INTERNATIONAL DIRECTIVES RELATING TO SENTENCING

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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, that 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,

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[1] Statute Of The International Criminal Court, art. 78(1), U.N. Doc. A/CONF.183/9 (17 July 1998), *reprinted in* 37 I.L.M. 1002 (1998) (hereafter "ICC Statute"); and *see also Prosecutor v. Tihomir Blaškić*, Case No11. IT-95-14-T, para. 771 (3 March 2000).

[2] Jens Peglau, *Penalties and the Determination of the Sentence in the Rules of Procedure and Evidence*, in Horst Fisher, Claus Krez & Sascha Rold Lüder (eds.), International And National Prosecution Of Crimes Under International Law: Current Developments 141, at 141. Berlin Verlag: Arno Spitz (2001).

[3] Jan Christoph Nemitz, *Sentencing in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in Horst Fischer, Claus Krez & Sascha Rolf Lüder (eds.), International And National Prosecution Of Crimes Under International Law: Current Developments 605, at 624. Berlin Verlag: Arno Spitz GmdH (2001).

somewhat inconsistently, that jurisprudence of the *ad hoc* Tribunals "is gradually developing into an international law of sentencing."[4]

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[5] should in some instances not at all have a bearing on the kind or severity of punishments imposed in any given case (retribution, incapacitation, rehabilitation, deterrence). It is wrong to say categorically that "the objectives of punishment provide . . . guidance in determining sentence."[6] Factors that ought to be considered for sentencing purposes may in general be classified, for the sake of systematic clarity, into two main categories: Those that constitute elements of an offence, and those that attend the commission of the offence but are not part and parcel of the *actus reus* as such. 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).

A. THE ESSANCE OF SENTENCING (RETRIBUTION)

A sentence imposed by a court of law is essentially a manifestation of retribution.

[4] *Id*., at 625.
[5] *See*, for example *Prosecutor v. Dragoljub Kunarać & Others*, Case No. IT-96-23-T & IT-96-23/1-T, para. 836 (22 Feb. 2001), where the ICTY referred interchangeably to sentencing "objectives", "purposes", "principles", "functions" or "policy" that ought to guide judicial officers when deciding on an appropriate sentence.
[6] *See Prosecutor v. Predrag Banović*, Case No. IT-02-65/1-S, para. 33 (28 Oct. 2003).

In the *Čelebići Case*, the ICTY depicted the theory of retribution as "an inheritance of the primitive theory of revenge, which urges the Trial Chamber to retaliate to appease the victim."[7] 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.[8]

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".[9]

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
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> 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.[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

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[7] *Prosecutor v. Zejnil Delalić & Others*, Case No. IT-96-21-T, para. 1231 (16 Nov. 1998).

[8] *Ibid*; and *see also Prosecutor v. Duško Tadić* (Sentencing Judgment), Case No. IT-94-1-T*bis*-R.117, para. 7 (11 Nov. 1999); Faiza P. King & Anne-Marie La Rosa, *Penalties Under the ICC Statute*, in Flavia Lattanzi & William A. Schabas (eds.), 1 Essays On The Rome Statute Of The International Criminal Court 311, at 329-30. Il Serente (1999) (with reference to exactly that happening in Rwanda).

[9] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, para. 185 (24 March 2000). The citation in this passage came from *Prosecutor v. Jean Kambanda* (Judgment and Sentence), Case No. ICTR 97-23-S, para. 28 (4 Sept. 1998). *See also Prosecutor v. Zoran Kupreškić & Others*, Case No. IT-95-16-T, para. 848 (14 Jan. 2000); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, para. 900 (31 July 2003); *Prosecutor v. Banović*, *supra* note 6, at para. 34; *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, para. 50 (10 Dec. 2003); *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, para. 23 (11 March 2004); *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, para. 143, 150 (30 March 2004); *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-9514/2-A, para. 1075 (17 Dec. 2004); *Prosecutor v. Momčilo Krajišnik*, Case No. IT-09-39-A, para. 775, 804 (17 March 2009); *Prosecutor v. Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute), Case No. ICC-01/04-01/07-3484-tENG-Corr, para. 38 (23 May 2014); *Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute), Case No. ICC-01/05-01/08-3343, para. 11 (21 March 2016).

[10] *Prosecutor v. Stevan Todorović* (Sentencing Judgment), Case No. IT-95-9/1-T, para. 29 (31 July 2001); and *see also Prosecutor v. Banović*, *supra* note 6, at para. 34; *Prosecutor v. Češić*, *supra* note 9, at para. 23.

punishment having to be proportional to the gravity of the crime *and the moral guilt of the convicted*."[11]

It is wrong, of course, to say that the purpose of punishment is retribution,[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."[13]

The ICTY was perfectly correct when it, in the case of *Kunarać*, defined retribution as merely "punishment of an offender for his specific criminal conduct."[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."[15] Faiza King & Anne-Marie La Rosa similar vein singled out retribution "in the sense of punishment rather than revenge" as a goal of the ICC.[16] Just to emphasize it once again, punishment is a particular manifestation of retribution and 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. And so, when it is said that "retribution may be out of fashion with legal scholars,"[17] this must be understood in the context only of the fallacious assumption that retribution is a function or purpose of punishment, or a circumstance to be considered for sentencing purposes.

B. THE FUNCTIONS OF PUNISHMENT

[11] *Prosecutor v. Drazen Erdemović* (Sentencing Judgment), Case No. IT-94-1-T*bis*-R.117, para. 65 (29 Nov. 1996) (emphasis added); and *see also Prosecutor v. Kambanda*, *supra* note 9, at para. 58; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, para. 243 (25 June 1999) (noting that a sentence depends mainly on the "magnitude of the crime and the extent of liability of the accused"); *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeal), Case No. IT-94-1-T*bis*-R.117, (Separate Opinion of Judge Cassese), para. 8 (26 Jan. 2000) (noting that, in addition to extenuating and aggravating circumstances, sentences are determined by "the degree of iniquity of the crime" and "the subjective state of mind of the convicted person"); *Prosecutor v. Obrenović*, *supra* note 9, at para. 50; *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1075; *Prosecutor v. Krajišnik*, *supra* note 9, at para. 804; *Prosecutor v. Bemba Gombo*, *supra* note 9, at para. 11.
[12] *See*, for example, *Prosecutor v. Češić*, *supra* note 9, at para. 24.
[13] *Prossecutor v. Vincent Rutaganira*, Case No. ICTR-95-1C-T, para. 108 (14 March 2005).
[14] *Prosecutor v. Kunarać*, *supra* note 5, at para. 841; and *see also Prosecutor v. Milorad Krnojelać*, Case No. IT-97-25-T, para. 508 (15 March 2002).
[15] *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1075, with reference to R v. M, [1996] 1 S.C.R. 500, para. 80 (Canada).
[16] King & La Rosa, *supra* note 8, at 330.
[17] *Ibid.*

Justifications for punishment include incapacitation of the convicted criminal, his or her rehabilitation, and deterrence.[18] The European Court of Human Rights has singled out as "penological grounds" for detention, objectives such as punishment, deterrence, public protection, and rehabilitation.[19] To this list should be added 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.

1. Incapacitation

The protection of society is relevant and important when persons guilty of serious crimes are regarded as dangerous to the community.[20] This would particularly be the case where a person who instigated the commission of a crime might just do that again.[21] 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."[22] 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.[23]

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

[18] Mirko Bagaric & Kumar Amarasekara, *The Error of Retributivism*, 24 MELBOURNE L. REV. 124, at 134 (2000); and *see also* King & La Rosa, *supra* note 8, at 329 (mentioning retribution [*sic*], deterrence, incapacitation, and rehabilitation as "objectives of punishment").
[19] *Vinter & Others v. The United Kingdom*, 2013-III EUR. CT. HUM. RTS. (Report on Judgments and Decisions) 317, para. 40 (9 July 2013); and *see also* the British case of R. v. BIEBER, [2009] 1 WLR 233 (CA), para. 40 (listing as "legitimate objects" of imprisonment, "punishment, deterrence, rehabilitation and protection of the public").
[20] *Prosecutor v. Delalić*, *supra* note 7, at para. 1232.
[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.

and reasonable to use protection of society, or preventive detention, as a general sentencing factor.[24]

2. 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 & 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 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 taken into account 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

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[24] *Prosecutor v. Kunarać*, *supra* note 5, at para. 843; and *see also Prosecutor v. Krnojelać*, *supra* note 14, at para. 508 (noting that incapacitation of the dangerous is of little significance for sentencing purposes); *Prosecutor v. Krajišnik*, *supra* note 9, at para. 776; *Prosecutor v. Bemba Gombo*, *supra* note 9, at para. 11; Krajis Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practices of the ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT'L CR. L. REV. 33, at 45-46 (2001).

[25] William A. Schabas, *Penalties*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), 2 The Rome Statute Of The International Criminal Court: A Commentary 1497, at 1519. Oxford Univ. Press (2002); and *see Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 8, at para. 61; *Prosecutor v. Drazen Erdemović* (Second Sentencing Judgment), Case No. IT-96-22-T, para. 16(i) under the heading "*Age*" (5 March 1998); *Prosecutor v. Anto Furundžiya*, Case No. IT-95-17/1-T, para. 291 (10 Dec.1998); *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-T, para. 12, 26 (21 May 1999); *Prosecutor v. Kupreškić*, *supra* note 9, at para. 849.

[26] *Prosecutor v. Obrenović*, *supra* note 9, at para. 53; and *see also id*., at 146 (the Sentencing Tribunal accepting "steps taken toward rehabilitation" as a mitigating factor).

[27] *Prosecutor v. Češić*, *supra* note 9, at para. 27.

[28] *See*, for example, *Prosecutor v. Georges Ruggiu* (Judgment and Sentence), Case No. ICTR-97-32-I, para. 68 (1 June 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.

[30] *Prosecutor v. Ruggiu*, *supra* note 28, at para. 33.

"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 has noted that in sentencing policies of the *ad hoc* Tribunals rehabilitation is regarded as subordinate to deterrence.[35] In its first sentenceing judgment in the *Case of Erdemović*, the ICTY altogether ruled out rehabilitation as a sentencing objective.[36]

It has been said that rehabilitation and punishment may be inconsistent.[37] A penitentiary is evidently not an ideal setting for rehabilitation.[38] Prison conditions, on the contrary, have the propensity to promote recidivism. It is furthermeore questionable whether rehabilitation efforts are

[31] *Prosecutor v. Delalić*, *supra* note 7, at para. 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"); and *see also Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1079; and *see further in general*, Beresford, *supra* note 24, at 44.

[32] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 291 (laying special stress on the relatively young age of the Accused, who was 23 when the crime was committed); and *see also Prosecutor v. Kupreškić*, *supra* note 9, at para. 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, at para. 16(i) under the heading: "*Age*".

[33] *Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S-T, para. 39 (5 Feb. 1999).

[34] *Prosecutor v. Zejnil Delalić & Others*, Case No. IT-96-21-A, para. 806 (20 Feb. 2001); and *see also Prosecutor v. Blaškić*, *supra* note 1, at para. 781-82; *Prosecutor v. Kronjelać*, *supra* note 14, at para 508; *Prosecutor v. Banović*, *supra* note 6, at para. 35; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, para. 133 (18 Dec. 2003); *Prosecutor v. Deronjić*, *supra* note 9, at para. 143; *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para.1079; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, para. 402 (22 March 2006); *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Case No. IT-01-47-A, para. 325, 328 (22 April 2008); *Prosecutor v. Krajišnik*, *supra* note 9, at para. 806; *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77-1, para. 11 (16 Sept. 2011); *Prosecutor v. Katanga*, *supra* note 9, at para. 38; *Prosecutor v. Vujadin Popović & Others*, Case No. IT-05-88-A, para. 1966 (30 Jan. 2015); *Prosecutor v. Bemba Gombo*, *supra* note 9, at para 11.

[35] Nemitz, *supra* note 3, at 614.

[36] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 66; and *see* King & La Rosa, *supra* note 8, at 332.

[37] Bagaric & Amarasekara, *supra* note 18, at 136.

