Leiden Journal of International Law (2012), 25, pp. 799–813
 doi:10.1017/S0922156512000398

The Good Deeds of International Criminal Defendants

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Abstract
International criminal tribunals try defendants for horrific acts: genocide, war crimes, and crimes against humanity. At sentencing, however, evidence often arises of what I will call defendants' 'good deeds' – humanitarian behaviour by the defendants towards those on the other side of the conflict that is conscientious relative to the culture in which the defendants are operating. This article examines the treatment of good deeds in the sentencing practices of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda. I show that the tribunals' approaches are both undertheorized and internally inconsistent. I argue that the tribunals should draw upon the goals that underlie international criminal law in developing a coherent approach to considering good deeds for sentencing purposes.

Key words
good deeds; International Criminal Tribunal for Rwanda (ICTR); International Criminal Tribunal for the former Yugoslavia (ICTY); mitigating evidence; sentencing

1. Introduction

What are we to make of Augustin Ndindiliyimana? The chief of staff of Rwanda's Gendarmerie nationale during much of the genocide, he commanded and left unpunished *gendarmes* who participated in appalling massacres. In May 2011, an International Criminal Tribunal for Rwanda (ICTR) Trial Chamber found him guilty and recognized the 'gravity of [his] crimes'.[1] Yet, it is hard to read this Trial Chamber's assessment of Ndindiliyimana for sentencing purposes without feeling that Ndindiliyimana was in some sense a decent man – one who disapproved of the genocide and took personal risks to try to limit its magnitude. Prior to being forced out by his colleagues, Ndindiliyimana opposed the extremist positions of Theoneste Bagosora, co-operated with UNAMIR forces, maintained a Tutsi as his personal secretary, posted *gendarmes* to protect a hotel where Tutsis were hiding, and sheltered numerous Tutsis in his own home.[2] He was not a saint, but nor was he much of a villain.

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1 *Ndindiliyimana et al.*, Judgement, ICTR-00-56-T, 17 May 2011, paras. 18–19, 22–23, 2242.

2 Ibid., paras. 2183–2242.

While Ndindiliyimana presents an extreme example, many international criminal defendants do make at least occasional efforts to behave responsibly towards soldiers or civilians on the other side of the conflict. They are likely to have at least a few moments of decency towards the other side mixed in with whatever else they do – perhaps due to flashes of humanity, to international pressure, or to personal ties with particular members of the other group. Evidence of these efforts, which I will call 'good deeds',[3] frequently comes up at their sentencings. This raises the question of how international judges should treat these good deeds, particularly where (as is often the case) these good deeds benefited not the particular victims against whom the defendant committed crimes, but rather other individuals on the same side of the conflict as these victims. Should trial judges find such good deeds to be mitigating? And, if so, how should they evaluate the level of mitigation?

This article looks at these questions in light of the practice at international criminal tribunals to date, with a particular focus on ICTR and International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence.[4] In section 2, I will show that evidence of good deeds comes up frequently at international criminal sentencing and indeed can be found as early as the judgment of the International Military Tribunal (IMT) at Nuremberg. But, as I also show, the tribunals have not developed a uniform or coherent theoretical framework for dealing with such evidence. Instead, judgements both within and across tribunals contain wide disparities on questions like when such mitigating evidence should matter. In section 3, I seek to develop a theoretical framework for when and how evidence of good deeds should matter for sentencing mitigation – one that rests not simply on domestic-law approaches to mitigating evidence, but rather specifically on the particular nature and goals of international criminal law. More precisely, I propose that international criminal judges should view good deeds as mitigating the retribution due to international criminal defendants (with the degree of mitigation to depend on the magnitudes of the defendants' crimes and good deeds) and that, depending on the specifics of the good deeds, these judges should sometimes also treat these deeds as evidence of rehabilitatable character.

Throughout, I use the phrase 'good deeds' to refer to humanitarian steps taken by a defendant that are aimed at those on the other side of the ongoing conflict and

3 See ibid., para. 2261 (using the phrase 'good deeds' in describing the mitigating acts of defendant Sagahutu).

4 Although I focus only on sentencing in this article, evidence of defendants' good deeds often appears in the guilt stage of trials as well. For example, defendants can use their good deeds to try to disprove *mens rea* or *actus reus*, and the prosecution can sometimes rely on defendants' good deeds in proving a superior–subordinate relationship or knowledge of criminal activity. For example, *Krstić*, Judgement, Case No. IT-98-33-A, 19 April 2004, para. 132 (finding that efforts of Krstić to ensure safety of Bosnian Muslim civilians being transported out of the Srebrenica region cast doubt on whether he had genocidal intent and therefore reducing the mode of liability to aiding and abetting); *Mpambara*, Judgement, Case No. ICTR-01-65-T, 11 September 2006, para. 70 (discrediting a witness's testimony of Mpambara's orchestration of killings in light of testimony by other witnesses that Mpambara was trying to stop the killings); *Čelebići*, Judgement, Case No. IT-96-21-A, 20 February 2001, para. 213 (using evidence that Mucić had camp guards treat prisoners better as evidence of a superior–subordinate relationship); *Kunarac et al.*, Judgement, Case No. T-96-23 & 23/1, 22 February 2001, para. 590 (relying on evidence that Vuković had assisted Bosnian Muslims in danger in finding that he knew of a widespread or systematic attack directed against Bosnian Muslims).

https://doi.org/10.1017/S0922156512000398 Published online by Cambridge University Press

that are conscientious relative to the culture in which the defendant is operating.[5] This use is intentionally broad, encompassing both behaviour that a defendant has a duty to undertake pursuant to international law and behaviour that is separate from what duty requires. Thus, I will consider that a commander who actively prevents his unruly troops from killing civilians has done a good deed, even though he is obligated to do so under international law. While, in theory, one could argue against assigning value to what is already obligatory,[6] in practice, compliance with international law in the midst of a culture of noncompliance is beneficial indeed. Moreover, such duty-bound good deeds will often prove more significant than free-standing good deeds, since the obligations imposed by international law tend to be associated with the exercise of power and thus have a potentially greater scope for influence.

