.9 years	Life impris.	27 years	0.21	0.1237
Willingness	13 cases	76 years	35.8 years	Life impris.	25 years	0.42	0.0019
Direct participation	11 cases	72 years	42.4 years	Life impris.	25 years	0.35	0.0107
Superior position	12 cases	71.6 years	41 years	Life impris.	25 years	0.48	0.0004
Abuse of authority/trust	25 cases	57.8 years	30.8 years	35 years	12 years	0.16	0.2398
Criminal record	0	-	-	-	-	-	-
Good character	3 cases	40.6 years	54 years	15 years	30 years	- 0.10	0.4852
Conduct	0	-	-	-	-	-	-

- Impact of aggravating and mitigating circumstances on the length of penalties:

General regression (objective variables, plus aggravating and mitigating factors)

a) Both Tribunals, only trial sentences:

Source	SS	df	MS	Number of obs =	100
Model	66705.9698	35	1905.88485	F(35, 64) =	4.62
Residual	26422.7177	64	412.854964	Prob > F =	0.0000
				R-squared =	0.7163
				Adj R-squared =	0.5611
Total	93128.6875	99	940.693813	Root MSE =	20.319

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]
t_id	28.03955	12.80341	2.19	0.032	2.4618 53.61729
type_ab	-5.055494	6.722012	-0.75	0.455	-18.48426 8.373269
type_c	.8267548	7.972584	0.10	0.918	-15.10031 16.75382
type_d	2.193108	12.37127	0.18	0.860	-22.52135 26.90757
leadership~l	12.7077	4.073848	3.12	0.003	4.569258 20.84615
type_partic	2.492451	9.960186	0.25	0.803	-17.40531 22.39021
guiltypl~a	22.20702	17.56949	1.26	0.211	-12.89207 57.3061
a_gravity	2.930946	7.545458	0.39	0.699	-12.14284 18.00473
a_victimiz~n	3.609663	6.915744	0.52	0.604	-10.20612 17.42545
a_trauma	5.254544	7.848411	0.67	0.506	-10.42446 20.93355
a_vulnerab~y	1.10779	6.557417	0.17	0.866	-11.99216 14.20774
a_premedit~n	1.234576	8.84856	0.14	0.889	-16.44245 18.91161
a_cruelty	-7.125934	9.001741	-0.79	0.432	-25.10898 10.85711
a_willingn~s	4.918242	5.587824	0.88	0.382	-6.24472 16.0812
a_direct_p~c	4.877301	10.25701	0.48	0.636	-15.61342 25.36803
a_superior	2.779286	6.385044	0.44	0.665	-9.976305 15.53488
a_abuse_au~y	-2.132687	6.043829	-0.35	0.725	-14.20662 9.941249
a_criminal~c	(dropped)				
a_goodchar	5.572174	8.835234	0.63	0.530	-12.07823 23.22258
a_conduct	-11.4003	18.89436	-0.60	0.548	-49.14612 26.34552
m_orders_d~s	16.42569	19.4183	0.85	0.401	-22.36682 55.2182
m_first_of~r	-11.19281	7.48793	-1.49	0.140	-26.15167 3.766052
m_family	-2.785291	5.952011	-0.47	0.641	-14.6758 9.105218
m_young_age	1.80661	7.549501	0.24	0.812	-13.27525 16.88847
m_old_age	-11.49043	10.76049	-1.07	0.290	-32.98697 10.00611
m_health	2.577117	8.276001	0.31	0.757	-13.9561 19.11033
m_remorse	-9.071333	10.35399	-0.88	0.384	-29.7558 11.61313
m_unwillin~s	4.541887	21.5154	0.21	0.833	-38.44007 47.52385
m_indpartic	-9.566642	10.36924	-0.92	0.360	-30.28158 11.1483
m_help_off~d	3.085403	5.731494	0.54	0.592	-8.364572 14.53538
m_cooperat~n	8.935762	8.115909	1.10	0.275	-7.27763 25.14916
m_surrender	-10.54278	5.998717	-1.76	0.084	-22.52659 1.441036
m_guiltyplea	-30.52169	19.30969	-1.58	0.119	-69.09722 8.053843
m_testimony	-12.28137	10.51379	-1.17	0.247	-33.28507 8.722334
m_goodchar	-6.766775	6.326426	-1.07	0.289	-19.40526 5.871713
m_conduct	4.763148	8.240031	0.58	0.565	-11.69821 21.2245
_cons	-35.92805	22.36605	-1.61	0.113	-80.60937 8.753266

b) Both Tribunals, only final sentences:

Source	SS	df	MS	Number of obs =	80
Model	57471.6323	35	1642.04664	F(35, 44) =	4.70
Residual	15366.5677	44	349.240175	Prob > F =	0.0000
Total	72838.2	79	922.002532	R-squared =	0.7890
				Adj R-squared =	0.6212
				Root MSE =	18.688

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]
t_id	17.87059	11.38002	1.57	0.123	-5.064331 40.8055
type_ab	-6.054874	7.117427	-0.85	0.400	-20.39911 8.289357
type_c	9.276714	8.854996	1.05	0.301	-8.569359 27.12279
type_d	10.00644	12.32725	0.81	0.421	-14.8375 34.85038
leadership~l	4.984887	4.768629	1.05	0.302	-4.625653 14.59543
type_partic	3.401624	9.038003	0.38	0.708	-14.81328 21.61652
guiltypl~a	21.05057	17.09563	1.23	0.225	-13.40341 55.50454
a_gravity	11.96707	8.101825	1.48	0.147	-4.361089 28.29522
a_victimiz~n	6.966385	7.219998	0.96	0.340	-7.584564 21.51733
a_trauma	-.6965694	9.015274	-0.08	0.939	-18.86566 17.47252
a_vulnerab~y	9.089058	8.000264	1.14	0.262	-7.034415 25.21253
a_premedit~n	26.1458	8.971232	2.91	0.006	8.065474 44.22613
a_cruelty	1.558498	8.658129	0.18	0.858	-15.89081 19.00781
a_willingn~s	.4082337	6.337858	0.06	0.949	-12.36488 13.18135
a_direct_p~c	6.88253	9.779982	0.70	0.485	-12.82773 26.59279
a_superior	18.8346	6.460205	2.92	0.006	5.814914 31.85429
a_abuse_au~y	-8.973984	6.746195	-1.33	0.190	-22.57005 4.622079
a_criminal~c	(dropped)				
a_goodchar	-.6724243	9.803291	-0.07	0.946	-20.42966 19.08481
a_conduct	-13.43161	24.23046	-0.55	0.582	-62.2649 35.40168
m_orders_d~s	26.33135	19.68522	1.34	0.188	-13.3416 66.0043
m_first_of~r	-8.704363	9.389311	-0.93	0.359	-27.62728 10.21855
m_family	-.4234308	6.948383	-0.06	0.952	-14.42698 13.58011
m_young_age	-19.69374	9.177014	-2.15	0.037	-38.1888 -1.198686
m_old_age	-10.63173	12.93799	-0.82	0.416	-36.70655 15.44308
m_health	-2.887329	8.350283	-0.35	0.731	-19.71622 13.94156
m_remorse	-2.359885	11.10309	-0.21	0.833	-24.7367 20.01693
m_unwillin~s	15.24976	21.79891	0.70	0.488	-28.68304 59.18257
m_indpartic	-13.15707	13.48342	-0.98	0.334	-40.33111 14.01696
m_help_off~d	1.672729	6.011261	0.28	0.782	-10.44217 13.78763
m_cooperat~n	2.648198	9.222923	0.29	0.775	-15.93938 21.23578
m_surrender	-9.709019	7.368291	-1.32	0.194	-24.55883 5.140796
m_guiltyplea	-31.94911	19.53945	-1.64	0.109	-71.32829 7.430072
m_testimony	-13.21478	10.04815	-1.32	0.195	-33.46549 7.035929
m_goodchar	-1.397122	7.563105	-0.18	0.854	-16.63956 13.84531
m_conduct	-10.18288	8.96245	-1.14	0.262	-28.24551 7.879755
_cons	-28.88086	25.087	-1.15	0.256	-79.44038 21.67866

c) Both Tribunals, all sentences:

Source	SS	df	MS	Number of obs = 156		
Model	113424.43	35	3240.69799	F(35, 120) =	8.95	
Residual	43448.7804	120	362.07317	Prob > F =	0.0000	
Total	156873.21	155	1012.08523	R-squared =	0.7230	
				Adj R-squared =	0.6423	
				Root MSE =	19.028	