[38] *See Prosecutor v. Kunarać*, *supra* note 5, at para. 844 (noting that to assume that "imprisonment alone . . . can have a rehabilitative effect on a convicted person" is "a controversial proposition").

at all called for in cases of "*Makrokriminalität*"; that is "criminality in which the State or some similar entity is directly involved."[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."[40] Rehabilitation also features prominently in the United Nations' *Standard Minimum Rules for the Treatment of Prosioners*.[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 deproved of their liberty."[42] The Rules further provide that "the [prison] regime for sentenced 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 stratergy for their release" be devised,[44] which may as far as paracicable include work, education, other activities and prepararion 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

[39] Claus Kreß & Guran Sluiter, *Preliminary Remarks*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), 2 The Rome Statute Of The International Criminal Court; A Commentary 1751, at 1755. Oxford Univ. Press (2002).
[40] *International Covenant on Civil and Political Rights*, art. 10(3), G.A. Res. 2200 (XXI) of 16 Dec. 1966 (Annex), U.N. GAOR Supp. (No. 16), U.N. Doc. A/6314/49, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967); and *see also American Convention on Human Rights*, art. 5(6), 1114 U.N.T.S. 123, reprinted in 9 I.L.M. 673 (1970).
[41] *See* the United Nation's *Standard Minimum Rules for the Treatment of Prisoners*, para. 56-64, ECOSOC Res. 663 C (XXIV) of 31 July 1957, as amended by ECOSOC Res. 2076 (LXII) of 13 May 1977. Those rules emphasize (a) that the ultimate purpose of imprisonment is "to protect society against crime" (para. 58); (b) that steps should be taken to ensure the prisoner's "gradual return to life in society" (para. 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" (para. 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" (para. 62); (d) that treatment of each prisoner is to be individualized (para. 59, 63(1)); (e) that individualization of treatment should not be hampered by a too large prison population in closed institutions (para. 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 (para. 64).
[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 January 11, 2006 at the 952nd Meeting of the Ministers' Deputees.
[43] *Id*., Rule 102.1.
[44] *See id*., Rule 103.2.
[45] *Id*., Rule 103.4.
[46] *Vinter & Others v. The United Kingdom*, *supra* note 19, at para. 115; and *see also Dickson v. The United Kingdom* (GC) Appl. No. 44362/04, 2007-V ECHR, para. 75 (Dec. 4, 2997); *Boulois v. Luxemburg* (GC), Appl. No. 37575/04, 2012 ECHR, para. 83 (3 April 2012). Special emphasis was placed on re-integration into society of a prisoner as an objective of incarceration in *Mastromatteo v. Italy* (GC) Appl. No. 37703/97, 2002-VIII ECHR, para. 72 (Oct. 24,

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 rerviewed, 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 ubreviewable."[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 aftter the convicted person has served 25 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 serve as a factor to be taken into account when deciding on an appropriate sentence.

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2002); *Schemkamper v. France*, Appl. No. 75833/01, para. 31 (18 Oct. 2005); *Majorano & Others v. Italy*, Appl. No 28634/06, para. 108 (Dec. 15, 2009).

[47] *Vinter & Others v. The United Kingdom*, *supra* note 19, at para. 114; and s*ee also id*., at para. 116.

[48] *Id*., at para. 112.

[49] *Id*., at para. 119.

[50] *Id*., at para. 65 and 114.

3. Deterrence and General Rehabilitation

According to Faiza King & Anne-Marie La Rosa, deterrence of future crimes "is obviously a primary goal of the ICC."[51] It has been decided that deterrence "is a consideration that may legitimately be considered in sentencing."[52] Deterrence has also been singled out in some judgments of the *ad hoc* Tribunals as "probably the most important [sentencing] factor."[53] In *Prosecutor v. Duško 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."[54] 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."[55] 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."[56]

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,[57]

[51] King & La Rosa, *supra* note 8, At 330.
[52] *Prosecutor v. Tadić* (Sentencing Appeal), *supra* note 11, at para. 48; and *see also Prosecutor v. Delalić*, *supra* note 34, at para. 803; *Prosecutor v. Češić*, *supra* note 9, at para. 24.
[53] *Prosecutor v. Delalić*, *supra* note 7, at para. 1234; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at Para. 64, 65, 66; *Prosecutor v. Kambanda*, *supra* note 9, at para. 28; *Prosecutor v. Jean-Paul Akayesu* (Sentence), Case No. Ictr-96-4-S, Para. 19 (2 Oct. 1998); *Prosecutor v. Furundžiya*, *supra* note 25, at para. 288; *Prosecutor v. Serushago*, *supra* note 25, at para. 20; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at sentence para. 2; *Prosecutor v. Blaškić*, *supra* note 1, at para. 761; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 33; *Prosecutor v. Stakić*, *supra* note 9, at para. 900; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 134; *Prosecutor v. Jean De Dieu Kamuhanda*, Case No. Ictr-95-54a-T, para. 754, 760, 765 (24 Jan. 2004); *Prosecutor v. Deronjić, supra* note 9, at para. 144; Beresford, *supra* note 24, at 42.
[54] *Prosecutor v. Tadić* (Sentencing Appeal), *supra* note 11, at para. 48; and *see also Prosecutor v. Aleksovski*, *supra* note 9, at para. 185; *Prosecutor v. Delalić*, *supra* note 34, at para. 801; *Prosecutor v. Dario Kordić & Mario Čerlkez*, Case No. It-95-14/2-T, para. 847 (26 Feb. 2001); *Prosecutor v. Banović*, *supra* note 6, at para. 34; *Prosecutor v. Češić*, *supra* note 9, at para. 26; *Prosecutor v. Krajišnik*, *supra* note 9, at para. 805.
[55] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 30.
[56] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 290.

[57] *Prosecutor v. Delalić*, *supra* note 7, at para. 1234; *Prosecutor v. Furundžiya*, *supra* note 25, at para. 288.

referred to in *Prosecutor v. Kunarać* as, respectively, "specific deterrence" and "general deterrence",[239] and in later judgments as "personal", "individual" or "special" deterrence, and "general" deterrence, respectfully.[240] This vital distinction is not always evident in judgments of the *ad hoc* Tribunals.[241] Emphasis is almost exclusively on general deterrence.[242] 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."[243]

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."[244] 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."[245] 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."[246] Affirmative prevention through legal

[239] *Prosecutor v. Kunarać*, *supra* note 5, at para. 839; and *see also Prosecutor v. Delalić*, *supra* note 7, at para. 1203; Bagaric & Amarasekara, *supra* note 18, at 137; and *see also Prosecutor v. Češić*, *supra* note 9, at para. 25 (referring to "special deterrence" and "general deterrence"); *Prosecutor v. Katanga*, *supra* note 9, at para 38; *Prosecutor v. Bemba Gombo*, supra note 9, at para. 11.

[240] *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 134-35; *Prosecutor v. Deronjić*, *supra* note 9, at para. 145-46; *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1076-78; *Prosecutor v. Krajišnik*, *supra* note 9, at para. 805; *Prosecutor v. Kabashi*, *supra* note 34, at para.11.

[241] *Prosecutor v. Kunarać*, *supra* note 5, at para. 839.

[242] *See Prosecutor v. George Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, para. 456 (6 Dec. 1999) (noting that punishment is directed at retribution "and over and above that" at deterrence); *Prosecutor v. Kambanda*, *supra* note 9, at para. 28; *Prosecutor v. Serushago*, *supra* note 33, at para. 20 (5 Feb. 1999); *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 30; *Prosecutor v. Biljana Plavšić* (Sentencing Judgment), Case No. IT-00-39&40/1-S, para. 28 (27 Feb. 2003); *Prosecutor v. Stakić*, *supra* note 9, at para. 899; *Prosecutor v. Banović*, *supra* note 6, at para. 34; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 124; *Prosecutor v. Češić*, *supra* note 9, at para. 25; *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1080-82; *Prosecutor v. Kabashi*, *supra* note 34, at para.11; and *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.

[243] *Prosecutor v. Kambanda*, *supra* note 9, at para. 28; and *see also Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 2; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 30.

[244] *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 139; *Prosecutor v. Deronjić*, *supra* note 9, at para. 149.

[245] *Prosecutor v. Češić*, *supra* note 9, at para. 26.

[246] *Prosecutor v. Kabashi*, *supra* note 34, at para. 11; and *see also Prosecutor v. Kupreškić*, *supra* note 9, at para. 848; *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1078, 1080-82; *Prosecutor v. Krajišnik*, *supra* note 9, at para. 807.

sanctions in times of war "have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent.[247]

In *Prosecutor v. Stakić*, the Trial Chamber stated, quite confusingly, that "general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society."[248] 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 reintegrated into society is a rather stupid thing to say.

In *Kunarać*, the Trial Chamber, quite realistically, came to the conclusion 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."[249]

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.[250]

4. Obviating Impunity

Thwarting impunity,[251] and reprobation by the community or stigmatization of the convicted criminal,[252] were mentioned in a sentencing context in judgments of the ICTY and the ICTR. In *Prosecutor v. Furundžiya*, the Trial Chamber had this to say: "It is the mandate and the duty of the

[247] *Prosecutor v. Kordić & Čerkez*, *supra* note 9, at para. 1078.
[248] *Prosecutor v. Stakić*, *supra* note 9, at para. 902; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 137 and *Prosecutor v. Deronjić*, *supra* note 9, at para. 147 (referring also to *Prosecutor v. Aleksovski*, *supra* note 9, at para. 185; *Prosecutor v. Delalić*, *supra* note 34, at para. 806, which said absolutely nothing of the kind).
[249] *Prosecutor v. Kunarać*, *supra* note 5, at para. 840; and *see also Prosecutor v. Krnojelać*, *supra* note 14, at para. 508; *Prosecutor v. Obrenović*, *supra* note 9, at para. 52 (noting that deterrence should not be afforded "undue prominence"); *Prosecutor v. Deronjić*, *supra* note 9, at para. 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).
[250] *Prosecutor v. Kunarać*, *supra* note 5, at para. 840; *Prosecutor v. Češić*, *supra* note 9, at para. 26.
[251] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 65; *Prosecutor v. Kambanda*, *supra* note 9, at para. 26; *Prosecutor v. Akayesu* (Sentence), *supra* note 53; *Prosecutor v. Furundžiya*, *supra* note 25, at para. 288; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 455.
[252] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 64, 65, 66; and *see also Prosecutor v. Furundžiya*, *supra* note 25, at para. 289; *Prosecutor v. Blaškić*, *supra* note 1, at para. 763.

International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity."[253] One analyst expressed the view that stigmatization of the perpetrator in itself "is often sufficient redress."[254] 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.