2. Good deeds as mitigating factors in ICTR and ICTY sentencing

Defendants' good deeds come up frequently in the sentencing portions of international criminal judgments. This section surveys the treatment of such mitigating evidence briefly with regard to the IMT and, at more length, with regard to the ICTR and ICTY. I show that, within and across tribunals, there is significant variation in the way judgments treat good deeds in mitigation.

2.1. IMT

At Nuremberg, the IMT sometimes took the good deeds of defendants into account in mitigation. With regard to Karl Dönitz, Albert Speer, and Constantin von Neurath, the IMT explicitly found certain good deeds to be mitigating – citing, in the case of Dönitz, his responsible treatment of British naval prisoners of war; in the case of Speer, his opposition to Hitler's scorched-earth policy towards the end of the war; and, in the case of von Neurath, his efforts to arrange for the release of certain Czechoslovaks and students.[7] These three defendants all received sentences for terms of years, whereas all but one of the other convicted defendants received sentences

5 For purposes of this article, I need not address the lower bounds of what constitutes a 'humanitarian step'. Suffice it to say that such a step should be genuine and at least marginally helpful to those on the other side. Thus, a commander's promise that a victim will no longer be mistreated cannot be a 'good deed' if it is found to be a false promise – as when the witness is then beaten daily for the next 12 days. See *Naletilić and Martinović*, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 427. I will, however, treat humanitarian steps affirmatively taken in the course of otherwise illegal conduct as good deeds. Thus, I treat an order that no harm come to civilians as a good deed, even if given in the context of a forcible transfer operation amounting to the crime of persecution. See *Krstić*, Judgement, Case No. IT-98-33-T, 2 August 2001, paras. 358–359.

6 Indeed, the ICTY prosecution has made this argument. See Appeal Brief, *Blagojević and Jokić*, ICTY Prosecution, 9 May 2005, paras. 6.46–6.49 (arguing that Jokić's role in guiding Bosnian Muslim boys safely through a minefield should not have counted as a mitigating factor in sentencing, since 'under international law, Jokić had a special duty to protect children from the negative effects of the conflict'); but see *Blagojević and Jokić*, Judgement, Case No. IT-02-60-A, 9 May 2007, para. 342 (rejecting this argument).

7 Judgement, 1 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (1947) (hereafter, 'IMT Judgement'), at 314–15 (Dönitz), 333 (Speer), and 336 (von Neurath).

https://doi.org/10.1017/S0922156512000398 Published online by Cambridge University Press

of either life imprisonment or death by hanging.[8] But, with regard to the good deeds of Arthur Seyss-Inquart, the IMT was more opaque. The judgment recognized that:

> [i]t is . . . true that in certain cases Seyss-Inquart opposed the extreme measures used by . . . other agencies, as when he was largely successful in preventing the Army from carrying out a scorched earth policy, and urged the Higher SS and Police Leaders to reduce the number of hostages to be shot.[9]

Yet, the IMT did not explicitly describe these actions as mitigating and, in light of the death sentence given to Seyss-Inquart, it is also clear that the IMT did not deem them to be materially mitigating.

The IMT did not explain how it distinguished between Dönitz, Speer, and von Neurath on the one hand and Seyss-Inquart on the other. It could have drawn a principled distinction by finding that Seyss-Inquart's crimes – including the deportation of Dutch Jews to Auschwitz – were so great as to make any mitigating power of his good deeds immaterial. But it did not draw this distinction, and instead left any reasoning unstated. This lack of clarity foreshadows the approaches found in today's ad hoc tribunals.

2.2. ICTR

ICTR defendants frequently assert good deeds in seeking sentencing mitigation. Indeed, a recent study has found that 'assistance to the victims' is cited in 42.7 per cent of ICTR cases – more than any other mitigating factor.[10] These good deeds are usually of a similar cloth: namely direct personal assistance to certain Tutsis, often relatives or friends of the defendants. With rare exceptions, ICTR Trial Chambers spend very little time discussing these good deeds or their implications for the sentence, usually devoting no more than three or four sentences in a trial judgement to these issues. This brevity is perhaps not surprising given the discretion available to judges in sentencing decisions and the many factors they may consider.[11] What is surprising is that even these brief discussions reveal multiple and sometimes

8 At least two of the US Nuremberg Military Tribunal judgements also took the good deeds of defendants into consideration in mitigation. See W. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 Duke JCIL 461, at 492–3 (describing mitigation with regard to Waldemar von Radetzky in the Einsatzgruppen Trial for his having helped certain victims to escape, with regard to Ernst Dehner in the *Hostage* case for his conscientious efforts to apply the laws of war, and with regard to several other defendants); see also S. Beresford, 'Unshackling the Paper Tiger: The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', (2001) 1 *International Criminal Law Review* 33, at 74–5 (discussing the same cases).

9 IMT Judgement, *supra* note 7, at 330; see also Beresford, *supra* note 8, at footnote 186 (noting the differential treatment between Speer and von Neurath on the one hand and Seyss-Inquart on the other).

