INTERNATIONAL DIRECTIVES RELATING TO SENTENCING

Johan D. van der Vyver*

INTRODUCTION

Punishment in international law must fit the crime, the personal dispensation of the criminal, and the interests of the international community. This basic norm of criminal justice is reflected in Article 78(1) of the Statute of the International Criminal Court (ICC Statute) which provides that “in determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the personal circumstances of the convicted person.”¹ Leaving it up to drafters of the Rules of Procedure and Evidence to afford substance to this basic principle became necessary due to the time constraints under which the Conference of Diplomatic Plenipotentiaries for an International Criminal Court, which was convened in Rome on June 15 through July 17, 1998, had to complete its primary mission, and the many controversies that prevailed among delegations that tended to prefer their own legal traditions, including constitutional standards of their respective countries.²

This Essay is focused on circumstances to be considered by a criminal court for purposes of determining an appropriate sentence following the conviction of an accused. It will appear that much confusion prevailed in this regard in the jurisprudence of international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). One analyst, writing at approximately the turn of the century, observed that judgments of these ad hoc tribunals on penal policy are “far from being comprehensive” and that “there is no emerging penal regime discernible,”³ but concluded, somewhat inconsistently, that jurisprudence of the


* I.T. Cohen Professor of International law and Human Rights, Emory University School of Law; Extraordinary Professor in the Department of Private Law of the University of Pretoria.
ad hoc tribunals “is gradually developing into an international law of sentencing.”

It is important to note that what has been held out by the ad hoc Tribunals as objectives/purposes/principles/functions/policies/goals of sentencing should, in some instances, have no bearing on the kind or severity of punishments imposed in any given case (e.g. retribution, incapacitation, rehabilitation, deterrence). It is wrong to say categorically that “[t]he objectives of punishment provide . . . guidance in determining sentence.” Factors that ought to be considered for sentencing purposes may in general be classified, for the sake of systematic clarity, into two main categories: (1) those that constitute elements of an offence, and (2) those that attend the commission of the offence but are not part-and-parcel of the actus reus. One can, of course, classify all factors that have a bearing on the severity of a sentence as either aggravating or extenuating circumstances. However, the concept of “aggravating and extenuating circumstances” will—for purposes of this survey—be confined to those sentencing considerations that do not form part of the criminal act as such. Those that do constitute elements of the offence are confined in this survey to “sentencing factors of the offence.”

One should namely distinguish between (a) the essence of punishment (retribution); (b) the functions of punishment (incapacitation, rehabilitation, deterrence, and avoiding impunity); (c) factors inherent in or resulting from a particular offence and which may be taken into account in determining an appropriate sentence (sentencing factors of the offence); and (d) circumstances attending the commission of an offence that have a bearing on an appropriate sentence in any given case but are in themselves not constituent elements of the criminal act as such (extenuating and aggravating circumstances).

I. THE ESSENCE OF SENTENCING (RETRIBUTION)

A sentence imposed by a court of law is essentially a manifestation of retribution. In the Čelebići case, the ICTY depicted the theory of retribution as “an inheritance of the primitive theory of revenge, which urges the Trial

---

4 Id. at 625.
Chamber to retaliate to appease the victim.” The Tribunal added: “A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice.”

In Prosecutor v. Zlatko Aleksovski, the ICTY came to the opposite conclusion:

[Retribution] is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes... A sentence of the International Tribunal should make plain the condemnation of the international community of the behavior in question and show “that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.”

In Prosecutor v. Todorović, a Trial Chamber of the ICTY gave the following assessment of retribution:

The principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words that the punishment be made to fit the crime. The Chamber is of the view that this principle is reflected in the account, which the...
Chamber is obliged by the Statute and the Rules to take, of the gravity of the crime.\textsuperscript{10} Earlier, a Trial Chamber of the same tribunal defined the proportionality principle inherent in the concept of retribution more accurately by referring to retribution as “‘just deserts’, . . . the punishment having to be proportional to the gravity of the crime and the moral guilt of the convicted.”\textsuperscript{11}

It is wrong, of course, to say that the purpose of punishment is retribution,\textsuperscript{12} because punishment for criminal conduct is (a form of) retribution. In one of its more recent judgments, the ICTR stated: “Retribution is the expression of the social disapproval attached to a criminal act and to its perpetrator and demands punishment for the latter for what he has done.”\textsuperscript{13}

The ICTY was perfectly correct when it, in the case of Kunarač, defined retribution as merely “punishment of an offender for his specific criminal conduct.”\textsuperscript{14} So too was a passage taken from a Canadian case that succinctly proclaimed: “Retribution requires the imposition of a just and appropriate punishment and nothing more.”\textsuperscript{15} In a similar vein, Faiza King and Anne-Marie La Rosa identified retribution “in the sense of punishment rather than revenge” as a goal of the ICC.\textsuperscript{16} Just to emphasize it once again, punishment is a particular manifestation of retribution; it is therefore wrong to say that retribution is a function or the purpose of punishment or worse still, is an element to be taken into account for sentencing purposes. When it is said that “retribution may be out of fashion with legal scholars,”\textsuperscript{17} this must be understood in the context only

\textsuperscript{10} Prosecutor v. Todorović, Case No. IT-95-9/1-T, Sentencing Judgement, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001). See also Prosecutor v. Banović, supra note 6, ¶ 34; Prosecutor v. Češić, supra note 9, ¶ 23.


\textsuperscript{12} See, e.g., Prosecutor v. Češić, supra note 9, ¶ 24.

\textsuperscript{13} Prosecutor v. Rutaganira, Case No. ICTR-95-1-C-T, Judgement & Sentence, ¶ 108 (Mar. 14, 2005).

\textsuperscript{14} Prosecutor v. Kunarač, supra note 5, ¶ 841. See also Prosecutor v. Knojelač, Case No. IT-97-25-T, Judgement ¶ 508 (Mar. 15, 2002).

\textsuperscript{15} Prosecutor v. Kordić, supra note 9, ¶ 1075 (referring to R v. M, [1996] 1 S.C.R. 500, ¶ 80 (Canada)).

\textsuperscript{16} King & La Rosa, supra note 8, at 330.

\textsuperscript{17} Id.
of the fallacious assumption that retribution is a function or purpose of punishment, or a circumstance to be considered for sentencing purposes.

II. THE FUNCTIONS OF PUNISHMENT

Justifications for punishment include incapacitation of the convicted criminal, his or her rehabilitation, and deterrence. The European Court of Human Rights has identified as “penological grounds” for detention, objectives—such as punishment, deterrence, public protection, and rehabilitation. To this list should be added the objective of obviating impunity. The functions of punishment will for purposes of the present survey be classified under the headings of (a) incapacitation, (b) rehabilitation, (c) deterrence, and (d) obviating impunity.

A. Incapacitation

The protection of society is relevant and important when persons guilty of serious crimes are regarded as dangerous to the community. This would particularly be the case where a person who instigated the commission of a crime might re-offend. Such protection is normally achieved by incarceration of a convicted criminal.

Taking this function of punishment into account when deciding on the length of imprisonment requires special circumspection, because “our ability to predict which offenders are likely to re-offend is so poor.” The crimes within the jurisdiction of international tribunals are in many cases ones that would normally be committed in very special circumstances, such as an armed conflict or large-scale political unrest, and when those circumstances no longer prevail—and that is mostly the case at the time perpetrators of the concerned offences are brought to trial—the need for the community to be protected becomes negligible.


21 King & La Rosa, *supra* note 8, at 332.

22 Bagaric & Amarasekara, *supra* note 18, at 135.

23 King & La Rosa, *supra* note 8, at 331.
In Kunarać, the Trial Chamber practically ruled out protection of society as a legitimate sentencing incentive:

Unless it can be shown that a particular convicted person has the propensity to commit violations of international humanitarian law, or, possibly, crimes relevant to such violations, such as “hate” crimes or discriminatory crimes, it may not be fair and reasonable to use protection of society, or preventive detention, as a general sentencing factor.24

B. Rehabilitation

It has been said that rehabilitation “should be one of the goals of sentencing,”25 and “that punishment must strive to attain . . . rehabilitation.”26 In Prosecutor v. Češić, the Sentencing Tribunal took into account for purposes of punishment “the rehabilitative potential” of the convicted person, noting that such potential goes hand in hand with reintegration of the convicted person into society.27

It is one thing to say that the Accused has shown remorse and has undergone a change of heart, which may be a legitimate mitigating factor for purposes of sentencing;28 it is quite another to proclaim rehabilitation and reconciliation to be determinants of an appropriate punishment. Faiza King and Anne-Marie La Rosa have argued that rehabilitation could be a relevant consideration for sentencing purposes in cases of “low-ranking soldiers or civilians who simply followed orders,” and in the case of young offenders.29 They also slightly missed


26 Prosecutor v. Obrenović, supra note 9, ¶ 53. See also id., at 146 (the Sentencing Tribunal accepting “steps taken toward rehabilitation” as a mitigating factor).

27 Prosecutor v. Češić, supra note 9, ¶ 27.

28 See, e.g., Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, ¶ 68 (June 1, 2000) (noting that “there is cause to believe that the accused has undergone a profound change and there are good reasons to expect his re-integration into society”).

29 King & La Rosa, supra note 8, at 332.
the point. The fact that a particular perpetrator was a low-ranking member of the armed forces following orders or was relatively young at the time the crime was committed, is indeed a mitigating circumstance and would be deserving of special rehabilitation efforts, but his or her possible rehabilitation as such is not a factor to be considered for sentencing purposes. To argue otherwise might even be taken to justify longer prison sentences in such cases so as to increase the time available for a rehabilitation program to have a better chance of success.

There are judgments proclaiming rehabilitation to be one of the “principal aims” of sentencing,30 or in the case of “younger, or less-educated, members of society,” laying stress on “reintegrating the guilty accused into society.”31 In Prosecutor v. Furundžiya, the Trial Chamber expressed its support for “rehabilitative programmes in which the accused may participate while serving his sentence.”32 In the Sentencing Judgment in the case of Prosecutor v. Serushago, the ICTR noted, under the heading of mitigating circumstances, that the family obligations of the Accused, his relatively young age, and the fact that he cooperated with the Prosecutor and publicly showed remorse, “would suggest possible rehabilitation.”33

In the Čelebići Case, on the other hand, the Appeals Chamber decided that rehabilitation “cannot play a prominent role in the decision-making process of the Trial Chamber of the Tribunal.”34 One analyst noted that in sentencing policies of the ad hoc Tribunals rehabilitation is regarded as subordinate to

---

30 Prosecutor v. Ruggiu, supra note 28, ¶ 33.
31 Prosecutor v. Delalić, supra note 7, ¶ 1233 (where, for sentencing purposes, the Tribunal considered “the age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility”); see also Prosecutor v. Kordić, supra note 9, ¶ 1079; see generally, Beresford, supra note 24, at 44.
32 Prosecutor v. Furundžiya, supra note 25, ¶ 291 (laying special stress on the relatively young age of the Accused, who was 23 when the crime was committed). See also Prosecutor v. Kupreškić, supra note 9, ¶ 849 (expressing its support for the sentencing purpose of rehabilitation “in the hope that in future, if faced with similar circumstances, they [the persons convicted] will uphold the rule of law”); Prosecutor v. Erdemović, Second Sentencing Judgment, supra note 25, ¶ 16(i) under the heading: “Age”.
deterrence.\textsuperscript{35} In its first sentencing judgment in the Case of Erdemović, the ICTY altogether ruled out rehabilitation as a sentencing objective.\textsuperscript{36}

It has been said that rehabilitation and punishment may be inconsistent.\textsuperscript{37} A penitentiary is evidently not an ideal setting for rehabilitation.\textsuperscript{38} Prison conditions, on the contrary, have the propensity to promote recidivism. It is furthermore questionable whether rehabilitation efforts are at all called for in cases of “Makrokriminalität”; that is “criminality in which the State or some similar entity is directly involved.”\textsuperscript{39}

However, rehabilitation has come to be accepted as an important objective of imprisonment. The International Covenant on Civil and Political Rights indeed provides: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”\textsuperscript{40} Rehabilitation also features prominently in the United Nations’ Standard Minimum Rules for the Treatment of Prisoners.\textsuperscript{41}

At the regional level, the European Prison Rules of the Council of Europe similarly provide: “All detentions shall be managed so as to facilitate the reintegration into a free society of persons who have been deprived of their liberty.”\textsuperscript{42} The Rules further provide that “the [prison] regime for sentenced

\begin{footnotesize}
\footnotesize
\textsuperscript{35} Nemitz, supra note 3, at 614.
\textsuperscript{36} Prosecutor v. Erdemović, Sentencing Judgment, supra note 11, ¶ 66. See also King & La Rosa, supra note 8, at 332.
\textsuperscript{37} Bagaric & Amarasekara, supra note 18, at 136.
\textsuperscript{38} See Prosecutor v. Kunarać, supra note 5, ¶ 844 (noting that to assume that “imprisonment alone . . . can have a rehabilitative effect on a convicted person” is “a controversial proposition”).
\textsuperscript{41} See United Nation’s Standard Minimum Rules for the Treatment of Prisoners, ¶ 56–64, ECOSOC Res. 663 C (XXIV) of 31 July 1957, as amended by ECOSOC Res. 2076 (LXII) of 13 May 1977 (emphasizing (a) that the ultimate purpose of imprisonment is “to protect society against crime”, ¶ 58; (b) that steps should be taken to ensure the prisoner’s “gradual return to life in society”, ¶ 60(2); (c) that community agencies should be enlisted, wherever possible, “to assist the staff of the institution in the task of rehabilitation of the prisoners”, ¶ 61; that medical services should be provided “to detect and . . . treat any physical or mental illness or defect which may hamper a prisoner’s rehabilitation”, ¶ 62; (d) that treatment of each prisoner is to be individualized, ¶ 59, 63(1); (e) that individualization of treatment should not be hampered by a too large prison population in closed institutions, ¶ 63(3); and that rehabilitation efforts do not end upon a prisoner’s release, and that after-care should be provided by government or private agencies, ¶ 64).
\textsuperscript{42} European Prison Rules, Rule 6, Recommendation REC (2006)2 of the Committee of Ministers to Member States, adopted by the Committee of Ministers on Jan. 11, 2006 at the 952d Meeting of the Ministers’ Deputies.
\end{footnotesize}
persons shall be designed to enable them to lead a responsible and crime-free life,43 and that a sentence plan for each prisoner, and “a strategy for their release” be devised,44 which may, as far as practicable, include work, education, other activities and preparation for release.45 The European Court of Human Rights has noted that “the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly toward the end of a long prison sentence.”46 For this reason, life sentences without the option of parole have come to be unacceptable, “since all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.47 The Court noted that “if a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable.”48 Provision must therefore be made for the reducibility of a life sentence “which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.”49

The Court cited Article 110(3) of the ICC Statute and the Rules of Procedure and Evidence pertinent to that Article that make provision for the periodic review of a life sentence after the convicted person has served twenty-five years of the sentence, which in the opinion of the Court serve as a commendable directive of contemporary international criminal law.50

The above goes to show that once a person has been sentenced to imprisonment, provision should be made for, and he or she should be given the benefit of, rehabilitation programs. It does not imply that rehabilitation should

---

43 Id., Rule 102.1.
44 See id., Rule 103.2.
45 Id., Rule 103.4.
47 Vinter v. United Kingdom, supra note 19, ¶ 114. See also id., ¶ 116.
48 Id., ¶ 112.
49 Id., ¶ 119.
50 Id., ¶ 65 and 114.
serve as a factor to be taken into account when deciding on an appropriate sentence.