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
t_id	22.97438	9.046441	2.54	0.012	5.063052	40.8857
type_ab	-3.772458	4.779051	-0.79	0.431	-13.23465	5.689731
type_c	7.492702	5.673116	1.32	0.189	-3.739673	18.72508
type_d	6.254226	8.810979	0.71	0.479	-11.1909	23.69935
leadership~l	9.278807	2.970448	3.12	0.002	3.397527	15.16009
type_partic	.056685	6.611539	0.01	0.993	-13.0337	13.14707
guiltypl~a	20.17838	12.00339	1.68	0.095	-3.587495	43.94425
a_gravity	6.659055	5.691208	1.17	0.244	-4.609141	17.92725
a_victimiz~n	5.631004	4.832744	1.17	0.246	-3.937493	15.1995
a_trauma	.9086399	5.627669	0.16	0.872	-10.23375	12.05103
a_vulnerab~y	2.562311	4.871828	0.53	0.600	-7.08357	12.20819
a_premedit~n	13.16056	5.824048	2.26	0.026	1.62935	24.69177
a_cruelty	2.66818	6.222116	0.43	0.669	-9.651176	14.98754
a_willingn~s	2.26554	4.091625	0.55	0.581	-5.835592	10.36667
a_direct_p~c	6.258711	6.801633	0.92	0.359	-7.208049	19.72547
a_superior	11.23016	4.234195	2.65	0.009	2.846745	19.61357
a_abuse_au~y	-4.097922	4.590133	-0.89	0.374	-13.18607	4.990221
a_criminal~c	(dropped)					
a_goodchar	-.5209	6.382412	-0.08	0.935	-13.15763	12.11583
a_conduct	-6.932796	15.94048	-0.43	0.664	-38.49384	24.62825
m_orders_d~s	19.58429	15.99324	1.22	0.223	-12.0812	51.24979
m_first_of~r	-5.877142	5.894773	-1.00	0.321	-17.54838	5.794098
m_family	-1.719399	4.387983	-0.39	0.696	-10.4073	6.968502
m_young_age	-6.685111	5.910322	-1.13	0.260	-18.38714	5.016914
m_old_age	-10.28412	8.44793	-1.22	0.226	-27.01043	6.442194
m_health	4.325017	6.28069	0.69	0.492	-8.110312	16.76035
m_remorse	-4.682127	7.29041	-0.64	0.522	-19.11663	9.752378
m_unwillin~s	8.147007	15.21284	0.54	0.593	-21.97335	38.26736
m_indpartic	-12.44389	8.23817	-1.51	0.134	-28.7549	3.867112
m_help_off~d	.9518162	4.35052	0.22	0.827	-7.66191	9.565542
m_cooperat~n	9.407865	6.227116	1.51	0.133	-2.921392	21.73712
m_surrender	-8.8817	4.530711	-1.96	0.052	-17.85219	.0887926
m_guiltyplea	-34.80511	13.31246	-2.61	0.010	-61.16285	-8.447374
m_testimony	-11.42214	7.316249	-1.56	0.121	-25.9078	3.063527
m_goodchar	-3.959258	4.61991	-0.86	0.393	-13.10636	5.187843
m_conduct	-3.179041	6.053475	-0.53	0.600	-15.1645	8.806418
_cons	-32.62966	16.62221	-1.96	0.052	-65.54049	.2811622

d) Only ICTY:

Source	SS	df	MS	Number of obs = 105		
Model	15845.5961	34	466.046943	F(34, 70) =	4.31	
Residual	7575.53249	70	108.221893	Prob > F =	0.0000	
				R-squared =	0.6766	
				Adj R-squared =	0.5194	
Total	23421.1286	104	225.203159	Root MSE =	10.403	

