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Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia

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Abstract

This article presents some defence perspectives on the sentencing practices of the ICTY and the ICTR. Recent developments, such as the new regime of plea bargaining recognized by recently adopted Rule 62 *ter*, are examined, along with the concepts of deterrence and retribution frequently recognized as the most important sentencing factors. In addition, the concept of 'substantial co-operation' with the prosecution is reviewed, an increasingly common phenomenon in sentencing decisions, and one which appears to entitle persons who demonstrate 'substantial co-operation' to significant discounts in their sentences. The article reviews aggravating and mitigating factors and their treatment and consideration by ICTY and ICTR trial chambers, as well as the treatment of discretionary sentencing decisions by trial chambers on appeal. Generally speaking, the author concludes that the increasingly common practice of plea bargaining, and the existence of 'substantial co-operation' with the prosecution, must be very seriously considered by any defence counsel at the outset of a case, while significant sentencing discounts may still be available.

Key words

aggravating and mitigating factors; appellate review of discretionary sentencing decisions by trial chambers; guilty pleas; 'substantial co-operation' with the prosecution

1. Introduction

For defence counsel contemplating representation of an accused before the International Criminal Tribunal for the former Yugoslavia (ICTY),[1] there is one verity that must be borne constantly in mind. It is not a tribunal devoted to acquittals. In all of the cases litigated in the ten-year history of the ICTY, only two accused have been acquitted on all charges at the trial chamber level.[2] Three other persons convicted of

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1. The establishment of the ICTY was authorized pursuant to UN Security Council Resolution 808 of 22 Feb. 1993. Sec. Council Res. 808, UN Doc. S/RES/808 (22 Feb. 1993). After consideration of a 3 May 1998 Report prepared by the Secretary-General, the Security Council unanimously approved Resolution 827, which formally established the ICTY and approved the Secretary-General's recommended text of the Statute of the International Criminal Tribunal for the former Yugoslavia without change. Sec. Council Res. 827, UN Doc. S/RES/827 (25 May 1993).
2. See *Prosecutor v. Delalić*, IT-96-21-T, Judgement, 16 Nov. 1998. Zejnil Delalić was a coordinator of Bosnian Muslim and Bosnian Croat forces in the Konjic area between April and Sept. of 1992, and was acquitted on all 12 charges of grave breaches of the Geneva Conventions of 1949, as well as on all charges of violations of the laws or customs of war. Although the prosecution's tissue-thin case of 'command responsibility' against

serious violations of international humanitarian law have been acquitted on appeal as a result of an impermissibly defective indictment and erroneous findings of fact made by the trial chamber.[3] These sombre statistics require defence counsel to give mature and urgent consideration to sentencing matters at the very outset of the case.[4]

Even though the ICTY has been diligently turning out a regular stream of complicated, lengthy, and multi-footnoted decisions and judgements, the Appeals Chamber has been reluctant to recognize any set of firm guidelines for sentencing, and has repeatedly observed that it is too early to discern the emergence of any consistent pattern of sentences that might be applicable in a particular case. Given the fact that the ICTY has a limited remit, a remit that is set to expire by 2008 or 2009,[5] whether such a regime will ever emerge becomes a legitimate question.

An interesting anomaly exists between the ICTY, and its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), as to sentencing practice and history. In the ICTR, life sentences are common, having been imposed in a number of cases.[6] In the ICTY, by contrast, no life sentences had been imposed by the date of submission of this article, 21 July 2003.[7] Ten days later, however, on 31 July 2003, an ICTY trial chamber handed down that Tribunal's first life sentence.[8] There appears

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Delalić collapsed, the remaining accused in the Čelebići camp cases – Zdravko Mucić, Hazim Delić, and Esad Landžo – were all convicted. The only other trial chamber acquittal was of Dragan Papić. See *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, 14 Jan. 2000, para. 769. Papić was charged with a single count of persecution as a crime against humanity in relation to the killings at Ahmići on 16 April 1993.

3. See *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Appeal Judgement, 23 Oct. 2001.
4. It is one of the realities of practice before the ICTY that the defence is required to make sentencing submissions, and introduce evidence pertinent to sentencing issues, during its case-in-chief. See P. M. Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', (2001) 42 HILJ 535, at 549 n. 62. Certain unfairness to the defence as a result of this has been noted. See generally R. May and M. Wierda, *International Criminal Evidence* (2002), 39, para. 2.57. The recently constituted International Criminal Court has not followed this practice. Instead, it has adopted the practice of separate evidentiary hearings for sentencing only after an accused has first been found guilty. *Ibid.* It is submitted that the latter approach is preferable, and more consistent with an accused's fundamental right to a 'fair trial'.
5. See ICTY Update No. 318, Institute for War and Peace Reporting, 4 July 2003 (President of ICTY, Judge Theodor Meron, discusses projected 2008 ICTY closing date proposed by UN Security Council, and observes that this date 'is not written in stone . . .', that the work of the ICTY trial chambers might run over to 2009, 'and of course there will be two or three years of appeals after that').
6. Life sentences have been imposed in six cases before the ICTR: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001; *Kambanda v. Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 Oct. 2000; *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 Nov. 2001; and *Prosecutor v. Rutaganda*, Case No. ICTR-36-3-T, Judgement and Sentence, 6 Dec. 1999; and, most recently, in *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003.
7. One commentator has attributed this difference in sentencing practice to the difference between penalty schemes in the former Yugoslavia (where the highest penalty was death or a sentence of 20 years) and Rwanda (where the highest penalties were death, for genocide convictions, and life imprisonment for murder convictions). A. M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Virginia Law Review* 415, 442 n. 105.
8. See *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003. The trial chamber convicted Milomir Stakić on a variety of charges under Art. 7(1) and (3) of the Statute. He was sentenced to imprisonment for life, with a recommendation that he serve a minimum sentence of 20 years before being eligible for release. *Ibid.*, at 253. Prior to the *Stakić* Judgement, the longest sentence imposed by the ICTY had been 46 years, for the crimes of genocide, persecution and murder committed in Srebrenica in July 1995. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, 2 Aug. 2001, para. 726. General Krstić was second-in-command under General Ratko Mladić, and was the commander of the Drina Corps of the Vojna Republika Srpska (VRS) at the time

to be no principled reason why this disparity in sentencing practice exists, especially since the members of the Appeals Chambers of both the ICTY and the ICTR are the same.[9]

This article will review some basic principles applicable to sentencing in the ICTY and ICTR, and will review, generally, the sentence-increasing or sentencing-reducing factors that have been examined in the decided case law. It will also review the increasingly important and emerging practice of plea bargaining, a relatively recent phenomenon in the ICTY. In addition, the issue of 'substantial co-operation' with the prosecution has assumed elevated prominence in some recent cases, and has resulted in significant reductions in sentences that might otherwise have been imposed. It will conclude with an analysis of the principles of appellate review of sentencing judgements. Despite an ostensibly narrow and challenging standard of appellate review, sentencing judgements in the ICTY have been revised or reversed with surprising frequency. Sentencing appeals in the ICTR, by contrast, have been almost uniformly unsuccessful.

2. The general framework involved in sentencing considerations

The starting point for any analysis of the sentencing powers of the ICTY trial chambers is the Statute of the Tribunal.[10] Article 24 of the Statute is entitled 'Penalties', and provides, generally, that the penalty imposed by a trial chamber 'shall be limited to imprisonment'.[11] Although life imprisonment is the maximum sentence that may be imposed by ICTY trial chambers, the Appeals Chamber has noted that '[n]either the Statute nor the Rules provide guidance for judicial discretion with respect to the recommendation of a minimum sentence'.[12] The ICTY has no power to

that over 25,000 Bosnian Muslim men, women, and children were expelled from their homes, and at the time that the VRS executed 7,000 to 8,000 Bosnian Muslim men and boys 'in the most cruel manner'. *Ibid.*, at para. 720. The prosecution understandably argued for the imposition of consecutive life sentences on each conviction. *Ibid.*, at para. 690.

9. The members of the Appeals Chambers of the ICTY and ICTR are identical. See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, Separate Declaration of Judge David Hunt, at 81, para. 3. The ICTY and ICTR are the only International Tribunals with their own internal appellate structures. *Ibid.*, at n. 2. See P. M. Wald, 'Judging War Crimes', (2000) 1 Chi. J. Int'l L. 189, at 195 (commenting on the 'slightly awkward situation of a relatively small number of judges sitting both as trial and appellate jurists and ruling on each other's cases').

10. See Statute, Art. 24. The ICTR was established pursuant to UN Security Council Resolution 955, adopted on 8 Nov. 1994. Its Statute, annexed to the Security Council Resolution, contains, in Art. 23, provisions that mirror those of Art. 24 of the ICTY Statute.

11. Art. 27 of the Statute states that '[i]mprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.' Selection of the State in which imprisonment is to be served has some important consequences. Art. 28 of the Statute provides that, '[i]f pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interest of justice and the general principles of law.' See also 'Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment', 9 July 1998.

12. *Prosecutor v. Tadić*, Case Nos. IT-94-1-A and IT-94-1-A *bis*, Judgement in Sentencing Appeals, 26 Jan. 2000, para. 28.

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impose the death penalty. In determining the duration of the imprisonment, trial chambers 'shall have recourse to the general practice regarding prison sentences in the Courts of the former Yugoslavia'.[13] As trial chambers decide on individual sentences, they are required to 'take into account such factors as the gravity of the offence and the individual circumstances of the convicted person'.[14]

The Tribunal currently has three primary rules in relation to sentencing matters. In the increasingly common environment of guilty pleas, Rule 62 *bis* requires trial chambers to ensure that any accused who makes a guilty plea has done so voluntarily, after having been fully informed of his rights. In addition, the plea must be completely unequivocal.[15] Furthermore, it is a trial chamber's duty to ensure that there is a sufficient factual basis for establishing that the crimes charged were actually committed, and that the accused actually participated in the commission of those crimes, either on the basis of independent indicia or because of the lack of any material disagreement between the parties about the facts of the case.[16]

Until recently the ICTY had no regime for the acceptance of plea agreements entered into between the prosecution and an accused. Rule 62 *ter* has now been adopted, however, and it permits the parties to enter into agreements relating to pleas of guilt, even though 'the Trial Chamber shall not be bound by any [such] agreement'.[17]

Rule 100 deals with sentencing procedure on guilty pleas. Rule 101 deals with penalties to be imposed by the trial chamber. If a trial chamber convicts an accused on a guilty plea, the prosecution and defence may submit 'any relevant information that can assist the trial chamber in determining an appropriate sentence'.[18] In other situations, such as after full trials, the ICTY's Rules specifically confer on trial chambers the authority to impose sentences 'for a term up to and including the remainder of the convicted person's life'.[19] In determining sentences, Rule 101(B) specifically requires trial chambers to take into account each of the factors mentioned in Article 24(2) of the Statute, as well as factors such as aggravating circumstances, mitigating circumstances, 'substantial co-operation with the Prosecutor by the convicted person before or after conviction', general practices regarding prison sentences in the courts of the former Yugoslavia, and matters of credit to be given for time served or detention in custody pending surrender to the Tribunal or pending trial or appeal.[20]

13. Statute, Art. 24(1).
14. *Ibid.*, Art. 24(2). In addition, trial chambers have the capacity to order the return of the property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. *Ibid.*, Art. 24(3).
15. See *infra* notes 16 and 100.
16. Rule 62 *bis* (i)–(iv). This is not a mere formality. At least one accused before the ICTR made, as one of his principal arguments on appeal, the contention that his guilty plea was not informed, not voluntary, and was equivocal. *Kambanda, supra* note 6, paras. 77, 87. That argument was unsuccessful. In one of the first full appeals decided by the ICTY Appeals Chamber, however, a similar argument was successfully made. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgement, 7 Oct. 1997, para. 20.
17. Rule 62 *ter* (B). This Rule was adopted on 21 Dec. 2001, and went into force on 28 Dec. 2001. See ICTY Judicial Supplement No. 29 (Nov./Dec. 2001).
18. Rule 100(A).
19. Rule 101(A).
20. Rule 101(B), (C).

