Leiden Journal of International Law, 16 (2003), pp. 717–750
 Printed in the United Kingdom DOI: 10.1017/S0922156503001419

The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis

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Abstract
The pronouncements of punishment for war crimes, crimes against humanity, and genocide by the International Criminal Tribunal for the former Yugoslavia (ICTY) will be among its most important legacies for international law and international relations. The purpose of our research is to examine the judges' opinions on the determinants of punishment and, most especially, the data on sentences handed down by the trial chambers in order to understand which factors are the most powerful in explaining sentences. We find that there is a fair degree of consistency in the sentences conferred on the guilty. By systematically examining all the sentences both doctrinally and empirically we can see that sentences are premised on those critical factors that the judges are admonished to employ by the ICTY Statute and their own Rules of Procedure and Evidence.

Key words
fairness; sentencing

1. Introduction

The pronouncements of punishment for war crimes, crimes against humanity, and genocide by the International Criminal Tribunal for the former Yugoslavia (ICTY) will be among its most important legacies for international law and international relations. They are the culmination of the efforts of the international community in general and the ICTY in particular to provide justice for the victims of the wars in the former Yugoslavia, the accused, and the world that is watching. As such, they are the Tribunal's most public acts and its most critical opportunity to realize the ambitions of its mandate. Indeed, the Appeals Chamber in the *Čelebići* case noted that:

> Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions that are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency of punishment.[1]

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1. *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo (Čelebići case)*, IT-96–21, Trial Chamber Judgement, 16 Nov. 1998, at para. 756.

Therefore it is crucial that the sentences meted out be generally viewed as proportionate, fair, and understandable. If, at the end of the day, these punishments are perceived as inconsistent or biased, and thus inexplicable by the standards of the ICTY Statute and the Rules of Procedure and Evidence, the verdicts of the ICTY will be seen as flawed. While there will always be some criticism of these sentences, for no court is perfect and some may never be satisfied, if the collective wisdom is that the punishments handed down were essentially fair and consistent, the ICTY can contribute to its other statutory aims – facilitating peace and reconciliation in the Balkans and promoting the deterrence of international crimes.

The ICTY recently marked the tenth anniversary of its establishment by the UN Security Council in May 1993. During these years the trial chambers have rendered judgement in the cases of 37 individuals. At present, 35 individuals have been found guilty of at least one charge and received prison sentences ranging from two to 46 years (two accused were exonerated on all counts, while three of the 35 found guilty by a trial chamber later had the verdicts reversed on appeal). The punishments rendered by the trial chambers for these crimes have attracted a great deal of attention from international legal experts, and within the Tribunal itself. ICTY judges have noted that there is something of a penal regime emerging from their decisions, but have been reluctant to develop sentencing guidelines that would make clear the determinants of punishment. And while some scholars have found patterns in ICTY sentencing behaviour,[2] others have criticized the sentencing practices.[3] Critics and defence lawyers in particular have charged that there are unfair disparities in punishment, as in the alleged differential treatment of minor players such as the prison camp guard Duško Tadić (sentenced to 20 years) and major war criminals, such as the former member of the Bosnian Serb presidency, Biljana Plavšić (sentenced to 11 years).

The purpose of our research is to examine the judges' opinions on the determinants of punishment and, most especially, the data on sentences handed down by the trial chambers to understand which factors are the most powerful in explaining sentences. We find that despite the ad hoc examples of unequal treatment towards some defendants, such as Tadić and Plavšić, there is a fair degree of consistency in the sentences conferred on the guilty. By systematically examining all the sentences both doctrinally and empirically we can see that sentences are premised on those critical factors that the judges are admonished to employ by the ICTY Statute and their own Rules of Procedure and Evidence.

Our analysis of the ICTY sentences proceeds as follows. First, we examine the ICTY Statute and its Rules of Procedure and Evidence to determine the purposes, criteria,

2. J. Meernik, 'Equality of Arms? The Individual Versus the International Community in War Crimes Tribunals', (2003) 86 *Judicature* 312; J. Meernik, 'Victor's Justice or the Law', (2003) 47 *Journal of Conflict Resolution* 140; J. Meernik and K. King, 'The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study', (2002) 1 *International Criminal Law Review* 343.
3. S. Johnson, 'On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia', (1998) 10 *International Legal Perspectives* 111; A. N. Keller, 'Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR', (2001) 12 *Indiana International and Comparative Law Review* 53; M. M. Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law', (2000) 15 *American University International Law Review* 321.

and procedures of sentencing. We then review scholarly and other assessments of the ICTY's sentencing practices to identify areas of interest and concern, and also to illustrate the need for systematic and empirical evaluations. Third, we analyze the impact of the sentencing determinants. We examine both what the judges say regarding which factors influence sentencing, and the data on sentences handed down by the trial chambers.[4] In particular, we analyze the impact of the gravity of the crime committed, the aggravating and mitigating factors cited by the judges, the level of responsibility of the guilty parties, and finally the ethnicity of the defendant, on the length of sentences. Our ultimate goal is to determine whether there is consistency in judicial reasoning about the importance of determinants, and whether the data on sentencing reveal consistent treatment of elements across decisions. We conclude the article with a discussion of the merits of sentencing guidelines and suggestions for future research.

2. The background to the ICTY Statute, the Rules of Procedure and Evidence, and the goals of sentencing

2.1. The ICTY Statute and the Rules of Procedure and Evidence

2.1.1. Structure

Both the ICTY Statute[5] as passed by the Security Council, and the subsequent development of the Rules of Procedure and Evidence (RPE)[6] by the trial chambers provide broad powers for the Tribunal, but little guidance for the sentencing process. Indeed, only broad contours are laid out regarding sentencing, and it has been incumbent on the judges to interpret the statute and rules on a case-by-case basis, which in turn has contributed to the criticisms levelled against the chambers.[7] Of the 34 articles, only Articles 23 and 24 provide substantive authority for the issuing of verdicts and sentences: such pronouncements must be delivered in public by a majority of the judges in the trial chamber, must provide justification for the decision, and may include separate and dissenting opinions. The chamber can sanction only with imprisonment, although restoration of property is provided for.[8] The judges may

4. See *infra* note 75 and accompanying text.
5. The full text of the Statute and the Rules of Procedure and Evidence are available online at <http://www.un.org/icty/legaldoc/index.htm>. It has been amended three times since its adoption: 25 May 1993 via Resolution 827 <http://www.un.org/Docs/scres/1993/scres93.htm>) (creating the ICTY); amended 13 May 1998 via Resolution 1166 (<http://www.un.org/Docs/scres/1998/scres98.htm>) expanding the number of judges to hear cases); amended 30 Nov. 2000 via Resolution 1329 (<http://www.un.org/Docs/scres/2000/sc2000.htm>) (creating and regulating *ad litem* judges for both the ICTY and ICTR); and amended 17 May 2002 via Resolution 1411 (<http://www.un.org/Docs/scres/2002/sc2002.htm>) (clarifying how nationality of the judges shall be determined).
6. Since the adoption of the Rules of Procedure and Evidence, they have been altered 27 times to include changes in Tribunal procedure.
7. C. B. Coan, 'Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia', (2000) 26 *North Carolina Journal of International Law and Commercial Regulation* 183; S. D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', (1999) 93 AJIL 57, at 91–2; J. Green, 'Affecting the Rules for the Prosecution of Rape and other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique', (1994) 5 *Hastings Women's Law Journal* 171.
8. As a practical matter, the ICTY's standing authority really allows the victim to seek redress in the national courts, which thus far has proven ineffectual. While there are some provisions for the return of property, to

consider the general sentencing practices of the former Yugoslavia and the 'gravity of the offence' along with the defendant's situation. Articles 27 and 28 address the serving of sentences and the authority for commutation, but these have been of little consequence compared with the impact of the sentences themselves.

Of the 127 rules issued in periodic plenary sessions to date, the bulk of the standards regarding sentences fall under Part Six of the RPE (Section Five addresses proceedings of the Chamber), and the most relevant section contains seven rules that range from the sentencing process to compensation of the victims. There are other rules governing sentences, notably in the area of plea agreements, evidentiary presentations, and the deliberation process. Rule 62 *bis* gives authority to go forward with the sentencing process after a voluntary, knowing, and unequivocal plea has been entered by the defendant. Rule 62 *ter* allows the prosecutor to amend the indictment and to recommend a sentence or a range relating to the sentence (either independently or in conjunction with the defence).

More controversial have been the provisions relating to evidentiary timing and presentation. Rules 85 to 87 address the taking of evidence during the trial phase for matters in the sentencing process – prior separation of the verdict and sentencing phases has been eliminated. Before July 1998 the judges first established guilt or innocence and then, after a verdict, adduced evidence regarding the appropriate sentence. Now judges consider such evidence during the trial, to be used if the defendant is eventually found guilty. Rule 85(A)(vi) allows the parties to present 'relevant information' for 'determining an appropriate sentence if the accused is found guilty'. Rule 86(C) allows the prosecution and defence to present 'matters of sentencing in closing arguments'. It also allows judges to sentence individuals by each guilty count or 'to impose a single sentence reflecting the totality of the criminal conduct' on the counts where the defendant is found guilty.[9] Rule 92 *bis* allows proof of the defendant's acts to be admitted (if certain criteria are met) by written statements if it 'relates to factors to be taken into account in determining sentence'.

Of the sections directly addressing sentencing, Rule 100 provides procedures for the prosecutor and the accused to present relevant information for sentencing, and requires a public rendering of the judgement in the defendant's presence. Rules 102 to 107 address sentence-related issues, but not the substance of the sentencing decision. The subjects include the status of the defendant pending final appeal (Rule 102), the location and management of imprisonment (Rules 103 and 104), and the restitution of property (Rule 105), along with victim compensation (Rule 106). Of these, the last two rules relate to victims, although the presiding judges of both the ICTY and the ICTR have requested that the UN Security Council amend the statute to provide compensation for persons who have been wrongfully imprisoned.[10]

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date these have been inconsequential. Sentencing of convicted defendants is really the greatest power the ICTY has. M. Ellis and E. Hutton, 'Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia', (2002) 20 *Berkeley Journal of International Law* 342.

9. When the Rules were amended, Rule 88 (public delivery and manner of the judgement) was moved to Rule 98 *ter*.

10. S. Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals', (2002) 96 AJIL 628.

Perhaps the most important provision, because of its substantive guidelines, is Rule 101, covering penalties and the specific factors for determining punishment. It is here that the chambers have had to wrestle with the exacting details of determining a just punishment. Under Rule 101(A) the ICTY has the authority to impose life imprisonment, but they have never done so to date.[11] The imposition of the death penalty was specifically prohibited when the Tribunal was established.[12] Rule 101 (B) refers to factors in Article 24 specifically, but leaves open which mitigating and aggravating factors can be considered. Co-operation with the prosecution (before and after conviction), as well as sentencing practices in the former Yugoslavia, are also to be considered. Finally, Rule 101(C) gives credit for time served pending surrender to The Hague or in ICTY detention. Thus, while the Statute and the RPE provide guidance, they are by no means definitive. What then might guide the judges in their determinations regarding sentences?

