

International Sentencing Facts and Figures

Sentencing Practice at the ICTY and ICTR

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Abstract

This comparative, empirical study analyses the sentencing practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It would appear that there are large differences in ICTY and ICTR sentencing practice. This apparent divergence is examined in greater detail by describing the sentencing behaviour of the courts in relation to different categories of crime, types of offence, scale of crime, modes of individual liability, 'ranking' of defendants and finally, aggravating and mitigating factors. Sentencing practice in light of the above factors is then juxtaposed to reveal the differences between the Tribunals and between different categories of cases.

1. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been functioning for more than 15 years now. In many respects, these tribunals have been pioneers of the international criminal justice system, including developing a first set of sentencing principles. So far, they are the only two 'purely international'

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tribunals actually trying and sentencing perpetrators of international crimes.¹ Together they have convicted more than 100 individuals for their involvement in genocide, crimes against humanity and war crimes during conflicts in the former Yugoslavia and Rwanda. From the beginning, ICTY and ICTR judges have been pronouncing sentences for these extraordinary crimes while lacking any detailed legislation or precedents for guidance. Positive law provided limited instruction with regard to sentencing.² The only relevant international precedents were the Nuremberg and Tokyo trials. In these proceedings the sentencing argumentation was very basic. Consequently, ICTY and ICTR judges have been vested with large discretionary powers in sentence determination. This study aims to answer the question how this discretion has materialized in the sentences handed down by the bench at the ICTY and ICTR.

This article consists of a descriptive, empirical analysis of ICTY and ICTR sentencing. It has been observed that sentencing practices of the ICTY and of the ICTR diverge significantly.³ At first sight, ICTR sentences seem to be longer than those pronounced by the ICTY judges. This article offers a detailed examination of the differences in the sentencing practices of these two tribunals. It focuses on selected sentencing determinants, as expressed in the case law and as provided for in the Statutes, and describes their relationship to sentence severity. The examined sentencing factors include: (i) category of crimes; (ii) type of underlying offences; (iii) scale of criminal activity; (iv) mode of individual liability; (v) rank of the defendant within the overall state hierarchy; and (vii) aggravating and mitigating factors. Initially, the article reviews the judges' own arguments, contained within the judgements, regarding the relationship between these factors and sentence severity. Thereafter, ICTY and ICTR sentences are examined in order to see whether there are any empirical differences in the actual sentence length between different categories of cases and between the Tribunals.

- 1 The article excludes other courts with international elements dealing with international crimes (internationalized courts), such as the Special Court for Sierra Leone (SCSL) or the Special Panels for Serious Crimes (SPSC) in East Timor, for two reasons: (1) Theoretical: arguably all the internationalized courts have a much stronger 'national element' (hybrid jurisdiction over international and domestic crimes, mixed composition with international and domestic judges, prosecutors or defence attorneys; applicability of international and domestic law). Therefore, it is difficult to compare directly the sentencing regimes and practice across these Tribunals. In this respect, the ICTY and ICTR are the only 'purely international criminal tribunals'. (2) Methodological/Pragmatic: there have either been not so many cases completed by these courts to allow a quantitative analysis of their sentencing trends (e.g. SCSL have completed proceedings with only eight defendants) or the composition of convictions is not as varied as in the ICTY/ICTR and it is thus difficult to make any sensible comparisons (e.g. SPSC have convicted over 80 individuals but the vast majority of defendants are very low-ranking perpetrators).
- 2 Art. 24 ICTYSt.; Art. 23 ICTRSt.; Rule 101 ICTY/ICTR RPE.
- 3 I.M. Weinberg de Roca and C.M. Rassi, 'Sentencing and Incarceration in the Ad Hoc Tribunals', 44 *Stanford Journal of International Law* (2008) 1, at 2; S.M. Sayers, 'Defence Perspective on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia', 16 *Leiden Journal of International Law (LJIL)* (2003) 751, at 776.

In so doing, this study attempts to fill an identified gap in empirical research regarding the penal regimes at the two Tribunals.⁴ So far, academics have focused primarily on normative issues in the sentencing of international crimes. Only a handful of studies have analysed sentencing practice empirically.⁵ In general, these studies have focused on one Tribunal at a time and tried to explain sentence severity on the basis of statistical analysis of the interplay of a number of selected legal and extralegal sentencing factors. To our knowledge, nobody has conducted a systematic, empirical comparison of ICTY and ICTR sentencing practice and/or has detailed the differences in sentence severity between the two.

2. Methodology

The article is divided into two main sections. First, a case law-based summary is given concerning the apparent relationship between sentence length and selected sentencing determinants. These general principles of sentence determination seem to be similar at both Tribunals. Judges from one tribunal often refer to the sentencing case law of the other, thus developing a common ICTY and ICTR legal narrative in most of the cases. Second, the judges' narrative is compared with actual sentencing practice. For the ICTY and ICTR separately, we compare median sentences⁶ handed down in different categories of cases.

Two issues complicate our analysis. First, defendants are usually convicted on multiple counts while only a total sentence is pronounced. This single sentence is not broken down in order to reflect the contribution of each crime to its length. It is therefore impossible to see how each conviction is reflected in the sentence; sentencing lacks transparency in this respect. This sentencing practice complicates our analysis since it is impossible to disentangle a sentence length in individual cases to assess the exact contribution of each count of guilt. Second, as required by Statute, the Tribunals have recourse to national sentencing practice in the former Yugoslavia and Rwanda, respectively. Arguably, fundamental differences in the penal culture of these two countries make direct comparisons difficult. However, both Tribunals have determined that national practices shall serve solely as points of reference and are not to

4 M. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007), at 11.

5 Cf. B. Holá et al., 'Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice', 22 *LJIL* (2009) 79; J. Meernik and K.L. King, 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis', 16 *LJIL* (2003) 717; J. 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) 140; J.W. Doherty and R.H. Steinberg, 'An Empirical Study of ICTY and ICTR Sentencing: Doctrine Versus Practice' (2009) available online at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1443468> (visited 1 February 2011).

6 The median sentence is the sentence which lies exactly in the middle of the sentence distribution — half of the issued sentences lie above the median and half below. As opposed to the mean (average), the median is not influenced by extreme sentences.

be treated as binding.⁷ Consequently, the guidance derived from national practice is arguably of minimal impact upon sentencing practice.⁸

By June 2010, the ICTY and ICTR had handed down sentences in 111 cases.⁹ Seventy-one cases have been dealt with by the ICTY and 40 by the ICTR. The sentences range from two years' imprisonment to the maximum: life imprisonment. At the ICTY two defendants¹⁰ and at the ICTR 16 individuals have been sentenced to life imprisonment. For the purposes of numerical analysis life sentences must be recoded.¹¹ In order to maintain the specific characteristic of a life sentence as the most severe sentence, we recoded life sentences to 55 years. This number is 10 years longer than the longest determinate sentence ever handed down by the Tribunals, i.e. 45 years,¹² and thus arguably expresses the specific quality of a life sentence as the severest sentence. Moreover, as the majority of defendants were in their 40s/50s at the time of a conviction, this number seems to cover well a maximum time of imprisonment that an average ICTY/ICTR defendant would spend in prison until the end of his/her life.

3. Sentencing in Judges' Narrative

Articles 24/23 of the ICTY/ICTR Statute contain very general instructions as to what factors the court should take into account when imposing sentences: gravity of the offence and the individual circumstances of the convicted person. However, what is actually meant by gravity of crime or what individual circumstances should be relevant is not defined by the Statutes. It is often repeated that '[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence',¹³ yet the judges are left to evaluate the respective gravity of crime on a case-by-case basis. Judges often emphasize a necessity to assess the gravity in light of the particular circumstances of each individual case.¹⁴ Theoretically, gravity can be determined *in abstracto* and *in concreto*. The gravity *in abstracto*

7 Judgment, *Mucić et al.* (IT-96-21), Appeals Chamber, 20 February 2001, § 816.

8 Weinberg de Roca and Rassi, *supra* note 3, at 14.

9 This number includes all final sentences (i.e. sentences pronounced by a trial chamber when appeal was not filed or sentences modified/confirmed by an appeal chamber) and all sentences handed down by a trial chamber when a case was still pending on appeal (ICTR: nine cases were pending on appeal, ICTY: eight cases were under appeal in June 2010). Cases where a defendant was acquitted are not included.

10 Stanislav Galić, Major General in the Bosnian Serb Army, Judgment, *Galić* (IT-98-29-A), Appeals Chamber, 30 November 2006; Milan Lukić, a paramilitary leader, Judgment, *Lukić & Lukić* (IT-98-32/1-T), Trial Chamber, 20 July 2009.

11 In order to analyse numerically the sentencing practice, we had to assign each life sentence a numerical value.

12 Judgment, *Kajelijeli* (ICTR- 98-44A), Appeals Chamber, 23 May 2005.

13 Judgment, *Mucić et al.* (IT-96-21), Trial Chamber, 16 November 1998, § 1192; Judgment, *Rutaganda* (ICTR-96-3), Appeals Chamber, 26 May 2006, § 591.