3. Underlying principles governing sentencing

Article 24(2) of the Statute requires trial chambers, in imposing sentence, to take into account 'such factors as the gravity of the offence and the individual circumstances of the convicted person'.[21] In view of this mandate, the 'gravity of the offence' has been described as by far the most important consideration in sentencing, and 'may be regarded as the litmus test for the appropriate sentence'.[22] The overarching goal of trial chambers in imposing sentence is to ensure that the sentence selected reflects the totality of the criminal conduct of an accused, and his or her overall culpability in the context of the offences proved.[23] The law is clear that trial chambers have wide discretion in fashioning an appropriate sentence, although this discretion is not unlimited.[24] In exercising this discretion the overriding obligation of the trial chamber is to individualize the penalty to fit the circumstances of the accused, in view of the gravity of the crime.[25] The Appeals Chamber, in reviewing sentences imposed by trial chambers, has occasionally set aside a sentence when the trial chamber had paid insufficient heed to the gravity of the offence in assessing the sentence on an accused.[26]

There are no objective guidelines for assessing gradations of gravity in analyzing offences committed by accused persons for sentencing purposes. The easy cases tend to deal with the vicious thugs, a large number of whom have been paraded before the ICTY, charged with a variety of heinous offences ranging from murder, aggravated sexual offences, beatings (occasionally to death), and an apparently endless variety of various forms of physical, psychiatric, and psychological torture. In connection with these offences, their gravity seems to be self-evident, and the sentences to be imposed should be accordingly harsh.[27] The more difficult case

21. The factors to be taken into account by trial chambers in assessing appropriate sentences were made the subject of a report of the Secretary-General of the United Nations, reviewed generally in M. Cherif Bassiouni and P. Manikas, *Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 973.
22. See *Prosecutor v. Delalić* Case No. IT-96-21-A, Judgement (*Čelebići* Appeal Judgement), 20 Feb. 2001, para. 731; see also *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 847; *Prosecutor v. Sikirica*, Case No. IT-95-8-S, Sentencing Judgement, 13 Nov. 2001, para. 106.
23. *Čelebići*, *supra* note 22, para. 430.
24. *Ibid.*, at para. 717; see also *Akayesu*, *supra* note 6, para. 410 (Trial chamber's sentencing discretion is not unlimited).
25. *Čelebići*, Appeal Judgement para. 717. One of the best expositions of the factors to be taken into account in sentencing appears in the *Kunarac* case. See *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 Feb. 2001, paras. 836–844, 853–854. The *Kunarac* trial chamber noted that sentencing factors may be interchangeably referred to as sentencing 'objectives', 'purposes', 'principles', 'functions' or 'polic[ies]'. *Ibid.* at para. 836 and n.1430.
26. See, e.g., *Čelebići*, *supra* note 22, para. 757 (seven-year sentence for Čelebići camp commander found to be inadequate); see also *Aleksovski*, *supra* note 9, para. 183 ($2^{1}/_{2}$-year sentence for prison camp commandant found to be 'manifestly inadequate'; the Appeals Chamber itself revised the sentence upwards to seven years).
27. Even so, despite execution-style murders, and varieties of vicious beatings and sexual offences, there is a surprising range of sentences that have been imposed on the perpetrators of these sorts of serious violations of international humanitarian law. See, e.g., *Sikirica*, *supra* note 22 (Sikirica, who admitted executing a Muslim, pleaded guilty and was sentenced to 15 years; Došen, a shift leader at Keraterm Camp, received a 'slap on the wrist' sentence of five years; and Kolundžija received a 'tap' on the wrist sentence of three years); *Prosecutor v. Todorović*, Case No. IT-95-9/I-S, Sentencing Judgement, 31 July 2001 (despite personal participation in a savage beating resulting in the death of one person and numerous other beatings, combined with cruel and inhumane treatment of non-Serb civilians, and despite his prominent position of command as chief of police in Bosanski Šamac, a 10-year sentence was imposed). The leniency of these sentences can be explained as

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comes when high-level commanders or political figures are involved. Typically, although not always, these accused are rather far, and occasionally very far, removed from the actual perpetration of crimes in the traditional sense. Both the ICTY and the ICTR have been extraordinarily diligent in elasticizing the legal contours of the crime of 'persecution', however, resulting in increased punishment for those found guilty of this evolving and expanding crime. Even though the Appeals Chamber has specifically commented on the 'nebulous character' of the crime of 'persecution',[28] the Tribunal's jurisprudence, nonetheless, insists that the crime of 'persecution' is particularly serious and that it merits proportionately severe punishment.[29]

In assessing the 'gravity of the offence', one trial chamber rejected an argument advanced by the prosecution that there should be some abstract comparison of the gravity per se of various crimes, comparing, for example, the severity of crimes against humanity against violations of the laws or customs of war.[30] The *Kunarac* trial chamber noted that such an argument had been rejected by the *Tadić* Appeals Chamber, which emphasized that there is 'no distinction between the seriousness of a crime against humanity and that of a war crime'.[31]

4. The arguments concerning sentencing guidelines or 'tariffs'

The ICTY was founded in 1993, and has issued a large number of judgements since that time. Many have been reviewed on appeal. Nonetheless, the Appeals Chamber has been extraordinarily reluctant to issue any definitive recommendations regarding sentencing guidelines or appropriate sentences in a particular case. Persons

a result of the guilty pleas registered, albeit tardily, by the accused in these cases and for which they were given a significant reduction of sentence by the applicable trial chambers.

28. See *Kupreškić*, *supra* note 3, para. 98.

29. See, e.g., *Todorović*, *supra* note 27, paras. 32, 57 (persecution is a 'particularly serious crime') (examining cases); *Stakić*, *supra* note 8, para. 907 (persecution inherently constitutes a 'very grave crime' because of its distinctive feature of discriminatory intent as a required element of the crime).

30. See *Kunarac*, *supra* note 25, para. 851.

31. *Tadić*, *supra* note 12, paras. 27–29; see also *Krstić*, *supra* note 8, para. 700 ('Assessing the seriousness of crimes is not a mere matter of comparing and ranking the crimes in the abstract'). In *Furundžija*, the Appeals Chamber noted its agreement with *Tadić*, *supra* note 12, on the issue of the impropriety of trying to draw illusory distinctions between the relative seriousness of war crimes as opposed to crimes against humanity. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 248; accord *Kayishema*, *supra* note 6, para. 367 (the Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all crimes specified therein are 'serious violations of international humanitarian law' capable of attracting the same sentence'). In a Declaration attached to the *Furundžija* Appeal Judgement, however, Judge Vohrah noted the 'cold logic' of *Tadić*, *supra* note 12, but argued, nevertheless, that crimes against humanity must be characterized as more serious than war crimes. *Furundžija* Appeal Judgement, Declaration of Judge Lal Chand Vohrah, paras. 1, 5, 11. Judge Vohrah suggested that the Appeals Chamber would be obliged to take the same position with respect to the crime of genocide, and wondered why a prosecutor would try to prove the additional elements required for genocide as a crime against humanity if, at sentencing, the convictions would be treated as those for war crimes in any event. See generally J. E. Ackerman and E. O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia, with Selected Materials from the International Criminal Tribunal for Rwanda* (2000), 469 n. 876 . One trial chamber has stated that it 'considers it wrong to resort to some abstract comparison of the '*per se* gravity of the crimes', comparing the severity of the crimes against humanity and violations of the laws or customs or war as suggested by the Prosecutor'. *Kunarac*, *supra* note 25, para. 851.

convicted of violations of the Statute have regularly made arguments concerning the disparity in the sentences imposed on them as opposed to, for example, sentences imposed on persons relatively more highly placed in the military hierarchy in the Nuremberg or Toyko Tribunals.[32]

Similar arguments were advanced in the *Furundžija* case.[33] Furundžija argued that an 'emerging penal regime' was recognizable in war crimes cases, and that certain identifiable principles governing the imposition of an appropriate sentence had been established. This argument was rejected by the Appeals Chamber, which commented that it is 'premature' to speak of an 'emerging penal regime', and that the development in the ICTY of the jurisprudence of sentencing 'is still in its early stages'.[34] In connection with the prosecution's suggestion that it would be advisable for the Appeals Chamber to develop a set of sentencing guidelines, the Appeals Chamber stated unequivocally that it was 'inappropriate to establish a definitive list of sentencing guidelines for future reference'.[35] The *Furundžija* Appeal Judgement was handed down on 21 July 2000, and, just seven months later, the same principles were revisited and reaffirmed in the *Čelebići* Appeal Judgement. Again, the Appeals Chamber emphasized that it was 'inappropriate to set down a definitive list of sentencing guidelines for future reference', and commented further that 'the benefits of such a definitive list are in any event questionable'.[36] Indeed, the Appeals Chamber stated that comparison of sentences is often of very little benefit, because of the obligation to individualize the penalty to fit the particular circumstances of the accused. The Appeals Chamber did concede, however, in a very general way, that two accused convicted of similar crimes, under similar circumstances, should not, in practice, receive very different sentences.[37] In the view of the Appeals Chamber, the differences between cases are often far more significant than the similarities, and an assessment of the individual aggravating and mitigating factors in a particular case make any generalizations inappropriate. Indeed, the Appeals Chamber

32. Tadić made precisely such an argument, and it was apparently rejected by the Appeals Chamber. Nonetheless, the 25-year sentence imposed on Tadić was revised downward to 20 years because his 'level in the command structure . . . was low', even though his brutal crimes, including wilful murder, were 'incontestibly heinous'. *Tadić*, *supra* note 12, para. 56.
33. Furundžija argued that the two crimes of which he was convicted involved no loss of life, and, therefore, by comparison with the individual sentences imposed on Tadić for his far more brutal crimes involving loss of life, Furundžija's sentence was too harsh. *Furundžija*, *supra* note 31, para. 236. This argument was dismissed out of hand. In *Furundžija*, the trial chamber found that, while the accused did not himself perpetrate acts of rape, he aided and abetted in the rapes and serious sexual assaults inflicted on Witness 'A'. The circumstances of these attacks were particularly horrifying. They involved a woman who was brought into detention, kept naked and helpless before her interrogators, and treated with the utmost cruelty and barbarism. Furundžija was found to have played a part in the commission of these crimes, rather than preventing them as was his duty as a superior. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 282. The case involved especially ruthless instances of torture and rape, and Furundžija's role as a commander was considered to be a serious aggravating factor, as was the fact that Witness 'A' was a civilian detainee, and at the complete mercy of her captors. *Ibid.* at para. 283.
34. *Furundžija*, *supra* note 31, at para. 237.
35. *Ibid.*, at para. 238.
36. *Čelebići*, *supra* note 22, paras. 715–716.
37. *Ibid.*, at para. 719; see also *Stakić*, *supra* note 8, para. 933 (rejecting defence arguments for a relatively lenient sentence by comparing Stakić's case to those of Plavšić and Todorović. The trial chamber pointed out that these cases involved guilty pleas and 'significant mitigating factors, among other factors, unknown to this trial chamber'.).

