

Punishment for Genocide – Exploratory Analysis of ICTR Sentencing

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Abstract

The sentencing practice of the International Criminal Tribunal for Rwanda (ICTR) is a relatively neglected topic in academic discussions. The few empirical studies on sentencing of international crimes have focused primarily on the sentencing practice of its ‘sister court’, the International Criminal Tribunal for the Former Yugoslavia (ICTY). Unlike ICTY defendants, almost all ICTR defendants have been convicted of and sentenced for genocide – arguably the most serious international crime. This empirical study examines the sentencing practice of the ICTR and analyses the relationship between sentence severity and the primary consideration in sentencing – crime gravity. The relevant principles stemming from ICTR case law are reviewed, followed by an examination of the interrelationship between sentence severity and factors relating to crime gravity, such as category of crime, scale of crime and the form and degree of a defendant’s involvement in the crime. The ICTR judges appear in most cases to follow the main principles emphasized in their case law, with sentences gradated in line with the increasing seriousness of defendants’ crimes and their culpability.

Keywords

International Criminal Tribunal for Rwanda (ICTR); genocide; sentencing; gravity; empirical analysis; homogeneity analysis by alternating least squares (HOMALS)

1. Introduction

In 1994, a small group of hardliners within Rwanda’s ruling party and military organized the most rapid extermination campaign of the 20th century. Immediately after a presidential assassination, Hutu hardliners consolidated power in Rwanda, eliminated their main political opponents, formed an interim government, mobilized civilians and declared war on ‘the Tutsi enemy’. The instructions were the same everywhere: eliminate the Tutsis. One hundred days later, the hardliners had lost the war and the violence had claimed hundreds of thousands of civilian lives. The main characteristic of the violence was the systematic annihilation of Rwanda’s Tutsi minority. It was a deliberate, systematic, state-led campaign to

eliminate a racially defined social group in an act of genocide.¹ The Hutu enacted their campaign with alarming efficiency. In the one hundred days between 6 April and 19 July 1994, they murdered around 800,000 individuals.² Roughly, this means 333.3 deaths per hour, and five and a half deaths per minute, with an even higher rate of murder in the first four weeks. The Rwandan genocide, therefore, has the gruesome distinction of exceeding the rate of killing attained during the Holocaust. And unlike the Nazis, who used modern industrial technology to accomplish the most primitive of ends, the architects of the Rwandan genocide enlisted the wide support of citizens employing primarily low-tech and physically demanding instruments of death such as machetes, which required an intimacy with their victims. This genocide was executed with a brutality and sadism that defy the imagination.³

The International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council in 1994 in response to these unimaginable atrocities. Its main purpose is to prosecute and hold persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda in 1994.⁴ The ICTR has now been operating for more than fifteen years and its judges have convicted and sentenced over 40 individuals, primarily the architects, leaders and orchestrators of the genocidal campaign. Together with its ‘sister court’,⁵ the International Criminal Tribunal for Yugoslavia (ICTY), it has revived and further developed substantive and procedural international criminal law. ICTR case law in particular provides important legal and factual material in relation to genocide, as in the case, for example, of *Akayesu*. As well as being the first international judgment to interpret the definition of genocide, it was also groundbreaking in that it affirmed rape as a genocidal act. The *Kambanda* case, involving the prime minister in charge during the genocide, was the first international judgment against a head of government; it also was the first time anyone at that level had pleaded guilty to genocide.⁶ The ICTR is also the first international tribunal

¹ Scott Strauss, *The Order of Genocide, Race Power and War in Rwanda* (Cornell University Press, USA, 2006) p. 1.

² UN, Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, 15 December 1999. Estimates vary between a minimum of 500,000 (Allison Des Forges, *Leave None to Tell the Story, Genocide in Rwanda*, Human Rights Watch, March 1999, p. 18, <http://www.grandslacs.net/doc/1317.pdf>, 12 April 2011) and a maximum of 1.1 million (Filip Reyntjens, *Rwanda Ten Years On: From Genocide to Dictatorship*, 103 *African Affairs* (2004) p. 178.

³ Michael Barnett, *Eyewitness to Genocide, The United Nations and Rwanda*, (Cornell University Press, USA, 2002) p. 1.

⁴ UN SC Res. 955, UN Doc S/RES/955, para. 1.

⁵ Ines Monica Weinberg de Roca and Christopher M. Rassi, ‘Sentencing and Incarceration in the Ad Hoc Tribunals’, 44 *Stanford Journal of International Law* (2008) 1–44, p. 5.

⁶ Eric Mose, ‘ICTR’, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, New York, 2009) p. 355.

to have tackled the issue of the appropriate punishment for genocide ('the crime of crimes'), and its sentencing jurisprudence has established many important precedents.

The main objective of this study is to empirically analyze the sentences handed down by the ICTR for genocide and other international crimes under its jurisdiction. ICTR jurisprudence on genocide has been discussed extensively in academic literature.⁷ Several scholars have doctrinally analyzed ICTR sentencing case law, focusing on selected issues such as the purposes of international sentencing,⁸ the principle of proportionality,⁹ recourse to Rwandan domestic sentencing practice¹⁰ or aggravating and mitigating factors.¹¹ Only limited attention, however, has focused on ICTR sentencing practice. To our knowledge, only one study has empirically analyzed the sentences announced by the ICTR.¹² Meernik examined the early ICTR verdicts and sentences by analyzing the sentences handed down to ten ICTR defendants, with a focus on the category of convicted crime, the level of power of a defendant, and aggravating and mitigating factors. The very small number of cases meant the analysis was limited to descriptive comparisons of sentences across different categories of cases. The author concluded that ICTR sentencing appears to be in line with the standards dictated by the law.¹³ Several empirical studies have analyzed ICTY sentencing,¹⁴ while there have also been

⁷ Larissa J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (VU University, Amsterdam, 2005); Guenael Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, New York, 2005).

⁸ Andrew N. Keller, 'Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR', 12 *Indiana International & Comparative Law Review* 53, (2001) pp. 53-47; Stuart Beresford, 'Unshackling the Paper Tiger – The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', 1 *International Criminal Law Review* (2001) pp. 33-90.

⁹ Mirko Bagaric and John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework', 6 *International Criminal Review* (2006) pp. 191-255.

¹⁰ Robert D. Sloane, 'Sentencing for the 'Crime of Crimes', The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda', 5 *Journal of International Criminal Justice* (2007) pp. 713-734.

¹¹ Bagaric and Morss, *supra* note 9.

¹² James Meernik, 'Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda', 4 *International Criminal Law Review* (2004) pp. 65-81.

¹³ *Ibid.*, p.79.

¹⁴ James Meernik and Kimi L. King, 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis', 16 *Leiden Journal of International Law* (2003) pp. 717-750; James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia', 47 *Journal of Conflict Resolution* (2003) pp. 140-162; Barbora Hola, Alette Smeulers and Catrien Bijleveld, 'Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice', 22 *Leiden Journal of International Law* (2009) pp. 79-97; Uwe Ewald, 'Predictably Irrational – International Sentencing and Its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices', 10 *International Criminal Law Review*(2010) pp. 365-402.

studies comparing ICTY and ICTR sentences¹⁵ or seeking to evaluate the consistency of international sentencing by combining ICTY and ICTR data.¹⁶ None of these studies, however, focuses exclusively on the ICTR.

Consequently, very limited attention in academic discourse has been devoted to ICTR sentencing. There are a few possible reasons for this relative neglect: the ICTR may be seen as operating in the shadow of the ICTY (it was established after the ICTY, the first post-Cold War *ad hoc* international criminal tribunal); it is located in Arusha, Tanzania, far away from the main stage of international law and politics in Europe and the US, and it deals with an event that occurred in a distant African state. In addition, the law governing its functioning (the Statute¹⁷ and the Rules of Procedure and Evidence [‘RoPE’])¹⁸ is almost identical to that of the ICTY, while both tribunals have a common Appeals Chamber and used to have a common Prosecutor. Last but not least, the ICTY has ruled on many more cases and ICTY case law arguably covers a broader array of legal issues. Some commentators have also argued that ICTR fact-finding is of poor quality and have called for improvements.¹⁹

For several reasons, however, it is important to examine ICTR sentencing practice separately: (i) the ICTR is dealing predominantly with genocide charges and, in contrast to the ICTY, which has dealt with a wider variety of crimes, almost all those appearing at the ICTR have been convicted of genocide; (ii) the ICTR has primarily focused on higher-ranking orchestrators of crimes and government figures, while the ICTY, especially at the beginning, tried and sentenced many more lower-ranking hands-on executioners of persecutorial campaigns; and finally (iii) in contrast to the ICTY, life sentences are much more prevalent in ICTR sentencing practice. ICTR practice needs, therefore, to be examined in more detail in order to identify any variation in international sentencing for genocide committed by leaders and influential figures in a society.