10 B. Holá et al., 'International Sentencing Facts and Figures', (2011) 9 JICJ 411, at 432.

11 The ICTR statute and its Rules of Procedure and Evidence give very little guidance on sentencing generally (let alone on the narrower issue of how to treat good deeds in mitigation). See Art. 23(1)–(2) ICTRSt; Rule 101(B) ICTR RPE; see also Art. 24(1)–(2) ICTYSt; Rule 101(B) ICTY RPE (containing provisions similar to those in the ICTR). The lack of precision in the foundational documents and the resulting broad discretion available to Trial Chambers have led to a wide range of sentencing practices in the ad hoc tribunals. This has been discussed in general terms by a number of commentators. See, generally, e.g., Beresford, *supra* note 8; M. B. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes', (2007) 5 JICJ 683; R. Henham, 'The Philosophical Foundations of International Sentencing', (2003) 1 JICJ 64; J. C. Nemitz, 'The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence', (2001) 4 YIHL 87, at 120.

inconsistent approaches to the overarching questions of when and how much good deeds should count in mitigation.

Most notably, ICTR Trial Chambers have taken different approaches to whether direct personal assistance to certain Tutsis during the genocide is a mitigating factor. Broadly speaking, Trial Chambers take one of three approaches: (i) not counting such assistance as a mitigating factor; (ii) not clearly resolving whether or not such assistance is a mitigating factor, but in any event finding it to have no weight; or (iii) counting such assistance as a mitigating factor (even if the trial court then goes on to give limited or no weight to it).

An example of the first approach occurs in the case of Yussuf Munyakazi, a farmer and Interahamwe leader convicted of leading genocidal attacks. In that case, the Trial Chamber stated that it:

> acknowledges the assistance [Munyakazi] provided to a number of Tutsi friends during the genocide. However, as the Appeals Chamber of the Tribunal has explicitly affirmed, it is well within the province of a Trial Chamber to disregard such 'selective assistance' to Tutsis as a mitigation factor. . . . Therefore, the Chamber does not regard these as mitigating factors.[12]

The Trial Chamber thus treated Munyakazi's good deeds as irrelevant for mitigation purposes. The Trial Chamber's rejection seems to turn here on the 'selective' nature of Munyakazi's good deeds, although it does not clarify why this selectivity makes these deeds non-mitigating. The Trial Chamber's concern could be with the *extent* of Munyakazi's efforts: that he did not do as much as he could have done to help Tutsis. If so, this would make it difficult for good-deed evidence ever to count in mitigation, since convicted international criminal defendants have obviously not done their utmost to prevent international crimes. From the limited language above, however, the most likely reason seems to be that the Trial Chamber's concern was with Munyakazi's *motivations*. In other words, the Trial Chamber did not treat Munyakazi's actions as mitigating – regardless of whether they saved Tutsi lives – because it thought Munyakazi acted not from disinterested motives, but rather from personal ties to the Tutsis at issue.

An example of the second approach occurs in the judgement on retrial in the case of Tharcisse Muvunyi, a lieutenant colonel in the Rwandan Army found guilty of incitement to genocide for giving a virulently anti-Tutsi speech at a public meeting. The Trial Chamber stated that:

> The Defence presented evidence of four character witnesses whom the Chamber found credible. These witnesses testified that Muvunyi: (1) sent soldiers to protect a bishop and some Tutsi refugees in Butare prefecture [and] (2) placed several Tutsi orphans in orphanages. . . . Exercising its discretion, the Chamber does not consider that the assistance Muvunyi provided to a handful of Tutsis during the genocide warrants mitigation because it was limited and selective. . . . The Chamber therefore concludes

12 *Munyakazi*, Judgement, Case No. ICTR-97-36A-T, 5 July 2010, para. 520. For another example, see *Muvunyi*, First Judgement, Case No. ICTR-2000-55A-T, 12 September 2006, para. 540 (a judgement reversed and remanded for other reasons by *Muvunyi*, Judgement, Case No. ICTR-00–55-A-A, 29 August 2008).

> that there are no mitigating circumstances that should be taken into account in the determination of his sentence.[13]

This last sentence is open to two possible interpretations. The first is that, as in the Munyakazi trial judgement discussed above, the Trial Chamber did not view Muvunyi's actions as mitigating.[14] The second is that, regardless of whether or not these actions were mitigating, the Trial Chamber simply did not view them as rising to a level that 'should be taken into account'. In any event, the ultimate outcome is clear: Muvunyi's assistance to certain Tutsis did not count in his favour in mitigation. The Trial Chamber reached this finding even though some of Muvunyi's good deeds seem to have been done towards Tutsis who were not his friends or relatives.[15]

The third approach, which is the most common, is for Trial Chambers to describe personal assistance to Tutsis during the genocide as a mitigating factor. For example, *Simba* described the defendant's 'rather selective assistance' to Tutsi friends and family as mitigating; *Serugendo* referred to the defendant's saving a Tutsi from a Hutu mob as mitigating; and *Rutaganda* described the defendant's aid to a handful of Tutsis (some or all of whom may have been friends or family) as mitigating.[16]

Within this third approach, however, there is considerable variation in the language that Trial Chambers use to describe the *extent* to which the defendant's good deeds are mitigating. Some judgements simply describe such assistance as mitigating without trying to quantify the degree of mitigation. *Serugendo* and *Rutaganda* do this, for example, and, more recently, *Ntawukililyayo* simply noted that the defendant's provision of supplies to Tutsi survivors was a factor that, in conjunction with other factors, 'require[d] mitigation in Ntawukulilyayo's sentence'.[17] Other judgements have language aimed at quantifying the weight accorded to evidence of the defendant's personal assistance to Tutsis – which is usually quite low. As examples, *Simba* described the good-deed evidence as of 'limited weight' and, more recently, *Rukundo* observed that, even if proven, evidence of the defendant's assistance to various Tutsis would carry 'limited, if any, weight'.[18] Still other judgements use language aimed at quantifying the weight accorded to the defendant's good-deed evidence relative to the gravity of his crimes. For example, *Niyitegeka* described the defendant's

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13 *Muvunyi*, Second Judgement, ICTR Trial Chamber, 11 February 2010, paras. 147, 150–151. For other examples of this approach, see *Bikindi*, Judgement, Case No. ICTR-01-72-T, 2 December 2008, para. 457; *Zigiranyirazo*, Judgement, Case No. ICTR-01-73-T, 18 December 2008, para. 465; cf. *Nahimana et al.*, Judgement, Case No. ICTR-99-52-T, 3 December 2003, paras. 850, 1101 (noting incidents in which Ngeze assisted individual Tutsis without making clear whether it was counting these incidents in mitigation).