C. SENTENCING FACTORS

A retributive response to crime must, for purposes of punishment, take into account 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

[253] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 288; and *see also Prosecutor v. Kamuhanda*, *supra* note 53, at para. 754; Mark A. Drumbl, *Punishment, Postgenocide*: *From Guilt to Shame to* Civis *in Rwanda*, 75 N.Y. UNIV. L. REV. 1221, at 1277 (2000).
[254] William A. Schabas, *Sentencing by International Tribunals*: *A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L.J. 461, at 502 (1997).

committed the crime; superior orders; the use of minors in the commission of the crime.[255]

These guidelines were intended to fit the general directive enunciated in the Statutes of the *ad hoc* Tribunals[256] 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,"[257] 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).[258] 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."[259] As succinctly stated in *Prosecutor v. Obrenović*: "An accused shall be held liable for his actions and omissions—no more and no less."[260]

1. **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.[261] The gravity of the

[255] *Report of the Working Group on Penalties*, para. 2, U.N. Doc. A/CONF.183/C.1/WGP/L.14/Corr.2 (6 July 1998).
[256] *Statute of the International Criminal Tribunal*, art. 24(2), contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, *reprinted in* 32 I.L.M. 1192 (1993) (hereafter ICTY Statute); *Statute of the International Tribunal for Rwanda*, art. 23(2), contained in the annex of S.C. Res. 955 (1994), *reprinted in* 33 I.L.M. 1602 (1994) (hereafter ICTR Statute); *and see Prosecutor v. Akayesu* (Sentence), *supra* note 53; Schabas, *supra* note 25, at 1523-24.
[257] *Report of the Working Group on Penalties*, art. 77(1), U.N. Doc. A/CONF.183/C.1/WGP/L.14 (4 July 1998); *and see* ICC Statute, *supra* note 1, art. 78(1).
[258] *See* King & La Rosa, *supra* note 8, at 332-37; Peglau, *supra* note 2, at 147; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 41 (speaking of "[t]he principle of proportionality and of appropriateness of sentence to the individual"); *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 8, at para. 61; *Prosecutor v. Blaškić*, *supra* note 1, at para. 771; *Prosecutor v. Rutaganira*, *supra* note 13, at para. 115; *Prosecutor v. Bemba Gombo*, *supra* note 9, at para 11.
[259] *Prosecutor v. Delalić*, *supra* note 34, at para. 717; and *see also Prosecutor v. Kambanda*, *supra* note 9, at para. 58; *Prosecutor v. Serushago*, *supra* note 33, at para. 22; *Prosecutor v. Aleksovski*, *supra* note 11, at para. 242; *Prosecutor v. Kupreškić*, *supra* note 9, at para. 852; *Prosecutor v. Kordić & Čerkez*, *supra* note 54, at para. 847; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 110; *Prosecutor v. Krnojelać*, *supra* note 14, at para. 507; *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze*, Case No. ICTR-99-55-T, para. 1097 (3 Dec. 2003); *Prosecutor v. Obrenović*, *supra* note 9, at para. 54, 62; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, para. 9 (4 Feb. 2005); *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, para. 291 (23 May 2005); *Prosecutor v. Stakić*, *supra* note 34, at para. 375; *Prosecutor v. Mladen Naletilić & Vinko Martinović*, Case No. IT-98-34-A, para. 593 (3 May 2006); *Prosecutor v. Théoneste Bagosora & Others*, Case No. ICTR-98-41-T, para. 2263 (18 Dec. 2008); *Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, para. 817 (14 July 2009); *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, para. 673 (31 March 2011).
[260] *Prosecutor v. Obrenović*, *supra* note 9, at para. 78.
[261] *Prosecutor v. Delalić*, *supra* note 7, at para. 1225; and *see also id*., at para. 1260 (calling gravity of an offence the "touchstone of sentencing"); *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 15; *Prosecutor v. Serushago*, *supra* note 33, at para. 27; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, para. 121 (14 Dec. 1999); *Prosecutor v. Aleksovski*, *supra* note 9, para. 182; *Prosecutor v. Kupreškić*, *supra* note 9, at para. 852; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 47-49; *Prosecutor v. Anto Furundžiya*, Case No. IT-95-17/1-A, para.

crime "is normally the starting point for consideration of an appropriate sentence,"[262] and has been singled out as "[t]he cardinal feature in sentencing."[263]

Retribution requires a certain proportionality between the gravity of a crime and the punishment imposed for that crime.[264] 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.[265] 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.[266] 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,[267] 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

249 (21 July 2000); *Prosecutor v. Delalić*, *supra* note 34, at para. 847, 731; *Prosecutor v. Kunarać*, *supra* note 5, at para. 841; *Prosecutor v. Kordić & Čerkez*, *supra* note 54, at para. 847; *Prosecutor v. Goran Jelisi*Ć, Case No. IT-95-10-A, para. 101 (5 July 2001); *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 29, 31; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, para. 698 (2 Aug. 2001); *Prosecutor v. Duško Sikirica & Others*, Case No. IT-95-8-S, para. 106 (13 Nov. 2001); *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 23; 25, 52; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, para. 101-02 (2 Dec. 2003); *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 144; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, para. 156 (25 Feb. 2004); *Prosecutor v. Češić*, *supra* note 9, at para. 31; *Prosecutor v. Deronjić*, *supra* note 9F, at para. 154; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, para. 267 (19 April 2004); *Prosecutor v. Stakić*, *supra* note 34, at para. 375; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2901, para. 36 (10 July 2012); *Prosecutor v. Bemba Gombo*, *supra* note 9, at para. 15.

[262] *Prosecutor v. Aleksovski*, *supra* note 9, at para. 182; *Prosecutor v. Banović*, *supra* note 6, at para. 36.

[263] *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 25; *Prosecutor v. Banović*, *supra* note 6, at para. 36.

[264] *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 126 (referring to "the fundamental principle of proportionality"); King & La Rosa, *supra* note 8, at 333; Beresford, *supra* note 24, at 41, 46; and *see also* Richard, *supra* note 61, at 125 (insofar as he identifies the proportionality requirement with the *lex talionis*, Richard has it slightly wrong).

[265] *Prosecutor v. Kupreškić*, *supra* note 9, at para. 852; *Prosecutor v. Delalić*, *supra* note 34, at para. 731; *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 26; *Prosecutor v. Češić*, *supra* note 9, at para. 32.

[266] *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).

[267] *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, Rule 145(1)(c), U.N. Doc. PCNICC/2000/INF/3/Add.1 (12 July 2000) (hereafter "RPE").

circumstances may include others not listed in the Rules "which, although not enumerated . . ., by virtue of their nature are similar to those mentioned."[268]

(a) *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.[269] The ICTR has thus proclaimed that all crimes within its jurisdiction are serious violations of international humanitarian law.[270]

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."[271] 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."[272] 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."[273] In *Prosecutor v. Serushago*, the ICTR emphasized the "extreme gravity" of genocide as "the crime of crimes."[274] Genocide and crimes against humanity have been held to be inherently aggravating crimes.[275] 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."[276] In the same case, the Appeals Chamber decided that "crimes which result in the loss

[268] *Id*., Rule 145(2)(b)(vi).
[269] *See*, for example, *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 15; *Prosecutor v. Delalić*, *supra* note 7, at para. 1225; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 468; *Prosecutor v. Blaškić*, *supra* note 1, at para. 782-86; *Prosecutor v. Aleksovski*, *supra* note 9, para. 182; *Prosecutor v. Furundžiya*, *supra* note 80, at para. 249; *Prosecutor v. Delalić*, *supra* note 34, at para. 731; *Prosecutor v. Jelisić* (A), *supra* note 80, at para. 101; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 144.
[270] *Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-1-A, para. 367 (1 June 2001); *Prosecutor v. Bagosora*, *supra* note 78, at para. 2263; *Prosecutor v. Renzaho*, *supra* note 78, at para. 817; *Prosecutor v. Gatete*, *supra* note 78, at para. 673.
[271] *Prosecutor v. Elizaphan & Gérard Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, para. 884 (21 Feb. 2003).
[272] *Prosecutor v. Kambanda*, *supra* note 9, at para. 57.
[273] *Id*., at para. 43.
[274] *Prosecutor v. Serushago*, *supra* note 33, at para. 15, 27; *Eliezer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, para. 53 (9 July 2004); and *see infra*, the text accompanying notes 95-98; and *see also* in the ICC, *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, para. 133 (4 March 2009).
[275] *Prosecutor v. Kambanda*, *supra* note 9, at para. 33; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 48.
[276] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 281.

of human life should be punished more severely."[277] In *Prosecutor v. Todorović*, the Tribunal observed in the same context that persecution "is a particularly serious crime,"[278] and that this also applies to "the murder and the sexual assaults perpetrated by the accused."[279]

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."[280]

The inherent gravity of some crimes over others cannot be denied.[281] The ICC Statute in fact contains several indications of a hierarchy of certain crimes.[282] It thus affords to States Parties the right to temporarily exclude the exercise of jurisdiction by the ICC for war crimes committed

[277] *Prosecutor v. Furundžiya*, *supra* note 80, at para. 244; and *see also Prosecutor v. Duško Tadić* (Sentencing Judgment), Case No. IT-94-1-T*bis*-R.117, para. 29 (14 July 1997); *Prosecutor v. Blaškić, supra* note 1, at para. 787; Nemitz, *supra* note 3, at 622-23.
[278] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 57.
[279] *Id.*, at para. 66.

[280] *Prosecutor v. Kayishema & Ruzindana*, *supra* note 89, at para. 367; and *see also Prosecutor v. Serushago, supra* note 33, at para. 13; *Prosecutor v. Stakić*, *supra* note 34, at para. 375; Emanuela Fronza, *Genocide in the Rome Statute*, in Flavia Lattanzi & William A. Schabas (eds.), 1 Essays On The Rome Statute Of The International Criminal Court 105, at 116, 117-18. Il Sirente (1999). Fronza refers to a passage in *Prosecutor v. Akayesu* where it was held that "there is no justification in the [ICTR] Staute 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." *Prosecutor v. Jean-Paul Akayesu* (Judgment), Case No. ICTR-96-4-T, para. 469 (2 Sept. 1998). Note, however, that *Akayesu* was here not concerned with the inherent gravity of crimes for sentencing purposes but with the problem of bringing cumulative charges.
[281] King & La Rosa, *supra* note 8, at 322-23; and *see also* Kai Ambos, Nulla Poena Sine Lege *in International Criminal Law*, in Roelof Haveman & Olaoluwa Olusanya (eds.), Sentencing And Sanctioning In Supranational Criminal Law 17, at 33-34. Antwerp/Oxford: Intersentia (2006).
[282] Schabas, *supra* note 25, at 1506.

in their territory or by their nationals, but not others;[283] 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;[284] defence of property can only exclude criminal responsibility for a war crime and can therefore not be raised as a defence against charges of genocide and crimes against humanity.[285]

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. Duško Tadić* based the extreme gravity of crimes against 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 the victims themselves but against humanity as a whole.[286]

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*."[287]

> 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.[288] In *Prosecutor v. Kambanda*, the ICTR thus noted that genocide is

[283] ICC Statute, *supra* note 1, art. 124.
[284] *Id*., art. 33(2); and see Andreas Zimmermann, *Superior Orders*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), 1 The Rome Statute Of The International Criminal Court: A Commentary 957, at 972. Oxford Univ. Press (2002).
[285] ICC Statute, *supra* note 1, art. 31(1)(c).
[286] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 73; and *see also Prosecutor v. Drazen Erdemović* (Judgment), Case No. IT-96-22-T (Joint Separate Opinion of Judge McDonald and Judge Vohrah), para. 21, 25 (7 Oct. 1999).
[287] *Draft Code of Crimes against the Peace and Security of Mankind*, art. 14, Comment para. (5), in Report Of The International Law Commission On The Work Of Its Fourty Eight Session, 6 May–26 July 1996, at 113-14, 51 U,N, GAOR Supp. (No. 10), U.N. Doc A/51/10 (1996); and *see also* Micaela Frulli, *Are Crimes against Humanity More Serious Than War Crimes?*, 12 EUR. J. INT'L L. 329, at 335 (2001).
[288] *Prosecutor v. Kambanda*, *supra* note 9, at para. 16; and *see also id*., at para. 42; *Prosecutor v. Serushago*, *supra* note 33, at para. 27; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 50, 451; and *see also Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, para. 986 (27 Jan. 2000); *Prosecutor v. Jelisić* (A) *supra* note 80 (Partial Dissenting Opinion of Judge Wald), at para.13; *Prosecutor v. Krstić* (T), *supra* note 80, at para. 699; William A. Schabas, Genocide In International Law, 9. Cambridge Univ. Press (2000) (proclaiming that in a hierarchy founded

"inherently aggravating,"[289] and this fact is germane to sentencing.[290] However, it has also been said that it is "more difficult" to rank the inherent gravity of genocide as against that of crimes against humanity.[291]

There is an influential body of opinion holding that the gravity of crimes against humanity exceeds that of war crimes.[292] It has been noted that crimes against humanity and war crimes based on the same conduct protect different interests.[293] In *Prosecutor v. Duško Tadić*, Judge Cassese in a separate opinion maintained that although there is *in abstracto* no hierarchy of gravity applying *a priori* to different crimes,[294] such a hierarchy does emerge when the very same act is classified as a war crime and a crime against humanity.[295] 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

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on the seriousness of crimes, genocide belongs to "the apex of the pyramid"); King & La Rosa, *supra* note 8, at 322; William A. Schabas, *Genocide*, in Otto Triffterer (ed.), The Rome Statute Of The International Criminal Court 107, at 109. Baden-Baden: Nomos Verlagsgesellschaft (1999); William A. Schabas, *The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in Horst Fischer, Claus Krez & Sascha Rolf Lüder (eds.), International And National Prosecution Of Crimes Under International Law: Current Developments 447, at 463. Berlin Verlag: Arno Spitz GmdH (2001); Nemitz, *supra* note 3, at 620; Leila Nadya Sadat, The International Criminal Court And The Transformation Of International Law: Justice For The New Millennium, 141. Ardsley, N.Y.: Transnat'l Publ. (2002); Antonio Cassese, *Genocide*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), 1 The Rome Statute Of The International Criminal Court: A Commentary, 335, at 344-45. Oxford Univ. Press (2002); Christine Byron, *The Crime of Genocide*, in Dominic Mcgoldrick, Peter Rowe & Eric Donnelly (eds.),The Permanent International Criminal Court: Legal And Policy Issues 143, at 143. Oxford/Portland: Hart Publ. (2004).