2.1.2. Goals of sentencing

Every judicial and legal system has goals it seeks to achieve in implementing its sentencing policy, and the ICTY is no different. The broad aims of sentencing are located within five main theories of justice: deterrence, retribution, rehabilitation, social defence, and restorative.[13] Of the two more traditional theories, deterrence and retribution focus on the acts committed in relation to the defendant. Deterrence seeks to prevent future criminal behaviour – either in preventing the individual from committing a crime again (specific deterrence), or by sending a signal to would-be criminals that a sanction can be imposed (general deterrence). Retribution emphasizes that punishment should be proportionate to the crime committed. Popularly referred to as the 'eye for an eye' approach, its focus is not on a societal value in punishing the individual, but on issuing a sanction because the offence merits penalty.

In contrast, rehabilitation, social defence, and restorative theories are more recent in their genesis and centre on the benefits that inure to society or to the victims as a result of institutional intervention. Rehabilitation looks at the net gain to the convicted individual in response to the criminal act or punishment imposed. Its

11. It is arguable that they did so in the *Krstić* case where he was 53 at the time of sentencing and received a sentence of 46 years. *Prosecutor v. Radislav Krstić*, IT-98–33, Trial Chamber Judgement, 2 Aug. 2001.
12. When both the ICTY and the ICTR were established the United States supported a position that the death penalty should be applicable for purposes of retribution and deterrence. While it continues to be a subject of debate, the death penalty has been abolished by a majority of UN members, and states within the former Yugoslavia have also moved that way. Slovenia (in 1989) and Croatia (1990) abolished the death penalty for all crimes prior to their independence from the Socialist Federal Republic of Yugoslavia, while Bosnia-Herzegovina abolished it for specified categories of crimes in 1997. Yugoslavia (Serbia and Montenegro) outlawed its usage for ordinary crimes only in 2002. Provisions for the death penalty were ultimately rejected, in part, due to principles of humanitarian law. See W. A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke Journal of Comparative and International Law* 461. Even so, one study found that about one in three persons surveyed in Zagreb and Sarajevo believe that the death penalty should be imposed for convicted war criminals. S. K. Ivkovic, 'Justice by the International Criminal Tribunal for the Former Yugoslavia', (2001) 37 *Stanford Journal of International Law* 255, at 323.
13. For an in-depth discussion of sentencing and its goals see N. N. Kittrie, E. H. Zenhoff, V. A. Eng, *Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice* (2002). For an analysis of sanctions and punishment in international law, see *The Rights International Companion to Criminal Law and Procedure: An International Human Rights and Humanitarian Law Supplement* (1999).

goal is the reintegration of the individual into society and, therefore, traditional punishment – such as a prison sentence – may not be the most appropriate method. Social defence theory supports the punishment of criminals to protect society. Unlike deterrence, the focal point is not the individual's acts, but the benefit to society that comes with stopping criminal behaviour. Restorative justice is the only one to place the victims' situation in the wider context of the conflict. Here the focus is on how to best repair the victim's injuries, and how to best reconcile the victims to the perpetrators so that the conflict is resolved for the wider community.[14] In all three instances, the sentence is placed in the broader context of the society and the individuals affected by the violence.

How do these theories apply in practice and principle to the activities of the ICTY? The appropriate or primary goals in establishing the institution are evident from the historical record, although the goals of sentencing specific individuals are unclear from the background materials.[15] The full name of the ICTY reflects the basis of its founding on individual responsibility rather than collective guilt – something that is clear from the UN deliberations.[16] Remarks, debates, and UN Security Council Resolution 827 emphasized that the situation in the former Yugoslavia was a 'threat to international peace and security', that such crimes should end, that justice must be brought to those who were to blame, and that taking such actions would 'contribute to the restoration and maintenance of peace'.[17] As an institution, the ICTY was given the mandate '[f]irst, to put an end to the crimes being committed in . . . the former Yugoslavia; second, to take effective measures to bring to justice the persons who are responsible for those crimes; and, third, to break the seemingly endless cycle of ethnic violence and retribution'.[18] Neither the Statute, the Secretary-General's Report, nor the RPE go into purposes of the sentencing procedures as regards establishing responsibility, but the background reports by the UN Secretary-General indicate that the definitions and guidelines regarding sentencing were minimal.[19]

The first time the Tribunal referred to the purpose of sentencing as a functional component of dispensing justice was in its first case.[20] In *Tadić,* the ICTY asserted the primary purposes behind sentencing to be retribution and deterrence. In its second

14. M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', (2002) 15 *Harvard Human Rights Journal* 39, at 77–8.
15. For an excellent summary of the background materials and drafting of the Statute, see V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vols. I and II (1995).
16. The full title, while not commonly known or referred to, is 'The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991'. For a summary discussion of the goals and tools of the institution for carrying out the UN mandate, see M. P. Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', (2000) 49 *DePaul Law Review* 925.
17. UN Security Council Resolution 827, 25 May 1993, online at <http://www.un.org/Docs/scres/1993/scres93.htm>.
18. Statement of UN Under-Secretary for Legal Affairs Carl-Aug. Fleischhauer, cited in G. de Bruin, 'Yugoslavia: War Crimes Tribunal Inaugurated in The Hague', Inter Press Service, 17 Nov. 1993, available at 1993 WL 2532943.
19. W. G. Sharp, 'The International Criminal Tribunal for the Former Yugoslavia: Defining the Offenses', (1999) 23 *Maryland Journal of International Law and Trade* 15, at 20–6. For information about sentencing in international humanitarian law, see D. B. Pickard, 'Proposed Sentencing Guidelines for the International Criminal Court', (1997) 20 *Loy. L. A. International and Comparative Law Journal* 123.
20. *Prosecutor v. Duško Tadić*, IT-94–1, Trial Chamber Judgement, 7 May 1997.

case, the judges noted that '[d]eterrence is probably the most important factor in the assessment of the appropriate sentences for violations', along with retribution, protection of society, rehabilitation, and the defendant's motives'.[21] The chambers went further in their third case by establishing that the purpose of punishing crimes against humanity, 'lies precisely in stigmatizing criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole'.[22] Thus, early on, the chambers established deterrence, retribution, stigmatization, and reprobation as important justifications for the sentencing and punishment tasks. Yet the weight to be given to any rationale has varied over time and according to the case.

Of the remaining three theories, retribution favours penalties appropriate to the criminal acts, and it has been considered at least as important as deterrence in some cases.[23] Retribution is not a 'desire for revenge', but an expression of 'outrage of the international community at these crimes' and of the community's unwillingness to tolerate such behaviour.[24] Society is justified in taking action, and the 'severity of a sentence should be proportional to the seriousness of the criminal conduct'.[25] While scholars, and the chambers themselves, have disagreed over the reasons both whether and how punishment should be applied in the retributive context, most do agree that it is for the purpose of protecting society.[26]

Rehabilitation and restorative justice, while important for achieving the goals of the ICTY, have not achieved the same primacy as deterrence and retribution, and such factors have tended to be dealt with as mitigating or aggravating factors. Moreover, for at least one chamber, rehabilitation may not be an important factor at all, because effective rehabilitation depends on the state where the defendants serve the sentence.[27] Finally, restorative justice has received piecemeal treatment, and when the victims are referred to it, it tends to be in the context of the heinous nature of the crime and the number of victims to have been affected. When concepts of restoration are discussed, it is in the context of restoring peace to the former Yugoslavia vis-à-vis the penalty issued (something that is more in line with social defence theories).[28] Notions of 'victims' justice' tend to focus on this aspect as an aggravating factor to be considered by the chambers as one of many.[29]

21. *Prosecutor v. Delalić et al.*, *supra* note 1, at para. 1234.
22. *Prosecutor v. Drazen Erdemović*, IT-96–22, Trial Chamber Judgement, 29 Nov. 1996, at para. 64.
23. *Prosecutor v . Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić, Drago Josipović, Dragan Papić, Vladimir Santić*, IT-95–16, Trial Chamber Judgement, 14 Jan. 2000, at para. 848; *Prosecutor v. Dragoljub Kunarać, Radomir Kovac, and Zoran Vuković*, IT-96–23 and 96–23/1, Trial Chamber Judgement, 22 Feb. 2001, at para. 838.
24. *Prosecutor v. Žlatko Aleksovski*, IT-95–14, Appeals Chamber Judgement, 24 March 2000.
25. Aukerman, *supra* note 14, at 54.
26. In at least one case the trial chamber argues that retribution focuses on placating the victim, but the Chamber also found that retribution is not reason enough to punish or by itself a 'desirable basis for sentencing in offences'. *Prosecutor v. Delalić et al.*, *supra* note 1, at para. 1252.
27. *Prosecutor v. Kunarać et al.*, *supra* note 23, at para. 844.
28. *Prosecutor v. Goran Jelisić*, IT-95–10, Trial Chamber Judgement, 14 Dec. 1999, at para. 116.
29. The *Blaškić* opinion points out that in the *Tadić, Čelebići*, and *Furundžija* cases, the chambers emphasized the victims' suffering as an aggravating factor. *Prosecutor v. Tihomir Blaskić*, IT-95–14, Trial Chamber Judgement of 3 March 2000, at para. 787.

The chambers have issued varying degrees of support for different theories about the purposes and goals of sentencing, but they have tended to give primacy to deterrence and, second, to retribution. We would argue this is not deterrence in the traditional sense, but some hybrid of general deterrence coupled with a social defence theory of justice. Society should be protected from individuals (like the defendants or others who remain at large), not necessarily because any particular individual is likely to commit such crimes again, but because criminal acts and impunity may continue if the institution fails to act.[30] It is not clear either that general deterrence or societal defence, within the meaning they have been accorded by the ICTY, have been fulfilled. One of the criticisms regarding the ineffectiveness of the institution was that it held no sway in stopping human rights abuses in the Balkans that erupted after the creation of the Tribunal. Even though the ICTY was established in 1993 and was reviewing cases by 1995, this did not prevent some of the worst atrocities in the Balkans, such as the massacre at Srebrenica and the Kosovo conflict.[31] Interestingly, this has even been reflected in the chambers' reasoning in a more recent decision. In *Kunarać*, the panel found that since the Bosnian conflict was over, general deterrence was of 'little importance'.[32]

Nonetheless, each of the theories has found its way into the ICTY sentencing process and they have been referred to as being some part of the Tribunal's objectives. Each has received different levels of attention by the chambers, depending on the case in question. In turn, this success (or failure) to apply the principles to the practical matter of sentencing has led to criticism about the penalties that are imposed when the accused is found guilty.

2.2. Criticisms of ICTY sentencing

The criticisms of the ICTY focus on everything from its establishment, jurisdiction, and legitimacy, to its bureaucratic problems, budgetary size, and lack of enforcement authority. Because the Tribunal took time to get under way – it was over three years before the first sentence was handed down and another two years before a verdict was rendered. As a result it was accused of being slow, violating due process, and failing to achieve reconciliation.[33] The critiques of the sentencing process grew out

30. Judges have been reluctant to focus on whether the actual individual would be likely to re-offend. In most instances, the defendants have had no prior criminal record, and the circumstances surrounding their behaviour are unlikely to be repeated. *Prosecutor v. Kunarać et al.*, *supra* note 23, at para. 840.

31. See M. Simons, 'UN. War Crimes Tribunal Steps Up its Inquiry into Kosovo', *New York Times*, 26 Aug. 1998, at A4; P. Shenon, 'Kosovo's Crisis Is Bad, and Getting Worse', *New York Times*, 16 Sept. 1998, at A8.

32. *Prosecutor v. Kunarać et al.*, *supra* note 23, at para. 836–42.

