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INTERNATIONAL DIRECTIVES RELATING TO SENTENCING

*Johan D. van der Vyver**

INTRODUCTION

Punishment in international law must fit the crime, the personal dispensation of the criminal, and the interests of the international community. This basic norm of criminal justice is reflected in Article 78(1) of the Statute of the International Criminal Court (ICC Statute) which provides that “in determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the personal circumstances of the convicted person.”¹ Leaving it up to drafters of the *Rules of Procedure and Evidence* to afford substance to this basic principle became necessary due to the time constraints under which the Conference of Diplomatic Plenipotentiaries for an International Criminal Court, which was convened in Rome on June 15 through July 17, 1998, had to complete its primary mission, and the many controversies that prevailed among delegations that tended to prefer their own legal traditions, including constitutional standards of their respective countries.²

This Essay is focused on circumstances to be considered by a criminal court for purposes of determining an appropriate sentence following the conviction of an accused. It will appear that much confusion prevailed in this regard in the jurisprudence of international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). One analyst, writing at approximately the turn of the century, observed that judgments of these *ad hoc* tribunals on penal policy are “far from being comprehensive” and that “there is no emerging penal regime discernible,”³ but concluded, somewhat inconsistently, that jurisprudence of the

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¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, 37 I.L.M. 1002 (1998), art. 78(1) [hereinafter ICC Statute]. See also Prosecutor v. Blaškić, Case No 11. IT-95-14-T, Judgement, ¶ 771 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

² Jens Peglau, *Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 141 (Horst Fisher, Claus Krez & Sascha Rold Lüder eds., 2001).

³ Jan Christoph Nemitz, *Sentencing in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 605, 624 (Horst Fisher, Claus Krez & Sascha Rold Lüder eds., 2001).

ad hoc tribunals “is gradually developing into an international law of sentencing.”⁴

It is important to note that what has been held out by the *ad hoc* Tribunals as objectives/ purposes/principles/functions/policies/goals of sentencing⁵ should, in some instances, have no bearing on the kind or severity of punishments imposed in any given case (e.g. retribution, incapacitation, rehabilitation, deterrence). It is wrong to say categorically that “[t]he objectives of punishment provide . . . guidance in determining sentence.”⁶ Factors that ought to be considered for sentencing purposes may in general be classified, for the sake of systematic clarity, into two main categories: (1) those that constitute elements of an offence, and (2) those that attend the commission of the offence but are not part-and-parcel of the *actus reus*. One can, of course, classify all factors that have a bearing on the severity of a sentence as either aggravating or extenuating circumstances. However, the concept of “aggravating and extenuating circumstances” will—for purposes of this survey—be confined to those sentencing considerations that do not form part of the criminal act as such. Those that do constitute elements of the offence are confined in this survey to “sentencing factors of the offence.”

One should namely distinguish between (a) the essence of punishment (retribution); (b) the functions of punishment (incapacitation, rehabilitation, deterrence, and avoiding impunity); (c) factors inherent in or resulting from a particular offence and which may be taken into account in determining an appropriate sentence (sentencing factors of the offence); and (d) circumstances attending the commission of an offence that have a bearing on an appropriate sentence in any given case but are in themselves not constituent elements of the criminal act as such (extenuating and aggravating circumstances).

I. THE ESSENCE OF SENTENCING (RETRIBUTION)

A sentence imposed by a court of law is essentially a manifestation of retribution. In the *Čelebići* case, the ICTY depicted the theory of retribution as “an inheritance of the primitive theory of revenge, which urges the Trial

⁴ *Id.* at 625.

⁵ *See, e.g.*, Prosecutor v. Kunarać, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 836, (Int’l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001) (referring interchangeably to sentencing “objectives,” “purposes,” “principles,” “functions,” or “policy” that ought to guide judicial officers when deciding on an appropriate sentence).

⁶ *See* Prosecutor v. Banović, Case No. IT-02-65/1-S, Sentencing Judgement, ¶ 33, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003).

Chamber to retaliate to appease the victim.”⁷ The Tribunal added: “A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice.”⁸

In *Prosecutor v. Zlatko Aleksovski*, the ICTY came to the opposite conclusion:

[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 . . . A sentence of the International Tribunal should make plain the condemnation of the international community of the behavior in question and show “that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.”⁹

In *Prosecutor v. Todorović*, a Trial Chamber of the ICTY gave the following assessment of retribution:

The principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words that the punishment be made to fit the crime. The Chamber is of the view that this principle is reflected in the account, which the

⁷ *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement, ¶ 1231 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

⁸ *Id.* See also *Prosecutor v. Tadić*, Case No. IT-94-1-*Tbis*-R.117, Sentencing Judgment, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999); Faiza P. King & Anne-Marie La Rosa, *Penalties Under the ICC Statute*, in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 311, 329-30 (Flavia Lattanzi & William A. Schabas eds., 1999) (referring to exactly this type of occurrence in Rwanda).

⁹ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (citing *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 28 (Sept. 4, 1998)). See also *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, ¶ 848 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, ¶ 900 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003); *Prosecutor v. Banović*, *supra* note 6, ¶ 34; *Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, ¶ 50 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003); *Prosecutor v. Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004); *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, ¶¶ 143, 150 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004); *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 1075 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Prosecutor v. Krajišnik*, Case No. IT-09-39-A, Appeal Chamber Judgement, ¶ 775, 804 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3484-tENG-Corr, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 38 (May 23, 2014); *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, ¶ 11 (Mar. 21, 2016).

Chamber is obliged by the Statute and the Rules to take, of the gravity of the crime.¹⁰

Earlier, a Trial Chamber of the same tribunal defined the proportionality principle inherent in the concept of retribution more accurately by referring to retribution as “‘just deserts’, . . . the punishment having to be proportional to the gravity of the crime *and the moral guilt of the convicted*.”¹¹

It is wrong, of course, to say that the purpose of punishment is retribution,¹² because punishment for criminal conduct is (a form of) retribution. In one of its more recent judgments, the ICTR stated: “Retribution is the expression of the social disapproval attached to a criminal act and to its perpetrator and demands punishment for the latter for what he has done.”¹³

The ICTY was perfectly correct when it, in the case of *Kunarać*, defined retribution as merely “punishment of an offender for his specific criminal conduct.”¹⁴ So too was a passage taken from a Canadian case that succinctly proclaimed: “Retribution requires the imposition of a just and appropriate punishment and *nothing* more.”¹⁵ In a similar vein, Faiza King and Anne-Marie La Rosa identified retribution “in the sense of punishment rather than revenge” as a goal of the ICC.¹⁶ Just to emphasize it once again, punishment is a particular manifestation of retribution; it is therefore wrong to say that retribution is a function or the purpose of punishment or worse still, is an element to be taken into account for sentencing purposes. When it is said that “retribution may be out of fashion with legal scholars,”¹⁷ this must be understood in the context only

¹⁰ Prosecutor v. Todorović, Case No. IT-95-9/1-T, Sentencing Judgement, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001). See also Prosecutor v. Banović, *supra* note 6, ¶ 34; Prosecutor v. Češić, *supra* note 9, ¶ 23.

¹¹ Prosecutor v. Erdemović, Case No. IT-94-1-*Tbis*-R.117, Sentencing Judgment, ¶ 65 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) (emphasis added). See also Prosecutor v. Kambanda, *supra* note 9, ¶ 58; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement ¶ 243 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999) (noting that a sentence depends mainly on the “magnitude of the crime and the extent of liability of the accused”); Prosecutor v. Tadić, Case No. IT-94-1-*Tbis*-R.117, Judgment in Sentencing Appeal, Separate Opinion of Judge Cassese, ¶ 8 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000) (noting that, in addition to extenuating and aggravating circumstances, sentences are determined by “the degree of iniquity of the crime” and “the subjective state of mind of the convicted person”); Prosecutor v. Obrenović, *supra* note 9, ¶ 50; Prosecutor v. Kordić, *supra* note 9, ¶ 1075; Prosecutor v. Krajišnik, *supra* note 9, ¶ 804; Prosecutor v. Bemba Gombo, *supra* note 9, ¶ 11.

¹² See, e.g., Prosecutor v. Češić, *supra* note 9, ¶ 24.

¹³ Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgement & Sentence, ¶ 108 (Mar. 14, 2005).

¹⁴ Prosecutor v. Kunarać, *supra* note 5, ¶ 841. See also Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgement ¶ 508 (Mar. 15, 2002).

¹⁵ Prosecutor v. Kordić, *supra* note 9, ¶ 1075 (referring to R v. M, [1996] 1 S.C.R. 500, ¶ 80 (Canada)).

¹⁶ King & La Rosa, *supra* note 8, at 330.

¹⁷ *Id.*

of the fallacious assumption that retribution is a function or purpose of punishment, or a circumstance to be considered for sentencing purposes.

II. THE FUNCTIONS OF PUNISHMENT

Justifications for punishment include incapacitation of the convicted criminal, his or her rehabilitation, and deterrence.¹⁸ The European Court of Human Rights has identified as “penological grounds” for detention, objectives—such as punishment, deterrence, public protection, and rehabilitation.¹⁹ To this list should be added the objective of obviating impunity. The functions of punishment will for purposes of the present survey be classified under the headings of (a) incapacitation, (b) rehabilitation, (c) deterrence, and (d) obviating impunity.

A. Incapacitation

The protection of society is relevant and important when persons guilty of serious crimes are regarded as dangerous to the community.²⁰ This would particularly be the case where a person who instigated the commission of a crime might re-offend.²¹ Such protection is normally achieved by incarceration of a convicted criminal.

Taking this function of punishment into account when deciding on the length of imprisonment requires special circumspection, because “our ability to predict which offenders are likely to re-offend is so poor.”²² The crimes within the jurisdiction of international tribunals are in many cases ones that would normally be committed in very special circumstances, such as an armed conflict or large-scale political unrest, and when those circumstances no longer prevail—and that is mostly the case at the time perpetrators of the concerned offences are brought to trial—the need for the community to be protected becomes negligible.²³

¹⁸ Mirko Bagaric & Kumar Amarasekara, *The Error of Retributivism*, 24 MELBOURNE L. REV. 124, at 134 (2000). See also King & La Rosa, *supra* note 8, at 329 (mentioning retribution [*sic*], deterrence, incapacitation, and rehabilitation as “objectives of punishment”).

¹⁹ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H. R. 317, ¶ 40 (July 9, 2013). See also the British case of *R. v. Bieber*, [2009] 1 WLR 233 (CA), ¶ 40 (listing as “legitimate objects” of imprisonment, “punishment, deterrence, rehabilitation and protection of the public”).

²⁰ *Prosecutor v. Delalić*, *supra* note 7, ¶ 1232.

²¹ King & La Rosa, *supra* note 8, at 332.

²² Bagaric & Amarasekara, *supra* note 18, at 135.

²³ King & La Rosa, *supra* note 8, at 331.

In *Kunarać*, the Trial Chamber practically ruled out protection of society as a legitimate sentencing incentive:

Unless it can be shown that a particular convicted person has the propensity to commit violations of international humanitarian law, or, possibly, crimes relevant to such violations, such as “hate” crimes or discriminatory crimes, it may not be fair and reasonable to use protection of society, or preventive detention, as a general sentencing factor.²⁴

B. Rehabilitation

It has been said that rehabilitation “should be one of the goals of sentencing,”²⁵ and “that punishment must strive to attain . . . rehabilitation.”²⁶ In *Prosecutor v. Češić*, the Sentencing Tribunal took into account for purposes of punishment “the rehabilitative potential” of the convicted person, noting that such potential goes hand in hand with reintegration of the convicted person into society.²⁷

It is one thing to say that the Accused has shown remorse and has undergone a change of heart, which may be a legitimate mitigating factor for purposes of sentencing;²⁸ it is quite another to proclaim rehabilitation and reconciliation to be determinants of an appropriate punishment. Faiza King and Anne-Marie La Rosa have argued that rehabilitation could be a relevant consideration for sentencing purposes in cases of “low-ranking soldiers or civilians who simply followed orders,” and in the case of young offenders.²⁹ They also slightly missed

²⁴ *Prosecutor v. Kunarać*, *supra* note 5, ¶ 843. *See also* *Prosecutor v. Krnojelac*, *supra* note 14, ¶ 508 (noting that incapacitation of the dangerous is of little significance for sentencing purposes); *Prosecutor v. Krajišnik*, *supra* note 9, ¶ 776; *Prosecutor v. Bemba Gombo*, *supra* note 9, ¶ 11; Krajis Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT’L CR. L. REV. 33, at 45–46 (2001).

²⁵ William A. Schabas, *Penalties*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1497, 1519 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); *and see* *Prosecutor v. Tadić*, Sentencing Judgment, *supra* note 8, ¶ 61; *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Second Sentencing Judgment, ¶ 16(i) (Int’l Crim. Trib. for the Former Yugoslavia March 5, 1998) (appearing under the heading “Age”); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 291 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, ¶ 12, 26 (May 21, 1999); *Prosecutor v. Kupreškić*, *supra* note 9, ¶ 849.

²⁶ *Prosecutor v. Obrenović*, *supra* note 9, ¶ 53. *See also id.*, at 146 (the Sentencing Tribunal accepting “steps taken toward rehabilitation” as a mitigating factor).

²⁷ *Prosecutor v. Češić*, *supra* note 9, ¶ 27.

²⁸ *See, e.g.*, *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence, ¶ 68 (June 1, 2000) (noting that “there is cause to believe that the accused has undergone a profound change and there are good reasons to expect his re-integration into society”).

²⁹ King & La Rosa, *supra* note 8, at 332.

the point. The fact that a particular perpetrator was a low-ranking member of the armed forces following orders or was relatively young at the time the crime was committed, is indeed a mitigating circumstance and would be deserving of special rehabilitation efforts, but his or her possible rehabilitation as such is not a factor to be considered for sentencing purposes. To argue otherwise might even be taken to justify longer prison sentences in such cases so as to increase the time available for a rehabilitation program to have a better chance of success.

There are judgments proclaiming rehabilitation to be one of the “principal aims” of sentencing,³⁰ or in the case of “younger, or less-educated, members of society,” laying stress on “reintegrating the guilty accused into society.”³¹ In *Prosecutor v. Furundžija*, the Trial Chamber expressed its support for “rehabilitative programmes in which the accused may participate while serving his sentence.”³² In the Sentencing Judgment in the case of *Prosecutor v. Serushago*, the ICTR noted, under the heading of mitigating circumstances, that the family obligations of the Accused, his relatively young age, and the fact that he cooperated with the Prosecutor and publicly showed remorse, “would suggest possible rehabilitation”³³

In the *Čelebići Case*, on the other hand, the Appeals Chamber decided that rehabilitation “cannot play a prominent role in the decision-making process of the Trial Chamber of the Tribunal.”³⁴ One analyst noted that in sentencing policies of the *ad hoc* Tribunals rehabilitation is regarded as subordinate to

³⁰ *Prosecutor v. Ruggiu*, *supra* note 28, ¶ 33.

³¹ *Prosecutor v. Delalić*, *supra* note 7, ¶ 1233 (where, for sentencing purposes, the Tribunal considered “the age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility”); *see also* *Prosecutor v. Kordić*, *supra* note 9, ¶ 1079; *see generally*, Beresford, *supra* note 24, at 44.

³² *Prosecutor v. Furundžija*, *supra* note 25, ¶ 291 (laying special stress on the relatively young age of the Accused, who was 23 when the crime was committed). *See also* *Prosecutor v. Kupreškić*, *supra* note 9, ¶ 849 (expressing its support for the sentencing purpose of rehabilitation “in the hope that in future, if faced with similar circumstances, they [the persons convicted] will uphold the rule of law”); *Prosecutor v. Erdemović*, Second Sentencing Judgment, *supra* note 25, ¶ 16(i) under the heading: “Age”.

³³ *Prosecutor v. Serushago*, Case No. ICTR-98-39-S-T, ¶ 39 (Feb. 5, 1999).

³⁴ *Prosecutor v. Delalić*, Case No. IT-96-21-A, ¶ 806 (Feb. 20, 2001). *See also* *Prosecutor v. Blaškić*, *supra* note 1, ¶ 781–82; *Prosecutor v. Kronjelać*, *supra* note 14, ¶ 508; *Prosecutor v. Banović*, *supra* note 6, ¶ 35; *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Sentencing Judgment, ¶ 133 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003); *Prosecutor v. Deronjić*, *supra* note 9, ¶ 143; *Prosecutor v. Kordić*, *supra* note 9, ¶ 1079; *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, ¶ 402 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-A, Judgment, ¶¶ 325, 328 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 22, 2008); *Prosecutor v. Krajišnik*, *supra* note 9, ¶ 806; *Prosecutor v. Kabashi*, Case No. IT-04-84-R77-1, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 16, 2011); *Prosecutor v. Katanga*, *supra* note 9, ¶ 38; *Prosecutor v. Popović*, Case No. IT-05-88-A, ¶ 1966 (Jan. 30, 2015); *Prosecutor v. Bemba Gombo*, *supra* note 9, at ¶ 11.

deterrence.³⁵ In its first sentencing judgment in the *Case of Erdemović*, the ICTY altogether ruled out rehabilitation as a sentencing objective.³⁶

It has been said that rehabilitation and punishment may be inconsistent.³⁷ A penitentiary is evidently not an ideal setting for rehabilitation.³⁸ Prison conditions, on the contrary, have the propensity to promote recidivism. It is furthermore questionable whether rehabilitation efforts are at all called for in cases of “*Makrokriminalität*”; that is “criminality in which the State or some similar entity is directly involved.”³⁹

However, rehabilitation has come to be accepted as an important objective of imprisonment. The *International Covenant on Civil and Political Rights* indeed provides: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”⁴⁰ Rehabilitation also features prominently in the United Nations’ *Standard Minimum Rules for the Treatment of Prisoners*.⁴¹

At the regional level, the European *Prison Rules* of the Council of Europe similarly provide: “All detentions shall be managed so as to facilitate the reintegration into a free society of persons who have been deprived of their liberty.”⁴² The Rules further provide that “the [prison] regime for sentenced

³⁵ Nemitz, *supra* note 3, at 614.

³⁶ Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 11, ¶ 66. *See also* King & La Rosa, *supra* note 8, at 332.

³⁷ Bagaric & Amarasekara, *supra* note 18, at 136.

³⁸ *See* Prosecutor v. Kunarac, *supra* note 5, ¶ 844 (noting that to assume that “imprisonment alone . . . can have a rehabilitative effect on a convicted person” is “a controversial proposition”).