This means that once a person has been sentenced to imprisonment, provision should be made for, and he or she should be given the benefits of, rehabilitation programs. It does not imply that rehabilitation should serve as a factor to be considered when deciding on an appropriate sentence.

C. Deterrence and General Rehabilitation

According to Faiza King and Anne-Marie La Rosa, deterrence of future crimes “is obviously a primary goal of the ICC.”\(^5^1\) It has been decided that deterrence “is a consideration that may legitimately be considered in sentencing.”\(^5^2\) Deterrence has also been singled out in some judgments of the ad hoc tribunals as “probably the most important [sentencing] factor.”\(^5^3\) In Prosecutor v. Tadić, the Appeals Chamber of the ICTY did observe that deterrence “must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”\(^5^4\) In Prosecutor v. Todorović, a Trial Chamber of the ICTY recognized “the importance of deterrence as a general consideration in sentencing,” but then somewhat obscurely promised that it “will not treat deterrence as a distinct factor in determining sentence in this case.”\(^5^5\) As noted in Prosecutor v. Furundžiya, punishment as such, rather than the severity of a sentence, is in reality “the tool of retribution, stigmatization and deterrence.”\(^5^6\)

In Prosecutor v. Delalić, the Tribunal included in the concept of deterrence, (a) deterring the accused, and (b) deterring other persons finding themselves in similar situations in the future,\(^5^7\) referred to in Prosecutor v. Kunarać as,

---

\(^5^1\) King & La Rosa, supra note 8, at 330.
\(^5^2\) Tadić, supra note 11, ¶ 48; Delalić, supra note 34, ¶ 803; Češić, supra note 9, ¶ 24.
\(^5^3\) Delalić, supra note 7, ¶ 1234; Erdemović, supra note 11, ¶ 64-66; Kambanda, supra note 9, ¶ 28; Prosecutor v. Akayesu, Case No. ICTR-96-4-S, Sentence, ¶ 19 (Oct. 2, 1998); Furundžiya, supra note 25, ¶ 288; Serushago, supra note 25, ¶ 20; Kayishema, supra note 25, Sentence ¶ 2; Bliškčić, supra note 1, ¶ 761; Ruggiu, supra note 28, ¶ 33; Stakić, supra note 9, ¶ 900; Dragan Nikolić, supra note 34, ¶ 134; Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgement, ¶¶ 754, 760, 765 (Jan. 24, 2004); Deronjić, supra note 9, ¶ 144; Beresford, supra note 24, at 42.
\(^5^4\) Tadić, supra note 11, ¶ 48; Aleksovski, supra note 9, ¶ 185; Delalić, supra note 34, ¶ 801; Prosecutor v. Dario Kordić & Mario Čerlek, Case No. IT-95-14-2-T, ¶ 847 (Feb. 26, 2001); Banović, supra note 6, ¶ 34; Češić, supra note 9, ¶ 26; Krajišnik, supra note 9, ¶ 805.
\(^5^5\) Todorović, supra note 10, ¶ 30.
\(^5^6\) Furundžiya, supra note 25, ¶ 290.
\(^5^7\) Delalić, supra note 7, ¶ 1234; Furundžiya, supra note 25, ¶ 288.
respectively, “specific deterrence” and “general deterrence”, and in later judgments as “personal”, “individual” or “special” deterrence, and “general” deterrence, respectfully. This vital distinction is not always evident in judgments of the ad hoc Tribunals. Emphasis is almost exclusively on general deterrence. It has thus been said in a judgment of the ICTR: “This Chamber seeks to dissuade for good those who will attempt in future to perpetuate such atrocities by showing them that the international community was not ready to tolerate the serious violations on international humanitarian law and human rights.”

The ICTY on several occasions expressed the opinion, in the spirit of general deterrence, that “[o]ne of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced,” and additionally, “to convey the message that globally accepted laws and rules have to be obeyed by everyone.” In Prosecutor v. Češić, the Sentencing Tribunal observed that general deterrence “serves to strengthen the legal order . . . and to reassure society of the effectiveness of its general provisions.” In Prosecutor v. Kabashi, the Sentencing Tribunal warned that “persons who believe themselves to be beyond the reach of the International Tribunal must be warned that they have to abide by its orders or face prosecution and, if convicted, sanctions.” Affirmative prevention through legal sanctions in times of war

58 Kunarać, supra note 5, ¶ 839; Delalić, supra note 7, ¶ 1203; Bagaric, supra note 18, at 137; Češić, supra note 9, ¶ 25 (referring to “special deterrence” and “general deterrence”); Katanga, supra note 9, at para 38; Bemba Gombo, supra note 9, ¶ 11.

59 Nikolić, supra note 34, ¶ 134-35; Deronjić, supra note 9, ¶ 145-46; Kordić, supra note 9, ¶ 1076-78; Krajišnik, supra note 9, ¶ 805; Kabashi, supra note 34, ¶ 11.

60 Kunarać, supra note 5, ¶ 839.

61 See Prosecutor v. Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 456 (Dec. 6, 1999) (noting that punishment is directed at retribution “and over and above that” at deterrence); Kambanda, supra note 9, ¶ 28; Serushagho, supra note 33, ¶ 20 (Feb. 5, 1999); Todorović, supra note 10, ¶ 36; Prosecutor v. Plavšić, Case No. IT-99-39/1-1-S, Sentencing Judgment, ¶ 28 (Feb. 27, 2003); Stakić, supra note 9, ¶ 899; Banović, supra note 6, ¶ 34; Nikolić, supra note 34, ¶ 124; Češić, supra note 9, ¶ 25; Kordić, supra note 9, ¶ 1080-82; Kabashi, supra note 34, ¶ 11. See also Daniel B. Richard, Proposed Sentencing Guidelines for the International Criminal Court, LOY. L.A. INT’L & COMP. L.J. 123, at 125 (1997); Beresford, supra note 24, at 42.

62 Kambanda, supra note 9, ¶ 28; Kayishema, supra note 25, ¶ 2; Todorović, Sentencing Judgment, supra note 10, ¶ 30.

63 Nikolić, supra note 34, ¶ 139; Deronjić, supra note 9, ¶ 149.

64 Češić, supra note 9, ¶ 26.

65 Kabashi, supra note 34, ¶ 11; Kupreškić, supra note 9, ¶ 848; Kordić, supra note 9, ¶ 1078, 1080-82; Krajišnik, supra note 9, ¶ 807.
“have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent).66

In *Prosecutor v. Stakić*, the Trial Chamber stated, quite confusingly, that “general deterrence is more accurately described as deterrence aiming at re-integrating potential perpetrators into the global society.”67 Re-integration of a convicted felon into society has to do with rehabilitation and not with deterrence; and furthermore, to maintain that persons other than the criminal are in need of being re-integrated into society is a rather stupid thing to say.

In *Kunarać*, the Trial Chamber, quite realistically, concluded that “special deterrence, as a sentencing factor, is generally of little significance before this jurisdiction,” simply because “the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair.”68

General deterrence ought not to be considered as a sentencing factor for reasons of principle rather than practicality, since punishment should address the culpable conduct of the accused only, and it would be unfair to impose a harsh sentence on the convicted person in the expectation that it might deter others.69

D. Obviating Impunity

Thwarting impunity,70 and reprobation by the community or stigmatization of the convicted criminal,71 were mentioned in a sentencing context in judgments of the ICTY and the ICTR. In *Prosecutor v. Furundžija*, the Trial Chamber said: “It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity.”72 One analyst

66 Kordić, supra note 9, ¶ 1078.
67 Stakić, supra note 9, ¶ 902; Nikolić, supra note 34, ¶ 137; Deronjić, supra note 9, ¶ 147 (referring also to Aleksovski, supra note 9, ¶ 183); Delalić, supra note 34, ¶ 806.
68 Kunarać, supra note 5, ¶ 840; see also Krnojelać, supra note 14, ¶ 508; Obrenović, supra note 9, ¶ 52 (noting that deterrence should not be afforded “undue prominence”); Deronjić, supra note 9, ¶ 145; Beresford, supra note 24, at 45; Bagaric & Amarasekara, supra note 18, at 137 (noting that specific deterrence does not work in cases of severe punishments such as imprisonment).
69 Kunarać, supra note 5, ¶ 840; Češić, supra note 9, ¶ 26.
70 Erdemović, supra note 11, ¶ 65; Kambanda, supra note 9, ¶ 26; Akayesu supr a note 53; Furundžija, supra note 25, ¶ 288; Rutaganda, supra note 61, ¶ 455.
71 Erdemović, supra note 11, ¶¶ 64, 65, 66; see also Furundžija, supra note 25, ¶ 289; Blaškić, supra note 1, ¶ 763.
expressed the view that stigmatization of the perpetrator in itself “is often sufficient redress.” Although these appendices of punishment are important considerations for criminalizing certain atrocious acts and creating tribunals for their prosecution, they have no place, really, in sentencing guidelines.

Putting institutions and procedures in place to bring perpetrators of such atrocities to answer for their conduct will inevitably result in absence of impunity, condemnation of the act and the actor by right-thinking members of the world community and disgracing the convicted perpetrators for what they have done. Those consequences also serve as justification for having an international criminal justice system in place, but should not, perhaps even could not, have a bearing on an appropriate sentence in any given case. Because of these considerations, the criminal act must be punished, but the kind and gravity of the punishment to be imposed are conditioned by considerations other than the inevitable function and effects of punishment per se.

Blameworthiness of perpetrators of criminal conduct, in a word, legitimizes obviating impunity, reprobation, and stigmatization; but preventing impunity, reprobation, and stigmatization does not determine the subjective blameworthiness of the perpetrator.

III. SENTENCING FACTORS

A retributive response to crime must, for purposes of punishment, account for several factors inherent in, or attending, the criminal conduct. At the Rome Conference, the Working Group on Penalties listed those factors, somewhat unsystematically and as a guide for Drafters of the Rules of Procedure and Evidence, as including:

[T]he impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person’s conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

These guidelines were intended to fit the general directive enunciated in the Statutes of the ad hoc Tribunals and which did go into the Statute of the ICC, reducing the sentencing factors to ones “such . . . as the gravity of the crime and the individual circumstances of the convicted person,” thereby upholding the principle of proportionality (punishment must be proportional to the gravity of the crime) and the principle of individualization (punishment must be based on personal circumstances of the convicted person). It has accordingly been decided that a trial tribunal must observe “the over-riding obligation to individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime.”

A. Gravity of the Offence

In the Čelebići Case, the Trial Chamber said: “By far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence.”

---


76 Rep. of the Working Group on Penalties, art. 77(1), supra note 74; see ICC Statute, supra note 1, art. 78(1).

77 See King & La Rosa, supra note 8, at 332–37; Peglau, supra note 2, at 147; see also Erdemović, supra note 11, ¶ 41 (speaking of “[t]he principle of proportionality and of appropriateness of sentence to the individual”); Tadić, supra note 8, ¶ 61; Blaškić, supra note 1, ¶ 771; Rutaganira, supra note 13, ¶ 115; Bemba Gombo, supra note 9, ¶ 11;


79 Obrenović, supra note 9, ¶ 78.

80 Delalić, supra note 7, ¶ 1225; see also id., ¶ 1260 (calling gravity of an offence the “touchstone of sentencing”); Erdemović, supra note 25, ¶ 15; Serushago, supra note 33, ¶ 27; Prosecutor v. Jeličić, Case No. IT-95-10-T, Judgement, ¶ 121 (Dec. 14, 1999); Aleksovski, supra note 9, ¶ 182; Kupreškić, supra note 9, ¶ 852; Ruggiu, supra note 28, ¶ 47–49; Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement, ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000); Delalić, supra note 34, ¶ 847, 731; Kumarac, supra note 5, ¶ 841; Kordić, supra note 54, ¶ 847; Prosecutor v. Jeličić, Case No. IT-95-10-A, Judgement, ¶ 101 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001); Todorović, supra note 10, ¶ 29, 31; Prosecutor v. Radislav Krstić,
The gravity of the crime “is normally the starting point for consideration of an appropriate sentence,” and has been singled out as “[t]he cardinal feature in sentencing.”

Retribution requires a certain proportionality between the gravity of a crime and the punishment imposed for that crime. Gravity of the crime was said to depend on the circumstances of the case as well as the form and degree of participation in the crime by the Accused. The element of gravity is more broadly determined by (i) the nature of the crime, (ii) the manner in which it was executed, (iii) the motive of the perpetrator, and (iv) the consequences of the criminal act. It should be noted that the ICC’s Rules of Procedure and Evidence pertaining to the determination of sentence make no mention of the nature of the crime as such. This does not mean that the ICC will not for sentencing purposes consider the inherent gravity of a particular crime. The Rules do refer to “the extent of damage caused” and “the nature of the unlawful behavior and the means employed to execute the crime” as factors to be considered by the Court in its determination of sentence, and those factors, among others, do have an impact on the nature and gravity of an offence. The sentencing factors listed in the Rules are furthermore expressly stated as applying only inter alia, and aggravating circumstances may include others not listed in the Rules “which, although not enumerated . . ., by virtue of their nature are similar to those mentioned.”

---

Case No. IT-98-33-T, ¶ 698 (Aug. 2, 2001); Prosecutor v. Duško Šišić, Case No. IT-95-8-S, ¶ 106 (Nov. 13, 2001); Prosecutor v. Plavšić (Sentencing Judgment), supra note 61, ¶ 23; 25, 52; Prosecutor v. Momir Nikolić, Case No. IT-02-60-I-S, ¶ 101-02 (Dec. 2, 2003); Prosecutor v. Dragan Nikolić, supra note 34, ¶ 144; Prosecutor v. Vasilić, Case No. IT-98-32-A, ¶ 156 (Feb. 25, 2004); Češić, supra note 9, ¶ 31; Deronjić, supra note 9F, ¶ 154; Krstić, Case No. IT-98-33-A, ¶ 267 (Apr. 19, 2004); Stakić, supra note 34, ¶ 375; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, ¶ 36 (July 10, 2012); Bemba Gombo, supra note 9, ¶ 15.