33. C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', (1996) 59 *Law and Contemporary Problems* 9, at 11–12. See also D. S. Bloch and E. Weinstein, 'Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court', (1998) 22 *Hastings International and Comparative Law Review* 1 (accusing the trials of being a 'farce' and 'attempts to salve guilty Western consciences'). The Security Council and the General Assembly have questioned the length of trials and the limited number of persons to have been put on trial. Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/54/874 (2000) (questioning delays and costs). Strong criticism has come from women's groups regarding the treatment of rape prosecutions and sexual assault cases. See K. D. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslavia and Rwandan Tribunals: Current Status', (1999) 93 AJIL 33; C. Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', (1995) 17 HRQ 649; A. M. Hoefgen, 'There Will Be No Justice Unless Women Are Part of That Justice: Rape in Bosnia, the ICTY and "Gender Sensitive" Prosecution', (2000) 14 *Wisc. Womens' Law Journal* 155; and P. H. Davis, 'The Politics of Prosecuting Rape as a War Crime', (2000) 34 *International Lawyer* 1223.

of the broader attacks on the ICTY regarding its structure and jurisdiction. This is, in part, due to the high visibility of the sentencing function because it is an 'end product' of adjudication. When verdicts are finally issued after months or years of trials, the final outcome of the case, pending appeal, provides a focal point for which observers can levy censure or praise.

Indeed, opponents and proponents of the ICTY have something in common – they have both criticized the Tribunal for its sentencing structure, process, and application. Advocates on all sides of the conflict have complained either that the Tribunal's substance and procedure on sentencing is too punitive or unfair to the accused, or that it has not gone far enough. From the ICTY's inception it was accused of being a forum for 'victor's justice'.[34] The institution has faced numerous attacks so that no matter what it has done, some group, organization, or government has disapproved. For example, the Statute's authority forces the ICTY to rely on co-operative states for apprehending indicted criminals, so it is dependent on whomever could be caught, wherever they could be found. Yet when relatively minor players were brought in early on, because they were the only ones to be found and arrested by others, the ICTY was accused of going after small fry rather than persons in positions of command or control.[35]

It is important to distinguish general criticisms of the Tribunal's legitimacy and authority from those relating to the specific application of that power as it relates to sentencing. Critiques of the ICTY have had a marked tendency to focus on individual cases or procedures without systematically evaluating the overall work that the institution has carried out. This is owing, in part, to the Tribunal's endeavours from the outset to retain transparency about its work. Persons affiliated to the Tribunal are among the first to be critical of their own work.[36] The Tribunal itself is currently examining sentencing practices and is evaluating the need for further guidelines.

But before such guidelines are explored, it is important to evaluate the criticisms of the ICTY in a methodical manner. Thus far, little empirical research has been

34. V. M. Creta, 'Comment: The Search for Justice in the Former Yugoslavia and Beyond', (1998) 30 *Houston Journal of International Law* 381.

35. University of California Berkeley International Human Rights Law Clinic and University of Sarajevo Human Rights Centre, 'Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors', (2000), at 34 (hereafter Berkeley–Sarajevo 2000 study). Available online at <http://www. law. berkeley. edu/cenpro/clinical/JUDICIAL%20REPORT%20ENGLISH.pdf>. Note that because the research is part of an ongoing project, it also appeared as a law review article. See University of California Berkeley International Human Rights Law Clinic and University of Sarajevo Human Rights Centre, 'Report: Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors', (2000) 18 *Berkeley Journal of International Law* 102.

36. P. M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court', (2001) 5 *Washington University Journal of Law and Policy* 87; G. K. McDonald, 'Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia', (2001) 24 *Hastings International and Comparative Law Review* 155; M. P. Scharf, 'A Critique of the Yugoslavia War Crimes Tribunal', (1997) 25 *Denver Journal of International Law and Policy* 305; D. Tolbert, 'The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yugoslavia – Unforeseen Successes and Foreseeable Shortcomings', (2002) 26 *Fletcher Forum of World Affairs* 7; J. L. Falvey, Jr., 'United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', (1995) 19 *Fordham International Law Journal* 475 (1995); L. Arbour, 'The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results', (1999) 3 *Hofstra Law and Policy Symposium* 37.

done on the sentencing process.[37] We first summarize the ad hoc criticisms of the sentencing process vis-à-vis the Statute and the RPE. The main criticisms of the judgements concern three contentious areas regarding the consistency and fairness of punishments. First, there has been criticism that the gravity and magnitude of the crimes are not consistent with the sentences handed down, nor with the sentencing practices in the former Yugoslavia. Second, some argue that the sentences are inconsistent and do not provide systematic determinations regarding punishment as they relate to factors most relevant under the Statute and the RPE. Specifically, the judges have not appropriately punished persons in command and control positions or persons who co-operate or plead guilty, or have not taken cognizance of certain aggravating and mitigating factors in sentencing. Third, some accuse the Tribunal of being a forum for victor's justice and of unfairly punishing certain ethnic defendants by not treating them equally.

2.2.1. The punishment rendered is inconsistent with the gravity of the actions and the laws of the former Yugoslavia

The horrific nature of the crimes that occurred during the Balkan wars prompted questions as to whether national or international tribunals were the appropriate forum in which to see justice done. One purpose of establishing the ICTY was to limit the culture of impunity that had reigned in the region and to call into question whether a 'person stands a better chance of being tried and judged for killing one human being than for killing 100,000'.[38] Once sentences were handed down, however, critics questioned whether they were proportionate to the severity and the gravity of the crimes. How can someone who has been found guilty of murdering hundreds of people be given only twenty years when under other conditions (outside armed conflict) that person might receive the same punishment for only one murder? Concerns about leniency in sentencing often focus on comparisons either with the ICTR (where life sentences are routinely given) or with the laws of the former Yugoslavia.[39] Victims' rights advocates and citizens of the former Yugoslavia have also questioned whether individuals are receiving their just deserts.[40] They question whether sentences ranging from 30 months to 20 years adequately punish individuals who committed vicious acts on a massive scale, and whether defendants convicted of such crimes should be allowed to have their sentences run concurrently rather than consecutively.[41]

Under Article 24 of the Statute judges 'have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia', but it is not a mandate and the trial chambers have indicated that this is 'indicative and not binding'.[42] Reinforcing this provision is Rule 101(b)(iii), which allows the ICTY to

37. Cf. Meernik, and Meernik and King, *supra* note 2.
38. Quoting former UN Human Rights Commissioner José Anala Lassa as cited in M. P. Scharf, *Balkan Justice* (1997), at xiv.
39. For criticisms relating to the ICTR see Penrose, *supra* note 3. For criticisms about sexual assault cases, see Green, *supra* note 7 .
40. Berkeley–Sarajevo 2000 study, *supra* note 35; and Ivkovic, *supra* note 12.
41. Coan, *supra* note 7, at 227–230.
42. *Prosecutor v. Blaskić, supra* note 29, at para. 75.

'take into account' practices of the former Yugoslavia. It is telling that virtually all opinions refer to it as instructive, but that the discretion of the chambers is not limited to those factors.[43] The relevant provisions from Yugoslavian law fall under Chapter 16 of the former Yugoslavia Criminal Code, which addresses violations of international humanitarian law and indicates that such crimes are punishable 'by no less than five years in prison or by the death penalty'.[44]

These criticisms are hard to analyze empirically because it is impossible to know what sentence the accused might have received if he or she had been tried and found guilty in the national courts under the penal code as it existed prior to the ICTY.[45] There are some comparisons, however, that can be drawn. In the former Yugoslavia, only two sets of trials had been held under the domestic laws governing genocide and war crimes. A 1946 trial resulted in the death penalty for most of the convicted defendants, and a 1986 trial imposed a death penalty which was not carried out because the person died in prison.[46] This led two scholars to conclude that 'no meaningful inferences' could be drawn.[47] Another study of trials of more 'typical' street crimes involving murder, found that of 749 sentences imposed, 12 (1.6%) were death sentences, 150 (20%) were terms of twenty years, while 227 (30%) were terms of 10–15 years.[48] These crimes not having been committed in the context of war and tending to be single murders, the sentences do seem severe.

2.2.2. The sentences do not reflect systematic determinations regarding the role of the accused

a. Persons in superior leadership positions. Article 7 acknowledges that persons high up in the chain of command, such as political and military leaders, who played a major role in the Balkan conflict, cannot escape liability by having ordered their subordinates actually to carry out the dirty work.

Traditionally, command and control responsibility attended only the relationships within the military, but one of the more important developments of ICTY jurisprudence has been the extension of liability to political leaders and to others who do not operate as part of traditional military personnel, but rather as paramilitaries.[49] Should individuals in leadership positions, either as military personnel or civilian leaders, be given lengthier sentences for the actions of their subordinates?

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43. *Prosecutor v. Delalić et al.*, *supra* note 1, at para. 1192.
44. The Socialist Federal Republic of Yugoslavia Penal Code, Ch. 16 contains 16 provisions that address war crimes and crimes against humanity. Arts. 141–4 contain the relevant provisions applicable in the *Erdemović* case (<http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm>).
45. This problem is aggravated by practices of the former Yugoslavia which arguably allowed victims greater participation in the process than has been allowed by the ICTY. These practices did not allow for the use of plea-bargaining typical of common law systems. Arts. 52–66 of the Yugoslav Criminal Procedure Code allow victims to be active in the prosecution of criminal cases. There are also issues regarding the impact of compensation for victims, given their more active participation (see Arts. 103–14). See Ivkovic, *supra* note 12, at 287, and Schabas, *supra* note 12, at 495–96. Beresford, *supra* note 10. Plea-bargaining is discussed *infra*, notes 56–65 and accompanying text.
46. D. Cors and S. Fisher, 'National Law in International Criminal Punishment: Yugoslavia's Maximum Prison Sentences and the UN War Crimes Tribunal', (1997) 3 *Parker School Journal of East European Law* 367.
47. I. Jankovic and V. Vasilijevic, *Sentencing Policies and Practise in the Former Yugoslavia* (1994), cited in Schabas, *supra* note 12, at 477. Schabas argues that one cannot compare national and international criminal punishment because of the distinctive differences between the two.
48. *Ibid.*
49. *Prosecutor v. Delalić et al.*, *supra* note 1, at para. 370.

Should they be held responsible for actions that they may not be able to control directly?