[289] *Prosecutor v. Kambanda*, *supra* note 9, at para. 42; and *see also Prosecutor v. Akayesu*, *supra* note 99, at para. 469; *Prosecutor v. Serushago*, *supra* note 33, at para. 15.

[290] *Prosecutor v. Serushago*, *supra* note 33, at para. 14, 15.

[291] *See*, for example, *Prosecutor v. Kambanda*, *supra* note 9, at para. 14; *Prosecutor v. Serushago*, *supra* note 33, at para. 14.

[292] *Prosecutor v. Duško Tadić* (Sentencing Appeal), *supra* note 11 (Separate Opinion of Judge Cassese), at para. 1, 16 (26 Jan. 2000); *Prosecutor v. Kambanda*, *supra* note 9, at para. 14 and *see also id*., at para. 43 (noting that crimes against humanity "are offences of the gravest kind against the life and liberty of the human being"); *Prosecutor V. Erdemović*, *supra* note 105, (Joint Separate Opinion of Judge McDonald and Judge Vohrah) at para. 20-25; *Prosecutor v. Furundžiya*, *supra* note 80, (Declaration by Judge Lal Chand Vohrah) at para. 8; King & La Rosa, *supra* note 8, at 322, 333-34; Frulli, *supra* note 106, at 335; and *see also id.*, at 349 (concluding that crimes against humanity are more serious than war crimes); Ambos, *supra* note 100, at 33-34.

[293] Flavia Lattanzi, *Crimes against Humanity and War Crimes in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in Horst Fischer, Claus Krez & Sascha Rolf Lüder (eds.), International And National Prosecution Of Crimes Under International Law: Current Developments 473, at 497. Berlin Verlag: Arno Spitz GmdH (2001).

[294] *Prosecutor v. Tadić* (Judgment in Sentencing Appeal), *supra* note 11, (Separate Opinion of Judge Cassese), at para. 7.

[295] *Id*., at para. 10.

of mind which may imperil fundamental values of the international community to a greater extent" than would be the case if the offence was prosecuted as a war crime.[296]

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.[297] In its judgment in the sentencing appeal in *Prosecutor v. Duško 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*.[298] Jan Nemitz 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.[299] In *Prosecutor v. Tihomir 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."[300]

It stands to reason that, within the realm of war crimes, grave breaches of the Geneva Conventions of 12 August 1949 and of 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.[301]

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.[302] Humiliation as an element of the crime of

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[296] *Id*., at para. 15; and *see also* Ambos, *supra* note 100, at 34.
[297] *See in general*, Lattanzi, *supra* note 112, at 498-503; Nemitz, *supra* note 3, at 618-20.
[298] *Prosecutor v. Tadić* (Judgment in Sentencing Appeal), *supra* note 11, at para. 69; and *see also Prosecutor v. Tadić* (Judgment in Sentencing Appeal), *supra* note 11, (Separate Opinion of Judge Shahabuddeen); *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 8, (Separate Opinion of Judge Robinson) at para. I; *Prosecutor v. Erdemović*, *supra* note 105, (Separate Opinion of Judge Li) at para. 18-26; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, (Separate Opinion of Judge Shahabuddeen), at para. II; *Prosecutor v. Blaškić*, *supra* note 1, at para. 804; *Prosecutor v. Furundžiya*, *supra* note 80, at para. 241-42, 247; *Prosecutor v. Krnojelać*, *supra* note 14, at para. 511; *Prosecutor v. Češić*, *supra* note 9, at para. 32.
[299] Nemitz, *supra* note 3, at 618, 618-19.
[300] *Prosecutor v. Blaškić*, *supra* note 1, at para. 800-03.
[301] Schabas, *supra* note 25, at 1507.
[302] *Prosecutor v. Vasiljević*, *supra* note 80, at para. 172; *Prosecutor v. Češić*, *supra* note 9, at para. 53.

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.[303] 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.[304]

(b) *The manner in which the crime was executed*

Gravity of a crime can also emerge from the manner in which the offence was executed.[305] 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,[306] and to "[c]ommission of the crime with particular cruelty" that has to be considered as an aggravating circumstance.[307]

The heinous means applied for the killing of victims of the crime was specially mentioned as an aggravating sentencing factor in *Prosecutor v. Kayishema*.[308] 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.[309] In *Prosecutor v. Ntakirutimana*, the ICTR stated that at the "upper end of the sentencing scale" are those who commit crimes with special zeal and sadism."[310] In *Prosecutor v. Češić*, the Sentencing Tribunal referred to the "exacerbating humiliation and degradation, depravity and sadistic behaviour" of the accused as aggravating factors.[311]

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[303] *Prosecutor v. Češić*, *supra* note 9, at para. 53.
[304] *Id*., at para. 54.
[305] *See Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 186.
[306] RPE, *supra* note 86, Rule 145(1)(c).
[307] *Id*., Rule 145(2)(b)(iv).
[308] *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 18.
[309] *Prosecutor v. Jelisić* (T), *supra* note 80, at para. 130.
[310] *Prosecutor v. Ntakirutimana*, *supra* note 90, at para. 884; and *see also Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 69; *Prosecutor v. Delalić*, *supra* note 7, at para. 1264, 1268, 1274, 1275; *Prosecutor v. Blaškić*, *supra* note 1, at para. 783; *Prosecutor v. Kunarać*, *supra* note 5, at para. 874; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, para. 486 (16 May, 2003); *Prosecutor v. Nahimana, Barayagwiza &Ngeze*, *supra* note 78, at para. 1097; *Prosecutor v. Gatete*, *supra* note 78, at para. 680.
[311] *Prosecutor v. Češić*, *supra* note 9, at para. 53; and *see also Prosecutor v. Delalić*, *supra* note 7, at para. 1262 (referring to "not only the inherent suffering involved in rape, but exacerbating her [the victim's] humiliation and degradation by raping her in the presence of his [the convicted person's] colleagues).

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.[312] In the *Čelibići Case*, the Trial Chamber found as a "most disturbing, serious and thus, an aggravating aspect" of the criminal acts that the accused "apparently enjoyed using this [electric shock] device upon his helpless victims,"[1313] and referred to the manner in which the crimes were committed as "indicative of a sadistic individual who, at times, displayed a total disregard of the sanctity of human life and dignity."[314]

(c) *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, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or status.[315]

A discriminatory motive has also been endorsed as an aggravating circumstance in the *ad hoc* Tribunals.[316] In *Prosecutor v. Tadić*, ethnic and religious discrimination and nationalistic sentiments were mentioned by name.[317] In *Prosecutor v. Vasiljević*, the Trail and the Appeals Chamber laid special stress on verbal abuse as an aggravating factor.[318]

In the *Čelebići Case*, a Trial Chamber of the ICTY was quite correct in saying:

> Motive is not an essential ingredient for the commission of an offence. It is to some extent a necessary factor in the determination of sentence after guilt has been established.[319]

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[312] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 57: and *see also Prosecutor v. Delalić*, *supra* note 7, at para. 1227.
[313] *Prosecutor v. Delalić*, *supra* note 7, at para.1264; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 193.
[314] *Prosecutor v. Delalić*, *supra* note 7, at para. 1268; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 193.
[315] RPE, *supra* note 86, Rule 145(2)(b)(v), read with ICC Statute, *supra* note 1, art. 21(3).
[316] *Prosecutor v. Vasiljević*, *supra* note 80, at para. 172; and *see also Prosecutor v. Delalić*, *supra* note 7, at para. 1269; *Prosecutor v. Blaškić*, *supra* note 1, at para. 784.
[317] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 55; and *see also Prosecutor v. Kunarać*, *supra* note 5, at para. 867.
[318] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, para. 276 (29 Nov. 2002); *Prosecutor v. Mitar Vasiljević*, *supra* note 80, at para. 161.
[319] *Prosecutor v. Delalić*, *supra* note 7, at para. 1235; and *see also Prosecutor v. Duško Tadić* (Judgment), Case No. IT-94-1-A, para. 250, 272 (15 July 1999).

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 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.[320] Tolerance and lack of bigotry will also count in mitigation of sentence.[321] In *Erdemović*, the accused actually saved a victim's life, and in sentencing this counted to his credit.[322]

(d) *Harmful consequences of the criminal act*

Cruelty of the criminal act is closely related to the harmful consequences of an offence, which has also been singled out as an element that falls under the nature of the crime as a sentencing directive.[323] The link appears from a statement in the sentencing judgment of *Duško Tadić*, where the ICTY referred in one breath to the cruelty of the act and the humiliation suffered by the victim as aggravating sentencing factors.[324] The ICC's *Rules of Procedure and Evidence* speak of "the extent of the damage caused, in particular the harm caused to victims and their families,"[325] and also, as an aggravating circumstance, of "[c]ommission of the crime where the victim is particularly defenceless."[326] It furthermore singles out "[c]ommission of the crime . . . where there were multiple victims" as a matter of aggravation.[327]

The number of victims killed would clearly come within the confines of the above directives.[328] But it goes beyond that. In the *Čelebići Case*, the Trial Chamber called gravity of an

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[320] *Prosecutor v. Delalić*, *supra* note 7, at para. 1235; and *see also Prosecutor v. Krstić* (T), *supra* note 80, at para. 711.
[321] *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i) under C*haracter*.
[322] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 105, 107.
[323] King & La Rosa, *supra* note 8, at 322; *and see Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 70; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 20; *Prosecutor v. Delalić*, *supra* note 7, at para. 1225, 1260, 1273; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 16.
[324] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 22; and *see also Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 63-65.
[325] RPE, *supra* note 86, Rule 145(1)(c).
[326] *Id*., Rule 145(2)b)(iii).
[327] *Id*., Rule 145(2)b)(iv).
[328] *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 15; *Prosecutor v. Kunarać*, *supra* note 5, at para. 866; *Prosecutor v. Krstić* (T), *supra* note 80, at para. 701; *Prosecutor v. Češić*, *supra* note 9, at para. 32; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, para. 337-38 (20 May 2005); *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, para. 440 (13 Dec. 2005); *Prosecutor v. Joseph Serugendo*, Case No. ICTR-2005-84-T, para. 90 (12 June 2006); *Emmanuel Ndindabahizi v. The Prosecutor*, Case No ICTR-01-71-A, para 135 (16 Jan 2007); *Prosecutor v. Juvénal Rugambarara*, Case No. ICTR-00-59-T, para. 24 (16 Nov. 2007); *Prosecutor v. François*

offence the "touchstone of sentencing," and noted that gravity includes the impact of the crime on victims.[329] It made special mention of the "substantial pain, suffering and injury" inflicted by the perpetrator upon each of his victims, and the "permanent physical scars" that resulted from the cruelty to which they were exposed.[330] In *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.[331]

In its sentencing policy articulated in the case of *Prosecutor v. Furundžiya*, the Trial Chamber laid special stress on "the severe physical pain and great emotional trauma that Witness A had to suffer as a consequence of these depraved acts committed against her."[332] The Tribunal had noted that the victim was a civilian detainee "and at the complete mercy of her captors."[333] In *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."[334]

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 at this day."[335] The Tribunal was particularly sensitive to the fact that victims were members of the civilian population and included

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Karera, Case No. ICTR-01-74-T, para. 579 (7 Dec. 2007); *Prosecutor v. Bagosora*, *supra* note 78, at para. 2272; *Prosecutor v. Gatete*, *supra* note 78, at para. 679.