noted specifically that a trial chamber is not bound to impose in one case the same sentence as that imposed in another case 'simply because the circumstance between the two cases are similar'.[38] Nonetheless, the Appeals Chamber observed that, as the number of sentences imposed by the Tribunal increases, 'there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar'.[39] This notion was revisited and reiterated in the 'Serbian Adolf' case involving a 'one-man genocide mission', where the Appeals Chamber commented that it is 'difficult and unhelpful' to lay down any hard and fast rule relating to sentencing issues.[40]

Most recently, in October 2002, the *Simić* trial chamber commented that it was mindful of the importance of achieving consistency in sentencing matters, but that, at the present time, a range or pattern of appropriate sentences for crimes such as those committed by Simić 'does not exist'.[41]

5. Factors to be considered in the individualization of an appropriate sentence

Article 24 of the ICTY Statute requires trial chambers to take into account the 'gravity of the offence' and the 'individual circumstances' of a convicted person. Rule 101 gives some contour to these generalities. Rule 101 provides that a prison term of up to and including the remainder of the convicted person's life may be imposed.[42] Prior to the *Stakić* Trial Judgement issued on 31 July 2003, the ICTY had never imposed a life sentence on any convicted person, despite the fact that many people who have been heard before it have committed astoundingly vicious and brutal crimes, including multiple executions, gang-rapes, and the sale of women into sexual enslavement, quite apart from genocidal mass murder and the mistreatment of thousands of detainees in latter-day concentration camps. General Krstić, one of the perpetrators of the Srebrenica massacre, in which seven to eight thousand Bosnian Muslims were sadistically executed, was sentenced to a 46-year prison term. General Blaškić, the overall military commander of the Central Bosnia Operative Zone, drew a 45-year sentence for what may be thought to be far less serious offences. Others, like Vasiljević, who participated in the deliberate execution of five Bosnian Muslims and the attempted murder of two others, drew a comparatively more lenient 20-year sentence. Goran Jelisić, the 'one-man genocide mission', drew a 40-year sentence, despite having deliberately executed numerous Bosnian Muslims and others.[43]

As to each of these sentences, Rule 101 requires trial chambers to take into account the factors mentioned in Article 24(2) of the Statute, as well as aggravating

38. *Čelebići*, Sentencing Judgement, at para. 757.
39. *Ibid.*
40. *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 96.
41. *Prosecutor v. Simić*, Case No. IT-95-9/2-S, Sentencing Judgement, 17 Oct. 2002, para. 114.
42. Rule 101(A).
43. By contrast, life sentences have been imposed fairly routinely by the ICTR on high-ranking persons. See *supra*, note 6.

circumstances, mitigating circumstances (which includes 'substantial co-operation with the Prosecutor by the convicted person before or after conviction'), and the general practice regarding prison sentences in the courts of the former Yugoslavia at the time the offences were committed.[44]

6. 'Deterrence' and 'retribution'

Deterrence and retribution have been described as the 'main general sentencing factors'.[45] The concept of 'deterrence' revolves around the notion of 'bringing to justice' individuals who are responsible for serious violations of international humanitarian law, and to deter others who might be inclined to commit similar violations of international humanitarian law in the future.[46] The Appeals Chamber has drawn a distinction between 'special' deterrence and 'general' deterrence.[47] 'Special' deterrence is aimed specifically at the individual, but, because persons prosecuted for violations of international humanitarian criminal law, or for war crimes, are unlikely to be faced with the opportunity to repeat the offence,[48] this 'special' deterrence factor 'is generally of little significance'.[49] By contrast, 'general' deterrence has been described as one of the most important factors in sentencing.[50]

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44. Rule 101(B)(i)–(iii).
45. *Kunarac*, *supra* note 25, para. 838 (citing *Aleksovski*, *supra* note 9, para. 185; *Kupreškić*, *supra* note 3, para. 848); see also *Simić*, *supra* note 41, para. 33. The *Furundžija* trial chamber considered that punishment by an International Tribunal must serve as a tool of retribution, stigmatization, and deterrence. The penalties imposed by the Tribunal must be made more onerous by the international nature of the crime, by the moral authority of the Tribunal and by the impact on world public opinion of an appropriate sentence. *Furundžija*, *supra* note 33, paras. 289–290; *Stakić*, *supra* note 8, para. 900.
46. *Čelebići*, *supra* note 22, para. 809.
47. Deterrence 'aims at deterring the specific accused from again committing similar crimes in future (special deterrence), and/or at deterring others from similar crimes (general deterrence)'. The *Tadić* Appeals Chamber was faced with a ground of appeal alleging that the trial chamber had erred in placing excessive weight on deterrence as a factor in the assessment of an appropriate sentence for violations of international humanitarian law. The Appeals Chamber held, without further elaboration, that the principle of deterrence is a 'consideration that may be legitimately considered in sentencing'. *Tadić*, *supra* note 12, para. 48. This factor, however, 'must not be accorded undue prominence in the overall assessment of the sentence to be imposed on persons convicted by the International Tribunal'. *Ibid.* The *Kunarac* trial chamber noted that the *Tadić* Appeals Chamber did not indicate whether its remarks concerned special or general deterrence, or both. *Kunarac*, *supra* note 25, para. 839 and n.1437. Reviewing the Tribunal's jurisprudence, and particularly *Aleksovski*, *supra* note 9, the *Kunarac* trial chamber noted that 'whether the Appeals Chamber considers special or general deterrence or both to be a main general sentencing factor is therefore not entirely clear'. *Ibid.*, at para. 840. Accordingly, 'given that uncertainty', the trial chamber considered it to be appropriate to express 'its view that special deterrence, as a general sentencing factor, is generally of little significance before this jurisdiction'. *Ibid.* The reason is that the likelihood of persons convicted before the ICTY of ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide, or grave breaches of the Geneva Conventions of 1949 'is so remote as to render its consideration in this way unreasonable and unfair'. *Ibid.* Insofar as 'general' deterrence is concerned, the jurisprudence of the ICTY is clear: 'it is not to be accorded undue prominence in the assessment of the overall sentence to be imposed'. *Ibid.* The reason is that a sentence should be imposed on the offender for '*his* culpable conduct – it may be unfair to impose a sentence on an offender greater than is appropriate for that conduct solely in the *belief* that it will deter others'. *Ibid.* (emphasis added).
48. See *Kunarac*, *supra* note 25, para. 840.
49. *Ibid.*
50. *Tadić*, *supra* note 12, para. 41. The *Tadić* Appeals Chamber emphasized, however, that this factor, while important, must not be accorded undue prominence in the overall assessment of the sentence to be imposed. *Ibid.*, at para. 48. Nonetheless, because deterrence is an important factor, any manifestly inadequate sentence has been viewed as defeating one of the central purposes of sentencing for international crimes, which is to deter and dissuade others from committing similar crimes in the future. *Kunarac*, *supra* note 25, para. 839.

The Appeals Chamber has also emphasized that the concept of 'retribution' is as important as 'deterrence'.[51] In assessing the retributive factor, any sentence should make clear the international community's condemnation of the behaviour in question, and the sentence must send an unmistakable message that the international community is not prepared to tolerate serious violations of international humanitarian law and human rights.[52] The recent *Todorović* Sentencing Judgement has explained that, in calculating appropriate sentences, the need for retribution must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing, and generally means that the punishment must be made to fit the crime.[53]

7. Sentencing practice in the courts of the former Yugoslavia

Although Article 24(1) of the Statute requires trial chambers to consider the sentencing practices of the courts of the former Yugoslavia, as a practical matter, with one exception,[54] this factor has generally not appeared to be particularly influential in the calculation or review of sentences imposed. The Appeals Chamber has emphasized that, despite the statutory mandate, a trial chamber is not bound to follow the practices of the courts of the former Yugoslavia, although it must take them into account in calculating an appropriate sentence.[55]

The only reported case in which the sentencing practices of the courts of the former Yugoslavia has played a relatively significant role in the revision of a trial chamber sentence is that of *Aleksovski*. In this case, the Appeals Chamber rejected as 'manifestly inadequate' a two-and-a-half year sentence imposed on Žlatko Aleksovski, the warden of the Kaonik Military Detention Facility in Central Bosnia.

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51. *Aleksovski*, *supra* note 9, para. 185. In *Erdemović*, the trial chamber stressed that the International Tribunal 'sees public reprobation and stigmatization by the international community, which would thereby express indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity'. *Prosecutor v. Erdemović*, Case No. IT-96-22-S, Sentencing Judgement, 29 Nov. 1996 *(Erdemović* Sentencing Judgement), para. 65. See also *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 763.
52. The *Furundžija* trial chamber considered that punishment by an International Tribunal must serve as a tool of retribution, stigmatization and deterrence. The penalties imposed by the Tribunal must be made more onerous by the international nature of the crime, by the moral authority of the Tribunal and the impact on world public opinion of an appropriate sentence. *Furundžija*, *supra* note 33, paras. 289–290; see also *Stakić*, *supra* note 8, para. 900 (observing that the severity of sentence reflects, not a desire for revenge, but a clear expression of the outrage of the international community about the commission of heinous crimes such as those generally involved in cases before the Tribunal).
53. *Todorović*, *supra* note 27, para. 29.
54. *Aleksovski*, *supra* note 9, para. 188.
55. *Čelebići*, *supra* note 22, para. 816; see also *Kunarac*, *supra* note 25, at para. 859; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 Nov. 2002, at 103, n. 669. Capital punishment was abolished by constitutional amendment in the SFRY republics, other than Bosnia and Herzegovina, in 1977. After that, a new maximum sentence of 20 years for the most serious offences, prescribed by Art. 38 of the SFRY Criminal Code, could be imposed. After Nov. 1998, Bosnia and Herzegovina prescribed the death penalty only in exceptional circumstances, for criminal offences committed during a state of war, as stated in Art. 34 of the Criminal Code of the Federation of Bosnia and Herzegovina, which came into force on 28 Nov. 1998. Otherwise, the Criminal Code provides for the imposition of a 'long-term imprisonment', ranging from 20 to 40 years, as a result of convictions of the 'gravest forms of criminal offences' (provided for in Art. 38 of the Criminal Code of the Federation of Bosnia and Herzegovina). *Ibid.*

In revising his sentence upwards to seven years, the Appeals Chamber took note of the fact that, under the sentencing practices prevalent in the courts of the former Yugoslavia, crimes such as those for which Aleksovski had been convicted would merit punishment of up to five years in jail.[56]