This article consequently focuses exclusively on sentences handed down by the ICTR. Firstly, it doctrinally examines the mechanisms of sentence determination emerging from ICTR case law. Secondly, it empirically analyzes ICTR sentencing

¹⁵ Weinberg de Roca, *supra* note 5; Barbora Hola, Alette Smeulers and Catrien Bijleveld, ‘International Sentencing Facts and Figures: The Sentencing Practice at the ICTY and ICTR’, 9 *Journal of International Criminal Justice* (2011) pp. 411–439.

¹⁶ Joseph W. Doherty and Richard H. Steinberg, *An Empirical Study of ICTY and ICTR Sentencing: Doctrine Versus Practice* (2009), www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1443468, 1 February 2011.

¹⁷ UN (1994). Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, UN Doc S/RES/955. Art. 23.

¹⁸ Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Adopted on 5 July 1995; as amended.

¹⁹ Nancy A. Combs, *Fact Finding without Facts, The Uncertain Evidentiary Foundations of International Criminal Conviction* (Cambridge University Press, New York, 2010).

practice with a specific focus on the relationship between sentence severity and gravity of crime. We further develop previous studies by examining the multivariate associations between sentence severity and factors relevant to the assessment of ‘the primary consideration in sentencing’ – crime gravity – including the extent of crime, the category and type of convicted crime, the way and degree of defendants’ participation in crime and their enthusiasm in committing crimes. The article begins with a brief discussion of ICTR sentencing law and a doctrinal analysis of the ICTR sentencing principles. In section 2, we outline the mechanisms of sentence determination according to the ICTR judges. Section 3 focuses on the empirical part of the study and describes the research protocol, including the data collection and methodology applied. The results of the empirical investigation are reported in section 4. The article concludes with a discussion of the empirical findings in the light of the ICTR sentencing principles and the overall context of sentencing for international crimes.

2. ICTR Sentencing Law and Principles

Article 23 of the ICTR Statute contains only very basic guidelines as to what factors should be taken into account when imposing sentences: gravity of the offence and the individual circumstances of the convicted person. The Statute also instructs judges to have recourse to the general practice regarding prison sentences in the courts of Rwanda.²⁰ The Statute does not define what is actually meant by the gravity of a crime or what individual circumstances should be relevant. No sentencing tariff for crimes under the Tribunal’s jurisdiction is provided. The RoPE provide only very limited clarification of how sentences should be determined. Indeed only one of the 126 provisions, Rule 101, deals with factors relevant to sentencing. This provision limits the range of applicable sentences, with the maximum sentence available to the judiciary being life imprisonment. Judges are also instructed to take into account any aggravating and/or mitigating circumstances when determining sentences. However, no list of aggravating and mitigating factors is provided. Only two potential mitigating factors – “superior orders”²¹ and “substantial cooperation with the Prosecutor”²² – are explicitly mentioned. Consequently, judges have broad discretionary powers to determine sentences.

²⁰ Art 23(1) ICTR Statute. Judges have ruled, however, that national practices shall serve solely as a point of reference and shall not be treated as binding. Consequently, the guidance derived from national practice arguably has minimal impact on sentencing practice. Cf. *Prosecutor v. Nahimana, Barayagwiza, Ngeze* (ICTR-99-52) Appeals Judgment, 28 November 2007, para. 1063.

²¹ Art 6(4) ICTR Statute.

²² Rule 101(B)(i) RoPE.

Over time, more detailed sentencing principles have evolved in both ICTR and ICTY case law.²³ Sentence severity seems to be primarily determined by factors relating to the gravity of the crime (by assessing aggravating factors and applying the principles of proportionality, totality and gradation), and the sentence is then adjusted by taking into account the individual circumstances of the offender, i.e. mitigating factors ('principle of individualization').

2.1. *Litmus Test of Sentence Severity – Gravity of Crime*

The starting point of sentence determination is the gravity of the offence. Judges have described the gravity of the crime as the "litmus test".²⁴ In other words, the consideration of most importance in determining the appropriate sentence.²⁵ The principles of proportionality, totality and gradation seem to be the governing criteria in this respect: a penalty must reflect the totality of the crimes committed by a person and be proportionate to the gravity of his or her crimes.²⁶

In theory, the gravity can be determined *in abstracto* and *in concreto*. The gravity *in abstracto* is based on an analysis, in terms of criminal law, of the subjective and objective elements of the crime. The gravity *in concreto* depends on the harm done and on the culpability of the offender.²⁷ ICTR judges arguably take into account both the gravity *in abstracto* of the crime and its gravity *in concreto* in determining the severity of a sentence.²⁸ The concrete (i.e. effective) gravity of crime seems, however, to be the most important consideration in meting out sentences as ICTR judges always emphasize the need to evaluate the gravity in the light of the particular circumstances of the case.

Regarding the gravity *in abstracto*, especially in early jurisprudence, the judges often emphasized the uniqueness of the crime of genocide because of its *dolus specialis* (the special intent that requires the crime to be committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such). The judges argued that, due to this special feature, genocide is labelled

²³ The law governing sentence determination, as described above, is almost identical at the ICTY and ICTR. The principles of sentence determination developed from case law also seem very similar at the two tribunals. Indeed judges at one tribunal often refer to the case law of the other in their general sentencing considerations. The tribunals also share a joint Appeals Chamber, which contributes to the development of consistent jurisprudence. In this respect, the tribunals have developed a relatively consistent sentencing narrative, with similar basic principles emphasized in both jurisdictions.

²⁴ *Prosecutor v. Akayesu* (ICTR-96-4-A) Appeals Judgment, 23 November 2001, para.413.

²⁵ *Prosecutor v. Rutaganda* (ICTR-96-3) Appeals Judgment, 26 May 2006, para. 591.

²⁶ *Ibid.*

²⁷ Allison M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', 87 *Virginia Law Review* (2001) 415-501, p. 609.

²⁸ Andrea Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law', 51 *International and Comparative Law Quarterly* (2002) 583-609, p. 609.

the ‘crime of crimes’ and that this must be taken into account when deciding the sentence.²⁹ They also noted that:

despite the gravity of violations of Article 3 common to the Geneva Conventions [i.e. war crimes under the ICTR jurisdiction] they should be considered as lesser crimes as [*sic*] genocide or crimes against humanity. It is, however, difficult to rank genocide and crimes against humanity in terms of their respective gravity. They are both crimes which particularly shock the collective conscience.³⁰

This differentiation, however, is not so profound in more recent case law. Instead, the judges have emphasized that there is no hierarchy among individual categories of international crimes and that *all* crimes under their jurisdiction represent very serious violations of international humanitarian law.³¹ In *Ntakirutimana*, the Trial Chamber highlighted the judges’ flexibility in determining the sentence under the Statute and the RoPE and noted that:

individuals convicted of genocide, crimes against humanity and [war crimes] may each face the highest sentence if the circumstances of the case, after assessment of any individual and mitigating factors, are deemed to require it. By the same token, not all persons convicted of genocide, to name but the ‘crime of the crimes’, are bound to serve the highest sentence.³²

Despite these pronouncements on equal gravity (*in abstracto*) of all international crimes, there are indications that genocide could be considered, by reason of its peculiar *mens rea*, as more serious than either war crimes or crimes against humanity.³³ From arguments presented in some cases it could be inferred that a conviction for genocide automatically entails the severest sentence, being life imprisonment. In *Musema*, for example, the Defence Counsel acknowledged on appeal that since the defendant had been convicted of genocide, it would be difficult to argue for a sentence other than life imprisonment. The Appeals Chamber confirmed the sentence of life imprisonment despite quashing one of Musema’s convictions for rape as a crime against humanity.³⁴ In *Gacumbitsi* the Appeals Chamber increased the trial sentence of 30 years to life imprisonment.

²⁹ *Prosecutor v. Serushago* (ICTR-98-39) 5 February 1999, para.13; *Prosecutor v. Rutaganda*, (ICTR-96-3) 6 December 1999, para. 451; *Prosecutor v. Musema* (ICTR-96-13) 27 January 2000, para. 981.

³⁰ *Prosecutor v. Kambanda* (ICTR-97-23) 4 September 1998, para. 14.

³¹ *Prosecutor v. Renzaho* (ICTR-97-31-T) 14 July 2009, para. 817; *Prosecutor v. Rutaganda*, *supra* note 25, para. 590.