81 Aleksovski, supra note 9, ¶ 182; Banović, supra note 6, ¶ 36.
82 Plavšić, supra note 61, ¶ 25; Banović, supra note 6, ¶ 36.
83 Nikolić, supra note 34, ¶ 126 (referring to “the fundamental principle of proportionality”); King & La Rosa, supra note 8, at 333; Beresford, supra note 24, at 41, 46; see also Richard, supra note 61, at 125 (insofar as he identifies the proportionality requirement with the lex talionis, Richard has it slightly wrong).
84 Kupreškić, supra note 9, ¶ 852; Delalić, supra note 34, ¶ 731; Plavšić, supra note 61, ¶ 26; Češić, supra note 9, ¶ 32.
85 See King & La Rosa, supra note 8, at 334 (mentioning, with reference to jurisprudence of the ad hoc Tribunals, the hierarchy of crimes, the number of victims killed, the relative scale and magnitude of the crime, and other factors, such as the existence of an armed conflict); Nemitz, supra note 3, at 614 (noting, with a different emphasis, that the ranking of crimes is determined by the nature of the crime and the consequences of the act).
87 Id.; Rule 145(2)(b)(vi).
1. The Nature of the Crime

The nature of the crime has a particular bearing on its relative gravity for sentencing purposes. The special gravity of the offences within the jurisdiction of the ad hoc Tribunals has been emphasized in many of the Tribunals’ judgments. The ICTR has thus proclaimed that all crimes within its jurisdiction are serious violations of international humanitarian law.

In Prosecutor v. Ntakirutimana, a Trial Chamber of the ICTR referred to “the principle of gradation in sentencing, which enables the Tribunal to distinguish between crimes which are of the most heinous nature, and those which, although reprehensible and deserving severe penalty, should not receive the highest penalties.” Earlier, in Prosecutor v. Kambanda, the ICTR held that “[t]he degree and magnitude of the crime is still an essential criterion for evaluation of sentence.” The Tribunal laid special stress on the gravity of crimes against humanity, noting that those crimes “are . . . conceived as offences of the gravest kind against the life and liberty of the human being.” In Prosecutor v. Serushago, the ICTR emphasized the “extreme gravity” of genocide as “the crime of crimes.” Genocide and crimes against humanity have been held to be inherently aggravating crimes. In Prosecutor v. Furundžiya, the Trial Chamber stated that “[t]orture is one of the most serious offences known to international criminal law and any sentence imposed must take this into account.” In the same case, the Appeals Chamber decided that “crimes which result in the loss of human life should be punished more severely.”

---

88 See Erdenović, supra note 25, ¶ 15; Delalić, supra note 7, ¶ 1225; Rutaganda, supra note 61, ¶ 468; Blaškić, supra note 1, ¶ 782-86; Aleksovski, supra note 9, ¶ 182; Furundžiya, supra note 80, ¶ 249; Delalić, supra note 34, ¶ 731; Jelisić, supra note 80, ¶ 101; Nikolić, supra note 34, ¶ 144.
89 Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment, ¶ 367 (June 1, 2001); Bagosora, supra note 78, ¶ 2263; Renzaho, supra note 78, ¶ 817; Gatete, supra note 78, ¶ 673.
91 Kambanda, supra note 9, ¶ 57.
92 Id., ¶ 43.
93 Serushago, supra note 33, ¶ 15, 27; Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Appeal Chamber Judgement, ¶ 53 (July 9, 2004). See infra, the text accompanying footnotes 95–98. See also Prosecutor v. Omar Al Bashir (Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir), Case No. ICC-02/05-01/09-3, ¶ 133 (Mar. 4, 2009).
94 Kambanda, supra note 9, ¶ 53; Ruggiu, supra note 28, ¶ 48.
95 Furundžiya, supra note 25, ¶ 281.
96 Furundžiya, supra note 80, ¶ 244; see also Prosecutor v. Duško Tadić, Case No. IT-94-1-T/R-117, ¶ 29 (July 14, 1997); Blaškić, supra note 1, ¶ 787; Nemitz, supra note 3, at 622-23.
persecution “is a particularly serious crime,”97 and that this also applies to “the murder and the sexual assaults perpetrated by the accused.”98

The question as to the existence of a hierarchy of crimes based on their inherent gravity has provoked profound disagreement in the jurisprudence of the ad hoc Tribunals and in scholarly comments on that jurisprudence. There are, to be sure, those who maintain that the crimes within the jurisdiction of the ad hoc Tribunals “are presented on an equal footing,” and that “it does not seem possible to classify these international crimes in a hierarchical way.”99

The inherent gravity of some crimes over others cannot be denied.100 The ICC Statute in fact contains several indications of a hierarchy of certain crimes.101 It thus affords to States Parties the right to temporarily exclude the exercise of jurisdiction by the ICC for war crimes committed in their territory or by their nationals, but not others;102 the crime of genocide and crimes against humanity are without exception to be regarded as “manifestly unlawful” and liability for those crimes can therefore never be excused on the basis of superior orders;103 defense of property can only exclude criminal responsibility for a war crime and can therefore not be raised as a defense against charges of genocide and crimes against humanity.104

The ongoing debate in this regard is mainly focused on the relative gravity of crimes against humanity and war crimes. The Trial Chamber, in its sentencing judgment in Prosecutor v. Tadić, based the extreme gravity of crimes against

97 Todorović, supra note 10, ¶ 57.
98 Id. ¶ 66.
99 Emanuela Fronza, Genocide in the Rome Statute, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 105, 117–18 (Flavia Lattanzi & William A. Schabas eds., 1999). Fronza refers to a passage in Prosecutor v. Akayesu where it was held that “there is no justification in the [ICTR] Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all circumstances alternative charges to genocide and thus lesser included offences.” Id. at 118 n.43; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 470 (Sept. 2, 1998). Note, however, that Akayesu was not concerned with the inherent gravity of crimes for sentencing purposes here but with the problem of bringing cumulative charges. Id. See also Kayishema, supra note 89, ¶ 367; Serushago, supra note 33, ¶ 13; Stakić, supra note 34, ¶ 375.
100 King & La Rosa, supra note 8, at 322–23; see, e.g. Kai Ambos, Nulla Poena Sine Lege in International Criminal Law, in 4 SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW 17, 33–34 (Roelof Haveman & Olaoluwa Olusanya eds., 2006).
101 Schabas, supra note 25, at 1506.
102 ICC Statute, supra note 1, art. 124.
103 Id. art. 33(2); see Andreas Zimmermann, Superior Orders, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 957, 972 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).
104 ICC Statute, supra note 1, art. 31(1)(c).
humanity on the fact that they, per definition, are committed on a widespread scale or systematically:

A prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crime having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.105

This approach finds support in the reasoning of the International Law Commission (ILC). In a comment on the war crimes provisions in its 1996 Draft Code of Crimes against the Peace and Security of Mankind, the ILC proclaimed that crimes against the peace and security of mankind “are the most serious on the scale of international offences” exactly because “the crimes in question must have been committed in a systematic manner or on a large scale.”106

There seems to be general agreement that genocide constitutes “the crime of crimes” and is therefore the most serious of offences within the subject-matter jurisdiction of international criminal tribunals.107 In Prosecutor v. Kambanda, the ICTR thus noted that genocide is “inherently aggravating,”108 and this fact is

105 Tadić, supra note 96, ¶ 73; see also Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 21, 25 (Oct. 7, 1997).
108 Kambanda, supra note 9, ¶ 42; see also Akayesu, supra note 99, ¶ 469; Serushago, supra note 33, ¶ 15.
germane to sentencing. However, it has also been said that it is “more difficult” to rank the inherent gravity of genocide against that of crimes against humanity.

There is an influential body of opinion holding that the gravity of crimes against humanity exceeds that of war crimes. It has been noted that crimes against humanity and war crimes based on the same conduct protect different interests. In Prosecution v. Tadić, Judge Cassese in a separate opinion maintained that although there is in abstracto no hierarchy of gravity applying a priori to different crimes, such a hierarchy does emerge when the very same act is classified as a war crime and a crime against humanity. Murder as a crime against humanity would, for example, warrant a higher sentence than murder as a war crime, because as a crime against humanity, willful killing “possesses an objectively greater magnitude and reveals in the perpetrator a subjective frame of mind which may imperil fundamental values of the international community to a greater extent” than would be the case if the offense was prosecuted as a war crime.

The assumption that crimes against humanity and war crimes committed in a systematic manner or on a large scale deserve higher sentences than “ordinary” war crimes has become a matter of profound controversy within the ICTY. In its judgment in the sentencing appeal in Prosecution v. Tadić, the Appeals Chamber found that “there is in law no distinction between the seriousness of a crime against humanity and that of a war crime,” basing its opinion exclusively on the ICTY Statute and Rules of Procedure and Evidence.

---

109 Serushago, supra note 33, ¶¶ 14–15.
110 See, e.g., Kambanda, supra note 9, ¶ 14; Serushago, supra note 33, ¶ 14.
111 Tadić, supra note 11, ¶¶ 1, 16 (separate opinion of Judge Cassese); Kambanda, supra note 9, ¶ 14; see also id., ¶ 43 (noting that crimes against humanity “are . . . offences of the gravest kind against the life and liberty of the human being”); Erdemović, supra note 105, ¶¶ 20–25; Furundžiya, supra note 80, ¶ 8 (declaration of Vorah, J.); King & La Rosa, supra note 8, at 322, 333–34; Frulli, supra note 106, at 335; id., at 349 (concluding that crimes against humanity are more serious than war crimes); Ambos, supra note 100, at 33–34.
113 Tadić, supra note 11, ¶ 7.
114 Id. ¶ 10.
115 Id. ¶ 15; see also Ambos, supra note 100, at 34.
117 Tadić, supra note 11, ¶ 69 (majority opinion); see also Tadić, supra note 11 (separate opinion of Shahabuddeen, J.); Tadić, supra note 8, at 3 (separate opinion of Robinson, J.); Erdemović, supra note 105, ¶¶ 19–23, 26; Erdemović, supra note 25, at 2 (separate opinion of Shahabuddeen, J.); Blaškić, supra note 1, ¶ 804; Furundžiya, supra note 80, ¶¶ 241–42, 247; Krnojelać, supra note 14, ¶ 511; Češić, supra note 9, ¶ 32.
maintained that war crimes can, in given circumstances, be as serious, or even more serious, that crimes against humanity, mentioning the example of the intentional killing of prisoners of war as part of a widespread practice and involving state authorities. In *Prosecutor v. Blaškić*, the Trial Chamber noted that the ICTY has not yet established a hierarchy of gravity of the crimes within its jurisdiction and therefore decided to “confine itself to assessing [for sentencing purposes] seriousness based on the circumstances of the case.”

It stands to reason that, within the realm of war crimes, grave breaches of the Geneva Conventions of August 12, 1949 and Protocol I to those Conventions should not per se be treated as more serious than the ones not stipulated as grave breaches, and that the gravity of a war crime should also not be assessed in view of the distinction between international armed conflicts and armed conflicts not of an international character.

A factor taken into account as an element of crime A can be considered as an aggravating factor for crime B, of which it is not an element. Humiliation as an element of the crime of humiliating and degrading treatment can therefore be considered as an aggravating circumstance following a concurrent conviction of rape, of which it is not a constituent element. In *Prosecutor v. Češić*, the Sentencing Tribunal declined to consider exacerbated humiliation twice, namely as an element of a war crime and of the corresponding crime against humanity, and decided in all fairness to impose a single sentence for which it considered the degree of humiliation only once in its final determination of an appropriate sentence.

2. The Manner in Which the Crime Was Executed

Gravity of a crime can also emerge from the manner in which the offence was executed. The ICC’s *Rules of Procedure and Evidence* refer to “the nature of the unlawful behaviour and the means employed to execute the crime” as a sentencing factor that applies in general, and to “[c]ommission of the crime

---

118 Nemitz, supra note 3, at 618.
119 Blaškić, supra note 1, ¶¶ 800–03.
120 Schabas, supra note 25, at 1507.
121 Vasiljević, supra note 80, ¶ 172; Češić, supra note 9, ¶ 53.
122 Češić, supra note 9, ¶ 53.
123 Id. ¶ 54.
124 See Nikolić, supra note 34, ¶ 186.
125 RPE, supra note 86, Rule 145(1)(e).
with particular cruelty” that has to be considered as an aggravating circumstance.126

The heinous means used for the killing of victims of the crime was specially mentioned as an aggravating sentencing factor in Prosecutor v. Kayishema.127 In Prosecutor v. Jelesić, the ICTY held out “the repugnant, bestial and sadistic nature” of the accused’s conduct and the “cold-blooded commission of murders and mistreatment of people” as contingencies that warrant severe punishment.128 In Prosecutor v. Ntakirutimana, the ICTR stated that at the “upper end of the sentencing scale” are “those who commit[ ]crimes with especial zeal or sadism.”129 In Prosecutor v. Češić, the Sentencing Tribunal referred to the “exacerbating humiliation and degradation, depravity and sadistic behaviour” of the accused as aggravating factors.130

In the Tadić sentencing judgment, the Trial Chamber took into consideration, as an aggravating circumstance, the convicted person’s “awareness of, and enthusiastic support for” the atrocities upon which his conviction was based.131 In the Čelibić case, the Trial Chamber found the “most disturbing, serious and thus, [] aggravating aspect” of the criminal acts was that the accused “apparently enjoyed using this [electric shock] device upon his helpless victims,”132 and referred to the manner in which the crimes were committed as “indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity.”133

3. The Motive of the Perpetrator

The Rules of Procedure and Evidence also list, as an aggravating circumstance, “any motive involving discrimination” on grounds such as “...
age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.\(^{134}\)

A discriminatory motive has also been endorsed as an aggravating circumstance in the \textit{ad hoc} Tribunals.\(^{135}\) In \textit{Prosecutor v. Tadić}, ethnic and religious discrimination and nationalistic sentiments were mentioned by name.\(^{136}\) In \textit{Prosecutor v. Vasiljević}, the Trial and the Appeals Chambers laid special stress on verbal abuse as an aggravating factor.\(^{137}\)

In the Ćelebići case, a Trial Chamber of the ICTY was quite correct in saying: “Motive is not an essential ingredient of liability for the commission of an offence. It is to some extent a necessary factor in the determination of sentence after guilt has been established.”\(^{138}\)

If the perpetrator committed the offence with “cold, calculated premeditation, suggestive of revenge against the individual victim or group to which the victim belongs,” this should be taken into account as an aggravating circumstance, but if he or she committed the offence “reluctantly and under the influence of group pressure and, in addition, demonstrated compassion toward the victim or the group to which the victim belongs,” this must be taken into account in mitigation of sentence.\(^{139}\) Tolerance and lack of bigotry will also count in mitigation of a sentence.\(^{140}\) In \textit{Erdemović}, the accused actually saved a victim’s life, and this counted to his credit in sentencing.\(^{141}\)

4. \textit{Harmful Consequences of the Criminal Act}

Cruelty of the criminal act is closely related to the harmful consequences of an offense, which has also been singled out as an element that falls under the nature of the crime as a sentencing directive.\(^{142}\) The link appears from a statement in the sentencing judgment of Duško Tadić, where the ICTY referred

\(^{134}\) Compare RPE, supra note 86, Rule 145(2)(b)(v), with ICC Statute, supra note 1, art. 21(3).