From the outset of the investigations into the Yugoslavian conflict, there was agreement that command responsibility would not mitigate liability.[50] As the UN Secretary-General noted, this was consistent with Second World War judgements, according to which superiors were not allowed to escape liability if they 'knew or had reason to know' that criminal conduct had occurred. Language holding superiors responsible is found in Article 7, addressing individual responsibility, and it holds both superiors and subordinates responsible for their actions. Article 7(2) specifically prevents the accused from claiming immunity or seeking to mitigate his sentence regardless of whether she or he is a 'Head of State or Government' or 'Government official'. Article 7(3) goes further with the requirement that even if the superior 'had reason to know', the defendant can still be held accountable. Finally, Article 7(4) limits subordinates from being relieved of responsibility or mitigating their sentence simply because she or he was acting under orders of 'a Government or of a superior'. As some have argued, this standard is rigorous and necessary to insure that the conduct of war imposes greater responsibilities on leaders.[51]

The concept of responsibility for political leaders is more controversial, since political leaders – especially those elected by their people – can lay claim to sovereign or political immunity. Further, the accused can argue that there are political motives in the prosecution and thus that the institution trying the leader may not have the proper jurisdiction or may be biased.[52] The tension is between holding senior officials accountable, and risking the perception of there being political motivations for prosecution, or giving extraterritorial institutions jurisdiction, which may destabilize both national and international political relationships.[53] Moreover, peace, justice, and reconciliation can be undercut if persons high in the leadership hierarchy are not punished on the same level as lower-level personnel. After all, leaders who act as the architects engineering criminal activity should be held to a greater degree of accountability, for without them violations of humanitarian law could not be co-ordinated on such a massive scale.[54]

50. Both the UN Commission of Experts and the UN Secretary-General indicated concerns about command and control responsibility. The relevant language that was provided by the Commission indicated that even if crimes were committed by a subordinate, it 'does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators'. *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 55–60, UN Doc. S/1994/674 (1994).
51. M. Stryszak, 'Command Responsibility: How Much Should a Commander Be Expected to Know?', (2000–2001) 11 *USAFA Journal of Legal Studies* 27.
52. These were two of the claims levelled by Milošević and rejected by the Tribunal after his capture by Yugoslavian Special Forces and transfer to The Hague. *Prosecutor v. Milošević*, IT-99–37-PT, Decision on Preliminary Motion, 8 Nov. 2001.
53. W. J. Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Towards a Universal System of Transnational Law Litigation', (2000) 41 *Harvard International Law Journal* 129, 160–1; A. I. Hasson, 'Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law', 25 *British Columbia International and Comparative Law Review* 125.
54. S. Arslanagic, 'Mixed Emotions in Bosnia at Plavsic's Verdict', Agence France-Presse, 27 Feb. 2003.

b. Persons who co-operate or plead guilty. Initially there were no provisions for explicit plea agreements between the prosecutor and the defendant, and the understanding of the intent behind plea agreements has been subject to controversy and amendments of the RPE.[55] 'Informed' plea bargains were established in the wake of the Erdemović conviction, when Rule 62 *bis* was amended to add such a requirement.[56] This does not mean that there had been no plea agreements until after that time – quite the contrary. The *Erdemović* case generated criticism and even a dissenting opinion from one of the panel's judges regarding the appropriateness of plea agreements in the absence of specific statutory provisions.[57] Co-operating with the prosecution either before or after the trial is covered under Rule 101(B)(ii), but that actually relates to providing assistance to the prosecution as a mitigating factor. As a practical matter and as a general rule, however, persons who plead guilty have also tended to co-operate with the prosecutor.[58]

Some believe that such agreements may encourage impunity because wrong doing is not punished at a level that might otherwise be sanctioned in the absence of the agreement.[59] Moreover, victims may not feel fully satisfied by plea agreements if it means that the defendant receives a reduced sentence as a result. The issue of plea agreements in international law also subjects the ICTY to criticism because they are a product of common law systems, and their use did not form part of the former Yugoslavia's judicial system. Even in instances in civil law systems where a defendant confesses, that information forms part of the materials to be examined by the trying court, and it does not necessarily mitigate the defendant's punishment.[60] While there has been no formal policy arrangement that the prosecutor offers plea bargains or immunity in return for testifying (rather it is done on a case-by-case basis), one former judge has acknowledged that this is problematic in the case of war crimes.[61] On the other hand, plea agreements are specifically provided for because they encourage reconciliation – defendants are admitting to their wrongdoing, and as a result, the victims may receive some recognition that they were harmed. In the case of trials involving international humanitarian law, plea agreements facilitate a more efficient resolution to a case that might otherwise drag on for extended periods of time – subjecting both defendants and victims to extended delays.[62]

55. In *Erdemović* the defendant pleaded guilty to specific counts at the trial level, but the Appeals Chamber remitted for reconsideration the original sentence, and he ultimately accepted a sentence of five years. *Prosecutor v. Erdemović, supra* note 22. For criticism about Rule 62 and an interpretation that the UN Security Council never intended such procedures see G. P. Lombardi, 'The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Legitimacy and the Expanding Power of the ICTY', (2003) 37 *New England Law Review* 887.
56. M. Bohlander, 'Plea Bargaining Before the ICTY', in R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001), at 151. Rule 62 *ter*, which formalized the plea process, was adopted at the 25th Plenary Session on 12–13 Dec. 2001.
57. *Prosecutor v. Erdemović, supra* note 22, Trial Chamber, Dissenting Opinion of Judge Antonio Cassese.
58. Bohlander, *supra* note 56.
59. M. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', (1997) 7 *Duke Journal of Comparative and International Law* 349.
60. N. A. Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', (2002) 151 *University of Pennsylvania Law Review* 1, at 9–49.
61. P. M. Wald, 'Establishing Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', 42 *Harvard International Law Journal* 535, at 550 and n. 64.
62. Combs, *supra* note 60, at 97–102.

The ICTY can devote resources to other individuals who are attempting to avoid responsibility, and create a more proficient and capable process that maximizes resources regarding the ascertaining of guilt or innocence.[63] Finally, plea agreements coupled with co-operation with the prosecution allow for additional evidence and potential witnesses to be identified so that others who might otherwise escape prosecution can be brought to justice. Even critics of the ICTY's sentencing process agree that this may be invaluable for ending the cycle of impunity.[64] Given the increasing pressure placed on the ICTY by the international community to expedite its procedures and focus attention on the trials of the major actors now in detention, there are multiple benefits arising from the use of plea bargains.

c. Aggravating and mitigating factors. Allowing judges discretion to render sentences based on aggravating or mitigating factors forms part of virtually every national court and domestic jurisdiction, including some of the laws applicable to humanitarian jurisprudence in the former Yugoslavia.[65] It is the ability to use judicial discretion that gives a distinctive quality to justice, but it is exactly this discretion that has resulted in some of the strongest criticisms that are being levelled at the ICTY.[66] Allowing them broad authority to determine what factors are most relevant gives judges wide latitude in selecting the traits or characteristics of a case to be emphasized when justifying the imposition of a particular sanction. Inevitably comparisons are then made between similarly situated defendants who receive different penalties based on the various factors the judges have determined to be most relevant when sentencing.[67] Why should some defendants receive lesser sentences because aspects of their background or the crimes committed differ from those of others who committed the same types of crimes? Is it fair for the victims or their families if the accused receives more lenient sentences as a result of actions he took in relation to other persons or after the crimes were carried out? While the ICTY has been criticized for its discretionary use of the aggravating and mitigating factors, this is a problem endemic to virtually all judicial systems that involve some sort of evaluation regarding the defendant's actions.[68]

2.2.3. The ICTY is only implementing a form of 'victor's justice' against those persons who were engaged in a lawful civil war: persons who were victims of the conflict should not be prosecuted

Critics of the ICTY have also raised questions regarding the independence and impartiality of the judges in their treatment of certain defendants. Numerous studies

63. For an argument that the ICTY has followed Yugoslavian sentencing practices *too closely*, hence undermining justice, see Penrose, *supra* note 3, at 374–9.
64. Keller, *supra* note 3, at 59.
65. Schabas, *supra* note 12, at 479; and Ivkovic, *supra* note 12, note 262.
66. Combs, *supra* note 60; and Keller *supra* note 3.
67. Residents in the former Yugoslavia have highlighted this in surveys about justice at the ICTY that have focused on the sentences handed down to specific defendants. Berkeley–Sarajevo 2000 study, *supra* note 35. See also Ivkovic, *supra* note 12. This has also been true for comparisons made between the ICTR and the ICTY. The *Kambanda* decision imposed a life sentence on a defendant who pleaded guilty and co-operated with the prosecution – something that was viewed as a highly important mitigating factor for the ICTY in the *Plavšić* case. *Prosecutor v. Biljana Plavšić*, IT-00-39 and 40/1, Trial Chamber Judgement, 27 Feb. 2003, at para. 7. See also Keller, *supra* note 3.
68. P. Krug, 'The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation', (2000) 94 AJIL 317, at 328–33.

and statements by political leaders, international organizations, and citizens of the former Yugoslavia highlight a perception that ICTY trials are not fair, and that the verdicts and sentences are disproportionately harsh (or too lenient) regarding some ethnic groups.

Article 21(1) of the Statute stipulates that '[a]ll persons shall be equal before the International Tribunal', and 21(4) requires that all persons receive 'minimum guarantees, in full equality'. The concern about impartiality towards Serbs has been acute within the international community as well as inside the former Yugoslavia.[69] Some Serbs charge that heavier sentences are being imposed against Serbian defendants because the UN Security Council and the North Atlantic Treaty Organization (NATO) wanted to punish them specifically. Moreover, at their trials a number of defendants have raised the issue that the attacks on other religious and ethnic groups were carried out only to pre-empt massacres of Serbian civilians, and that this fear was based on the memory of the attacks that occurred during the Second World War.[70] Conversely, advocates for those persons perceived as victims in the conflict (Croats and Bosnian Muslims) have condemned the Tribunal's process as inequitable because aggression by the Serbs constituted the violations of international humanitarian law: any wrongdoing on the part of other groups was simply an attempt to defend themselves against that aggression, and so therefore should not receive the same level of punishment.[71] Again, these criticisms come from both internal elites and external viewers of the reconciliation process.[72] Surveys conducted by the University of California Berkeley and the University of Sarajevo indicate that survivors from the Balkans conflict, regardless of ethnicity, mistrust the Tribunal's goals in sentencing, but they do so for different reasons.[73] What is striking about this line of criticism of the Tribunal is that each group perceives that it is being unfairly treated. Thus, to the extent that certain ethnic and religious groups are perceived as being unfairly singled out for harsh punishment, reconciliation in the former Yugoslavia may be hindered.

3. Sentencing determinants

Having reviewed the criticisms regarding ICTY sentencing, we next turn to examining both the opinions of the judges and data on sentencing. In each subsequent section of this part, we first examine ICTY jurisprudence relating to sentencing

69. One study found universally 'vehement' attitudes among Serbian legal elites, who believed that the ICTY selectively prosecuted and punished Serbs, and was hypocritical in its treatment of NATO violations in the 1999 Kosovo war. One interviewee even suggested that the ICTY process might be doing more harm than good to the reconciliation process. While all of those interviewed for the Berkeley–Sarajevo study criticized the Tribunal, only two of those interviewed believed that it should be abolished. Berkeley–Sarajevo 2000 study, *supra* note 35, at 27–31.
70. See, for example, *Prosecutor v. Plavšić*, *supra* note 67, at para. 72.
71. Amra Hadziosmanovic, 'Massacre Survivors Bitter at Arrest of Wartime Muslim Leader', Agence France-Presse, 11 April 2003.
72. Berkeley–Sarajevo 2000 study, *supra* note 35; Ellis and Hutton, *supra* note 8, at 342.
73. Berkeley–Sarajevo 2000 study, *supra* note 35.

determinants to understand what the judges have ruled. We follow this by analyzing data on sentences and sentencing determinants to identify which factors are most important and to look for patterns of consistency in sentencing. We examine only the sentences of first instance handed down by the trial chambers prior to review by the Appeals Chamber in order to maintain comparability. If we were to incorporate those changes made by the Appeals Chamber to date into our analysis, while leaving the other sentences as they are (but which yet may be changed by the Appeals Chamber), we would be analyzing sentences at different stages in the adjudication process. Sentences rendered after subsequent appeal, remand, and future hearings also affect the empirical analysis, because such judgements say more about the interplay between the appellate and trial hierarchy than about the initial sentencing process.