³² *Prosecutor v. Elizaphan & Gerard Ntakirutimana* (ICTR-96-10 & ICTR-96-17) 21 February 2003, para. 776.

³³ Mettraux, *supra* note 7, p. 348.

³⁴ *Prosecutor v. Musema* (ICTR-96-13-A) Appeals Judgment, 16 November 2001, para. 372. It should be noted, however, that while confirming the sentence, the appeal judges emphasized primarily the fact that the accused was involved in “several attacks that resulted in considerable number of victims” not the fact that he was convicted of genocide.

After noting that the Appellant had played a central role in the genocidal campaign in his commune of Rusumo, where thousands of Tutsi had been killed or seriously harmed, and noting his enthusiasm and sadism in instigating rapes, the judges emphasized that “unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here.”³⁵ This statement implies that the ‘default’ sentence for genocide is life imprisonment, unless compelling mitigating factors are present. The reasoning along these lines was argued by the Prosecution in *Rukundo* and the Appeals Chamber dismissed it stating that “[j]ust as there is no category of cases (...) where the imposition of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated. Each case remains to be examined on its own individual facts”.³⁶

Consequently, the legal label attached to the conduct is perceived only as a starting point of sentence determination. Given the inherent gravity of all the crimes in the Statute it is not sufficient to cite the abstract gravity of the crime at the sentencing stage.³⁷ Throughout the case law it is the gravity *in concreto* that is primarily emphasized. Judges have often argued that, in assessing the gravity of the offence, “the Chamber ought to go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form and degree of the participation of the Accused in the crime”.³⁸ In most cases, the concept of gravity has been interpreted as encompassing two aspects: i) the particular circumstances of the case; in other words, the magnitude of harm caused by the offender and represented by, for example, the scale of the crime, the number of victims, the extent of victims’ suffering, and ii) the form and degree of the accused’s participation in the crime; in other words, the offender’s culpability.

The principle of gradation enables judges to differentiate between “crimes which are of the most heinous nature, and those which, although reprehensible and deserving severe penalty, should not receive the highest penalties”.³⁹ Judges acknowledge that:

although there is no pre-established hierarchy between crimes within the jurisdiction of the Tribunal (...) it is obvious that, in concrete terms, some criminal behaviours are more serious than others. The effective gravity of the offences committed is the deciding factor in the determination of the sentence.⁴⁰

³⁵ *Prosecutor v. Gacumbitsi* (ICTR-2001-64) Appeals Judgment, 7 July 2006, para. 204.

³⁶ *Prosecutor v. Rukundo* (ICTR-2001-70) Appeals Judgment, 20 October 2010, para. 260.

³⁷ *Prosecutor v. Kajelijeli* (ICTR-98-44) 1 December 2003, para. 953.

³⁸ *Prosecutor v. Kamuhanda* (ICTR-99-54A_T) 22 January 2003, para.760; *Prosecutor v. Semanza* (ICTR-97-20) 15 May 2003, para. 555.

³⁹ *Ntakirutimana*, *supra* note 32, para. 773.

⁴⁰ *Nahimana, Barayagwiza, Ngeze*, *supra* note 20, para. 1060.

Consequently, life imprisonment as the severest sentence available to judges should be reserved for the most serious offenders,⁴¹ being those at the upper end of the sentencing scale, such as those who planned, led or ordered atrocities, or those who committed crimes with particular zeal or sadism. Accordingly, judges often reiterate that offenders receiving the most severe sentences tend to have been in senior positions of authority, such as ministers in the interim government.⁴² However, very severe sentences can also be imposed on those at lower levels who zealously orchestrated or participated in crimes. Conversely, secondary or indirect forms of participation, such as complicity in genocide or facilitation of crime, usually result in lower sentences.⁴³ In *Kayishema & Ruzinanda*, for example, the judges enumerated the factors that distinguished the different levels of culpability of the two accused, both of whom were convicted of genocide. Kayishema, the prefect of Kibuye, was convicted for his leading role and active participation in several massacres and attacks on sacred places such as churches. He was a leader in the genocide in Kibuye prefecture and instigated and ordered attacks resulting in the death of thousands of victims. Ruzinanda, a commercial trader in Kigali, played a leadership role during one attack and also personally participated in the killings. The judges emphasized the heinous means by which he committed murders such as

the vicious nature of the murder of a sixteen-year old girl named Beatrice. Ruzinanda ripped off her clothes and slowly cut off one of her breasts with a machete. When he finished, he cut off her other breast while mockingly telling her to look at the first one as it lay on the ground, and finally he tore open her stomach.⁴⁴

Despite the horrendous nature of Ruzinanda's acts the judges concluded that Kayishema deserved more punishment than Ruzinanda. The principal reasons for this decision can be traced back to the principle of gradation: Kayishema occupied a position of authority, while Ruzinanda did not. Kayishema's conviction also covered a more extensive crime base; he was educated, a medical doctor and, at the time of genocide, the prefect of Kibuye, who betrayed the ethical duty that he owed to his community. In addition, on at least one occasion, Kayishema instructed and praised Ruzinanda, thus indicating his more important and leading role in the atrocities. Taken together, these considerations led the judges to sentence Kayishema to life imprisonment, while Ruzinanda was given a sentence of 25 years.⁴⁵

⁴¹ *Prosecutor v. Nahimana, Barayagwiza, Ngeze* (ICTR-99-52), 3 December 2003, para. 1097.

⁴² *Prosecutor v. Setako* (ICTR-04-81) 25 February 2010, para. 500.

⁴³ *Prosecutor v. Karena* (ICTR-01-74) 7 December 2007, para. 583.

⁴⁴ *Prosecutor v. Kayishema & Ruzinanda* (ICTR-95-1) 21 May 1999, para. 18.

⁴⁵ *Ibid.*, para. 26.

Since all the crimes coming before the ICTR are especially grave and reproachable and in many national jurisdictions would most probably attract the severest sentences, ICTR judges differentiate between ‘serious and horrendous’ and ‘even more serious and horrendous’ criminal acts. By applying the principle of gradation they seek to distinguish between different degrees of individual culpability and gradate sentence severity accordingly, taking into account the role of the offender in the overall conflict situation. The severest sentences are reserved, therefore, for the most serious cases.

2.2. *Fine-tuning of Appropriate Sentence - Individual Circumstances*

As discussed above, sentence severity is primarily determined on the basis of considerations relating to the gravity of crime. The judges then adjust the sentence length by way of individualization, taking into account the personal and individual circumstances of each defendant. The individual circumstances are usually discussed under the heading of ‘mitigating and aggravating factors’. Aggravating factors are circumstances directly related to the committing of the offence for which the person has been charged and to the offenders themselves when they committed the offence. Therefore, they are linked with the assessment of the gravity of the crime in that they increase the seriousness of offences committed. They must be proven by the Prosecution beyond any reasonable doubt.⁴⁶ The standards applying in respect of mitigating factors are looser. Mitigating factors need to be established on the balance of probabilities and need not relate directly to the offences for which the person has been charged.⁴⁷ The weight to be accorded to mitigating circumstances lies within the discretion of a Trial Chamber.⁴⁸ A finding of mitigating circumstances relates to the assessment of the sentence and in no way derogates from the gravity of crime nor diminishes the responsibility of convicted persons or lessens the degree of condemnation of their actions. Such a finding mitigates the punishment, not the crime.⁴⁹ A defendant can be sentenced to life imprisonment if the gravity of the offence requires the imposition of the maximum sentence, even if judges identify mitigating circumstances.⁵⁰

The Tribunal has accepted a wide range of factors in aggravation/mitigation of a sentence. Whether a certain factor constitutes a mitigating or an aggravating circumstance depends largely on the particular circumstances of the case. In some cases, therefore, factors such as education or the respected status of a defendant

⁴⁶ *Ntakirutimana*, *supra* note 32, para. 781.

⁴⁷ *Prosecutor v. Ndindabahizi* (ICTR-01-71) 15 July 2004, para. 502.

⁴⁸ *Kajelijeli*, ICTR-98-44A, Appeals Judgment, 23 May 2005, para. 294.

⁴⁹ *Ntakirutimana*, *supra* note 32, para. 781.

⁵⁰ *Muhimana* (ICTR-95-1B) Appeals Judgment, 21 May 2007, para. 234.

have been accepted in mitigation,⁵¹ while in others they have aggravated the sentence.⁵² It is not possible, therefore, to determine in absolute terms whether a certain factor will always be accepted by judges as aggravating or mitigating.