14 Judgment, *Česić* (IT-95-10/1), Trial Chamber, 11 March 2004, § 32.

is based on an analysis, in terms of criminal law, of the subjective and objective elements of the crime. Gravity *in concreto* depends on the harm done and on the culpability of the offender.¹⁵ In the latest case law, the concrete gravity of crime has been emphasized. In most cases, the concept of gravity has been interpreted as encompassing two aspects: (i) 'the particular circumstances of the case', i.e. magnitude of harm caused by the offender represented by, e.g. scale of crime, number of victims, extent of victims' suffering, and (ii) 'the form and degree of participation of the accused in the crime', i.e. the offender's culpability.¹⁶ Judges have consistently rejected the idea of an abstract ranking of offences under their jurisdiction and emphasized instead the freedom to evaluate severity in the light of the particular circumstances of each individual case.¹⁷

All the sentencing determinants examined could be seen as representing the two main considerations relevant to sentencing according to law: gravity of crime (represented by category of crimes, type of underlying offence, scale of crime, mode of liability, rank and role of a defendant, and aggravating factors) and individual circumstances of the offender (represented primarily by mitigating factors).

A. *Category of Crime, Type of Underlying Offence and Scope of Crime*

According to their Statutes, the Tribunals have jurisdiction over three broad categories of international crimes: genocide, crimes against humanity and war crimes. The Statutes do not contain any indication relating to the determination of sentence length for these three distinct categories. The question whether a hierarchical relationship should exist among the individual categories based on the comparative analysis of their gravity *in abstracto* has nonetheless been addressed many times in the case law. Arguably, the category of crime for which a defendant is convicted has a bearing on the severity of his sentence. It has been argued elsewhere that it should make a difference if an act is classified as genocide or as a crime against humanity or a war crime. Scholars have advocated a hierarchy between individual categories of international crimes based on their objective severity.¹⁸ In the early case law, judges too endorsed the idea of a hierarchy among genocide, crimes against humanity and war crimes.¹⁹ Later, both Tribunals seem to have adopted the stance

15 A.M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', 87 *Virginia Law Review* (2001) 415, at 609.

16 Judgment, *Milutinović et al.* (IT-05-87), Trial Chamber, 26 February 2009, § 1147.

17 Judgment, *Česić*, *supra* note 14, § 32.

18 A. Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law', 51 *International and Comparative Law Quarterly* (2002) 583, at 607–609; Danner, *supra* note 15; O.A. Olusanya, 'Do Crimes against Humanity Deserve a Higher Sentence than War Crimes?' 4 *International Criminal Law Review* (2004) 431.

19 Sentencing Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 14 July 1997, § 73. This position was in substance repeated in § 28 of the Sentencing Judgment in *Tadić* (IT-94-1-Tbis-R117), Trial Chamber, 11 November 1999; and in the Joint Separate Opinion of Judge McDonald and

that there is no pre-established hierarchy between individual categories of crimes,²⁰ emphasizing that *all* crimes under their jurisdiction are very serious violations of international humanitarian law.²¹

Genocide, crimes against humanity and war crimes could all be committed through a wide variety of punishable acts listed in the respective articles of the Statutes. These so-called ‘underlying offences’ differ in character and range from killings involving torture, rape and inhuman treatment to property-related offences such as pillage or destruction of property. Each underlying offence has its specific mental (*mens rea*) and physical (*actus reus*) requirements of proof and consequently, sentencing should ideally reflect whether a person is convicted for killing or for appropriation of property. According to the case law the legal nature of the offence forms one of the factors to be considered when assessing the gravity of crime.²² It has been stated that ‘the more heinous the crime, the higher the sentence that should be imposed upon its perpetrator’.²³ However, more detailed principles distinguishing among individual underlying offences in terms of their severity have not yet been developed. As ICTR judges often note, ‘the practice of awarding a single sentence for the totality of an accused’s conduct makes it difficult to determine the range of sentences for each specific crime’.²⁴ Despite this noted difficulty, the ICTR judges tried to establish ‘general ranges of sentences for each specific crime’ on the basis of the Tribunals’ previous sentencing practice to guide them in their sentencing consideration. So far, however, this attempt has remained limited²⁵ and judges have not derived any general conclusions in terms of objective severity of individual offences on this basis. The ICTY singled out the crime of persecution as ‘one of the most vicious of all crimes against humanity’²⁶ and stated that ‘on account of its distinctive features, it justifies a more severe penalty’.²⁷ Otherwise, however, the judges have not discussed in objective terms the gravity of individual underlying offences.

Vohrah, *Erdemović* (IT-96-22), Appeals Chamber, 7 October 1997, § 20; Judgment, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §§ 14, 16; Judgment, *Serushago* (ICTR-98-39), Trial Chamber, 5 February 1999, § 15.

20 Cf. Sentencing Appeal, *Tadić* (IT-94-1-A and IT-94-1-Abis), Appeals Chamber, 26 January 2000, § 69; *Lukić & Lukić*, *supra* note 10, § 1050; Judgment, *Mrkšić et al.* (IT-95-13/1), Appeals Chamber, 5 May 2009, § 375; Judgment, *Kayishema & Ruzindana* (ICTR-95-1), Appeals Chamber, 1 June 2001, § 367; Judgment, *Rutaganda* (ICTR-96-3), *supra* note 13, § 590.

21 Judgment, *Renzaho* (ICTR-97-31-T), Trial Chamber, 14 July 2009, § 817.

22 Cf. Judgment, *Rajić* (IT-95-14/1), Trial Chamber, 8 May 2006, § 82; Judgment, *Mrkšić et al.*, *supra* note 20, § 400.

23 Judgment, *Kajelijeli* (ICTR-98-44A), Trial Chamber, 1 December 2003, § 953.

24 Judgment, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003, § 562.

25 Judgment, *Imanishimwe* (ICTR-99-46), Trial Chamber, 25 February 2004, § 813; Judgment, *Semanza*, *ibid.*, § 564.

26 Judgment, *Kupreškić et al.* (IT-95-16), Trial Chamber, 14 January 2000, § 751.

27 Judgment, *Sikirica et al.* (IT-95-8-S), Trial Chamber, 13 November 2001, § 232; Judgment, *Banović* (IT-02-65/1), Trial Chamber, 28 October 2003, § 91.

B. Mode of Liability

Modes of individual liability indicate the manner in which a defendant participated in crimes. Article 7(6) of the ICTY (ICTR) Statute distinguishes between superior responsibility and other modes of individual liability — a person is responsible for a crime when he/she plans, instigates, orders, commits or otherwise aids and abets its planning, preparation or execution. Participation in a joint criminal enterprise (JCE) must be added to this list as a specific liability mode used especially by the ICTY.²⁸ It is established in the case law that the form and degree of participation of an accused in crime is one of the elements constituting gravity.²⁹ It follows that the fact whether a defendant is convicted as a hands-on perpetrator or as an aider should influence sentence severity. Neither the Statutes nor the Rules, however, indicate any principles governing a sentence determination in relation to individual modes of liability. The question of the relationship between modes of liability and sentence severity has not been raised systematically in the Tribunals' case law either. Over time, some fragmentary principles addressing this issue have evolved.

At the ICTY, sentencing principles in relation to superior responsibility have been discussed. In the latest case law, judges emphasized a '*sui generis*' nature of superior responsibility in the sense that an individual is not convicted for the crimes committed by his subordinates, but for failing to intervene. The special character of superior responsibility calls for 'even greater flexibility in the determination of sentence'.³⁰ Accordingly, the Trial Chamber in *Hadžihasanović* argued that 'the *sui generis* nature of superior responsibility under Article 7(3) could justify the fact that the sentencing scale applied to those Accused convicted ... on the basis of Article 7(1) of the Statute ... is not applied to those convicted solely under Article 7(3)'.³¹

Other modes of individual liability may either 'augment' (e.g. commission of the crime with direct intent) or 'lessen' (e.g. aiding and abetting a crime with awareness that the crime will probably be committed) the gravity of crime.³² The following principles have been established in the case law: (1) aiding and abetting is a lower form of liability than ordering, committing or participating in a JCE and warrants a lower sentence;³³ (2) at the ICTR a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities

28 Cf. J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice (JICJ)* (2007) 69; or A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007) 109. For further analysis of modes of responsibility, cf. E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press, 2003).

29 Judgment, *Milutinović et al.* *supra* note 16, § 1147.

30 Judgment, *Orić* (IT-03-68), Trial Chamber, 30 June 2006, § 724.

31 Judgment, *Hadžihasanović & Kubura* (IT-01-47), Trial Chamber, 15 March 2006, § 2076; Judgment, *Delić* (IT-04-83), Trial Chamber, 15 September 2008, § 562.