Our data on sentencing are organized according to individuals found guilty on at least one count by a trial chamber. To date, the trial chambers have rendered verdicts in the cases of 37 individuals. Two were found innocent of all charges, 35 were found guilty on at least one count and were sentenced to a term of months in prison. Three of the 35 had their convictions subsequently overturned by the Appeals Chamber, while others have had their sentences modified; these are included in the analysis for statistical reasons as noted above. For each individual we have information on: (i) the full sentence (s)he received, before any months are subtracted for time already spent in detention; (ii) the general charges of which the individual has been found guilty, including war crimes, crimes against humanity, and genocide; (iii) all aggravating circumstances cited by the trial chamber in the opinion; (iv) all mitigating circumstances cited by the trial chamber in the opinion; (v) whether the individual was found guilty of crimes as an individual, a superior, or both; (vi) a measure of the individual's level of responsibility in the political or military chain of command; and (vii) defendant ethnicity (Serb, Croat or Muslim).

We analyze statistically the data to determine whether the sentences differ systematically depending on the sentencing determinants. We use four principal statistics to analyze the data: (i) the average length of sentence received by individuals where the sentencing determinant is present; (ii) the standard deviation of these averages, which tells us the extent to which the sentences that make up the average vary widely (large deviation) or narrowly (small deviation); (iii) the median sentence (the point in the distribution of all sentences where 50 per cent of the defendants receive a sentence greater than the median sentence, and 50 per cent of the population receives a sentence less than the median sentence) where the sentencing determinant is present; and (iv) the correlation between the sentencing determinant and the sentence. The correlation is a measure of association ranging between '–1', indicating a perfect, negative association between two measures, and '+1', indicating a perfect, positive association between two indicators. For example, we expect the relationship between the gravity of the crime and sentence length to be positive because (all other things being equal) the more serious the crime, the longer the sentence. Conversely, we might expect a negative relationship between the presence of a mitigating factor, such as an expression of remorse, and sentence length, which would indicate that when remorse is expressed sentences tend to be reduced. The correlation coefficient

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

does not tell us whether two variables are causally related. It tells us only about the strength of the relationship between two variables so that we may draw initial conclusions about which factors seem to be more strongly associated with greater or lesser sentences.

3.1. Gravity of the crime

Article 24 of the Statute provides that the Tribunal should take into consideration the gravity of the offence in establishing punishment. As the *Čelebići* decision clarified, '[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence'.[74] How the judges go about evaluating the gravity of the offence is a critical question regarding sentence consistency and fairness. Early on the Tribunal established that while the gravity of the defendant's actions is important in determining the appropriate punishment, the focus is much broader than the defendant's acts alone. 'The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime'.[75] As the Appeals Chamber elaborated:

> Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct. The gravity of the crimes must ultimately be determined with regard to the particular circumstances of the case; the degree of the accused's participation should be considered and, generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime.[76]

Conversely, there is some indication that the critical distinction is not the defendant's actions, but the impact of those actions on the victims: 'The gravity of the offences of the kind charged has always been determined by the effect on the victim or, at the most, on persons associated with the crime and nearest relations.'[77] Certainly this is reflected in the legal elements that distinguish war crimes from crimes against humanity and genocide. From a legal perspective there are four key elements that distinguish war crimes from crimes against humanity, as well as from genocide: the armed conflict requirement; the persons protected from that conflict; the presence of a widespread or systematic assault on civilians; and the underlying offences related to the attacks.[78]

For crimes against humanity and genocide, it is unnecessary that the acts be related to war, while for war crimes the actions must be proximately related to the ongoing conflict. War crimes, unlike genocide and the crime of persecution falling under crimes against humanity, do not have a special intent element required for

74. *Prosecutor v. Delalić et al.*, *supra* note 1, at para. 1225.
75. *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Santić*, IT-95-16, Appeal Chamber Judgement, 23 Oct. 2001, at para. 442.
76. *Prosecutor v. Anto Furundžija*, IT-95-17/1, Appeals Chamber Judgement, 21 July 2001, at para. 227.
77. *Prosecutor v. Delalić et al.*, *supra* note 1, at para. 1226.
78. For an excellent analysis of the distinctions between all the elements, see G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *Harvard International Law Journal* 237.

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

proof of guilt. In some ways this is similar to domestic laws, such as hate crimes, where an additional element is required for a higher level of punishment to be imposed. Also, genocide is the 'crime of all crimes' and the 'ultimate crime against humanity' because of the special intent, as well as its scope and magnitude.[79] In a sense, crimes against humanity serve as a catch-all category for those actions that do not meet the legal requirements of genocide, but involve widespread abuses of human rights, not necessarily connected with armed conflict, as are war crimes. Thus, crimes against humanity and genocide involve critical distinctions from war crimes and grave breaches because they can be considered as widespread assaults on innocents not necessarily related to armed conflict. Thus, a hierarchy may exist, with genocide being considered to be the most egregious violation, crimes against humanity to be horrific, but not of the same magnitude, and finally war crimes being seen as the least heinous of the three. It is important to note that while the trial chamber in *Tadić* found that crimes against humanity should be considered a more severe crime than war crimes, subsequent decisions have not subscribed to this argument.[80]

While there has been significant analysis of the doctrinal differences between the categories, there has been little systematic investigation into the way in which they relate to sentence length.[81] To assess whether there are broad distinctions that judges may make when sentencing, we relied upon a measure of 'gravity' that has been utilized by other research.[82] We were interested in determining whether there are significant correlations between the chapeau categories and sentence length. For each individual we determined the nature of the crimes from the Article they were charged with and found guilty of as contained in the sentencing judgements. Although this was straightforward in a majority of cases, one caveat is in order, however. Given that the unit of analysis is the individual defendant and because some defendants were charged and subsequently found guilty of multiple violations of Articles 2 to 5, we needed to make one methodological adjustment in order to

79. *Attorney-General v. Eichmann*, (1961) 36 ILR 5, affirmed, (Supreme Court of Israel 1962) 36 ILR 277; T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239.

80. 'The Trial Chamber considers it wrong to resort to some abstract comparison of the "*per se* gravity of the crimes", comparing the severity of crimes against humanity and violations of the laws or customs of war as suggested by the Prosecutor . . . In [*Tadić*], the Trial Chamber, solely on the basis that a crime against humanity, all else being equal, is a more serious offence than a war crime, considered that a heavier penalty should be imposed for the former crime. However, the Appeals Chamber in that case concluded that there is "in law no distinction between the seriousness of a crime against humanity and that of a war crime", finding that the Trial Chamber committed an error in determining that crimes against humanity should attract a higher sentence than war crimes. The Appeals Chamber in the *Aleksovski* case also held that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The authorised penalties for these crimes are also the same, "the level in any particular case being fixed by reference to the circumstances of the case". The Appeals Chamber in the *Furundžija* case followed the pronouncements in the *Tadić* and *Aleksovski* cases on the same issue. This submission by the Prosecutor is therefore rejected.' *Prosecutor v. Kunarać et al.*, *supra* note 23, at para. 823.

81. For doctrinal analyses of the four categories see W. J. Fenrick, 'Should Crimes Against Humanity Replace War Crimes?', (1999) 37 *Columbia Journal of Transnational Law* 767; L. C. Green, 'Grave Breaches or Crimes Against Humanity?', (1997–98) 8 *USAFA Journal of Legal Studies* 19; and M. Lippman, 'Crimes Against Humanity', (1997) 17 *B. C. Third World Law Journal* 171. For an excellent systematic analysis of these issues, see A. M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Virginia Law Review* 415.

82. Danner, *supra* note 81; Meernik, and Meernik and King, *supra* note 2.

TABLE 1. *Sentences for gravest crimes imposed by the ICTY trial chamber*

Category of crime	Number of persons convicted	Average sentence	Median sentence
		months	
Genocide	1	552.0 (na)	552
Crimes against humanity	29	188.8 (123.9)	180
War crimes	5	130.8 (81.8)	120

na = not applicable.
Standard deviations are given in parentheses.
Correlation between gravity of crime and sentence = .36 (statistically significant at the .05 level).

be consistent with our expectations regarding a 'hierarchy' of criminal behaviour. Thus, we categorized each defendant on the basis of the 'worst' crime of which (s)he was found guilty by the trial chamber. Thus, for example, Goran Jelisić was found guilty both of war crimes and of crimes against humanity, so that his categorization would be under crimes against humanity. We did not make a distinction between the grave breach provision (Article 2) and the violations of the laws or customs of war provision (Article 3), because theoretically there is no reason to believe that one is of a greater magnitude than another. They both address the treatment of civilians and combatants during war. Our measure of the gravity of the offence provides a value of '1' for all Articles 2 and 3 war crimes; '2' for crimes against humanity; and '3' for genocide.

As for the relationship between sentencing outcomes and the gravity of the crime (Table 1), the data are quite revealing. Notable and already well known is the lengthy sentence given to Radislav Krstić, the sole individual convicted of genocide, so that both the average and median sentence of 552 months applies only to his case. Because it is a unique case, comparisons of this sentence to those in the other categories would be premature. Certainly this sentence is consistent with the charge that genocide is the 'crime of all crimes', and the trial chamber has treated it as such.

As for the other crimes, we should note that the great majority of the defendants (29) were found guilty of crimes against humanity, and only five defendants (Aleksovski, Furundžija, Delić, Landžo, and Mucić) were found guilty of war crimes without being placed in the crimes against humanity category. The average prison term for crimes against humanity was 188.8 months, with a standard deviation of 123.3, while the median sentence was 180 months. In contrast, persons convicted for war crimes received an average sentence of 130.8 months, with a standard deviation of 81.8 months. There are marked differences in the average sentences given to individuals based on the broad criminal category of criminal offences on which they were found guilty. More importantly, we find that the correlation between the gravity of the crime and sentence length is positive (.36), and statistically significant – the more severe the crime, the longer the sentence. Statistical significance refers to our degree of confidence that the correlation is not due to some random factor or chance. Generally, statisticians use the 90 per cent or 95 per cent confidence level as the benchmark for determining statistical significance. This finding, combined

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with other empirical evidence that indicates that there is a relationship between the categories of crimes and sentencing outcomes, highlights the critical role of the severity of the crime in sentencing.[83] It also demonstrates that contrary to what the judges argue in their opinions, there is something of a rank ordering of general categories of offences. Genocide is treated differently from crimes against humanity and war crimes, and crimes against humanity are punished more severely than war crimes. As more verdicts are handed down in cases involving charges of genocide we will be in a better position to reach more comprehensive assessments of this sentencing determinant.