8. Aggravating factors

When the prosecution relies on particular circumstances as constituting 'aggravating factors', meriting an increased sentence, the prosecution is required to prove the existence of the aggravating factor beyond a reasonable doubt.[57] The most significant factor that aggravates a particular offence, and merits an increased sentence, is a position of superior responsibility occupied by the person convicted.[58] If that person occupies such a position, and actively participates in the commission of the crimes him- or herself, this will constitute a 'serious aggravating factor'.[59] Similarly, active encouragement of criminal activity by a superior has been found to be a serious aggravating factor, just as much as the failure on the part of the superior to prevent crimes before they occurred or to punish those responsible for committing them.[60] In reversing the imposition of the sentence as inadequate, the Appeals Chamber remitted the case of Zdravko Mucić to the trial chamber for recomputation of the sentence, with instructions to the trial chamber that it should take into account the gravity of Mucić's offences and the active encouragement he gave to his subordinates to commit the crimes, as well as his own individual commission of certain crimes.[61] In this context, at least, the Appeals Chamber does appear to recognize that an escalating gradation of sentences is appropriate, with the severest sentences being imposed on those in the highest echelons of power. Those at the highest levels of political and military power should ordinarily receive high sentences.[62] This said, however, the highest-ranking political figure so far to come before the ICTY with

56. *Aleksovski*, *supra* note 9, para. 188.
57. 'The trial chamber underlines its view that fairness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt, and that the defence needs to prove mitigating circumstances only on the balance of probabilities'. *Kunarac*, *supra* note 25, para. 847.
58. The ICTR Appeals Chamber has recognized that, as a general principle, sentences should be graduated, with those 'within the most senior levels of the command structure attracting the severest of sentences'. *Musema*, *supra* note 6, para. 382. See generally *Stakić*, *supra* note 8, para. 912 (holding that 'the primary aggravating factor in this case is the superior position held by Dr. Milomir Stakić'); *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement, 17 Oct. 2003 (*Simić* Trial Judgement), para. 1082 (noting that Simić's position as President of Bosanski Šamac Crisis Staff, and, later, its War Presidency, was an aggravating factor).
59. See *Kupreškić*, *supra* note 3, para. 451 (noting that the position of Vladimir Šantić, as commander of the Jokers, the unit principally guilty of committing the Ahmići massacre on 16 April 1993, as just such a factor). However, the *Krstić* trial chamber observed that '[a] high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own'. *Krstić*, *supra* note 8, para. 709.
60. *Čelebići*, *supra* note 22, para. 736. By contrast, the absence of such active participation on the part of a superior is not considered to be a mitigating factor. *Ibid.*, at para. 737.
61. The Appeals Chamber also indicated to the trial chamber that it considered a sentence of 'around 10 years' imprisonment' to be broadly appropriate, given the gravity of Mucić's offences. *Čelebići*, *supra* note 22, para. 853. The Appeals Chamber has also doubled an accused's sentence in a case where the Chamber concluded that the trial chamber had erroneously acquitted the accused of 'command responsibility' charges under Art. 7(3) of the Tribunal's Statute. See *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 Sept. 2003 (*Krnojelac* Appeal Judgement).
62. *Kunarac*, *supra* note 25, para. 858. One trial chamber has also commented that premeditation can be a significant aggravating factor, although the trial chamber found it not to be present in the case before it.

a plea of guilty is Biljana Plavšić. She was one of a three-person Presidency of the Republika Srpska (along with Radovan Karadžić and Nikola Koljević)[63] during an almost unprecedented campaign of ethnic cleansing involving hundreds of thousands of displaced persons,[64] and tens of thousands of people who were murdered.[65] The Main Staff of the armed forces of the Republika Srpska was directly responsible to the Presidency,[66] so Plavšić had lofty military responsibility at the highest political level. Nonetheless, the trial chamber concluded that Plavšić 'did not participate in the conception or planning of the forcible ethnic separation' and had a 'lesser role in its execution' than others.[67] The trial chamber provided absolutely no explanation for this seemingly implausible conclusion, which is inconsistent with other parts of the *Plavšić* Sentencing Judgement emphasizing that she was 'one of the beacons' of those who advocated a policy of ethnic separation, and 'she imbued them with a mission to use criminal means to achieve her vision of an ethically [sic] separated Bosnia'.[68] As the *Kunarac* trial chamber put it, 'the criminal culpability of those leading others is higher than those who follow'.[69]

Among the aggravating factors that have been remarked on by trial chambers are: (i) the infancy or youth of the victims;[70] (ii) the fact that there are multiple victims of the crimes involved;[71] (iii) the fact that the crimes were committed over an extended, as opposed to compressed, period of time;[72] (iv) whether the victims were taunted or psychologically abused before being killed or beaten;[73] and (v) the fact that there are surviving victims who continue to suffer from the trauma of the crimes involved.[74] The professional status of the accused has also been considered to be an aggravating factor, when public trust and confidence have been reposed in the accused as a result of that status.[75]

Krstić, *supra* note 8, para. 712. The concept of premeditation has not been extensively commented on in other cases as an aggravating factor.

63. The Republika Srpska Presidency was subsequently expanded to five members.
64. Nearly 500,000 by some estimates. See *Prosecutor v. Plavšić*, Case Nos. IT-00-39 and 40/1, Sentencing Judgement, 27 Feb. 2003, para. 36.
65. Over 50,000 according to one expert. *Ibid.*, at para. 41. The trial chamber also noted that she had participated in an attempted cover-up of the existence and extent of the war crimes committed during her tenure of high political office. *Ibid.*, at para. 17. This included public denials that such crimes had ever occurred. *Ibid.*
66. *Ibid.*, at para. 14.
67. *Ibid.*, at para. 121. No factual findings about these *ipse dixit* observations were made.
68. *Ibid.* Plavšić drew an extraordinarily light 11-year sentence, principally as a result of her plea of guilty (although, at her initial appearance, she had pleaded not guilty to all charges). In the trial chamber's assessment of the various sentencing factors, her guilty plea constituted the most significant mitigating factor, in conjunction with her efforts after the war at attempting to achieve the reconciliation of the various communities involved in the negotiation and implementation of the Dayton accords.
69. *Kunarac*, *supra* note 25, para. 863.
70. *Ibid.*, at para. 864.
71. *Ibid.*, at para. 866.
72. *Ibid.*, at para. 865.
73. *Vasiljević*, *supra* note 55, para. 276. The *Vasiljević* trial chamber also took note of the 'cold-blooded nature of the killing' as well as the fact that one of the victims was known to the accused. *Ibid.*, at para. 279. An additional aggravating factor was the fact that the executioners, immediately before the Drina River executions and attempted murders, calmly discussed among themselves whether to shoot their victims with single shots, or with automatic bursts from their Kalashnikov rifles. *Ibid.*, at n. 673.
74. *Ibid.*, at para. 276.
75. *Stakić*, *supra* note 8, para. 915 (electing to follow ICTR precedent in the *Ntakirutimana* case, holding that accused's status as a medical doctor was relevant in that the crimes involved the betrayal of an ethical duty owed to community, and when a doctor took lives instead of saving them.); *Prosecutor v. Ntakirutimana*, Case

The prosecution has attempted to expand the concept of 'aggravating' factors unsuccessfully in at least two cases. First, in *Vasiljević*, the prosecution tried to argue that the discriminatory motivation for the execution-style murders at issue should be counted as an aggravating factor. The trial chamber rejected this argument, because the discriminatory purpose with which the accused acted was one of the essential elements of the crime.[76] Similarly, in *Simić*, the prosecution tried to argue that the civilian status of the victims at issue constituted an 'aggravating' factor, but this argument went nowhere because, just as with discriminatory intent, the civilian status of the victims was one of the elements of the crime against humanity that the prosecution had to prove.[77]

The command status of the accused, either military or, as is more often the case, in command of others in a detention facility or prison camp, has been adjudged to be a significant aggravating factor in a number of instances. In the *Sikirica* case, for example, Sikirica's position as a commander of camp security was an aggravating factor, because he had contributed by his actions and inactions to the overall atmosphere of terror that pervaded the Keraterm prison camp.[78]

One of the rationales given in the camp commander or superior context for increasing punishment is illustrated by the position of Damir Došen in the *Sikirica* case. Došen was a shift leader, and this was found to be an aggravating factor because

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No. ICTR-96-10, Judgement and Sentence of Trial Chamber. 21 Feb. 2003, para. 910; see also *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Sentencing Judgement, 21 May 1999, para. 26.

76. *Ibid.*, at para. 277; see also *Todorović*, *supra* note 27, para. 57 (rejecting essentially the same argument made by the prosecution).

77. *Simić* Sentencing Judgement, *supra* note 41, para. 70. In other cases, the prosecution has sought to argue that uncharged conduct, or conduct not squarely within the scope of the indictment, should be included by the trial chamber in its consideration of aggravating factors. The prosecution has argued that 'any evidence' of the accused's conduct presented to the trial chamber can, and should, be used for sentencing purposes. This argument has been rejected. See, e.g., *Kunarac*, *supra* note 25, para. 848. The trial chamber insisted that it would not allow such uncharged crimes to be used as an aggravating circumstance. The reason is this: 'an offender can only be sentenced for conduct for which he has been convicted'. *Ibid.* at para. 850 and n.1470; see also *ibid.*, at para. 28. Only those circumstances directly related to the commission of the offence charged, and to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered as aggravation. *Ibid.*, at para. 850. Circumstances not directly related to an offence cannot be used as aggravation in relation to an offender's sentence for that offence. The reason is simple: 'to permit otherwise would be to whittle away the purpose and import of an indictment'. *Ibid.* The importance of precise indictments has been authoritatively reaffirmed in the *Kupreškić* case, *supra* note 3, where the convictions of two accused were quashed, in significant part, because of a defective indictment which permitted the prosecution to mount a 'moving target' case, and which did not fairly put the accused on notice of the facts that the prosecution intended to prove. *Kupreškić*, *supra* note 3, paras. 93, 95, 122. An indictment must 'inform [an accused] of the case he has to meet'. *Ibid.*, at para. 122. The prosecution has also argued, in various contexts, that the assertion of false defences by an accused, such as the false defence of alibi, should be considered to be an aggravating factor. Again, as with other similar attempts on the part of the prosecution to balloon the concept of aggravating factors, this argument has been rejected. The *Kunarac* trial chamber noted that the defence of alibi raised by an accused, but rejected by a trial chamber, is part of the legitimate conduct of the accused's defence, unless the prosecutor can establish that it was not legitimately raised, such as by proving that defence counsel acted in collusion with an accused, or that the accused instructed or counselled this line of defence. 'To hold otherwise would mean the attribution of counsel's conduct to the Accused'. *Kunarac*, *supra* note 25, para. 853.