32 Judgment, *Ndindabahizi* (ICTR-01-71), Appeals Chamber, 16 January 2007, § 122.

33 Judgment, *Simić et al.* (IT-95-9), Appeals Chamber, 28 November 2006, § 265; Judgment, *Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005, § 388.

and those who have participated in the crimes with particular zeal or sadism;³⁴ and (3) according to the ICTY, under certain circumstances a participant in a JCE might deserve a higher sentence than the principal offender.³⁵

C. Rank of Defendant

The actual position of a defendant within a state structure (political or military) at the time of a crime is also relevant for assessing personal culpability and constitutes another important factor in determining sentence length. As noted by Judge Schomburg in *Martić*, ‘in principle, a person’s guilt must be described as increasing in tandem with his position in the hierarchy: The higher in rank or further detached the mastermind is from the person who commits a crime with his own hands, the greater is the responsibility.’³⁶

The relation between sentence severity and the rank of a defendant was raised in one of the first ICTY cases. In *Tadić*, the Appeals Chamber reduced the trial sentence because ‘the Trial Chamber failed to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.’³⁷ The Appeals Chamber emphasized that ‘[a]lthough the criminal conduct ... was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.’³⁸ Over time a general principle evolved in the ICTY case law that sentences should be graduated along with increasing authority of a defendant in the state structure. This principle has also been emphasized by the ICTR.³⁹ The degree to which a leadership position may increase the relative seriousness of crimes and sentence severity depends upon the actual level of authority of a defendant.⁴⁰ As noted in *Obrenović*, ‘[t]he actual authority is of consequence, whereby not only high-ranking, but also a middle-ranking command position can aggravate the sentence.’⁴¹ It must be emphasized, though, that there is one very important *caveat* to this principle: the position of the offender is just one and not necessarily *the* most important consideration when determining the sentence. In exceptional cases, high-ranking defendants could be subjected to relatively lenient sentences and vice versa: ‘even if the position of an accused in the overall

34 This principle is part of the so-called principle of gradation endorsed in the ICTR case law. Cf. Judgment, *Bagosora et al.* (ICTR-98-41-T), Trial Chamber, 18 December 2008, § 2270.

35 Judgment, *Krnolejac* (IT-97-25), Appeals Chamber, 17 September 2003, § 75.

36 Judgment, Separate Opinion of Judge Schomburg, *Martić* (IT-95-11), Appeals Chamber, 8 October 2008, § 9.

37 Sentencing Appeal, *Tadić*, *supra* note 20, §§ 55–58.

38 *Ibid.*, § 56.

39 Judgment, *Rukundo* (ICTR-2001-70), Trial Chamber, 27 February 2009, § 605.

40 Judgment, *Krajišnik* (IT-00-39), Trial Chamber, 27 September 2006, § 1156.

41 Judgment, *Obrenović* (IT-02-60/2), Trial Chamber, 10 December 2003, § 99.

hierarchy in the conflict ... was low, it does not follow that a low sentence is to be automatically imposed.⁴²

D. Mitigating and Aggravating Factors

Neither the ICTY/ICTR Statute nor the Rules stipulate which factors are to be considered as aggravating or mitigating, only 'substantial cooperation with the Prosecution' and 'superior orders' are listed as potential mitigating factors.⁴³ In this way, judges are vested with a large amount of discretion, and a wide range of circumstances has been accepted in mitigation and/or aggravation of a sentence.⁴⁴ The question whether a specific factor constitutes a mitigating or aggravating circumstance turned out to be largely a case-specific determination;⁴⁵ as discussed below, in some cases several factors are accepted in mitigation yet in others the same factors are deemed to aggravate a sentence. The decision of weight to be given to individual factors is also within the discretion of a chamber.⁴⁶

It has been stated that '[p]roof of mitigating circumstances does not automatically entitle to a "credit" in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination.'⁴⁷ The Appeals Chamber indicated that even the severest sentence of life imprisonment is not precluded by identification of mitigating factors.⁴⁸ A finding of mitigating circumstances relates to the assessment of sentence and in no way derogates from the gravity of crime nor diminishes the responsibility of the convicted person or lessens the degree of condemnation of his/her actions. It mitigates punishment, not the crime.⁴⁹ Mitigating factors need to be established upon the balance of probabilities and need not directly relate to charged offences.

The standards applicable to aggravating factors are more stringent. Aggravating factors must be proven beyond any reasonable doubt and only those circumstances directly related to the commission of the offence charged, and to the offender himself when he committed the offence, may be considered in aggravation. Furthermore, factors taken into account in evaluating the gravity of the crime may not be reconsidered as factors aggravating the sentence

42 Judgment, *Naletilić & Martinović* (IT-98-34), Trial Chamber, 31 March 2003, § 744.

43 Rule 101 ICTY/ICTR RPE; Art. 7(6)(4) ICTY/ICTRSt.

44 Judgment, *Babić* (IT-03-72), Appeals Chamber, 29 June 2004, § 43.

45 Judgment, *Hadžihasanović & Kubura* (IT-01-47), Appeals Chamber, 22 April 2008, § 325.

46 Judgment, *Deronjić* (IT-02-61), Trial Chamber, 30 March 2004, § 155; Judgment, *Elizaphan & Gerard Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003, § 781.

47 Judgment, *Babić*, *supra* note 44, § 44.

48 Judgment, *Muhimana* (ICTR-95-1B), Appeals Chamber, 21 May 2007, § 234; Judgment, *Stakić* (IT-97-24), Appeals Chamber, 22 March 2006, § 407.

49 Judgment, *Milutinović et al.*, *supra* note 16, § 1150; Judgment, *Elizaphan & Gerard Ntakirutimana*, *supra* note 46, § 781.

and vice versa.⁵⁰ However, clear guidelines as to what factors are relevant for assessing the gravity and what circumstances could constitute aggravating factors have not yet been developed. Judges have considerable discretion regarding the rubric under which factors pointing to the gravity of an offence or constituting an aggravating circumstance may be considered. In practice, it should not play a decisive role for sentence determination whether a certain factor is considered under the heading of crime gravity or under aggravating circumstances. The most important principle remains that no factor should be counted twice to the detriment of an accused.

4. Sentencing in Practice

In this section all the sentences handed down by the Tribunals preceding June 2010 were divided into groups based on (i) category of crimes of which a defendant was convicted; (ii) type of underlying offences; (iii) scale of crime; (iv) mode of liability; and finally (v) defendant's rank/position. Thereafter, the median sentences⁵¹ were computed for each group for the ICTY and ICTR separately. The medians of various categories of cases were compared in order to assess differences in sentence length between the individual groups of cases and between the Tribunals.⁵² At the end of this section, the most frequent mitigating and aggravating factors cited by the ICTY and ICTR judges are listed and compared.

Overall, and with the caveat discussed above on the value assigned to life sentences, the median sentence at the ICTY is 15 years⁵³ and at the ICTR 33.5 years. The ICTR sentences clearly tend to be longer.

Arguably, the lengthier ICTR sentences are related to a different composition of cases compared with the ICTY. The different composition of cases stems (i) from the differing nature of the underlying conflicts in the former Yugoslavia⁵⁴ and Rwanda⁵⁵ and consequently, from a different crime base in Yugoslavia and Rwanda; and (ii) from the different prosecution policy and selection of cases brought before the Tribunals. Particularly at the beginning, many low-ranking defendants were tried by the ICTY. Commentators also pointed out that in order to appear even-handed and prevent accusations of

50 Judgment, *Lukić & Lukić*, *supra* note 10, § 1050; Likewise, elements of a crime should not be reviewed a first time as a constitutive element and a second time as an aggravating circumstance. Cf. Judgment, *Milutinović et al.*, *supra* note 16, § 1149.

51 See *supra* note 6.

52 Given the fact that there are 18 cases of life imprisonment in our data set, the median is a more appropriate measure of central tendency compared with average sentence which would depend heavily on a choice of a numerical value for the life sentences.

53 In the following text all numbers have been rounded off to one decimal place.

54 The nature of the Yugoslavian conflict could be characterized as an inter-state ethnic war connected to states' expansionist tendencies and carried out by the ethnic cleansing (deportations/forcible transfer, persecutions, etc.).

55 The nature of the Rwandese conflict can be described as genocide carried out primarily by methods of physical extermination of one ethnic group.

Table 1.

Tribunal	WC	CAH	GEN	CAH + WC	GEN + WC	GEN + CAH	GEN + CAH + WC
ICTY							
Median sentence	9.0	13.0	NA	20.0	NA	NA	35.0
Range	2–20	3–20		6–life			35
No. of cases	18	19	0	33	0	0	1
ICTR							
Median sentence	NA	9.0	20.0	12.0	NA	42.5	55.0
Range		6–15	8–life	12		6–life	25–life
No. of cases	0	4	6	1	0	22	7

GEN: genocide; CAH: crimes against humanity; WC: war crimes; NA: not applicable.

an ethnic bias, the ICTY Prosecutor indicted a number of non-Serbs despite the fact that Serbs had committed the bulk of crimes in the former Yugoslavia.⁵⁶ Most of these defendants were, however, acquitted or sentenced to very low sentences. In contrast, at the ICTR many government officials stood trial and were convicted. Only a handful of cases dealt with low-ranking individuals. Furthermore, all but one of the defendants indicted and convicted by the ICTR were Hutu.⁵⁷ All the ICTR accused were tried and the majority was subsequently convicted of genocide. This is not the case at the ICTY where charges and convictions for crimes against humanity/war crimes are prevalent, and all national groups involved in the wars of the 1990s are represented.