3.2. Level of responsibility

Key to any assessment of the appropriate punishment for the accused is the degree of responsibility the accused exercised in the commission of criminal offences. The trial chambers have taken cognizance of the role of the accused in the crimes with which he or she has been charged, and have generally argued that the greater the liability of the accused, *ceteris paribus*, the more severe the punishment should be.[84] In *Blaskić*, the judges found that

> Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to mitigating circumstances, independently of the issue of the form of participation in the crime.[85]

The Appeals Chamber in *Tadić*, ruling on the appellant's argument that his sentence was excessive in the light of his low position in the command structure, agreed and reduced his sentence accordingly.[86] Similarly, the Appeals Chamber in *Aleksovski* went so far as to find that the sentence imposed by the trial chamber was too lenient given Aleksovski's degree of responsibility for the crimes committed by his subordinates.[87] The trial chambers often treat the level of responsibility, de facto or *de jure*, exercised by the accused as an aggravating factor in deciding the sentences. This appears to be the case regardless of whether the accused is found guilty by reason of individual liability under Article 7(1) of the ICTY Statute, superior liability under Article 7(3) of the Statute, or both. Judges have also noted that even though the accused may occupy a senior, command position and be charged as a superior under Article 7(3), he still may be found guilty of individual criminal liability under Article 7(1) if he also personally took part in the commission of criminal offences.[88] The trial chamber ruled in *Krstić* that:

> Direct criminal participation under Article 7(1), if linked to a high-rank position of command, may be invoked as an aggravating factor. The Trial Chamber finds that the direct participation of a high-level superior in a crime is an aggravating circumstance,

83. Meernik (2003) and Meernik and King, *supra* note 2.
84. See especially *Prosecutor v. Žlatko Aleksovski*, IT-95-14/1, Trial Chamber Judgement, 25 June 1999, at para. 243;
85. *Prosecutor v. Blaskić*, *supra* note 29, at para. 789.
86. *Prosecutor v. Duško Tadić*, IT-94-1, Appeals Chamber Judgement, 26 Jan. 2000, 56–7.
87. *Prosecutor v. Aleksovski*, *supra* note 24, at para. 187.
88. *Prosecutor v. Milan Simić*, IT-95-9/2-S, Trial Chamber Judgement, 17 Oct. 2002, 66–7.

> although to what degree depends on the actual level of authority and the form of direct participation.[89]

Nonetheless, the command position of the accused may not always lead to increasingly severe punishment. For example, in *Čelebići* the Appeals Chamber found that 'Establishing a gradation does not entail a low sentence for all those at a low level of the overall command structure.'[90] And finally, the trial chamber in *Krstić* nicely summarizes recent thinking on the importance in sentencing of the level of responsibility:

> 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. The consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes. It must be noted, though, that current case law of the Tribunal does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors.[91]

Is there any discernible pattern in the sentences handed down by the trial chambers in relation to the level of responsibility exercised by the guilty party? While the trial chambers generally seem to argue that those who exercised substantial authority, politically or militarily, in the overall command structure should receive lengthier prison terms, as noted in the previous discussion, they have also raised important caveats in their treatment of this criterion. If there is consistency in the manner in which the trial chambers are sentencing individuals according to their level of responsibility, we expect to find that the greater the responsibility borne by the accused, the longer the sentence will be.

To determine whether there are any discernible patterns in sentencing on this account, we utilize two indicators when correlating sentence length to measure the level of responsibility exercised by the accused. First, using information contained in the judgements handed down by the ICTY, we distinguish between those individuals found guilty as superiors under Article 7(3) of the ICTY Statute, those found guilty as individuals under Article 7(1) of the Statute, and those found guilty under both. We should note, however, that in our examination of the sentences we could find no clear instances in which an individual was found guilty only as a superior of all crimes of which (s)he was convicted. In some instances where a plea bargain arrangement was reached, it is not made clear in the count(s) on the last amended indictment to which the individual pleaded whether the individual is charged under 7(3) or 7(1) of the ICTY Statute.[92] In these instances we left such cases out of the analysis. Second, we constructed our own scale of the level of responsibility exercised by the accused, using information on these individuals in ICTY documents. The scale we constructed assigns a value of '1' to those individuals whom we consider to be relatively low-level

89. *Prosecutor v. Krstić*, *supra* note 11, at para. 708.
90. *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo*, IT-96-21, Appeals Chamber Judgement, 20 Feb. 2001, at para. 847.
91. *Prosecutor v. Krstić*, *supra* note 11, at para. 709.
92. See *Prosecutor v. Simić*, *supra* note 88, at para. 10.

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TABLE 2. *Liability as an individual and as a superior and ICTY trial chamber sentences*

Nature of liability	Number of persons convicted	Average sentence	Median sentence
		months	
Article 7(1) individual liability convictions	21	198.2 (108.3)	180.0
Articles 7(1) and 7(3) individual and superior liability convictions	12	195.0 (156.0)	177.7

Standard deviations are given in parentheses.
Note: Two cases are omitted because the form of liability could not reliably be determined.
Correlation between liability and sentencing = −.011 (not statistically significant).

war criminals, principally ordinary soldiers and prison camp guards. We assign a value of '2' to those mid-level officials, such as prison camp commanders, military officers below the rank of colonel, and important, but local, political figures. We assign a value of '3' to high-level officials including military officials at or above the rank of colonel and political officials of regional or national importance. Allowing for only three values may not provide enough levels of gradation given the variety of positions occupied by the accused. It does, however, provide a simple and intuitive method for making the sort of broad-brush distinctions we believe are most useful at this stage.

Regarding the punishment of those convicted of all manner of international crimes under individual liability or both individual and superior liability, we find little difference in sentencing. The average prison term for the 21 individuals convicted only under Article 7(1) is 198.2 months, with a standard deviation of 108.3, while the median prison term is 180 months. For those 12 persons convicted under both Article 7(1) and 7(3), the average sentence is 195 months, with a standard deviation of 177.7. The median sentence is 156 months. This negligible difference is also apparent when we examine the correlation between liability and sentence length. The correlation coefficient is –.011 and is thus statistically insignificant. There is therefore virtually no reason to suspect that those convicted solely as individuals are treated any differently from those found guilty as both individuals and superiors. One critical reason for this lack of differentiation is simply that in theory anyone can be charged with superior liability if he or she exercises some level of control that meets what seems to be the principal test of superior liability found in the *Čelebići* Appellate ruling of 20 February 2001.[93] Thus many comparatively low-ranking individuals have been found guilty under Article 7(3).

Using our second measure of power, we find far more conclusive results. Those holding the least amount of political or military power (18 individuals who are scored '1' on our scale) are sentenced on average to 156.6 months in prison. The

93. *Prosecutor v. Delalić et al.*, *supra* note 90, at section 4.

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

TABLE 3. *Levels of responsibility and ICTY trial chamber sentences*

Level of responsibility	Number of persons convicted	Average sentence	Median sentence
		months	
High	4	381.0 (202.5)	420
Medium	13	180.0 (130.4)	120
Low	18	156.6 (80.8)	162

Standard deviations are given in parentheses.
Correlation between level of responsibility and sentence = .43 (statistically significant at the .01 level).

standard deviation is 80.8, while the median value is 162 months. Mid-level officials (13 in total) receive an average sentence of 180 months, with a standard deviation of 130.4, and a median value of 120 months. The four 'big fish' in our sample have been sentenced to an average of 381 months in prison, with a standard deviation of 202.5 and a median value of 420 months. More importantly, the correlation coefficient between our measure of level of responsibility and sentence length is .437, and is statistically significant. This demonstrates a fairly strong and positive relationship between power and punishment. Those who were ultimately responsible for the most harm in the Balkan wars have generally been punished the most severely. We recognize, however, that these data currently contain a disproportionate share of relatively low-ranking war criminals and that the ICTY has many more cases in trial or pending that will involve high-level officials. As more verdicts and sentences are pronounced in these cases, we will have a greater body of evidence to examine and from which to derive final conclusions.

3.3. Aggravating circumstances

As indicated earlier, Article 24(2) of the ICTY Statute provides that the judges should consider 'the gravity of the offence and the individual circumstances of the convicted person'. Rule 101(B)(i) of the RPE indicates that the judges shall consider 'any aggravating circumstances'. In conflicts that spawned widespread and violent atrocities of the most vicious sort, it might seem to a certain extent superfluous to specify additional aggravating circumstances that should be taken into account. The trial chamber opinion of 29 November 1996 in *Erdemović* appears to evince similar inclinations:

> The Trial Chamber holds the view that, when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration . . . The Trial Chamber must, however, pursuant to the provisions of Article 24 of the Statute, consider circumstances surrounding the commission of the crime likely to characterise its gravity which might preclude any leniency stemming from mitigating circumstances.[94]

94. *Prosecutor v. Erdemović, supra* note 22, at para. 45.

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

While this view has, to our knowledge, never been challenged, it does appear that subsequent sentences have not adhered to this line of thinking, since aggravating circumstances have been raised in several cases involving convictions of crimes against humanity.[95] There are, however, several points regarding aggravating circumstances that have gained common acceptance and have formed part of ICTY jurisprudence. First, the trial chambers have recognized that there are likely to be many different types of aggravating factors. Such behaviours may be circumscribed only by the limits of human cruelty. Second, the trial chambers have consistently stated that aggravating factors must be proved by the prosecution beyond a reasonable doubt, and this view has been supported by the Appeals Chamber.[96] As the trial chamber in *Kunarać* ruled:

> 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 in aggravation.[97]

This assertion and the prevailing view that aggravating circumstances must be proved by the prosecution beyond a reasonable doubt may be at odds, however, with the first Appeals Chamber ruling in the *Čelebići* case. There, the judges ruled that courtroom demeanour could be taken into account:

> The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges' perception of an accused, have also been considered in both mitigation and aggravation of sentence.[98]

It is not clear how such conduct would be proved beyond a reasonable doubt by the prosecution, but we shall leave debate over this issue to future research. At present we are more interested in ascertaining two, critical, questions regarding aggravating circumstances and the consistency of Tribunal sentencing. First, do findings by the judges of aggravating factors lead to lengthier sentences? And second, are some aggravating factors more likely to lead to longer prison terms than others? To address these issues, we examined all discussions of aggravating circumstances in the sentencing judgements of the ICTY trial chambers. Whenever the trial chambers indicated that an aggravating circumstance was relevant to a sentence, we took note of it, and added that factor to our general listing of all aggravating factors. We found 13 categories of aggravating factors utilized in all cases to date. Since we have previously analyzed the level of responsibility of the accused, we do not consider that factor here. The various factors are listed in Table 4 for all persons found guilty by a trial chamber along with: (i) the number of individuals cited for each aggravating circumstance; (ii) the average sentence given to those individuals cited for such behaviour; (iii) the average sentence handed down to those individuals *not* cited for this factor; (iv) the median sentence handed down to those individuals cited for

95. See especially *Prosecutor v. Kunarać et al.*, *supra* note 23, at section 4(D).
96. *Prosecutor v. Delalić et al.*, *supra* note 90, at para. 763.
97. *Prosecutor v. Kunarać et al.*, *supra* note 23, at para. 850.
98. *Prosecutor v. Delalic et al.*, *supra* note 90, at para. 788.

TABLE 4. *Aggravating circumstances and ICTY trial chamber sentences*

Circumstance	Number of persons convicted	Average sentence cited	Average sentence not cited	Median sentence cited	Median sentence not cited	Correlation with sentence
			months			
Magnitude of crimes	5	295.2 (156.8)	173.6 (123.7)	240	138	**.32
Zeal in committing crimes	4	300.0 (120.0)	176.9 (130.2)	240	132	*.29
Heinousness of crimes	12	228.0 (150.8)	171.6 (122.5)	210	144	.20
Duration of crimes	2	288.0 (67.8)	185.0 (134.7)	288	144	.18
Discriminatory intent	3	212.0 (140.1)	189.0 (134.9)	240	162	.04
Vulnerability of victims	5	208.8 (164.8)	188.0 (130.6)	144	180	.05
Youth of victims	3	240.0 (96)	186.3 (136.6)	240	156	.11
Trauma of surviving victims	1	240.0 (na)	189.5 (135.1)	240	162	.06
Abuse of trust or personal authority	16	173.6 (129.3)	205.5 (138.5)	126	180	−.12
Failure to punish those committing crimes	2	318.0 (330.9)	183.2 (120.1)	318	180	.23
Intimidation of witnesses/courtroom demeanour	1	84.0 (na)	194.1 (134.1)	84	180	−.13
Personal gain	1	72.0 (na)	194.4 (133.8)	72	180	−.15

na = not applicable.
Standard deviations are given in parentheses.
** statistically significant at the .05 level.
*** statistically significant at the .01 level.

the aggravating circumstance; (v) the median sentence given to those individuals *not* cited for this circumstance; and (vi) the correlation between the aggravating circumstance and sentence length. The standard deviations for average sentences are given in parentheses with each average.