78. *Sikirica*, *supra* note 22, paras. 139–140. Sikirica failed in his duty to prevent outsiders from coming into the camp for the purpose of mistreating detainees, and this was also considered to be an aggravating factor. See also *Krnojelac* Appeal Judgement.

he had abused his position of trust by condoning violence against detainees in the camp, 'the very people he should have been protecting'.[79]

One final note about aggravation may be appropriate. Various accused have tried to argue that their education and intelligence, the nature of their employment before the conflict, and the fact that they came from religiously and ethnically tolerant family backgrounds, should be considered in mitigation of any sentence imposed on them. The Appeals Chamber and the trial chambers have taken this argument into account, not as a mitigating factor, but, rather, as an aggravating factor. For example, the fact that Simić was educated and an intelligent man who came from a good family could be considered an aggravating factor, because he should have known better than to have acted as he did.[80]

9. Mitigating factors

In proving the existence of factors in mitigation of the severity of a sentence, an accused need only satisfy the 'balance of probabilities' standard; the accused does not have to prove the existence of such factors beyond reasonable doubt, as is the case with 'aggravating' circumstances.[81]

In view of the statutory mandate that an appropriate sentence must be individualized to take into account the circumstances of the person convicted, an exhaustive recitation of what constitutes 'mitigating circumstances' is not possible. Those circumstances, inevitably, vary considerably from case to case. Some general principles have, however, been laid down in the ICTY cases. For example, the fact that an accused surrendered voluntarily to the custody of the United Nations has been taken into account as a mitigating factor,[82] as has the youth of the accused at the time the crimes were committed.[83] In addition, accused almost always acquire, as a mitigating factor, a report from the head of the UN Detention Facility attesting to their good behaviour while in detention.[84]

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79. *Ibid.*, at para. 172. Došen eventually acknowledged his guilt in a plea, which was, according to the prosecution, very 'rare' and 'important for the process of reconciliation'. *Ibid.*, at para. 179.
80. *Simić*, *supra* note 41, para. 103. The trial chamber found that Simić was sufficiently mature to know that his actions were 'not only wrong, but criminal and . . . he knowingly took advantage of a war-time situation to commit horrific, violent acts against defenceless persons he knew'. By contrast, the same sorts of facts appear to be present in *Plavšić*, but the trial chamber ignored the distinguished academic background and education of this high-ranking political figure in fashioning for her a very lenient sentence. *Plavšić*, *supra* note 64, para. 10 (noting Plavšić's very distinguished academic career, and giving a compendium of her high-ranking political positions).
81. *Kunarac*, *supra* note 25, paras. 846–847.
82. *Ibid.*, at para. 868. This factor does not appear to have weighed particularly significantly in the decided case law. In *Vasiljević*, the fact that the accused did not surrender voluntarily to the Tribunal was viewed by the trial chamber as a 'non-factor' in the calculation of his sentence, primarily because the indictment against him remained secret until his arrest. *Vasiljević*, *supra* note 55, para. 298.
83. *Jelisić*, *supra* note 40, para. 130 (noting that Jelisić was 23 years old when he committed his brutal crimes in Brčko; Esad Landžo was 19 years old at the time of the crimes he committed against detainees; Dražen Erdemović was 23 years old when he gunned down 70 Muslims; and Anto Furundžija was 23 years old at the time of the rape, torture, and outrages against human dignity involved in that case).
84. See *Sikirica*, *supra* note 22, para. 41; see also *Kordić*, *supra* note 22, para. 845 (Trial Exhibit D69/1 describing accused's behaviour in detention as 'excellent'). An accused's excellent behaviour in the detention facility has been favourably commented on as a mitigating factor. *Sikirica*, *supra* note 22, para. 184. Rehabilitation has sometimes been cited as a factor in the calculation of an appropriate sentence, although this factor has,

Attempts to argue that an accused was suffering from diminished mental capacity at the time the crimes were committed have not fared very well before the ICTY. In *Vasiljević*, despite an attempt to present it as such, the state of mind arising from alcoholism and grief at the death of a close family member was found not to amount to diminished mental responsibility.[85]

In *Simić*, by contrast, an interesting dilemma was presented to the sentencing tribunal, as a result of the fact that Simić had been rendered a paraplegic after being shot during the latter part of the war. The trial chamber stated that the mitigating factors present in that case were the accused's expression of remorse, his medical condition, his personal family circumstances, his voluntary surrender to the Tribunal, his lack of a prior record, and his good comportment in the detention unit.[86] The trial chamber in *Simić* noted generally that ill health would be considered to be a mitigating circumstance only in a 'rare' or 'exceptional' case. The medical evidence presented by Simić did not indicate the extent to which his life expectancy would be shortened by incarceration, if at all, even though it was generally shortened by his injuries and even though the medical evidence established that his physical and mental state had declined significantly during his trial and detention.[87] Nonetheless, the trial chamber determined that, in conjunction with various other circumstances, such as his guilty plea during the course of the presentation of the prosecution's case, 'exceptional' circumstances were present in this case. Despite the high political office occupied by Simić as the president of the Executive Board of Bosanski Šamac, and despite his personal participation in a brutal beating incident, the trial chamber imposed a very lenient sentence of five years, finding that no other accused before the Tribunal had found himself or herself in such dire medical circumstances.[88]

Another recent interesting example of 'mitigating' factors comes from the *Plavšić* Sentencing Judgement in February 2003. Plavšić argued that her advanced age (72)

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so far, stood very much in the wings. The only real case in which rehabilitation is cited as a significant factor in the calculation of an appropriate sentence is *Erdemović*. See *Erdemović*, *supra* note 51, para. 16(i) ('The trial chamber believes that his circumstances and character . . . indicate that he is reformable and should be given a second chance to start his life afresh, whilst still young enough to do so'). The only other reported case examining rehabilitation as a factor in the calculation of an appropriate sentence is the *Ruggiu* case, from the ICTR, where the defence produced significant amounts of character evidence which established 'good reason to expect his reintegration into society'. *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-1, Judgement and Sentence, 1 June 2000, para. 68. One ICTY trial chamber has stipulated its full support for rehabilitative programmes, if they are available while those accused are serving their sentences. *Kunarac*, *supra* note 25, para. 844 and n.1450 (reviewing comments from other trial chambers on the significance of rehabilitation as a sentencing factor). The scope of national rehabilitation programmes, if any, depends, however, on the states in which convicted persons will serve their sentences, and not on the International Tribunal. *Ibid.* *Kunarac*, *supra* note 25, also emphasized that experience worldwide has shown that 'it is a controversial proposition that imprisonment alone – which is the only penalty that a trial chamber may impose – can have a rehabilitative effect on a convicted person. The trial chamber is, therefore, not convinced that rehabilitation is of significance as a relevant sentencing objective in this jurisdiction'. *Ibid.* and at n.1452.

85. *Vasiljević*, *supra* note 55, para. 281; see also *Todorović*, *supra* note 27, para. 94 (no evidence of major mental disorder was found, although the accused made arguments that he was suffering from post-traumatic stress disorder and alcohol abuse during the war).
86. *Simić*, *supra* note 41, para. 79. The absence of a prior criminal record has occasionally been considered as a mitigating factor, 'albeit not a significant one'. *Ibid.*, at para. 108.
87. *Ibid.* at para. 95.
88. *Ibid.* at para. 116.

constituted a significant mitigating factor in conjunction with the other mitigating factors, such as her substantial co-operation with the prosecution and her contributions generally to the process of reconciliation following the end of the war.[89] The trial chamber first observed that there was no authority supporting the argument that the advanced age of an accused should have any effect on the determination of sentence.[90] It also commented that it was not persuaded by the defence argument that the calculation of an accused's life expectancy should be crucial in determining sentence, although it did note that the physical deterioration associated with advanced years makes serving the same sentence relatively harder for an older person, and that an offender of advanced years may on release have little worthwhile life left.[91] Accordingly, the trial chamber did consider the advanced age of the accused to be a mitigating factor, and took into account a medical report filed on her behalf.[92] It rejected the prosecution's arguments that advanced age should not be considered in sentencing, and concluded that the prosecution had given insufficient weight to Plavšić's age as a significant mitigating factor.[93] Although the advanced age of the accused in *Plavšić* was a factor, it seems that the trial chamber gave most weight to Plavšić's guilty plea and her post-conflict conduct, which was attested to by a variety of high-ranking political figures such as Madeleine Albright, the former US Secretary of State, and Carl Bildt, the UN Secretary-General's Special Envoy for the Balkans in 1999–2001, as well as Robert Frowick, Head of the OSCE Mission to Bosnia and Herzegovina in 1995–97.

Two additional comments about mitigation may be appropriate. In the *Erdemović* case,[94] the accused successfully established to the satisfaction of the trial chamber, after the case had been remanded, that he suffered from post-traumatic stress disorder.[95] In conjunction with Erdemović's confession and substantial co-operation with the prosecution, accompanied by a full and unqualified admission of guilt, the trial chamber found that he had come forward voluntarily, and related his part in the massacres before his full involvement had been ascertained by the authorities. Even though Erdemović gunned down seventy Muslims in cold blood, he did so under the threat that he himself would be shot unless he participated in the executions. The trial chamber considered that his will had been overborne as a result of these death threats. Nonetheless, the crimes of which Erdemović was convicted were particularly serious, and could not be entirely overlooked, even in view of the highly unusual degree of co-operation he tendered to the prosecution. Despite the fact that more than seventy people had died at his hands, the trial chamber found that Erdemović 'is reformable and should be given a second chance to start his life afresh on release, whilst still young enough to do so'.[96]

89. See generally *Plavšić*, *supra* note 64, paras. 74–84, 85.
90. *Ibid.* at para. 103.
91. *Ibid.* at para. 105.
92. *Ibid.* at para. 106.
93. *Ibid.* at para. 130.
94. *Erdemović*, *supra* note 16.
95. The trial chamber actually ordered a psychiatric and psychological evaluation of Erdemović. *Ibid.*, at para. 5.
96. *Ibid.*, at para. 16(i).

In the *Vasiljević* case, the trial chamber took into account, in its computation of an appropriate sentence, the assistance given by the accused's lawyers in helping to expedite the case, without compromising their professional duties to the accused.[97] In the recent *Krnojelac* Appeal Judgement, however, consideration of counsel's commendable conduct during the trial was specifically held *not* to be a matter properly to be considered in mitigation of an accused's sentence. In fact, the Appeals Chamber specifically ruled that the conduct displayed by the lawyers representing Vasiljević was to be expected of all counsel in ICTY trials, in the exercise of their professional obligations to a trial chamber.[98] The Appeals Chamber concluded, from this premise, that the conduct of counsel should not have been taken into account in arriving at the appropriate sentence.[99]

One final point to be made about mitigation is the good job done by the defence in the *Sikirica* case. Very light sentences were imposed on Došen and Kolundžija, largely as a result of significant medical evidence assembled on their behalf, along with fact and character witness statements that were carefully assembled and combined with their respective acknowledgements of guilt. Despite participating in crimes involving the beating and maltreatment of detainees, Došen drew only a five-year sentence and Kolundžija a three-year sentence. Both of these shift leaders at Keraterm expressed remorse, and their expressions were found to be sincere by the sentencing Tribunal.[100]

Generally, however, when there is no guilty plea or plea bargain, mitigating factors tend not to make much of a difference in cases of the gravest crimes, such as genocide, persecution, deportation, and extermination.[101]

10. Guilty pleas

Until recently, guilty pleas before the ICTY were extremely rare.[102] By contrast, guilty pleas before the ICTR were not uncommon, although their effect seems to have been

97. *Vasiljević* Trial Judgement, para. 297.
98. *Krnojelac* Appeal Judgement, *supra* note 61, para. 262.
99. *Ibid.* By the same token, the fact that the defence has assertedly been guilty of 'abusive' conduct during the trial of a case has been found not to be an aggravating factor at the sentencing stage. *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 572 (*Semanza* Trial Judgement).
100. Expressions of remorse have become rather more frequent as defence attorneys give far more thought to guilty pleas and co-operation with the prosecution. These expressions are scrutinized somewhat carefully by trial chambers in the reported cases. For example, in the *Valiljević* case, the trial chamber was not satisfied that the accused had demonstrated any genuine remorse, and did not take this into account as a mitigating factor. By contrast, the assistance that Vasiljević's lawyers had given to the trial chamber in expediting the case, without compromising their duties of representation of the accused, was taken into account and given credit by the trial chamber. *Valiljević*, at para. 297. By contrast, in *Todorović*, the accused's expression of remorse was found to be sincere: he expressed a desire to channel his remorse into positive action by contributing to the process of reconciliation of Bosnia and Herzegovina, and this factor was weighted appropriately by the trial chamber. *Todorović*, *supra* note 27, para. 91.
101. In *Stakić*, for example, the trial chamber recited a litany of what might otherwise have been thought to be persuasive and significant mitigating factors. See *Stakić*, *supra* note 8, paras. 921–924, 927. The aggravating factors outweighed any mitigating factors, however, and a life sentence was imposed.
102. See generally Wald, *supra* note 4, at 549 (noting that the prosecutor had no formal policy of encouraging guilty pleas by dropping charges or recommending a reduced sentence, 'although there have been a few spontaneous pleas'). The *Erdemović* case was the only early example of a guilty plea prior to the adoption of Rule 62 *ter* in Dec. 2001. That rule now regulates the procedure involving plea agreements. Prior to the adoption of this rule, there was no formal regime in the Tribunal for the acceptance of plea agreements. In *Erdemović*, the accused provided extremely substantial co-operation to the prosecution, including the

uniquely unsuccessful for the accused, several of whom have drawn life sentences following a guilty plea,[103] in sharp distinction to the practice followed by the ICTY. In the ICTY, guilty pleas have almost always been accompanied by relatively lenient sentences.