[329] *Prosecutor v. Delalić*, *supra* note 7, at para. 1260; and *see also Prosecutor v. Krstić* (T), *supra* note 80, at para. 701; *Prosecutor v. Češić*, *supra* note 9, at para. 32.

[330] *Prosecutor v. Delalić*, *supra* note 7, at para. 1273; and *see also Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 56.

[331] *Prosecutor v. Vasiljević*, *supra* note 137, para. 235; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 200-05.

[332] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 287.

[333] *Id*., at para. 283.

[334] *Prosecutor v. Banović*, *supra* note 6, at para. 50; and *see also* P*rosecutor v. Dragoljub Kunarać & Others,* Case No. IT-96-23-A & IT-96-23/1-A, para. 352 (12 June 2002); *Prosecutor v. Milan Simić* (Sentencing Judgment), Case No. IT-95-9/2-S, para. 70 (17 Oct. 2002); *Prosecutor v. Obrenović*, *supra* note 9, at para. 102-03; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 184, 213 (vi).

[335] *Prosecutor v. Blaškić*, *supra* note 1, at para. 787.

women and children.[336] 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.[337] In *Prosecutor v. Kunarać*, special significance was attached for sentencing purposes to the fact that the victims of sexual assault included a young person.[338] 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.[339] 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 offence."[340]

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.[341] This proposition has subsequently been challenged. In *Prosecutor v. Krnojelać*, the ITCY 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, "that it would be unfair to consider such effects in determining sentence."[342] The ICTY subsequently changed its mind by holding that the impact of an offence on the relatives and friends of the victims may be taken into account for sentencing purposes,[343] for example in the case of murder and sexual assault.[344]

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[336] *Id*., at 786; and *see also Prosecutor v. Kunarać*, *supra* note 5, at para. 867; *Prosecutor v. Dragan Nikolić, supra* note 34, at para. 213 (iv).
[337] *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 137.
[338] *Prosecutor v. Kunarać*, *supra* note 5, at para. 835, 864, 879.
[339] *Prosecutor v. Vasiljević*, *supra* note 137, at para. 276; *Prosecutor v. Vasiljević*, *supra* note 80, at para. 116-17; *Prosecutor v. Krnojelać*, *supra* note 14, at para. 144.
[340] Nemitz, *supra* note 3, at 617.
[341] *Prosecutor v. Delalić*, *supra* note 7, at para. 1226.
[342] *Prosecutor v. Krnojelać*, *supra* note 14, at para. 512; and *see also Prosecutor v. Kunarać*, *supra* note 5, at para. 852.
[343] *Prosecutor v. Milorad Krnojelać*, Case No. IT-97-25-A, para. 260 (17 Sept. 2003); *and see Prosecutor v. Češić*, *supra* note 9, at para. 38.
[344] *Prosecutor v. Češić*, *supra* note 9, at para. 39, read with para. 44.

It should finally be noted that compassion with and assistance rendered by an accused to certain victims can also serve as a mitigating factor.[345] The ICC's *Rules of Procedure and Evidence* expressly mention "efforts by the person to compensate the victims" as a mitigating circumstance.[346]

(e) *Participation of the Accused in the Criminal Conduct*

The ICC'S *Rules of Procedure and Evidence* refer to "the degree of participation of the convicted person" in the offence of which he or she was convicted, and of "the degree of intent" as factors to be considered for sentencing purposes.[347]

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: personal responsibilities of the person, and the form of perpetration for which he or she was held responsible.

Several judgments of the *ad hoc* Tribunals laid stress, as an aggravating circumstance, on the status of the person within the community.[348] It has been decided, for example, that "[a]buse of positions of authority or trust is generally considered an aggravating factor,"[349] and even that a command position deserves a higher sentence than direct participation in the crime.[350] Particularly

[345] *See infra*, Paragraph D.4 (c).
[346] RPE, *supra* note 86, Rule 145(2)(a)(ii).
[347] *Id*., Rule 145(1)(c).
[348] *See in general*, *Prosecutor v. Serushago*, *supra* note 33, at para. 28-29; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 15; *Prosecutor v. Kordić & Čerkrz*, *supra* note 54, at para. 847; *Prosecutor v. Serugendo*, *supra* note 147, at para. 90; Nemitz, *supra* note 3, at 612.
[349] *Prosecutor v. Kambanda*, *supra* note 9, at para. 44; and *see also Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 26; *Prosecutor v. Delalić*, *supra* note 7, at para. 1220; *Prosecutor v. Musema*, *supra* note 107, at para. 1003-04; *Prosecutor v. Sikirica*, *supra* note 80, at para. 172, 210.
[350] *Prosecutor v. Blaškić*, *supra* note 1, at para. 791; and *see also id*., at para. 768.

critical in this regard is the position occupied by an accused in the organizational hierarchy of the prevailing power structures.[351] As stated in the *Čelebići Case*:

> It would be 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.[352]

In *Prosecutor v. Kambanda*, the fact that the accused was Prime Minister of Rwanda was accordingly taken into consideration as an aggravating factor.[353] In the *Čelibići Case*, the ICTY made something of the fact that it was dealing with high-ranking political officials and military officers,[354] 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.[355] 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.[356] In *Prosecutor v. Todorović*, the superior position of the accused as Chief of Police was considered an aggravating factor.[357] 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."[358] 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."[359] 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, and her post-conflict

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[351] *See*, for example, *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 60; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 50, 451, 469; *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 8, at para. 56; *Prosecutor v. Blaškić*, *supra* note 1, at para. 788; *Prosecutor v. Kordić & Čerkez*, *supra* note 54, at para. 847; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 60-62; *Prosecutor v. Krstić (T)*, *supra* note 80, at para. 708, 721; *Prosecutor v. Sikirica*, *supra* note 80, at para. 140; *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 60; *Prosecutor v. Obrenović*, *supra* note 9, at para. 99; *Prosecutor v. Gatete*, *supra* note 78, at para. 678.

[352] *Prosecutor v. Delalić*, *supra* note 7, at para. 1250; and *see also Prosecutor v. Aleksovski*, *supra* note 9, para. 187.

[353] *Prosecutor v. Kambanda*, *supra* note 9, at para. 61.

[354] *Prosecutor v. Delalić*, *supra* note 7, at para. 1234.

[355] *Id*., at para. 1268; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 19394, 213 (iii).

[356] *Prosecutor v. Kamuhanda*, *supra* note 53, at para. 764.

[357] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 59, 66.

[358] *Prosecutor v. Mladen Naletelić & Vinko Martinović*, Case No. IT-98-34-T, para. 751 (31 March 2003).

[359] *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 60; and *see also Prosecutor v. Renzaho*, *supra* note 78, at para. 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).

role in ensuring that the Dayton Accord was accepted and implemented in the Republic of Srpska,[360] added "much weight to the plea in mitigation put forward in this regard."[361] She was 72 years old at the time and was sentenced to eleven years imprisonment for her "participation in a crime of utmost gravity" (persecution).[362]

Of special significance in regard to war crimes is the position of the Accused in the chain of command.[363] 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.[364] In *Prosecutor v. Tadić*, on the other hand, the Appeals Chamber decided that a sentence in excess of 20 years imprisonment on any counts in the indictment would be excessive because the level in the command structure of the accused was low.[365] 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 mitigating factor.[366] 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.[367] The principle of "graduation of sentence"—that is, the rule that "the most senior levels of command

[360] *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 85-94.
[361] *Id*., at para. 94.
[362] *Id*., at para. 132, 134.
[363] *See*, for example, *Prosecutor v. Kupreškić*, *supra* note 9, at para. 852; *Prosecutor v. Aleksovski*, *supra* note 9, para. 184; *Prosecutor v. Delalić*, *supra* note 34, at para. 847; *Prosecutor v. Kunarać*, *supra* note 5, at para. 863; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, para. 381, 382 (16 Nov. 2001).
[364] *Prosecutor v. Aleksovski*, *supra* note 9, para. 187.
[365] *Prosecutor v. Tadić* (Judgment in Sentencing Appeal), *supra* note 11, at para. 55-57; and *see also Prosecutor v. Kordić & Čerkwz*, *supra* note 54, at para. 847.
[366] *Prosecutor v. Delalić*, *supra* note 7, at para. 1250; and *see* Schabas, *supra* note 25, at 1522 (noting that command responsibility is biased on negligence).
[367] *Prosecutor v. Krstić (T)*, *supra* note 80, at para. 709; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 89, at para. 358; *Prosecutor v. Elizaphan & Gérard Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-A, para. 563 (13 Nov. 2003); *Prosecutor v. Milan Babić*, Case No. IT-03-72-A, para. 80 (18 July 2005); *Prosecutor v. Jean De Dieu Kamuhanda*, Case No. ICTR-95-54A-A, para. 347 (19 Sept. 2005); *Prosecutor v. Stakić*, *supra* note 34, at para. 411; *Ndindabahizi v. The Prosecutor*, *supra* note 147, at para. 136; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, para. 284-85 (27 Nov. 2007); *Prosecutor v. Athanase Seromaba*, Case No. ICTR-2001-66-A, para. 230 (12 March 2008); *Prosecutor v. Hadžihasanović & Kubura*, *supra* note 34, at para. 320; *Prosecutor v. Renzaho*, *supra* note 78, at para. 823; *Prosecutor v. Gatete*, *supra* note 78, at para. 678.

structure should attract the severest sentences, with less severe sentences for those lower down the structure"[368]—is therefore not absolute.[369]

Also at the objective level, emphasis is placed on the form and degree of participation in the crime.[370] Playing a leading role in the execution of atrocities clearly serves as an aggravating circumstance,[371] while those not playing a significant role in the commission of an offence should receive lighter sentences.[372] The Trial Court is required to reflect in the sentence imposed "the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender."[373] 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.[374] Inchoate participation, such as an attempt to commit the crime, is generally treated for sentencing purposes as being of a less serious nature.[375] Merely aiding and abetting has generally been considered as warranting a reduced level of criminal responsibility.[376] 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."[377] In *Prosecutor v. Ntakirutimana*, the ICTR stated that those who planned or ordered the atrocities deserve the highest penalties.[378]

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[368] *Prosecutor v. Musema*, *supra* note 182, at para. 382.
[369] *Prosecutor v. Hadžihasanović & Kubura*, *supra* note 34, at para. 321.
[370] *Prosecutor v. Kupreškić*, *supra* note 9, at para. 852; *Prosecutor v. Aleksovski*, *supra* note 9, para. 182; *Prosecutor v. Delalić*, *supra* note 34, at para. 731; *Prosecutor v. Jelisić (A)*, *supra* note 80, at para. 101; *Prosecutor v. Stakić*, *supra* note 9, at para. 903; *Prosecutor v. Obrenović*, *supra* note 9, at para. 50; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 144; *Prosecutor v. Deronjić*, *supra* note 9, at para. 154, 156.
[371] *Prosecutor v. Serushago*, *supra* note 33, at para. 19; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 470; *Prosecutor v. Radoslav Brdanin*, Case No. IT-00-36-A, para. 413 (3 April 2007); *Prosecutor v. Bagosora*, *supra* note 78, at para. 2272; *Prosecutor v. Gatete*, *supra* note 78, at para. 680.
[372] *See Prosecutor v. Aleksovski*, *supra* note 9, para. 236; *Prosecutor v. Krnojelać*, *supra* note 14, at para. 509; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156.
[373] *Prosecutor v. Akayesu* (Sentence), *supra* note 53, para. 40, cited with approval by the Appeals Chamber in *Prosecutor v. Jean-Paul Akayesu* (Judgment), Case No. ICTR-96-4-A, para. 414 (1 June 2001); and *see also Prosecutor v. Dragan Dragan Nikolić*, *supra* note 34, at para. 144; *Prosecutor v. Deronjić*, *supra* note 9, at para. 154.
[374] *See*, for example, *Prosecutor v. Ruggiu*, *supra* note 28, at para. 49; and *see also id.*, at para. 77-79 (noting that the accused did not personally commit any of the acts of violence); Ambos, *supra* note 100, at 33.
[375] Schabas, *supra* note 25, at 1507.
[376] *Prosecutor v. Vasiljević*, *supra* note 80, at para. 182; *Prosecutor v. Krstić (A)*, *supra* note 80, at para. 251, 266, 268; *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, para. 963 (1 Dec. 2003) (noting that an "indirect form of participation" such as incitement to commit genocide and aiding and abetting warrants a lesser sentence).
[377] *Prosecutor v. Aleksovski*, *supra* note 11, para. 236: and *see also Prosecutor v. Deronjić*, *supra* note 9, at para. 156.
[378] *Prosecutor v. Ntakirutimana*, *supra* note 90, at para. 884.