The most common aggravating factor cited by ICTR judges is abuse of a position of authority, leadership, influence or trust. The ICTY has held that a leadership position increases the relative seriousness of the crime if such a person abuses or wrongfully exercises the power stemming from that position. Those with authority over a group of people can inflict more damage through this group than they would be able to inflict alone. Moreover, the leader serves as an example for others to act in a similar way, and criminal behaviour by a leader is likely, therefore, to have a more serious effect. Furthermore, if a person holds a public position or a position of public duty and exploits it in order to commit or facilitate a crime, the relative seriousness of the crime is further increased by the breach of duty and the legitimate expectations attached to this position.⁵³ Direct and active criminal participation by figures in authority is always deemed to aggravate a sentence.⁵⁴ Similar considerations are reflected in the sentencing arguments used by the ICTR. In *Ndindabahizi*, for example, the judges noted as particularly aggravating the facts that he (i) was a well known and influential figure in his native prefecture of Kibuye and abused the trust placed in him by the population; (ii) held an official position in the interim government and, instead of promoting peace and reconciliation in his capacity as minister, he supported and advocated a policy of genocide; (iii) personally participated in the massacres in Gitwa Hill, during which thousands of people were killed; and (iv) actively influenced and encouraged others to take part in massacres.⁵⁵ The judges have argued along similar lines in the majority of ICTR cases concerning national, regional or even local leadership figures.

The most common mitigating factor cited by ICTR judges is ‘assistance to victims’. It should not be assumed, however, that assistance to victims is always accepted in mitigation. Indeed judges often reject defendants’ requests for sentence mitigation on these grounds. In particular, ‘selective assistance to victims’ does not necessarily result in sentence mitigation. In some ICTR judgments Trial Chambers have refused to accept this factor in mitigation or have even indicated that it could aggravate a sentence.⁵⁶

⁵¹ *Prosecutor v. Barayagwiza, Nsengiyumva and Ntabakuze* (ICTR-99-52-A) Appeals Judgment, 28 November 2007, para. 1069.

⁵² *Prosecutor v. Rukundo* (ICTR-01-70) 27 February 2009, para. 599.

⁵³ *Krajisnik* (IT-00-39) 27 September 2006, paras. 1156-1157.

⁵⁴ *Milutinovic et al* (IT-05-87) 26 February 2009, para. 1151.

⁵⁵ *Ndindabahizi*, *supra* note 47, para. 508.

⁵⁶ *Prosecutor v. Bikindi* (ICTR-01-72) 2 December 2008, para. 457; *Prosecutor v. Muvunyi* (ICTR-2000-55A) 12 September 2006, para. 540.

In the following paragraphs, we empirically analyze how factors related to the primary consideration in sentencing, which according to the ICTR judges is the gravity of the crime, are reflected in sentence severity. Our analysis includes factors relating to the gravity *in abstracto* (i.e. the category of convicted crime) and the gravity *in concreto* (i.e., the extent of criminal activity, defendants' ranks and roles in the crime, the type of underlying offence and the particular degree of zeal in committing the crime). The following section outlines the methodology used and method of data collection.

3. Methodology

ICTR defendants are usually convicted on multiple counts, but receive one overall sentence. This single sentence is not broken down to reflect the extent to which each count contributes to the total length. It is impossible, therefore, to see how each conviction is reflected in the overall sentence; in this respect sentencing lacks transparency. This makes any statistical analysis of ICTR sentencing difficult. If we were to seek to extract the contribution of individual factors to sentence length, a statistical method such as multiple regression analysis would be the most appropriate.⁵⁷ However, the low number of cases and the high incidence of life sentences at the ICTR make it impossible to use regression (or any similar statistical method) to analyze ICTR sentencing practice.⁵⁸ We therefore performed a more exploratory study by using homogeneity analysis: a descriptive method that seeks to identify multivariate associations among selected variables.⁵⁹

⁵⁷) Multiple regression analysis is a statistical technique that attempts to use independent variables to predict a dependent variable, i.e. sentence length. It seeks a combination of predictors (i.e. legal factors) that best predict the sentence. It then enables assessment of the relative importance of the individual predictors, given the effect of other variables in the model.

⁵⁸) There are several reasons why regression analysis cannot be used: (i) the number of ICTR cases (the dataset) is very limited compared to the number of possible predictors and (ii) a solution would be too dependent on the value ascribed to the life sentences, and the distribution of dependent variables (even after recoding life sentences) would be very skewed.

⁵⁹) Homogeneity analysis is a non-linear, multivariate technique used mainly to explore and summarize data (its objective is not a confirmatory data analysis or statistical model testing). This technique is particularly suitable for dealing with categorical variables. It assigns numerical values to the categories and then treats those rescaled variables as if they were continuous. As the 'optimal scaling techniques' do not make any distributional assumptions, they are particularly suitable here since all the variables in our dataset are categorical and there is a prevalence of life sentences at the ICTR. The solution enables a researcher to investigate multivariate relationships between all categorical variable simultaneously, i.e. to analyze all the legal factors included in the analysis together. Researchers can use homogeneity analysis to explore and interpret the structure in the categorical data. However, the technique (in contrast, for example, to regression analysis)

3.1. *Data Collection*

All the 44 individuals sentenced by the ICTR in the period to 31 March 2011 were included in the analysis. This number includes all finalized sentences (i.e. sentences pronounced by a Trial Chamber without an appeal, or sentences modified or confirmed by an Appeals Chamber) and all sentences handed down by a Trial Chamber in cases still pending on appeal.⁶⁰ All information was obtained from written versions of the judgments published on ICTR web pages.⁶¹ The following data were collected from the ICTR judgments for each defendant: a) the length of the final sentence before any reduction due to time spent in detention; b) the category of crime of which a defendant was convicted; c) the scale of crime; d) the rank in the military or political hierarchy and e) the way in which defendants participated in crime (their main role).

All the variables were then coded as indicated in Table 1. Sentence length was coded as a 5-category variable encompassing short sentences (0 - 10 years), medium sentences (11 - 20 years), long sentences (21 - 30 years), very long sentences (31 - 45 years)⁶² and life imprisonment. Category of crime relates to the gravity of crime *in abstracto* and was coded as a 5-category variable indicating a combination of separate categories of crime of which a defendant was convicted, i.e. war crimes, crimes against humanity and genocide.

The gravity of crime *in concreto* is represented by two different variables: the scale of crime (indicating the overall harm caused by the individual defendants) and the rank of defendants combined with their typical role in crime (indicating their personal culpability). The scale of crime was coded as a 4-category variable capturing the scope of the defendant's criminal activity. From the judges' argumentation, it appears that the more extensive the criminal activity, the graver the crimes are considered as they entailed higher numbers of victims, were committed over longer periods of time and often involved more people executing crime. Cases were divided into four categories on the basis of the overall factual background underlying each defendant's conviction. We distinguished between (i) incidental crime, being those individuals convicted on the basis of isolated incidents such as involvement in a single attack or several attacks not committed over a protracted period of time; (ii) recurrent/extensive crime, whereby

does not provide information on the statistical properties of the solution. The conclusion based on the homogeneity analysis cannot therefore be generalized. Cf. Catrien Bijleveld and Eeke van der Burg, 'Analysis of Longitudinal Categorical Data Using Optimal Scaling Techniques', in Catrien Bijleveld and Leo J.T. van der Kamp, (eds.), *Longitudinal Data Analysis, Designs, Models and Methods* (Sage Publications, London, 1998) pp. 46-64.

⁶⁰ At the time of writing 10 individual cases were pending before the Appeals Chamber.

⁶¹ See <http://www.unictcr.org/Cases/tabid/204/Default.aspx>.

⁶² The longest determinate sentence handed down so far by the ICTR has been 45 years. Cf. *Prosecutor v. Kajelijeli*, *supra* note 48.

Table 1. Active Variables, their Categories and Frequencies (N=43)

<i>Variable</i>	<i>Measurement</i>	<i>Proportion</i>
Sentence length	1= 0 - 10 years	11.4%
	2= 11 - 20 years	15.9%
	3= 21 - 30 years	22.7%
	4= 31 - 45 years	11.4%
	5= life	38.6%
Category of crime	1= CAH	9.1%
	2=GEN	15.9%
	3=CAH+WC	2.3%
	4=GEN+CAH	56.8%
	5=GEN+CAH+WC ⁶³	15.9%
Scale of crime	1= isolated incident	18.2%
	2= recurrent/extensive	52.3%
	3= campaign	13.7%
	4= propaganda	15.9%
Role combined with rank	1= low organizer	2.3%
	2= low helper	4.5%
	3= low executioner	2.3%
	4= low bystander	2.3%
	5= low hands-on organizer	2.3%
	6= middle organizer	22.7%
	7= middle helper	15.9%
	8= middle executioner	2.3%
	9= middle bystander	11.4%
	10=middle hands-on organizer	9.1%
	11= high architect	4.5%
	12=high organizer	15.9%
	13=high hands-on organizer	4.5%

defendants were convicted on the basis of repeated crimes committed over a longer period of time; (iii) propaganda, whereby defendants were convicted on the basis of conduct that promoted crimes of others (general incitement), such as those associated with the RTLM radio station; and finally (iv) campaign, where defendants (officials with power over others) were found responsible for a wide array of crimes committed within a regional or state-wide genocidal campaign.