³⁹ Claus Kreß & Guran Sluiter, *Preliminary Remarks*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1751, 1755 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

⁴⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 10(3), Dec. 16, 1966 (Annex), U.N. GAOR Supp. (No. 16), U.N. Doc. A/6314/49, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967). *See also* American Convention on Human Rights, 1114 U.N.T.S. 123, art. 5(6), reprinted in 9 I.L.M. 673 (1970).

⁴¹ *See* United Nations’ *Standard Minimum Rules for the Treatment of Prisoners*, ¶ 56–64, ECOSOC Res. 663 C (XXIV) of 31 July 1957, as amended by ECOSOC Res. 2076 (LXII) of 13 May 1977 (emphasizing (a) that the ultimate purpose of imprisonment is “to protect society against crime”, ¶ 58; (b) that steps should be taken to ensure the prisoner’s “gradual return to life in society”, ¶ 60(2); (c) that community agencies should be enlisted, wherever possible, “to assist the staff of the institution in the task of rehabilitation of the prisoners”, ¶ 61; that medical services should be provided “to detect and . . . treat any physical or mental illness or defect which may hamper a prisoner’s rehabilitation”, ¶ 62; (d) that treatment of each prisoner is to be individualized, ¶ 59, 63(1); (e) that individualization of treatment should not be hampered by a too large prison population in closed institutions, ¶ 63(3); and that rehabilitation efforts do not end upon a prisoner’s release, and that after-care should be provided by government or private agencies, ¶ 64).

⁴² *European Prison Rules*, Rule 6, Recommendation REC (2006)2 of the Committee of Ministers to Member States, adopted by the Committee of Ministers on Jan. 11, 2006 at the 952d Meeting of the Ministers’ Deputies.

persons shall be designed to enable them to lead a responsible and crime-free life,”⁴³ and that a sentence plan for each prisoner, and “a strategy for their release” be devised,⁴⁴ which may, as far as practicable, include work, education, other activities and preparation for release.⁴⁵ The European Court of Human Rights has noted that “the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly toward the end of a long prison sentence.”⁴⁶ For this reason, life sentences without the option of parole have come to be unacceptable, “since all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”⁴⁷ The Court noted that “if a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable.”⁴⁸ Provision must therefore be made for the reducibility of a life sentence “which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.”⁴⁹

The Court cited Article 110(3) of the ICC Statute and the *Rules of Procedure and Evidence* pertinent to that Article that make provision for the periodic review of a life sentence after the convicted person has served twenty-five years of the sentence, which in the opinion of the Court serve as a commendable directive of contemporary international criminal law.⁵⁰

The above goes to show that once a person has been sentenced to imprisonment, provision should be made for, and he or she should be given the benefit of, rehabilitation programs. It does not imply that rehabilitation should

⁴³ *Id.*, Rule 102.1.

⁴⁴ *See id.*, Rule 103.2.

⁴⁵ *Id.*, Rule 103.4.

⁴⁶ *Vinter v. United Kingdom*, *supra* note 19, ¶ 115. *See also* *Dickson v. The United Kingdom* (GC) Appl. No. 44362/04, 2007-V ECHR, ¶ 75 (Dec. 4, 1997); *Boulois v. Luxembourg* (GC), Appl. No. 37575/04, Eur. Ct. H. R., ¶ 83 (Apr. 3, 2012). Special emphasis was placed on re-integration into society of a prisoner as an objective of incarceration in *Mastromatteo v. Italy* (GC) Appl. No. 37703/97, 2002-VIII ECHR, ¶ 72 (Oct. 24, 2002); *Schemkamper v. France*, Appl. No. 75833/01, ¶ 31 (Oct. 18, 2005); *Majorano v. Italy*, Appl. No. 28634/06, ¶ 108 (Dec. 15, 2009).

⁴⁷ *Vinter v. United Kingdom*, *supra* note 19, ¶ 114. *See also id.*, ¶ 116.

⁴⁸ *Id.*, ¶ 112.

⁴⁹ *Id.*, ¶ 119.

⁵⁰ *Id.*, ¶ 65 and 114.

serve as a factor to be taken into account when deciding on an appropriate sentence.

This means that once a person has been sentenced to imprisonment, provision should be made for, and he or she should be given the benefits of, rehabilitation programs. It does not imply that rehabilitation should serve as a factor to be considered when deciding on an appropriate sentence.

C. Deterrence and General Rehabilitation

According to Faiza King and Anne-Marie La Rosa, deterrence of future crimes “is obviously a primary goal of the ICC.”⁵¹ It has been decided that deterrence “is a consideration that may legitimately be considered in sentencing.”⁵² Deterrence has also been singled out in some judgments of the *ad hoc* tribunals as “probably the most important [sentencing] factor.”⁵³ In *Prosecutor v. Tadić*, the Appeals Chamber of the ICTY did observe that deterrence “must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”⁵⁴ In *Prosecutor v. Todorović*, a Trial Chamber of the ICTY recognized “the importance of deterrence as a general consideration in sentencing,” but then somewhat obscurely promised that it “will not treat deterrence as a distinct factor in determining sentence in this case.”⁵⁵ As noted in *Prosecutor v. Furundžija*, punishment as such, rather than the severity of a sentence, is in reality “the tool of retribution, stigmatization and deterrence.”⁵⁶

In *Prosecutor v. Delalić*, the Tribunal included in the concept of deterrence, (a) deterring the accused, and (b) deterring other persons finding themselves in similar situations in the future,⁵⁷ referred to in *Prosecutor v. Kunarać* as,

⁵¹ King & La Rosa, *supra* note 8, at 330.

⁵² *Tadić*, *supra* note 11, ¶ 48; *Delalić*, *supra* note 34, ¶ 803; *Češić*, *supra* note 9, ¶ 24.

⁵³ *Delalić*, *supra* note 7, ¶ 1234; *Erdemović*, *supra* note 11, ¶ 64-66; *Kambanda*, *supra* note 9, ¶ 28; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-S, Sentence, ¶ 19 (Oct. 2, 1998); *Furundžija*, *supra* note 25, ¶ 288; *Serushago*, *supra* note 25, ¶ 20; *Kayishema*, *supra* note 25, Sentence ¶ 2; *Blaškić*, *supra* note 1, ¶ 761; *Ruggiu*, *supra* note 28, ¶ 33; *Stakić*, *supra* note 9, ¶ 900; *Dragan Nikolić*, *supra* note 34, ¶ 134; *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgement, ¶¶ 754, 760, 765 (Jan. 24, 2004); *Deronjić*, *supra* note 9, ¶ 144; *Beresford*, *supra* note 24, at 42.

⁵⁴ *Tadić*, *supra* note 11, ¶ 48; *Aleksovski*, *supra* note 9, ¶ 185; *Delalić*, *supra* note 34, ¶ 801; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T, ¶ 847 (Feb. 26, 2001); *Banović*, *supra* note 6, ¶ 34; *Češić*, *supra* note 9, ¶ 26; *Krajišnik*, *supra* note 9, ¶ 805.

⁵⁵ *Todorović*, *supra* note 10, ¶ 30.

⁵⁶ *Furundžija*, *supra* note 25, ¶ 290.

⁵⁷ *Delalić*, *supra* note 7, ¶ 1234; *Furundžija*, *supra* note 25, ¶ 288.

respectively, “specific deterrence” and “general deterrence”,⁵⁸ and in later judgments as “personal”, “individual” or “special” deterrence, and “general” deterrence, respectfully.⁵⁹ This vital distinction is not always evident in judgments of the *ad hoc* Tribunals.⁶⁰ Emphasis is almost exclusively on general deterrence.⁶¹ It has thus been said in a judgment of the ICTR: “This Chamber seeks to dissuade for good those who will attempt in future to perpetuate such atrocities by showing them that the international community was not ready to tolerate the serious violations on international humanitarian law and human rights.”⁶²

The ICTY on several occasions expressed the opinion, in the spirit of general deterrence, that “[o]ne 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,” and additionally, “to convey the message that globally accepted laws and rules have to be obeyed by everyone.”⁶³ In *Prosecutor v. Češić*, the Sentencing Tribunal observed that general deterrence “serves to strengthen the legal order . . . and to reassure society of the effectiveness of its general provisions.”⁶⁴ In *Prosecutor v. Kabashi*, the Sentencing Tribunal warned that “persons who believe themselves to be beyond the reach of the International Tribunal must be warned that they have to abide by its orders or face prosecution and, if convicted, sanctions.”⁶⁵ Affirmative prevention through legal sanctions in times of war

⁵⁸ Kunarać, *supra* note 5, ¶ 839; Delalić, *supra* note 7, ¶ 1203; Bagarić, *supra* note 18, at 137; Češić, *supra* note 9, ¶ 25 (referring to “special deterrence” and “general deterrence”); Katanga, *supra* note 9, at para 38; Bemba Gombo, *supra* note 9, ¶ 11.

⁵⁹ Nikolić, *supra* note 34, ¶ 134-35; Deronjić, *supra* note 9, ¶ 145-46; Kordić, *supra* note 9, ¶ 1076-78; Krajišnik, *supra* note 9, ¶ 805; Kabashi, *supra* note 34, ¶ 11.

⁶⁰ Kunarać, *supra* note 5, ¶ 839.

⁶¹ See *Prosecutor v. Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 456 (Dec. 6, 1999) (noting that punishment is directed at retribution “and over and above that” at deterrence); Kambanda, *supra* note 9, ¶ 28; Serushago, *supra* note 33, ¶ 20 (Feb. 5, 1999); Todorović, *supra* note 10, ¶ 30; *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 28 (Feb. 27, 2003); Stakić, *supra* note 9, ¶ 899; Banović, *supra* note 6, ¶ 34; Nikolić, *supra* note 34, ¶ 124; Češić, *supra* note 9, ¶ 25; Kordić, *supra* note 9, ¶ 1080-82; Kabashi, *supra* note 34, ¶ 11. See also Daniel B. Richard, *Proposed Sentencing Guidelines for the International Criminal Court*, LOY. L.A. INT’L & COMP. L.J. 123, at 125 (1997); Beresford, *supra* note 24, at 42.

⁶² Kambanda, *supra* note 9, ¶ 28; Kayishema, *supra* note 25, ¶ 2; Todorović, Sentencing Judgment, *supra* note 10, ¶ 30.

⁶³ Nikolić, *supra* note 34, ¶ 139; Deronjić, *supra* note 9, ¶ 149.

⁶⁴ Češić, *supra* note 9, ¶ 26.

⁶⁵ Kabashi, *supra* note 34, ¶ 11; Kupreškić, *supra* note 9, ¶ 848; Kordić, *supra* note 9, ¶ 1078, 1080-82; Krajišnik, *supra* note 9, ¶ 807.

“have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent).⁶⁶

In *Prosecutor v. Stakić*, the Trial Chamber stated, quite confusingly, that “general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society.”⁶⁷ Re-integration of a convicted felon into society has to do with rehabilitation and not with deterrence; and furthermore, to maintain that persons other than the criminal are in need of being reintegrated into society is a rather stupid thing to say.

In *Kunarać*, the Trial Chamber, quite realistically, concluded that “special deterrence, as a sentencing factor, is generally of little significance before this jurisdiction,” simply because “the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair.”⁶⁸

General deterrence ought not to be considered as a sentencing factor for reasons of principle rather than practicality, since punishment should address the culpable conduct of the accused only, and it would be unfair to impose a harsh sentence on the convicted person in the expectation that it might deter others.⁶⁹

D. Obviating Impunity

Thwarting impunity,⁷⁰ and reprobation by the community or stigmatization of the convicted criminal,⁷¹ were mentioned in a sentencing context in judgments of the ICTY and the ICTR. In *Prosecutor v. Furundžija*, the Trial Chamber said: “It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity.”⁷² One analyst

⁶⁶ Kordić, *supra* note 9, ¶ 1078.

⁶⁷ Stakić, *supra* note 9, ¶ 902; Nikolić, *supra* note 34, ¶ 137; Deronjić, *supra* note 9, ¶ 147 (referring also to Aleksovski, *supra* note 9, ¶ 185); Delalić, *supra* note 34, ¶ 806.

⁶⁸ Kunarać, *supra* note 5, ¶ 840; *see also* Krnojelac, *supra* note 14, ¶ 508; Obrenović, *supra* note 9, ¶ 52 (noting that deterrence should not be afforded “undue prominence”); Deronjić, *supra* note 9, ¶ 145; Beresford, *supra* note 24, at 45; Bagarić & Amarasekara, *supra* note 18, at 137 (noting that specific deterrence does not work in cases of severe punishments such as imprisonment).

⁶⁹ Kunarać, *supra* note 5, ¶ 840; Češić, *supra* note 9, ¶ 26.

⁷⁰ Erdemović, *supra* note 11, ¶ 65; Kambanda, *supra* note 9, ¶ 26; Akayesu, *supra* note 53; Furundžija, *supra* note 25, ¶ 288; Rutaganda, *supra* note 61, ¶ 455.

⁷¹ Erdemović, *supra* note 11, ¶¶ 64, 65, 66; *see also* Furundžija, *supra* note 25, ¶ 289; Blaškić, *supra* note 1, ¶ 763.

⁷² Furundžija, *supra* note 25, ¶ 288; *see also* Kamuhanda, *supra* note 53, ¶ 754; Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to ‘Civis’ in Rwanda*, 75 N.Y. UNIV. L. REV. 1221, at 1277 (2000).

expressed the view that stigmatization of the perpetrator in itself “is often sufficient redress.”⁷³ Although these appendices of punishment are important considerations for criminalizing certain atrocious acts and creating tribunals for their prosecution, they have no place, really, in sentencing guidelines.

Putting institutions and procedures in place to bring perpetrators of such atrocities to answer for their conduct will inevitably result in absence of impunity, condemnation of the act and the actor by right-thinking members of the world community and disgracing the convicted perpetrators for what they have done. Those consequences also serve as justification for having an international criminal justice system in place, but should not, perhaps even could not, have a bearing on an appropriate sentence in any given case. Because of these considerations, the criminal act must be punished, but the kind and gravity of the punishment to be imposed are conditioned by considerations other than the inevitable function and effects of punishment *per se*.

Blameworthiness of perpetrators of criminal conduct, in a word, legitimizes obviating impunity, reprobation, and stigmatization; but preventing impunity, reprobation, and stigmatization does not determine the subjective blameworthiness of the perpetrator.

III. SENTENCING FACTORS

A retributive response to crime must, for purposes of punishment, account for several factors inherent in, or attending, the criminal conduct. At the Rome Conference, the Working Group on Penalties listed those factors, somewhat unsystematically and as a guide for Drafters of the *Rules of Procedure and Evidence*, as including:

[T]he 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.⁷⁴

⁷³ William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L.J. 461, 502 (1997).

⁷⁴ Rep. of the Working Group on Penalties, ¶ 2, U.N. Doc. A/CONF.183/C.1/WGP/L.14/Corr.2 (1998).

These guidelines were intended to fit the general directive enunciated in the Statutes of the *ad hoc* Tribunals⁷⁵ and which did go into the Statute of the ICC, reducing the sentencing factors to ones “such . . . as the gravity of the crime and the individual circumstances of the convicted person,”⁷⁶ thereby upholding *the principle of proportionality* (punishment must be proportional to the gravity of the crime) and *the principle of individualization* (punishment must be based on personal circumstances of the convicted person).⁷⁷ It has accordingly been decided that a trial tribunal must observe “the over-riding obligation to individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime.”⁷⁸ As succinctly stated in *Prosecutor v. Obrenović*: “An accused shall be held liable for his actions and omissions—no more and no less.”⁷⁹

A. Gravity of the Offence

In the *Čelebići* Case, the Trial Chamber said: “By far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence.”⁸⁰

⁷⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24(2), contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, reprinted in 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, art. 23(2), contained in the annex of S.C. Res. 955 (1994), reprinted in 33 I.L.M. 1602 (1994) [hereinafter ICTR Statute]; see Akayesu, Sentence, *supra* note 53; Schabas, *supra* note 25, 1523–24.

⁷⁶ Rep. of the Working Group on Penalties, art. 77(1), *supra* note 74; see ICC Statute, *supra* note 1, art. 78(1).

⁷⁷ See King & La Rosa, *supra* note 8, at 332–37; Peglau, *supra* note 2, at 147; see also Erdemović, *supra* note 11, ¶ 41 (speaking of “[t]he principle of proportionality and of appropriateness of sentence to the individual”); Tadić, *supra* note 8, ¶ 61; Blaškić, *supra* note 1, ¶ 771; Rutaganira, *supra* note 13, ¶ 115; Bemba Gombo, *supra* note 9, ¶ 11;

⁷⁸ Delalić, *supra* note 34, ¶ 717; see also Kambanda, *supra* note 9, ¶ 58; Serushago, *supra* note 33, ¶ 22; Aleksovski, *supra* note 11, ¶ 242; Kupreškić, *supra* note 9, ¶ 852; Čerkez, *supra* note 54, ¶ 847; Todorović, *supra* note 10, ¶ 110; Krnojelac, *supra* note 14, ¶ 507; Prosecutor v. Nahimana, Case No. ICTR-99-55-T, Judgement and Sentence, ¶ 1097 (Dec. 3, 2003); Obrenović, *supra* note 9, ¶ 54, 62; Prosecutor v. Nikolić, Case No. IT-94-2-A, ¶ 9 (Feb. 4, 2005); Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgement, ¶ 291 (May 23, 2005); Stakić, *supra* note 34, ¶ 375; Prosecutor v. Naletilić, Case No. IT-98-34-A, ¶ 593 (May 3, 2006); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, ¶ 2263 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 18, 2008); Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Judgement and Sentence, ¶ 817 (July 14, 2009); Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgement and Sentence, ¶ 673 (Mar. 31, 2011).

⁷⁹ Obrenović, *supra* note 9, ¶ 78.