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
t_id	(dropped)					
type_ab	4.976893	3.650335	1.36	0.177	-2.30347	12.25726
type_c	19.44906	4.422322	4.40	0.000	10.62901	28.2691
type_d	5.898103	7.260352	0.81	0.419	-8.582213	20.37842
leadership~l	2.920099	2.275824	1.28	0.204	-1.618889	7.459086
type_partic	-4.80531	4.439315	-1.08	0.283	-13.65925	4.048626
guiltypl~a	-6.015576	12.02657	-0.50	0.619	-30.00181	17.97066
a_gravity	6.814975	3.547179	1.92	0.059	-.2596511	13.8896
a_victimiz~n	8.486615	3.394933	2.50	0.015	1.715635	15.25759
a_trauma	1.317368	3.904086	0.34	0.737	-6.469086	9.103823
a_vulnerab~y	-6.398899	3.58907	-1.78	0.079	-13.55707	.7592759
a_premedit~n	12.78492	4.537791	2.82	0.006	3.734583	21.83526
a_cruelty	6.773997	5.102768	1.33	0.189	-3.403152	16.95115
a_willingn~s	-.9453055	3.089783	-0.31	0.761	-7.107683	5.217072
a_direct_p~c	4.070475	4.656109	0.87	0.385	-5.215843	13.35679
a_superior	5.00588	3.303457	1.52	0.134	-1.582657	11.59442
a_abuse_au~y	.3740464	3.231988	0.12	0.908	-6.07195	6.820043
a_criminal~c	(dropped)					
a_goodchar	-2.861645	4.483442	-0.64	0.525	-11.80359	6.080298
a_conduct	6.114779	9.889499	0.62	0.538	-13.6092	25.83876
m_orders_d~s	-14.27243	14.60119	-0.98	0.332	-43.39358	14.84872
m_first_of~r	2.415202	3.978471	0.61	0.546	-5.519609	10.35001
m_family	3.413509	2.946319	1.16	0.251	-2.462739	9.289757
m_young_age	7.408763	4.190833	1.77	0.081	-.9495905	15.76712
m_old_age	-8.136461	5.992333	-1.36	0.179	-20.08779	3.814871
m_health	4.450823	4.684762	0.95	0.345	-4.892641	13.79429
m_remorse	1.121295	6.35122	0.18	0.860	-11.54581	13.7884
m_unwillin~s	11.20879	11.47534	0.98	0.332	-11.67804	34.09563
m_indpartic	-5.011895	7.334349	-0.68	0.497	-19.63979	9.616003
m_help_off~d	-.4817902	4.006387	-0.12	0.905	-8.472278	7.508697
m_cooperat~n	-4.223731	5.001863	-0.84	0.401	-14.19963	5.75217
m_surrender	-1.013608	3.047399	-0.33	0.740	-7.091453	5.064237
m_guiltyplea	1.750231	12.78586	0.14	0.892	-23.75036	27.25082
m_testimony	-6.487705	5.18002	-1.25	0.215	-16.81893	3.843519
m_goodchar	4.411321	3.616231	1.22	0.227	-2.801024	11.62367
m_conduct	-8.977876	3.764697	-2.38	0.020	-16.48633	-1.469425
_cons	-7.948183	9.105939	-0.87	0.386	-26.10941	10.21304

e) Only ICTR:

Source	SS	df	MS	Number of obs = 51		
Model	73915.9917	31	2384.38683	F(31, 19) =	5.87	
Residual	7719.34167	19	406.281141	Prob > F =	0.0001	
Total	81635.3333	50	1632.70667	R-squared =	0.9054	
				Adj R-squared =	0.7512	
				Root MSE =	20.156	