A. Category of Crimes, Type of Underlying Offence and Scale of Crime

In Table 1, cases are divided based on the category of crime, i.e. either genocide or crimes against humanity or war crimes or any combination thereof. In most of the cases, defendants were convicted on more than one count and their conviction was based on a combination of more than one category of crime. As discussed earlier, in the majority of cases ICTY and ICTR judges pronounced only one sentence for all guilty counts without any indication as to how individual counts affected sentence length. Consequently, it is difficult to disentangle sentence length in a particular case and assign a specific proportion of the sentence to a specific crime. In order to provide a clearer picture of how individual categories of international crimes are sentenced, we divided all cases on the basis of combinations of separate categories of crimes dealt with by the Tribunals so far.

56 A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *American Journal of International Law* (2003) 510, at 537.

57 The only exception is Georges Ruggiu who is of Belgian nationality. Ruggiu moved to Rwanda in 1993 and during the genocide was a presenter at the *Radio Télévision Libre des Mille Collines* (RTL) radio station.

At the beginning, it should be noted that even this detailed distinction is insufficient to properly compare sentences for the different categories of crimes. Some possible combinations, such as the combination of genocide with war crimes, have not been dealt with in practice by either of the Tribunals. The ICTY judges have never sentenced anybody for genocide alone or genocide combined with crimes against humanity. The ICTR judges have never convicted a defendant solely of war crimes. These 'gaps' frustrate more detailed comparisons of sentence differences across the Tribunals.

At the ICTY, the defendants convicted solely for war crimes were given the shortest sentences, followed by those convicted solely for crimes against humanity. The combination of war crimes and crimes against humanity has been the most frequent conviction at the ICTY. The median sentence for this combination is longer when compared with the median sentences for war crimes and crimes against humanity taken separately. The longest median sentence⁵⁸ was found in the case of a combination of all three categories of crimes. Based on the length of sentences for each category of crimes (and their combinations) our results indicate an ordinal ranking among categories of international crimes for the purposes of sentencing in the ICTY practice. It is necessary to realize, though, that the presented results are based on a descriptive analysis of the sentences. In practice, a sentence is arguably determined by the interplay of a multiplicity of sentencing determinants. Consequently, the medians in individual categories of cases could be influenced by other sentencing factors unaccounted for. This fact must always be kept in mind when interpreting results based on a descriptive bivariate analysis.

At the ICTR, the shortest median sentence was found in case of defendants convicted on the basis of crimes against humanity, followed by one case where a defendant was convicted of crimes against humanity combined with war crimes.⁵⁹ In these cases the median sentences are shorter than those of the ICTY. The picture is completely different, though, when a conviction for genocide comes to play. The sentences for genocide are substantially longer. The longest sentences have been handed down to defendants convicted of a combination of genocide, crimes against humanity and war crimes. Except for two cases⁶⁰ all were sentenced to life imprisonment. Similar to the ICTY, there are indications of a hierarchy of crimes. The ICTR sentencing practice shows that genocide receives the severest sentences followed by crimes against humanity.

The first thing to be noted when we compare ICTY and ICTR is that overall there are generally lengthier sentences given by the ICTR. It is argued that this difference is connected to the dominance of genocide convictions at the

58 This number is based on only one case, namely *Krstić* (IT-98-33), Appeals Chamber, 19 April 2004.

59 Judgment, *Imanishimwe* (ICTR-99-46), Appeals Chamber, 7 July 2006.

60 Judgment, *Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005; Judgment, *Setako* (ICTR-04-81-T), Trial Chamber, 25 February 2010.

ICTR. It seems that genocide is indeed considered to be 'the crime of crimes' for the purposes of sentencing, as a conviction for genocide entails substantially lengthier sentences. In the only case involving genocide at the ICTY, the defendant was convicted to one of the lengthiest sentences ever handed down by the Tribunal. This argument is further underpinned by the fact that in the scarce amount of ICTR cases where a genocide conviction was not entered, sentences are actually lighter compared with those of the ICTY. Thus, the sentencing practice of the Tribunals indicates an ordering of international crimes with genocide at the top, followed by crimes against humanity and war crimes at the tail.⁶¹ The question remains, however, whether the heavier sentences for genocide or crimes against humanity are related solely to the fact that cases were characterized as genocide or crimes against humanity and this characterization in itself attracts a heavier sentence (related to gravity *in abstracto*) or whether these cases are sentenced harsher because they are indeed the very worst cases with the greatest number of death and harm caused (related to gravity *in concreto*).⁶²

In order to examine sentencing practice vis-à-vis the type of crime in more detail, we have also distinguished cases on the basis of the type of offence underlying each guilty count. Offences under the Tribunals' jurisdiction were divided into six broad categories: (i) killing (incorporating killing, murder, extermination or the crimes of unlawful attack on civilians or terror⁶³ (causing death)); (ii) violence against persons (including, e.g. cruel treatment, outrages upon personal dignity, violence to life, etc.); (iii) torture; (iv) rape; (v) other violations (e.g. imprisonment; taking of hostages); and (vi) property related offences (such as pillage or wanton destruction). Each of these groups is further divided to two subgroups: 'discriminatory' and 'arbitrary'. In this way the acts underlying convictions for persecution and genocide are analysed separately. Both persecution and genocide are crimes that can be committed by a wide range of underlying acts but they are distinguished on account of discriminatory motivations of perpetrators. As discussed above, judges have emphasized the distinctive character of persecutory offences in the case law; it has been noted that 'crimes based upon ethnic grounds are particularly reprehensible, and the existence of such a state of mind is relevant to the sentence.'⁶⁴ It has also been argued in the literature that crimes committed with such discriminatory intent deserve higher sentences than other crimes.⁶⁵

61 Cf. Holá et al., *supra* note 5, at 94; Doherty and Steinberg, *supra* note 5, at 56; Meernik and King, *supra* note 5, at 733-736; Meernik (2003), *supra* note 5, at 157.

62 Cf. M. Drumbl and K. Gallant, 'Sentencing Policies and Practices in the International Criminal Tribunals', 15 *Federal Sentencing Reporter* (2002) 140, at 142.

63 The crime of terror is defined as '[a]cts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population'. Cf. Judgment, *Milošević* (IT-98-29/1-T), Trial Chamber, 12 December 2007, §§ 875 ff.

64 Judgment, *Vasiljević* (IT-98-32), Trial Chamber, 29 November 2002, § 278.

65 O. Olusanya: *Sentencing War Crimes and Crimes against Humanity under the International Tribunal for the Former Yugoslavia* (Groningen: Europa Law Publishing, 2005).

It is impossible again to disentangle sentence length in every case on the basis of the underlying offences. All defendants were divided into groups on the basis of underlying offences in the following way: every time a defendant was convicted on the basis of a particular crime, his sentence was included within a respective group. Therefore, when a defendant was convicted of murder and cruel treatment, his sentence was used to count the median sentence in both groups.

The practice of the Tribunals of declaring one sentence for all guilty counts makes the exact investigation of differences very intricate. At the ICTY, only 18 (25%) defendants were convicted solely on the basis of one type of underlying offence. In the rest of the cases (75%), the sentence was meted out reflecting a combination of different types of criminal behaviour. At the ICTR, 21 (52%) of all defendants were convicted solely on the basis of killing incidents; in the rest of the cases a combination of killings with violence formed the basis of convictions. This fact could also explain the relatively low median sentences of killing-based convictions (arguably the most serious offence) because the majority of defendants at both Tribunals were convicted of killings and consequently, the medians reflect all the variation among cases. In many cases a conviction included only one incident of killings, while the other type of underlying conduct, e.g. violence or property crimes formed the core of a defendant's criminal activity.⁶⁶

In spite of these difficulties, we can see that at both Tribunals acts adjudicated as being based on ethnic grounds (discriminatory motive) resulting in relatively lengthier sentences compared with 'random' crime in all categories. The lowest sentences at both Tribunals have been handed down to those defendants convicted of crimes that usually do not result in physical damage to victims: 'other', such as taking of hostages, unlawful labour, imprisonment or forcible transfer/deportation⁶⁷ and 'arbitrary' property crimes. Conversely, the lengthiest sentences were meted out for violent offences. The median sentences of all categories are rank ordered similarly within each Tribunal (except of the two deviations addressed below). The median sentence for rape-based convictions is the highest at both Tribunals. All defendants in this category were convicted for extensive criminal conduct involving multiple instances of very cruel and deplorable treatment of their victims and the cruelty of their acts can explain relatively severe sentences.⁶⁸ As noted above, there are two seemingly counterintuitive results in Table 2: the relatively high sentences for discriminatory property-based offences at the ICTY and relatively low sentences for killing-based convictions. At the ICTY, the median sentence of defendants convicted for property-related crimes is equal to rape and larger than medians computed for all other categories of crime. This finding looks odd on the face of it, given the relatively minor characterization of property-based offences.

66 Cf. Judgment, *Strugar* (IT-01-42), Appeals Chamber, 17 July 2008.

67 At the ICTR, however, only one defendant has been convicted under Art. 4(c), 'imprisonment', for ordering his subordinates to detain civilians. Cf. Judgment, *Imanishimwe*, *supra* note 59.