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, the Chamber noted that not participating in the actual killings "goes to his criminal conduct rather than to mitigation."[379]

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."[380] The principle has been applied in several judgments of the *ad hoc* Tribunals.[381]

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.[382] 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,[383] 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.

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[379] *Prosecutor v. Rutaganira*, *supra* note 13, at para. 137-38.
[380] *Statute of the International Criminal Tribunal*, art. 6(4), contained in the annex of the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (*1993*), *reprinted in* 32 I.L.M. 1192 (1993); *Statute of the International Tribunal for Rwanda*, art. 5(4), contained in the annex of S.C. Res. 955 (1994), *reprinted in* 33 I.L.M. 1602 (1994).
[381] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 15, 20, 53; and *see also Prosecutor v. Delalić*, *supra* note 7, at para. 1281 (the Court 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 vicitms).
[382] ICC Statute, *supra* note 1, art. 33.
[383] *See*, for example, King & La Rosa, *supra* note 8, at 335.

Although the ICTY in *Furundžiya* subscribed to the principle that those not acting as principal perpetrators deserve lighter sentences,[384] the Tribunal did judge the accused, being an aider and abettor,[385] harshly for his "active role as a commander of the Jokers,"[386] 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 the fact that the accused did not occupy a senior position in the overall command structure.[387] 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.[388] 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."[389] 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.[390](e)

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[384] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 281.
[385] *Id*., at para. 282.
[386] *Id*., at para. 283.
[387] *Prosecutor v. Delalić*, *supra* note 34, at para. 847; and *see also Prosecutor v. Kunarać*, *supra* note 5, at para. 858; *Prosecutor v. Vasiljević*, *supra* note 80, at para. 301; *Prosecutor v. Banović*, *supra* note 6, at para. 45; *Prosecutor v. Češić*, *supra* note 9, at para. 32.
[388] *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 17; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 16-20, 54, 89; *Prosecutor v. Delalić*, *supra* note 7, at para. 1283; *Prosecutor v. Rutaganira*, *supra* note 13, at para. 161.
[389] *Prosecutor v. Blaškić*, *supra* note 1, at para. 769; and *see Omar Serushago v. Prosecutor*, Case No. ICTR-98-39-A, para. 27 (6 April 2001) (The Appeals Chamber of the ICTR not accepting duress as an extenuating circumstance because it was neither alleged nor proven at trial).
[390] *Prosecutor v. Blaškić*, *supra* note 1, at para. 768; and *see also Prosecutor v. Vasiljević*, *supra* note 137, at para. 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."[391] Retributive theories assert that "punishment must be equivalent to the level of wrongdoing."[392]

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."[393] 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.[394] As noted by one analyst, "no one regards raping a rapist, or torturing a torturer, as appropriate punishment today."[395] 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.[396] 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.[397]

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.*"[398] (Emphasis added.) The "just desert" theory

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[391] Bagaric & Amarasekara, *supra* note 18, at 127.
[392] *Ibid*.; and *see also id.*, at 157.
[393] *See Leviticus* 24:19-20: "If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered."
[394] F.J. VAN ZYL & J.D. VAN DER VYVER, INLEIDING TOT DIE REGSWETENSKAP, 228-29. Durban: Butterworths (1982).
[395] Eric Blumenson, *The Challenge of a Global Standard of Justice*: *Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COL. J. TRANSNAT'L L. 801, at 840 (2006).
[396] *Prosecutor v. Aleksovski*, *supra* note 9, para. 185; and *see also Prosecutor v. Kordić & Čerkez*, *supra* note 54, at para. 847; *Prosecutor v. Banović*, *supra* note 6, at para. 34; *Prosecutor v. Deronjić*, *supra* note 9, at para. 150; King & La Rosa, *supra* note 8, at 330.
[397] *See* Bagaric & Amarasekara, *supra* note 18, at 163-64.
[398] *Supra*, the text accompanying notes 10-11.

"places the requirement of justice, rather than the pursuit of crime prevention, at the foundation of the general justification for criminal sanctions."[399] 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.[400] 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.[401]

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.[402] Committing the crime "knowingly and with premeditation" therefore deserves to be severely punished.[403]

The *Rules of Procedure and Evidence* mention in their list of mitigating circmstances those "falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress."[404] 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

[399] Beresford, *supra* note 24, at 40.
[400] *See Prosecutor v. Kabashi*, *supra* note 34, at para. 11 (noting that a sentence must "properly reflect[] the personal culpability of the wrongdoer"); *Prosecutor v. Bemba Gombo*, *supra* note 9, at para. 12; Frulli, *supra* note 106, at 336 (noting that the mental element influences the gravity of a crime); Nemitz, *supra* note 3, at 616 (noting that gravity of a crime 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").
[401] Peglau, *supra* note 2, at 143, 147.
[402] RPE, *supra* note 86, Rule 145(1)(c); and *see also* King & La Rosa, *supra* note 8, at 332 (including under the rubric of gravity of the offence, the "types of intent").
[403] *See Prosecutor v. Kambanda*, *supra* note 9, at para. 61; *and see supra*, the text accompanying note 139.
[404] RPE, *supra* note 86, Rule 145(2)(a)(i).

the time the offence was committed) to be a mitigating circumstance.[405] 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 when the crime was committed), no previous convictions for any violent crime, and being the father of a young child,[406] and, perhaps more puzzling, that the fact the he suffered from "personality disorders, [and] had borderline narcissistic and anti-social characteristics" did not diminish his criminal responsibility.[407]

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,[408] and consequently declined to take the mental condition of the accused into account as a ground in mitigation of sentence.[409] 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."[410] 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.

D. 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 entencing in terms of extenuating or aggravating circumstances. Here the nature and magnitude of

[405] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 283; and *see also Prosecutor v. Serushago*, *supra* note 33, at para. 39 (where the convicted person was 37 years old at the time the crime was committed).
[406] *Prosecutor v. Jelisić (T*), *supra* note 80, at para. 124.
[407] *Id*., at para. 125.
[408] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 93; and *see also Prosecutor v. Delalić*, *supra* note 7, at para. 1172.
[409] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 95.
[410] ICC Statute, *supra* note 1, art. 67(1)((c)(i).

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.[411] That, perhaps, is what the ICTY had in mind when it proclaimed that "[m]itigation of punishment in no way reduces the gravity of the crime or the guilty verdict against a convicted person."[412]

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.[413] 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.[414] 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,[415] 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

[411] *See Prosecutor v. Stakić*, *supra* note 9, at para. 920 (noting that "mitigating circumstances may also include those not related to the offence"); and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 145; *Prosecutor v. Deronjić*, *supra* note 9, at para. 155.
[412] *Prosecutor v. Ruggiu*, *supra* note 28, at para. 80; *Prosecutor v. Kambanda*, *supra* note 9, at para. 37, 56; and *see also Prosecutor v. Deronjić*, *supra* note 9, at para. 224.
[413] *See* Peglau, *supra* note 2, at 146.
[414] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 86.
[415] *See* Nemitz, *supra* note 3, at 608.

aggravating circumstance.[416] It therefore makes no sense to proclaim as a supposed aggravating circumstance for sentencing purposes that the convicted person "knowingly and consciously",[417] or "voluntarily",[418] 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.[419]

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.[420] A discriminatory intent can be considered an aggravating factor of crimes against humanity other than persecution,[421] for example in the case of murder as a crime against humanity.[422] 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.[423]

It is on the other hand quite feasible and appropriate to take willing participation in the crime,[424] or premeditation,[425] into account as an aggravating circumstance. Premeditation is the opposite of spontaneity. If a person commits a crime after having considered the consequences of

[416] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 57; and *see also Prosecutor v. Kunarać*, *supra* note 5, at para. 852; *Prosecutor v. Krnojelać*, *supra* note 14, at para. 517; *Prosecutor v. Vasiljević*, *supra* note 137, at para. 277; *Prosecutor v. Stakić*, *supra* note 9, at para. 904; *Prosecutor v. Banović*, *supra* note 6, at para. 53; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 144 note 179; *Prosecutor v. Obrenović*, *supra* note 9, at para. 99; *Prosecutor v. Vasiljević*, *supra* note 80, at para. 171-72; *Prosecutor v. Češić*, *supra* note 9, at para. 53; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, para. 693 (29 July 2004); *Prosecutor v. Deronjić*, *supra* note 9, at para.106, 127; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, para. 44 (8 March 2006); *Ndindabahizi v. The Prosecutor*, *supra* note 147, at para. 137; *Prosecutor v. Renzaho*, *supra* note 78, at para. 822; *Prosecutor v. Gatete*, *supra* note 78, at para. 677; *Prosecutor v. Lubanga*, *supra* note 80, at para. 35; *Prosecutor v. Vlastimir Dordević*, Case No. IT-05-87/1-A, para. 936 (27 Jan. 2014); *Callixte Nzabonimana v. The Prosecotor*, Case No. ICTR-98-44D-A, para. 464 (29 Sept. 2014); *Prosecutor v. Pauline Nyiramasuhuko & Others*, Case No. ICTR-98-42-A, para. 3356, 3385 (14 Dec. 2015; *Prosecutor v. Bemba Gombo*, *supra* note 9, at para 14.

[417] *Prosecutor v. Rutaganda*, *supra* note 61, at para. 50, 673; and *see also Prosecutor v. Serushago*, *supra* note 33, at para. 30.

[418] *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 26; and *see also Prosecutor v. Krstić (T)*, *supra* note 80, at para. 721 (referring to "conscious and voluntary participation").

[419] *See* Schabas, *supra* note 25, at 1525.

[420] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 57.

[421] *Prosecutor v. Kunarać*, *supra* note 153, at para. 357; *Prosecutor v. Vasiljević*, *supra* note 137, at para. 278; *Prosecutor v. Vasiljević*, *supra* note 80, at para. 171.

[422] *Prosecutor v. Vasiljević*, *supra* note 80, at para. 173.

[423] *Prosecutor v. Blaškić*, *supra* note 1, at para. 793.

[424] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 44; *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 55 56, 57.

[425] Schabas, *supra* note 25, at 1525; and *see*, for example, *Prosecutor v. Kambanda*, *supra* note 9, at para. 61; *Prosecutor v. Delalić*, *supra* note 7, at para. 1261; *Prosecutor v. Serushago*, *supra* note 33, at para. 30; *Prosecutor v. Blaškić*, *supra* note 1, at para. 793; *Prosecutor v. Krstić (T)*, *supra* note 80, at para. 711.

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.[426] The burden of proof of aggravating circumstances is on the Prosecutor, while the burden of proof in respect of mitigating circumstances is on the Defence.[427] It is also important to note that the *ad hoc* tribunals require that aggravating circumstances be proven beyond reasonable doubt,[428] while mitigating circumstances require no more than proof on a balance of probabilities.[429] In *Prosecutor Češić*, the Sentencing Tribunal could not conclude on a balance of probabilities that the accused was of a good character,[430] 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.[431] One might well wonder how the burden of proof with regard to mitigating circumstances will play itself 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

[426] *Prosecutor v. Delalić*, *supra* note 34, at para. 777, 780; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 125; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 125, 141, 145; *Prosecutor v. Deronjić*, *supra* note 9, at para. 155; *Prosecutor v. Stakić*, *supra* note 34, at para. 416; *Prosecutor v. Hadžihasanović & Kubura*, *supra* note 34, at para. 325; *Augustine Bizimungu v. The Prosecutor*, Case No.ICTR-00-56B-A, para. 400 (30 June 2014); *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, para. 644 (8 April 2015; *Prosecutor v. Bemba Gombo*, *supra* note 9, at para.19.

[427] *Prosecutor v. Kunarać*, *supra* note 5, at para. 847; *Prosecutor v. Stakić*, *supra* note 34, at para. 406.