⁸⁰ Delalić, *supra* note 7, ¶ 1225; see also *id.*, ¶ 1260 (calling gravity of an offence the “touchstone of sentencing”); Erdemović, *supra* note 25, ¶ 15; Serushago, *supra* note 33, ¶ 27; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 121 (Dec. 14, 1999); Aleksovski, *supra* note 9, ¶ 182; Kupreškić, *supra* note 9, ¶ 852; Ruggiu, *supra* note 28, ¶ 47–49; Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement, ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000); Delalić, *supra* note 34, ¶ 847, 731; Kunarac, *supra* note 5, ¶ 841; Kordić, *supra* note 54, ¶ 847; Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 101 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001); Todorović, *supra* note 10, ¶ 29, 31; Prosecutor v. Radislav Krstić,

The gravity of the crime “is normally the starting point for consideration of an appropriate sentence,”⁸¹ and has been singled out as “[t]he cardinal feature in sentencing.”⁸²

Retribution requires a certain proportionality between the gravity of a crime and the punishment imposed for that crime.⁸³ Gravity of the crime was said to depend on the circumstances of the case as well as the form and degree of participation in the crime by the Accused.⁸⁴ The element of gravity is more broadly determined by (i) the nature of the crime, (ii) the manner in which it was executed, (iii) the motive of the perpetrator, and (iv) the consequences of the criminal act.⁸⁵ It should be noted that the ICC’s *Rules of Procedure and Evidence* pertaining to the determination of sentence make no mention of the nature of the crime as such. This does not mean that the ICC will not for sentencing purposes consider the inherent gravity of a particular crime. The Rules do refer to “the extent of damage caused” and “the nature of the unlawful behavior and the means employed to execute the crime” as factors to be considered by the Court in its determination of sentence,⁸⁶ and those factors, among others, do have an impact on the nature and gravity of an offence. The sentencing factors listed in the Rules are furthermore expressly stated as applying only *inter alia*, and aggravating circumstances may include others not listed in the Rules “which, although not enumerated . . . , by virtue of their nature are similar to those mentioned.”⁸⁷

Case No. IT-98-33-T, ¶ 698 (Aug. 2, 2001); Prosecutor v. Duško Sikirica, Case No. IT-95-8-S, ¶ 106 (Nov. 13, 2001); Prosecutor v. Plavšić (Sentencing Judgment), *supra* note 61, ¶ 23; 25, 52; Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, ¶ 101-02 (Dec. 2, 2003); Prosecutor v. Dragan Nikolić, *supra* note 34, ¶ 144; Prosecutor v. Vasiljević, Case No. IT-98-32-A, ¶ 156 (Feb. 25, 2004); Češić, *supra* note 9, ¶ 31; Deronjić, *supra* note 9F, ¶ 154; Krstić, Case No. IT-98-33-A, ¶ 267 (Apr. 19, 2004); Stakić, *supra* note 34, ¶ 375; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, ¶ 36 (July 10, 2012); Bemba Gombo, *supra* note 9, ¶ 15.

⁸¹ Aleksovski, *supra* note 9, ¶ 182; Banović, *supra* note 6, ¶ 36.

⁸² Plavšić, *supra* note 61, ¶ 25; Banović, *supra* note 6, ¶ 36.

⁸³ Nikolić, *supra* note 34, ¶ 126 (referring to “the fundamental principle of proportionality”); King & La Rosa, *supra* note 8, at 333; Beresford, *supra* note 24, at 41, 46; *see also* Richard, *supra* note 61, at 125 (insofar as he identifies the proportionality requirement with the *lex talionis*, Richard has it slightly wrong).

⁸⁴ Kupreškić, *supra* note 9, ¶ 852; Delalić, *supra* note 34, ¶ 731; Plavšić, *supra* note 61, ¶ 26; Češić, *supra* note 9, ¶ 32.

⁸⁵ *See* King & La Rosa, *supra* note 8, at 334 (mentioning, with reference to jurisprudence of the *ad hoc* Tribunals, the hierarchy of crimes, the number of victims killed, the relative scale and magnitude of the crime, and other factors, such as the existence of an armed conflict); Nemitz, *supra* note 3, at 614 (noting, with a different emphasis, that the ranking of crimes is determined by the nature of the crime and the consequences of the act).

⁸⁶ *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, Rule 145(1)(c), U.N. Doc. PCNICC/2000/Inf/3/Add.1 (July 12, 2000) [hereinafter “RPE”].

⁸⁷ *Id.*; Rule 145(2)(b)(vi).

1. *The Nature of the Crime*

The nature of the crime has a particular bearing on its relative gravity for sentencing purposes. The special gravity of the offences within the jurisdiction of the *ad hoc* Tribunals has been emphasized in many of the Tribunals' judgments.⁸⁸ The ICTR has thus proclaimed that all crimes within its jurisdiction are serious violations of international humanitarian law.⁸⁹

In *Prosecutor v. Ntakirutimana*, a Trial Chamber of the ICTR referred to "the principle of gradation in sentencing, which enables the Tribunal to distinguish between crimes which are of the most heinous nature, and those which, although reprehensible and deserving severe penalty, should not receive the highest penalties."⁹⁰ Earlier, in *Prosecutor v. Kambanda*, the ICTR held that "[t]he degree and magnitude of the crime is still an essential criterion for evaluation of sentence."⁹¹ The Tribunal laid special stress on the gravity of crimes against humanity, noting that those crimes "are . . . conceived as offences of the gravest kind against the life and liberty of the human being."⁹² In *Prosecutor v. Serushago*, the ICTR emphasized the "extreme gravity" of genocide as "the crime of crimes."⁹³ Genocide and crimes against humanity have been held to be inherently aggravating crimes.⁹⁴ In *Prosecutor v. Furundžija*, the Trial Chamber stated that "[t]orture is one of the most serious offences known to international criminal law and any sentence imposed must take this into account."⁹⁵ In the same case, the Appeals Chamber decided that "crimes which result in the loss of human life should be punished more severely."⁹⁶ In *Prosecutor v. Todorović*, the Tribunal observed in the same context that

⁸⁸ See Erdemović, *supra* note 25, ¶ 15; Delalić, *supra* note 7, ¶ 1225; Rutaganda, *supra* note 61, ¶ 468; Blaškić, *supra* note 1, ¶ 782-86; Aleksovski, *supra* note 9, ¶ 182; Furundžija, *supra* note 80, ¶ 249; Delalić, *supra* note 34, ¶ 731; Jelisić, *supra* note 80, ¶ 101; Nikolić, *supra* note 34, ¶ 144.

⁸⁹ *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-A, Judgement, ¶ 367 (June 1, 2001); Bagosora, *supra* note 78, ¶ 2263; Renzaho, *supra* note 78, ¶ 817; Gatete, *supra* note 78, ¶ 673.

⁹⁰ *Prosecutor v. Elizaphan & Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, ¶ 884 (Feb. 21, 2003).

⁹¹ *Kambanda*, *supra* note 9, ¶ 57.

⁹² *Id.*, ¶ 43.

⁹³ *Serushago*, *supra* note 33, ¶ 15, 27; *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Appeal Chamber Judgement, ¶ 53 (July 9, 2004). See *infra*, the text accompanying footnotes 95–98. See also *Prosecutor v. Omar Al Bashir* (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir), Case No. ICC-02/05-01/09-3, ¶ 133 (Mar. 4, 2009).

⁹⁴ *Kambanda*, *supra* note 9, ¶ 33; *Ruggiu*, *supra* note 28, ¶ 48.

⁹⁵ *Furundžija*, *supra* note 25, ¶ 281.

⁹⁶ *Furundžija*, *supra* note 80, ¶ 244; see also *Prosecutor v. Duško Tadić*, Case No. IT-94-1-Tbis-R.117, ¶ 29 (July 14, 1997); *Blaškić*, *supra* note 1, ¶ 787; *Nemitz*, *supra* note 3, at 622-23.

persecution “is a particularly serious crime,”⁹⁷ and that this also applies to “the murder and the sexual assaults perpetrated by the accused.”⁹⁸

The question as to the existence of a hierarchy of crimes based on their inherent gravity has provoked profound disagreement in the jurisprudence of the *ad hoc* Tribunals and in scholarly comments on that jurisprudence. There are, to be sure, those who maintain that the crimes within the jurisdiction of the *ad hoc* Tribunals “are presented on an equal footing,” and that “it does not seem possible to classify these international crimes in a hierarchical way.”⁹⁹

The inherent gravity of some crimes over others cannot be denied.¹⁰⁰ The ICC Statute in fact contains several indications of a hierarchy of certain crimes.¹⁰¹ It thus affords to States Parties the right to temporarily exclude the exercise of jurisdiction by the ICC for war crimes committed in their territory or by their nationals, but not others;¹⁰² the crime of genocide and crimes against humanity are without exception to be regarded as “manifestly unlawful” and liability for those crimes can therefore never be excused on the basis of superior orders;¹⁰³ defense of property can only exclude criminal responsibility for a war crime and can therefore not be raised as a defense against charges of genocide and crimes against humanity.¹⁰⁴

The ongoing debate in this regard is mainly focused on the relative gravity of crimes against humanity and war crimes. The Trial Chamber, in its sentencing judgment in *Prosecutor v. Tadić*, based the extreme gravity of crimes against

⁹⁷ Todorović, *supra* note 10, ¶ 57.

⁹⁸ *Id.* ¶ 66.

⁹⁹ Emanuela Fronza, *Genocide in the Rome Statute*, in 1 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 105, 117–18 (Flavia Lattanzi & William A. Schabas eds., 1999). Fronza refers to a passage in *Prosecutor v. Akayesu* where it was held that “there is no justification in the [ICTR] Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all circumstances alternative charges to genocide and thus lesser included offences.” *Id.* at 118 n.43; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 470 (Sept. 2, 1998). Note, however, that *Akayesu* was not concerned with the inherent gravity of crimes for sentencing purposes here but with the problem of bringing cumulative charges. *Id.* See also Kayishema, *supra* note 89, ¶ 367; Serushago, *supra* note 33, ¶ 13; *Stakić*, *supra* note 34, ¶ 375.

¹⁰⁰ King & La Rosa, *supra* note 8, at 322–23; see, e.g. Kai Ambos, *Nulla Poena Sine Lege in International Criminal Law*, in 4 *SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW* 17, 33–34 (Roelof Haveman & Olaoluwa Olusanya eds., 2006).

¹⁰¹ Schabas, *supra* note 25, at 1506.

¹⁰² ICC Statute, *supra* note 1, art. 124.

¹⁰³ *Id.* art. 33(2); see Andreas Zimmermann, *Superior Orders*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 957, 972 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

¹⁰⁴ ICC Statute, *supra* note 1, art. 31(1)(c).

humanity on the fact that they, per definition, are committed on a widespread scale or systematically:

A prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crime having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.¹⁰⁵

This approach finds support in the reasoning of the International Law Commission (ILC). In a comment on the war crimes provisions in its 1996 *Draft Code of Crimes against the Peace and Security of Mankind*, the ILC proclaimed that crimes against the peace and security of mankind “are the most serious on the scale of international offences” exactly because “the crimes in question must have been committed *in a systematic manner* or on a *large scale*.”¹⁰⁶

There seems to be general agreement that genocide constitutes “the crime of crimes” and is therefore the most serious of offences within the subject-matter jurisdiction of international criminal tribunals.¹⁰⁷ In *Prosecutor v. Kambanda*, the ICTR thus noted that genocide is “inherently aggravating,”¹⁰⁸ and this fact is

¹⁰⁵ Tadić, *supra* note 96, ¶ 73; *see also* Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 21, 25 (Oct. 7, 1997).

¹⁰⁶ Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 54 (1996) (emphasis added); *see also* Micaela Frulli, *Are Crimes Against Humanity More Serious than War Crimes?*, 12 EUR. J. INT'L L. 329, 335 (2001).

¹⁰⁷ Kambanda, *supra* note 9, ¶ 16; *see also id.* ¶ 42; Serushago, *supra* note 33, ¶ 27; Rutaganda, *supra* note 61, ¶ 451; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 986 (Jan. 27, 2000); Jelisić (A), *supra* note 80, ¶ 13 (Wald, J., partially dissenting); Krstić (T), *supra* note 80, ¶ 699; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 10–11 (2000) (proclaiming that in a hierarchy founded on the seriousness of crimes, “genocide belongs at the apex of the pyramid”); King & La Rosa, *supra* note 8, at 322; Schabas, *Genocide*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 107, 109 (Otto Triffterer ed., 1999); William A. Schabas, *The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 447, 463 (Horst Fischer, Claus Kress & Sascha Rolf Lüder eds., 2001); Nemitz, *supra* note 3, at 620; LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 141 (2002); Antonio Cassese, *Genocide*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 335, 344–45 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); Christine Byron, *The Crime of Genocide*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 143, 144 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

¹⁰⁸ Kambanda, *supra* note 9, ¶ 42; *see also* Akayesu, *supra* note 99, ¶ 469; Serushago, *supra* note 33, ¶ 15.

germane to sentencing.¹⁰⁹ However, it has also been said that it is “more difficult” to rank the inherent gravity of genocide against that of crimes against humanity.¹¹⁰

There is an influential body of opinion holding that the gravity of crimes against humanity exceeds that of war crimes.¹¹¹ It has been noted that crimes against humanity and war crimes based on the same conduct protect different interests.¹¹² In *Prosecutor v. Tadić*, Judge Cassese in a separate opinion maintained that although there is *in abstracto* no hierarchy of gravity applying *a priori* to different crimes,¹¹³ such a hierarchy does emerge when the very same act is classified as a war crime and a crime against humanity.¹¹⁴ Murder as a crime against humanity would, for example, warrant a higher sentence than murder as a war crime, because as a crime against humanity, willful killing “possesses an objectively greater magnitude and reveals in the perpetrator a subjective frame of mind which may imperil fundamental values of the international community to a greater extent” than would be the case if the offense was prosecuted as a war crime.¹¹⁵

The assumption that crimes against humanity and war crimes committed in a systematic manner or on a large scale deserve higher sentences than “ordinary” war crimes has become a matter of profound controversy within the ICTY.¹¹⁶ In its judgment in the sentencing appeal in *Prosecutor v. Tadić*, 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,” basing its opinion exclusively on the ICTY Statute and *Rules of Procedure and Evidence*.¹¹⁷ Jan Nemitz

¹⁰⁹ Serushago, *supra* note 33, ¶¶ 14–15.

¹¹⁰ See, e.g., Kambanda, *supra* note 9, ¶ 14; Serushago, *supra* note 33, ¶ 14.

¹¹¹ Tadić, *supra* note 11, ¶¶ 1, 16 (separate opinion of Judge Cassese); Kambanda, *supra* note 9, ¶ 14; see also *id.*, ¶ 43 (noting that crimes against humanity “are . . . offences of the gravest kind against the life and liberty of the human being”); Erdemović, *supra* note 105, ¶¶ 20–25; Furundžija, *supra* note 80, ¶ 8 (declaration of Vorah, J.); King & La Rosa, *supra* note 8, at 322, 333–34; Frulli, *supra* note 106, at 335; *id.*, at 349 (concluding that crimes against humanity are more serious than war crimes); Ambos, *supra* note 100, at 33–34.

¹¹² Flavia Lattanzi, *Crimes against Humanity and War Crimes in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 473, 497 (Horst Fischer, Claus Kress & Sascha Rolf Lüder eds., 2001).

¹¹³ Tadić, *supra* note 11, ¶ 7.

¹¹⁴ *Id.* ¶ 10.

¹¹⁵ *Id.* ¶ 15; see also Ambos, *supra* note 100, at 34.

¹¹⁶ See generally, Lattanzi, *supra* note 112, at 498–503; Nemitz, *supra* note 3, at 618–20.

¹¹⁷ Tadić, *supra* note 11, ¶ 69 (majority opinion); see also Tadić, *supra* note 11 (separate opinion of Shahabuddeen, J.); Tadić, *supra* note 8, at 3 (separate opinion of Robinson, J.); Erdemović, *supra* note 105, ¶¶ 19–23, 26; Erdemović, *supra* note 25, at 2 (separate opinion of Shahabuddeen, J.); Blaškić, *supra* note 1, ¶ 804; Furundžija, *supra* note 80, ¶¶ 241–42, 247; Kmojelać, *supra* note 14, ¶ 511; Češić, *supra* note 9, ¶ 32.

maintained that war crimes can, in given circumstances, be as serious, or even more serious, than crimes against humanity, mentioning the example of the intentional killing of prisoners of war as part of a widespread practice and involving state authorities.¹¹⁸ In *Prosecutor v. Blaškić*, the Trial Chamber noted that the ICTY has not yet established a hierarchy of gravity of the crimes within its jurisdiction and therefore decided to “confine itself to assessing [for sentencing purposes] seriousness based on the circumstances of the case.”¹¹⁹

It stands to reason that, within the realm of war crimes, grave breaches of the Geneva Conventions of August 12, 1949 and Protocol I to those Conventions should not per se be treated as more serious than the ones not stipulated as grave breaches, and that the gravity of a war crime should also not be assessed in view of the distinction between international armed conflicts and armed conflicts not of an international character.¹²⁰

A factor taken into account as an element of crime A can be considered as an aggravating factor for crime B, of which it is not an element.¹²¹ Humiliation as an element of the crime of humiliating and degrading treatment can therefore be considered as an aggravating circumstance following a concurrent conviction of rape, of which it is not a constituent element.¹²² In *Prosecutor v. Češić*, the Sentencing Tribunal declined to consider exacerbated humiliation twice, namely as an element of a war crime and of the corresponding crime against humanity, and decided in all fairness to impose a single sentence for which it considered the degree of humiliation only once in its final determination of an appropriate sentence.¹²³

2. *The Manner in Which the Crime Was Executed*

Gravity of a crime can also emerge from the manner in which the offence was executed.¹²⁴ The ICC’s *Rules of Procedure and Evidence* refer to “the nature of the unlawful behaviour and the means employed to execute the crime” as a sentencing factor that applies in general,¹²⁵ and to “[c]ommission of the crime

¹¹⁸ Nemitz, *supra* note 3, at 618.

¹¹⁹ Blaškić, *supra* note 1, ¶¶ 800–03.

¹²⁰ Schabas, *supra* note 25, at 1507.

¹²¹ Vasiljević, *supra* note 80, ¶ 172; Češić, *supra* note 9, ¶ 53.

¹²² Češić, *supra* note 9, ¶ 53.

¹²³ *Id.* ¶ 54.

¹²⁴ See Nikolić, *supra* note 34, ¶ 186.

¹²⁵ RPE, *supra* note 86, Rule 145(1)(c).

with particular cruelty” that has to be considered as an aggravating circumstance.¹²⁶

The heinous means used for the killing of victims of the crime was specially mentioned as an aggravating sentencing factor in *Prosecutor v. Kayishema*.¹²⁷ In *Prosecutor v. Jelešić*, the ICTY held out “the repugnant, bestial and sadistic nature” of the accused’s conduct and the “cold-blooded commission of murders and mistreatment of people” as contingencies that warrant severe punishment.¹²⁸ In *Prosecutor v. Ntakirutimana*, the ICTR stated that at the “upper end of the sentencing scale” are “those who commit[]crimes with especial zeal or sadism.”¹²⁹ In *Prosecutor v. Češić*, the Sentencing Tribunal referred to the “exacerb[at]ing humiliation and degradation, depravity and sadistic behaviour” of the accused as aggravating factors.¹³⁰

In the *Tadić* sentencing judgment, the Trial Chamber took into consideration, as an aggravating circumstance, the convicted person’s “awareness of, and enthusiastic support for” the atrocities upon which his conviction was based.¹³¹ In the *Čelibići* case, the Trial Chamber found the “most disturbing, serious and thus, [] aggravating aspect” of the criminal acts was that the accused “apparently enjoyed using this [electric shock] device upon his helpless victims,”¹³² and referred to the manner in which the crimes were committed as “indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity.”¹³³

3. *The Motive of the Perpetrator*

The *Rules of Procedure and Evidence* also list, as an aggravating circumstance, “any motive involving discrimination” on grounds such as “. . .