In assessing any plea agreement, the trial chamber is required to ensure that the plea has been made voluntarily, that it has been made on an informed basis, that it is not equivocal, and that the existence of the crimes themselves and the participation of the particular accused in those crimes have an adequate factual basis.[104] Even if the parties are in full agreement regarding a plea, the trial chamber is not bound to accept it, or to impose the sentence recommended by the prosecution.[105] The timing of a guilty plea is also significant in terms of its status as a mitigating factor. Belated pleas of guilty, deferred until the middle of the prosecution's case, or made during the accused's own case-in-chief, will generally be entitled to less credit than a plea made at a much earlier stage.[106] Guilty pleas are treated so reverently by the Tribunal because they are seen to have two decisive components of value. First, a plea of guilty saves tremendous resources, both in terms of trial time and in terms of conserving the investigative resources of the prosecution. Combined with this is the added value of not subjecting victims or witnesses to the trauma of having

provision of significant details about four incidents of which the prosecution was previously unaware. Erdemović's degree of co-operation was described by the prosecution in its sentencing recommendations as 'excellent'. *Erdemović, supra* note 51, para. 16(iv). The trial chamber noted somewhat wryly that '[t]hese are words rarely spoken by the prosecution of an Accused'. *Ibid.* The trial chamber in *Erdemović* found that it was significantly in the interest of international criminal justice, and fully concordant with the purposes of the ICTY, to give appropriate weight to the co-operative attitude of the accused. *Ibid.*, at para. 21. Confessions, and guilty pleas, are extremely significant for 'encouraging other suspects or unknown perpetrators to come forward'. *Ibid.* Furthermore, the ICTY has a duty, in the exercise of its judicial functions, to contribute to the settlement of wider issues of accountability, reconciliation, and establishing the truth behind the evils perpetrated in the former Yugoslavia. *Ibid.* 'Discovering the truth is a cornerstone of the rules of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process'. *Ibid.* Similarly, 'the International Tribunal must demonstrate that those that have the honesty to confess are treated fairly as part of the process, underpinned by principles of justice, fair trial and protection of the fundamental rights of the individual'. *Ibid.* See also May and Wierda, *supra* note 4, at 48, para. 2.74 (noting that guilty pleas seem to have been more common in the ICTR than in the ICTY).

103. For example, in *Kambanda*, the accused pleaded guilty to six counts of genocide, conspiracy to commit genocide, and crimes against humanity (extermination), and was sentenced to imprisonment for life. *Kambanda, supra* note 6, paras. 2, 126. Life sentences, however, have not uniformly followed guilty pleas in the ICTR. For example, in *Serushago*, the accused pleaded guilty to all counts, including serious multiple murders, yet drew only a 15-year sentence. *Prosecutor v. Serushago*, Case No. ICTR-98-39-A, Reasons for Judgement, paras. 2, 22, 33.

104. Rule 62 *ter* (i)–(iv). See generally *Kambanda, supra* note 6, paras. 77, 86–87 (rejecting the accused's arguments that his plea agreement was not informed, not voluntary, and equivocal); *Erdemović, supra* note 16, (reversing a conviction based on an inadequately informed guilty plea and remitting the case to the trial chamber for further proceedings).

105. *Sikirica, supra* note 22, paras. 45, 48.

106. *Ibid.*, at paras. 149–150. The trial chamber observed that if a plea were entered at the outset of a trial, 'so much the better'. *Ibid.*, at para. 143. One drawback to this practice, however, is that the accused may bargain away valuable rights in a weak case. In *Sikirica*, for example, the accused successfully moved for a judgement of acquittal on the genocide charges brought against him. The trial chamber granted the motion under Rule 98 *bis*. Then, and only then, was the prosecutor prepared to 'talk turkey' with Sikirica regarding a plea agreement, and the prosecution conceded that it would not have accepted a plea agreement of this nature at the outset of the case, while the genocide charges were still pending. *Sikirica, supra* note 22, para. 24.

to relive events and to testify about them in the pressured environment of a trial chamber.[107]

The second rationale generally advanced by the Tribunal for treating plea agreements preferentially is that they contribute to the 'truth-finding process', even if entered at a later stage of the case.[108] Accordingly, the *Sikirica* trial chamber noted that a guilty plea will always be entitled to substantial credit, even if entered at a very late stage of the case, although that credit will not be as significant as it would have been had the guilty plea been entered at an earlier stage.[109]

11. 'Substantial co-operation' with the prosecution

Rule 101(B)(ii) includes as a mitigating circumstance any 'substantial co-operation with the Prosecutor (given) by the convicted person before or after conviction'. In recent years, this 'substantial co-operation' factor has featured increasingly prominently in trial chamber decisions regarding the imposition of sentence, or in appellate revisions of sentences imposed by trial chambers.

Though distinct from pleas of guilty, 'substantial co-operation' issues have featured prominently in several cases and tend to be treated analogously. Some co-operation, given grudgingly, or in reluctant dribs and drabs, will not be deemed by a trial chamber to be 'substantial' co-operation, and it will not be given much weight as a 'mitigating' factor.[110] For example, General Krstić tried to argue that he had given voluntary statements to the prosecution, and that his co-operation with the prosecution in connection with the crimes committed at Srebrenica had been 'substantial'. This contention was not accepted by the *Krstić* trial chamber. It found that General Krstić's 'voluntary' statement had turned out not to be wholly accurate, and that the general had not been altogether forthcoming: he had been obstinate on cross-examination and had repeatedly refused to answer prosecution questions directly. Combined with his demonstrated lack of remorse, the co-operation he had given to the prosecution was found not to weigh heavily in mitigation of his sentence, which was set at 46 years.

The determination of whether an accused's co-operation with the prosecution has been 'substantial' or not has been found to depend 'on the extent and quality of

107. *Ibid.*, at para. 149; *Todorović*, *supra* note 27, para. 80. Interestingly, the trial chamber allowed the prosecution to withdraw various counts of the indictment based on Todorović's plea agreement, but reserved to the prosecution the right to reinstate those counts 'should the Accused fail to comply fully with the plea agreement'. *Ibid.*, at para. 8.

108. *Sikirica, supra* note 22, para. 149.

109. *Ibid.* Thus, in the *Simić* case, the prosecution had tried to argue that because Simić's guilty plea was delayed until the middle of the prosecution's case, it was entitled to virtually no weight. *Simić*, Sentencing Judgement, *supra* note 41, 17 Oct. 2002, para. 82. The trial chamber rejected the prosecution's submission, and reaffirmed the general principle that a guilty plea should, as a matter of principle, give rise to a reduction of sentence. *Ibid.* Despite the relative lateness of the plea, coming as it did 26 months after Simić's initial appearance, the plea of guilty was still entitled, in the view of the trial chamber, to 'some credit . . .'. *Ibid.*, at para. 87.

110. For example, in *Tadić*, *supra* note 12, the accused tried to argue that his co-operation with the prosecution had been 'all the co-operation he can give', and that it thus qualified as 'substantial'. *Ibid.*, at para. 59. This argument was given short shrift on appeal, and the trial chamber's discretionary conclusion that 'Tadić's co-operation had not been substantial' was not found to have been demonstrably wrong. *Ibid.* at para. 63.

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the information he provides'.[111] Picking up on this trial chamber observation, the prosecution has tried to push it one step further by arguing that only a statement that results in self-incrimination can truly be considered to be 'substantial co-operation' with the prosecution. This argument was rejected by the *Vasiljević* trial chamber.[112] Evaluating the quality of the co-operation provided by Vasiljević, the trial chamber concluded that it was not satisfied that his co-operation qualified as 'substantial' under Rule 101(B)(ii), but that the modest co-operation he had provided was entitled to some credit, although 'very little weight was given to it'.[113] Even where an accused has provided information to, and co-operated fully with the prosecution, trial chambers have observed that the fact that this co-operation was less than spontaneous and selfless, and that the party giving it was looking for something in return, is not particularly relevant.[114] Despite his obviously self-interested motive in providing co-operation, the *Todorović* trial chamber noted that the accused had met the prosecution's expectations, and that the quantity and quality of the information he had provided had lived up to its billing.[115] In *Simić*, by contrast, no credit at all was given to the accused for co-operation with the prosecution, partially because the accused refused to allow his plea agreement to be used against a former co-accused.[116]

The most prominent recent illustration of the high value placed on 'substantial co-operation' is the case of Biljana Plavšić. In her case, the trial chamber accepted a plea agreement entered into between Plavšić and the prosecution in a case pursued under the 'command responsibility' provisions of Article 7(3) of the Statute. The indictment in her case sets out a harrowing litany of grave war crimes committed on a massive scale. Nearly 500,000 people of non-Serb ethnicity were expelled from Serb-controlled areas; thousands of non-Serbs were killed in multiple prison camps where conditions were appallingly inhumane; many more thousands of civilians were killed as a result of military activity conducted in connection with the campaign of ethnic cleansing.[117] It is difficult to imagine an individual who had participated at a higher level than Plavšić in this campaign of ethnic cleansing and persecution, yet the trial chamber, without a word of explanation, concluded that she had not participated in the conception or planning of the forcible ethnic separation at the centre of that campaign, and that she allegedly had a 'lesser role' than others in its execution.[118] Despite her prominent role at the pinnacle of power of the Presidency of the Republika Srpska, the trial chamber imposed a modest 11-year sentence on Plavšić, with full credit for time served.[119]

111. *Sikirica*, *supra* note 22, para. 111 (citing *Todorović*, *supra* note 27, para. 86).
112. See *Vasiljević*, *supra* note 55, para. 299.
113. *Ibid.*, at para. 299.
114. See *Todorović*, *supra* note 27, para. 85.
115. *Ibid.*, at para. 87 (accordingly, Todorović's co-operation, though somewhat reluctant, was deemed to be 'substantial' in law, and to be entitled to significant weight in mitigation of the sentence otherwise to be imposed on him.)
116. *Simić*, *supra* note 41, para. 89.
117. One expert estimated that over 50,000 people were killed in the ethnic cleansing campaigns mounted by the armed forces of the Republika Srpska during 1992–94. See *Plavšić*, *supra* note 64, para. 121.
118. *Ibid.* at para. 121.
119. Plavšić will serve her sentence in Sweden, most probably in the Hinseberg Women's Prison. This prison 'boasts a sauna, solarium, massage room and horse riding paddock and offers inmates classes in salsa

Perhaps the most interesting and elliptical treatment given by the Appeals Chamber to the concept of 'substantial co-operation' with the prosecution appears in the *Kupreškić* Appeal Judgement. Many separate issues were dealt with in this decision, but, for the purposes of this article, the principal issue involved a senior military police commander named Vladimir Šantić. Šantić was the commander of a detachment of the Bosnian Croat army (HVO) military police known as the 'Jokers'. This particular unit featured prominently in the slaughter of civilians, both women and children, and the murder of Muslim men in the Central Bosnian village of Ahmići on 16 April 1993. One hundred or so civilians were massacred by the military police, and the picture of the minaret in that village, destroyed and toppled by HVO forces after the fighting, is one of the enduring *leitmotifs* of the ICTY.