⁶³⁾ The ICTR has not convicted anyone solely of war crimes or of the combination of war crimes and genocide.

The personal culpability of defendants is represented by a variable combining their position in the whole conflict (i.e. their rank) and their typical role in the particular criminal acts of which they were convicted. In this way “the form and degree of participation of the accused in the crime” is best captured. As discussed above, ICTR judges have often argued that sentences are gradated in line with the rank in the overall system; however, the defendant’s position is not the only relevant consideration when assessing culpability. It is also important to establish how perpetrators personally contributed to violence: whether they passively stood by while being under a duty to intervene, whether they more actively facilitated the committing of crime of others by, for example, providing ammunition or whether they enthusiastically took part in killing and personally committed massacres. Especially in the case of higher-ranking influential figures it is often emphasised that their personal participation in massacres is a particularly important aggravating factor.

The rank of the offender was coded as a 3-category variable, distinguishing between low-ranking, middle-ranking and high-ranking individuals. Low-ranking offenders, such as rank and file soldiers, local politicians or individuals occupying positions such as a hospital doctor, commercial trader or a singer, held little or no power in the overall circumstances of the conflict. Middle-ranking individuals, such as more senior army commanders, *conseillers*, *bourgemesters*, pastors and priests in the Catholic church or leaders of the *Interahamwe*, had more extensive *de jure* or *de facto* power and/or authority to command or influence the conduct of others. Finally, high-ranking offenders comprise regional or national military and political leaders such as prefects, members of the national government, military officers above the rank of colonel or military commanders of operational sectors (being the military equivalent of a prefecture in Rwanda).

The typical role of a defendant was coded as a 6-category variable:⁶⁴ (i) main architects who devised a genocidal campaign and actively implemented it at state level; (ii) organizers who implemented the policies and played an organizational role (for example, planning, ordering or coordinating crime); (iii) hands-on organizers who not only coordinated crime committed by others, but also personally took part in atrocities; (iv) executioners who implemented genocidal campaigns on the ground and personally committed crimes; (v) helpers who mainly played an ancillary role by, for example, providing ammunition, active encouragement or logistical activities; and (vi) bystanders whose role was mainly passive, such as superiors who did not intervene when their subordinates were committing crimes. The rank and role of a defendant was then combined into one variable expressing that individual’s personal culpability.

⁶⁴ We determined the typical role of a defendant on the basis of the factual findings underlying the defendant’s convictions that were discussed in every judgment.

All the above variables were included in the analysis as active variables, with the ultimate solution being based on multivariate associations among these factors. Additionally, we collected information on a) the type of underlying criminal conduct; b) the mode of liability of which a defendant was convicted; c) whether a defendant pleaded guilty to the charges; and d) whether a defendant participated in crime particularly zealously or enthusiastically. These factors were then added to the analysis as passive variables to see where cases sharing these characteristics were placed in the solution (see Table 2).⁶⁵

Genocide, crimes against humanity and war crimes could all be committed through a wide variety of punishable acts listed in the respective articles of the ICTR Statute. These ‘underlying offences’ differ in character and range from killings involving torture, rape and inhuman treatment to property-related offences. The type of underlying offence of which a defendant is convicted relates to the assessment of the gravity *in concreto* of the crime since it clearly expresses the nature of the person’s criminal behaviour. The underlying offence was coded as a

Table 2. Passive Variables, their Categories and Frequencies (N=43) – Underlying Offence, Mode of Liability, Guilty Plea and Zeal

<i>Variable</i>	<i>Measurement</i>	<i>Proportion</i>
Underlying offence	1= ‘only’ killing	54.5%
	2= killing + violence	20.5%
	3= killing + rape	2.3%
	4= killing + violence + rape	13.6%
	5= killing + violence + torture	2.3%
	6= killing + violence + rape + torture	4.5%
Superior responsibility	1= YES	20.5%
Hands-on perpetrator	1= YES	47.7%
JCE (joint criminal enterprise)	1= YES	4.5%
Planner	1= YES	6.8%
Order-giver	1= YES	47.7%
Instigator	1= YES	27.3%
Aider	1= YES	59.1%
Guilty plea	1= YES	20.5%
Zeal	1= YES	20.5%

⁶⁵ See below for more details of the methodology and the distinction between active and passive variables.

6-category variable indicating a combination of underlying offences – killing, violence, rape, torture or other (unlawful imprisonment)⁶⁶ – of which a defendant was convicted. Since all the ICTR defendants were convicted of killing we examined all the possible combinations of criminal conduct to see whether any differences in sentence severity could be identified.

The judges use modes of individual liability to characterize an accused's participation in crime. These are provided for in Article 6 of the ICTR Statute, which distinguishes between superior responsibility and other modes of individual liability. In other words, individuals are responsible for a crime if they plan, instigate, order, commit or otherwise aid and abet its planning, preparation or execution. Participation in a joint criminal enterprise ('JCE') must be added to this list as a specific mode of liability used especially by the ICTY.⁶⁷ We coded each mode of liability of which a defendant was convicted as a separate variable.

We also included the variable indicating whether a defendant pleaded guilty to the charges. It has been argued in literature that a guilty plea is one of the most significant factors accepted by judges in mitigation.⁶⁸ In order to see the relationship between a guilty plea and sentence severity we coded a guilty plea as a dichotomous variable and included it in the analysis.

Finally we included the variable indicating whether the accused participated in crime zealously and with particular enthusiasm. As part of the principle of gradation the ICTR judges have often emphasised that lower-ranking offenders participating in atrocities with a particular zeal or sadism deserve severe sentences. We recorded all cases where judges explicitly noted a defendant's zeal, sadism or enthusiasm and coded zeal as a dichotomous variable.

3.2. *Method*

The collected data were then analyzed using multiple correspondence analysis (homogeneity analysis). This exploratory technique examines the multivariate associations between sentence severity and the selected case characteristics (in other words, factors relating to the gravity of crime, such as category of crime,

⁶⁶ Only one defendant has been convicted by the ICTR of an offence other than violence or murder. As well as being convicted of murder, violence and torture Samuel Imanishimwe was convicted of 'imprisonment' under Article 4c because of having ordered subordinates to detain civilians. As this was the only case in the whole sample, we included it in the category of murder combined with violence and torture; *Prosecutor v. Imanishimwe*, (ICTR-99-46), Appeals Judgment, 7 July 2006.

⁶⁷ Cf. Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007) p. 109. For further analysis of each responsibility mode see Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, (The Hague, T.M.C. Asser Press, 2003).

⁶⁸ Stephen M. Sayers, 'Defence Perspective on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia', 16 *Leiden Journal of International Law (LJIL)* (2003) p. 751.

extent of criminal activity, rank of the offender and the method of participating in criminal activities). Homogeneity analysis reduces complicated multivariate data structures to two-dimensional plots displaying all analyzed cases and their respective characteristics.⁶⁹ For this purpose a statistical software package HOMALS (Homogeneity Analysis by Alternating Least Squares, i.e. multiple correspondence analysis) in the SPSS.18 was used. In HOMALS all individual cases are related to their characteristics according to the principle of each case being located within the solution as closely as possible to its characteristics and, conversely, a characteristic being positioned as closely as possible to cases sharing that characteristic. In doing so, HOMALS attempts to achieve as much discrimination between categories as possible.⁷⁰ The multivariate structuring of characteristics and cases can be interpreted. If, for instance, three characteristics are typically found in a number of cases, the technique will in all likelihood position these characteristics in the same area of the solution. The cases will be located close to these characteristics. These cases then constitute what is regarded as a homogeneous group as the group is homogeneous with respect to these characteristics.⁷¹ In HOMALS, the position of a case in the solution is referred to as the 'object score'. The position of a characteristic is referred to as the 'category quantification'. The category quantification of a characteristic is equal to the average object score of all cases sharing that characteristic, while, conversely, a case's object score is the average of the category quantifications of its characteristics. The results can be interpreted by examining a position of categories and cases in the solution. Category quantifications that are placed together tend to occur together. Clusters (subgroups) of object scores indicate that homogeneous subgroups exist for which patterns or profiles of category quantifications are typical. By combining the interpretation of the category quantifications and groups of object scores, groups of cases can be labelled in terms of their typical characteristics. As a rule of thumb, the more peripheral groups are more particular and distinct; cases placed in the centre of the solution have either a fairly average pattern or unusual combinations of characteristics. Similarly, category quantifications placed in the centre are not typical for certain cases, but instead are shared by many.⁷² It should be noted that HOMALS is not a cluster analysis as such. Therefore, differences between individual groups (clusters) are gradual and fuzzy rather than distinct and absolute.