y_impris	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
t_id	(dropped)					
type_ab	-.0234326	19.7437	-0.00	0.999	-41.34748	41.30061
type_c	-3.767574	28.34254	-0.13	0.896	-63.08919	55.55404
type_d	18.76757	28.34254	0.66	0.516	-40.55404	78.08919
leadership~l	36.80225	15.83584	2.32	0.031	3.657459	69.94704
type_partic	-5.769474	34.26381	-0.17	0.868	-77.48444	65.9455
guiltypl~a	215.5021	88.60179	2.43	0.025	30.05639	400.9477
a_gravity	(dropped)					
a_victimiz~n	-32.13062	22.66151	-1.42	0.172	-79.56172	15.30047
a_trauma	232.5024	100.3909	2.32	0.032	22.38188	442.6229
a_vulnerab~y	81.97768	54.06054	1.52	0.146	-31.17233	195.1277
a_premedit~n	-23.0342	27.72066	-0.83	0.416	-81.0542	34.9858
a_cruelty	64.94332	26.59801	2.44	0.025	9.273046	120.6136
a_willingn~s	-27.41498	26.0315	-1.05	0.305	-81.89954	27.06958
a_direct_p~c	57.97261	37.53095	1.54	0.139	-20.58057	136.5258
a_superior	-10.01362	23.59395	-0.42	0.676	-59.39633	39.3691
a_abuse_au~y	76.61558	58.10285	1.32	0.203	-44.99509	198.2262
a_criminal~c	(dropped)					
a_goodchar	-27.48718	48.17042	-0.57	0.575	-128.309	73.33466
a_conduct	(dropped)					
m_orders_d~s	-168.5283	81.09125	-2.08	0.051	-338.2543	1.197605
m_first_of~r	-244.6412	93.94269	-2.60	0.017	-441.2655	-48.01692
m_family	-113.955	46.82527	-2.43	0.025	-211.9615	-15.94862
m_young_age	8.829797	59.07315	0.15	0.883	-114.8117	132.4713
m_old_age	70.85085	52.02345	1.36	0.189	-38.03548	179.7372
m_health	-7.166086	27.74327	-0.26	0.799	-65.23342	50.90125
m_remorse	244.5749	87.73871	2.79	0.012	60.93565	428.2141
m_unwillin~s	(dropped)					
m_indpartic	20.7215	26.51262	0.78	0.444	-34.77005	76.21306
m_help_off~d	52.8545	23.36726	2.26	0.036	3.946264	101.7627
m_cooperat~n	-223.9357	90.82719	-2.47	0.023	-414.0392	-33.83223
m_surrender	7.19126	65.24281	0.11	0.913	-129.3635	143.746
m_guiltyplea	54.48733	45.52412	1.20	0.246	-40.79574	149.7704
m_testimony	-273.1077	102.6261	-2.66	0.015	-487.9065	-58.30882
m_goodchar	-5.023433	19.7437	-0.25	0.802	-46.34748	36.30061
m_conduct	-148.2674	87.63271	-1.69	0.107	-331.6848	35.14995
_cons	-118.646	94.51101	-1.26	0.225	-316.4598	79.16784

- Pairwise correlations amongst aggravating factors (both Tribunals):

	y_impris	a_gravit	a_victim	a_trauma	a_vulner	a_premed	a_cruelty	
y_impris	1.0000							
a_gravity	0.3181 0.0001	1.0000						
a_victimizat	0.0049 0.9517	-0.0767 0.3414	1.0000					
a_trauma	-0.0493 0.5414	0.1495 0.0624	0.4470 0.0000	1.0000				
a_vulnerabil	-0.2341 0.0033	-0.0700 0.3853	0.4163 0.0000	0.4410 0.0000	1.0000			
a_premeditat	0.2349 0.0032	0.0432 0.5925	0.0225 0.7802	0.0755 0.3488	-0.0883 0.2729	1.0000		
a_cruelty	0.1382 0.0854	-0.0551 0.4949	0.4217 0.0000	0.0478 0.5538	0.2168 0.0066	0.1797 0.0248	1.0000	
a_willingnes	0.3307 0.0000	0.0026 0.9740	0.1022 0.2041	-0.0031 0.9691	-0.0320 0.6913	0.2807 0.0004	0.4161 0.0000	
a_direct_par	0.1699 0.3390	-0.1647 0.0399	0.1739 0.0299	-0.1323 0.0997	0.0873 0.2786	0.1117 0.1652	0.4094 0.0000	
a_superior	0.2649 0.0008	0.0637 0.4298	0.0083 0.9179	0.0884 0.2727	-0.1313 0.1024	-0.0656 0.4158	-0.0775 0.3365	
a_abuse_auth	0.4245 0.0000	0.2833 0.0003	-0.1299 0.1060	-0.1060 0.1878	-0.2264 0.0045	0.2291 0.0040	-0.0027 0.9729	
a_criminalre	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	
a_goodchar	-0.0403 0.6176	0.1525 0.0573	0.1639 0.0409	0.0175 0.8280	0.1386 0.0845	0.0183 0.8204	0.1020 0.2052	
a_conduct	-0.0809 0.3153	-0.1847 0.0210	-0.0853 0.2898	-0.0647 0.4225	-0.1042 0.1957	-0.0412 0.6100	-0.0486 0.5469	
		a_willing	a_direct	a_super	a_abusaut	a_crimre	a_goodch	a_conduc
a_willingnes	1.0000							
a_direct_par	0.3193 0.0000	1.0000						
a_superior	0.0469 0.5609	-0.2817 0.0004	1.0000					
a_abuse_auth	0.2203 0.0057	0.0242 0.7644	0.1181 0.1419	1.0000				
a_criminalre	0.0000	0.0000	0.0000	0.0000				
a_goodchar	0.0461 0.5673	-0.0912 0.2576	0.1168 0.1465	0.0034 0.9668		1.0000		
a_conduct	0.0239 0.7673	0.0223 0.7820	0.1331 0.0977	-0.1055 0.1899		-0.0372 0.6450	1.0000	

g) *Mitigating circumstances* (pp.318-326, Chapter 4)