We would note first that in most cases those individuals who were cited for a particular aggravating circumstance received a longer average sentence than those who were not cited. In addition, there are positive correlations between a majority of aggravating circumstances and sentence length, as we would expect. This indicates that the mention of a particular aggravating factor as relevant in a case increases sentence length for those individuals. There are only three instances in which there is a negative correlation between the aggravating behaviour and the severity of punishment, which would indicate that the factor is associated with reduced sentences. Two of these instances, however, involve cases where only one individual was cited for the particular aggravating factor. Given such isolated instances, it is nearly impossible to generalize beyond the particular individual to the larger population of those convicted.

There are two aggravating circumstances that are positively associated with an increased sentence and whose relationship can be characterized as statistically significant – the magnitude of the crime(s) and the zeal with which the accused

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

committed the crime(s). Those whose offences are typified as encompassing many victims, large-scale destruction, or similar such designations of dimension are given prison sentences of 295.2 months on average. Conversely, those whose crimes are not so characterized are sentenced to 173.6 months on average. Those whose crimes were committed with zeal or eagerness (as opposed to reluctant or perfunctory execution) were sentenced on average to 300 months in prison, while those whose offences were not depicted as such were given sentences of 176.9 months on average. By treating these two aggravating factors as especially critical in their sentencing decisions, ICTY judges are signalling that both the extent of the crime and the manner in which it was committed are important determinants of the offence's severity.

It may also be the case that the more often aggravating circumstances are cited against an individual, the greater the sentence he receives. To investigate this possibility, we simply counted the number of aggravating factors mentioned for each defendant found guilty. We then correlated this measure with sentence length. The correlation coefficient, .23, is not statistically significant. We cannot therefore conclude with confidence that the greater the number of aggravating factors cited, the lengthier the sentence. In sum, the results here provide some indication that aggravating factors do explain sentence length. Since we made no predictions regarding which specific aggravating factors would be most strongly associated with increasing severity of punishment, it is important to consider which among these factors are likely to be the most important. Given that most individuals are cited for at least one aggravating circumstance (all but nine of those found guilty were clearly cited for at least one aggravating circumstance) and given the wide range of sentences that exist, it is inevitable that some aggravating factors will exercise little effect – they cannot all predict sentence length. Therefore, it is important in future research to explore which, if any, aggravating factors are the most influential in this regard, and why.

3.4. Mitigating factors

Rule 101(B)(ii) of the RPE provides that the judges should take into account 'any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction'. Judges have promulgated a fair amount of jurisprudence regarding the weight to be attached to such factors in mitigation of punishment and the standards of evidence required to support such mitigating circumstances.

The trial chambers and the Appeals Chamber have been virtually unanimous in finding that the judges shall determine what effect, if any, a mitigating circumstance will have upon the sentences they pronounce, and which mitigating factors they may consider. In the *Kupreškić* case, the Appeals Chamber found that 'The weight to be attached to such [mitigating] circumstances lies within the discretion of a trial chamber, which is under no obligation to set out in detail each and every factor relied upon.'[99] While substantial co-operation with the prosecutor is the only mitigating

99. *Prosecutor v. Kupreškić et al.*, *supra* note 75, at para. 430.

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

circumstance specified by either the ICTY Statute or the RPE, in practice the trial chambers have identified a plethora of factors that have been considered. It also appears to be a settled matter of law that the defence must demonstrate mitigating circumstances 'on balance of probabilities'.[100] In *Kunarać*, the trial chamber also argued that the courtroom behaviour of one individual would be viewed as evidence against a mitigating condition of remorse.[101]

Perhaps the two most critical and widely discussed mitigating circumstances are guilty pleas and co-operation with the prosecution. Guilty pleas and plea bargaining arrangements are becoming more common at the ICTY. According to Rule 62 *bis* of the RPE, the judges must be satisfied that

(i) the guilty plea has been made voluntarily;

(ii) the guilty plea is informed;

(iii) the guilty plea is not equivocal; and

(iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or of a lack of any material disagreement between the parties about the facts of the case.

Guilty pleas may be entered at any number of points in the legal proceedings, although the trial chambers have indicated that:

> Accordingly, while an accused who pleads guilty to the charges against him prior to the commencement of his trial will usually receive full credit for that plea, one who enters a plea of guilty any time thereafter will still stand to receive some credit, though not as much as he would have, had the plea been made prior to the commencement of the trial.[102]

In plea bargain arrangements, the Office of the Prosecutor (OTP) has, in co-operation with defence counsel, notified the trial chambers what it believes to be an acceptable range of sentences for the accused. While the trial chambers have stated that they are not bound by such agreements,[103] in practice they have generally followed the recommendations of the OTP.

Co-operation with the OTP has also been at the centre of much of the jurisprudence regarding mitigating circumstances. Such co-operation can take many forms, from merely facilitating the presentation of the prosecutor's case[104] to providing evidence in other cases.[105] The trial chambers and the OTP have both found reason to encourage such behaviour for many of the same reasons as guilty pleas assist the ICTY, since it expedites the business of the Tribunal and facilitates reconciliation as defendants take responsibility for their actions. But since co-operation can take many forms and be offered with varying degrees of enthusiasm, the judges have been careful to note that they alone determine the quality and quantity of such

100. *Prosecutor v. Duško Sikirica, Damir Dosen and Dragan Kolundzija*, IT-95-8, Trial Chamber Judgement, 13 Nov. 2001, at para. 108.
101. *Prosecutor v. Kunarać et al., supra* note 23, at para. 854.
102. *Prosecutor v. Sikirica et al., supra* note 100, at para. 148.
103. *Prosecutor v. Simić, supra* note 88, at para. 13.
104. *Ibid.*, at para. 111.
105. *Prosecutor v. Plavšić, supra* note 67, at para. 7.

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

assistance to be used, if at all, in mitigation of sentence. In an oft-cited opinion, the trial chamber in *Blaškić* argued that

> The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of co-operation, which must be lent without asking for something in return.[106]

Certainly, there are many other mitigating circumstances that defence counsel have raised and judges have considered. The trial chambers determine which, if any, of these factors have been established and are deserving of weight, and the extent to which they shall lessen the sentence.

We examined all the trial chamber sentencing judgements for discussions of all mitigating factors. While many such factors were raised, we only analyze those that the judges indicated had been established and had some degree of relevance in their deliberations. Nonetheless, even though we may find that a particular mitigating factor was relevant in a case, its influence on the convicted person's sentence varies. In Table 5 we list all such factors along with the following data in relation to all individuals found guilty by a trial chamber: (i) the number of individuals for whom each mitigating circumstance is cited; (ii) the average sentence given to those individuals cited for such behaviour; (iii) the average sentence handed down to those individuals *not* cited for this factor; (iv) the median sentence handed down to those individuals cited for the mitigating circumstance; (v) the median sentence given to those individuals *not* cited for this circumstance; and (vi) the correlation between the mitigating circumstance and sentence length. The standard deviations for average sentences are given in parentheses with each average.

In all but two instances (when an individual surrendered to authorities, and when the defendant was defined as young) we see that when a mitigating factor is cited as relevant in a case, the average sentence given to the accused is shorter than that given to individuals for whom such factors were not cited. In addition there are negative correlations between all mitigating circumstances (except the aforementioned two factors) and sentence length. However, in only one case do we find that there is a negative and statistically significant correlation. This occurs in the relationship between sentence length and guilty pleas when we do not include the case of Goran Jelisić. We believed it to be necessary to exclude the *Jelisić* case in this instance for three important reasons. First, despite having pleaded guilty to a number of war crimes and crimes against humanity, Jelisić was still tried for genocide. Second, the trial chamber hearing his case discounted the weight of his plea as a mitigating factor.[107] Third, Jelisić did not reach a plea bargain arrangement with the OTP as did most others who have pleaded guilty. His case is thus unique in many respects and should be isolated from the other plea bargain arrangements. When we exclude *Jelisić* from the set of cases in which the accused pleaded guilty, we see that there is a strong, negative, and statistically significant correlation between such pleas

106. *Prosecutor v. Blaškić*, *supra* note 29, at para. 774.
107. *Prosecutor v. Jelisić*, *supra* note 28, at para. 127.

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TABLE 5. *Mitigating circumstances and ICTY trial chamber sentences*

Circumstance	Number of persons convicted	Average sentence cited	Average sentence not cited	Median sentence cited	Median sentence not cited	Correlation with sentence
			months			
Guilty plea	8	148.5 (141.9)	203.5 (130.9)	120	180	−.12
Guilty plea (excluding Jelisić)	7	101.1 (50.8)	213.4 (138.7)	120	198	**−.34
Co-operation	7	145.7 (104.0)	202.2 (139.1)	120	180	−.12
Remorse	8	130.5 (95.4)	208.8 (139.2)	120	180	−.19
Surrendered	9	209.3 (154.7)	184.6 (128.0)	132	180	.12
No prior criminal record	2	75.0 (21.2)	198 (134.2)	75	180	−.18
Assisted victims	6	106.0 (85.4)	208.5 (135.8)	75	180	−.24
Not active participant	2	72.0 (16.9)	198.1 (134.0)	72	180	−.19
Family	2	150.0 (127.2)	193.4 (135.2)	150	180	−.04
Youth	5	206.4 (190.3)	188.4 (125.8)	120	180	.07
Old age	3	94.0 (36.1)	200.0 (135.8)	90	180	−.19
Not a present threat	1	120.0 (na)	193.0 (134.8)	120	180	−.07
Redeemable	1	120.0 (na)	193.0 (134.8)	120	180	−.07
Subordinate rank	1	120.0 (na)	193.0 (134.8)	120	180	−.07
Prison would be far away	1	120.0 (na)	193.0 (134.8)	120	180	−.07
Context of Actions	2	135.0 (63.6)	194.3 (136.3)	135	180	−.08
Co-operation with defence counsel	1	240.0 (na)	189.5 (135.1)	240	162	−.07
Post-conflict conduct	1	132.0 (na)	192.7 (135.0)	132	180	−.06

Standard deviations are given in parentheses.
na = not applicable.
*** Statistically significant at the .01 level.

and length of sentence. Those who plead guilty are sentenced to an average of 101 months behind bars, while those who do not are sentenced to an average of 213 months in prison, or more than double those who do reach accommodation.

Co-operation with the OTP, expressions of remorse, and assisting victims have been cited by the trial chambers in many cases as relevant to the sentence handed down. Expressions of remorse and assistance to victims tend to lead to the greatest differences in the average sentence handed down to those who have been recorded as behaving in such a way. There also appears to be a reduction in sentence associated with co-operating with the OTP, but its effect is modest. Given that individuals have been cited for a number of different types and degree of co-operation, the lack of a strong relationship may be due to cases in which relatively little such assistance was rendered. It is also interesting to note that although numerous mitigating circumstances (e.g. 'not a present threat', 'redeemable', 'subordinate rank', and 'prison would be far away') were cited in the case of Drazen Erdemović, the first individual sentenced by the ICTY, many of them are never mentioned again in sentencing judgements.[108]

108. There is an interesting similarity between the *Erdemović* case and that of Georges Ruggiu at the ICTR. In both instances judges appear to have taken pity on a defendant, who is given a fairly light sentence and who

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Finally, we examined the relationship between the number of mitigating circumstances cited and the length of sentence. Here there is a strong negative relationship (-.30) which is statistically significant and indicates that we can have a great degree of confidence in the validity of the results. The more mitigating factors cited by the trial chamber, the lesser the sentence.