¹²⁶ *Id.* Rule 145(2)(b)(iv).

¹²⁷ *Kayishema*, *supra* note 25, at ¶ 18.

¹²⁸ *Jelišić (T)*, *supra* note 80, ¶ 86.

¹²⁹ *Ntakirutimana*, *supra* note 90, ¶ 884; *see also Tadić (Sentencing Judgment)*, *supra* note 96, ¶ 69; *Delalić*, *supra* note 7, ¶¶ 1264, 1268, 1274–1275; *Blaškić*, *supra* note 1, ¶ 783; *Kunarać*, *supra* note 5, ¶ 874; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 486 (May 16, 2003); *Nahimana*, *supra* note 78, ¶ 1097; *Gatete*, *supra* note 78, ¶ 680.

¹³⁰ *Češić*, *supra* note 9, ¶ 53; *see also Delalić*, *supra* note 7, ¶ 1262 (referring to “not only the inherent suffering involved in rape, but exacerb[at]ing her [the victim’s] humiliation and degradation by raping her in the presence of his [the convicted person’s] colleagues.”).

¹³¹ *Tadić*, *supra* note 96, ¶ 57; *see also Delalić*, *supra* note 7, ¶ 1227.

¹³² *Delalić*, *supra* note 7, ¶ 1264; *see also Nikolić*, *supra* note 34, ¶ 193.

¹³³ *Delalić*, *supra* note 7, ¶ 1268; *see also Nikolić*, *supra* note 34, ¶ 193.

age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”¹³⁴

A discriminatory motive has also been endorsed as an aggravating circumstance in the *ad hoc* Tribunals.¹³⁵ In *Prosecutor v. Tadić*, ethnic and religious discrimination and nationalistic sentiments were mentioned by name.¹³⁶ In *Prosecutor v. Vasiljević*, the Trial and the Appeals Chambers laid special stress on verbal abuse as an aggravating factor.¹³⁷

In the *Čelebići* case, a Trial Chamber of the ICTY was quite correct in saying: “Motive is not an essential ingredient of liability for the commission of an offence. It is to some extent a necessary factor in the determination of sentence after guilt has been established.”¹³⁸

If the perpetrator committed the offence with “cold, calculated premeditation, suggestive of revenge against the individual victim or group to which the victim belongs,” this should be taken into account as an aggravating circumstance, but if he or she committed the offence “reluctantly and under the influence of group pressure and, in addition, demonstrated compassion toward the victim or the group to which the victim belongs,” this must be taken into account in mitigation of sentence.¹³⁹ Tolerance and lack of bigotry will also count in mitigation of a sentence.¹⁴⁰ In *Erdemović*, the accused actually saved a victim’s life, and this counted to his credit in sentencing.¹⁴¹

4. Harmful Consequences of the Criminal Act

Cruelty of the criminal act is closely related to the harmful consequences of an offense, which has also been singled out as an element that falls under the nature of the crime as a sentencing directive.¹⁴² The link appears from a statement in the sentencing judgment of *Duško Tadić*, where the ICTY referred

¹³⁴ Compare RPE, *supra* note 86, Rule 145(2)(b)(v), with ICC Statute, *supra* note 1, art. 21(3).

¹³⁵ Vasiljević, *supra* note 80, ¶ 172; see also Delalić, *supra* note 7, ¶ 1269; Blaškić, *supra* note 1, ¶ 784.

¹³⁶ Tadić, *supra* note 96, ¶ 55; see also Kunarać, *supra* note 5, ¶ 867.

¹³⁷ Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 276 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); Vasiljević, *supra* note 80, ¶ 161.

¹³⁸ Delalić, *supra* note 7, ¶ 1235; see also Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 250, 272 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹³⁹ Delalić, *supra* note 7, ¶ 1235; see also Krstić, *supra* note 80, ¶ 711.

¹⁴⁰ Erdemović (Second Sentencing Judgement), *supra* note 25, ¶ 16(i) (under *Character*).

¹⁴¹ Erdemović, *supra* note 11, ¶¶ 105, 107.

¹⁴² King & La Rosa, *supra* note 8, at 322; see also Tadić, *supra* note 8, ¶ 70; Erdemović, *supra* note 11, ¶ 20; Delalić, *supra* note 7, ¶¶ 1225, 1260, 1273; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Sentence, ¶ 16 (May 21, 1999).

in one breath to the cruelty of the act and the humiliation suffered by the victim as aggravating sentencing factors.¹⁴³ The ICC's *Rules of Procedure and Evidence* speak of "the extent of the damage caused, in particular the harm caused to victims and their families,"¹⁴⁴ and also, as an aggravating circumstance, of "[c]ommission of the crime where the victim is particularly defenceless."¹⁴⁵ It furthermore singles out "[c]ommission of the crime . . . where there were multiple victims" as a matter of aggravation.¹⁴⁶

The number of victims killed would clearly come within the confines of the above directives.¹⁴⁷ But it goes beyond that. In the *Čelebići Case*, the Trial Chamber called gravity of an offense the "touchstone of sentencing," and noted that gravity includes the impact of the crime on victims.¹⁴⁸ It made special mention of the "substantial pain, suffering and injury" inflicted by the perpetrator upon each of his victims, and the "permanent physical and psychological scars" that resulted from the cruelty to which they were exposed.¹⁴⁹ In *Prosecutor v. Mitar Vasiljević*, the Trial Chamber mentioned as sentencing guidelines, alongside "the nature of the act or omission" and "the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim," and the fact that the criminal act had long-term effects.¹⁵⁰

In the sentencing policy articulated in the case of *Prosecutor v. Furundžija*, the Trial Chamber laid special stress on "the severe physical pain and great emotional trauma that Witness A has had to suffer as a consequence of these depraved acts committed against her."¹⁵¹ The Tribunal had noted that the victim "was a civilian detainee and at the complete mercy of her captors."¹⁵² In

¹⁴³ Tadić, *supra* note 8, ¶ 22; *see also* Prosecutor v. Todorović, Case No. IT-95-9/1-S, Sentencing Judgment, ¶¶ 63–65 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2001).

¹⁴⁴ RPE, *supra* note 86, Rule 145(1)(c).

¹⁴⁵ *Id.* Rule 145(2)(b)(iii).

¹⁴⁶ *Id.* Rule 145(2)(b)(iv).

¹⁴⁷ Erdemović, *supra* note 11, ¶ 15; Kunarać, *supra* note 5, ¶ 866; Krstić, *supra* note 80, ¶ 701; Češić, *supra* note 9, ¶ 32; Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgment, ¶¶ 337–38 (May 20, 2005); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment and Sentence, ¶ 440 (Dec. 13, 2005); Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, Judgment and Sentence, ¶ 90 (June 12, 2006); Ndindabahizi v. Prosecutor, Case No. ICTR-01-71-A, Judgment, ¶ 135 (Jan. 16, 2007); Prosecutor v. Rugambarara, Case No. ICTR-00-59-T, Sentencing Judgment, ¶ 24 (Nov. 16, 2007); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgment and Sentence, ¶ 579 (Dec. 7, 2007); Prosecutor v. Bagosora & others, *supra* note 78, ¶ 2272; Gatete, *supra* note 78, ¶ 679.

¹⁴⁸ Delalić, *supra* note 7, ¶ 1260; *see also* Krstić, *supra* note 80, ¶ 701; Češić, *supra* note 9, ¶ 32.

¹⁴⁹ Delalić, *supra* note 7, ¶ 1273; *see also* Tadić, *supra* note 8, ¶ 56.

¹⁵⁰ Vasiljević, *supra* note 137, ¶ 235; *see also* Nikolić, *supra* note 34, ¶¶ 200–05.

¹⁵¹ Furundžija, *supra* note 25, ¶ 287.

¹⁵² *Id.*, ¶ 283.

Prosecutor v. Banović, the Sentencing Trial Chamber made special mention of the fact that the prison victims “were particularly vulnerable, frightened and isolated individuals,” and accepted “the position of inferiority and the vulnerability of the victims” as “relevant factors in assessing the gravity of the offence.”¹⁵³

In *Prosecutor v. Blaškić*, the Trial Chamber also emphasized, as an aggravating circumstance, “the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day.”¹⁵⁴ The Tribunal was particularly sensitive to the fact that victims were members of the civilian population and included women and children.¹⁵⁵ In *Prosecutor v. Momir Nikolić*, the victims included women, children, the elderly, and persons in captivity, and their vulnerability and position of helplessness were taken into account as aggravating factors.¹⁵⁶ In *Prosecutor v. Kunarać*, special significance was attached for sentencing purposes to the fact that several of the sexual assault victims were young.¹⁵⁷ Several judgments emphasized, as an aggravating circumstance, the fact that victims at the time of the trial still suffered from the trauma brought upon them by the perpetrators’ criminal conduct.¹⁵⁸ It has further been noted by one analyst that “the gravity of a crime is not only affected by the actual harm, but also by the danger caused to other legal values, i.e. the potential harm that may result from the offense.”¹⁵⁹

It has been held that for sentencing purposes, victims are not to be confined to those directly affected by the crime but may also include their next-of-kin.¹⁶⁰ This proposition has subsequently been challenged. In *Prosecutor v. Krnojelac*, the ICTY noted that effects of an offence on relatives—or friends—of the immediate victims have no bearing on the criminal culpability of the convicted person and, therefore, “it would be unfair to consider such effects in determining a sentence.”¹⁶¹ The ICTY subsequently changed its mind by holding that the

¹⁵³ Banović, *supra* note 6, ¶ 50; *see also* Kunarać, *supra* note 5, at ¶ 352; *Prosecutor v. Simić*, Case No. IT-95-9/2-S, Sentencing Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002); Obrenović, *supra* note 9, ¶¶ 102–03; Nikolić, *supra* note 34, ¶ 184.

¹⁵⁴ Blaškić, *supra* note 1, ¶ 787.

¹⁵⁵ *Id.* ¶ 786; *see also* Kunarać, *supra* note 5, ¶ 867; Nikolić, *supra* note 34, ¶ 213(iv).

¹⁵⁶ Nikolić, *supra* note 34, ¶ 137.

¹⁵⁷ Kunarać, *supra* note 5, ¶¶ 835, 864, 879.

¹⁵⁸ Vasiljević, *supra* note 137, ¶ 276; Vasiljević, *supra* note 80, ¶¶ 164–66; Krnojelac, *supra* note 14, ¶ 144.

¹⁵⁹ Nemitz, *supra* note 3, 617.

¹⁶⁰ Delalić, *supra* note 7, ¶ 1226.

¹⁶¹ Krnojelac, *supra* note 14, at ¶ 512; *see also* Kunarać, *supra* note 5, ¶ 852.

impact of an offense on the relatives and friends of the victims may be taken into account for sentencing purposes,¹⁶² for example in the case of murder and sexual assault.¹⁶³

It should finally be noted that compassion shown, and assistance rendered by an accused to certain victims can also serve as a mitigating factor.¹⁶⁴ The ICC's *Rules of Procedure and Evidence* expressly mention "efforts by the person to compensate the victims" as a mitigating circumstance.¹⁶⁵

5. *Participation of the Accused in the Criminal Conduct*

The ICC'S *Rules of Procedure and Evidence* refer to "the degree of participation of the convicted person" in the offense of which he or she was convicted, and to "the degree of intent" as factors to be considered for sentencing purposes.¹⁶⁶

There are thus many sides to the personal conduct and dispensation of the convicted person that should weigh with international tribunals in assessing an appropriate sentence on basis of the principles of retributive justice. Some of the personal factors that are to be considered relevant for achieving proportionality between the crime and the sentence derive from the participation of the convicted person in the crime and are objective in nature, while others may be defined as subjective attributes of the convicted person. Those subjective factors will be considered hereafter under the heading of Retributive Justice.

The objective standards attending conduct of the accused again fall into two main categories: (1) personal responsibilities of the person, and (2) the form of perpetration for which he or she was held responsible.

Several judgments of the *ad hoc* Tribunals stressed the status of the person within the community as an aggravating circumstance.¹⁶⁷ It has been decided, for example, that "[a]buse of positions of authority or trust is generally considered an aggravating factor,"¹⁶⁸ and even that a command position deserves

¹⁶² Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 260 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); see also Češić, *supra* note 9, ¶ 38.

¹⁶³ Češić, *supra* note 9, ¶¶ 39, 44.

¹⁶⁴ See *infra* Section D.2(c).

¹⁶⁵ RPE, *supra* note 86, Rule 145(2)(a)(ii).

¹⁶⁶ *Id.* Rule 145(1)(c).

¹⁶⁷ See generally Serushago, *supra* note 33, ¶¶ 28–29; Kayishema, *supra* note 142, ¶ 15; Kordić, *supra* note 54, ¶ 847; Serugendo, *supra* note 147, ¶ 90; Nemitz, *supra* note 3, 612.

¹⁶⁸ Prosecutor v. Kambanda, *supra* note 9, ¶ 44 (Sept. 4, 1998); see also Kayishema, *supra* note 142, ¶ 26; Delalić, *supra* note 7, ¶ 1220; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence,

a higher sentence than direct participation in the crime.¹⁶⁹ Particularly critical in this regard is the position occupied by an accused in the organizational hierarchy of the prevailing power structures.¹⁷⁰ As stated in the *Čelebići Case*: “It would constitute a travesty of justice, and an abuse of the concept of command authority, to allow the calculated dereliction of an essential duty to operate as a factor in mitigation of criminal responsibility.”¹⁷¹

In *Prosecutor v. Kambanda*, the fact that the accused was Prime Minister of Rwanda was accordingly taken into consideration as an aggravating factor.¹⁷² In the *Čelebići Case*, the ICTY made something of the fact that it was dealing with high-ranking political officials and military officers,¹⁷³ and also took a grim view of the fact that one of the accused was deputy commander of the prison camp where the atrocities were committed.¹⁷⁴ In *Prosecutor v. Kamuhanda*, special mention was made, as an aggravating circumstance, of the accused having held a high-ranking position in the civil service.¹⁷⁵ In *Prosecutor v. Todorović*, the superior position of the accused as Chief of Police was considered an aggravating factor.¹⁷⁶ In *Prosecutor v. Mladen Naletelić & Vinco Martinović*, the Trial Chamber noted that the accused was “something of a legend in the region” and that his “command role . . . is [therefore] an aggravating factor.”¹⁷⁷ Mrs. Biljana Plavšić was at the time the crime was committed President of the Republic of Srpska and her “high leadership position” led the Court to decide that “misplaced leniency would not be fitting and that a substantial sentence of imprisonment is called for.”¹⁷⁸ The Sentencing Tribunal did, on the other hand, decide that the fact that “witnesses . . . of high international reputation”—including United States Secretary of State Madeleine Albright, President of Sweden Carl Bildt, and Head of the Mission of the Organization for Society and Co-operation in Europe Robert Frowick—came forward to testify on her behalf,

¶¶ 1003–04 (Jan. 27, 2000); Sikirica, *supra* note 80, ¶¶ 172, 210.

¹⁶⁹ Blaškić, *supra* note 1, ¶ 791; *see also id.* at ¶ 768.

¹⁷⁰ *See, e.g.*, Tadić, *supra* note 8, ¶ 60; Rutaganda, *supra* note 61, ¶¶ 50, 451, 469; Blaškić, *supra* note 1, ¶ 788; Kordić, *supra* note 54, ¶ 847; Todorović, *supra* note 143, ¶¶ 60–62; Krstić, *supra* note 80, ¶ 708; Sikirica, *supra* note 80, ¶ 140; Plavšić, *supra* note 61, ¶ 60; Obrenović, *supra* note 9, ¶ 99; Gatete, *supra* note 78, ¶ 678.

¹⁷¹ Delalić, *supra* note 7, ¶ 1250; *see also* Aleksovski, *supra* note 9, ¶ 187.

¹⁷² Kambanda, *supra* note 168, ¶ 61.

¹⁷³ Delalić, *supra* note 7, ¶ 1234.

¹⁷⁴ *Id.*, ¶ 1268; *see also* Nikolić, *supra* note 34, ¶¶ 193–94, 213 (iii).

¹⁷⁵ Kamuhanda, *supra* note 53, ¶ 764.

¹⁷⁶ Todorović, *supra* note 143, ¶¶ 59, 66.

¹⁷⁷ *Prosecutor v. Naletelić*, Case No. IT-98-34-T, Judgment, ¶ 751 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

¹⁷⁸ Plavšić, *supra* note 61, ¶ 60; *see also* Renzaho, *supra* note 78, ¶ 824 (the Sentencing Tribunal affording only “very limited weight” to the convicted person’s lengthy public service and assistance rendered by him to the Tutsi victim group).

and her post-conflict role in ensuring that the Dayton Accord was accepted and implemented in the Republic of Srpska,¹⁷⁹ added “much weight to the plea in mitigation put forward in this regard.”¹⁸⁰ She was seventy-two years old at the time and was sentenced to eleven years imprisonment for her “participation in a crime of utmost gravity” (persecution).¹⁸¹

Of special significance in regard to war crimes is the position of the Accused in the chain of command.¹⁸² In *Prosecutor v. Aleksovski*, the Appeals Chamber decided that the sentence imposed by the Trial Chamber was “manifestly inadequate” because, amongst other things, the sentencing Tribunal failed to treat the position of the convicted person as a commander as an aggravating circumstance.¹⁸³ In *Prosecutor v. Tadić*, on the other hand, the Appeals Chamber decided that a sentence in excess of twenty years imprisonment on any counts in the indictment would be excessive because the level in the command structure of the accused was low.¹⁸⁴ In the *Čelebići Case*, the ICTY regarded the fact that a commanding officer only had constructive knowledge of the criminal act (he did not know but should have known) as a potential mitigating factor.¹⁸⁵

It should be emphasized, though, that a position of authority should not, in and of itself, attract a harsher sentence; it is the abuse or wrongful exercise of a position of authority that serves as an aggravating factor.¹⁸⁶ The principle of “graduation of sentence”—that is, the rule that “the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those lower down the structure”¹⁸⁷—is therefore “not absolute.”¹⁸⁸

¹⁷⁹ Plavšić, *supra* note 61, ¶¶ 85–94.

¹⁸⁰ *Id.*, ¶ 94.

¹⁸¹ *Id.*, ¶¶ 132, 134.