Šantić started off his sentencing appeal by arguing that his 25-year sentence was too severe, and did not bear comparison with the comparatively shorter sentences imposed on military figures in the Nuremberg and Tokyo war crimes trials.[120] The Appeals Chamber brushed these arguments aside as insubstantial,[121] and proceeded to drill into Šantić's 'substantial co-operation' argument. Šantić argued that he had given 'substantial co-operation' to the prosecution, and that the prosecution itself had acknowledged that this was so.[122] As if he were in a legal bazaar or souk, he argued that this entitled him to a substantial 'discount', or 'mark-down', of his appropriately heavy sentence. According to the Appeals Chamber, Šantić's co-operation with the prosecution had been 'unconditional and full'.[123] In rather general terms, the Appeals Chamber observed that the material co-operation provided by Šantić not only corroborated information that had been known, but also brought forth 'completely new information', without indicating what that information was.[124]

The Appeals Chamber noted that there is no provision in either the Statute or the Rules that specifically permits it to take into account post-conviction substantial co-operation with the prosecution.[125] The Appeals Chamber referred, however, to the express provision of Rule 101(B)(ii), which allows, as a mitigating circumstance, substantial co-operation with the prosecutor by a convicted person to be taken into account 'before *or after* conviction'.[126] The Appeals Chamber then observed that, although there is some precedent suggesting that post-conviction 'behaviour' is not relevant to the assessment of sentence on appeal,[127] by virtue of Rule 101(B)(ii)

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dancing, photography and cookery'. See P. McLoughlin, 'Serb War Criminal Plavšić Goes to Swedish Jail', Reuters, 27 June 2003. The combination of the almost unprecedentedly lenient sentence, and the relatively luxurious conditions of her incarceration in a 'plush high-security mansion that offers inmates private all suite cells with colour televisions' (*Ibid.*), provoked bitter criticism from Muslim victims, one of whom commented that 'Plavšić could never have dreamt of a better way of spending the rest of her life . . . Now she has a chance to live it in a top-class hotel. I can't tell [you] how embittered I am' (*ibid.*).

120. *Kupreškić*, *supra* note 3, paras. 440–441. See *supra* notes 32 and 33, where the same sorts of arguments were rejected in *Tadić* and *Furundžija*.
121. *Ibid.* at para. 445.
122. *Ibid.* at para. 461.
123. *Ibid.*
124. *Ibid.*
125. *Ibid.* at para. 463.
126. Rule 101(B)(ii) (emphasis added).
127. *Kupreškić*, *supra* note 3, n. 741 (citing *Prosecutor v. Jelisić*, Case No. IT-95-10-A, *Decision on Request to Admit Additional Evidence*, 15 Nov. 2000).

the Appeals Chamber may, in appropriate cases, consider that co-operation given by a convicted person after conviction, or even on appeal, 'could be a factor that the Appeals Chamber too may consider in order to reduce sentence'.[128] The Appeals Chamber also observed that the magnitude of this factor would depend, in each case, on the 'degree of co-operation rendered'.[129] In Šantić's case, the Appeals Chamber commented that 'the interests of justice demand that this factor be taken into account'.[130] No explanation of this observation was volunteered by the Appeals Chamber.[131]

12. Appellate review of the sentencing decisions of trial chambers

The final topic to address in considering sentencing practice in the ICTY is the principles that govern appellate review of sentences.[132] Some of the accused before the ICTY have been somewhat successful on appeal in arguing for a reduction of sentence. Others, however, have been uniquely unsuccessful, and have actually had their sentences revised upwards as a result of errors committed by the trial chamber in assessment of the factors that must be considered in devising an appropriate sentence.[133] Due to their 'corrective' nature, ICTY and ICTR sentencing appeals are, according to the *Mucić* Sentencing Appeal Judgement, appeals *stricto sensu*.[134] As such, no new evidence is ordinarily admissible on appeal with respect to sentencing matters.[135]

128. *Kupreškić*, *supra* note 3, para. 463.
129. *Ibid.*
130. *Ibid.* The Appeals Chamber did note that Šantić had not fully acknowledged the magnitude of the crimes he had committed, and commented on his 'limited acceptance of guilt even at this late stage'. *Ibid.*, at para. 464.
131. Šantić also tried to argue that the transcript of testimony of Witness 'AT' from the *Kordić* case showed that his responsibility for the murders, house burnings, and other crimes committed in Ahmići, was somehow lessened. This argument did not go very far because, at least as to Šantić, Witness 'AT' was found to be 'an unreliable witness'. *Kupreškić*, *supra* note 3, para. 367. No real explanation of this conclusion emerges from *Kupreškić*. Even though all of Šantić's various sentencing arguments fell on a deaf appellate ears, the Appeals Chamber took it upon itself, however, and without any explanation, to reduce Šantić's sentence from 25 years to 18 years, based on the 'substantial co-operation' he had provided to the prosecution in the form of information 'and valuable assistance'. Whatever the 'substantial' co-operation was that Šantić had given to the prosecution, it was clearly enough in the view of the Appeals Chamber to buy Šantić a substantial discount from his sentence.
132. The ICTY has only one level of appeal, and that is a 'limited form of appeal relating to errors on a question of law which invalidates the trial chamber's decision or an error of fact which has occasioned a miscarriage of justice'. *Prosecutor v. Mucić*, Case No. IT-96-21 A *bis*, Judgement on Sentence Appeal, 8 April 2003, para. 51.
133. See *Aleksovski*, *supra* note 9, para. 183 (observing that the trial chamber failed to pay sufficient regard to the gravity of Aleksovski's conduct and that his offences were not trivial). It was also observed that the trial chamber had failed properly to take into account Aleksovski's superior responsibility as the warden of Kaonik Detention Facility, a factor that 'seriously aggravated' Aleksovski's offences. *Ibid.* Instead of preventing violence against those whom he should have been protecting, Aleksovski allowed the detainees to be subjected to psychological terror and to be used for forced labour. Permitting detainees to be used for forced labour, such as trench-digging, and as human shields, had resulted in a sentence that was 'manifestly inadequate'. See also *Krnojelac* Appeal Judgement (doubling accused's $7^1/_2$-year sentence to 15 years, based on the conclusion that the accused had erroneously been acquitted of 'superior responsibility' charges).
134. *Mucić*, *supra* note 132, para. 11; see also *Kupreškić*, *supra* note 3, para. 408.
135. The Appeals Chamber has been careful to preserve several fundamental rights of an accused before the ICTY. One of those rights is that not to be compelled to give testimony against him- or herself, enshrined in Art. 21(4)(g) of the Statute (the accused has the right 'not to be compelled to testify against himself or confess guilt'). The Appeals Chamber has rigidly and dutifully enforced this 'minimum' guarantee, and has

The principles governing the review of sentences are not complicated. Generally speaking, in non-sentencing matters, it is incumbent on an appellant to show that the trial chamber has committed either an error of law which has had a determinative impact on the outcome, or an error of fact which has led to a miscarriage of justice in that the evidence relied on was significant, and could not have been accepted by any reasonable tribunal of fact.[136] Ordinarily, in sentencing matters, factual findings will not play a significant role. Rather, the argument reduces itself to the proposition that a trial chamber has erroneously applied the applicable law or misunderstood it, and that this has had a significant impact on the sentence. Nonetheless, the law is perfectly clear that trial chambers are vested with a 'broad discretion' in sentencing matters.[137] Because of a trial chamber's statutory duty to individualize sentences according to the particular circumstances of the case, and its obligation under the Rules to assess aggravating and mitigating factors in this regard, the Appeals Chamber has noted that appellate review of sentencing is 'usually exercised sparingly'.[138] It is incumbent on any appellant challenging the severity of the sentence imposed to demonstrate that the trial chamber has made a 'discernible error' in the exercise of its sentencing discretion.[139] The Appeals Chamber does not operate as a second trial chamber, and is obliged to give 'a margin of deference' to factual findings made by a trial chamber.[140] In view of a trial chamber's 'very broad' discretion in sentencing matters, and considering the accordingly narrow and deferential standard of appellate review,[141] the Appeals Chamber will generally decline to substitute its own sentence for that of the trial chamber, unless there has

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reversed a judgement, in part, because of a reference by the trial chamber to the fact that the accused did not testify in his own defence, as part of the sentencing judgement. *Čelebići*, *supra* note 22, paras. 782–783; see generally R. May and M. Wierda, ' Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha', (1998–99) 37 *Columbia Journal of Transnational Law* 725, at 742. The Appeals Chamber has found that there is an absolute prohibition against consideration of the exercise of the right to silence in the determination of guilt or innocence, and that this is guaranteed by the Statute and the Rules. *Čelebići*, *supra* note 22, at para. 783. 'Similarly, this absolute prohibition must extend to an inference being drawn in a determination of sentence'. *Ibid.* The Appeals Chamber has bent over backwards to protect the right to silence, and found a trial chamber's passing reference to an accused's failure to give evidence 'indicates that it regarded the failure in an adverse light'. The trial chamber's remark left open the real possibility that it had treated the accused's exercise of his right of silence in a manner prejudicial to Mucić, so the Appeals Chamber found that the trial chamber had erred. *Ibid.*, at para. 785; see also *Kunarac*, *supra* note 25, para. 560 ('[N]o unfavourable inference has been drawn from the fact that [the accused] did not testify'.). Another protection carefully preserved by the Appeals Chamber is the right to appeal. One of the attributes of the right to a fair trial is the right to appellate correction of errors made at trial. *Aleksovski*, *supra* note 9, para. 106. In the *Tadić* Sentencing Judgement, the Appeals Chamber insisted that fairness requires that a convicted person cannot be punished for the exercise of a procedural right such as the right to appeal. *Tadić*, *supra* note 12, para. 30. The Appeals Chamber endorsed US legal authority to the effect that it is wrong to 'put a price on an appeal'. *Ibid.* Accordingly, the Appeals Chamber ruled that the trial chamber had erred in recommending a 10-year minimum sentence, to run from the date of the sentencing judgement 'or of the final determination of any appeal, which ever is the latter [sic]'. *Ibid.*, at para. 31. In the view of the Appeals Chamber, 'such a condition could suggest to prospective appellants that the exercise of the right to appeal would result in increased penalties. The consequential discouragement of appeals may deprive the Appeals Chamber of the opportunity to hear appeals on substantial questions of law.' *Ibid.*

136. *Aleksovski*, *supra* note 9, para. 63.
137. *Jelisić*, *supra* note 40, para. 100.
138. *Aleksovski*, *supra* note 8, para. 186.
139. *Jelisić*, *supra* note 40, para. 99 (citing *Čelebići*, *supra* note 22, para. 725; *Aleksovski*, *supra* note 9, para. 187; *Furundžija*, *supra* note 31, para. 239).
140. *Čelebići*, *supra* note 22, para. 491.
141. *Kayishema*, *supra* note 6, paras. 337–338.