14 See Holá et al., *supra* note 10, at 434 (reading similar language in *Bikindi* this way and briefly noting the conflicting trends in the jurisprudence).

15 See *Muvunyi*, Second Judgement, ICTR Trial Chamber, 11 February 2010, para. 130 (describing his good deeds as 'limited and selective, or offered to Tutsis who were close to either his friends or family').

16 *Simba*, Judgement, Case No. ICTR-01-76-T, 13 December 2005, para. 442; *Serugendo*, Judgement, ICTR-2005-84-T, 12 June 2006, paras. 68–69; *Rutaganira*, Judgement, ICTR Trial Chamber, 14 March 2005, paras. 153–155.

17 *Ntawukulilyayo*, Judgement, Case No. ICTR-05-82-T, 3 August 2010, para. 475. For additional examples, see *Ntakirutimana*, Judgement, Case No. ICTR-96-10 & ICTR-96-17-T, 21 February 2003, para. 909; Sentencing *Nzabirinda*, Judgement, Case No. ICTR 2001-77-T, 23 February 2007, paras. 75–77; *Ruggiu*, Judgement, Case No. ICTR-97-32-1, 1 June 2000, paras. 73–74; *Serushago*, Judgement, Case No. ICTR-98-39-S, 5 February 1999, para. 38.

18 *Simba*, *supra* note 16, para. 442; *Rukundo*, Judgement, Case No. ICTR-2001-70-T, 27 February 2009, para. 602. For another example, see *Bagosora et al.*, Judgement, Case No. ICTR-98-41-T, 18 December 2008, para. 2273.

intervention to protect some Tutsis from a roving band of Hutus as of 'limited weight' given his 'crimes of a heinous nature against civilians prior to and after this episode', and *Kajelijeli* found that the defendant's assistance in evacuating 'one Tutsi man and his family is insufficient to mitigate Kajelijeli's sentence, in light of the number of Tutsis whom Kajelijeli not only failed to protect, but whose deaths he actively brought about'.[19] Different Trial Chambers thus frame their mitigation analysis with different levels of specificity. It is hard to tell, however, whether these differences stem from different choices of wording, from variations in factual circumstances, or from more fundamental differences in approaches to weighing mitigating evidence.

In sum, different Trial Chambers describe their treatment of good deeds for sentencing purposes in quite different terms. The Appeals Chamber has accepted this variation among Trial Chambers by affirming the Trial Chambers' treatment of good-deed evidence regardless of which approach was taken below.[20] In doing so, it tolerates the direct doctrinal inconsistencies as to whether good-deed evidence is a mitigating factor in the first place, as well as the softer variation among Trial Chambers in terms of whether or not they expressly assess the weight to be given to good-deed evidence in mitigation.

Lurking behind these doctrinal inconsistencies is a much harder question of practical significance – namely do these inconsistencies matter in practice? In other words, are similarly situated defendants getting treated differently because of these inconsistencies? This is a hard question to answer because of the overall lack of transparency in sentencing decisions. Trial chambers do not precisely quantify how many months or years they write off the sentence in mitigation, let alone break this down based on individual mitigating factors.[21] It may be that good-deed evidence will rarely have more than a marginal effect and often will have none at all, since the crimes of the defendants usually dwarf their good deeds to a dramatic extent. So far, the *Ndindiliyimana* case discussed at the beginning of this article is the only ICTR case in which the ICTR Trial Chamber seems to have viewed good-deed evidence as making an enormous difference at sentencing – a difference so enormous that it led the Trial Chamber to sentence Ndindiliyimana only to time served.[22]

Yet, even if the doctrinal inconsistencies in how ICTR Trial Chambers approach good deeds for mitigation purposes do not matter much in practice, they are still worthy of concern. Doctrinal clarity has value for its own sake. In addition, even small effects arising from doctrinal inconsistencies can matter to defendants and

19 *Niyitegeka*, Judgement, Case No. ICTR-96-14-T, 16 May 2003, paras. 494–495; *Kajelijeli*, Judgement, Case No. ICTR-98-44A-T, 1 December 2003, paras. 949, 951. For another example, see *Nchamihigo*, Judgement, Case No. ICTR-01-63-T, 24 September 2008, paras. 393–394.

20 E.g., *Munyakazi*, Judgement, ICTR Appeals Chamber, 28 September 2011, paras. 172–175; *Bikindi*, Judgement, Case No. ICTR-01-72-A, 18 March 2010, paras. 162–163; *Niyitegeka*, Judgement, Case No. ICTR-96-14-A, 9 July 2004, para. 266.

21 The only empirical study to try to answer this question focuses on the ICTY and finds that '[g]iven all other factors, a sentence is on average reduced by 0.6 years (7 months) for each mitigating factor'. B. Holá et al., 'Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice', (2009) 22 LJIL 79, at 94.

22 See Judgement, *Ndindiliyimana et al.*, *supra* note 1, paras. 2188–2242, 2266 (noting in a very long discussion of mitigation that the mitigating factors – many of which involved good deeds — carried 'considerable weight' and amounted to 'circumstances [that] are unique and distinguish Ndindiliyimana from . . . other Accused who have come before this Tribunal').

victims. Accordingly, I will close this survey of how ICTR Trial Chambers treat good deeds in mitigation by comparing two cases in which, in my view, the different approaches taken by the Trial Chambers may be best explained by differences in the doctrinal approaches rather than in the underlying facts.