¹⁸² See, e.g., Kupreškić, *supra* note 9, ¶ 862; Aleksovski, *supra* note 9, ¶ 184; Delalić, *supra* note 7, ¶ 847; Kunarać, *supra* note 5, ¶ 863; Musema, *supra* note 168, ¶¶ 381, 382.

¹⁸³ Aleksovski, *supra* note 9, ¶ 187.

¹⁸⁴ *Prosecutor v. Tadić*, Case No. IT-94-1-A & IT-94-1-*Abis*, Judgment in Sentencing Appeals, ¶¶ 55–57 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); see also Kordić, *supra* note 54, ¶ 847.

¹⁸⁵ Delalić, *supra* note 7, ¶ 1250; see also Schabas, *supra* note 25, at 1522 (noting that command responsibility is based on negligence).

¹⁸⁶ Krstić, *supra* note 80, ¶ 709; Kayishema, *supra* note 89, ¶ 358; *Prosecutor v. Elizaphan*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶ 563 (Dec. 13, 2004); *Prosecutor v. Babić*, Case No. IT-03-72-A, ¶ 80 (July 18, 2005); *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-A, Judgment, ¶ 347 (Sept. 19, 2005); Stakić, *supra* note 34, at ¶ 411; Ndindabahizi, *supra* note 147, ¶ 136; *Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgment, ¶¶ 284–85 (Nov. 27, 2007); *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Judgment, ¶ 230 (Mar. 12, 2008); Hadžihasanović, *supra* note 34, ¶ 320; Renzaho, *supra* note 78, at ¶ 823; Gatete, *supra* note 78, ¶ 678.

¹⁸⁷ Musema, *supra* note 168, ¶ 382.

¹⁸⁸ Hadžihasanović, *supra* note 34, ¶ 321.

Also at the objective level, emphasis is placed on the form and degree of participation in the crime.¹⁸⁹ Playing a leading role in the execution of atrocities clearly serves as an aggravating circumstance,¹⁹⁰ while those not playing a significant role in the commission of an offense should receive lighter sentences.¹⁹¹ The Trial Court is required to reflect on the sentence imposed, “the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.”¹⁹²

A distinction can therefore be made for sentencing purposes between principal perpetrators and accessories, on the understanding that the latter group is entitled to lighter sentences.¹⁹³ Inchoate participation, such as an attempt to commit the crime, is generally treated for sentencing purposes as being of a less serious nature.¹⁹⁴ Merely aiding and abetting has generally been considered as warranting a reduced level of criminal responsibility.¹⁹⁵ In *Prosecutor v. Aleksovski*, the Trial Chamber gave the accused credit for the fact that his “direct participation in the commission of the acts of violence was relatively limited.”¹⁹⁶ In *Prosecutor v. Ntakirutimana*, the ICTR stated that those who planned or ordered the atrocities deserved the highest penalties.¹⁹⁷

It should be noted, though, that in some instances not playing an active role in the execution of a crime is inherent in the criminal conduct (the crime of which the accused was found guilty) and should therefore not be taken into account as a mitigating circumstance. In *Prosecutor v. Vincent Rutaganira*, for example, the accused pleaded guilty to, and was convicted of, complicity by an omission in the crime of extermination (not intervening to stop massive killings and injuring of Tutsi who had taken refuge in a church building in a district where the accused was an elected Counselor). In considering an appropriate sentence,

¹⁸⁹ Kupreškić, *supra* note 9, ¶ 852; Aleksovski, *supra* note 9, ¶ 182; Delalić, *supra* note 34, ¶ 731; Jelisić, *supra* note 80, ¶ 101; Stakić, *supra* note 9, ¶ 903; Obrenović, *supra* note 9, ¶ 50; Nikolić, *supra* note 34, ¶ 144; Deronjić, *supra* note 9, ¶¶ 154, 156.

¹⁹⁰ Serushago, *supra* note 33, ¶ 19; Rutaganda, *supra* note 61, ¶ 470; Radoslav Brdanin, Case No. IT-00-36-A, ¶ 413 (Apr. 3, 2007); Bagosora, *supra* note 78, ¶ 2272; Gatete, *supra* note 78, ¶ 680.

¹⁹¹ See Aleksovski, *supra* note 9, ¶ 236; Krnojelac, *supra* note 14, ¶ 509; Deronjić, *supra* note 9, ¶ 156.

¹⁹² Akayesu, *supra* note 53, Sentence, ¶ 40, cited with approval by the Appeals Chamber in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, ¶ 414 (June 1, 2001); see also *Dragan Nikolić*, *supra* note 34, ¶ 144; Deronjić, *supra* note 9, ¶ 154.

¹⁹³ See, e.g., Ruggiu, *supra* note 28, ¶ 49; see also *id.*, ¶¶ 77–79 (noting that the accused did not personally commit any of the acts of violence); Ambos, *supra* note 100, at 33.

¹⁹⁴ Schabas, *supra* note 25, at 1507.

¹⁹⁵ Vasiljević, *supra* note 80, ¶ 182; Krstić, *supra* note 80, ¶¶ 251, 266, 268; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, ¶ 963 (Dec. 1, 2003) (noting that an “indirect form of participation” such as incitement to commit genocide and aiding and abetting warrants a lesser sentence).

¹⁹⁶ Aleksovski, *supra* note 11, ¶ 236; see also Deronjić, *supra* note 9, ¶ 156.

¹⁹⁷ Ntakirutimana, *supra* note 90, ¶ 884.

the Chamber noted that not participating in the actual killings “goes to his criminal conduct rather than to mitigation.”¹⁹⁸

Closely related is the supposition that persons acting upon the orders of a superior official should receive a lighter sentence. The Statutes of the *ad hoc* Tribunals expressly state that acting “pursuant to an order of a Government or of a superior shall not relieve . . . [the accused person] of criminal responsibility, but may be considered in mitigation of punishment if . . . justice so requires.”¹⁹⁹ The principle has been applied in several judgments of the *ad hoc* Tribunals.²⁰⁰

In terms of the ICC Statute, superior orders will, to the contrary, in certain limited circumstances exclude criminal liability, namely if the perpetrator was under a legal obligation to obey the order, did not know that the order was unlawful, and the order was not manifestly unlawful.²⁰¹ Nothing is provided in the ICC Statute as to the mitigating effect on sentencing of superior orders that fall short of these requirements. Although some analysts maintain that superior orders will be treated as a mitigating circumstance by the ICC,²⁰² it is equally reasonable to assume that acting upon a superior order which the perpetrator was not obliged to obey, or which he or she did not know was unlawful, or which was as a matter of fact manifestly unlawful, should not serve as a mitigating circumstance.

Although the ICTY in *Furundžija* subscribed to the principle that those not acting as principal perpetrators deserve lighter sentences,²⁰³ the Tribunal did judge the accused, being an aider and abettor,²⁰⁴ harshly for his “active role as a commander of the Jokers,”²⁰⁵ the Jokers being a special unit of the military police responsible for the atrocities in issue in that case. In the *Čelebići Case*, the Appeals Chamber decided that in certain circumstances the gravity of the crime might be so great that a very severe penalty is to be imposed in spite of

¹⁹⁸ Rutaganira, *supra* note 13, ¶¶ 137–38.

¹⁹⁹ STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL, art. 6(4), annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, reprinted in 32 I.L.M. 1192 (1993); STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, art. 5(4), annex of S.C. Res. 955 (1994), reprinted in 33 I.L.M. 1602 (1994).

²⁰⁰ *Erdemović*, *supra* note 11, ¶¶ 15, 20, 53; *see also Delalić*, *supra* note 7, ¶ 1281 (declining to take superior orders into account as a mitigating factor because the accused executed the orders without reluctance and in fact took some pleasure in the infliction of pain and suffering on the victims).

²⁰¹ ICC Statute, *supra* note 1, art. 33.

²⁰² *See, e.g., King & La Rosa, supra* note 8, at 335.

²⁰³ *Furundžija*, *supra* note 25, ¶ 281.

²⁰⁴ *Id.*, ¶ 282.

²⁰⁵ *Id.*, ¶ 283.

the fact that the accused did not occupy a senior position in the overall command structure.²⁰⁶

In the second sentencing judgment in the case of *Erdemović*, the ICTY accepted duress as an extenuating circumstance, describing the accused as “the helpless victim” with “no choice in taking part in the Srebrenica operations,” but also at times risking his life by breaking out of “this chain of helplessness” and actually refusing to kill some members of the target group.²⁰⁷ In *Prosecutor v. Blaškić*, a Trial Chamber of the ICTY observed that duress can only be considered as an extenuating circumstance if the convicted person “had no choice or moral freedom in committing the crime.”²⁰⁸ It should be noted that duress deriving from superior orders can in exceptional circumstances be so severe as to leave the subordinate without any freedom of choice, in which event it would not only serve as an extenuating circumstance but become a ground of justification that would warrant a finding of not guilty.

The judgment of the Trial Chamber in *Prosecutor v. Blaškić* also makes instructive reading in the present context:

The fact that the accused did not directly participate may be taken as a mitigating circumstance when the accused held a junior position within the civilian or military command structure. However, the Trial Chamber considers that the fact that commanders . . . played no direct part cannot act in mitigation of the sentence when found guilty.²⁰⁹

Theories of retribution are mostly founded on the premise that “offenders deserve to suffer and that the institution of punishment should reflect the suffering they deserve.”²¹⁰ Retributive theories assert that “punishment must be equivalent to the level of wrongdoing.”²¹¹

In undiluted form, retribution may be likened to retaliation, or punishment in kind. Based on the teachings of the celebrated mathematician, Pythagoras (*circa* 540–504 B.C.), the *lex talionis* accordingly required an arithmetical

²⁰⁶ *Delalić*, *supra* note 34, ¶ 847; *see also* *Kunarać*, *supra* note 5, ¶ 858; *Vasiljević*, *supra* note 80, ¶ 301; *Banović*, *supra* note 6, ¶ 45; *Češić*, *supra* note 9, ¶ 32.

²⁰⁷ *Erdemović*, *supra* note 25, Sentencing Judgment, ¶ 17; *see also* *Erdemović*, *supra* note 11, Sentencing Judgment, ¶¶ 16-20, 54, 89; *Delalić*, *supra* note 7, ¶ 1283; *Rutaganira*, *supra* note 13, ¶ 161.

²⁰⁸ *Blaškić*, *supra* note 1, ¶ 769; *see Omar Serushago v. Prosecutor*, Case No. ICTR-98-39-A, ¶ 27 (Apr. 6, 2001) (The Appeals Chamber of the ICTR not accepting duress as an extenuating circumstance because it was neither alleged nor proven at trial.).

²⁰⁹ *Blaškić*, *supra* note 1, ¶ 768; *see also* *Vasiljević*, *supra* note 137, ¶¶ 301-05 (deciding that the fact that the accused was a low-level offender did not alter the seriousness of his crime).

²¹⁰ *Bagaric & Amarasekara*, *supra* note 18, at 127.

²¹¹ *See id.* at 157.

equilibrium between the wrongful act and retributive punishment in accordance with the classical adage: “an eye for an eye, and a tooth for a tooth.”²¹² This approach was characteristic of “primitive” societies, where the kind and measurements of punishment were exclusively based on the nature and gravity of the criminal act.²¹³ As noted by one analyst, “no one regards raping a rapist, or torturing a torturer, as appropriate punishment today.”²¹⁴ The idea of retribution being a matter of retaliation, or at least remnants of that idea, regrettably, still lingers on in many contemporary systems of criminal law, and in the minds of many people. When an outraged community calls for justice, they mostly seek revenge.

But retribution is not revenge.²¹⁵ The harm suffered which triggered acts of revenge are not necessarily wrongful acts in the legal sense; revenge is not necessarily commensurate with the harm caused by the act being revenged; a revenge-inspired act does not set a precedent for similar responses to the same kind of harmful acts; the victims of revenge are not necessarily confined to the person whose conduct sparked the retaliatory response, but could for example include a spouse, child or relative of that person; the person taking revenge often derives pleasure from suffering of the other; and revenge is personal in the sense that the avenger is typically the person wronged.²¹⁶

To be “just deserts,” retribution—as we have seen—must be “proportional to the gravity of the crime *and the moral guilt of the convicted*.”²¹⁷ The “just desert” theory “places the requirement of justice, rather than the pursuit of crime prevention, at the foundation of the general justification for criminal sanctions.”²¹⁸ That is to say, judicial response to a criminal act must be conditioned by the demands of retributive *justice*, which, among other things, make criminal liability dependent on the subjective culpability or blameworthiness of the accused.²¹⁹ Retributive justice requires (a) making a

²¹² See *Leviticus* 24:19-20: “If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered.”

²¹³ F.J. van Zyl & J.D. van der Vyver, *Inleiding tot die Regswetenskap*, 228–29. Durban: Butterworths (1982).

²¹⁴ Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 *COL. J. TRANSNAT’L L.* 801, 840 (2006).

²¹⁵ Aleksovski, *supra* note 9, ¶ 185; see also Kordić, *supra* note 54, ¶ 847; Banović, *supra* note 6, ¶ 34; Deronjić, *supra* note 9, ¶ 150; King & La Rosa, *supra* note 8, at 330.

²¹⁶ See Bagaric & Amarasekara, *supra* note 18, at 163–64.

²¹⁷ *Supra*, the text accompanying notes 10–11.

²¹⁸ Beresford, *supra* note 24, at 40.

²¹⁹ See *Kabashi*, *supra* note 34, ¶ 11 (noting that a sentence must “properly reflect[] the personal culpability of the wrongdoer”); *Bemba Gombo*, *supra* note 9, ¶ 12; *Frulli*, *supra* note 106, at 336 (noting that the mental element influences the gravity of a crime); *Nemitz*, *supra* note 3, at 616 (noting that gravity of a crime

conviction for criminal conduct dependent on fault in the form of *dolus* (intent) or *culpa* (negligence) on the part of the perpetrator; and (b) taking into account, for sentencing purposes, reduced culpability of the offender.²²⁰

The *Rules of Procedure and Evidence* accordingly instruct the ICC to take into account for purposes of sentencing “the degree of intent” of the person concerned.²²¹ Committing the crime “knowingly and with premeditation” therefore deserves to be severely punished.²²²

The *Rules of Procedure and Evidence* mention in their list of mitigating circumstances those “falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.”²²³ Requiring that diminished mental capacity must be “substantial” is perhaps unfortunate, since every manifestation of reduced culpability, provided it is real, should serve as a consideration for the reduction of sentence. Grounds for reduced culpability include subjective attributes of the perpetrator which do not altogether exclude his or her capacity to form a criminal intent or negligent disposition but nevertheless diminished his or her ability to appreciate the wrongfulness of the criminal act or to act in accordance with that insight.

It should in the present context be emphasized that personal attributes of the accused do not in all instances have an impact on *mens rea* but could still serve as extenuating or aggravating factors for sentencing purposes. In *Prosecutor v. Furundžija*, for example, the Tribunal was not concerned with the question of reduced culpability when considered the young age of the accused (23 years at the time the offence was committed) to be a mitigating circumstance.²²⁴ Mental capacity *per se* was also not the issue when the Trial Chamber, in *Prosecutor v. Goran Jelešić*, decided that “Judges cannot accord too great a weight” to personal attributes of the convicted person, such as age (he was twenty-two years old when the crime was committed), no previous convictions for any violent crime, and being the father of a young child,²²⁵ and, perhaps more puzzling, that the fact the he suffered from “personality disorders, [and] had borderline

derives from (a) the *actus reus* (harmfulness of the offence), and (b) *mens rea* (culpability of the offender)); Peglau, *supra* note 2, at 143 (noting that “the sentence must not exceed the culpability of the criminal”).

²²⁰ Peglau, *supra* note 2, at 143, 147.

²²¹ RPE, *supra* note 86, Rule 145(1)(c); *see also* King & La Rosa, *supra* note 8, at 332 (including under the rubric of gravity of the offence, the “types of intent”).

²²² *See* Kambanda, *supra* note 9, ¶ 61.

²²³ RPE, *supra* note 86, Rule 145(2)(a)(i).

²²⁴ Furundžija, *supra* note 25, ¶ 283; *see also* Serushago, *supra* note 33, ¶ 39 (where the convicted person was thirty-seven years old at the time the crime was committed).

²²⁵ Jelisić, *supra* note 80, ¶ 124.

narcissistic and anti-social characteristics” did not diminish his criminal responsibility.²²⁶

In *Prosecutor v. Todorović*, conflicting reports of psychiatrist as to the alleged post-traumatic stress disorder of the accused were presented to the Trial Chamber. This is a matter of *mens rea*. The Tribunal proceeded on the assumption that the onus rested on the accused to prove on a balance of probabilities his or her grounds of diminished culpability,²²⁷ and consequently declined to take the mental condition of the accused into account as a ground in mitigation of sentence.²²⁸ It must be emphasized, with acclamation, that the ICC cannot possibly follow this same approach. In terms of the ICC Statute, an accused has the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”²²⁹ If the accused should raise any of the grounds of diminished culpability, the onus to disprove the same rests squarely on the Prosecutor and the Trial Chamber must be satisfied, above reasonable doubt, that the grounds relied on by the accused did not exist at the time the crime was committed.

IV. EXTENUATING AND AGGRAVATING CIRCUMSTANCES

When one considers the gravity of a crime and conduct of the perpetrator as components of the concept of retribution, their impact on sentencing already emerges. It is perhaps wrong to think of the impact of the nature of the crime and the means of perpetration of the person concerned on sentencing in terms of extenuating or aggravating circumstances. Here the nature and magnitude of a particular sentence derives from considerations inherent in the crime as such as conditioned by culpability of the Accused on the basis of retributive justice.

The same is true in regard to the general functions of punishment, which in a very limited sense might influence a sentencing judge to decide on a particular kind and measure of punishment to be imposed. Extenuating and aggravating circumstances embrace additional factors attending the commission of a crime, not part of the criminal act *per se*, which ought to influence the decision to impose a lighter or a heavier sentence, as the case might be.²³⁰ That, perhaps, is what the ICTY had in mind when it proclaimed that “[m]itigation of punishment

²²⁶ *Id.*, ¶ 125.

²²⁷ Todorović, *supra* note 10, ¶ 93; *see also* Delalić, *supra* note 7, ¶ 1172.

²²⁸ Todorović, *supra* note 10, ¶ 95.

²²⁹ ICC Statute, *supra* note 1, art. 67(1)(c)(i).

²³⁰ *See* Stakić, *supra* note 9, ¶ 920 (noting that “mitigating circumstances may also include those not related to the offence”); *see also* Nikolić, *supra* note 34, ¶ 145; Deronjić, *supra* note 9, ¶ 155.

in no way reduces the gravity of the crime or the guilty verdict against a convicted person.”²³¹

Since the same factor can warrant a lighter or a heavier sentence, it is perhaps inappropriate to put a particular factor in the one, and the other in another basket.²³² Proposals to this effect were not accepted by the Preparatory Commission of the ICC responsible for the drafting of the *Rules of Procedure and Evidence*.