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been a demonstrated 'discernible error' in the exercise of its sentencing discretion or the trial chamber has obviously failed to follow the applicable law.[142] The onus of demonstrating that a trial chamber has ventured outside its discretionary framework in imposing sentence lies affirmatively upon the appellant.[143]

Despite the fact that a 'margin of deference' is given to a trial chamber's factual findings, the Appeals Chamber has the power to reverse, revise, or affirm a particular sentence on appeal.[144] As noted, in *Aleksovski* the Appeals Chamber decided to exercise this power because of a clear error committed by the trial chamber in failing to assess Aleksovski's superior position as an aggravating factor.[145] Properly viewed, in the Appeals Chamber's opinion, the crimes committed by Aleksovski were sufficiently serious to merit a seven-year sentence. Similarly, in *Krnojelac*, the Appeals Chamber increased to 15 years a $7^{1}/_{2}$-year sentence imposed on a prison camp commandant erroneously acquitted of 'command responsibility' charges under Art. 7(3) of the Tribunal's Statute.[146] By contrast, the Appeals Chamber reduced a 25-year sentence imposed on Tadić, a vicious thug who beat numerous people in the Omarska camp, including one Muslim who had been hung upside down in a cell and beaten so severely that his skull was fractured and his hand paralyzed. Another Muslim was beaten and stabbed in the shoulder. Two others were beaten to death, and yet another died after having been sexually mutilated. Despite these

142. *Čelebići*, *supra* note 22, para. 725; *Furundžija*, *supra* note 31, para. 239; *Jelisić*, *supra* note 40, para. 99. Furthermore, the Appeals Chamber has repeatedly stated that it will not lightly disturb a trial chamber's findings of fact. *Kupreškić*, *supra* note 3, para. 32; see also *Musema*, *supra* note 6, paras. 18, 286, 303.

143. *Musema*, *supra* note 6, para. 379; *Kayishema*, *supra* note 6, paras. 337–338.

144. *Furundžija*, *supra* note 31, para. 34; *Musema*, *supra* note 6, para. 379.

145. The Appeals Chamber has been fascinated, in a number of cases, with the concept of cumulative convictions, but it must be recognized that this issue has rarely had any practical impact in terms of sentencing. For example, in the *Mucić* Sentencing Judgement, in an earlier stage of appellate proceedings, the appellants successfully appealed against their sentences on the ground that impermissible cumulative convictions had been imposed on them. See *Mucić*, *supra* note 132, para. 2. In addition, Mucić was successful in his earlier appeal arguing that an adverse inference had been drawn from the fact that he had not given evidence at the trial. *Ibid.*, at para. 2(d). Insofar as Mucić was concerned, the Appeals Chamber remitted the case to the trial chamber for consideration of what adjustment, if any, should be made to the original sentence imposed on Mucić and his two other co-accused. On remand, the trial chamber reconsidered the sentence imposed on Mucić, finding that there should be 'a small reduction' in sentence given to him as a result of the adverse reference by the original trial chamber, in considering sentence, to the fact that he had not given evidence at his own trial. In remitting the case to the trial chamber, the Appeals Chamber noted that Mucić was the commander of the Čelebići prison camp, and that his 7-year sentence was inadequate and that a 10-year sentence would have been more appropriate. The trial chamber decided to impose a 9-year sentence, and Mucić argued that the trial chamber has given him merely a 'token' reduction of the recommended sentence, and that this was an abuse of discretion. In considering the arguments advanced by Mucić, the Appeals Chamber rejected them decisively, holding that 'if an error is made by the Sentencing Tribunal, the Appellate Tribunal does not compensate the appellant for the fact that an error was made; it adjusts the sentence to remove the effect of the error which was made'. *Ibid.*, at para. 31. In reviewing the very serious crimes of which Mucić had been found guilty (which included provision of appalling facilities and inadequate sanitation to detainees in the Čelebići camp, and that Mucić had participated in the maintenance of these inhumane conditions, as well as the beating to death of detainees by guards, who were not subject to any punishment at the hands of Mucić, the camp commander), the Appeals Chamber found that there was no abuse of discretion in view of the inherent gravity of the criminal conduct, and that the trial chamber had taken the appropriate factors into consideration in calculating the 9-year sentence to be imposed on Mucić. Parenthetically, Mucić has served the prescribed two-thirds of his sentence and was ordered to be released on 9 July 2003. See ICTY Press Release No. CC/P.I.S.768(e), 9 July 2003. See also 'Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the Tribunal', 7 April 1999.

146. *Krnojelac* Appeal Judgement, *supra* note 61, paras. 263–264.

savage beatings administered in Omarska, Keraterm, and Trnopolje, and despite the fact that Tadić was a willing participant in all of these beatings, and that he had enthusiastically espoused ethnic and religious discrimination, his sentence was reduced to 20 years.[147] Other sentences for similarly vicious execution-style murders stand in similarly sharp contrast to the 25-year sentence imposed, for example, on Dario Kordić. For example, Hazim Delić murdered two Muslims and drew a 20-year sentence. Mitar Vasiljević executed five Muslims, and tried to execute two more. He was sentenced to 20 years. Vladimir Šantić, the commander of the Jokers detachment responsible for the murder of nearly 100 Muslims in Ahmići, was sentenced to 25 years initially, but his sentence was subsequently reduced to 18 years as a result of his 'substantial co-operation' with the prosecution.[148]

The full impact of the highly deferential standard of appellate review in sentencing judgements is illustrated forcefully by the fate of sentencing appeals in the ICTR. These appeals have been uniformly unsuccessful.[149]

13. Conclusion

It appears that no sentencing 'tariff' will ever be devised in the ICTY before its 'remit' expires several years from now. As the Appeals Chamber has stated, the value of

147. No particularly good explanation was given for the reduction of the sentence of this thug and murderer. This sentence contrasts markedly with that imposed on Kordić, who was a regional politician in Central Bosnia. The prosecution tried to argue that Kordić had extensive military powers and should be convicted under Art. 7(3) of the Statute. The trial chamber rejected this argument and found Kordić to be a civilian with no power or control over HVO military forces in Central Bosnia, and not to be in the highest echelons of government of the Croat community of Herceg-Bosna. *Kordić, supra* note 22, paras. 829, 839–841. Nonetheless, Kordić drew a 25-year sentence. When one compares Kordić's activity with Tadić's, eyebrows must be raised by the severity of the sentence imposed on Kordić, an individual who had not engaged in any acts of violence towards anybody, and whose conviction for 'planning' and 'instigating' the Ahmići massacre was based exclusively on the uncorroborated second-hand hearsay testimony of a single witness who was a convicted accomplice to murder, and who had attempted to perpetrate a fraud on the Tribunal through the presentation of knowingly perjured testimony as part of a 'lying alibi defence'. (See *Kordić, supra* note 22, para. 627). See also May and Wierda, *supra* note 4, 172–3, para. 6.21. Another good illustration of the severity of sentence imposed upon Kordić emerges by comparison of his case with the circumstances presented in the *Semanza* case, *supra* note 98. Semanza was the Bourgmèstre of Bicumbi Commune. He was found guilty of participating in genocide and extermination, murder, rape, and torture as crimes against humanity. Semanza actually killed a teenage girl; attacked another Tutsi victim with a machete, resulting in the victim's death; and personally directed a group of people to rape Tutsi women before killing them. *Ibid.* at paras. 117, 261. In addition, Semanza directed a group of Interahamwe to attack refugees at the Musha church, *ibid.* at para. 426, and instructed various soldiers to 'go and find [Tutsis] and exterminate them'. *Ibid.* at para. 429. The convictions of Semanza were more than adequately founded on direct eyewitness testimony and the testimony of persons who heard the accused directly exhort and instruct members of his own ethnic group to go out and kill members of another ethnic group. Semanza received the same sentence as Kordić – 25 years – even though Kordić had engaged in no acts of violence and had committed none of the acts of brutality, including murder, perpetrated by Semanza.

148. The Appeals Chamber noted 'Šantić's limited acceptance of guilt, even at this late stage'. *Kupreškić, supra* note 3, para. 464.

149. In *Akayesu*, for example, the Appeals Chamber held that the trial chamber had properly taken into account all of the required factors in assessing a life sentence on the accused, and that the trial chamber had not ventured outside its discretionary framework in view of the extreme gravity of the crimes involved: genocide and crimes against humanity. *Akayesu, supra* note 6, para. 413. Similarly, in *Kayishema*, the Appeals Chamber applied the 'discernible error' test to conclude that the appellant had failed to shoulder his burden of showing an abuse of discretion, and the life sentence imposed in that case was also affirmed. *Kayishema, supra* note 6, paras. 337–338. The same result obtained in *Kambanda, supra* note 6, paras. 125–126; and in *Musema, supra* note 6, para. 390.

sentencing guidelines, or a sentencing 'tariff', is questionable, largely because of the obligation of a trial chamber to individualize a sentence in view of the particular circumstances of the accused, and having due regard to the gravity of the offence. Nonetheless, there is a significant, and unexplained, disparity between the severity of the sentences imposed in the ICTR by comparison with those imposed in the ICTY. The reluctance of ICTY trial chambers to impose life sentences is unexplained, and is inexplicable in view of the serious crimes committed by some of the more vicious and more notorious perpetrators of, for example, genocide, the 'crime of crimes',[150] in the cases before the ICTY. Largely as a result the inappropriateness of sentencing guidelines or 'tariffs', however, matters relating to sentencing are likely to continue to be somewhat unpredictable from case to case. Nonetheless, given the burgeoning prominence of plea agreements in the crafting of particularly lenient sentences, the incentive to enter into such an agreement must be seriously considered by any practitioner advising a client who faces prosecution in the ICTY.[151] Even in cases of the most serious crimes, or of persons occupying the highest political positions, plea agreements and 'substantial co-operation' with the prosecution have featured remarkably prominently in the imposition of sentences that can only be described as surprisingly lenient under the circumstances.

As stated at the outset of this article, defence counsel practising in the ICTY must realize, from the very beginning of his or her representation in this Tribunal, that this is not a Tribunal devoted to the concept of acquittal. Trials in the ICTY tend to be long, complex, arduous and bitterly fought. Sentencing issues must be seriously considered and weighed at the outset of the case, when significant discounts from the potential maximum sentence are still a realistic possibility. The likelihood of acquittal in any individual case is extremely remote, and defence counsel practising before the ICTY would be very well advised to pay careful and meticulous heed to the expanding body of case law that emphasizes how significant, in terms of sentence reduction, plea agreements and 'substantial co-operation' with the prosecution can be.

150. *Krstić, supra* note 8, para. 698 (citing *Kambanda, supra* note 6, para. 9.16).
151. Trials before the ICTY have been remarkably protracted and complex, some involving hundreds of witnesses and thousands of exhibits. See generally May and Wierda, *supra* note 4, 143, para. 5.06 (compiling statistics of length of trials, number of witnesses and exhibits, in selected ICTY cases).