In the present analysis we sought to distinguish the ICTR cases/defendants on the basis of the sentence severity and gravity of crime as discussed by the ICTR judges. The HOMALS solution presented is based on sentence length, category

⁶⁹ See Catrien Bijleveld and Paul Smit, 'Homicide in the Netherlands: On the Structuring of Homicide Typologies', 10 *Homicide Studies* (2006) 195-219, p. 201.

⁷⁰ *Ibid.* p. 202.

⁷¹ *Ibid.*

⁷² *Ibid.*

of convicted crime, scale of crime and defendant's rank combined with the manner in which defendants participated in crime. These active variables are used to distinguish between the individual cases and to form the individual groups. We subsequently passively analyzed a number of other factors that arguably may have influenced sentence length in a particular case, such as the type of underlying offence, mode of liability, guilty plea and zeal. These passive variables do not influence the solution, but helped us to explore ICTR sentencing practice in more detail and to interpret the solution.⁷³

4. Results

The HOMALS analysis produced a solution with a satisfactory fit (1.271 out of maximum 2).⁷⁴ We can thus conclude that cases are well distinguishable on the basis of the selected characteristics. Figures 1 and 2 present the plots of object scores and category quantifications. The solution can be interpreted by examining these plots. The patterns are described, moving clockwise through the periphery of the solution. As noted above, the more central categories are less typical, while those at the periphery of a solution make the best distinction among the individuals.

In the upper right corner of the solution are the individuals convicted for passive, acquiescent behaviour - the lower ranking bystanders (some were classified as low-ranking and some as middle-ranking). These defendants were all convicted for failing to intervene in massacres and acting as 'approving spectators'⁷⁵ or 'accomplices by omission'⁷⁶ or were superiors who failed to investigate or punish crime committed by their subordinates.⁷⁷ They all pleaded guilty and were convicted solely of crimes against humanity. They admitted to having participated in one attack or in several separate incidents. Their involvement in atrocities was thus rather limited.⁷⁸ The sentences imposed on these defendants were the lowest

⁷³ The passive analysis enables additional characteristics to be placed alongside those on which the actual solution is based. Consequently, a researcher can see where cases sharing these characteristics are placed in a plot and can interpret results of the analysis in more detail. For more information on HOMALS, see Bijleveld & Smit, *Ibid.* pp. 201-205 and Appendix pp. 214-217.

⁷⁴ The fit of the solution indicates how well the examined variables distinguish between the cases. A total (maximal) fit of a HOMALS solution is equal to a number of dimensions of the solution, i.e. in our case 2. In practice, a fit under 0.3/0.2 is considered to be very low, while a fit over 0.8 is already accepted as large. See Catrien Bijleveld and Jacques Commandeur, *Multivariate Analyse, Een Inleiding voor Criminologen en Andere Sociale Wetenschappers* (Boom Juridische Uitgevers, The Hague, 2008) p. 234.

⁷⁵ *Prosecutor v. Nzabirinda* (ICTR-2001-77-T).

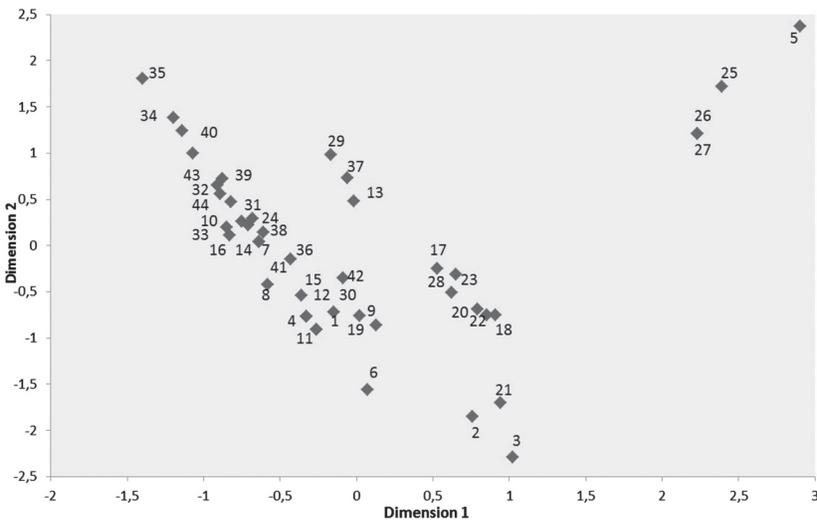
⁷⁶ *Prosecutor v. Rutaganira* (ICTR-95-1C).

⁷⁷ *Prosecutor v. Rugambarara* (ICTR-00-59).

⁷⁸ These factors may all relate to the fact that all these defendants pleaded guilty and entered into a plea agreement with the Prosecutor. By pleading guilty to crimes against humanity (even though

handed down by the ICTR, arguably on account of the factors referred to above: guilty plea, very limited crime base and very limited involvement in crime.

The next cluster of individuals is located to the left, slightly lower in the solution. All these individuals were classified as middle-ranking helpers and were convicted on account of their facilitating role in crime committed by others. Although their role in the crimes was more active than that of the first group, they did not kill or torture anybody with their own hands.



1. Kanyarukiga	16. Hategekimana	31. Akayesu
2. Ruggiu	17. E. Ntakirutimana	32. Rutaganda
3. Bikindi	18. Serugendo	33. Semanza
4. G. Ntakirutimana	19. Simba	34. Kambanda
5. Nzabirinda	20. Bagaragaza	35. Bagosora
6. Ruzinanda	21. Muvunyi	36. Kayishema
7. Musema	22. Ntawukulilyayo	37. Kamuhanda
8. Kajelijeli	23. Rukundo	38. Ndindabahizi
9. Imanishimwe	24. Muhimana	39. Nsengiyumva
10. Gacumbitsi	25. Rutaganira	40. Renzaho
11. Ngeze	26. Bisengimana	41. Setako
12. Barayagwiza	27. Rugambarara	42. Kalimanzira
13. Seromba	28. Nahimana	43. Niyitegeka
14. Nchamihigo	29. Ntabakuze	44. Karera
15. Munyakazi	30. Serushago	

Fig. 1. Object scores of ICTR defendants.

which was heavily involved in inciting the public to participate in massacres.⁸⁰ However, little else is typical for the group placed here in the solution. Their form and degree of participation is the defining characteristic for these defendants. Some were convicted for having participated in a few attacks or even a few incidents, while others provided assistance throughout the whole period of genocide and a third group was active on radio RTLM and ‘assisted’ massacres by inciting the masses to participate in the killings. These defendants were convicted of genocide or a combination of genocide and crimes against humanity (either extermination or persecution). Although the solution suggests that their sentences range from 11 - 20 years, a more detailed examination of the cases in this group shows that the punishment actually ranges from very short sentences (6 and 8 years imprisonment⁸¹ for two individuals who pleaded guilty to their charges and are therefore positioned closer to the category of 0-10 years) to longer terms of imprisonment of up to 30 years⁸² (a position of this case is thus pulled more towards the 21 - 30 years sentence category).

A small group of three defendants was placed below this cluster. The main defining characteristic of these individuals was that they were all active in propaganda. One was a journalistic broadcaster for RTLM, while another was a popular singer in Rwanda who, as well as singing discriminatory songs, openly called on the population to “rise up and exterminate the minority, the Tutsi”⁸³ and the third was a military officer convicted on the basis of his inflammatory speech at a single meeting.⁸⁴ All three were lower-ranking individuals⁸⁵ who had no significant power over others and were convicted of incitement to commit genocide. Like the previous group, they did not actively participate in massacres and never personally killed anybody. They were all classified as active helpers. They were convicted of genocide or a combination of genocide and crimes against humanity and were sentenced to medium-length imprisonment terms of between 12 and 15 years.