\(^{135}\) Vasiljević, supra note 80, ¶ 172; see also Delalić, supra note 7, ¶ 1269; Blaškić, supra note 1, ¶ 784.

\(^{136}\) Tadić, supra note 96, ¶ 55; see also Kumarač, supra note 5, ¶ 867.

\(^{137}\) Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 276 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); Vasiljević, supra note 80, ¶ 161.

\(^{138}\) Delalić, supra note 7, ¶ 1235; see also Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 250, 272 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

\(^{139}\) Delalić, supra note 7, ¶ 1235; see also Krestić, supra note 80, ¶ 711.

\(^{140}\) Erdemović (Second Sentencing Judgement), supra note 25, ¶ 16(i) (under Character).

\(^{141}\) Erdemović, supra note 11, ¶¶ 105, 107.

\(^{142}\) King & La Rosa, supra note 8, at 322; see also Tadić, supra note 8, ¶ 70; Erdemović, supra note 11, ¶ 20; Delalić, supra note 7, ¶¶ 1225, 1260, 1273; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Sentence, ¶ 16 (May 21, 1999).
in one breath to the cruelty of the act and the humiliation suffered by the victim as aggravating sentencing factors.\textsuperscript{143} The ICC’s \textit{Rules of Procedure and Evidence} speak of “the extent of the damage caused, in particular the harm caused to victims and their families,”\textsuperscript{144} and also, as an aggravating circumstance, of “[c]ommission of the crime where the victim is particularly defenceless.”\textsuperscript{145} It furthermore singles out “[c]ommission of the crime . . . where there were multiple victims” as a matter of aggravation.\textsuperscript{146}

The number of victims killed would clearly come within the confines of the above directives.\textsuperscript{147} But it goes beyond that. In the \textit{Čelebići Case}, the Trial Chamber called gravity of an offense the “touchstone of sentencing,” and noted that gravity includes the impact of the crime on victims.\textsuperscript{148} It made special mention of the “substantial pain, suffering and injury” inflicted by the perpetrator upon each of his victims, and the “permanent physical and psychological scars” that resulted from the cruelty to which they were exposed.\textsuperscript{149} In \textit{Prosecutor v. Mitar Vasiljević}, the Trial Chamber mentioned as sentencing guidelines, alongside “the nature of the act or omission” and “the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim,” and the fact that the criminal act had long-term effects.\textsuperscript{150}

In the sentencing policy articulated in the case of \textit{Prosecutor v. Furundžiya}, the Trial Chamber laid special stress on “the severe physical pain and great emotional trauma that Witness A has had to suffer as a consequence of these depraved acts committed against her.”\textsuperscript{151} The Tribunal had noted that the victim “was a civilian detainee and at the complete mercy of her captors.”\textsuperscript{152} In

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{143} Tadić, supra note 8, ¶ 22; see also Prosecutor v. Todorović, Case No. IT-95-9/1-S, Sentencing Judgment, ¶¶ 63–65 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001).
\item\textsuperscript{144} RPE, supra note 86, Rule 145(1)(c).
\item\textsuperscript{145} Id. Rule 145(2)(b)(iii).
\item\textsuperscript{146} Id. Rule 145(2)(b)(iv).
\item\textsuperscript{147} Erdemović, supra note 11, ¶ 15; Kunaran, supra note 5, ¶ 666; Krestić, supra note 80, ¶ 701; Češić, supra note 9, ¶ 32; Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgment, ¶¶ 337–38 (May 20, 2005); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment and Sentence, ¶ 440 (Dec. 13, 2005); Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, Judgment and Sentence, ¶ 90 (June 12, 2006); Nindibahiri v. Prosecutor, Case No. ICTR-01-71-A, Judgment, ¶ 135 (Jan. 16, 2007); Prosecutor v. Rugambwara, Case No. ICTR-00-59-T, Sentencing Judgment, ¶ 24 (Nov. 16, 2007); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgment and Sentence, ¶ 579 (Dec. 7, 2007); Prosecutor v. Bagosora & others, supra note 78, ¶ 2272; Gatete, supra note 78, ¶ 679.
\item\textsuperscript{148} Delalić, supra note 7, ¶ 1260; see also Krestić, supra note 80, ¶ 701; Češić, supra note 9, ¶ 32.
\item\textsuperscript{149} Delalić, supra note 7, ¶ 1273; see also Tadić, supra note 8, ¶ 56.
\item\textsuperscript{150} Vasiljević, supra note 137, ¶ 235; see also Nikolić, supra note 34, ¶¶ 200–05.
\item\textsuperscript{151} Furundžiya, supra note 25, ¶ 287.
\item\textsuperscript{152} Id., ¶ 283.
\end{itemize}
\end{footnotesize}
Prosecutor v. Banović, the Sentencing Trial Chamber made special mention of the fact that the prison victims “were particularly vulnerable, frightened and isolated individuals,” and accepted “the position of inferiority and the vulnerability of the victims” as “relevant factors in assessing the gravity of the offence.”

In Prosecutor v. Blaškić, the Trial Chamber also emphasized, as an aggravating circumstance, “the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day.” The Tribunal was particularly sensitive to the fact that victims were members of the civilian population and included women and children. In Prosecutor v. Momir Nikolić, the victims included women, children, the elderly, and persons in captivity, and their vulnerability and position of helplessness were taken into account as aggravating factors. In Prosecutor v. Kunarać, special significance was attached for sentencing purposes to the fact that several of the sexual assault victims were young. Several judgments emphasized, as an aggravating circumstance, the fact that victims at the time of the trial still suffered from the trauma brought upon them by the perpetrators’ criminal conduct. It has further been noted by one analyst that “the gravity of a crime is not only affected by the actual harm, but also by the danger caused to other legal values, i.e. the potential harm that may result from the offense.”

It has been held that for sentencing purposes, victims are not to be confined to those directly affected by the crime but may also include their next-of-kin. This proposition has subsequently been challenged. In Prosecutor v. Krnojelać, the ICTY noted that effects of an offence on relatives—or friends—of the immediate victims have no bearing on the criminal culpability of the convicted person and, therefore, “it would be unfair to consider such effects in determining a sentence.” The ICTY subsequently changed its mind by holding that the

---

153 Banović, supra note 6, ¶ 50; see also Kunarać, supra note 5, at ¶ 352; Prosecutor v. Simić, Case No. IT-95-92-2-S, Sentencing Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002); Obrenović, supra note 9, ¶¶ 102–03; Nikolić, supra note 34, ¶ 184.
154 Blaškić, supra note 1, ¶ 787.
155 Id. ¶ 786; see also Kunarać, supra note 5, ¶ 867; Nikolić, supra note 34, ¶ 213(iv).
156 Nikolić, supra note 34, ¶ 137.
157 Kunarać, supra note 5, ¶¶ 835, 864, 879.
158 Vasiljević, supra note 137, ¶ 276; Vasiljević, supra note 80, ¶¶ 164–66; Krnojelać, supra note 14, ¶ 144.
159 Nemitz, supra note 3, 617.
160 Delalić, supra note 7, ¶ 1226.
161 Krnojelać, supra note 14, at ¶ 512; see also Kunarać, supra note 5, ¶ 852.
impact of an offense on the relatives and friends of the victims may be taken into account for sentencing purposes.\textsuperscript{162} for example in the case of murder and sexual assault.\textsuperscript{163}

It should finally be noted that compassion shown, and assistance rendered by an accused to certain victims can also serve as a mitigating factor.\textsuperscript{164} The ICC’s \textit{Rules of Procedure and Evidence} expressly mention “efforts by the person to compensate the victims” as a mitigating circumstance.\textsuperscript{165}

5. Participation of the Accused in the Criminal Conduct

The ICC’S \textit{Rules of Procedure and Evidence} refer to “the degree of participation of the convicted person” in the offense of which he or she was convicted, and to “the degree of intent” as factors to be considered for sentencing purposes.\textsuperscript{166}

There are thus many sides to the personal conduct and dispensation of the convicted person that should weigh with international tribunals in assessing an appropriate sentence on basis of the principles of retributive justice. Some of the personal factors that are to be considered relevant for achieving proportionality between the crime and the sentence derive from the participation of the convicted person in the crime and are objective in nature, while others may be defined as subjective attributes of the convicted person. Those subjective factors will be considered hereafter under the heading of Retributive Justice.

The objective standards attending conduct of the accused again fall into two main categories: (1) personal responsibilities of the person, and (2) the form of perpetration for which he or she was held responsible.

Several judgments of the \textit{ad hoc} Tribunals stressed the status of the person within the community as an aggravating circumstance.\textsuperscript{167} It has been decided, for example, that “[a]buse of positions of authority or trust is generally considered an aggravating factor,“\textsuperscript{168} and even that a command position deserves

\textsuperscript{162} Prosecutor v. Krnojelač, Case No. IT-97-25-A, Judgment, ¶ 260 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); see also Češić, supra note 9, ¶ 38.

\textsuperscript{163} Češić, supra note 9, ¶¶ 39, 44.

\textsuperscript{164} See infra Section D.2(c).

\textsuperscript{165} RPE, supra note 86, Rule 145(2)(a)(ii).

\textsuperscript{166} Id. Rule 145(1)(c).

\textsuperscript{167} See generally Serushago, supra note 33, ¶¶ 28–29; Kayishema, supra note 142, ¶ 15; Kordić, supra note 54, ¶ 847; Serugendo, supra note 147, ¶ 90; Nemitz, supra note 3, 612.

\textsuperscript{168} Prosecutor v. Kambanda, supra note 9, ¶ 44 (Sept. 4, 1998); see also Kayishema, supra note 142, ¶ 26; Delalić, supra note 7, ¶ 1220; Prosecutor v. Musema, Case No.ICTR-96-13-A, Judgment and Sentence,
a higher sentence than direct participation in the crime. Particularly critical in this regard is the position occupied by an accused in the organizational hierarchy of the prevailing power structures. As stated in the Čelebići Case: “It would constitute a travesty of justice, and an abuse of the concept of command authority, to allow the calculated dereliction of an essential duty to operate as a factor in mitigation of criminal responsibility.”

In Prosecutor v. Kambanda, the fact that the accused was Prime Minister of Rwanda was accordingly taken into consideration as an aggravating factor. In the Čelebići Case, the ICTY made something of the fact that it was dealing with high-ranking political officials and military officers, and also took a grim view of the fact that one of the accused was deputy commander of the prison camp where the atrocities were committed. In Prosecutor v. Kamuhanda, special mention was made, as an aggravating circumstance, of the accused having held a high-ranking position in the civil service. In Prosecutor v. Todorović, the superior position of the accused as Chief of Police was considered an aggravating factor. In Prosecutor v. Mladen Naletelić & Vinco Martinović, the Trial Chamber noted that the accused was “something of a legend in the region” and that his “command role . . . is [therefore] an aggravating factor.” Mrs. Biljana Plavšić was at the time the crime was committed President of the Republic of Srpska and her “high leadership position” led the Court to decide that “misplaced leniency would not be fitting and that a substantial sentence of imprisonment is called for.” The Sentencing Tribunal did, on the other hand, decide that the fact that “witnesses . . . of high international reputation”—including United States Secretary of State Madeleine Albright, President of Sweden Carl Bildt, and Head of the Mission of the Organization for Society and Co-operation in Europe Robert Frowick—came forward to testify on her behalf.

¶¶ 1003–04 (Jan. 27, 2000); Sikirica, supra note 80, ¶¶ 172, 210.

169 Blaškić, supra note 1, ¶ 791; see also id. at ¶ 768.

170 See, e.g., Tadić, supra note 5, ¶ 60; Rutaganda, supra note 61, ¶¶ 50, 451, 469; Blaškić, supra note 1, ¶ 788; Kordić, supra note 54, ¶ 847; Todorović, supra note 143, ¶ 60–62; Krstić, supra note 80, ¶ 708; Sikirica, supra note 80, ¶ 1240; Plavšić, supra note 61, ¶ 60; Obrenović, supra note 9, ¶ 99; Gatete, supra note 78, ¶ 678.

171 Delalić, supra note 7, ¶ 1250; see also Aleksovski, supra note 9, ¶ 187.

172 Kambanda, supra note 168, ¶ 61.

173 Delalić, supra note 7, ¶ 1234.

174 Id., ¶ 1268; see also Nikolić, supra note 34, ¶¶ 193–94, 213 (iii).

175 Kamuhanda, supra note 53, ¶ 764.

176 Todorović, supra note 143, ¶¶ 59, 66.


178 Plavšić, supra note 61, ¶ 60; see also Renzaho, supra note 78, ¶ 824 (the Sentencing Tribunal affording only “very limited weight” to the convicted person’s lengthy public service and assistance rendered by him to the Tutsi victim group).
and her post-conflict role in ensuring that the Dayton Accord was accepted and implemented in the Republic of Srpska,\(^{179}\) added “much weight to the plea in mitigation put forward in this regard.”\(^{180}\) She was seventy-two years old at the time and was sentenced to eleven years imprisonment for her “participation in a crime of utmost gravity” (persecution).\(^{181}\)

Of special significance in regard to war crimes is the position of the Accused in the chain of command.\(^{182}\) In *Prosecutor v. Aleksovski*, the Appeals Chamber decided that the sentence imposed by the Trial Chamber was “manifestly inadequate” because, amongst other things, the sentencing Tribunal failed to treat the position of the convicted person as a commander as an aggravating circumstance.\(^{183}\) In *Prosecutor v. Tadić*, on the other hand, the Appeals Chamber decided that a sentence in excess of twenty years imprisonment on any counts in the indictment would be excessive because the level in the command structure of the accused was low.\(^{184}\) In the Čelebići Case, the ICTY regarded the fact that a commanding officer only had constructive knowledge of the criminal act (he did not know but should have known) as a potential mitigating factor.\(^{185}\)

It should be emphasized, though, that a position of authority should not, in and of itself, attract a harsher sentence; it is the abuse or wrongful exercise of a position of authority that serves as an aggravating factor.\(^{186}\) The principle of “graduation of sentence”—that is, the rule that “the most senior levels of the command structure should attract the severest sentences, with less severe sentences for those lower down the structure”\(^{187}\)—is therefore “not absolute.”\(^{188}\)

---

\(^{179}\) Plavšić, *supra* note 61, ¶ 85–94.