[428] *Prosecutor v. Delalić*, *supra* note 34, at para. 763; *Prosecutor v. Kunarać*, *supra* note 5, at para. 847; *Prosecutor v. Sikirica*, *supra* note 80, at para. 110; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 126; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 145; *Prosecutor v. Češić*, *supra* note 9, at para. 47; *Prosecutor v. Deronjić*, *supra* note 9, at para. 155; *Prosecutor v. Blaškić*, *supra* note 235, at para. 686, 697; *Kajelijeli v. The Prosecutor*, *supra* note 78, at para. 294; *Prosecutor v. Babić*, *supra* note 186, at para. 43; *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze*, Case No. ICTR-99-55-A, para. 1038 (28 Nov. 2007); *Prosecutor v. Renzaho*, *supra* note 78, at para. 822; *Prosecutor v. Gatete*, *supra* note 78, at para. 677; P*rosecutor v. Lubanga*, *supra* note 80, at para. 33.

[429] *Prosecutor v. Delalić*, *supra* note 34, at para. 590; *Prosecutor v. Kunarać*, *supra* note 5, at para. 847; *Prosecutor v. Sikirica*, *supra* note 80, at para. 110; *Prosecutor v. Simić* (Sentencing Judgment), *supra* note 153, at para. 40; *Prosecutor v. Stakić*, *supra* note 9, at para. 920; *Prosecutor v. Momir Nikolić*, *supra* note 236, at para. 126; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 145; *Prosecutor v. Deronjić*, *supra* note 9, at para. 155; *Prosecutor v. Blaškić*, *supra* note 235, at para. 697; *Kajelijeli v. The Prosecutor*, *supra* note 78, at para. 294; *Prosecutor v. Babić*, *supra* note 186, at para. 43; *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, para. 8 (2 April 2007); *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, para. 11 (31 Oct. 2007); *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, *supra* note 246, at para. 1038; *Prosecutor v. Hadžihasanović & Kubura*, *supra* note 34, at para. 302; *Prosecutor v. Gatete*, *supra* note 78, at para. 677; *Prosecutor v. Lubanga*, *supra* note 80, at para. 33.

[430] *Prosecutor v. Češić*, *supra* note 9, at para. 87.

[431] *See Kajelijeli v. The Prosecutor*, *supra* note 78, at para. 294 (noting that the burden of proof with the regard to mitigating circumstances is on the accused).

him or her any reversal of the burden of proof or any onus of rebuttal."[432] 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;[433] and that absence of mitigating circumstances can never serve as an aggravating circumstance.[434]

> 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;[435]
- As an aggravating circumstance, prior convictions for crimes within the jurisdiction of the ICC or of a similar nature;[436] and
- As a mitigating circumstance, the convicted person's conduct after the act, including his or her efforts to compensate victims and any co-operation with the Court.[437]

1. 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.

(a) *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 hierarchy.[438] The *Rules of Procedure and Evidence* go well beyond these confines and explicitly mention the age, education, and social and economic

[432] ICC Statute, *supra* note 1, art. 67(1)(i).
[433] *Prosecutor v. Naletilic & Martinovic*, *supra* note 78, at para. 742; *Prosecutor v. Stakić*, *supra* note 34, at para. 405.
[434] *Prosecutor v. Tihomir Blaškić*, *supra* note 235, at para. 687; *Prosecutor v. Plavšić* (Sentencing Judgment), *supra* note 61, at para. 64.
[435] RPE, *supra* note 86, Rule 145(1)(c).
[436] *Id*., Rule 145(2)(b)(i).
[437] *Id*., Rule 145(2)(a)(ii).
[438] King & La Rosa, *supra* note 8, at 322; and *see also id.*, at 323, 332.

conditions of the convicted person, which, it would seem, can serve as either mitigating or aggravating circumstances.[439]

One is here 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"[440] and "diminished mental capacity",[441] 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*.[442] In *Prosecutor v. Furundžiya*, the young age of the accused (23 years at the time the offence was committed) was taken into account as a mitigating circumstance.[443] 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.[444] In *Prosecutor v. Vinvent Rutaganira*, the Trial Chamber held the old age of the accused (60 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.[445] In *Prosecutor v. Biljana Plavšić*, the fact that until the time of the offence the accused was known to have "led an honest, honourable and private family, professional and social life" was taken into account in mitigation of sentence."[446]

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[439] RPE, *supra* note 86, Rule 145(1)(c).
[440] *Ibid*.
[441] *Id*., Rule 145(2)(a)(i).
[442] *Prosecutor v. Kambanda*, *supra* note 9, at para. 28-29; and *see also Prosecutor v. Krstić (A)*, *supra* note 80, at para. 267.
[443] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 284, 291; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 111 and *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i) (where the convicted person was 23 years old at the time the crime was committed); *Prosecutor v. Delalić*, *supra* note 7, at para. 1283 (where the convicted person was 19 years old at the time the crime was committed); *Prosecutor v. Serushago*, *supra* note 33, at para. 39 (where the convicted person was 37 years old at the time the crime was committed); *Prosecutor v. Serugendo*, *supra* note 147, at para. 91.
[444] *Prosecutor v. Serushago*, *supra* note 33, at para. 39; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 111 (referring to the convicted person's "current family status"); *Prosecutor v. Furundžiya*, *supra* note 25, at para. 280 (noting, though, at para. 284, that this factor must not be given "significant weight"); *Prosecutor v. Banović*, *supra* note 6, at para. 82 (taking into account that the accused is married and has a child); *Prosecutor v. Obrenović*, *supra* note 9, at para. 139 (noting that the accused was married to an economist and is the father of a six-year old boy); *Prosecutor v. Rutaganira*, *supra* note 13, at para. 120-21 (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").
[445] *Prossecutor v. Rutaganira*, *supra* note 13, at para. 132-36.
[446] *Prosecutor v. Plavšić*, *supra* note 61, at para. 108.

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 23 when the crime was committed), no previous convictions for any violent crime, and being the father of a young child.[447] 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,[448] but since all that is required was for the Trial Chamber to consider the age of the accused, which it did,[449] 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,[450] as "a strange decision, as clearly at the age of 23, the accused is old enough to be aware that his offences were unlawful,"[451] or noting that in *Kayishema & Ruzindana*, where Rizindana was 32 years of age,[452] the ICTR "gave a rediculously wide interpretation to the term youth."[453] The same analyst, on the other hand, applauded a prison sentence of 15 years (instead of five as requested by the Defence) in the case of Esad Landžo (an Accused in the *Case* who was 19 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."[454] This line of reasoning is misleading, since the age of an accused was but one of several sentencing factors taken into account by the sentencing tribunals. In cases where the Accused was

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[447] *Prosecutor v. Jelisić (T), supra* note 80, at para. 124; and *see also Prosecutor v. Furundžiya*, *supra* note 25, at para. 284 (saying the same in regard to absence of previous convictions and the family disposition of the convicted person); *Prosecutor v. Obrenović*, *supra* note 9, at para. 140 (noting that in view of the gravity of the crime, the family circumstances of the accused cannot be afforded any significant eight); *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 170 (deciding that family circumstances, such as the accused being a teacher, was married and had two sons—*see* para. 169—can be said of many accused persons and should not be given any significant weight); *Prosecutor v. Gatete*, *supra* note 78, at para. 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).

[448] *Prosecutor v. Jelisić (A*), *supra* note 80, at para. 129, 131; *see also Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16; *Prosecutor v. Furundžiya*, *supra* note 25, at para. 284; *Prosecutor v. Blaškić*, *supra* note 1, at para. 778; *Prosecutor v. Kunarać*, *supra* note 5, at para. 864; *Prosecutor v. Kordić & Čerkez*, *supra* note 54, at para. 853; *Prosecutor v. Banović*, *supra* note 6, at para. 75; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 146; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156.

[449] *Prosecutor v. Jelisić (A)*, *supra* note 80, at para. 131.

[450] *Supra*, the text accompanying note 262.

[451] Olaoluwa Olusanya, *Granting Immunity to Child Combatants Supranationally*, in ROELOF HAVEMAN & OLAOLUWA OLUSANYA (eds.), SENTENCING AND SANCTIONING IN SUPRANATIONAL CRIMINAL LAW 87, at 106. Intersentia (2006).

[452] *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 12.

[453] Olusanya, *supra* note 270, at 107.

[454] *Id*., at 105.

young but not so young (say in his 30's), 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.[455] In *Prosecutor v. Češić*, the Sentencing Tribunal declined to accept the age of 27 years as a mitigating factor since the accused was "well beyond the age of majority."[456] In *Prosecutor v. Plavišić*, the question whether being a senior (72 years of age) 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,[457] 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.[458] The advanced age of the convicted person was therefore accepted by the Sentencing Tribunal as a mitigating factor.[459] 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,[460] physical and mental condition,[461] poor health,[462] indigence,[463] a mediocre level of education,[464] an immature and fragile personality,[465] a

[455] *See*, for example, *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 12 (the Court noting that for sentencing purposes it considered "the relatively young age of Ruzindana (thirty-two years old in 1994) and the possibility of rehabilitation"); *Prosecutor v. Blaškić*, *supra* note 1, at para. 778 (noting that "[t]he case-law of the two ad hioc Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance").
[456] *Prosecutor v. Češić*, *supra* note 9, at para. 91.
[457] *Prosecutor v. Plavšić*, *supra* note 61, at para. 103. In *Prosecutor v. Krnojelać*, the Sentencing Tribunal did mention the accused's age (62 years) as a "final matter to which the Trial Chamber has had regard in sentencing." *Prosecutor v. Krnojelać*, *supra* note 14, at para. 533.
[458] *Prosecutor v. Plavšić*, *supra* note 61, at para. 105.
[459] *Id*., at para. 106.
[460] *Prosecutor v. Delalić*, *supra* note 7, at para. 1283; and *see also Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i); *Prosecutor v. Serushago*, *supra* note 33, at para. 36; *Serushago v. Prosecutor*, *supra* note 208, at para. 24; *Prosecutor v. Serugendo*, *supra* note 147, at para. 91 (simply mentioning the family position of the convicted person).
[461] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 44; and *see also Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 93-95 (dealing with the diminished mental capacity of the convicted person).
[462] *Prosecutor V. Rutaganda*, *supra* note 61, at para. 50, 472; *Prosecutor V. Serugendo*, *supra* note 147, at para. 92, 94; *Prossecutor V. Rutaganira*, *supra* note 13, at para. 133, 135-36.
[463] *Prosecutor V.Tadić* (Sentencing Judgment), *supra* note 96, at para. 62.
[464] *Prosecutor V. Ruggiu*, *supra* note 28, at para. 61.
[465] *Prosecutor V. Delalić*, *supra* note 7, at para. 1283; and *see also Prosecutor V. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i) under *family background*; *Prosecutor V. Jelisić (T*), *supra* note 80, at para. 125 (mentioning personality disorders).

corrigible personality favorable to rehabilitation,[466] not being a danger to society,[467] the work record of the convicted person,[468] being non-nationalistic (that is, to one's credit, not entertaining sectional biases in a highly polarized plural society),[469] and finally, having to serve a prison sentence far from home.[470]

Emphasis has also been placed, in extenuation, on the general nicety of a convicted person, for example being "an honest and respectable citizen";[471] 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.[472] 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.[473] A good character was mentioned as an extenuating circumstance in several judgments of the *ad hoc* Tribunals,[474] but in most cases little weight was given to the character of a convicted person for purposes of sentencing.[475] (b) *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."[476] Although

[466] *Prosecutor V. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 111.
[467] *Id*.
[468] *Prosecutor V. Tadić* (Sentencing Judgment), *supra* note 96, at para. 63.
[469] *Prosecutor V. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 105-08; and *see also Prosecutor V. Furundžiya*, *supra* note 25, at para. 280.
[470] *Prosecutor V. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 111.
[471] *Prosecutor V. Ruggiu*, *supra* note 28, at para. 59; and *see also Prosecutor V. Serugendo*, *supra* note 147, at para. 91.
[472] *Prosecutor V. Ruggiu*, *supra* note 28, at para. 61-62.
[473] *Prosecutor V. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i) under *Character*. As to the commendable character of a convicted person as a mitigating factor, *see also Prosecutor V. Kunarać*, *supra* note 5, at para. 478; *Prosecutor V. Momir Nikolić*, *supra* note 80, at para. 164.