3.5. Ethnicity

Article 21(1) of the Statute of the ICTY asserts that 'All persons shall be equal before the International Tribunal.' The ideal of equality before the law is a bedrock principle in any jurisdiction, but is especially relevant at the ICTY.[109] Serbs, Croats, and Muslims have each accused the ICTY of unfair treatment of their ethnic brethren, given their sufferings. In *Čelebići*, the Appeals Chamber addressed the charge from the defendant, Esad Landžo, that he was singled out by the OTP as a Muslim when the office decided not to pursue cases against many other, similarly low-ranking individuals accused of offences while working at prison camps. The OTP's position was that it did so because of the increasing number of individuals in detention and because it wished to focus on high-ranking persons along with others alleged to have been involved in exceptionally serious crimes.[110] Landžo alleged that his prosecution was due to the need to maintain some sort of ethnic diversity among those standing trial so that the ICTY could counter accusations of bias brought by other ethnic groups. The Appeals Chamber advanced a two-pronged test for the violation of the principle of equality, involving '(i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted'.[111] The Appeals Chamber ultimately dismissed Landžo's claims because he had been accused of particularly serious crimes and because his trial had been under way for many months when the OTP decided not to pursue cases against other similar individuals who were not in the ICTY's custody.[112]

While criticisms of bias or unequal treatment have been directed at various facets of the Tribunal's work, and even at its very existence, here we are concerned only with the relationship between ethnicity and sentencing. In Table 6 we provide, for all those found guilty by a trial chamber, data on (i) the number of Serbs, Croats, and Muslims who have been found guilty by a trial chamber; (ii) the average sentences for each of the three groups; (iii) the median sentence for each group; and (iv) the correlation between ethnicity and sentence length. The standard deviations for average sentences are given in parentheses with the averages. Ethnicity was determined by reference to the ICTY judgements describing the accused. We included

is cited for numerous, mitigating circumstances. *Prosecutor v. Georges Ruggiu*, ICTR-97-32-I, Trial Chamber Judgement, 1 June 2000.

109. Ethnicity is not entirely absent from the RPE, for Rule 92 *bis* (c) provides that the use of expert testimony regarding the ethnic composition of places involved in ICTY cases is permissible. It is also, of course, part of the definition of genocide as a crime committed against a 'national, ethnical, racial or religious group'.

110. *Prosecutor v. Delalić et al.*, *supra* note 90, at para. 597.

111. *Ibid.*, at para. 611.

112. *Ibid.*, at paras. 614–619.

https://doi.org/10.1017/S0922156503001419 Published online by Cambridge University Press

TABLE 6. *Ethnicity and ICTY trial chamber sentences*

Ethnicity	Number of persons convicted	Average sentence	Median sentence	Correlation with sentence
		months		
Serb	19	192.9 (145.0)	144	.01
Croat	13	193.3 (133.2)	180	.01
Muslim	3	168.0 (78.6)	180	−.05

Figures for standard deviations are given in parentheses.
No correlation was statistically significant.

Drazen Erdemović as a Croat in this analysis, even though he was found guilty of crimes committed while he was part of the Bosnian Serb army. Moving his case from the 'Croat' category to the 'Serb' category results in only a very slight change in the average sentences for each group.

As we would expect, there are few differences in the sentences meted out to the guilty based on ethnicity. In fact, the average sentences given to Serbs and Croats are virtually identical. While the average sentence given to Muslim defendants is somewhat lower, there are really too few individuals who have been sentenced thus far to permit us to draw any reliable conclusions. We would also note that the Tribunal has continued to indict several high-profile leaders of the Croats and Bosnian Muslims, including Ante Gotovina and Naser Orić, so that future research may be able to reach more definitive conclusions. As it is, the results here are statistically insignificant. The correlations between each ethnic group and sentence length are approaching zero. This provides even more critical evidence that ethnicity is not a factor with regard to severity of punishment. Such findings may not reassure all those critics of the ICTY who believe that some form of bias exists against individuals because of their membership of a particular ethnic group, but it does demonstrate that judicial efforts at providing equality before the law at one critical stage have been fairly successful.

4. CONCLUSION

The primary objectives of this analysis have been to identify the determinants of ICTY sentences and to ascertain the degree to which there is consistency in these sentences based on these determinants. As we have said, a final determination of these matters will have to await the completion of the Tribunal's work, and thus our conclusions must be preliminary. Nonetheless, we believe that we have shown that it is possible to identify the key determinants of sentencing, and that we might infer from such evidence that there is significant consistency in these punishments. First, arguments by some judges notwithstanding, there is evidence that there is something of a rank ordering of the gravity of offences based on the general category of criminal actions under which they fall. Genocide is punished more severely than crimes against humanity, which are in turn punished more severely than war crimes. Second, those who have exercised the most power or command

responsibility in the Balkan wars receive longer prison terms than comparatively lower-ranking individuals. Third, some aggravating circumstances, such as the magnitude of the crimes committed and the zeal with which they were committed, whatever the broad category of offence, are associated with lengthier sentences. Fourth, the trial chambers tend to reduce the sentences given to individuals whose cases are characterized by mitigating factors, especially guilty pleas by the accused. And lastly, we find no evidence that sentences vary at all according to the ethnicity of the guilty party.

Such findings come at an interesting time in the ICTY's history, as increasingly both judges and outside experts discuss the consistency of sentences. The dominant questions are whether there is a need for some sort of sentencing guidelines, or at least some increased consideration of previously given sentences in current deliberations.[113] As one critic argued:

> General sentencing guidelines, which place certain limits on a Trial Chamber's discretion with regard to aggravating and mitigating circumstances, can help Trial Chambers make more appropriate sentencing determinations in the future.[114]

Both the Prosecution and the Defence urged the Appeals Chamber in *Čelebići* to modify the punishment of the accused in the light of prior sentences, albeit with different intended outcomes.[115] In *Krnojelać*, the trial chamber did something like that: it identified several earlier cases whose facts resembled the pattern of the current case, and analyzed the sentences handed down for guidance. The judges in that case were at pains to note, however, that they were under no obligation to do so or to base their punishment on previous patterns.[116] The trial chamber in *Aleksovski* has made one of the strongest arguments to date for some sort of sentencing guidelines.

> The Trial Chamber is strongly of the view that, in order to implement the Tribunal's mandate, it is crucial to establish a gradation of sentences, depending mainly on the magnitude of the crimes committed and the extent of the liability of the accused.[117]

Such guidelines might include any number of elements regarding punishment beyond those already specified in the ICTY Statute and the RPE. They might include both a thorough listing of factors to be considered, as well as a range of punishment for various types of offences.

Such guidelines might well prove useful to the judges, the accused and their counsel, and the OTP for several reasons. First, some sort of sentencing tariff would make the entire process of punishment more transparent, predictable, and understandable to the parties involved and affected by the ICTY and thus, arguably, fairer. To the extent that this critical phase in the adjudication process can be made more understandable, it may also facilitate the efforts of the Tribunal to educate individuals and groups from the former Yugoslavia about its work. In addition, by reducing

113. See Penrose, *supra* note 3, at 374; and Danner, *supra* note 81, at 442.
114. Keller, *supra* note 3, at 66.
115. *Prosecutor v. Delalić et al.*, *supra* note 90, at para. 719.
116. *Prosecutor v. Milorad Krnojelać*, IT-97-25, Trial Chamber Judgement, 15 March 2002, at para. 231.
117. *Prosecutor v. Aleksovski*, *supra* note 24, at para. 243.

uncertainty among the prosecution and the defence about potential sentences and their determinants, sentencing guidelines might reduce the number of appeals on such grounds and expedite plea bargaining.

At the same time, however, sentencing guidelines might prove to be at odds with other elements of the ICTY Statute and the RPE. Judges are supposed to consider the individual circumstances of the accused and to provide a punishment that fits the crimes committed. To the extent that guidelines would circumscribe punishment, they remove discretion from the judges to consider all relevant factors in the most appropriate manner. Further, an attempt to list all potentially mitigating and aggravating circumstances might also exclude other, unlisted, factors from being considered. Since it may well be impossible to enumerate exhaustively all manner of human cruelty, or all forms of human decency, such a listing may generate more heat than light. If sentencing guidelines were to remove some circumstances from judicial consideration, they might well give rise to new problems and new types of appeals. Finally, the establishment of a sentencing tariff, by making routine, formulaic, and even bureaucratic the assessment of punishment for the most horrific of crimes, might well diminish the moral impact these judgements are designed to have. It is because these crimes are so horrific and inhumane that humans should find the punishment for them – using reason and training to be sure – but relying on human judgement to fit the punishment to the crime. If the end result of international trials for war crimes, crimes against humanity, and genocide becomes the routine of punishment, the moral weight of judicial condemnation becomes submerged in bureaucracy. Certainty of a proportionate, but fair, punishment pronounced by a judge may provide better justice than a predictable, but inflexible, rule.

Before such final judgements can be made regarding the wisdom of sentencing guidelines, however, more research is needed into ICTY and ICTR punishments. Our analysis considered only relationships between individual sentencing determinants and punishment. Given that the preliminary results indicate that the sentences may be more consistent than critics have thought or the Tribunal staff believe, more comprehensive analyses of these determinants are needed. While previous research on this subject demonstrated that ICTY sentences could be analyzed through such multivariate analyses, as more sentences are pronounced, more research is needed. In addition, we have only considered the punishments handed down by the trial chambers. We also need to analyze the changes that have been made to these sentences by the Appeals Chamber. Finally, there are a number of current developments in ICTY adjudication that deserve further scrutiny in analyses such as these. More high-ranking accused are on trial, and as judgements and sentences for those convicted are announced, the composition of our data will change. The fact that more persons are being tried for genocide will also affect the range of sentences we shall see in the future. In addition, there appears to be an increasing trend towards plea bargain arrangements that result in a single conviction for persecution as a crime against humanity. More analysis is needed of the sentences meted out for these crimes in order to determine what types of persecutory acts are associated with particular sentence lengths.

Concern over and attention to consistency in sentencing at the ICTY will undoubtedly continue. Indeed, this is a characteristic of all judicial systems that punish criminal behaviour, regardless of what the goals or objectives of the sanctions are. As the ICTY embarks on its mission to conclude indictments, trials, and sentences for the majority of the accused who are in pre-trial detention or not yet in custody, the results here support the preliminary conclusion that more rigorous scrutiny, which includes quantitative analysis, is necessary. Such investigations would only serve to add to the substantial body of doctrinal research that has been conducted into the Tribunal. Moreover, it would contribute to the Tribunal's mission of facilitating peace and reconciliation because it would shift the emphasis from particular cases to the work of the Tribunal as a whole. Before there is a rush to judgement on the uniformity of the sentencing decisions during the last decade, judges, attorneys, scholars, and critics would do well to re-examine these decisions through empirical inquiry.