\(^{180}\) *Id.*, ¶ 94.

\(^{181}\) *Id.*, ¶¶ 132, 134.

\(^{182}\) See, e.g., Kupreškić, *supra* note 9, ¶ 862; Aleksovski, *supra* note 9, ¶ 184; Delalić, *supra* note 7, ¶ 847; Kunarač, *supra* note 5, ¶ 863; Musema, *supra* note 168, ¶¶ 381, 382.

\(^{183}\) Aleksovski, *supra* note 9, ¶ 187.


\(^{185}\) Delalić, *supra* note 7, ¶ 1250; see also Schabas, *supra* note 25, at 1522 (noting that command responsibility is based on negligence).


\(^{187}\) Musema, *supra* note 168, ¶ 382.

\(^{188}\) Hadžihasanović, *supra* note 34, ¶ 321.
Also at the objective level, emphasis is placed on the form and degree of participation in the crime. Playing a leading role in the execution of atrocities clearly serves as an aggravating circumstance, while those not playing a significant role in the commission of an offense should receive lighter sentences. The Trial Court is required to reflect on the sentence imposed, “the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.”

A distinction can therefore be made for sentencing purposes between principal perpetrators and accessories, on the understanding that the latter group is entitled to lighter sentences. Inchoate participation, such as an attempt to commit the crime, is generally treated for sentencing purposes as being of a less serious nature. Merely aiding and abetting has generally been considered as warranting a reduced level of criminal responsibility. In Prosecutor v. Aleksovski, the Trial Chamber gave the accused credit for the fact that his “direct participation in the commission of the acts of violence was relatively limited.” In Prosecutor v. Ntakirutimana, the ICTR stated that those who planned or ordered the atrocities deserved the highest penalties.

It should be noted, though, that in some instances not playing an active role in the execution of a crime is inherent in the criminal conduct (the crime of which the accused was found guilty) and should therefore not be taken into account as a mitigating circumstance. In Prosecutor v. Vincent Rutaganira, for example, the accused pleaded guilty to, and was convicted of, complicity by an omission in the crime of extermination (not intervening to stop massive killings and injuring of Tutsi who had taken refuge in a church building in a district where the accused was an elected Counselor). In considering an appropriate sentence,

---

189 Kupreškić, supra note 9, ¶ 852; Aleksovski, supra note 9, ¶ 182; Delalić, supra note 34, ¶ 731; Jelišić, supra note 80, ¶ 101; Stakić, supra note 9, ¶ 903; Obrenović, supra note 9, ¶ 50; Nikolić, supra note 34, ¶ 144; Deronjić, supra note 9, ¶¶ 154, 156.
190 Serushago, supra note 33, ¶ 19; Rutaganda, supra note 61, ¶ 470; Radoslav Brdanin, Case No. IT-00-36-A, ¶ 413 (Apr. 3, 2007); Bagosora, supra note 78, ¶ 2272; Gatete, supra note 78, ¶ 680.
191 See Aleksovski, supra note 9, ¶ 236; Kmejelac, supra note 14, ¶ 509; Deronjić, supra note 9, ¶ 156.
192 Vasiljević, supra note 80, ¶ 182; Krstić, supra note 80, ¶¶ 251, 266, 268; Prosecutor v. Kajelijeli, Case No. ICTR-98-44-A, ¶ 963 (Dec. 1, 2003) (noting that an “indirect form of participation” such as incitement to commit genocide and aiding and abetting warrants a lesser sentence).
193 See, e.g., Ruggiu, supra note 28, ¶ 49; see also id., ¶¶ 77–79 (noting that the accused did not personally commit any of the acts of violence); Ambos, supra note 100, at 33.
194 Schabas, supra note 25, at 1507.
195 See, e.g., Ruggiu, supra note 28, ¶ 49; see also id., ¶¶ 77–79 (noting that the accused did not personally commit any of the acts of violence); Ambos, supra note 100, at 33.
196 Kupreškić, supra note 9, ¶ 852; Aleksovski, supra note 9, ¶ 182; Delalić, supra note 34, ¶ 731; Jelišić, supra note 80, ¶ 101; Stakić, supra note 9, ¶ 903; Obrenović, supra note 9, ¶ 50; Nikolić, supra note 34, ¶ 144; Deronjić, supra note 9, ¶¶ 154, 156.
Closely related is the supposition that persons acting upon the orders of a superior official should receive a lighter sentence. The Statutes of the ad hoc Tribunals expressly state that acting “pursuant to an order of a Government or of a superior shall not relieve . . . [the accused person] of criminal responsibility, but may be considered in mitigation of punishment if . . . justice so requires.” The principle has been applied in several judgments of the ad hoc Tribunals.

In terms of the ICC Statute, superior orders will, to the contrary, in certain limited circumstances exclude criminal liability, namely if the perpetrator was under a legal obligation to obey the order, did not know that the order was unlawful, and the order was not manifestly unlawful. Nothing is provided in the ICC Statute as to the mitigating effect on sentencing of superior orders that fall short of these requirements. Although some analysts maintain that superior orders will be treated as a mitigating circumstance by the ICC, it is equally reasonable to assume that acting upon a superior order which the perpetrator was not obliged to obey, or which he or she did not know was unlawful, or which was as a matter of fact manifestly unlawful, should not serve as a mitigating circumstance.

Although the ICTY in Furundžiya subscribed to the principle that those not acting as principal perpetrators deserve lighter sentences, the Tribunal did judge the accused, being an aider and abettor, harshly for his “active role as a commander of the Jokers,” the Jokers being a special unit of the military police responsible for the atrocities in issue in that case. In the Čelebići Case, the Appeals Chamber decided that in certain circumstances the gravity of the crime might be so great that a very severe penalty is to be imposed in spite of

---

198 Rutaganira, supra note 13, ¶¶ 137–38.
200 Erdemović, supra note 11, ¶¶ 15, 20, 53; see also Delalić, supra note 7, ¶ 1281 (declining to take superior orders into account as a mitigating factor because the accused executed the orders without reluctance and in fact took some pleasure in the infliction of pain and suffering on the victims).
201 ICC Statute, supra note 1, art. 33.
202 See, e.g., King & La Rosa, supra note 8, at 335.
203 Furundžiya, supra note 25, ¶ 281.
204 Id., ¶ 282.
205 Id., ¶ 283.
the fact that the accused did not occupy a senior position in the overall command structure.\footnote[206]{Delalić, supra note 34, ¶ 847; see also Kanarać, supra note 5, ¶ 858; Vasiljević, supra note 80, ¶ 301; Banović, supra note 6, ¶ 45; Češić, supra note 9, ¶ 32.}

In the second sentencing judgment in the case of Erdemović, the ICTY accepted duress as an extenuating circumstance, describing the accused as “the helpless victim” with “no choice in taking part in the Srebrenica operations,” but also at times risking his life by breaking out of “this chain of helplessness” and actually refusing to kill some members of the target group.\footnote[207]{Erdemović, supra note 25, Sentencing Judgment, ¶ 17; see also Erdemović, supra note 11, Sentencing Judgment, ¶¶ 16-20, 54, 89; Delalić, supra note 34, ¶ 1283; Rutaganira, supra note 13, ¶ 161.} In Prosecutor v. Blaškić, a Trial Chamber of the ICTY observed that duress can only be considered as an extenuating circumstance if the convicted person “had no choice or moral freedom in committing the crime.”\footnote[208]{Blaškić, supra note 1, ¶ 769; see Omar Serushago v. Prosecutor, Case No. ICTR-98-39-A, ¶ 27 (Apr. 6, 2001) (The Appeals Chamber of the ICTR not accepting duress as an extenuating circumstance because it was neither alleged nor proven at trial.).} It should be noted that duress deriving from superior orders can in exceptional circumstances be so severe as to leave the subordinate without any freedom of choice, in which event it would not only serve as an extenuating circumstance but become a ground of justification that would warrant a finding of not guilty.

The judgment of the Trial Chamber in Prosecutor v. Blaškić also makes instructive reading in the present context:

The fact that the accused did not directly participate may be taken as a mitigating circumstance when the accused held a junior position within the civilian or military command structure. However, the Trial Chamber considers that the fact that commanders . . . played no direct part cannot act in mitigation of the sentence when found guilty.\footnote[209]{Blaškić, supra note 1, ¶ 768; see also Vasiljević, supra note 137, ¶¶ 301-05 (deciding that the fact that the accused was a low-level offender did not alter the seriousness of his crime).}

Theories of retribution are mostly founded on the premise that “offenders deserve to suffer and that the institution of punishment should reflect the suffering they deserve.”\footnote[210]{Bagarić & Amarasekara, supra note 18, at 127.} Retributive theories assert that “punishment must be equivalent to the level of wrongdoing.”\footnote[211]{See id. at 157.}

In undiluted form, retribution may be likened to retaliation, or punishment in kind. Based on the teachings of the celebrated mathematician, Pythagoras (circa 540–504 B.C.), the lex talionis accordingly required an arithmetical
equilibrium between the wrongful act and retributive punishment in accordance with the classical adage: “an eye for an eye, and a tooth for a tooth.” This approach was characteristic of “primitive” societies, where the kind and measurements of punishment were exclusively based on the nature and gravity of the criminal act. As noted by one analyst, “no one regards raping a rapist, or torturing a torturer, as appropriate punishment today.” The idea of retribution being a matter of retaliation, or at least remnants of that idea, regrettably, still lingers on in many contemporary systems of criminal law, and in the minds of many people. When an outraged community calls for justice, they mostly seek revenge.

But retribution is not revenge. The harm suffered which triggered acts of revenge are not necessarily wrongful acts in the legal sense; revenge is not necessarily commensurate with the harm caused by the act being revenged; a revenge-inspired act does not set a precedent for similar responses to the same kind of harmful acts; the victims of revenge are not necessarily confined to the person whose conduct sparked the retaliatory response, but could for example include a spouse, child or relative of that person; the person taking revenge often derives pleasure from suffering of the other; and revenge is personal in the sense that the avenger is typically the person wronged.

To be “just deserts,” retribution—as we have seen—must be “proportional to the gravity of the crime and the moral guilt of the convicted.” The “just desert” theory “places the requirement of justice, rather than the pursuit of crime prevention, at the foundation of the general justification for criminal sanctions.” That is to say, judicial response to a criminal act must be conditioned by the demands of retributive justice, which, among other things, make criminal liability dependent on the subjective culpability or blameworthiness of the accused. Retributive justice requires (a) making a
conviction for criminal conduct dependent on fault in the form of dolus (intent) or culpa (negligence) on the part of the perpetrator; and (b) taking into account, for sentencing purposes, reduced culpability of the offender.\textsuperscript{220}

The Rules of Procedure and Evidence accordingly instruct the ICC to take into account for purposes of sentencing “the degree of intent” of the person concerned.\textsuperscript{221} Committing the crime “knowingly and with premeditation” therefore deserves to be severely punished.\textsuperscript{222}

The Rules of Procedure and Evidence mention in their list of mitigating circumstances those “falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.”\textsuperscript{223} Requiring that diminished mental capacity must be “substantial” is perhaps unfortunate, since every manifestation of reduced culpability, provided it is real, should serve as a consideration for the reduction of sentence. Grounds for reduced culpability include subjective attributes of the perpetrator which do not altogether exclude his or her capacity to form a criminal intent or negligent disposition but nevertheless diminished his or her ability to appreciate the wrongfulness of the criminal act or to act in accordance with that insight.

It should in the present context be emphasized that personal attributes of the accused do not in all instances have an impact on mens rea but could still serve as extenuating or aggravating factors for sentencing purposes. In Prosecutor v. Furundžiya, for example, the Tribunal was not concerned with the question of reduced culpability when considered the young age of the accused (23 years at the time the offence was committed) to be a mitigating circumstance.\textsuperscript{224} Mental capacity per se was also not the issue when the Trial Chamber, in Prosecutor v. Goran Jelesić, decided that “Judges cannot accord too great a weight” to personal attributes of the convicted person, such as age (he was twenty-two years old when the crime was committed), no previous convictions for any violent crime, and being the father of a young child,\textsuperscript{225} and, perhaps more puzzling, that the fact the he suffered from “personality disorders, [and] had borderline

derives from (a) the actus reus (harmfulness of the offence), and (b) mens rea (culpability of the offender)); Peglau, supra note 2, at 143 (noting that “the sentence must not exceed the culpability of the criminal”).

\textsuperscript{220} Peglau, supra note 2, at 143, 147.

\textsuperscript{221} RPE, supra note 86, Rule 145(1)(c); see also King & La Rosa, supra note 8, at 332 (including under the rubric of gravity of the offence, the “types of intent”).

\textsuperscript{222} See Kambanda, supra note 9, ¶ 61.

\textsuperscript{223} RPE, supra note 86, Rule 145(2)(a)(i).

\textsuperscript{224} Furundžiya, supra note 25, ¶ 283; see also Serushago, supra note 33, ¶ 39 (where the convicted person was thirty-seven years old at the time the crime was committed).

\textsuperscript{225} Jelisić, supra note 80, ¶ 124.
narcissistic and anti-social characteristics” did not diminish his criminal responsibility.226

In Prosecutor v. Todorović, conflicting reports of psychiatrist as to the alleged post-traumatic stress disorder of the accused were presented to the Trial Chamber. This is a matter of mens rea. The Tribunal proceeded on the assumption that the onus rested on the accused to prove on a balance of probabilities his or her grounds of diminished culpability,227 and consequently declined to take the mental condition of the accused into account as a ground in mitigation of sentence.228 It must be emphasized, with acclamation, that the ICC cannot possible follow this same approach. In terms of the ICC Statute, an accused has the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”229 If the accused should raise any of the grounds of diminished culpability, the onus to disprove the same rests squarely on the Prosecutor and the Trial Chamber must be satisfied, above reasonable doubt, that the grounds relied on by the accused did not exist at the time the crime was committed.