These cases are *Muvunyi* and *Serugendo*. Both cases involved the crime of incitement to genocide (and *Serugendo* also involved persecution as a crime against humanity). Tharcisse Muvunyi's conviction rested on a speech he gave at a public meeting in Gikore in which he called for the murder of Tutsis, including of Tutsi women married to Hutu men.[23] Joseph Serugendo pled guilty to incitement stemming from his role as an Interahamwe leader and as a board member/adviser of Radio Télévision libre des Mille Collines (RTLM). While he was not found to have personally made a speech calling for genocide, he played an ongoing and important role across many months in a radio station that he and others had 'planned . . . to disseminate an anti-Tutsi message, intended to foment racial hatred and ultimately to destroy the Tutsi ethnic group'.[24] In terms of good deeds, Muvunyi was found to have helped save multiple Tutsi refugees and orphans (of whom at least some appear not to have been friends or family), while Serugendo was found to have saved one Tutsi.[25]

Based on these facts, one might expect that good deeds would be more likely to mitigate Muvunyi's sentence than Serugendo's. Muvunyi's good deeds were more significant than Serugendo's, and his criminal acts were far less sustained and probably also less widespread in their impact. Yet exactly the opposite happened. The Trial Chamber in *Muvunyi* entirely disregarded his good deeds in mitigation on the grounds that they were 'limited and selective', while the Trial Chamber in *Serugendo* took his far more modest good deed into account in mitigation. We cannot tell the extent to which these different doctrinal approaches meaningfully affected the sentences ultimately given – in Serugendo's case, his guilty plea and terminal illness were doubtless the main factors behind his extraordinarily low six-year sentence – but, at the very least, they created the possibility for disparate treatment.

2.3. ICTY

As in the ICTR, defendants frequently raise good deeds in seeking mitigation in ICTY sentencing procedures. A recent study found that 'assistance to victims' is cited in 38 per cent of ICTY cases, second only to family circumstances.[26] As with the ICTR, the ICTY has inconsistent strands of jurisprudence with regard to how to take account of good-deed evidence. These strands overlap partially but not completely with those of the ICTR. Where the ICTR strands focus on whether defendants' assistance to Tutsis merits mitigation when it is selectively targeted to friends or family or at least limited in scope, the ICTY strands have focused on the question of whether good deeds should count at all when they are not directed to the specific

23 *Muvunyi*, Second Judgement, ICTR Trial Chamber, 11 February 2010, paras. 94–98.
24 *Serugendo*, *supra* note 16, paras. 24–27.
25 *Muvunyi*, Second Judgement, ICTR Trial Chamber, 11 February 2010, paras. 130, 147.
26 Holá, *supra* note 10, at 433.

https://doi.org/10.1017/S0922156512000398 Published online by Cambridge University Press

individual victims against whom the defendant is found to have committed crimes. In addition, ICTY cases have an unacknowledged tension in *how* they count good deeds in mitigation. Some count these good deeds directly, while others seem to count them only as evidence of good character.

A comparison of three cases – *Kunarec et al.*, *Krajišnik*, and *Blagoje Simić et al.* – illustrates the tension in ICTY jurisprudence over whether the sentence for crimes committed against certain individuals on the other side of the conflict can be mitigated by good deeds towards different individuals on the other side of the conflict. In *Kunarec et al.*, defendant Zoran Vuković was found guilty of twice raping a 16-year-old Bosnian Muslim girl, who was given the pseudonym FWS-50. Although recognizing aid provided by Vuković to certain other Bosnian Muslims,[27] the Trial Chamber did not discuss this fact in mitigation. On appeal, Vuković claimed that the Trial Chamber erred in not treating his aid to other Bosnian Muslims in mitigation. The Appeals Chamber rejected this argument. Specifically:

> [t]he Appeals Chamber holds that the Appellant's help to other Muslims in the conflict does not change the fact that he committed serious crimes against FWS-50. If he is to be punished for his acts against FWS-50, it is to these acts that any possible mitigating factors should be linked.[28]

This approach ties any mitigating effects of good deeds very closely to the particular crimes committed by the defendant – and indeed to the particular victims harmed by his crimes.[29] This restrictive approach is likely to sharply limit the role of good deeds in mitigation.

A somewhat less restrictive approach is found in *Krajišnik*. In what is perhaps the longest abstract discussion in ICTY jurisprudence on how good deeds should be treated for sentencing purposes, the Trial Chamber stated the following:

> Good conduct contemporaneous to the crimes may serve as a mitigating factor when the convicted person had taken steps to save lives or alleviate the suffering of the victims. The Chamber may mitigate a sentence where the convicted person provided selected assistance to the victims or persons of the same ethnicity as the victims, even though his or her acts had little practical effect. The mitigating effect is less, however, where the convicted person is shown to have been in a position to take steps to control or prevent all acts of violence. In such case, sporadic benevolent acts or ineffective assistance may be disregarded.[30]

This framework holds considerably broader potential for the role of good deeds in mitigation, as it recognizes that good deeds can count even if aimed not at the

27 *Kunarac et al.*, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 434.

28 *Kunarac et al.*, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 408.

29 An interesting comparison to this case is *Perišić*, where the Trial Chamber found that the defendant had in fact done good deeds towards his victims – certain captured Bosnian Muslim soldiers – but declined to give any weight to this factor on the grounds that he 'had himself helped precipitate this situation'. *Perišić*, Judgement, Case No. IT-04-81-T, 6 September 2011, para. 1831.