68 Cf. Judgment, *Kunarac et al.* (IT-96-23), Trial Chamber, 22 February 2001, §§ 587,781.

Table 2.

Tribunal	Killing	Rape	Torture	Violence	Other	Property
ICTY						
Discriminatory	18.0 6–life	20.0 20	17.5 6–35	18.0 5–life	17.0 3–40	20.0 10–life
Arbitrary	16.0 5–life	18.0 12–28	15.0 5–28	15.0 3–life	15.0 7–28	12.0 2–40
No. of cases	49	6	25	48	41	24
ICTR						
Discriminatory	40.0 6–life	55.0 25–life	35.0 15–life	55.0 6–life	NA	NA
Arbitrary	11.0 6–15	NA	12.0 12	12.0 12	12.0 12	NA
No. of cases	40	8	4	19	1	0

Killing: Articles 2a, 3-murder, 3-terror, 3-unlawful attack on civilians, Article 4(2)a — genocide based on killings, Articles 5a, 5b and 5h persecution based on murder ICTY Statute; Article 2(2)a genocide based on killings, Articles 3a, 3b and 3h persecution based on killings, Articles 4a and 4d ICTR Statute.

Violence: Articles 2c, 3-humiliating and degrading treatment, 3-violence to life and person, 3-cruel treatment, 3-outrages upon personal dignity, Articles 5i and 5h-persecution based on violence (beatings, cruel treatment etc.) ICTY Statute; Article 2(2)b genocide based on causing serious bodily or mental harm, Articles 3i, 3h — persecution based on violence, Articles 4a and 4e ICTR Statute.

Property: Articles 2d, 3-attack on civilian objects, 3b, 3e, 3d, Article 5h — persecution based on destruction of property ICTY Statute; Article 4f, Article 3h — persecution based on destruction of property ICTR Statute.

Other (e.g. deportation, taking of hostages etc.): Articles 2g, 2h, 3-taking of hostages, 3-unlawful labour, Articles 5c, 5d, 5e, 5h — persecution based on deportations, forcible transfer, unlawful confinement, humiliation, violation of rights, harassment ICTY Statute; Articles 3c, 3e, 3d, 3h — persecution based on other acts enumerated before, Articles 4b, 4c ICTR Statute.

Rape: Article 3-rape, Articles 5g, 5h — persecution based on rape ICTY Statute; Article 2(2)b genocide based on rapes, Articles 3g, 3h-persecution based on rape ICTR Statute.

Torture: Articles 3-torture, 2b, Article 5f, 5h — persecution based on torture ICTY Statute; Article 2(2)b genocide based on torture, Articles 3f, 3h — persecution based on torture, Article 4a ICTR Statute.

NA: Not Applicable.

However, it turns out that all defendants of property crime were simultaneously convicted for violence and/or killings. As discussed below, only in one case was a defendant convicted of property crimes alone and the judges handed down a very low sentence.⁶⁹ Therefore, the comparable sentences of property- and violence-related crimes are arguably caused by the methodological complications induced by the fact that judges do not pronounce a separate sentence per individual count. Next, all cases vary enormously due to the particular circumstances of the case and these differences cannot be reflected in a bivariate descriptive study such as this one. Even if two cases are legally qualified as falling under the same offence, there could be large difference in the concrete gravity of each act relating to the number of victims, duration of the crime or

69 Amir Kubura was sentenced to 2.5 years. See Judgment, *Hadžihasanović & Kubura*, *supra* note 45.

brutality. These peculiarities to a large extent explain the very broad ranges of sentence length within each category of underlying offences.

This observation is equally applicable to the relatively low medians computed for the killing-based convictions. Since all ICTR defendants and the majority of the ICTY defendants have been convicted for murders, the median sentences are actually computed on all ICTR cases and almost 70% of ICTY cases. There is a large variance among individual cases: from convictions based on isolated incidents to convictions encompassing a state-wide persecutory campaign; and the medians computed for killing-based convictions reflect all this variation.

In order to better understand the patterns, we have also divided the underlying offences to four categories on the basis of the protected interests violated by the underlying criminal conduct: offences against life, offences against limb, offences against liberty and offences against property. The violation of protected interest is one key component of offence seriousness.⁷⁰ On the basis of comparing the protected interests, the offences can be rank ordered into a seriousness scale. Arguably, offences violating a human life, such as murders and killings, are the most serious, followed by offences against physical integrity of human beings entailing physical harm to victims. The next category on this seriousness scale is constituted by the offences against liberty which typically violate other internationally protected human rights such as the right to liberty and security, freedom from slavery or forced labour. The least serious category of crime is arguably formed by offences against property.

The cases were divided into the four groups based on the most serious offence individual was convicted for. Consequently, when a defendant was convicted for, e.g. murder and rape, his sentence was included only in the category of offences against life. In this way, the computed medians in each category reflect only the most serious conviction entered against a defendant.

At the ICTY, there is a clear gradation of sentence severity based on the protected interest violated by a defendant's conduct: offences against life entailed the lengthiest sentences while offences against property led to relatively short sentences. Surprisingly however, the median sentence of cases where defendants' most serious crimes constituted non-fatal violence is relatively low. On a closer inspection of this very varied group, it turned out that there are factors which might have influenced the relatively low sentences in some of the cases included within this group: five defendants pleaded guilty and 10 defendants were convicted either as superiors for their omissions to supervise subordinates or as facilitators for only ancillary activities. In all these cases, the sentences meted out by judges were low ranging from three to 10 years' imprisonment. If we, however, take into account only cases where a conviction is based on defendant's actual infliction of pain on victims, the sentences are higher ranging from five to 28 years and the median of 15 years. At the ICTR,

70 See for discussion on domestic crimes and development of parameters of ordinal proportionality to assess inter-offence seriousness, A. Ashworth, *Sentencing and Criminal Justice, Fourth Edition* (Cambridge: Cambridge University Press, 2005), at 107–108.

Table 3.

Tribunal	Life	Limb	Liberty	Property
ICTY				
Median sentence	18.0	7.0	15.0	2.0
Range	5–life	3–28	6–20	2
No. of cases	47	17	6	1
ICTR				
Median sentence	33.5	NA	NA	NA
Range	6–life			
No. of cases	40	NA	NA	NA

NA: not applicable

all defendants were convicted for killing-based offences so it is impossible to make any comparisons. One further observation that could be made on the basis of Tables 2 and 3, in addition to the generally lengthier sentences at the ICTR, concerns the variation of guilty counts within each Tribunal. At the ICTY, the composition of offences is much more varied — the ICTY have dealt with all types of offences. Contrastingly, the ICTR cases form a much more homogeneous set and convictions on the basis of homicide and violence are prevalent.

As already noted, rather than the gravity *in abstracto* judges emphasize the gravity *in concreto* (in the sense of particular circumstances of each case). In order to analyse these particularities, it would be necessary to conduct a detailed qualitative analysis focusing on the characteristics of each case. We have, in addition to our essentially quantitative design, tried to examine the relationship between the particular circumstances of a case and sentence length by examining differences in punishment depending on the scope of the criminal activity conducted by the defendant. It appears that the more extensive the criminal activity of a defendant the graver his crimes are considered; as they entail a larger number of victims, are committed over a longer period of time and often involve more persons executing crime. On the basis of an overall factual background underlying defendant's convictions we have divided cases into five categories in Table 4. We distinguished among (i) those convicted on the basis of isolated incidents, e.g. single or several instances of mistreatment not committed over protracted period of time; (ii) defendants convicted on basis of repeated crimes committed within a longer period of time and/or on larger scale involving hundreds of victims (such as the Srebrenica massacre, shelling of Sarajevo or attack on Ahmići); (iii) those who were convicted on basis of their overall responsibility for a mistreatment of victims within an institution, e.g. detention and concentration camps; (iv) defendants convicted on the basis of their conduct promoting crimes of others (general incitement) such as those associated with the *Radio Télévision Libre des Mille Collines* (RTL) radio station in Rwanda; and finally (v) defendants (authority figures) found responsible for wide array of crimes committed within a regional/state-wide campaign of persecution.

Table 4.

Tribunal	Incident	Recurrent	Institution	Propaganda	Campaign
ICTY					
Median Sentence	10.0	20.0	6.5	NA	22.0
Range	3–15	2–life	3–18		11–40
No. of cases	15	31	12	0	13
ICTR					
Median Sentence	12.0	35.0	NA	15.0	55.0
Range	7–25	6–life		6–35	40–life
No. of cases	5	21	0	6	8

Incident: convicted on the basis of isolated incidents, e.g. several instances of mistreatment but not committed over protracted period of time.

Recurrent: more extensive criminal activity involving multiplicity of victims, e.g. Srebrenica massacre, shelling of Sarajevo, repeated crimes committed over longer period of time.

Institution: convicted on the basis of an overall responsibility for a mistreatment of victims within an institution, e.g. detention camps, deemed responsible for inhuman conditions and cruel treatment of victims within the institution.

Campaign: those responsible for the regional/state-wide campaign encouraging/promoting crimes.

Propaganda: responsible for general incitement of crimes, e.g. within the radio RTLM in Rwanda.

NA: not applicable.