IV. EXTENUATING AND AGGRAVATING CIRCUMSTANCES

When one considers the gravity of a crime and conduct of the perpetrator as components of the concept of retribution, their impact on sentencing already emerges. It is perhaps wrong to think of the impact of the nature of the crime and the means of perpetration of the person concerned on sentencing in terms of extenuating or aggravating circumstances. Here the nature and magnitude of a particular sentence derives from considerations inherent in the crime as such as conditioned by culpability of the Accused on the basis of retributive justice.

The same is true in regard to the general functions of punishment, which in a very limited sense might influence a sentencing judge to decide on a particular kind and measure of punishment to be imposed. Extenuating and aggravating circumstances embrace additional factors attending the commission of a crime, not part of the criminal act per se, which ought to influence the decision to impose a lighter or a heavier sentence, as the case might be.230 That, perhaps, is what the ICTY had in mind when it proclaimed that “[m]itigation of punishment

226 Id., ¶ 125.
227 Todorović, supra note 10, ¶ 93; see also Delalić, supra note 7, ¶ 1172.
228 Todorović, supra note 10, ¶ 95.
229 ICC Statute, supra note 1, art. 67(1)(c)(i).
230 See Stakić, supra note 9, ¶ 920 (noting that “mitigating circumstances may also include those not related to the offence”); see also Nikolić, supra note 34, ¶ 145; Deronjić, supra note 9, ¶ 155.
in no way reduces the gravity of the crime or the guilty verdict against a convicted person."231

Since the same factor can warrant a lighter or a heavier sentence, it is perhaps inappropriate to put a particular factor in the one, and the other in another basket.232 Proposals to this effect were not accepted by the Preparatory Commission of the ICC responsible for the drafting of the Rules of Procedure and Evidence.

In Prosecutor v. Erdemović, the Trial Chamber distinguished between mitigating circumstances that existed at the time the crime was committed and those that emerged after the crime was committed.233 This distinction is of value for purposes of classification only. The suggestion that it might have been intended to separate the ones that have an influence on the gravity of the offence from those that do not,234 is not tenable. Some of the extenuating and aggravating circumstances that existed at the time the crime was committed are quite unrelated to the severity of the crime.

There is an important aspect of the Todorović judgment which merits special attention and should be emphasized before particular extenuating and aggravating circumstances can be scrutinized in greater detail. In cases where a factor that might be considered as an aggravating circumstance constitutes an element of the crime, it should not be treated separately as an aggravating circumstance.235 It therefore makes no sense to proclaim as a supposed aggravating circumstance for sentencing purposes that the convicted person

231 Ruggiu, supra note 28, ¶ 80; Kambanda, supra note 9, ¶¶ 37, 56; see also Deronjić, supra note 9, ¶ 224.
232 See Peglau, supra note 2, at 146.
233 Erdemović, supra note, ¶ 86.
234 See Nemitz, supra note 3, at 608.
“knowingly and consciously,” or “voluntarily,” participated in the commission of the crime, since intentional and voluntary perpetration are already included in the concept of fault as an element of criminal liability.

In the case of persecution, for example, a discriminatory intent is a basic element of the crime and should therefore not be given additional weight for purposes of sentencing; and the same applies to the fact that the crime was committed against members of the civilian population. A discriminatory intent can be considered an aggravating factor of crimes against humanity other than persecution, for example in the case of murder as a crime against humanity. It has therefore also been decided that premeditation should not be taken into account for purposes of sentencing upon a conviction for crimes against humanity.

It is on the other hand quite feasible and appropriate to take willing participation in the crime, or premeditation, into account as an aggravating circumstance. Premeditation is the opposite of spontaneity. If a person commits a crime after having considered the consequences of his or her act, he or she is clearly more blameworthy than someone who acts on the spur of the moment.

It simply remains to state, by way of introduction, that the weight to be afforded to aggravating and extenuating circumstances is within the discretion of the Sentencing Tribunal. The burden of proof of aggravating circumstances

---

236 Rutaganda, supra note 61, ¶ 50; see also Prosecutor v. Serushago, ICTR 98-39-S, Sentence, ¶ 30 (Feb. 5, 1999).
238 See Schabas, supra note 25, at 1525.
239 Prosecutor v. Todorović, Todorović, supra note 143, ¶ 57.
241 Vasiljević, supra note 235, at ¶¶ 173.
245 Delalić, supra note 244, ¶¶ 777, 780; Momir Nikolić, supra note 235, ¶ 125; Dragan Nikolić, supra
is on the Prosecutor, while the burden of proof in respect of mitigating circumstances is on the Defense.\(^{246}\) It is also important to note that the *ad hoc* tribunals require that aggravating circumstances be proven beyond reasonable doubt,\(^{247}\) while mitigating circumstances require no more than proof on a balance of probabilities.\(^{248}\) In *Prosecutor v. Češić*, the Sentencing Tribunal could not conclude on a balance of probabilities that the accused was of a good character,\(^{249}\) and therefore did not give him the credit due to a convicted person of good character. The Sentencing Tribunal seemingly based its decision on the typical Anglo-American legal arrangement which places the burden of proof in respect of mitigating circumstances on the accused.\(^{250}\) One might well wonder how the burden of proof with regard to mitigating circumstances will play itself


\(^{246}\) Kunaraće, supra note 235, ¶ 847; Stakić, *supra* note 235, ¶ 406.


\(^{249}\) Češić, *supra* note 235, ¶ 87.

\(^{250}\) See Kajelijeli, *supra* note 247, ¶ 294 (noting that the burden of proof with the regard to mitigating circumstances is on the accused).
out in jurisprudence of the ICC, given the express provision in the ICC Statute that a person standing trial in the ICC will under no circumstances “have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.” It is submitted that this provision applies only to material elements of a crime, and since mitigating factors are not elements of the crime as such, the ICC will most likely follow the approach of the ad hoc Tribunals and require an accused to prove mitigating factors relied upon on a balance of probabilities.

It is also worth noting that the weight to be attached to mitigating circumstances is discretionary; and that absence on mitigating circumstances can never serve as an aggravating circumstance.

The Rules of Procedure and Evidence mention the following circumstances that must be taken into account for purposes of punishment and which in essence fall under the present heading as defined for purposes of this survey:

In general, the age, education, social and economic conditions of the convicted person;

As an aggravating circumstance, prior convictions for crimes within the jurisdiction of the ICC or of a similar nature; and

As a mitigating circumstance, the convicted person’s conduct after the act, including his or her efforts to compensate victims and any cooperation with the Court.

A. Circumstances Existing at the Time the Offence was Committed

The following extenuating or aggravating circumstances may be singled out as ones that existed at the time the offence was committed.

1. Individual Circumstances of the Accused

According to Faiza King & Anne-Marie La Rosa, personal circumstances should mainly be confined to factors that enable the perpetrator to commit the particular crime, such as his or her position in the military or civilian

---

251 Rome Statute, supra note 1, art. 67(1)(i).
253 Blaškić, supra note 242, ¶ 687; Prosecutor v. Plavšić, IT-00-39&40/1-S, Sentencing Judgment, ¶ 64 (Feb. 27, 2003).
254 RPE, supra note 86, Rule 145(1)(c).
255 Id. Rule 145(2)(b)(i).
256 Id. Rule 145(2)(a)(ii).
hierarchy. The *Rules of Procedure and Evidence* go well beyond these confines and explicitly mention the age, education, and social and economic conditions of the convicted person, which, it would seem, can serve as either mitigating or aggravating circumstances.

One is not concerned with personal attributes of the Accused that may be indicative of reduced culpability. The *Rules of Procedure and Evidence*, quite rightly, deal separately with “the degree of intent” and “diminished mental capacity”, which constitute, within the meaning of this survey, sentencing factors of the offence.

Individual (subjective) circumstances of the accused—such as age, background, education, intelligence, and mental structure—received special prominence in the sentencing directives of the ICTR in the case of *Kambanda*. In *Prosecutor v. Furundžiya*, the young age of the accused (twenty-three years at the time the offence was committed) was taken into account as a mitigating circumstance. In *Prosecutor v. Serushago*, the ICTR accepted as a mitigating factor the fact that the convicted person was the father of six children, two of whom were still very young. In *Prosecutor v. Vinvent Rutaganira*, the Trial Chamber held the old age of the accused (sixty years) and the state of his health (he suffered from diabetes and was in poor health) are factors to be taken into account by the Chamber in determining the sentence. In *Prosecutor v. Biljana Plavšić*, the fact that until the time of the offence the accused was known to have

257 King & La Rosa, *supra* note 8, at 322–23, 332.
258 *RPE*, *supra* note 86, Rule 145(1)(e).
259 Id.
260 Id. Rule 145(2)(a)(ii).
262 *Prosecutor v. Furundžiya*, IT-95-17/1-T, Judgment, ¶¶ 284, 291 (Dec. 10, 1998); *see also* Erdemović, *supra* note 243, ¶ 16(i) (where the convicted person was twenty-three years old at the time the crime was committed); Delalić, *supra* note 244, at ¶ 1283 (where the convicted person was nineteen years old at the time the crime was committed); Serushago, *supra* note 236, ¶ 39 (where the convicted person was thirty-seven years old at the time the crime was committed); *Prosecutor v. Serugendo*, ICTR-2005-84-I, Judgment, ¶ 91 (Int’l Crim. Trib. For Rwanda June 12, 2006).
263 Serushago, *supra* note 236, ¶ 39; *see also* Erdemović, *supra* note 243 (referring to the convicted person’s “current family status”); Furundžiya, *supra* note 262, ¶ 280 (noting, though, ¶ 284, that this factor must not be given “significant weight”); Banović, *supra* note 235, ¶ 82 (taking into account that the accused is married and has a child); Obrenović, *supra* note 235, ¶ 139 (noting that the accused was married to an economist and is the father of a six-year old boy); *Prosecutor v. Rutaganira*, ICTR-95-1C-T, Judgment, ¶¶ 120–21 (Int’l Crim. Trib. For Rwanda Mar. 14, 2005) (noting that being the father of nine children and having a wife who has become deputy mayor in charge of women’s development in her commune, “augurs well for the potential rehabilitation of the Accused into a local community and his joining the national reconciliation process”).
“led an honest, honourable and private family, professional and social life was taken into account in mitigation of sentence.”265

In Prosecutor v. Goran Jelesić, the Tribunal decided that “Judges cannot accord too great a weight” to personal attributes of the convicted person, such as age (he was twenty-three years old when the crime was committed), no previous convictions for any violent crime, and being the father of a young child.266 On appeal, focusing only on the element of age, the Appeals Chamber recognized that age is an element that should be considered for sentencing purposes,267 but since all that is required was for the Trial Chamber to consider the age of the accused, which it did,268 the appeal on this ground was dismissed.

Emphasis in jurisprudence of the ICTY and ICTR on age as a mitigating factor has been criticized by one analyst, denouncing for example the verdict in Furundžiya, referred to above,269 as “a strange decision, as clearly at the age of 23, the accused is old enough to be aware that his offences were unlawful,”270 or noting that in Kayishema & Ruzindana, where Rizindana was thirty-two years old,271 the ICTR “gave a ridiculously wide interpretation to the term youth.”272 The same analyst, on the other hand, applauded a prison sentence of fifteen years (instead of five as requested by the Defence) in the case of Esad Landžo (an Accused in the Case who was nineteen years old at the relevant time) praiseworthy, since it “prevented the Accused from exploiting the excuse of age as a way of avoiding full accountability for his crime.”273 This line of reasoning is misleading, since the age of an accused was but one of several sentencing

---

265 Plavšić, supra note 253, at ¶ 108.
266 Prosecutor v. Jelisić, IT-95-10-T, Judgment, ¶ 124 (Dec. 14, 1999); see also Furundžiya, supra note 262, at ¶ 284 (saying the same in regard to absence of previous convictions and the family disposition of the convicted person); Obrenović, supra note 235, at ¶ 140 (noting that in view of the gravity of the crime, the family circumstances of the accused cannot be afforded any significant eight); Momir Nikolić, supra note 235, at ¶ 169–170 (deciding that family circumstances, such as the accused being a teacher, was married and had two sons can be said of many accused persons and should not be given any significant weight); Gatete, supra note 235, at ¶ 681 (proclaiming that, given the gravity of the crimes committed, the Trial Chamber can only accord “very limited weight” to the lengthy public service, family situation and health condition of the accused).
267 Jelisić, supra note 6, ¶¶ 129, 131; see also Erdemović, supra note 243, ¶ 16; Furundžiya, supra note 262, ¶ 284; Blaškić, supra note 242, ¶ 778; Kunarač, supra note 235, ¶ 864; Prosecutor v. Kordić & Čerkez, supra note 54, ¶ 853; Banović, supra note 235, ¶ 75; Dragan Nikolić, supra note 235, ¶ 146; Deronjić, supra note 235, ¶ 124.
268 Jelisić, supra note 6, ¶ 131.
269 Supra note 262 and accompanying text.
270 Olaoluwa Olusanya, Granting Immunity to Child Combatants Supranationally, in SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW 87, 106 (Roelof Haveman & Olaoluwa Olusanya eds., 2006).
272 Olusanya, supra note 271, at 107.
273 Id. at 105.
factors taken into account by the sentencing tribunals. In cases where the Accused was young but not so young (say in his thirties), age was considered for sentencing purposes, not as a mitigating circumstance in itself, but with a view to the chances of rehabilitation of the convicted person.274 In Prosecutor v. Češić, the Sentencing Tribunal declined to accept the age of twenty-seven years as a mitigating factor since the accused was “well beyond the age of majority.”275 In Prosecutor v. Plavšić, the question whether being a senior (seventy-two years old) should serve as a mitigating factor was considered. The Tribunal stated that there was no authority in ICTY jurisprudence as to the effect of an advanced age on sentencing,276 but decided that an advanced age is a sentencing factor for two reasons: (a) physical deterioration that comes with age; and (b) the fact that the convicted person may have little worthwhile time left to live for upon her release.277 The advanced age of the convicted person was therefore accepted by the Sentencing Tribunal as a mitigating factor278 Sensitivity of the ad hoc Tribunals to age for sentencing purposes must indeed be applauded, since tender age and being not so young are in themselves mitigating factors.

Other personal circumstances that have featured in judgments of the ad hoc Tribunals’ sentencing directives are a poor family background,279 physical and mental condition,280 poor health,281 indigence,282 a mediocre level of education,283 an immature and fragile personality,284 a corrigible personality favorable to rehabilitation,285 not being a danger to society,286 the work record

274 See Kayishema & Ruzindana, supra note 25, at ¶ 12 (noting that for sentencing purposes it considered “the relatively young age of Ruzindana (thirty-two years old in 1994) and the possibility of rehabilitation”); Blaškić, supra note 235, ¶ 778 (noting that “[t]he case-law of the two ad hoc Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance”).

275 Češić, supra note 9, ¶ 91.