30 *Krajišnik*, Judgement, Case No. IT-00-39-T, 27 September 2006, para. 1162 (footnotes omitted). Applying this framework to the facts, the Trial Chamber then recognized that the defendant had 'made some efforts during the indictment period to provide help to non-Serb individuals' but deemed this assistance 'sporadic'; ibid., para. 1163. On appeal, the Appeals Chamber similarly remarked that the defendant's 'sporadic assistance . . . can only have a limited impact on the sentence'; *Krajišnik*, Judgement, Case No. IT-00-39-A, 17 March 2009, para. 817.

specific victims, but rather at 'persons of the same ethnicity as the victims'. But it also includes one notable limit, namely that these good deeds be 'contemporaneous to the crimes'. The Trial Chamber does not explain why this temporal element is important and thus does not justify why good deeds towards those on the other side of the conflict should count if they occur at the same time as the crimes but not at other times during the conflict.

Where *Krajišnik* expressly inserts a temporal element, other Trial Chambers have simply treated good deeds towards others of the victims' ethnicity as mitigating without a contemporaneity requirement. In most of these cases, the good deeds taken into account do turn out to be roughly contemporaneous with the crimes (especially if the crimes occurred across a long period of time), although the cases do not note this as a formal requirement.[31] This is not always true, however. In *Blagoje Simić et al.*, the Trial Chamber's brief discussion of good-deed evidence in mitigation in relation to defendant Miroslav Tadić expressly suggests that good deeds throughout the war (rather than narrowly around the times of the crimes) can be relevant. Specifically, the Trial Chamber 'accept[ed] evidence showing that Miroslav Tadić helped some Bosnian Muslims during the war'.[32]

As in the ICTR, then, we see inconsistencies within the ICTY as to the conditions under which a good deed should be found to be a mitigating factor.[33] In the ICTY, we further find a tension in the *manner* in which Trial Chambers use good deeds in mitigation. Sometimes, ICTY cases treat good deeds as mitigating in and of themselves and sometimes they treat these deeds as mitigating because they shed positive light on the character of the defendant. The cases discussed in the prior paragraphs take the former approach and treat the good deeds as their own mitigating factor. The *Blaškić* case is an example of the latter approach. There, the Trial Chamber observed that '[a]nother indication that the accused's character is reformable is evident in his lending assistance to some of the victims'.[34] This language suggests that the defendant's good deeds are relevant in mitigation not for their own sake per se, but rather for what they reveal about the defendant's character.[35]

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31 E.g., in *Kupreskić et al.*, the Trial Chamber found as a mitigating factor that defendant Josipović assisted two Bosnian Muslims in escaping. From the Judgement, it is clear that Josipović aided one of these individuals at around the same time as he committed his crimes, but it is not spelled out when he aided the other individual. *Kupreskić et al.*, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 860. For other examples in which the good deeds noted in mitigation seem to be roughly contemporaneous with the crimes but where no contemporaneity requirement is expressly noted, see Sentencing *Nikolić*, Judgement, ICTY Trial Chamber, 18 December 2003, para. 266; *Brđanin*, Judgement, Case No. IT-99-36-T, 1 September 2004, para. 1121; *Čelebići*, Judgement, Case No. IT-96-21-T, 16 November 1998, paras. 1248, 1270; *Čelebići*, *supra* note 4, para. 776; *Aleksovski*, Judgement, ICTY Trial Chamber, 25 June 1999, para. 238; *Krstić*, *supra* note 4, paras. 272–273; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-T, 20 November 2001, paras. 715, 730, 739.

32 *Simić et al.*, Judgement, Case No. IT-95-9-T, 17 October 2003, para. 1096. For other examples, see *Lukić & Lukić*, Judgement, ICTY Trial Chamber, 20 July 2009, para. 1092; *Delić*, Judgement, ICTY Trial Chamber, September 15 2008, paras. 581–585.

33 Also, as in the ICTR, once an ICTY Trial Chamber determines a good deed to be mitigating, there is significant variation in the extent to which the Trial Chamber spells out how much or how little weight it attaches to this factor. It is thus hard to assess how consistent the Trial Chambers are in how they weigh the impact of these mitigating factors.

34 *Blaškić*, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 781.

35 For other examples in which good deeds are deemed to shed positive light on a defendant's character, see *Hadžihasanović and Kubara*, Judgement, ICTY Trial Chamber, 15 March 2006, para. 2080 (considering

The interplay between good deeds as directly mitigating and good deeds as indirect evidence of character comes across in *Popović et al.* in relation to defendant Vinko Pandurević. A lieutenant colonel in the Bosnian Serb forces at Srebrenica, he was found guilty of certain crimes against humanity and war crimes (but not genocide) that the Trial Chamber termed 'serious and grave' and 'normally associated with heavy sentences'.[36] As in the ICTR case of Ndindiliyimana, however, the Trial Chamber viewed Pandurević's good deeds to be so important that they merited 'significant weight'.[37] It sentenced him only to 13 years. Most importantly, the Trial Chamber emphasized that Pandurević opened a corridor that allowed safe passage for many Bosnian Muslim men at Srebrenica 'in contravention of the orders from his superiors and with knowledge that it would potentially put him in jeopardy'.[38] In words that have a startlingly approving ring given that they are directed at a man whom it had just convicted, the Trial Chamber stated that:

> Pandurević's action in this regard stands out as an instance of courage and humanity in a period typified by human weakness, cruelty, and depravity. . . . [E]ven if Pandurević's motivations in opening the corridor included military considerations and protecting Serb lives, this does not detract from the fact that objectively he saved thousands of lives. The Trial Chamber is overall convinced that Pandurević's action in opening the corridor was a clear and compelling instance of assistance to potential victims. . . . [t]he Trial Chamber therefore gives significant weight to these acts [in conjunction with other 'brave acts'] by Pandurević as mitigating factors in the determination of his sentence.[39]

This language suggests two possible reasons why the good deed was mitigating – first, that it showed courage and humanity on the part of Pandurević (i.e., was indirect evidence of good character) and, second, that, regardless of how mixed his motivations may have been, it 'objectively' saved lives (i.e., was directly mitigating). In other words, although the Trial Chamber does not say so expressly, it seems to recognize that good deeds can be *both* directly mitigating and evidence of good character rather than simply one or the other.