In *Prosecutor v. Erdemović*, the Trial Chamber distinguished between mitigating circumstances that existed at the time the crime was committed and those that emerged after the crime was committed.²³³ This distinction is of value for purposes of classification only. The suggestion that it might have been intended to separate the ones that have an influence on the gravity of the offence from those that do not,²³⁴ is not tenable. Some of the extenuating and aggravating circumstances that existed at the time the crime was committed are quite unrelated to the severity of the crime.

There is an important aspect of the *Todorović* judgment which merits special attention and should be emphasized before particular extenuating and aggravating circumstances can be scrutinized in greater detail. In cases where a factor that might be considered as an aggravating circumstance constitutes an element of the crime, it should not be treated separately as an aggravating circumstance.²³⁵ It therefore makes no sense to proclaim as a supposed aggravating circumstance for sentencing purposes that the convicted person

²³¹ Ruggiu, *supra* note 28, ¶ 80; Kambanda, *supra* note 9, ¶¶ 37, 56; *see also* Deronjić, *supra* note 9, ¶ 224.

²³² *See* Peglau, *supra* note 2, at 146.

²³³ Erdemović, *supra* note, ¶ 86.

²³⁴ *See* Nemitz, *supra* note 3, at 608.

²³⁵ Todorović, *supra* note 143, ¶ 57; *see also* Prosecutor v. Kunarać, IT-96-23-T, Judgment, ¶ 852 (Feb. 22, 2001); Krnojelac, *supra* note 14, ¶ 517; Vasiljević, *supra* note 137, ¶ 277; Stakić, *supra* note 9, ¶ 904; Prosecutor v. Banović, IT-02-65/1-S, Sentencing Judgment, ¶ 53 (Oct. 28, 2003); Nikolić, *supra* note 34, ¶ 144; Prosecutor v. Obrenović, IT-02-60/2-S, Sentencing Judgment, ¶ 99 (Dec. 10, 2003); Vasiljević, *supra* note 80, ¶ 17–72; Češić, *supra* note 9, ¶ 53; Prosecutor v. Tihomir Blaškić, IT-95-14-A, Judgment, ¶ 693 (July 29, 2004); Prosecutor v. Deronjić, IT-02-61-A, Judgment on Sentencing Appeal, ¶¶ 106, 127 (July 20, 2005); Prosecutor v. Momir Nikolić, IT-02-60/1-A, Judgment on Sentencing Appeal, ¶ 44 (Mar. 8, 2006); Ndindabahizi, *supra* note 147, ¶ 137 (Jan. 16, 2007); Prosecutor v. Renzaho, ICTR-97-31-T, Sentencing Judgment, ¶ 822 (July 14, 2009); Gatete, *supra* note 78, ¶ 677; Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment, ¶ 35 (Mar. 14, 2012); Prosecutor v. Dordević, IT-05-87/1-A, Judgment, ¶ 936 (Feb. 23, 2011); Nzabonimana v. The Prosecutor, ICTR-98-44D-A, Judgment, ¶ 464 (Sept. 29, 2014); Prosecutor v. Nyiramasuhuko, ICTR-98-42-T, Judgment, ¶¶ 3356, 3385 (June 24, 2011).

“knowingly and consciously,”²³⁶ or “voluntarily,”²³⁷ participated in the commission of the crime, since intentional and voluntary perpetration are already included in the concept of fault as an element of criminal liability.²³⁸

In the case of persecution, for example, a discriminatory intent is a basic element of the crime and should therefore not be given additional weight for purposes of sentencing; and the same applies to the fact that the crime was committed against members of the civilian population.²³⁹ A discriminatory intent can be considered an aggravating factor of crimes against humanity other than persecution,²⁴⁰ for example in the case of murder as a crime against humanity.²⁴¹ It has therefore also been decided that premeditation should not be taken into account for purposes of sentencing upon a conviction for crimes against humanity.²⁴²

It is on the other hand quite feasible and appropriate to take willing participation in the crime,²⁴³ or premeditation,²⁴⁴ into account as an aggravating circumstance. Premeditation is the opposite of spontaneity. If a person commits a crime after having considered the consequences of his or her act, he or she is clearly more blameworthy than someone who acts on the spur of the moment.

It simply remains to state, by way of introduction, that the weight to be afforded to aggravating and extenuating circumstances is within the discretion of the Sentencing Tribunal.²⁴⁵ The burden of proof of aggravating circumstances

²³⁶ Rutaganda, *supra* note 61, ¶ 50; *see also* Prosecutor v. Serushago, ICTR 98-39-S, Sentence, ¶ 30 (Feb. 5, 1999).

²³⁷ Kayishema & Ruzindana, *supra* note 89, ¶ 26; *see also* Prosecutor v. Krstić, IT-98-33-T, Judgment, ¶ 721 (Int’l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Aug. 2, 2001) (referring to “conscious and voluntary participation”).

²³⁸ *See* Schabas, *supra* note 25, at 1525.

²³⁹ Prosecutor v. Todorović, Todorović, *supra* note 143, ¶ 57.

²⁴⁰ Prosecutor v. Kunarać, IT-96-23-T, Judgment, ¶ 357 (Feb. 22, 2001); Prosecutor v. Vasiljević, IT-98-32-T, Judgment, ¶¶ 171, 278. (Nov. 29, 2002).

²⁴¹ Vasiljević, *supra* note 235, at ¶¶ 173.

²⁴² Prosecutor v. Blaškić, IT-95-14-T, Judgment, ¶ 793 (Int’l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Mar. 3, 2000).

²⁴³ Prosecutor v. Erdemović, IT-96-22-T, Sentencing Judgment, (Mar. 5, 1998); Prosecutor v. Tadić, IT-95-9/1-S, Sentencing Judgment, ¶¶ 55–57 (July 31, 2001).

²⁴⁴ Schabas, *supra* note 25, at 1525; *see* Prosecutor v. Kambanda, ICTR 97-23-S, Judgment, ¶ 61 (Int’l Crim. Trib. For Rwanda Sept. 4, 1998); Prosecutor v. Delalić, IT-96-21-T, Judgment, ¶ 1261 (Int’l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Nov. 16, 1998); Serushago, *supra* note 236, at ¶ 30; Blaškić, *supra* note 242, at ¶ 793; Krstić, *supra* note 237, at ¶ 711.

²⁴⁵ Delalić, *supra* note 244, ¶¶ 777, 780; Momir Nikolić, *supra* note 235, ¶ 125; Dragan Nikolić, *supra*

is on the Prosecutor, while the burden of proof in respect of mitigating circumstances is on the Defense.²⁴⁶ It is also important to note that the *ad hoc* tribunals require that aggravating circumstances be proven beyond reasonable doubt,²⁴⁷ while mitigating circumstances require no more than proof on a balance of probabilities.²⁴⁸ In *Prosecutor v. Češić*, the Sentencing Tribunal could not conclude on a balance of probabilities that the accused was of a good character,²⁴⁹ and therefore did not give him the credit due to a convicted person of good character. The Sentencing Tribunal seemingly based its decision on the typical Anglo-American legal arrangement which places the burden of proof in respect of mitigating circumstances on the accused.²⁵⁰ One might well wonder how the burden of proof with regard to mitigating circumstances will play itself

note 235, ¶¶ 125, 141, 145; Deronjić, *supra* note 235, ¶ 155; Stakić, *supra* note 235, ¶ 416; Prosecutor v. Hadžihasanović & Kubura, IT-01-47-A, Judgment, ¶ 325 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Apr. 22, 2008); Bizimungu v. The Prosecutor, ICTR-00-56B-A, Judgment, ¶ 400 (Int'l Crim. Trib. For Rwanda June 30, 2014); Prosecutor v. Zdravko Tolimir, IT-05-88/2-A, Judgment, ¶ 644 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Apr. 8, 2015); Bemba Gombo, *supra* note 9, ¶19.

²⁴⁶ Kunarać, *supra* note 235, ¶ 847; Stakić, *supra* note 235, ¶ 406.

²⁴⁷ Delalić, *supra* note 244, ¶ 763; Kunarać, *supra* note 235, ¶ 847; Prosecutor v. Sikirica, IT-95-8-S, Sentencing Judgment, ¶ 110 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Nov. 13, 2001); Momir Nikolić, *supra* note 235, ¶ 126; Prosecutor v. Dragan Nikolić, IT-02-60/1-A, Judgment on Sentencing Appeal, ¶ 145 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Mar. 8, 2006); Češić, *supra* note 235, ¶ 47; Deronjić, *supra* note 235, ¶ 155; Blaškić, *supra* note 242, ¶¶ 686, 697; Kajelijeli v. The Prosecutor, ICTR-98-44A-A, Judgment, ¶ 294 (Int'l Crim. Trib. For Rwanda May 23, 2005); Prosecutor v. Babić, IT-03-72-A, Judgment, ¶ 43 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 July 18, 2005); Prosecutor v. Nahimana, ICTR-99-52-T, Judgment, ¶ 1038 (Int'l Crim. Trib. For Rwanda Nov. 28, 2007); Prosecutor v. Renzaho, ICTR-97-31-T, Sentencing Judgment, ¶ 822 (Int'l Crim. Trib. For Rwanda July 14, 2009); Gatete, *supra* note 235, ¶ 677; Lubanga, *supra* note 235, ¶ 33.

²⁴⁸ Delalić, *supra* note 244, ¶ 590; Kunarać, *supra* note 235, ¶ 847; Sikirica, *supra* note 247, ¶ 110; Prosecutor v. Simić, IT-95-9-A, Sentencing Judgment, ¶ 40 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Nov. 28, 2006); Stakić, *supra* note 235, at ¶ 920; Momir Nikolić, *supra* note 235, ¶ 126; Dragan Nikolić, *supra* note 247, ¶ 145; Deronjić, *supra* note 235; Blaškić, *supra* note 242, ¶ 697; Kajelijeli, *supra* note 247, ¶ 294; Babić, *supra* note 247, at ¶ 43; Prosecutor v. Miroslav Bralo, IT-95-17-A, Judgment, ¶ 8 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Apr. 2, 2007); Prosecutor v. Dragan Zelenović, IT-96-23/2-A, Sentencing Judgment, ¶ 11 (Int'l Trib. For the Pros. Of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 Oct. 31, 2007); Prosecutor v. Nahimana, ICTR-99-52-T, Judgment, ¶ 1038 (Int'l Crim. Trib. For Rwanda Dec. 3, 2003); Hadžihasanović & Kubura, *supra* note 245, ¶ 302; Gatete, *supra* note 235, ¶ 677; Lubanga, *supra* note 235, ¶ 33.

²⁴⁹ Češić, *supra* note 235, ¶ 87.

²⁵⁰ See Kajelijeli, *supra* note 247, ¶ 294 (noting that the burden of proof with the regard to mitigating circumstances is on the accused).

out in jurisprudence of the ICC, given the express provision in the ICC Statute that a person standing trial in the ICC will under no circumstances “have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”²⁵¹ It is submitted that this provision applies only to material elements of a crime, and since mitigating factors are not elements of the crime as such, the ICC will most likely follow the approach of the *ad hoc* Tribunals and require an accused to prove mitigating factors relied upon on a balance of probabilities.

It is also worth noting that the weight to be attached to mitigating circumstances is discretionary;²⁵² and that absence on mitigating circumstances can never serve as an aggravating circumstance.²⁵³

The *Rules of Procedure and Evidence* mention the following circumstances that must be taken into account for purposes of punishment and which in essence fall under the present heading as defined for purposes of this survey:

In general, the age, education, social and economic conditions of the convicted person;²⁵⁴

As an aggravating circumstance, prior convictions for crimes within the jurisdiction of the ICC or of a similar nature;²⁵⁵ and

As a mitigating circumstance, the convicted person’s conduct after the act, including his or her efforts to compensate victims and any cooperation with the Court.²⁵⁶

A. *Circumstances Existing at the Time the Offence was Committed*

The following extenuating or aggravating circumstances may be singled out as ones that existed at the time the offence was committed.

1. *Individual Circumstances of the Accused*

According to Faiza King & Anne-Marie La Rosa, personal circumstances should mainly be confined to factors that enable the perpetrator to commit the particular crime, such as his or her position in the military or civilian

²⁵¹ Rome Statute, *supra* note 1, art. 67(1)(i).

²⁵² Prosecutor v. Naletilic, IT-98-34-T, Judgment, ¶ 742 (Mar. 31, 2003); Stakić, *supra* note 235, ¶ 405.

²⁵³ Blaškić, *supra* note 242, ¶ 687; Prosecutor v. Plavšić, IT-00-39&40/1-S, Sentencing Judgment, ¶ 64 (Feb. 27, 2003).

²⁵⁴ RPE, *supra* note 86, Rule 145(1)(c).

²⁵⁵ *Id.* Rule 145(2)(b)(i).

²⁵⁶ *Id.* Rule 145(2)(a)(ii).

hierarchy.²⁵⁷ The *Rules of Procedure and Evidence* go well beyond these confines and explicitly mention the age, education, and social and economic conditions of the convicted person, which, it would seem, can serve as either mitigating or aggravating circumstances.²⁵⁸

One is not concerned with personal attributes of the Accused that may be indicative of reduced culpability. The *Rules of Procedure and Evidence*, quite rightly, deal separately with “the degree of intent”²⁵⁹ and “diminished mental capacity”,²⁶⁰ which constitute, within the meaning of this survey, sentencing factors of the offence.

Individual (subjective) circumstances of the accused—such as age, background, education, intelligence, and mental structure—received special prominence in the sentencing directives of the ICTR in the case of *Kambanda*²⁶¹ In *Prosecutor v. Furundžija*, the young age of the accused (twenty-three years at the time the offence was committed) was taken into account as a mitigating circumstance.²⁶² In *Prosecutor v. Serushago*, the ICTR accepted as a mitigating factor the fact that the convicted person was the father of six children, two of whom were still very young.²⁶³ In *Prosecutor v. Vincent Rutaganira*, the Trial Chamber held the old age of the accused (sixty years) and the state of his health (he suffered from diabetes and was in poor health) are factors to be taken into account by the Chamber in determining the sentence.²⁶⁴ In *Prosecutor v. Biljana Plavšić*, the fact that until the time of the offence the accused was known to have

²⁵⁷ King & La Rosa, *supra* note 8, at 322–23, 332.

²⁵⁸ RPE, *supra* note 86, Rule 145(1)(c).

²⁵⁹ *Id.*

²⁶⁰ *Id.* Rule 145(2)(a)(i).

²⁶¹ *Prosecutor v. Kambanda*, ICTR 97-23-S, Judgment, ¶¶ 28–29 (Sept. 4, 1998); *see also* *Prosecutor v. Krstić (A)*, IT-98-33-T, Judgment, ¶ 267 (Aug. 2, 2001).

²⁶² *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgment, ¶¶ 284, 291 (Dec. 10, 1998); *see also* Erdemović, *supra* note 243, ¶ 16(i) (where the convicted person was twenty-three years old at the time the crime was committed); Delalić, *supra* note 244, at ¶ 1283 (where the convicted person was nineteen years old at the time the crime was committed); Serushago, *supra* note 236, ¶ 39 (where the convicted person was thirty-seven years old at the time the crime was committed); *Prosecutor v. Serugendo*, ICTR-2005-84-I, Judgment, ¶ 91 (Int’l Crim. Trib. For Rwanda June 12, 2006).

²⁶³ Serushago, *supra* note 236, ¶ 39; *see also* Erdemović, *supra* note 243 (referring to the convicted person’s “current family status”); Furundžija, *supra* note 262, ¶ 280 (noting, though, ¶ 284, that this factor must not be given “significant weight”); Banović, *supra* note 235, ¶ 82 (taking into account that the accused is married and has a child); Obrenović, *supra* note 235, ¶ 139 (noting that the accused was married to an economist and is the father of a six-year old boy); *Prosecutor v. Rutaganira*, ICTR-95-1C-T, Judgment, ¶¶ 120–21 (Int’l Crim. Trib. For Rwanda Mar. 14, 2005) (noting that being the father of nine children and having a wife who has become deputy mayor in charge of women’s development in her *commune*, “augurs well for the potential rehabilitation of the Accused into a local community and his joining the national reconciliation process”).

²⁶⁴ Rutaganira, *supra* note 263, at ¶¶ 132–36.

“led an honest, honourable and private family, professional and social life was taken into account in mitigation of sentence.”²⁶⁵

In *Prosecutor v. Goran Jelešić*, the Tribunal decided that “Judges cannot accord too great a weight” to personal attributes of the convicted person, such as age (he was twenty-three years old when the crime was committed), no previous convictions for any violent crime, and being the father of a young child.²⁶⁶ On appeal, focusing only on the element of age, the Appeals Chamber recognized that age is an element that should be considered for sentencing purposes,²⁶⁷ but since all that is required was for the Trial Chamber to consider the age of the accused, which it did,²⁶⁸ the appeal on this ground was dismissed.

Emphasis in jurisprudence of the ICTY and ICTR on age as a mitigating factor has been criticized by one analyst, denouncing for example the verdict in *Furundžija*, referred to above,²⁶⁹ as “a strange decision, as clearly at the age of 23, the accused is old enough to be aware that his offences were unlawful,”²⁷⁰ or noting that in *Kayishema & Ruzindana*, where Rizindana was thirty-two years old,²⁷¹ the ICTR “gave a ridiculously wide interpretation to the term youth.”²⁷² The same analyst, on the other hand, applauded a prison sentence of fifteen years (instead of five as requested by the Defence) in the case of Esad Landžo (an Accused in the *Case* who was nineteen years old at the relevant time) praiseworthy, since it “prevented the Accused from exploiting the excuse of age as a way of avoiding full accountability for his crime.”²⁷³ This line of reasoning is misleading, since the age of an accused was but one of several sentencing

²⁶⁵ Plavšić, *supra* note 253, at ¶ 108.

²⁶⁶ *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, ¶ 124 (Dec. 14, 1999); *see also* *Furundžija*, *supra* note 262, at ¶ 284 (saying the same in regard to absence of previous convictions and the family disposition of the convicted person); *Obrenović*, *supra* note 235, at ¶ 140 (noting that in view of the gravity of the crime, the family circumstances of the accused cannot be afforded any significant weight); *Momir Nikolić*, *supra* note 235, at ¶ 169–170 (deciding that family circumstances, such as the accused being a teacher, was married and had two sons can be said of many accused persons and should not be given any significant weight); *Gatete*, *supra* note 235, at ¶ 681 (proclaiming that, given the gravity of the crimes committed, the Trial Chamber can only accord “very limited weight” to the lengthy public service, family situation and health condition of the accused).