- Descriptive graph: mitigating circumstances as used by both Tribunals

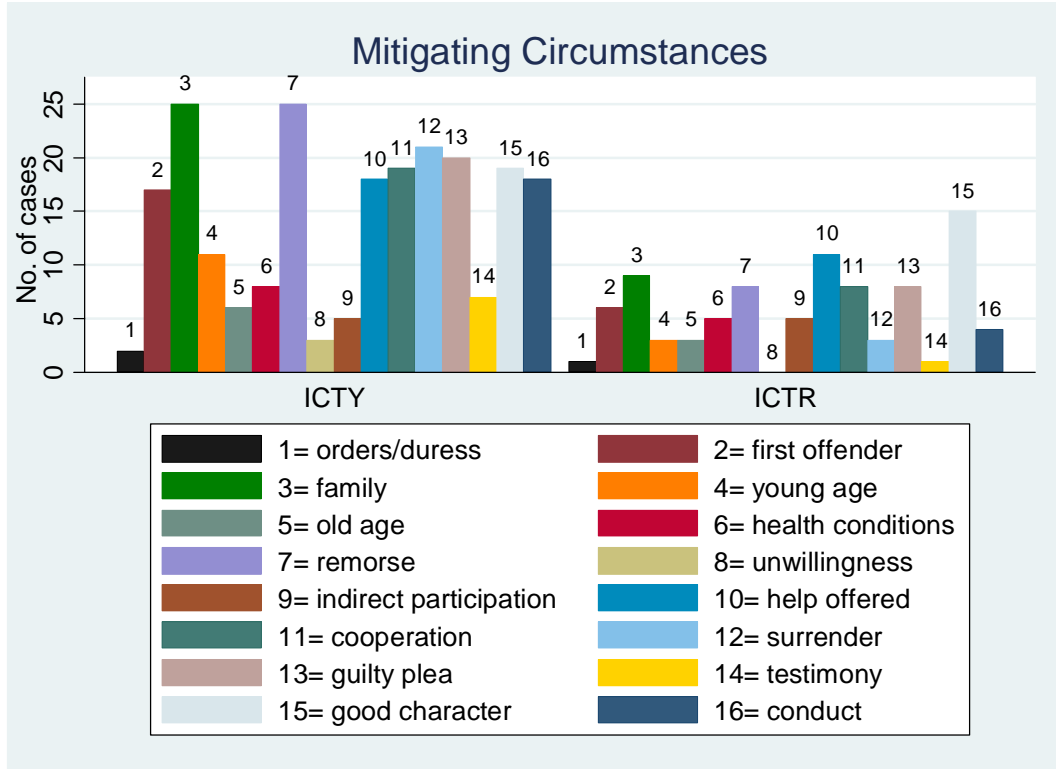


Table 27. ICTY – Mitigating circumstances and average length of trial sentences

Mitigating circumstances	Number of cases	Average sentence with	Average sentence without	Median sentence with	Median sentence without	Index of correlation	'P' value
Orders/duress	1 case	7.5 years	17 years	7.5 years	15 years	- 0.09	0.3288
First offender	17 cases	14 years	17 years	8 years	15 years	- 0.09	0.3583
Family	25 cases	17.6 years	16 years	13 years	15 years	- 0.01	0.9116
Young age	11 cases	23 years	15.6 years	10 years	15 years	0.18	0.0643
Advanced age	6 cases	15 years	16.9 years	9.5 years	15 years	- 0.04	0.6473
Health conditions	8 cases	11 years	17 years	10 years	15 years	- 0.14	0.1325
Remorse	25 cases	12 years	18 years	10 years	17 years	- 0.21	0.0309
Unwillingness	2 cases	9 years	17 years	10 years	15 years	- 0.10	0.3063
Indirect participation	5 cases	5.8 years	17.6 years	7 years	15 years	- 0.20	0.0333
Help offered	18 cases	13 years	17.9 years	11 years	15 years	- 0.11	0.2264
Cooperation	19 cases	12 years	18 years	10 years	15 years	- 0.19	0.0499
Surrender	21 cases	15 years	17 years	11 years	15 years	- 0.10	0.3063
Guilty plea	20 cases	12.5 years	18.5 years	11.5 years	16 years	- 0.18	0.0626
Testimony	7 cases	10 years	17 years	10 years	15 years	- 0.16	0.0874
Good character	19 cases	19 years	15.9 year	9 years	15 years	0.01	0.8882
Conduct	18 cases	20 years	15 years	16 years	15 years	0.03	0.7362

Table 28. ICTR – Mitigating circumstances and average length of trial sentences

Mitigating circumstances	Number of cases	Average sentence with	Average sentence without	Median sentence with	Median sentence without	Index of correlation	'P' value
Orders/duress	1 case	6 years	55 years	6 years	30 years	- 0.17	0.2086
First offender	6 cases	9.5 years	64 years	9 years	Life impr.	- 0.43	0.0016
Family	9 cases	11.8 years	71 years	11 years	Life impr.	- 0.60	0.0000
Young age	3 cases	18.3 years	57 years	15 years	35 years	- 0.31	0.0266
Advanced age	3 cases	10 years	58 years	10 years	35 years	- 0.33	0.0151
Health conditions	5 cases	27.4 years	58 years	10 years	35 years	- 0.21	0.1331
Remorse	8 cases	21.5 years	64.9 years	11.5 years	Life impr.	- 0.34	0.0131
Unwillingness	0	-	-	-	-	-	-