3. Towards a more coherent sentencing jurisprudence

The prior section has shown that evidence of good deeds comes up frequently in ICTY and ICTR sentencing decisions, yet the tribunals have not developed consistent

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Hadžihasanović to have 'a character which can be rehabilitated' based in parts on his efforts to train his troops to comply with international humanitarian law); *Blagojević and Jokić*, Judgement, Case No. IT-02-60-T, 17 January 2005, para. 854 (finding that Jokić's aid to Bosnian Muslim boys in a minefield established 'both [his] character and the fact that [he] did not discriminate against Bosnian Muslims'); see also *Gotovina et al.*, Judgement, Case No. IT-06-90-T, 15 April 2011, para. 2610 (finding that evidence that defendant Markač has assisted several victims was 'not sufficient for the Trial Chamber to assess whether [he] had a good character which it could consider as a mitigating factor').

36 *Popović et al.*, Judgement, Case No. IT-05-88-T, 10 June 2010, para. 2210.

37 Ibid., para. 2219.

38 Ibid.

39 Ibid., paras. 2219–2222. In the next paragraph, the Trial Chamber then observes that evidence of certain other good deeds by Pandurević during the course of the war constituted 'other evidence of Pandurević's good character' but stated further, without explanation, that it would give 'only limited weight to [this evidence] as a mitigating factor'; ibid., para. 2223.

https://doi.org/10.1017/S0922156512000398 Published online by Cambridge University Press

theories for whether, when, and how they should consider this evidence to be mitigating. Different domestic legal systems answer this question in different ways,[40] and the question the tribunals should consider is what approach would make the most sense in the context of international criminal law. This section seeks to articulate such an approach. I begin with Jan Nemitz's observation that '[t]he starting point for every consideration of a mitigating factor has to be the following question: does the granting of mitigation for certain conduct of the accused serve the sentencing purposes of the court?'[41] For international criminal tribunals, two of the most important sentencing purposes are undoubtedly deterrence and retribution.[42] It is thus appropriate to focus on whether the use of defendants' good deeds in mitigation would advance these purposes.

As regards deterrence, there is an argument that the good deeds of defendants should be considered mitigating. To the extent that potential international criminals are sensitive to the practices of international tribunals, then, by suggesting that good deeds can lead to lighter sentences, the tribunals theoretically provide incentives for these individuals to do good deeds. I would not place weight on this factor, however. Its effect is reduced for at least two reasons. First, to the extent that potential international war criminals can expect mitigation, their incentives to act lawfully are also lessened. Given a choice between focusing on deterring bad conduct and encouraging good conduct, international criminal tribunals should focus on the former. Second, and more practically, it seems unlikely that potential international criminals are sensitive to the fine points of international sentencing practices.

In considering whether it serves the purposes of retribution to treat the good deeds of defendants as mitigating, it is necessary to first address whom retribution is for. Is retribution for the specific victim alone, as *Kunarec et al.* implies in rejecting the relevance of Vuković's good deeds towards other Bosnian Muslims, or is it also for a broader group, such as those on the same side of the conflict as the victim or even society at large?

In the domestic criminal context, retribution is largely for the specific victim and perhaps to some extent for society at large for having its peace disturbed. I would suggest that, in the international criminal context, however, retribution may also be due to the collective group to which the victim belonged. International crimes are not simply crimes aimed at individuals; rather, they are crimes that take place in the context of a larger struggle between groups. Doctrinally, this

40 Some systems create no explicit space for taking beneficial acts into account; others provide explicit space for them only where they are aimed at the specific victims; and still other systems will take into account beneficial acts unconnected to the victims. See United States Sentencing Commission, *Guidelines Manual*, § 5H1.11 (November 2006) ('prior good works are not ordinarily relevant in determining whether a departure [from the guidelines] is warranted'); German Criminal Code, §§ 46(2) and 46a (stating that steps taken to make restitution towards the victim can be deemed mitigating); D. Thomas QC, *Current Sentencing Practice* (2007), § C2-2H (noting that, in the United Kingdom, even worthy acts unconnected to the particular victims may serve as mitigating circumstances).

41 Nemitz, *supra* note 11, at 120.

42 There is debate about what all the proper sentencing purposes of international criminal tribunals are, but deterrence and retribution are broadly accepted as proper purposes – although concerns about the efficacy of deterrence may make it a less important purpose than retribution. See, e.g., Harmon and Gaynor, *supra* note 11, at 691–6.

is shown by the elements of international crimes. War crimes require an armed conflict and genocide requires an intent to destroy a protected group. Both types of crime thus plainly involve a struggle between groups. In theory, crimes against humanity require no such group conflict, as any widespread or systematic attack directed against civilians can give rise to crimes against humanity. In practice, however, crimes against humanity prosecuted in international criminal tribunals have typically involved the same kinds of group conflict that are found in war crimes and genocide.

In my view, these group elements should inform the nature of retribution for international crimes.[43] Some retribution is on behalf of the specific victims (and perhaps some on behalf of society at large), but some retribution is also on behalf of the group. With regard to this group-based retribution, less is due to a defendant who committed crimes against some members of the group but also helped other members of the group than is due to a defendant who committed the same crimes but did not help other members of the group.[44] This is not to say that individual-level retribution should be forgotten. A defendant who has committed an international crime against one member of the other side but saved the lives of many members of the other side would justly serve time, as retribution is partially due to his specific victim. Nonetheless, it seems fair to take the good deeds of defendants towards members of the other side into account in mitigation in a way that might not be recognized in the domestic criminal context. International crimes are international crimes in part because they involve wider conflicts between groups and, accordingly, in measuring the sentence due to a defendant, it seems appropriate to consider the overall impact he has had on members of the opposing group.