Moving upwards, towards the left-hand side, there is one case of a low-ranking organizer who also personally committed horrendous crimes. Obed Ruzinanda, a commercial trader in Kigali, played a very active part in the massacres by distributing weapons, transporting attackers and leading a group of perpetrators during an attack. He also personally committed some of the crimes, and the judges specifically condemned his zeal and the heinous means by which he committed the killings.⁸⁶ He was sentenced to 25 years of imprisonment.

⁸⁰ *Prosecutor v. Nahimana* (ICTR-96-11); *Prosecutor v. Serugendo* (ICTR-2005-84).

⁸¹ *Serugendo, ibid.*; *Prosecutor v. Bagaragaza* (ICTR-05-86).

⁸² *Nahimana, supra* note 80.

⁸³ *Bikindi, supra* note 56, para. 422.

⁸⁴ *Muvunyi, supra* note 56.

⁸⁵ Except for Muvunyi, who was a senior officer in the Rwandan army.

⁸⁶ See *Kayishema and Ruzinanda, supra* note 44, para. 18.

The next cluster of cases is placed closer to the middle of the solution. In general, these are individuals who played a more active role in massacres, such as organizers or hands-on executioners. In the lower part of this group are two low-ranking defendants who were sentenced to relatively long terms of imprisonment (25 and 30 years respectively). Gerard Ntakirutimana, who was a medical doctor, was found to have led attackers against Tutsi refugees and to have participated in these attacks with a particular zeal,⁸⁷ while Gaspard Kanyarukiga, a businessman, was convicted of planning with others the attack on Nyange church which resulted in more than 2000 Tutsi deaths.⁸⁸ Towards the middle of the solution can be found the more senior and influential figures who primarily played organizational and coordinating roles. Most of these individuals were convicted of genocide in combination with crimes against humanity, and their criminal involvement was relatively extensive as they either participated in numerous attacks or committed crimes over longer periods of time. The crime basis of their convictions constituted killing, sometimes in combination with violence and torture. Many of them were convicted as perpetrators, some as planners or participants in a joint criminal enterprise. Their sentences have generally been long, ranging from 25 to 45 years' imprisonment. At the top of this group there are also some high-ranking figures (a senior government official at the Ministry of the Interior⁸⁹ and a senior military officer).⁹⁰ Despite their high-ranking positions these individuals received relatively short sentences of 25 years compared with all the other high-ranking defendants, who are located more in the upper left of the solution and usually received sentences of life imprisonment. This could be because the first two individuals were convicted for several attacks that were limited in scope and place, and their roles were also rather limited (Kalimanzira, for example, was convicted for having been repeatedly involved in massacres in the prefecture of Butare, but the Trial Chamber noted that "the charges relate to crimes committed in his own *préfecture* and not crimes committed at the national level. Moreover, although he was the *Directeur de Cabinet* of the Ministry of the Interior, the crimes for which he is convicted are essentially unrelated to his official duties and powers at the national level".⁹¹ Setako was found guilty of ordering the killings of 40 individuals and the Trial Chamber took into account that he was not "an architect of the larger body of crimes committed in Ruhengeri prefecture"⁹²).

Moving up towards the top left corner of the plot there is a group of individuals on whom the ICTR imposed the severest sentences: life imprisonment.

⁸⁷ *Ntakirutimana*, *supra* note 32, para. 797.

⁸⁸ *Prosecutor v. Kanyarukiga* (ICTR-02-78).

⁸⁹ *Prosecutor v. Kalimanzira* (ICTR-05-88).

⁹⁰ *Setako*, *supra* note 42.

⁹¹ *Kalimanzira*, *supra* note 89, 22 June 2009, para. 747.

⁹² *Setako*, *supra* note 42, para. 501.

All these defendants were convicted of extensive criminal activities or organization of regional/national campaigns of genocide. Usually they were found guilty of genocide in combination with crimes against humanity and in some cases also with war crimes. These are the defendants convicted of many types of underlying offences – next to killing many of them actively committed or promoted rape and other forms of violence. Their criminal conduct was classified as ordering or instigating, often in combination with aiding and abetting and/or superior responsibility. The defining characteristic of these defendants is their status in society and the overall state hierarchy; they were all authority figures who exercised more extensive power over the masses. In many cases they were classified as high-ranking; indeed, some were government ministers. At the top of this group can be found the two cases classified as the main architects of the Rwandan genocide: Jean Kambanda, prime minister of the interim government,⁹³ and Theoneste Bagosora, the most senior official at the Ministry of Defence during the genocide.⁹⁴

However, there are also several instances of very severe sentences being imposed on middle-ranking defendants, specifically when these individuals next to their coordinating role also personally participated in massacres and killed, raped or tortured their victims. Despite not being the highest authorities during the conflict all these perpetrators received the severest sentences on account of their personal and often enthusiastic participation in massacres. There is also one case of a middle-ranking executioner, Mikaeli Muhimana, who was a municipal councillor in Gishyita and personally murdered and raped many Tutsis with terrifying cruelty and sadism.⁹⁵

Lastly a small group of three individuals was placed to the right of the cluster of high-ranking architects, organizers and zealous executioners. Although this group was also sentenced to life imprisonment, there are some factors distinguishing these individuals from other defendants given a life sentence. Either their participation was relatively passive or their crimes were limited to one attack. One, Aloys Ntabakuze, was convicted for failing to intervene in crimes committed by his subordinates and was therefore classified as a bystander.⁹⁶ The other, Jean de Dieu Kamuhanda, a Minister of Higher Education, was convicted for having organized a single attack at Gikomero Parish Compound. His crimes were spatially very limited and his criminal conduct was classified as incidental.⁹⁷ Athanase Seromba, a Catholic priest in Nyange parish, was initially sentenced to 15 years for participating (aiding and abetting) in genocide and extermination

⁹³ *Kambanda*, *supra* note 30.

⁹⁴ *Prosecutor v. Bagosora, Ntabakuze and Nsengiyumva* (ICTR-98-41-T).

⁹⁵ *Muhimana* (ICTR-95-1B-T) 28 April 2005, paras. 606-615.

⁹⁶ Ntabakuze, *Prosecutor v. Bagosora et al.*, *supra* note 94.

⁹⁷ *Kamuhanda*, *supra* note 38.

during an attack in Nyange parish. During the attack, Seromba identified the weakest parts of his church (where Tutsis were hiding) as targets for bulldozer drivers and later also encouraged the attackers to finish off any survivors. His role was therefore relatively passive as he did not actively help the attackers or personally commit violence. The Appeals Chamber, however, reclassified his conduct as committing and increased his sentence to life imprisonment.⁹⁸ Given these defendants' relatively limited role and/or the fact that their guilt is based on participation in a single attack, these cases were positioned more to the right of the solution and so closer to category quantifications expressing only incidental involvement and/or a passive/bystander role.

5. Discussion and Conclusions

The main aim of this study was to empirically analyze ICTR sentencing practice. Firstly, we briefly discussed the main sentencing principles stemming from the judges' reasoning and then explored the multivariate relationships between the sentencing factors relating to the assessment of the gravity of the crime and sentence severity. The results showed that patterns in ICTR sentencing could be identified.

Defendants sentenced by the ICTR were structured in a two-dimensional solution for which we can identify two axes: an activity axis running diagonally through the solution and a culpability level axis running perpendicular to this (see Fig. 3). Along the first axis, running from the top right-hand corner of the solution, individuals are distinguished on the basis of their passive or active participation in crime. In this respect, two very distinct groups can be distinguished at the two extremes of this axis: (i) passive participants convicted for being present at a crime scene or for failing to intervene while under a duty to do so, and (ii) more active participants who actively contributed to massacres and either actively assisted actual perpetrators, personally committed the killings or organized the crime. The sentences are then distributed accordingly: the very short sentences are in principle reserved for passive offenders, while more severe sentences are imposed on active contributors.⁹⁹

⁹⁸ *Prosecutor v. Seromba* (ICTR-2001-66) Appeals Judgment, 12 March 2008. This is a very controversial interpretation of the mode of liability of committing as Seromba did not personally kill or injure anybody. He was just present at the crime scene and provided advice to the actual perpetrators. For a more detailed commentary, see Gregory Townsend, *Committing Genocide by Integral-Part Participation: The ICTR Appeals Chamber judgment in Prosecutor v. Seromba*, The Hague Justice Portal, www.haguejusticeportal.net/eCache/DEF/9/782.html, 12 April 2011.