The sentences of both Tribunals seem to be gradated depending on the scope of crime. Only in case of ‘institution-related crimes’ (i.e. crimes related to various detention facilities and general responsibility of their commanders/managers to maintain human conditions and prevent mistreatment of detainees) are sentences low. Despite a generally broader crime base of institution-related crimes, the median is lower than the median of defendants sentenced for isolated incidents. In many cases however, convictions of the ‘institution-related’ defendants stem from their omissions to prevent and punish their subordinates for committing crimes or from minor ancillary activities. Such conduct is arguably less serious than an active involvement in crime.

At the ICTR the median sentence for convictions stemming from propaganda activities (e.g. radio broadcasts promoting violence) is relatively low despite the fact that it is often argued and accepted by the judges that, e.g. radio broadcasts were important tools in mobilizing the Rwandese population to commit atrocities.⁷¹

Otherwise at both Tribunals, the sentences are rank-ordered similarly: perpetrators of isolated incidents were sentenced to shorter sentences than perpetrators of recurrent and more extensive crime. The severest sentences were handed down to the defendants responsible for a nation-wide campaign of persecution or its regional implementation. It is notable that also here we see quite a wide range in sentence length. This gradation of sentence severity indicates that at the aggregate level the ICTY and ICTR judges indeed distinguish

71 G. Prunier, *The Rwanda Crisis, History of a Genocide* (London: C. Hurst & Co. Ltd, 2008), at 189, 224; Judgment, *Nahimana et al.* (ICTR-99-52-T), Trial Chamber, 3 December 2003, §§ 1031 ff.

Table 5.

Tribunal	Planners	Instigators	Order-givers	Perpetrators	JCE	Aiders	Superiors
ICTY							
Median sentence	25.0	25.0	22.5	18.0	17.0	15.0	9.0
Range	25	7–30	7–life	5–life	6–40	6–35	2–29
No. of Cases	1	3	10	25	25	24	16
ICTR							
Median sentence	32.0	50.0	55.0	50.0	25.0	45.0	55.0
Range	6–life	6–life	6–life	12–life	25	6–life	11–life
No. of Cases	3	14	20	22	1	25	9

among cases on the basis of the concrete gravity of crime and those convicted for the most extensive criminal conduct are sentenced the most.

B. Mode of Liability

In Table 5, cases are divided based on the different modes of liability. All defendants were divided into groups in the following way: every time a defendant was convicted on the basis of a particular mode of liability, his sentence was included within a respective group. Therefore, when a defendant was convicted as a superior and order-giver, his sentence was used to count the median sentence in both groups.

At the ICTY, the longest sentences were handed down to those who planned, instigated or ordered others to commit crimes. The median sentences of these groups range from 22.5 to 25 years of imprisonment. The next group is constituted by perpetrators and participants in JCE with the median of 18 and 17 years. Aiders are convicted to slightly shorter sentences with the median of 15 years. Finally, those convicted on the basis of superior responsibility are subjected to the shortest sentences with the median of 9 years. It seems that the analysed median sentences pronounced by the ICTY generally correspond to the above discussed reasoning — superiors' sentences being the lowest, followed by aiders, then perpetrators and JCE participants and the longest sentences have been handed down to order-givers, planners and instigators.

The ICTR sentencing practice offers a different picture. A median sentence of 55 years of imprisonment (i.e. the majority of defendants got a life sentence) is found in the case of order-givers and superiors. The median of the hands-on perpetrators and instigators is slightly shorter: 50 years. Those aiding and abetting are subjected to even lighter sentences, followed by planners. The lowest median is that of a participant in JCE. The ICTR actual sentences are not as differentiated on the basis of the mode of liability as at the ICTY. One of the surprising findings is the relatively low sentences of the 'planners'. The median sentence of planners is based on three cases of middle-ranking defendants: one was sentenced to life imprisonment, one of the three defendants pleaded

Table 6.

Tribunal	High rank	Middle rank	Low rank
ICTY			
Median sentence	20.0	10.0	15.0
Range	3–life	2–life	3–40
No. of cases	21	27	23
ICTR			
Median sentence	55.0	32.0	15.0
Range	25–life	6–life	7–25
No. of cases	10	25	5

guilty and was convicted to six years' imprisonment (for the ICTR an extremely low sentence)⁷² and in the last case the sentence was explicitly reduced to compensate for the violation of defendant's fundamental rights during the trial.⁷³ This can offer an explanation for the relatively low median sentence of planners.

It seems the ICTY delivers more differentiation among individual modes of liability and related sentences. The observed empirical differences in sentencing between the Tribunals could be related to (i) the fact that the ICTR defendants were, in the majority of cases, convicted of combinations of several modes of liability, such as perpetration, ordering and instigation together, often combined with superior responsibility;⁷⁴ and also to (ii) the fact that the ICTR deals primarily with cases of killings and violence, as discussed above. Consequently, the convictions at the ICTR are based on a more homogenous crime base and sentences seem to be not as differentiated as at the ICTY.

C. Rank of Offender

In Table 6, cases are divided according to the rank of the offender. In order to see differences in the actual sentencing practice, we have divided all the convicted ICTY and ICTR defendants into three groups according to the rank individuals occupied in the overall state civil/military hierarchy. The low-ranking offenders held little or no power/influence in the overall circumstances of each conflict such as camp guards, shift leaders in detention camps, rank and file soldiers or local politicians and people occupying positions such as a doctor in a hospital, commercial trader or a singer (28 individuals). The most numerous and varied group contains the middle-ranking defendants.

72 Judgment, *Serugendo* (ICTR-2005-64), Trial Chamber, 12 June 2006.

73 Judgment, *Nahimana et al.* (ICTR-99-52), Appeals Chamber, 28 November 2007.

74 At the ICTY approximately 68% of all defendants were convicted on the basis of only one mode of responsibility as opposed to only 30% at the ICTR.

These are the individuals who had more extensive *de jure* or *de facto* authority to command and/or influence conduct of others such as camp commanders, local or more senior army commanders and *conseillers*, *bourgemestres* in Rwanda, pastors and priests in the Catholic church or leaders of the *Interahamwe* (52 individuals). Finally, the group of high-ranking offenders consists of regional or national military and political leaders such as members of regional or national governments, regional political leaders, prefects in Rwanda, members of the national government and military officers above the rank of colonel or military commanders of operational sectors (military equivalent of prefecture in Rwanda) (31 individuals).

At the ICTY, high-ranking defendants are given the lengthiest sentences. The median sentence of low-ranking offenders is five years longer than the median of middle-ranking perpetrators. This finding is rather puzzling given the reasoning discussed above. In line with the judges' arguments, we would expect that middle-ranking offenders would be subjected to lengthier sentences than their low-ranking followers. However, it is also emphasized in the case law that the particular circumstances of each case such as magnitude of harm caused by the offender and his degree of participation in crimes are other important considerations in sentence determination. Apparently, as discussed below, there are some factors in the case of low-ranking defendants (such as cruelty of crime and enthusiastic participation) that seem to add to their sentences and counteract the influence of the relative role of the offender within the overall conflict.⁷⁵ At the ICTR, the median sentences are graduated along the line of defendants' rank. All high-ranking defendants (with one exception⁷⁶) have been sentenced to life imprisonment. As opposed to the ICTY, middle-ranking offenders are subjected to more severe sentences than their low-ranking subordinates/followers.⁷⁷ Consequently, the rank-ordering of sentence severity based on the rank of a defendant in the overall state hierarchy differs across the Tribunals.

In order to clarify the (lack of) sentence gradation according to rank in more depth and understand the noted discrepancies, we examined the typical role of each defendant (his degree of participation) and examined the connection between the rank of a defendant and his typical role.⁷⁸ On closer inspection, it turned out that at both Tribunals the high-ranking organizers of crime have been sentenced to the lengthiest sentences. Their sentences are, however, comparable with the sentences of enthusiastic hands-on perpetrators who in most cases are lower ranking. The enthusiasm and the cruelty of crimes committed seem to add to the sentences of enthusiastic participants and counteract the

75 Cf. Holá et al., *supra* note 5, at 90; Meernik and King, *supra* note 5, at 739, Doherty and Steinberg, *supra* note 5, at 54; Meernik (2005), *supra* note 5, at 157.

76 Judgment, *Kalimanzira* (ICTR-05-88), Trial Chamber, 22 June 2009.

77 Cf. J. Meernik, 'Proving and punishing genocide at the International Criminal Tribunal for Rwanda', 4 *International Criminal Law Review* (2004) 65–81, at 75–76.

78 We determined the typical role of a defendant on the basis of the factual findings underlying defendant's convictions discussed in every judgment.

influence of the minor role of the offender within the overall conflict.⁷⁹ This finding could explain the relatively high median sentence for the low-ranking defendants at the ICTY since the cases of these low-ranking enthusiastic executioners have been tried only by the ICTY (seven low-ranking individuals were deplored by judges for the extreme cruelty of their acts and/or enthusiasm in their execution and/or pleasure they derived from their execution as opposed to no such a low-ranking defendant at the ICTR).