276 Plavšić, supra note 61, ¶ 103; Knojelac, supra note 235, ¶ 533. In Prosecutor v. Knojelac, the Sentencing Tribunal did mention the accused’s age as a “final matter to which the Trial Chamber has had regard in sentencing.”

277 Plavšić, supra note 61, ¶ 105.

278 Id. at ¶ 106.

279 Delalić, supra note 7, ¶ 1283; see also Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(i); Serushago, supra note 208, ¶ 24; Serugendo, supra note 147, ¶ 91 (simply mentioning the family position of the convicted person).

280 Erdemović (Sentencing Judgment), supra note 11, ¶ 44; see also Todorović (Sentencing Judgment), supra note 10, ¶ 93–95 (dealing with the diminished mental capacity of the convicted person).

281 Rutaganda, supra note 61, ¶ 50, 472; Serugendo, supra note 147, ¶ 92, 94; Rutaganira, supra note 13, ¶ 133, 135-36.

282 Tadić (Sentencing Judgment), supra note 96, ¶ 62.

283 Ruggiu, supra note 28, ¶ 61.

284 Delalić, supra note 7, ¶ 1283; see also Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(i) under family background; Jelisić (T), supra note 80, ¶ 125 (mentioning personality disorders).

285 Erdemović (, supra note 11, ¶ 111.

286 Id.
of the convicted person, being non-nationalistic (that is, to one’s credit, not entertaining sectional biases in a highly polarized plural society), and finally, having to serve a prison sentence far from home.

Emphasis has also been placed, in extenuation, on the general nicety of a convicted person, for example: being “an honest and respectable citizen;” or being inspired by a sense of justice; being an idealist, being immature and impulsive, having worked in the local branch of the Red Cross; assisting foreigners, the underprivileged and illiterate persons in the region; and rendering assistance to young students. Having “an honest character” and being “an easygoing young man showing no signs of bigotry or intolerance, with a desire to help others in difficulty,” was also considered in mitigation of sentence. While a good character was mentioned as an extenuating circumstance in several judgments of the ad hoc Tribunals, in most cases little weight was given to the character of a convicted person for purposes of sentencing.

2. Prior Convictions

The Rules of Procedure and Evidence mention, as an aggravating circumstance, “[a]ny relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature.” Although not mentioned in the Rules of Procedure and Evidence, it stands to reason that the absence of any prior convictions for such crimes should be taken into account in mitigation of the sentence. That, in any event, appears from several judgments of the ad hoc Tribunals.

---

287 Tadić (Sentencing Judgment), supra note 96, ¶ 63.
288 Erdemović, supra note 11, ¶ 105–08; see also Furundžiya, supra note 25, ¶ 280.
289 Erdemović, supra note 11, ¶ 111.
290 Ruggiu, supra note 28, ¶ 59; see also Serugendo, supra note 147, ¶ 91.
292 Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(i) (under Character). As to the commendable character of a convicted person as a mitigating factor, see also Kunarać, supra note 5, ¶ 478; Nikolić, supra note 80, ¶ 164.
293 Aleksovski, supra note 9, ¶ 236; Blaškić, supra note 1, ¶ 779–82; Kupreškić, supra note 9, ¶ 459; Krnojelać, supra note 14, ¶ 519; Ntakirutimana, supra note 90, ¶ 895, 906; Momir Nikolić, supra note 80, ¶ 164; Obrenović, supra note 9, ¶ 134; Semanza, supra note 147, ¶ 397; Sylvestre Gacumbitsi v. The Prosecutor, Case No ICTR-2001-64-A, ¶ 195 (July 7, 2006).
294 Kunarać, supra note 153, ¶ 33; Blaškić, supra note 1, ¶ 782; Ntakirutimana, supra note 90, ¶ 908; Stakić, supra note 9, ¶ 926; Niyitegeka, supra note 129, ¶ 264–66; Semanza, supra note 147, ¶ 398; Seromba, supra note 186, ¶ 235.
295 RPE, supra note 86, Rule 145(2)(b)(i).
296 Tadić (Sentencing Judgment), supra note 96, ¶ 63; Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(i), under the heading, Character; Kambanda, supra note 9, ¶ 45; Furundžiya, supra note 25, ¶ 280, 284; Aleksovski, supra note 11, ¶ 236; Jelisić (T), supra note 80, ¶ 124; Blaškić, supra note 1, ¶ 780; Banović,
In *Prosecutor v. Kordić*, the Trial Chamber noted, on the other hand, that “it will be rare” for personal circumstances, such as character, no previous convictions, poor health, and youth, to play “a significant part” in mitigation of a sentence.\(^{297}\) In *Prosecutor v. Furundžiya*, the Trial Chamber decided that the fact that the accused had no previous convictions and was the father of a young child “[could not] be given significant weight in a case of [that] gravity.”\(^{298}\)

### B. Conduct of the Convicted Person after the Event

As far as the convicted person’s conduct after the criminal act is concerned, the *Rules of Procedure and Evidence* mention two examples, namely “efforts by the person to compensate the victims” and “any co-operation with the Court.”\(^{299}\) Judgments of the *ad hoc* Tribunals more generously laid special stress on co-operation by the accused with the Prosecutor, a guilty plea, regret and remorse.

#### 1. Co-operation with the Court

The *Rules of Procedure and Evidence* of the ICC mention, as a mitigating circumstance, “co-operation with the Court,”\(^{300}\) while the *Rules of Procedure and Evidence* of the ICTY and of the ICTR expressly provide that “substantial co-operation with the Prosecutor by the convicted person” is to be taken into account as an mitigating circumstance.\(^{301}\) Co-operation with the Prosecutor must, thus in terms of the latter set of Rules, be “substantial.”\(^{302}\) Substantiality of co-operation will depend in part on “the extent and quality of the information provided to the Prosecution.”\(^{303}\) In *Prosecutor v. Mitar Vasiljević*, a Trial

---

\(^{297}\) Kordić, supra note 54, ¶ 848.

\(^{298}\) Furundžiya, supra note 25, ¶ 284; see also Banović, supra note 6, ¶ 76.

\(^{299}\) RPE, supra note 86, Rule 145(2)(a)(ii).

\(^{300}\) Id.


\(^{302}\) Vasiljević, supra note 80, ¶ 179.

\(^{303}\) Todorović (Sentencing Judgment), supra note 10, ¶ 86; see also Sikirica, supra note 80, ¶ 111; Plavšić, supra note 61, ¶ 63; Banović, supra note 6, ¶ 58; Češić, supra note 9, ¶ 62; Deronjić, supra note 9, ¶ 244.
Chamber of the ICTY found that cooperation with the Prosecutor was only “modest” but did deserve some, albeit very little, weight.304

In several of their judgments, the ICTY305 and the ICTR306 looked favorably upon substantial co-operation with the Prosecutor. Voluntary surrender was specially mentioned, to the convicted person’s credit, in Prosecutor v. Serushago.307 In Prosecutor v. Obrenović, the Sentencing Tribunal attached “little weight” to an offer by the Accused to surrender when he was arrested, because it was not clear whether he would have surrendered voluntary if his arrest was not imminent.308

In Prosecutor v. Blaškić, the Trial Chamber laid down the conditions under which co-operation with the Prosecutor will qualify as mitigating factors:

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 on the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Provided that the co-operation lent respects the aforesaid requirements, the Trial Chamber classes such co-operation as a “significant mitigating factor[.]”309

In Prosecutor v. Deronjević, the Sentencing Tribunal decided, on basis of a guilty plea and substantial co-operation, that “a substantial reduction of the sentence deserved for the crime is warranted.”310 Expecting nothing in return would mean that a plea agreement cannot be accepted as co-operation.311 In the Čelebići Case, the Trial Chamber of the ICTY

---

304 Vasiljević, supra note 137, ¶ 299; endorsed on appeal in Vasiljević, supra note 80, ¶ 180.
305 Erdemović (Sentencing Judgment), supra note 11, ¶¶ 99–101; Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(i), under the heading, Character, ¶ iv, 21; Todorović (Sentencing Judgment), supra note 10, ¶¶ 83–88; Plavšić, supra note 61, ¶ 109; Obrenović, supra note 9, ¶¶ 122, 129, 141; Deronjić, supra note 9, ¶ 156; Serushago, supra note 147, ¶ 91.
306 Kayishema, supra note 25, at Sentence ¶ 20; Kambanda, supra note 9, ¶¶ 36, 47, 61(i); Serushago, supra note 53, ¶¶ 31–33, 38, 41; Ruggiu, supra note 28, ¶¶ 56–58; Musema, supra note 107, ¶ 1007; Serushago, supra note 208, ¶ 24.
307 Serushago, supra note 33, ¶¶ 34, 41; see also Erdemović, supra note 11, ¶ 55; Kayishema, supra note 25, ¶ 20; Kupreškić, supra note 9, ¶¶ 853, 860, 863; Blaškić, supra note 1, ¶ 776; Kunarač, supra note 5, ¶ 868; Serushago, supra note 208, ¶ 24; Kupreškić, supra note 9, ¶ 430; Plavšić, supra note 61, ¶¶ 65, 84, 110; Obrenović, supra note 9, ¶¶ 136, 141; Deronjić, supra note 9, ¶¶ 156, 266; Rutaganda, supra note 61, ¶ 145.
308 Obrenović, supra note 9, ¶ 111; see also Deronjić, supra note 9, ¶ 267.
309 Blaškić, supra note 1, ¶ 774.
310 Deronjić, supra note 9, ¶ 276.
311 Contra Schabas, supra note 73, at 497 (stating that if an admission of guilt is to be a mitigating factor,
altogether rules out an attempt at plea bargaining as a mitigating factor.312 In the case of Duško Tadić, the Trial Chamber found that although there was “some degree of co-operation” by the accused with the Prosecutor, it did not live up to the standard of “substantial co-operation” and should therefore not be taken into account for sentencing purposes.313 Although substantial co-operation with the prosecutor serves as a mitigating factor, failure of an accused to co-operate is not necessarily an aggravating factor,314 because an accused has the right to be presumed innocent and can reap the benefit of the fact that the burden of proof rest squarely on the shoulders of the prosecution.

2. Admission of Guilt

An admission of guilt is not expressly mentioned in the ICC’s Rules of Procedure and Evidence as a mitigating factor, probably because of differences of opinion between proponents of the adversarial and the inquisitorial procedures as to the significance of such a plea.315 It could, of course, come within the general confines of co-operation with the Court,316 but has been mentioned in judgments of the ad hoc Tribunals as an extenuating circumstance alongside co-operation with the Court.317

In Erdemović, the Trial Chamber of the ICTY had this to say about an admission of guilt:

An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International

---

312 Delalić, supra note 7, ¶ 1280.
313 Tadić (Sentencing Judgment), supra note 8, ¶ 19; see also Tadić (Sentencing Judgment), supra note 96, ¶ 58 (noting that the convicted person did not co-operate and denied his guilt).
314 Plavšić, supra note 61, ¶ 64; Banović, supra note 6, ¶ 61; Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, Judge and Sentence ¶ 127 (Apr. 13, 2006); Gatetic, supra note 78, ¶ 680.
315 France and Rwanda were among those who believed that an admission of guilt should not be taken into account for sentencing purposes. See Schabas, supra note 25, at 1526 note 193.
316 See Peglau, supra note 2, at 148.
317 Serushago, supra note 208, ¶ 24; see also Erdemović (Sentencing Judgment), supra note 11, ¶ 55; Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(ii); Kambanda, supra note 9, ¶¶ 36, 50, 52, 61(iii); Serushago, supra note 33, ¶¶ 35, 41; Kayishema, supra note 25, at Sentence ¶ 20; Ruggiu, supra note 28, ¶¶ 53–55; Jelisić (A), supra note 80, ¶ 122; Todorović (Sentencing Judgment), supra note 10, ¶ 76; Sikirica, supra note 80, ¶¶ 148–51, 192–93, 228; Kupreškić, supra note 9, ¶ 464; Plavšić, supra note 61, ¶¶ 65, 66–81, 110; Banović, supra note 6, ¶¶ 62, 68; Obrenović, supra note 9, ¶¶ 111–18, 141; Nikolić, supra note 35, ¶¶ 146, 232–37; Češić, supra note 9, ¶ 60; Deronjić, supra note 9, ¶ 156; Serugendo, supra note 147, ¶¶ 89, 91.
Tribunal the time and effort of a lengthy investigation and trial is to be commended.318

In Prosecutor v. Momir Nikolić, the Sentencing Tribunal cautioned against affording “undue consideration or importance to the role of a guilty plea to saving of resources.”319 The Tribunal referred to a strongly worded dissenting opinion of Judge David Hunt, in the case against Slobodan Milošević, relating to the admissibility of evidence in the form of written statements, which was seemingly resorted to by the ICTY to comply with the Completion Strategy imposed upon the ad hoc Tribunals by the Security Council.320 According to Judge Hunt, the ICTY “will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.”321 In Momir Nikolic, the Sentencing Tribunal stated along much the same lines that “savings of time and resources may be a result of guilty pleas,” but “should not be the main reason for promoting guilty pleas through plea agreements.”322 An appropriate sentence must primarily be based on the gravity of the offence and not on a guilty plea.323

In Todorović, the Trial Chamber added to the benefits of an admission of guilt mentioned in Erdemović the fact that it “relieves victims and witnesses of the necessity of giving evidence with the attendant stress which this may incur,”324 but also noted that to derive all the benefits concerned that would prompt a lighter sentence, the admission of guilt must be entered before commencement of the trial and in any event not at a late stage of the

318 Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(i) (under Character); see also Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 2; Todorović (Sentencing Judgment), supra note 10, ¶ 80; Plavšić, supra note 61, ¶ 73; Banović, supra note 6, ¶¶ 66, 68; Nikolić, supra note 80, ¶ 151; Obrenović, supra note 9, ¶ 118; Dragan Nikolić, supra note 35, ¶¶ 121, 231; Deronjić, supra note 9, ¶ 234 see also id., ¶ 134 (the Sentencing Tribunal noting that “[a]s a side effect, albeit not a significant mitigating factor, it [a guilty plea] also saves the Tribunal’s resources’’); Češić, supra note 9, ¶ 56, 59.

319 Nikolić, supra note 80, ¶ 67.


321 Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73-A, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ¶ 22 (Oct. 21, 2003); see also Prosecutor v. Pauline Nyiramasuhuko, Case No. ICTR-98-42-A15bis, ¶ 17 (Sep. 24, 2003).