Under this approach, a defendant who has done good deeds towards those on the other side of the conflict merits less retribution, from a collective perspective, than a comparable defendant without such good deeds. Accordingly, the approach taken in *Kunarac et al.* is less desirable than those taken in *Krajišnik* and *Blagoje Simić et al.* As between *Krajišnik* and *Blagoje Simić et al.*, the latter has the better approach. There is no reason to limit this collective perspective to the time frame contemporaneous with the defendant's crimes, as *Krajišnik* would do, since the benefits of good deeds can accrue to the other group at any time during the conflict.[45] There is also no

43 See, e.g., R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 Stanford JIL 39, at 41 (noting 'the collective nature of the victim of international crimes'); R. Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials', (2007) 5 JICJ 757 (noting the need to consider collective claims of justice in the course of international criminal-law sentencing).

44 This argument may also hold true with regard to society at large. Indeed, I think that is why we see different approaches in domestic jurisdictions to whether a defendant's beneficial acts to those other than the victim can count in his favour in mitigation. See *supra* note 40. Some jurisdictions choose to factor in these social benefits, while others focus more strictly on retribution for the specific victim. In the international criminal context, however, we can bypass this domestic debate entirely by relying on the group-based component to retribution that is present in the international context but not in the domestic one.

45 A related question is whether post-conflict assistance to the other side should be mitigating. E.g., *Plavšić*, Sentencing Judgement, Case No. IT-00-39&40/1-S, 27 February 2003, paras. 91–94; Judgement on Sentencing Appeal, *Milan Babić*, ICTY Appeals Chamber, 18 July 2005, paras. 53–62; cf. Judgement on Sentencing Appeal, *Miodrag Jokić*, ICTY Appeals Chamber, 30 August 2005, para. 53. This issue raises distinct questions of its own, however, and is beyond the scope of this article.

reason to limit the treatment of good deeds as mitigating factors to instances where the defendant's motives are strictly pure and disinterested. Whether a defendant saves a friend from the other group or a stranger from it, he has still done something beneficial to this other group, and thus the collective retribution due to him is less than with regard to a defendant who committed the same crimes but did no good deeds at all. In terms of ICTR jurisprudence, then, the approaches taken in *Munyakazi* and *Muvunyi*, which decline to treat limited or selective good deeds as mitigating factors, should be disavowed. Good deeds, even selective ones, should be considered mitigating factors, as cases like *Simba* and *Serugendo* recognize.

In terms of how much mitigation is warranted, I would suggest a rough comparison between the defendant's crimes and good deeds. A good deed would mitigate a crime of equal magnitude partly (by substantially reducing the collective component of retribution), but only partly (because, unless directed at the specific victim, it would not reduce the individual component of retribution). The rough comparison between crimes and good deeds need not be spelled out – indeed, it would be tasteless to do so – but the Trial Chamber should give an indication of how much mitigation it ultimately thinks appropriate, such as 'no material weight', 'limited weight', or 'moderate weight'. In most cases, as existing trial judgements suggest, good deeds will likely have at most limited weight. The crimes committed by most international criminal defendants are typically so heinous that their good deeds are unlikely to merit significant mitigating effect.[46] Nonetheless, international criminal tribunals will occasionally encounter the rare defendant like Ndindiliyimana and Pandurević whose good deeds make appropriate a significant reduction in the sentence.

So far, I have suggested that good deeds should be treated as an independent mitigating factor and that the focus should be on the objective value that these good deeds brought to the other side of the conflict rather than on the defendant's subjective motivations. But, as the discussion in *Popović et al.* with regard to defendant Pandurević suggests, a defendant's subjective motivations may also be relevant as evidence of his character. His character may in turn inform yet another possible sentencing purpose, namely rehabilitation.[47] For good deeds to be evidence of good character, however, they must stem from motivations that we would consider signs of good character. Selective assistance to family or friends on the other side of the conflict is less likely to meet this requirement than is disinterested assistance to strangers on the other side of the conflict.

Good deeds thus have two potential ways in which they can influence sentencing mitigation. One is directly, as good deeds, and the other is indirectly, as evidence of good character. These two ways are complementary, not in conflict, although they

46 This is particularly true as international criminal tribunals move away from the ICTY's early approach of trying any suspects it could get custody over, whether low-level or high-level, and more towards the approach taken by the ICTR, the SCSL, and the ICC of focusing on high-level perpetrators believed responsible for numerous atrocities.

47 A debate exists about whether and to what extent rehabilitation – which often turns upon a defendant's character – should be a relevant sentencing purpose. See, e.g., Harmon and Gaynor, *supra* note 11, at 693 (suggesting that rehabilitation should be at most a lesser sentencing purpose). For purposes of this article, I assume that it is at least a modest sentencing purpose.

have different focuses. As a direct mitigating factor, good-deed evidence should emphasize the magnitude of the benefit brought to the other group, while, as evidence of good character, it should emphasize the subjective motivations that led to this good deed.

4. Conclusion

This article has addressed what I have termed the 'good deeds' of international criminal defendants for purposes of sentencing mitigation. I have argued that international criminal tribunals lack a consistent framework for when and how they treat these good deeds as mitigating factors. Such a framework is needed because international criminal defendants raise good deeds in mitigation in a large number of cases. Their good deeds usually are minor in comparison with the atrocities for which they are convicted, meaning that they should receive little if any sentence reduction due to their good deeds. On rare occasions, however, this is not the case. Sometimes, defendants who are high up in the organizational structure of what becomes the abusive regime push back against it – not completely by resigning or avoiding the commission of any crimes, but strongly enough to merit substantial reductions in their sentences.