Generally, therefore, the sentences at the Tribunals are distinguished on the basis of the rank of the defendant in the overall state hierarchy. The higher ranking architects of persecutory campaigns and organizers were subjected to the severest sentences. However, despite their generally low-ranking status in the overall hierarchy and negligible role in the overall conflict, also many enthusiastic executioners were sentenced to lengthy imprisonment terms arguably on account of extreme cruelty in the crimes committed and their zeal in the execution thereof.

D. Mitigating and Aggravating Factors

A wide range of factors has been accepted by the Tribunals in aggravation/mitigation of a sentence. Whether a certain factor constitutes a mitigating or aggravating circumstance depends largely on the particular circumstances of each case. For example, factors such as education or respected status of a defendant were in some cases accepted in mitigation yet in others in aggravation of a sentence. The following tables provide a basic overview of the most frequent aggravating and mitigating circumstances cited by the ICTY and ICTR judges. Aggravating and mitigating circumstances are just ancillary factors influencing the sentence — according to judges the most important consideration is the gravity of crime. Consequently, it is impossible to make direct comparisons between the individual factors accepted in mitigation/aggravation and their influence on sentence severity in a descriptive bivariate analysis such as ours. Therefore, in the following text the relation between individual aggravating and mitigating factors and sentence severity is not discussed and only the most frequent factors accepted in mitigation and/or aggravation at both Tribunals are listed.

1. Mitigating Factors

As discussed above, mitigating factors are circumstances that could justify a reduction of a sentence. It seems from the case law that all mitigating factors are generally applicable to all offences under the Tribunals' jurisdiction; no specific groups of mitigating factors have developed applicable only to specific offences. A large variety of factors has been accepted in mitigation in each case. Holá et al. revealed that mitigating factors do indeed account for a

79 Cf. Holá et al., *supra* note 5, at 93–94.

Table 7. ICTY

Mitigating factor	No. of cases cited (%)
Family circumstances	40 (56%)
Assistance to victims	27 (38%)
Voluntary surrender	26 (37%)
No prior crimes	26 (37%)
Remorse	24 (34%)
Cooperation with the prosecutor	24 (34%)
Good conduct in detention	24 (34%)
(Prior) good character	24 (34%)
Guilty plea	20 (28%)
General attitude towards proceedings	17 (24%)

Table 8. ICTR

Mitigating factor	No. of cases cited (%)
Assistance to victims	17 (42.5%)
Good character	12 (30%)
Family circumstances	9 (22.5%)
Guilty plea	9 (22.5%)
Remorse	8 (20%)
Cooperation with the Prosecutor	8 (20%)
Lengthy public service for Rwanda	8 (20%)
No prior crimes	7 (17.5%)
Health problems	6 (15%)
Voluntary surrender	5 (12.5%)
Good conduct in detention	5 (12.5%)

reduction in the sentence — sentences at the ICTY are on average reduced by seven months for each cited mitigating factor.⁸⁰ In Tables 7 and 8, the 10 most common factors cited in mitigation of sentence by the ICTY and ICTR, respectively, are listed.

There are no notable differences between the ICTY and ICTR in the type of mitigating factors cited by the judges. Despite the different crime base in Yugoslavia and Rwanda and different composition of cases at the ICTY and ICTR, the factors accepted by judges in mitigation of a sentence are very similar. If we compare the proportions of cases where individual factors in mitigation were cited, it seems that at the ICTY the same (general) mitigating factors are often repeated and accepted by judges in multiple cases, e.g. the most frequent mitigating factor at the ICTY is ‘family circumstances’ accepted in 56% of ICTY cases compared with ‘assistance to victims’ at the ICTR accepted in

80 *Ibid.*, at 94.

mitigation in 42.5% of all the cases. At the ICTR, it is more often the case that mitigating factors identified by the judges are very case specific, limited to the particular circumstances of the case and the specific conduct of a defendant.

It should also be noted that the Tribunals' case law on mitigating factors has not been entirely clear and there are disparities among cases as to whether a certain factor could be considered in mitigation of a sentence for international crimes or not. In these cases judges often refer to a notion of particular circumstances of a case to justify the differences. For example, factors such as 'good character (prior to the conflict)' and/or 'no criminal record' of a defendant are accepted in mitigation by some trial chambers but refused or considered in aggravation of a sentence by others without a detailed guideline why in certain cases these circumstances warrant mitigation of a sentence but not in others.⁸¹ Another example constitutes an approach to 'assistance to victims', the most frequent mitigating factor cited by the ICTR. It often occurs that judges turn down defendants' requests to mitigate their sentence on this basis. In particular, 'selective assistance to victims' does not necessarily lead to sentence mitigation. In some ICTR judgments trial chambers refused to accept this factor in mitigation or even indicated that it could aggravate a sentence.⁸²

It has been argued in the literature that a guilty plea is one of the most influential mitigating factors accepted by the judges of both Tribunals.⁸³ Indeed, it seems that cases where defendants have admitted to their guilt and concluded an agreement with the Prosecutor resulted in lower sentences at both Tribunals (ICTY: median sentence of guilty plea cases is 12.5 years versus 15.0 years for cases with no guilty plea; ICTR: 11.0 versus 45.0).⁸⁴ However, it should also be noted that the guilty plea in itself does not guarantee a lower sentence. The first person to plead guilty at the ICTR, Jean Kambanda, was sentenced to life imprisonment.⁸⁵ At the ICTY, Goran Jelisić was sentenced to a very severe sentence of 40 years' imprisonment despite his admission of guilt.⁸⁶ The practice of pleading guilty is more widespread at the ICTY where 20 (28%) defendants plead guilty so far. In contrast, at the ICTR nine (22.5%) accused admitted to their guilt. The fact that a guilty plea is allegedly connected to a lower sentence could also be seen as a possible factor contributing to generally lower sentences at the ICTY compared with the ICTR.

81 Judgment, *Nahimana et al.*, *supra* note 73, § 1069.

82 Judgment, *Bikindi* (ICTR-01-72), Trial Chamber, 2 December 2008, § 457.

83 Sayers, *supra* note 3, at 768.

84 Please note that the computed median sentences are again based only on bivariate relationships comparing sentences where the defendant entered a guilty plea to sentences without a guilty plea. On the basis of these numbers, it is difficult to conclude as to a particular trend of less severe sentences with respect to guilty plea cases. The numbers may serve only as an indication thereof.

85 Judgment, *Kambanda* (ICTR-97-23), Appeals Chamber, 19 October 2000.

86 Judgment, *Jelisić* (IT-95-10), Appeals Chamber, 5 July 2001.

Table 9. ICTY

Aggravating factor	No. of cases cited (%)
Abuse of superior position/position of authority/influence	41 (58%)
Special vulnerability of victims	33 (46%)
Extra suffering of victims	25 (35%)
Many victims	18 (25%)
Cruelty of attack	13 (18%)
Duration of participation in crimes	11 (15%)
Active participant	11 (15%)
Important role in an attack	11 (15%)
Status of victims	8 (11%)
Encouragement of terror atmosphere	5 (7%)
Status/educated person	5 (7%)

Table 10. ICTR

Aggravating factor	Number of cases cited (%)
Abuse of superior position/position of authority/influence	31 (77.5%)
Cruelty/gravity of crimes/attack	14 (35%)
Many victims	11 (27.5%)
Active participant	7 (17.5%)
Encouragement of crimes	5 (12.5%)
Status/educated person	5 (12.5%)
Participation in attacks on churches/hospitals	5 (12.5%)
Abuse of trust of local community	3 (7.5%)
Extra suffering of victims	3 (7.5%)
Leading of some attacks	3 (7.5%)

2. Aggravating factors

In contrast to mitigating factors, aggravating factors are factors which justify an increase in sentence length. The principles applicable to aggravating factors are set up with stringent standards compared with mitigating factors. These strict conditions substantially limit the range of possible circumstances that could be accepted in aggravation of a sentence. Tables 9 and 10 show the 10 aggravating factors most frequently accepted at the ICTY and ICTR.

There are no major differences in the types of factors judges used to increase a sentence. At both Tribunals, the fact that a defendant occupied and abused a higher ranking position of authority and influence constitutes the most common aggravating factor. At the ICTR, this factor was accepted in aggravation of a sentence in 77.5% of cases (compared with 58% at the ICTY). The higher proportion of cases with this particular aggravating factor at the ICTR is arguably connected to the different composition of cases as the ICTR has

dealt with a comparably lower number of low-ranking defendants — the majority of accused exercised authority over others and their criminal conduct was considered to be an abuse of their position of power/influence.