Indirect participation	5 cases	13 years	61 years	12 years	Life impr.	- 0.42	0.0020
Help offered	11 cases	43.8 years	58.8 years	15 years	35 years	- 0.11	0.4400
Cooperation	8 cases	66.6 years	48.5 years	Life impr	26 years	0.27	0.0469
Surrender	3 cases	12 years	57.9 years	15 years	35 years	- 0.32	0.0220
Guilty plea	8 cases	21.5 years	64.9 years	11.5 years	Life impr.	- 0.34	0.0131
Testimony	1 case	15 years	54.6 years	15 years	30 years	- 0.21	0.1383
Good character	15 cases	26.6 years	80 years	15 years	Life impr.	- 0.44	0.0010
Conduct	4 cases	9.7 years	60 years	9 years	67.5 years	- 0.34	0.0140

- Pairwise correlations amongst mitigating factors (both Tribunals):

	y_impris	m_orders	m_first_o	m_family	m_younga	m_oldage	m_health
y_impris	1.0000						
m_orders_dur	-0.1038 0.1970	1.0000					
m_first_offe	-0.2478 0.0018	0.1731 0.0307	1.0000				
m_family	-0.3151 0.0001	0.1952 0.0146	0.2835 0.0003	1.0000			
m_young_age	-0.0858 0.2869	0.2333 0.0034	0.0740 0.3588	0.2295 0.0040	1.0000		
m_old_age	-0.1574 0.0497	0.1267 0.1151	0.0348 0.6665	0.2734 0.0006	-0.1123 0.1628	1.0000	
m_health	-0.1122 0.1633	0.0955 0.2355	0.1885 0.0185	0.1646 0.0401	-0.1345 0.0941	0.3993 0.0000	1.0000
m_remorse	-0.2716 0.0006	0.2234 0.0051	0.3230 0.0000	0.2722 0.0006	0.0279 0.7293	0.1203 0.1348	0.1303 0.1049
m_unwillingn	-0.1037 0.1978	0.5679 0.0000	0.0267 0.7405	0.2261 0.0045	0.1876 0.0190	-0.0489 0.5443	0.1953 0.0146
m_indpartic	-0.2069 0.0096	0.1127 0.1614	0.0118 0.8835	0.0874 0.2779	-0.1215 0.1309	0.4524 0.0000	0.2225 0.0052
m_help_offer	-0.0144 0.8582	0.2385 0.0027	0.1722 0.0316	0.0747 0.3540	0.0058 0.9432	0.1416 0.0778	0.2015 0.0117
m_cooperatio	0.0672 0.4045	0.1285 0.1100	0.0890 0.2691	0.1252 0.1195	0.0448 0.5785	-0.1273 0.1132	-0.0333 0.6797
m_surrender	-0.2678 0.0007	0.0317 0.6949	0.1597 0.0465	0.2046 0.0104	-0.0233 0.7725	-0.0045 0.9551	-0.0127 0.8750
m_guiltyplea	-0.2310 0.0037	0.2511 0.0016	0.2759 0.0005	0.2046 0.0104	0.0227 0.7781	-0.0045 0.9551	0.0816 0.3110
m_testimony	-0.1939 0.0153	0.2710 0.0006	-0.1000 0.2144	0.1792 0.0252	0.1445 0.0719	0.0590 0.4644	0.0183 0.8204
m_goodchar	-0.0918 0.2544	0.2069 0.0095	0.2446 0.0021	0.3019 0.0001	0.0436 0.5891	0.1957 0.0143	0.0582 0.4706
m_conduct	-0.2157 0.0068	0.0391 0.6276	0.5061 0.0000	0.2442 0.0021	-0.0542 0.5018	0.1779 0.0263	0.1495 0.0624