²⁶⁷ *Jelisić*, *supra* note 6, ¶¶ 129, 131; *see also* *Erdemović*, *supra* note 243, ¶ 16; *Furundžija*, *supra* note 262, ¶ 284; *Blaškić*, *supra* note 242, ¶ 778; *Kunarać*, *supra* note 235, ¶ 864; *Prosecutor v. Kordić & Čerkez*, *supra* note 54, ¶ 853; *Banović*, *supra* note 235, ¶ 75; *Dragan Nikolić*, *supra* note 235, ¶ 146; *Deronjić*, *supra* note 235, ¶ 124.

²⁶⁸ *Jelisić*, *supra* note 6, ¶ 131.

²⁶⁹ *Supra* note 262 and accompanying text.

²⁷⁰ Olaoluwa Olusanya, *Granting Immunity to Child Combatants Supranationally*, in *SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW* 87, 106 (Roelof Haveman & Olaoluwa Olusanya eds., 2006).

²⁷¹ *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgment, ¶ 12 (May 21, 1999).

²⁷² *Olusanya*, *supra* note 271, at 107.

²⁷³ *Id.* at 105.

factors taken into account by the sentencing tribunals. In cases where the Accused was young but not so young (say in his thirties), age was considered for sentencing purposes, not as a mitigating circumstance in itself, but with a view to the chances of rehabilitation of the convicted person.²⁷⁴ In *Prosecutor v. Češić*, the Sentencing Tribunal declined to accept the age of twenty-seven years as a mitigating factor since the accused was “well beyond the age of majority.”²⁷⁵ In *Prosecutor v. Plavišić*, the question whether being a senior (seventy-two years old) should serve as a mitigating factor was considered. The Tribunal stated that there was no authority in ICTY jurisprudence as to the effect of an advanced age on sentencing,²⁷⁶ but decided that an advanced age is a sentencing factor for two reasons: (a) physical deterioration that comes with age; and (b) the fact that the convicted person may have little worth-while time left to live for upon her release.²⁷⁷ The advanced age of the convicted person was therefore accepted by the Sentencing Tribunal as a mitigating factor.²⁷⁸ Sensitivity of the *ad hoc* Tribunals to age for sentencing purposes must indeed be applauded, since tender age and being not so young are in themselves mitigating factors.

Other personal circumstances that have featured in judgments of the *ad hoc* Tribunals’ sentencing directives are a poor family background,²⁷⁹ physical and mental condition,²⁸⁰ poor health,²⁸¹ indigence,²⁸² a mediocre level of education,²⁸³ an immature and fragile personality,²⁸⁴ a corrigible personality favorable to rehabilitation,²⁸⁵ not being a danger to society,²⁸⁶ the work record

²⁷⁴ See Kayishema & Ruzindana, *supra* note 25, at ¶ 12 (noting that for sentencing purposes it considered “the relatively young age of Ruzindana (thirty-two years old in 1994) and the possibility of rehabilitation”); Blaškić, *supra* note 235, ¶ 778 (noting that “[t]he case-law of the two ad hoc Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance”).

²⁷⁵ Češić, *supra* note 9, ¶ 91.

²⁷⁶ Plavišić, *supra* note 61, ¶ 103; Krnojelac, *supra* note 235, ¶ 533. In *Prosecutor v. Krnojelac*, the Sentencing Tribunal did mention the accused’s age as a “final matter to which the Trial Chamber has had regard in sentencing.”

²⁷⁷ Plavišić, *supra* note 61, ¶ 105.

²⁷⁸ *Id.* at ¶ 106.

²⁷⁹ Delalić, *supra* note 7, ¶ 1283; see also Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(i); Serushago, *supra* note 33, ¶ 36; Serushago, *supra* note 208, ¶ 24; Serugendo, *supra* note 147, ¶ 91 (simply mentioning the family position of the convicted person).

²⁸⁰ Erdemović (Sentencing Judgment), *supra* note 11, ¶ 44; see also Todorović (Sentencing Judgment), *supra* note 10, ¶ 93–95 (dealing with the diminished mental capacity of the convicted person).

²⁸¹ Rutaganda, *supra* note 61, ¶ 50, 472; Serugendo, *supra* note 147, ¶ 92, 94; Rutaganira, *supra* note 13, ¶ 133, 135–36.

²⁸² Tadić (Sentencing Judgment), *supra* note 96, ¶ 62.

²⁸³ Ruggiu, *supra* note 28, ¶ 61.

²⁸⁴ Delalić, *supra* note 7, ¶ 1283; see also Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(i) under *family background*; Jelisić (T), *supra* note 80, ¶ 125 (mentioning personality disorders).

²⁸⁵ Erdemović, *supra* note 11, ¶ 111.

²⁸⁶ *Id.*

of the convicted person,²⁸⁷ being non-nationalistic (that is, to one's credit, not entertaining sectional biases in a highly polarized plural society),²⁸⁸ and finally, having to serve a prison sentence far from home.²⁸⁹

Emphasis has also been placed, in extenuation, on the general nicety of a convicted person, for example: being “an honest and respectable citizen;”²⁹⁰ or being inspired by a sense of justice; being an idealist, being immature and impulsive, having worked in the local branch of the Red Cross; assisting foreigners, the underprivileged and illiterate persons in the region; and rendering assistance to young students.²⁹¹ Having “an honest character” and being “an easygoing young man showing no signs of bigotry or intolerance, with a desire to help others in difficulty,” was also considered in mitigation of sentence.²⁹² While a good character was mentioned as an extenuating circumstance in several judgments of the *ad hoc* Tribunals,²⁹³ in most cases little weight was given to the character of a convicted person for purposes of sentencing.²⁹⁴

2. *Prior Convictions*

The *Rules of Procedure and Evidence* mention, as an aggravating circumstance, “[a]ny relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature.”²⁹⁵ Although not mentioned in the *Rules of Procedure and Evidence*, it stands to reason that the absence of any prior convictions for such crimes should be taken into account in mitigation of the sentence. That, in any event, appears from several judgments of the *ad hoc* Tribunals.²⁹⁶

²⁸⁷ Tadić (Sentencing Judgment), *supra* note 96, ¶ 63.

²⁸⁸ Erdemović, *supra* note 11, ¶ 105–08; *see also* Furundžija, *supra* note 25, ¶ 280.

²⁸⁹ Erdemović, *supra* note 11, ¶ 111.

²⁹⁰ Ruggiu, *supra* note 28, ¶ 59; *see also* Serugendo, *supra* note 147, ¶ 91.

²⁹¹ Ruggiu, *supra* note 28, ¶ 61–62.

²⁹² Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(i) (under *Character*). As to the commendable character of a convicted person as a mitigating factor, *see also* Kunarać, *supra* note 5, ¶ 478; Nikolić, *supra* note 80, ¶ 164.

²⁹³ Aleksovski, *supra* note 9, ¶ 236; Blaškić, *supra* note 1, ¶ 779–82; Kupreškić, *supra* note 9, ¶ 459; Krnojelac, *supra* note 14, ¶ 519; Ntakirutimana, *supra* note 90, ¶ 895, 906; Momir Nikolić, *supra* note 80, ¶ 164; Obrenović, *supra* note 9, ¶ 134; Semanza, *supra* note 147, ¶ 397; Sylvestre Gacumbitsi v. The Prosecutor, Case No ICTR-2001-64-A, ¶ 195 (July 7, 2006).

²⁹⁴ Kunarać, *supra* note 153, ¶ 33; Blaškić, *supra* note 1, ¶ 782; Ntakirutimana, *supra* note 90, ¶ 908; Stakić, *supra* note 9, ¶ 926; Niyitegeka, *supra* note 129, ¶ 264–66; Semanza, *supra* note 147, ¶ 398; Seromba, *supra* note 186, ¶ 235.

²⁹⁵ RPE, *supra* note 86, Rule 145(2)(b)(i).

²⁹⁶ Tadić (Sentencing Judgment), *supra* note 96, ¶ 63; Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(i), under the heading, *Character*; Kambanda, *supra* note 9, ¶ 45; Furundžija, *supra* note 25, ¶ 280, 284; Aleksovski, *supra* note 11, ¶ 236; Jelisić (T), *supra* note 80, ¶ 124; Blaškić, *supra* note 1, ¶ 780; Banović,

In *Prosecutor v. Kordić*, the Trial Chamber noted, on the other hand, that “it will be rare” for personal circumstances, such as character, no previous convictions, poor health, and youth, to play “a significant part” in mitigation of a sentence.²⁹⁷ In *Prosecutor v. Furundžija*, the Trial Chamber decided that the fact that the accused had no previous convictions and was the father of a young child “[could not] be given significant weight in a case of [that] gravity.”²⁹⁸

B. Conduct of the Convicted Person after the Event

As far as the convicted person’s conduct after the criminal act is concerned, the *Rules of Procedure and Evidence* mention two examples, namely “efforts by the person to compensate the victims” and “any co-operation with the Court.”²⁹⁹ Judgments of the *ad hoc* Tribunals more generously laid special stress on co-operation by the accused with the Prosecutor, a guilty plea, regret and remorse.

1. Co-operation with the Court

The *Rules of Procedure and Evidence* of the ICC mention, as a mitigating circumstance, “co-operation with the Court,”³⁰⁰ while the *Rules of Procedure and Evidence* of the ICTY and of the ICTR expressly provide that “substantial co-operation with the Prosecutor by the convicted person” is to be taken into account as an mitigating circumstance.³⁰¹ Co-operation with the Prosecutor must, thus in terms of the latter set of Rules, be “substantial.”³⁰² Substantiality of co-operation will depend in part on “the extent and quality of the information provided to the Prosecution.”³⁰³ In *Prosecutor v. Mitar Vasiljević*, a Trial

supra note 6, ¶¶ 62, 76; Deronjić, *supra* note 9, ¶ 156; Ruggiu, *supra* note 28, ¶ 59; Rutaganira, *supra* note 13, ¶ 130; Serugendo, *supra* note 147, ¶ 91.

²⁹⁷ Kordić, *supra* note 54, ¶ 848.

²⁹⁸ Furundžija, *supra* note 25, ¶ 284; *see also* Banović, *supra* note 6, ¶ 76.

²⁹⁹ RPE, *supra* note 86, Rule 145(2)(a)(ii).

³⁰⁰ *Id.*

³⁰¹ *Rules of Procedure and Evidence of the International Criminal Tribunal*, Rule 101(B)(ii), U.N. Doc. IT/32/Rev.13, reprinted in *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, Basic Documents 29, at 130 (1998) [hereinafter ICTY RPE]; *Rules of Procedure and Evidence of the International Tribunal for Rwanda*, Rule 101(B)(ii), U.N. Doc. ITR/3/Rev.2 (July 5, 1996), reprinted in Virginia Morris & Michael Scharf, 2 *The International Criminal Tribunal for Rwanda* 19, at 55 (1999) [hereinafter ICTR RPE]; *see also* Vasiljević, *supra* note 80, ¶ 180 (emphasizing that the *Rules of Procedure and Evidence* of the *ad hoc* Tribunals only mention co-operation with the Prosecutor and do not cover other forms of co-operation).

³⁰² Vasiljević, *supra* note 80, ¶ 179.

³⁰³ Todorović (Sentencing Judgment), *supra* note 10, ¶ 86; *see also* Sikirica, *supra* note 80, ¶ 111; Plavšić, *supra* note 61, ¶ 63; Banović, *supra* note 6, ¶ 58; Češić, *supra* note 9, ¶ 62; Deronjić, *supra* note 9, ¶ 244.

Chamber of the ICTY found that cooperation with the Prosecutor was only “modest” but did deserve some, albeit very little, weight.³⁰⁴

In several of their judgments, the ICTY³⁰⁵ and the ICTR³⁰⁶ looked favorably upon substantial co-operation with the Prosecutor. Voluntary surrender was specially mentioned, to the convicted person’s credit, in *Prosecutor v. Serushago*.³⁰⁷ In *Prosecutor v. Obrenović*, the Sentencing Tribunal attached “little weight” to an offer by the Accused to surrender when he was arrested, because it was not clear whether he would have surrendered voluntarily if his arrest was not imminent.³⁰⁸

In *Prosecutor v. Blaškić*, the Trial Chamber laid down the conditions under which co-operation with the Prosecutor will qualify as mitigating factors:

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 co-operation depends on the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Provided that the co-operation lent respects the aforesaid requirements, the Trial Chamber classes such co-operation as a “significant mitigating factor[.]”³⁰⁹

In *Prosecutor v. Deronjević*, the Sentencing Tribunal decided, on basis of a guilty plea and substantial co-operation, that “a substantial reduction of the sentence deserved for the crime is warranted.”³¹⁰

Expecting nothing in return would mean that a plea agreement cannot be accepted as co-operation.³¹¹ In the *Čelebići Case*, the Trial Chamber of the ICTY

³⁰⁴ Vasiljević, *supra* note 137, ¶ 299; endorsed on appeal in Vasiljević, *supra* note 80, ¶ 180.

³⁰⁵ Erdemović (Sentencing Judgment), *supra* note 11, ¶¶ 99–101; Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(i), under the heading, *Character*, ¶ iv, 21; Todorović (Sentencing Judgment), *supra* note 10, ¶¶ 83–88; Plavšić, *supra* note 61, ¶ 109; Obrenović, *supra* note 9, ¶¶ 122, 129, 141; Deronjić, *supra* note 9, ¶ 156; Serugendo, *supra* note 147, ¶ 91.

³⁰⁶ Kayishema, *supra* note 25, at Sentence ¶ 20; Kambanda, *supra* note 9, ¶ 29, 36, 47, 61(i); Serushago, *supra* note 33, ¶¶ 31–33, 38, 41; Ruggiu, *supra* note 28, ¶¶ 56–58; Musema, *supra* note 107, ¶ 1007; Serushago, *supra* note 208, ¶ 24.

³⁰⁷ Serushago, *supra* note 33, ¶¶ 34, 41; *see also* Erdemović, *supra* note 11, ¶ 55; Kayishema, *supra* note 25, ¶ 20; Kupreškić, *supra* note 9, ¶¶ 853, 860, 863; Blaškić, *supra* note 1, ¶ 776; Kunarać, *supra* note 5, ¶ 868; Serushago, *supra* note 208, ¶ 24; Kupreškić, *supra* note 9, ¶ 430; Plavšić, *supra* note 61, ¶¶ 65, 84, 110; Obrenović, *supra* note 9, ¶¶ 136, 141; Deronjić, *supra* note 9, ¶¶ 156, 266; Rutaganda, *supra* note 61, ¶ 145.

³⁰⁸ Obrenović, *supra* note 9, ¶ 111; *see also* Deronjić, *supra* note 9, ¶ 267.

³⁰⁹ Blaškić, *supra* note 1, ¶ 774.

³¹⁰ Deronjić, *supra* note 9, ¶ 276.

³¹¹ *Contra* Schabas, *supra* note 73, at 497 (stating that if an admission of guilt is to be a mitigating factor,

altogether rules out an attempt at plea bargaining as a mitigating factor.³¹² In the case of *Duško Tadić*, the Trial Chamber found that although there was “some degree of co-operation” by the accused with the Prosecutor, it did not live up to the standard of “substantial co-operation” and should therefore not be taken into account for sentencing purposes.³¹³ Although substantial co-operation with the prosecutor serves as a mitigating factor, failure of an accused to co-operate is not necessarily an aggravating factor,³¹⁴ because an accused has the right to be presumed innocent and can reap the benefit of the fact that the burden of proof rest squarely on the shoulders of the prosecution.

2. Admission of Guilt

An admission of guilt is not expressly mentioned in the ICC’s *Rules of Procedure and Evidence* as a mitigating factor, probably because of differences of opinion between proponents of the adversarial and the inquisitorial procedures as to the significance of such a plea.³¹⁵ It could, of course, come within the general confines of co-operation with the Court,³¹⁶ but has been mentioned in judgments of the *ad hoc* Tribunals as an extenuating circumstance alongside co-operation with the Court.³¹⁷

In *Erdemović*, the Trial Chamber of the ICTY had this to say about an admission of guilt:

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

it would encourage plea bargaining).

³¹² Delalić, *supra* note 7, ¶ 1280.

³¹³ Tadić (Sentencing Judgment), *supra* note 8, ¶ 19; *see also* Tadić (Sentencing Judgment), *supra* note 96, ¶ 58 (noting that the convicted person did not co-operate and denied his guilt).

³¹⁴ Plavšić, *supra* note 61, ¶ 64; Banović, *supra* note 6, ¶ 61; Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, Judge and Sentence ¶ 127 (Apr. 13, 2006); Gatete, *supra* note 78, ¶ 680.

³¹⁵ France and Rwanda were among those who believed that an admission of guilt should not be taken into account for sentencing purposes. *See* Schabas, *supra* note 25, at 1526 note 193.

³¹⁶ *See* Peglau, *supra* note 2, at 148.

³¹⁷ Serushago, *supra* note 208, ¶ 24; *see also* Erdemović (Sentencing Judgment), *supra* note 11, ¶ 55; Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(ii); Kambanda, *supra* note 9, ¶¶ 36, 50, 52, 61(iii); Serushago, *supra* note 33, ¶¶ 35, 41; Kayishema, *supra* note 25, at Sentence ¶ 20; Ruggiu, *supra* note 28, ¶ 53–55; Jelisić (A), *supra* note 80, ¶ 122; Todorović (Sentencing Judgment), *supra* note 10, ¶ 76; Sikirica, *supra* note 80, ¶¶ 148–51, 192–93, 228; Kupreškić, *supra* note 9, ¶ 464; Plavšić, *supra* note 61, ¶¶ 65, 66–81, 110; Banović, *supra* note 6, ¶ 62, 68; Obrenović, *supra* note 9, ¶¶ 111–18, 141; Nikolić, *supra* note 35, ¶¶ 146, 232–37; Češić, *supra* note 9, ¶ 60; Deronjić, *supra* note 9, ¶ 156; Serugendo, *supra* note 147, ¶¶ 89, 91.