322 Momir Nikolić, supra note 80, ¶ 67.

323 Id., ¶ 69.

324 Todorović, supra note 10, ¶ 80. See also id., ¶ 92 (accepting remorse, a guilty plea and co-operation with the Prosecutor as mitigating factors); Banović, supra note 6, ¶ 66; Nikolić, supra note 80, ¶ 150; Obrenović, supra note 9, ¶ 117; Nikolić, supra note 34, ¶¶ 121, 231; Deronjić, supra note 9, ¶ 134 (noting that “[a] guilty plea protects victims from having to relive their experiences and re-open old wounds”); Češić, supra note 9, ¶¶ 56, 58.
proceedings. The importance of the timing of a guilty plea was also emphasized in *Prosecutor v. Sikirica*. In *Prosecutor v. Milan Simić*, the Sentencing Tribunal afforded “some credit” to a guilty plea despite its lateness. In the *Delalić Case*, the Trial Chamber refused to accept a “belated partial admission of guilt” as a mitigating factor. In the *Case of Duško Tadić*, the Trial Chamber took a grim view of the fact that the accused falsely asserted an alibi and denied his guilt.

In *Kambanda*, the Trial Chamber reiterated that an admission of guilt demonstrates honesty, and added that a guilty plea “is likely to encourage other individuals to recognize their responsibilities during the tragic events which occurred in Rwanda in 1994.” The Tribunal did note that a guilty plea does not necessarily mean remorse. Other deserving attributes of a guilty plea are its contribution to establishing the truth, its potential of promoting reconciliation within a strife-torn community, and its being an important step toward rehabilitation of the accused and his or her re-integration in society.

It is one thing to say that an admission of guilt should count as a mitigating factor; it is quite another to hold a plea of not guilty as an aggravating factor. There is also a difference between persistently denying one’s guilt and entering a plea of not guilty. Pleading not guilty and leaving it up to the Prosecutor to prove one’s guilt beyond reasonable doubt is a recognized right of every person confronting criminal charges, and that right is founded on the presumption of innocence which in turn is a salient principle of criminal justice. Aggravation

---

325 Todorović, supra note 10, ¶ 81. See also Momir Nikolić, supra note 80, ¶ 148; Češić, supra note 9, ¶ 56; Rutaganira, supra note 13, ¶ 151–52.
326 Sikirica, supra note 80, ¶ 150. See also Nikolić, supra note 34, ¶ 231; Deronjić, supra note 9, ¶ 234.
327 Simić, supra note 153, ¶ 87. See also Nikolić, supra note 34, ¶ 231.
328 Delalić, supra note 7, ¶ 1279. See also Blaškić, supra note 1, ¶ 777 (noting that an admission of guilt is an extenuating factor but that it did not apply in that case because the accused did not plead guilty).
329 Tadić (Sentencing Judgment), supra note 96, ¶ 58; Kayishema & Ruzindana, supra note 25, at Sentence ¶ 16.
330 Kambanda, supra note 9, ¶ 53. See also Erdemović (Second Sentencing Judgement), supra note 25, ¶ 16(ii); Banović, supra note 6, ¶ 66.
331 Kambanda, supra note 9, ¶ 61(ii). See also Erdemović (Second Sentencing Judgement), supra note 25, ¶ 16(ii); Nikolić, supra note 34, ¶ 231; Deronjić, supra note 9, ¶ 234.
332 Kambanda, supra note 9, ¶ 52.
333 Sikirica, supra note 80, ¶ 149; Plavšić, supra note 61, ¶ 73, 80; Banović, supra note 6, ¶ 66; Nikolić, supra note 80, ¶ 149; Obrenović, supra note 9, ¶ 116; Nikolić, supra note 34, ¶¶ 231, 233, 237; Češić, supra note 9, ¶¶ 28, 58; Deronjić, supra note 9, ¶¶ 234, 236.
334 Plavšić, supra note 61, ¶¶ 70, 79, 80; Banović, supra note 6, ¶ 66; Nikolić, supra note 80, ¶¶ 72, 145, 149; Obrenović, supra note 9, ¶¶ 111, 116; Nikolić, supra note 34, ¶¶ 121, 231; Češić, supra note 9, ¶¶ 28, 58; Deronjić, supra note 9, ¶¶ 234, 236.
335 Češić, supra note 9, ¶ 28.
336 Nikolić, supra note 80, ¶ 148; Obrenović, supra note 9, ¶ 113.
of sentence should not merely be based on a plea of not guilty. However, an accused who gives false evidence and by word and conduct dishonestly persist in his or her innocence exceeds the accepted confines of the presumption of innocence, and that conduct can and should be taken into account for sentencing purposes.

3. Regret and Remorse

The Rules of Procedure and Evidence of the ICC refer in quite general terms to conduct of the convicted person after the criminal act, adding only one example indicative of regret and remorse: “efforts by the person to compensate victims.”

Co-operation with the prosecution, a guilty plea, and evidence of remorse as grounds of extenuation have had a mixed reception in the ad hoc Tribunals. Regret and remorse, or regret and repentance, was accepted in Ruggiu as a mitigating factor, and having been expressed in public was favorably looked upon by the sentencing Tribunal in Prosecutor v. Serushago. In Prosecutor v. Obrenović, the Sentencing Tribunal accepted genuine remorse as “a substantial mitigating factor.” In Prosecutor v. Plavšić, the expression of remorse connected with a guilty plea was considered a mitigating factor. In Prosecutor v. Kupreškić, the Appeals Chamber of the ICTY decided that “limited acceptance of guilt” ought to be given “some consideration in terms of sentence.” However, remorse was treated in Kambanda with a great deal of skepticism. The Trial Chamber noted in that case that “remorse is not the only reasonable inference that can be drawn from a guilty plea.” It must above all

\[\text{References}\]

337 RPE, supra note 86, Rule 145(2)(a)(ii).
338 See generally Kayishema & Razindana, supra note 25, ¶ 20; Ruggiu, supra note 28, ¶¶ 53–55; Todorović, supra note 10, ¶ 92.
339 Ruggiu, supra note 28, ¶¶ 56–58, 69–72. See also Erdemović, supra note 11, ¶¶ 44, 45; Erdemović (Second Sentencing Judgment), supra note 25, ¶ 16(ii) (under the heading, Remorse); Kambanda, supra note 9, ¶ 34, 52; Serushago, supra note 33, ¶¶ 40–41; Blaškić, supra note 1, ¶ 775; Delalić, supra note 34, ¶ 1277; Serushago v. Prosecutor, supra note 208, ¶ 24; Todorović, supra note 10, ¶ 89–92; Sikirica, supra note 80, ¶ 146; Plavšić, supra note 61, ¶ 70; Banović, supra note 6, ¶ 62; Obrenović, supra note 9, ¶¶ 121, 141; Nikolić, supra note 34, ¶¶ 231, 237, 241–42; Deronjić, supra note 80, ¶ 156, 234; Serugendo, supra note 147, ¶ 91.
340 Serushago, supra note 33, ¶ 40.
341 Obrenović, supra note 9, ¶ 121.
342 Plavšić, supra note 61, ¶ 73.
343 Kupreškić, supra note 293, ¶ 464. See also Nikolić, supra note 34, ¶ 146; Prosecutor v. Deronjić, supra note 9, ¶ 156.
344 Kambanda, supra note 9, ¶¶ 51–52.
345 Id., ¶ 52; see id., ¶ 61. See also Jelisić (T), supra note 80, ¶ 127 (the Tribunal only affording “relative weight” to the accused’s admission of guilt, because he did not show any remorse before the guilty plea), aff’d by Jelisić, supra note 80 (A), ¶¶ 119–23; Nikolić, supra note 80, ¶ 161 (the Sentencing Tribunal accepting the
be demonstrated that the expression of remorse is sincere.\textsuperscript{346} It is possible, of course, that an accused can express sincere regrets without admitting his or her participation in the crime.\textsuperscript{347}

In the Čelebići Case, the accused after his conviction submitted to the Tribunal a written statement expressing his regrets. The tribunal would have nothing of it, stating that “[s]uch expression of remorse would have been more appropriately made in open court, with these victims and witnesses present, and thus this ostensible, belated contrition seems to merely have been an attempt to seek concession in the matter of sentencing.”\textsuperscript{348}

Participating in acts of mercy and assistance to victims will almost invariably be perceived by a sentencing Tribunal as concrete evidence of regret and remorse, or perhaps of reluctant participation under pressure in the criminal act and will either way serve in mitigation of sentence.\textsuperscript{349}

A persistent defiant attitude will, on the other hand, demonstrate absence of regret and remorse and will do the accused no good when upon conviction the sentence to be imposed becomes an issue. In the Čelebići Case, for example, the Trial Chamber noted: “[t]he accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process.”\textsuperscript{350}

**CONCLUDING OBSERVATIONS**

This is not the time and place to record and to evaluate the American sentencing practices. However, there are some lessons in the above analysis for

---

\textsuperscript{346} Erdemović, supra note 11, ¶¶ 96–98; Erdemović, supra note 25, ¶ 16; Jelisić (T), supra note 80, ¶ 127; Blaškić, supra note 1, ¶ 775; Todorović, supra note 10, ¶ 89; Serushago, supra note 33, ¶ 41; Ruggiu, supra note 28, ¶¶ 69–72; Sikirica, supra note 80, ¶¶ 152, 194, 230; Simić (Sentencing Judgment), supra note 153, ¶ 92; Banović, supra note 6, ¶ 72; Vasiljević, supra note 80, ¶ 177; Češić, supra note 9, ¶ 66; Deronjić, supra note 9, ¶ 156; Rutaganira, supra note 13, ¶ 158.

\textsuperscript{347} Vasiljević, supra note 80, ¶ 177.

\textsuperscript{348} Delalić, supra note 7, ¶ 1279.

\textsuperscript{349} Erdemović, supra note 11, ¶ 111; Erdemović (Second Sentencing Judgement), supra note 25, ¶ 16(iii), 17; Kambanda, supra note 9, ¶¶ 34, 50–52; Delalić, supra note 7, ¶ 1270; Serushago, supra note 33, ¶ 38, 40; Kayishema & Ruzindana, supra note 25, ¶ 20; Rutaganda, supra note 61, ¶ 471; Ruggiu, supra note 28, ¶¶ 73–74; Delalić, supra note 34, ¶ 775–76; Serushago v. Prosecutor, supra note 208, ¶ 24; Sikirica, supra note 80, ¶ 242; Krmolejalić, supra note 14, ¶ 518; Banović, supra note 6, ¶ 83; Obrenović, supra note 9, ¶ 134; Nikolić, supra note 34, ¶ 146; Češić, supra note 9, ¶ 78; Deronjić, supra note 9, ¶ 156; Rutaganira, supra note 13, ¶ 155.

\textsuperscript{350} Delalić, supra note 7, ¶ 1244. See also id., ¶¶ 1217, 1251.
American penologists. It is worth noting, in conclusion, that the sentencing practices of the United States are not even remotely in conformity with what has come to be accepted as international directives of sentencing standards.

In the United States, almost exclusive emphasis is placed, for sentencing purposes, on the gravity of the crime. In *Solem v. Helms*, it was decided that proportionality of a punishment to the offence is determined with three criteria in mind: “(i) the gravity of the offence and the harshness of the penalty; (ii) the sentences imposed on other criminals [for offences of the same gravity] in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions.” The essence of the penal policy in *Solem* was subsequently overruled in *Harmelin v. Michigan*, where Justice Scalia decided that “the Eighth Amendment contains no proportionality guarantee”; that taking into account mitigating factors for sentencing purposes “has no support in the text and history of the Eighth Amendment”, and that “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.”

Individualization of sentencing to fit the crime, the criminal, and the interests of society, which have become the international standard of penology, is thus not part of the American sentencing philosophy. Prosecuting juveniles as adults and imposing penalties in such cases without regard to their reduced culpability, maintaining the death penalty and imposing prison sentences without the option of parole, and applying the sentencing guidelines as though they were mandatory simply deviates from taking into account for sentencing purposes the personal circumstances and culpability of a convicted person.

A few isolated, yet important, recent innovations by the U.S. Supreme Court must be applauded as initiatives that brought the United States closer to upholding generally accepted standards in its criminal justice system. Proclaiming juvenile executions, and life imprisonment of juveniles without the option of parole as a mandatory sentence, to be in violation of the “cruel and unusual” criteria of the Eighth Amendment was a step in the right direction, even though one must admit that the Court had to make a quantum leap to bypass

---

351 See, e.g., Weems v. United States, 217 U.S. 349, 367 (1910) (holding that “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offence.”).
354 *Id.*, at 994.
355 *Id.*, at 994–95.
the “unusual” prong of the Eighth Amendment to reach its admirable conclusion in the life sentence without parole decision. No less than twenty-nine jurisdictions mandated life sentences without the option of parole for juvenile offenders, but noting differences that obtain in those jurisdictions, relating for example to minimum age requirements, whether the transfer of juvenile offenders to an adult court occurs automatically in the case of some offences or is left in the discretion of prosecutors, the U.S. Supreme Court declined to find that the laws applied by state courts meet the criterion of “usual” punishments.358

In coming to this conclusion, the U.S. Supreme Court used language that is in conformity with international standards of juvenile justice, referring for example to the “lesser culpability” and “greater capacity for change” of juvenile offenders,359 and the requirement of “individualised sentencing.”360 It emphasized that a basic precept of justice requires “that punishment for crime should be graduated and proportioned,” and that individuals consequently have “the right not to be subjected to excessive sanctions.”361 The U.S. Supreme Court proclaimed quite admirably that juveniles have “lessened culpability” and therefore “are less deserving of the most severe punishments.”362 The “gaps between juveniles and adults” are threefold: “(a) lack of maturity and an underdeveloped sense of responsibility;” (b) vulnerability or susceptibility “to negative influences and outside pressures, including peer pressure”, and (c) the fact that “the character of a juvenile is not as well formed as that of an adult.”363

Such rhetoric is indeed admirable but will remain a voice calling in the dark as long as juveniles can be prosecuted and sentenced as though they were adults; or in general, as long as the United States declines to impose the basic norm of criminology that punishments must not only be determined by the gravity of the crime, the manner in which it was executed, its harmful consequences, and the means of perpetration by the convicted person, but should also take note of and accommodate the personal circumstances of the individual to be sentenced, such as his or her degree of intent, diminished mental capacity, or individual circumstances, such as age, background, education, intelligence, and mental structure.

358 Id., at 483–89.
360 Alabama, 567 U.S. at 465.
361 Simmons, 354 U.S. at 560; Alabama, 567 U.S. at 469.
362 Graham, 560 U.S. at 68; Alabama, 567 U.S. at 471.
363 Simmons, 354 U.S. at 569–70. See also Graham, 560 U.S. at 68; Alabama, 567 U.S. at 471.
It is to be hoped that the American sentencing system will in the not too distant future do justice to the concept of “justice” within the true meaning of the concept of criminal *justice*!