There are also few ‘conflict-specific’ aggravating circumstances. At the ICTY, ‘special vulnerability of victims’ could be seen as one such example. In the Yugoslavian conflict many crimes were committed against persons held in detention camps such as Omarska or Keraterm. These detainees found themselves in particularly vulnerable positions and this fact is often emphasized by the ICTY judges. At the ICTR, ‘participation in attacks on places considered to be safe havens’ could be mentioned in this connection. During the genocide, many Tutsis sought refuge in churches, hospitals and schools, places universally recognized to be a sanctuary, under a false belief that they would be safe there. In several instances, Hutus attacked these concentration points and attacks resulted in massive Tutsi executions. ICTR judges in such cases emphasize the particularly condemnable nature of such attacks.⁸⁷

It is also to be noted that the analysis of aggravating factors is complicated by the fact that the case law on the distinction between aggravating factors and the gravity of the crime is not entirely clear. ICTR judges sometimes consider the gravity of crime to be one of the factors in aggravation. At the ICTY in some cases, the circumstances, such as special vulnerability of victims, extra suffering of victims, active role in an attack or a multitude of criminal acts, were accepted in aggravation, yet in others the same factors were considered as falling within the notion of gravity.⁸⁸

5. Assessment of Findings

In this study, we assessed the empirical reality of ICTY and ICTR sentencing. As noted by many commentators, there are large differences in the length of sentences issued by the ICTY and ICTR.⁸⁹ It was previously argued by others, and we showed that this is indeed in all likelihood the case, that this difference is mainly connected to the different case composition at the Tribunals. At the ICTR, the majority of defendants are convicted of genocide; many key figures (members of government and other high-ranking officials) and organizers of violence stood trial in Arusha. This is not the case in The Hague at the ICTY which has dealt with a comparatively higher number of low-ranking, hands-on executioners of persecutory campaigns. The dominance of genocide convictions at the ICTR could be seen as one of the primary reasons for the much more severe ICTR sentences. Genocide as ‘the crime of crimes’ is subject to generally lengthier sentences compared with other categories of international crimes. Our conclusion is further corroborated by the fact that in the

87 Judgment, *Kamuhanda* (ICTR-99-54A-T), Trial Chamber, 22 January 2004, § 764.

88 Cf. Judgment, *Bala* (IT-03-66-T), Trial Chamber, 30 November 2005, § 731; Judgment, *Zelenović* (IT-96-53/2), Trial Chamber, 4 April 2007, §§ 36-43.

89 This fact has been subject to comment many times. Cf. Drumbl and Gallant, *supra* note 62.

ICTR cases where no genocide conviction was entered, the sentences were in fact shorter compared with the ICTY. Other factors that could account for the difference in sentence severity include the relatively limited range of crimes prosecuted by the ICTR and the lack of guilty pleas. The crime base and composition of convictions is much less varied at the ICTR — the majority of defendants are convicted for killing and/or serious violence against victims. These are arguably the most serious violations of international criminal law. At the ICTY, the convictions include also generally less serious offences, such as crimes against property. Finally, the practice of a guilty plea, that is more frequent at the ICTY, arguably may have led to a shorter average sentence length and could also contribute to the generally shorter sentences at the ICTY.⁹⁰

Our analysis revealed several other interesting features of the Tribunals' sentencing practice. First, it has been demonstrated that there are indicia of an empirical ordering of international crimes in terms of sentence length with genocide at the top, followed by crimes against humanity and war crimes at the tail. These findings could add empirically based arguments to current discussions on the hierarchy of individual categories of international crimes. The ICTY and ICTR judges in the latest case law dismissed the idea of the crime hierarchy and emphasized that all the categories of international crimes are equally serious violations of international humanitarian law. The most important consideration should be the gravity of crimes *in concreto*, i.e. the particular circumstances of a case at hand with a focus on degree of harm actually caused by a defendant's criminal conduct. Therefore, according to the judges, the legal classification of an act as genocide or a war crime does not matter so much. In practice, many defendants convicted of genocide were the top- or mid-level organizers of a genocidal campaign at a state or regional level and counts of genocide often covered a broad array of criminal conduct of many people implementing the genocidal policies and perpetrating genocidal killings. Conversely, the defendants convicted exclusively of war crimes tend to be low- to middle-ranking individuals convicted on the basis of criminal activities never amounting to the organization of a state/regional persecutory campaign — in many cases these defendants were convicted as superiors for their omissions or for only ancillary activities. Therefore, it could be the case that genocide convictions are indeed in terms of the gravity *in concreto* the worst cases with the greatest amount of harm and this is what brings about the severest sentences. Convictions for war crimes, on the other hand, encompass comparably less serious cases entailing the least amount of harm and thus the most lenient sentences.⁹¹

90 Other possible reasons for the difference in sentence severity between ICTY and ICTR, such as reference to national practice (incorporation of national law) and/or the sheer gravity of atrocity in Rwanda, have been offered in a literature. Cf. Drumbl and Gallant, *ibid.*

91 It should be noted that there are cases in which a high-ranking defendant was convicted for an extensive campaign of violence while war crimes constituted the bulk of the conviction. However, this type of cases seems to be rather exceptional. For example, General Stanislav Galić, the only defendant sentenced to life imprisonment on appeal by the ICTY, was held

Indeed, in terms of the gravity *in concreto* assessment, our analysis revealed that sentences seem to be gradated according to the scope of the crime, the role of a defendant and his/her rank. Our results indicated that those responsible for regional or national campaigns of persecution, extending over longer periods of time and involving many victims, were subjected to the severest sentences. The high-ranking figures organizing crime from above were sentenced to the lengthiest sentences at both Tribunals. This finding indicates that those orchestrating crime at the top leadership levels are indeed considered the most culpable for the purposes of sentencing. It is generally accepted in legal but also criminological discourse that the top leadership figures are those most to be blamed for international crimes.⁹² These normative considerations seem to be reflected in the empirical sentencing practice of both ICTY and ICTR. The lower ranking enthusiastic executioners are, unexpectedly, sentenced to comparably severe sentences. As we have showed this is arguably on account of the cruelty of committed acts and zeal of these perpetrators. Their enthusiasm and the extreme cruelty of crimes committed seem to add to their sentences and counteract the influence of the minor role of the offender within the overall conflict.⁹³

responsible for war crimes and crimes against humanity for the campaign of sniping and shelling attacks on the city of Sarajevo. In this case, the judges emphasized the exceptional brutality and cruelty of the acts, the defendant's systematic, prolonged and premeditated participation and abuse of his senior position within the army to justify sentence severity. See *Galić*, *supra* note 10, § 455; See also Judgment, *Milosević* (IT-98-29/1A), Appeals Chamber, 12 November 2009, §§ 324–328.

92 Cf. C. Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', 2 *JICJ* (2004) 516; A. Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in A. Smeulers and R. Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), at 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* (New York: Oxford University Press, forthcoming, 2011) available online at <http://ssrn.com/abstract=1726411> (visited 1 February 2011), at 14, where the author argues for a primacy of the offence-gravity proportionality (i.e. a defendant receives punishment that is proportional to his/her wrongdoing) over the defendant-relative proportionality (i.e. more culpable defendants ought to be punished more severely than less culpable defendants) in international sentencing. According to Ohlin, international sentences should above all reflect the inherent gravity of the offence so that even limited participation in international crimes by a low- or mid-level offender would yield a life sentence (if the offence seriousness warrants a life imprisonment), even if participation by the highest level offenders yields the same life sentence.

93 This observation applies in particular to ICTY sentencing practice. The 'apparent' discrepancy between 'sentences of such low level perpetrators and their superiors' at the ICTY has already been noted in academic literature. Cf. S. Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 99 *The Journal of Criminal Law and Criminology* (2009) 857, at 926. As discussed in the text, a possible explanation of this phenomenon could be that in cases of some low-ranking defendants, there are factors that seem to add to their sentences (such as cruelty, sadism, pleasure derived from crime and enthusiastic participation) and judges seem to weigh these other factors against the relative importance of a defendant in the overall state hierarchy.

Finally, the overview of the most common aggravating and mitigating factors revealed that there do not seem to be any substantial differences between the Tribunals. With few exceptions, similar mitigating/aggravating circumstances are accepted by judges at both jurisdictions.

6. Conclusions

This overview of ICTY and ICTR sentencing practice attempted to fill the gap in empirical research into sentencing of international crimes.⁹⁴ By comparing ICTY and ICTR sentencing outcomes with sentencing narrative, we described variation in sentences related to different categories of crimes, type of underlying offence, scope of crime, modes of individual liability, different ranking of defendants and aggravating and mitigating factors. Of course, a descriptive analysis cannot fully uncover the impact of inter-related sentencing determinants on sentence severity as this is based on the interplay of a multiplicity of sentencing factors. To investigate the actual contribution to sentence length of individual sentencing factors and to assess their relevance given other pertinent properties of cases, a more complex statistical technique would be needed. This is a matter we plan to investigate in the future. It should, however, be noted that sentence determination is a complex phenomenon which one cannot unravel with a method that aims to summarize the main trends. Our study fundamentally offers an overview of ICTY and ICTR practice and allows us to identify broad 'red lines' in the sentencing procedure of the Tribunals leaving out the particularities of cases.

The findings of our analysis form one of the building blocks on the road to understand the phenomenon of international sentencing and if necessary, to develop international sentencing guidelines. Recently, various scholars have called for international sentencing guidelines in order to secure a minimum of uniformity and coherence in the sentencing of international crimes.⁹⁵ The questions whether there is a necessity for such an instrument at the international level; and if so, how such guidelines should be drafted, are however still open and need to be answered in light of further evaluative research of international sentencing.

94 Drumbl, *supra* note 4.

95 Cf. A. Cassese, 'The ICTY: A Living and Vital Reality', 2 *JICJ* (2004) 585, at 596.