	m_remors	m_unwilli	m_indpar	m_helpof	m_cooper	m_surren	m_guilty
m_remorse	1.0000						
m_unwillingn	0.0786 0.3296	1.0000					
m_indpartic	-0.1078 0.1804	-0.0529 0.5118	1.0000				
m_help_offer	0.2844 0.0003	0.2763 0.0005	0.0575 0.4762	1.0000			
m_cooperatio	0.5966 0.0000	0.0874 0.2779	-0.0960 0.2334	0.1830 0.0222	1.0000		
m_surrender	0.1863 0.0199	-0.0905 0.2614	-0.1308 0.1038	-0.0513 0.5245	0.0779 0.3337	1.0000	
m_guiltyplea	0.8227 0.0000	0.1002 0.2131	-0.0796 0.3231	0.2248 0.0048	0.6600 0.0000	0.1142 0.1556	1.0000
m_testimony	0.2305 0.0038	0.2222 0.0053	0.1887 0.0183	0.0077 0.9244	0.2499 0.0017	0.0226 0.7793	0.2782 0.0004
m_goodchar	0.1283 0.1105	0.0650 0.4204	0.3414 0.0000	0.2036 0.0108	0.1293 0.1076	0.0447 0.5791	0.1422 0.0767
m_conduct	0.2212 0.0055	-0.0856 0.2878	-0.0142 0.8605	0.0456 0.5720	0.0728 0.3664	0.3262 0.0000	0.1437 0.0736

	m_testimo	m_goodchar	m_conduct
m_testimony	1.0000		
m_goodchar	0.0135 0.8670	1.0000	
m_conduct	-0.1195 0.1373	0.2449 0.0021	1.0000

4.5 Data analysis on judges (pp.327-328, Chapter 4)

Composition of the bench	ICTY	ICTR
Majority of civil law judges	67 cases	41 cases
Majority of common law judges	34 cases	6 cases
Majority of practitioners	95 cases	50 cases
Majority of academics	8 cases	1 case
Majority of men	100 cases	42 cases
Majority of women	5 cases	9 cases

- Pairwise correlations between length of sentences and composition of the judicial bench:

```

-----
      | y_impris j_commonl j_civill g_female gen_male prof_acc pro_prac
-----|-----
y_impris | 1.0000
      |
j_commonlaw | -0.1978 1.0000
      | 0.0133
j_civillaw | 0.0578 -0.5729 1.0000
      | 0.4735 0.0000
genderfemale | -0.0899 0.0328 -0.0334 1.0000
      | 0.2645 0.6841 0.6788
gender_male | 0.1497 -0.0329 0.6099 -0.5627 1.0000
      | 0.0622 0.6833 0.0000 0.0000
profess_accad | 0.0064 0.0295 0.5111 -0.0793 0.5492 1.0000
      | 0.9367 0.7143 0.0000 0.3250 0.0000
profess_pract | 0.1232 0.0000 0.3181 0.1224 0.4392 -0.2260 1.0000
      | 0.1254 1.0000 0.0001 0.1280 0.0000 0.0046
-----

```