⁹⁹ It should be noted, however, that all the defendants in the group of passive bystanders are also those who pleaded guilty to only very limited involvement in crime. Therefore, the very short

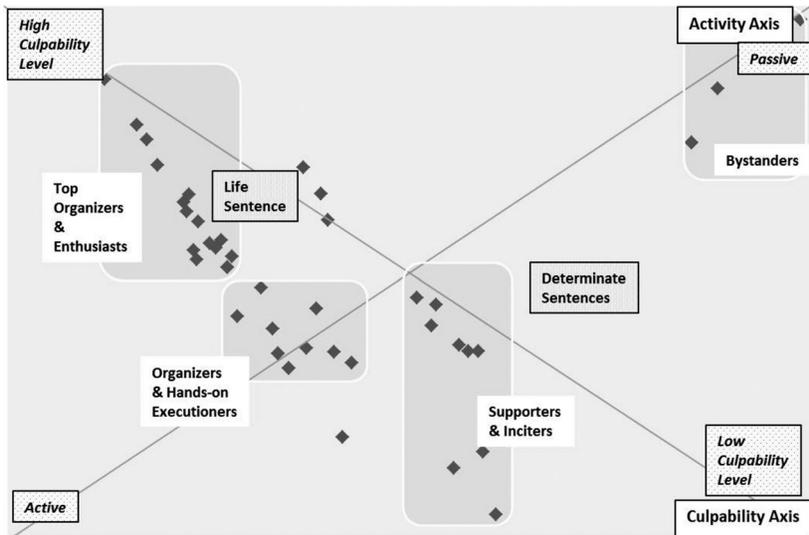


Fig. 3. Dimension interpretation.

Along the second axis, the group of actively participating defendants is distinguished on the basis of their culpability level. The latter is determined primarily by a combination of three indicators: (i) the defendant's position in the overall society (whether and to what extent a defendant exercised any *de facto* or *de jure* power over other individuals); (ii) the extent of involvement in atrocities (whether a defendant merely facilitated crime committed by others, or personally committed or organized the violence), and (iii) overall harm (whether a defendant is found guilty of participating in a limited number of or multiple/recurrent attacks). Along this dimension we can identify three distinct groups: (i) supporters and inciters; (ii) organizers and field executioners (generally middle-ranking)¹⁰⁰ and (iii) high-level organizers of regional or state-wide criminal campaigns and enthusiastic (middle-ranking) organizers who also personally committed the crimes. The first two groups are at the lower end of this axis and were generally sentenced to determinate sentences, while the third group is at the upper end of this axis and most of its members were sentenced to life imprisonment.¹⁰¹

sentences could be the result of a combination of these factors: their guilty plea, the very limited crime base and their very limited involvement in crime.

¹⁰⁰ This group also includes a few high-ranking defendants whose criminal involvement, however, was limited (either they merely assisted others or they were convicted for having participated in a single attack).

¹⁰¹ In the case of three ICTR defendants, sentences of life imprisonment were imposed despite these individuals' relatively limited participation in crime compared to other defendants who

Our empirical analysis indicated that the principles discussed in ICTR sentencing jurisprudence are generally reflected in ICTR sentencing practice. Regarding the gravity *in abstracto*, our analysis confirmed that being convicted of genocide (the ‘crime of crimes’) does not automatically result in the severest sentence of life imprisonment. There have been many cases in which defendants were convicted of genocide and received a determinate (and sometimes short) sentence. In fact, almost all ICTR defendants have been convicted of genocide and life imprisonment does not seem to be the Tribunal’s default sentence. It should also be noted that the shortest sentences pronounced by judges were in the few cases in which defendants were not convicted of genocide. In most of these cases, however, the defendants pleaded guilty to a very limited crime base and participation.¹⁰² What seems to be the most important consideration in sentencing is the gravity of defendants’ crimes *in concreto*. In other words, the overall harm caused and their culpability, not the legal classification of their acts.

With respect to gravity *in concreto*, the most severe sentences have been handed out, in line with the principle of gradation, to defendants who occupied the most senior positions in the civil or military hierarchy and organized massacres from behind their desks or to those who participated in crime with particular zeal and sadism. However, those sentenced to life imprisonment seem as a rule to have been people who exercised some authority over others. No low-ranking defendant, no matter how enthusiastic or zealous, has yet been sentenced to life imprisonment.¹⁰³ Consequently, leadership figures seem to be regarded as the most culpable for the purposes of ICTR sentencing. Theoretically, international crimes are perceived as a manifestation of collective, large-scale and systematic violence, and it is often argued that violence on such a large scale never breaks out without the instrumental role of top organizers. Therefore, also theoretically, the highest-level leadership figures are considered the most blameworthy in the event

received the severest sentence. These cases are to the right of the group of high-level organizers and enthusiasts. In none of these cases did the judges elaborate on why the severest sentence was justified despite the individuals’ relatively limited involvement in genocide compared to many others sentenced to life imprisonment. See *supra* notes 96-98. In *Seromba* the judges emphasized the egregious character of his crime and the fact that he “knew that approximately 1,500 refugees were in the church and that they were bound to die or be seriously injured as a consequence of his approval that the church be bulldozed.” Although this criminal conduct is certainly very serious, it may be questioned whether Seromba belongs to the most culpable perpetrators in the Rwandan genocide, when compared with other defendants sentenced to life imprisonment for their very active role in organizing massacres of hundreds of thousands of people. See *Seromba*, *supra* note 98, para. 238.

¹⁰²⁾ In the only case in which a conviction was not based on a guilty plea, the defendant, *Imanishimwe*, was convicted for crimes against humanity and war crimes (after the Appeals Chamber quashed his conviction for genocide) and was sentenced to 12 years in prison. However, his conviction was also limited to participation in several incidents; *Imanishimwe*, *supra* note 66, paras. 442-444.

¹⁰³⁾ Cf. *Ruzinanda*, *supra* note 44; *Ntakirutimana*, *supra* note 32.

of such crimes.¹⁰⁴ On the other hand, it is also true that the ICTR does not automatically sentence all high-ranking defendants to life imprisonment. If the conviction of these senior figures is limited in scope (if, for example, the crime basis is limited to a single attack or the degree of involvement is very limited), their sentences tend to be more lenient. ICTR judges seem therefore to weigh the position of defendants in the overall conflict against the level of their involvement in crime. Although sentence severity and the actual rank in the state hierarchy in principle correspond, a defendant's exact role and level of involvement in the atrocities also play an important part in sentence determination.

This empirical analysis of ICTR sentencing practice is one of the few studies of international sentencing focusing exclusively on the Rwanda Tribunal. It further develops an emerging scholarship empirically evaluating the sentences imposed for international crimes.¹⁰⁵ Our study concentrates primarily on the relationship between sentence severity and crime gravity – the primary consideration in sentencing – at one international tribunal, the ICTR. There are, however, many other aspects of international sentencing that need to be addressed in further empirical or doctrinal research. One such question at a micro-level is the role of individual circumstances in sentence determination. In the majority of cases, judges consider individual circumstances to be mitigating or aggravating. Given that all crimes coming before international judges are extremely grave and that, based on their gravity alone, the severest sentences would be justified (and indeed are often imposed), the question of the role played by mitigating and aggravating factors in sentence determination can be examined. As a related issue, the principle of sentences proportional to crime gravity should also be analyzed and conceptualized specifically for international crimes. How should we understand proportionality in the case of sentencing for international crimes that are the most serious known to humankind? Is a sentence of 25 years indeed proportional in cases involving multiple killings committed with the intent to eliminate a whole ethnic or religious group? Can we draw any conclusions in this respect on the basis of the sentencing case law and practice of the international courts and tribunals and/or domestic courts? At the macro-level, what are the relationships

¹⁰⁴ Cf. C. Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', (2004) 2 *JICJ* 516; A. Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in A. Smeulers, R. Haveman [eds.], *Supranational Criminology: Towards a Criminology of International Crimes* (2008), p. 233; For a different perspective, see J.D. Ohlin, 'Proportional Sentences at the ICTY', in B. Swart, G. Sluiter and A. Zahar (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) available online at <http://ssrn.com/abstract=1726411> (visited 1 February 2011), p. 14, where the author argues for a primacy of offence-gravity proportionality (i.e. a defendant should receive punishment proportional to his/her wrongdoing) over defendant-relative proportionality (i.e. more culpable defendants ought to be punished more severely than less culpable defendants) in international sentencing.

¹⁰⁵ For a brief overview of the existing empirical articles on international sentencing see *supra* notes 12-16.

and influences, from a perspective of sentencing for international crimes, among the international criminal courts and tribunals that have emerged in the past decade? In view of the principle of complementarity, one of the governing principles at the International Criminal Court, influences between domestic courts dealing with international crimes and their international counterparts also need to be examined. Consequently, many question marks still remain when it comes to sentencing of international crimes, and further theoretical and empirical research of the phenomenon of international punishment and sentencing practice is needed for these questions to be answered.