Tribunal the time and effort of a lengthy investigation and trial is to be commended.³¹⁸

In *Prosecutor v. Momir Nikolić*, the Sentencing Tribunal cautioned against affording “undue consideration or importance to the role of a guilty plea to saving of resources.”³¹⁹ The Tribunal referred to a strongly worded dissenting opinion of Judge David Hunt, in the case against Slobodan Milošević, relating to the admissibility of evidence in the form of written statements, which was seemingly resorted to by the ICTY to comply with the Completion Strategy imposed upon the *ad hoc* Tribunals by the Security Council.³²⁰ According to Judge Hunt, the ICTY “will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.”³²¹ In *Momir Nikolic*, the Sentencing Tribunal stated along much the same lines that “savings of time and resources may be a *result* of guilty pleas,” but “should not be the main *reason* for promoting guilty pleas through plea agreements.”³²² An appropriate sentence must primarily be based on the gravity of the offence and not on a guilty plea.³²³

In *Todorović*, the Trial Chamber added to the benefits of an admission of guilt mentioned in *Erdemović* the fact that it “relieves victims and witnesses of the necessity of giving evidence with the attendant stress which this may incur,”³²⁴ but also noted that to derive all the benefits concerned that would prompt a lighter sentence, the admission of guilt must be entered before commencement of the trial and in any event not at a late stage of the

³¹⁸ Erdemović (Second Sentencing Judgment), *supra* note 25, ¶ 16(i) (under *Character*); *see also* Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 2; Todorović (Sentencing Judgment), *supra* note 10, ¶ 80; Plavšić, *supra* note 61, ¶ 73; Banović, *supra* note 6, ¶¶ 66, 68; Nikolić, *supra* note 80, ¶ 151; Obrenović, *supra* note 9, ¶ 118; Dragan Nikolić, *supra* note 35, ¶¶ 121, 231; Deronjić, *supra* note 9, ¶ 234 *see also id.*, ¶ 134 (the Sentencing Tribunal noting that “[a]s a side effect, albeit not a significant mitigating factor, it [a guilty plea] also saves the Tribunal’s resources”); Češić, *supra* note 9, ¶ 56, 59.

³¹⁹ Nikolić, *supra* note 80, ¶ 67.

³²⁰ *See* S.C. Res. 1503 (2003) of Aug. 28, 2003, calling on the *ad hoc* Tribunals to take all possible measures to complete all trial activities at front instance by the end of 2008.

³²¹ Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ¶ 22 (Oct. 21, 2003); *see also* Prosecutor v. Pauline Nyiramasuhuko, Case No. ICTR-98-42-A15bis, ¶ 17 (Sep. 24, 2003).

³²² Momir Nikolić, *supra* note 80, ¶ 67.

³²³ *Id.*, ¶ 69.

³²⁴ Todorović, *supra* note 10, ¶ 80. *See also id.*, ¶ 92 (accepting remorse, a guilty plea and co-operation with the Prosecutor as mitigating factors); Banović, *supra* note 6, ¶ 66; Nikolić, *supra* note 80, ¶ 150; Obrenović, *supra* note 9, ¶ 117; Nikolić, *supra* note 34, ¶¶ 121, 231; Deronjić, *supra* note 9, ¶ 134 (noting that “[a] guilty plea protects victims from having to relive their experiences and re-open old wounds”); Češić, *supra* note 9, ¶¶ 56, 58.

proceedings.³²⁵ The importance of the timing of a guilty plea was also emphasized in *Prosecutor v. Sikirica*.³²⁶ In *Prosecutor v. Milan Simić*, the Sentencing Tribunal afforded “some credit” to a guilty plea despite its lateness.³²⁷ In the *Delalić Case*, the Trial Chamber refused to accept a “belated partial admission of guilt” as a mitigating factor.³²⁸ In the *Case of Duško Tadić*, the Trial Chamber took a grim view of the fact that the accused falsely asserted an alibi and denied his guilt.³²⁹

In *Kambanda*, the Trial Chamber reiterated that an admission of guilt demonstrates honesty,³³⁰ and added that a guilty plea “is likely to encourage other individuals to recognize their responsibilities during the tragic events which occurred in Rwanda in 1994.”³³¹ The Tribunal did note that a guilty plea does not necessarily mean remorse.³³² Other deserving attributes of a guilty plea are its contribution to establishing the truth,³³³ its potential of promoting reconciliation within a strife-torn community,³³⁴ and its being an important step toward rehabilitation of the accused and his or her re-integration in society.³³⁵

It is one thing to say that an admission of guilt should count as a mitigating factor; it is quite another to hold a plea of not guilty as an aggravating factor. There is also a difference between persistently denying one’s guilt and entering a plea of not guilty. Pleading not guilty and leaving it up to the Prosecutor to prove one’s guilt beyond reasonable doubt is a recognized right of every person confronting criminal charges, and that right is founded on the presumption of innocence which in turn is a salient principle of criminal justice.³³⁶ Aggravation

³²⁵ Todorović, *supra* note 10, ¶ 81. *See also* Momir Nikolić, *supra* note 80, ¶ 148; Češić, *supra* note 9, ¶ 56; Rutaganira, *supra* note 13, ¶ 151–52.

³²⁶ Sikirica, *supra* note 80, ¶ 150. *See also* Nikolić, *supra* note 34, ¶ 231; Deronjić, *supra* note 9, ¶ 234.

³²⁷ Simić, *supra* note 153, ¶ 87. *See also* Nikolić, *supra* note 34, ¶ 231.

³²⁸ Delalić, *supra* note 7, ¶ 1279. *See also* Blaškić, *supra* note 1, ¶ 777 (noting that an admission of guilt is an extenuating factor but that it did not apply in that case because the accused did not plead guilty).

³²⁹ Tadić (Sentencing Judgment), *supra* note 96, ¶ 58; Kayishema & Ruzindana, *supra* note 25, at Sentence ¶ 16.

³³⁰ Kambanda, *supra* note 9, ¶ 53. *See also* Erdemović (Second Sentencing Judgement), *supra* note 25, ¶ 16(ii); Banović, *supra* note 6, ¶ 66.

³³¹ Kambanda, *supra* note 9 ¶ 61(ii). *See also* Erdemović (Second Sentencing Judgement), *supra* note 25, ¶ 16(ii); Nikolić, *supra* note 34, ¶ 231; Deronjić, *supra* note 9, ¶ 234.

³³² Kambanda, *supra* note 9, ¶ 52.

³³³ Sikirica, *supra* note 80, ¶ 149; Plavšić, *supra* note 61, ¶ 73, 80; Banović, *supra* note 6, ¶ 66; Nikolić, *supra* note 80, ¶ 149; Obrenović, *supra* note 9, ¶ 116; Nikolić, *supra* note 34, ¶¶ 231, 233, 237; Češić, *supra* note 9, ¶¶ 28, 58; Deronjić, *supra* note 9, ¶¶ 234, 236.

³³⁴ Plavšić, *supra* note 61, ¶¶ 70, 79, 80; Banović, *supra* note 6, ¶ 66; Nikolić, *supra* note 80, ¶¶ 72, 145, 149; Obrenović, *supra* note 9, ¶¶ 111, 116; Nikolić, *supra* note 34, ¶¶ 121, 231; Češić, *supra* note 9, ¶¶ 28, 58; Deronjić, *supra* note 9, ¶¶ 234, 236.

³³⁵ Češić, *supra* note 9, ¶ 28.

³³⁶ Nikolić, *supra* note 80, ¶ 148; Obrenović, *supra* note 9, ¶ 113.

of sentence should not merely be based on a plea of not guilty. However, an accused who gives false evidence and by word and conduct dishonestly persist in his or her innocence exceeds the accepted confines of the presumption of innocence, and that conduct can and should be taken into account for sentencing purposes.

3. *Regret and Remorse*

The *Rules of Procedure and Evidence* of the ICC refer in quite general terms to conduct of the convicted person after the criminal act, adding only one example indicative of regret and remorse: “efforts by the person to compensate victims.”³³⁷

Co-operation with the prosecution, a guilty plea, and evidence of remorse as grounds of extenuation³³⁸ have had a mixed reception in the *ad hoc* Tribunals. Regret and remorse, or regret and repentance, was accepted in *Ruggiu* as a mitigating factor,³³⁹ and having been expressed in public was favorably looked upon by the sentencing Tribunal in *Prosecutor v. Serushago*.³⁴⁰ In *Prosecutor v. Obrenović*, the Sentencing Tribunal accepted genuine remorse as “a substantial mitigating factor.”³⁴¹ In *Prosecutor v. Plavšić*, the expression of remorse connected with a guilty plea was considered a mitigating factor.³⁴² In *Prosecutor v. Kupreskić*, the Appeals Chamber of the ICTY decided that “limited acceptance of guilt” ought to be given “some consideration in terms of sentence.”³⁴³ However, remorse was treated in *Kambanda* with a great deal of skepticism.³⁴⁴ The Trial Chamber noted in that case that “remorse is not the only reasonable inference that can be drawn from a guilty plea.”³⁴⁵ It must above all

³³⁷ RPE, *supra* note 86, Rule 145(2)(a)(ii).

³³⁸ See generally Kayishema & Ruzindana, *supra* note 25, ¶ 20; *Ruggiu*, *supra* note 28, ¶¶ 53–55; *Todorović*, *supra* note 10, ¶ 92.

³³⁹ *Ruggiu*, *supra* note 28, ¶¶ 56–58, 69–72. See also *Erdemović*, *supra* note 11, ¶¶ 44, 45; *Erdemović* (Second Sentencing Judgment), *supra* note 25, ¶ 16(iii) (under the heading, *Remorse*); *Kambanda*, *supra* note 9, ¶ 34, 52; *Serushago*, *supra* note 33, ¶¶ 40–41; *Blaškić*, *supra* note 1, ¶ 775; *Delalić*, *supra* note 34, ¶ 1277; *Serushago v. Prosecutor*, *supra* note 208, ¶ 24; *Todorović*, *supra* note 10, ¶ 89–92; *Sikirica*, *supra* note 80, ¶ 148; *Plavšić*, *supra* note 61, ¶¶ 65, 70; *Banović*, *supra* note 6, ¶ 62; *Obrenović*, *supra* note 9, ¶¶ 121, 141; *Nikolić*, *supra* note 34, ¶¶ 231, 237, 241–42; *Deronjić*, *supra* note 9, ¶¶ 156, 234; *Serugendo*, *supra* note 147, ¶ 91.

³⁴⁰ *Serushago*, *supra* note 33, ¶ 40.

³⁴¹ *Obrenović*, *supra* note 9, ¶ 121.

³⁴² *Plavšić*, *supra* note 61, ¶ 73.

³⁴³ *Kupreskić*, *supra* note 293, ¶ 464. See also *Nikolić*, *supra* note 34, ¶ 146; *Prosecutor v. Deronjić*, *supra* note 9, ¶ 156.

³⁴⁴ *Kambanda*, *supra* note 9, ¶¶ 51–52.

³⁴⁵ *Id.*, ¶ 52; see *id.*, ¶ 61. See also *Jelišić* (T), *supra* note 80, ¶ 127 (the Tribunal only affording “relative weight” to the accused’s admission of guilt, because he did not show any remorse before the guilty plea), *aff’d* by *Jelišić*, *supra* note 80 (A), ¶¶ 119–23; *Nikolić*, *supra* note 80, ¶ 161 (the Sentencing Tribunal accepting the

be demonstrated that the expression of remorse is sincere.³⁴⁶ It is possible, of course, that an accused can express sincere regrets without admitting his or her participation in the crime.³⁴⁷

In the *Čelebići Case*, the accused after his conviction submitted to the Tribunal a written statement expressing his regrets. The tribunal would have nothing of it, stating that “[s]uch 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 sentencing.”³⁴⁸

Participating in acts of mercy and assistance to victims will almost invariably be perceived by a sentencing Tribunal as concrete evidence of regret and remorse, or perhaps of reluctant participation under pressure in the criminal act and will either way serve in mitigation of sentence.³⁴⁹

A persistent defiant attitude will, on the other hand, demonstrate absence of regret and remorse and will do the accused no good when upon conviction the sentence to be imposed becomes an issue. In the *Čelebići Case*, for example, the Trial Chamber noted: “[t]he 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.”³⁵⁰

CONCLUDING OBSERVATIONS

This is not the time and place to record and to evaluate the American sentencing practices. However, there are some lessons in the above analysis for

expression of remorse as a mitigating factor but in view of the circumstances of the case declining to afford “substantial weight to this factor.”)

³⁴⁶ Erdemović, *supra* note 11, ¶¶ 96–98; Erdemović, *supra* note 25, ¶ 16; Jelisić (T), *supra* note 80, ¶ 127; Blaškić, *supra* note 1, ¶ 775; Todorović, *supra* note 10, ¶ 89; Serushago, *supra* note 33, ¶ 41; Ruggiu, *supra* note 28, ¶¶ 69–72; Sikirica, *supra* note 80, ¶¶ 152, 194, 230; Simić (Sentencing Judgment), *supra* note 153, ¶ 92; Banović, *supra* note 6, ¶ 72; Vasiljević, *supra* note 80, ¶ 177; Češić, *supra* note 9, ¶ 66; Deronjić, *supra* note 9, ¶ 156; Rutaganira, *supra* note 13, ¶ 158.

³⁴⁷ Vasiljević, *supra* note 80, ¶ 177.

³⁴⁸ Delalić, *supra* note 7, ¶ 1279.

³⁴⁹ Erdemović, *supra* note 11, ¶ 111; Erdemović (Second Sentencing Judgement), *supra* note 25, ¶ 16(iii), 17; Kambanda, *supra* note 9, ¶¶ 34, 50–52; Delalić, *supra* note 7, ¶ 1270; Serushago, *supra* note 33, ¶ 38, 40; Kayishema & Ruzindana, *supra* note 25, ¶ 20; Rutaganira, *supra* note 61, ¶ 471; Ruggiu, *supra* note 28, ¶¶ 73–74; Delalić, *supra* note 34, ¶ 775–76; Serushago v. Prosecutor, *supra* note 208, ¶ 24; Sikirica, *supra* note 80, ¶ 242; Krnojelac, *supra* note 14, ¶ 518; Banović, *supra* note 6, ¶ 83; Obrenović, *supra* note 9, ¶ 134; Nikolić, *supra* note 34, ¶ 146; Češić, *supra* note 9, ¶ 78; Deronjić, *supra* note 9, ¶ 156; Rutaganira, *supra* note 13, ¶ 155.

³⁵⁰ Delalić, *supra* note 7, ¶ 1244. *See also id.*, ¶¶ 1217, 1251.

American penologists. It is worth noting, in conclusion, that the sentencing practices of the United States are not even remotely in conformity with what has come to be accepted as international directives of sentencing standards.

In the United States, almost exclusive emphasis is placed, for sentencing purposes, on the gravity of the crime.³⁵¹ In *Solem v. Helms*, it was decided that proportionality of a punishment to the offence is determined with three criteria in mind: “(i) the gravity of the offence and the harshness of the penalty; (ii) the sentences imposed on other criminals [for offences of the same gravity] in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions.”³⁵² The essence of the penal policy in *Solem* was subsequently overruled in *Harmelin v. Michigan*, where Justice Scalia decided that “the Eighth Amendment contains no proportionality guarantee”;³⁵³ that taking into account mitigating factors for sentencing purposes “has no support in the text and history of the Eighth Amendment”;³⁵⁴ and that “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.”³⁵⁵ Individualization of sentencing to fit the crime, the criminal, and the interests of society, which have become the international standard of penology, is thus not part of the American sentencing philosophy. Prosecuting juveniles as adults and imposing penalties in such cases without regard to their reduced culpability, maintaining the death penalty and imposing prison sentences without the option of parole, and applying the sentencing guidelines as though they were mandatory simply deviates from taking into account for sentencing purposes the personal circumstances and culpability of a convicted person.

A few isolated, yet important, recent innovations by the U.S. Supreme Court must be applauded as initiatives that brought the United States closer to upholding generally accepted standards in its criminal justice system. Proclaiming juvenile executions,³⁵⁶ and life imprisonment of juveniles without the option of parole as a mandatory sentence,³⁵⁷ to be in violation of the “cruel and unusual” criteria of the Eighth Amendment was a step in the right direction, even though one must admit that the Court had to make a quantum leap to bypass

³⁵¹ See, e.g., *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offence.”).

³⁵² *Solem v. Helms*, 463 U.S. 277, 292 (1983).

³⁵³ *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991).

³⁵⁴ *Id.*, at 994.

³⁵⁵ *Id.*, at 994–95.

³⁵⁶ *Roper v. Simmons*, 354 U.S. 551 (2005).

³⁵⁷ *Miller v. Alabama*, 567 U.S. 460 (2012).

the “unusual” prong of the Eighth Amendment to reach its admirable conclusion in the life sentence without parole decision. No less than twenty-nine jurisdictions mandated life sentences without the option of parole for juvenile offenders, but noting differences that obtain in those jurisdictions, relating for example to minimum age requirements, whether the transfer of juvenile offenders to an adult court occurs automatically in the case of some offences or is left in the discretion of prosecutors, the U.S. Supreme Court declined to find that the laws applied by state courts meet the criterion of “usual” punishments.³⁵⁸

In coming to this conclusion, the U.S. Supreme Court used language that is in conformity with international standards of juvenile justice, referring for example to the “lesser culpability” and “greater capacity for change” of juvenile offenders,³⁵⁹ and the requirement of “individualised sentencing.”³⁶⁰ It emphasized that a basic precept of justice requires “that punishment for crime should be graduated and proportioned,” and that individuals consequently have “the right not to be subjected to excessive sanctions.”³⁶¹ The U.S. Supreme Court proclaimed quite admirably that juveniles have “lessened culpability” and therefore “are less deserving of the most severe punishments.”³⁶² The “gaps between juveniles and adults” are threefold: “(a) lack of maturity and an underdeveloped sense of responsibility;” (b) vulnerability or susceptibility “to negative influences and outside pressures, including peer pressure”, and (c) the fact that “the character of a juvenile is not as well formed as that of an adult.”³⁶³

Such rhetoric is indeed admirable but will remain a voice calling in the dark as long as juveniles can be prosecuted and sentenced as though they were adults; or in general, as long as the United States declines to impose the basic norm of criminology that punishments must not only be determined by the gravity of the crime, the manner in which it was executed, its harmful consequences, and the means of perpetration by the convicted person, but should also take note of and accommodate the personal circumstances of the individual to be sentenced, such as his or her degree of intent, diminished mental capacity, or individual circumstances, such as age, background, education, intelligence, and mental structure.

³⁵⁸ *Id.*, at 483–89.

³⁵⁹ *Graham v. Florida*, 560 U.S. 48, 69, 74 (2010); *Alabama*, 567 U.S. at 465.

³⁶⁰ *Alabama*, 567 U.S. at 465.

³⁶¹ *Simmons*, 354 U.S. at 560; *Alabama*, 567 U.S. at 469.

³⁶² *Graham*, 560 U.S. at 68; *Alabama*, 567 U.S. at 471.

³⁶³ *Simmons*, 354 U.S. at 569–70. *See also Graham*, 560 U.S. at 68; *Alabama*, 567 U.S. at 471.

It is to be hoped that the American sentencing system will in the not too distant future do justice to the concept of “justice” within the true meaning of the concept of criminal *justice*!