[474] *Prosecutor v. Aleksovski*, *supra* note 9, para. 236; *Prosecutor v. Blaškić*, *supra* note 1, at para. 779-82; *Prosecutor v. Zoran Kupreškić & Others*, Case No. IT-95-16-A, para. 459 (23 Oct. 2001); *Prosecutor v. Krnojelać*, *supra* note 14, at para. 519; *Prosecutor v. Ntakirutimana*, *supra* note 90, at para. 895, 906; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 164; *Prosecutor v. Obrenović*, *supra* note 9, at para. 134; *Prosecutor v. Semanza*, *supra* note 147, at para. 397; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No ICTR-2001-64-A, para. 195 (7 July 2006).
[475] *Prosecutor v. Kunarać*, *supra* note 153, at para. 33; *Prosecutor v. Blaškić*, *supra* note 1, at para. 782; *Prosecutor v. Ntakirutimana*, *supra* note 90, at para. 908; *Prosecutor v. Stakić*, *supra* note 9, at para. 926; *Prosecutor v. Niyitegeka*, *supra* note 129, at para. 264-66: *Prosecutor v. Semanza*, *supra* note 147, at para. 398; *Prosecutor v. Seromba*, *supra* note 186, at para. 235.
[476] RPE, *supra* note 86, Rule 145(2)(b)(i).

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 sentence. That, in any event, appears from several judgments of the *ad hoc* Tribunals.[477]

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 sentence.[478] In *Prosecutor v. Furundžiya*, the Trial Chamber decided that the fact that the accused had no previous convictions and is the father of a young child "cannot be given significant weight in a case of this gravity."[479]

2. **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*

[477] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 63; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i), under the heading, *Character*; *Prosecutor v. Kambanda*, *supra* note 9, at para. 45; *Prosecutor v. Furundžiya*, *supra* note 25, at para. 280, 284; *Prosecutor v. Aleksovski*, *supra* note 11, para. 236; *Prosecutor v. Jelisić (T)*, *supra* note 80, at para. 124; *Prosecutor v. Blaškić*, *supra* note 1, at para. 780; *Prosecutor v. Banović*, *supra* note 6, at para. 62, 76; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156; and in the ICTR, *Prosecutor v. Ruggiu*, *supra* note 28, at para. 59; *Prosecutor v. Rutaganira*, *supra* note 13, at para. 130; *Prosecutor v. Serugendo*, *supra* note 147, at para. 91.

[478] *Prosecutor v. Kordić & Čerkez*, *supra* note 54, at para. 848.

[479] *Prosecutor v. Furundžiya*, *supra* note 25, at para. 284; and *see also Prosecutor v. Banović*, *supra* note 6, at para. 76.

and Evidence mention two examples, namely "efforts by the person to compensate the victims" and "any co-operation with the Court".[480] Judgments of the *ad hoc* Tribunals more generously laid special stress on co-operation by the accused with the Prosecutor, a guilty plea, and regret and remorse.

(a) *Co-operation with the Court*

The *Rules of Procedure and Evidence* of the ICC mention, as a mitigating circumstance, "co-operation with the Court,"[481] 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.[482] Co-operation with the Prosecutor must thus in terms of the latter set of Rules be "substantial".[483] Substantiality of cooperation will depend in part on "the extent and quality of the information provided to the Prosecution."[484] In *Prosecutor v. Mitar Vasiljević*, a Trial Chamber of the ICTY found that co operation with the Prosecutor was only "modest" but did deserve some, albeit very little, weight.[485] In several of their judgments, the ICTY[486] and the ICTR[487] looked favorably upon substantial co-operation with the Prosecutor. Voluntary surrender was specially mentioned, to the convicted person's credit, in *Prosecutor v.*

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[480] RPE, *supra* note 86, Rule 145(2)(a)(ii).
[481] *Ibid*.
[482] *Rules of Procedure and Evidence of the International Criminal Tribunal*, Rule 101(B)(ii), U.N. Doc. IT/32/Rev.13, *reprinted in* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, BASIC DOCUMENTS 29, at 130 (1998) (hereafter "ICTY RPE "); *Rules of Procedure and Evidence of the International Tribunal for Rwanda*, Rule 101(B)(ii), U.N. Doc. ITR/3/Rev.2 (5 July 1996), *reprinted in* VIRGINIA MORRIS & MICHAEL SCHARF, 2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 19, at 55 (1999) (hereafter "ICTR RPE "); and *see Prosecutor v. Vasiljević*, *supra* note 80, at para. 180 (emphasizing that the *Rules of Procedure and Evidence* of the *ad hoc* Tribunals only mention co-operation with the Prosecutor and do not cover other forms of co-operation).
[483] *Prosecutor v. Vasiljević*, *supra* note 80, at para. 179.
[484] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 86; and *see also Prosecutor v. Sikirica*, *supra* note 80, at para. 111; *Prosecutor v. Plavšić*, *supra* note 61, at para. 63; *Prosecutor v. Banović*, *supra* note 6, at para. 58; *Prosecutor v. Češić*, *supra* note 9, at para. 62; and *see also Prosecutor v. Deronjić*, *supra* note 9, at para. 244.
[485] *Prosecutor v. Vasiljević*, *supra* note 137, at para. 299; endorsed on appeal in *Prosecutor v. Vasiljević*, *supra* note 80, at para. 180.
[486] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 99-101; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i), under the heading, *Character*, para. iv, 21; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 83-88; *Prosecutor v. Plavšić*, *supra* note 61, at para. 109; *Prosecutor v. Obrenović*, *supra* note 9, at para. 122, 129, 141; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156; *Prosecutor v. Serugendo*, *supra* note 147, at para. 91.
[487] *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 20; *Prosecutor v. Kambanda*, *supra* note 9, at para. 29, 36, 47, 61(i); *Prosecutor v. Serushago*, *supra* note 33, at para. 31-33, 38, 41; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 56–58; *Prosecutor v. Musema*, *supra* note 107, at para. 1007; *Serushago v. Prosecutor*, *supra* note 208, at para. 24.

Serushago.[488] 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.[489]

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".[490]

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."[491]

Expecting nothing in return would mean that a plea agreement cannot be accepted as co-operation.[492] In the *Čelebići Case*, the Trial Chamber of the ICTY altogether rules out an attempt at plea bargaining as a mitigating factor.[493]

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[488] *Prosecutor v. Serushago*, *supra* note 33, at para. 34, 41; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 55; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 20; *Prosecutor v. Kupreškić*, *supra* note 9, at para. 853, 860, 863; *Prosecutor v. Blaškić*, *supra* note 1, at para. 776; *Prosecutor v. Kunarać*, *supra* note 5, at para. 868; *Serushago v. Prosecutor*, *supra* note 208, at para. 24; *Prosecutor v. Kupreškić, supra* note 290, at para. 430; *Prosecutor v. Plavšić*, *supra* note 61, at para. 65, 84, 110; *Prosecutor v. Obrenović*, *supra* note 9, at para. 136, 141; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156, 266; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 145.

[489] *Prosecutor v. Obrenović*, *supra* note 9, at para. 111; and *see Prosecutor v. Deronjić*, *supra* note 9, at para. 267.

[490] *Prosecutor v. Blaškić*, *supra* note 1, at para. 774.

[491] *Prosecutor v. Deronjić*, *supra* note 9, at para. 276.

[492] *See contra*, Schabas, *supra* note 73, at 497 (stating that if an admission of guilt is to be a mitigating factor, it would encourage plea bargaining).

[493] *Prosecutor v. Delalić*, *supra* note 7, at para. 1280.

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.[494] And, 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,[495] 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.

(b) *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.[496] It could, of course, come within the general confines of co-operation with the Court,[497] but has been mentioned in judgments of the *ad hoc* Tribunals as an extenuating circumstance alongside co-operation with the Court.[498] 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

[494] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 8, at para. 19; and *see also Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 58 (noting that the convicted person did not co-operate and denied his guilt).
[495] *Prosecutor v. Plavšić*, *supra* note 61, at para. 64; *Prosecutor v. Banović*, *supra* note 6, at para. 61; *Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, para. 127 (13 April 2006); *Prosecutor v. Gatete*, *supra* note 78, at para. 680.
[496] 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.
[497] *See* Peglau, *supra* note 2, at 148.
[498] *Serushago v. Prosecutor*, *supra* note 208, at para. 24; and *see also Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 55; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(ii); *Prosecutor v. Kambanda*, *supra* note 9, at para. 36, 50, 52, 61(iii); *Prosecutor v. Serushago*, *supra* note 33, at para. 35, 41; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 20; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 53-55; *Prosecutor v. Jelisić (A)*, *supra* note 80, at para. 122; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 76; *Prosecutor v. Sikirica*, *supra* note 80, at para. 14851, 192-93, 228; *Prosecutor v. Kupreškić*, *supra* note 293, at para. 464; *Prosecutor v. Plavšić*, *supra* note 61, at para. 65, 66-81, 110; *Prosecutor v. Banović*, *supra* note 6, at para. 62, 68; *Prosecutor v. Obrenović*, *supra* note 9, at para. 111-18, 141; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 146, 232-37; *Prosecutor v. Češić*, *supra* note 9, at para. 60; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156; *Prosecutor v. Serugendo*, *supra* note 147, at para. 89, 91.

> saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.[499]

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."[500] 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.[501] 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."[502] 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."[503] An appropriate sentence must primarily be based on the gravity of the offence and not on a guilty plea. [504]

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,"[505] but also noted that to derive all the benefits concerned

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[499] *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i), under the heading, *Character*, para. ii; and *see also Prosecutor v. Erdemović*, *supra* note 105, (Joint Separate Opinion of Judge McDonald and Judge Vohrah), at para. 2; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 80; *Prosecutor v. Plavšić*, *supra* note 61, at para. 73; *Prosecutor v. Banović*, *supra* note 6, at para. 66, 68; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 151; *Prosecutor v. Obrenović*, *supra* note 9, at para. 118; *Prosecutor v. Dragan Nikolić, supra* note 34, at para. 121, 231; *Prosecutor v. Deronjić*, *supra* note 9, at para. 234 and also *id*., at para. 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"); *Prosecutor v. Češić*, *supra* note 9, at para. 56, 59.

[500] PROSECUTOR v. MOMIR NIKOLIĆ, *supra* note 80, at para. 67.

[501] *See* S.C. Res. 1503 (2003) of 28 Aug. 2003, calling on the *ad hoc* Tribunals to take all possible measures to complete all trial activities at front instance by the end of 2008.

[502] *Prosecutior v. Slobodan Milošević*, Case No. IT-02-54-AR73.4 (21 Oct. 2003), (Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements), para. 22; and *see also Prosecutor v. Pauline Nyiramasuhuko & Others*, Case No. ICTR-98-42-A15bis, (Dissenting Opinion of Judge David Hunt), para. 17 (24 Sept 2003).

[503] *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 67.

[504] *Id*., at para. 69.

[505] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 80; and *see also id.*, at para. 92 (accepting remorse, a guilty plea and co-operation with the Prosecutor as mitigating factors); and *see also Prosecutor v. Banović*, *supra* note 6, at para. 66; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 150; *Prosecutor v. Obrenović*, *supra* note 9, at para. 117; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 121, 231; *Prosecutor v. Deronjić*, *supra* note 9, at para. 134 (noting that "[a] guilty plea protects victims from having to relive their experiences and re-open old wounds"); *Prosecutor v. Češić*, *supra* note 9, at para. 56, 58.

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 proceedings.[506] The importance of the timing of a guilty plea was also emphasized in *Prosecutor v. Sikirica*.[507] In *Prosecutor v. Milan Simić*, the Sentencing Tribunal afforded "some credit" to a guilty plea despite its lateness.[508] In the *Čelebići Case*, the Trial Chamber refused to accept a "belated partial admission of guilt" as a mitigating factor.[509] 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.[510]

In *Kambanda*, the Trial Chamber reiterated that an admission of guilt demonstrates honesty,[511] 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."[512] The Tribunal did note that a guilty plea does not necessarily mean remorse.[513] Other deserving attributes of a guilty plea are its contribution to establishing the truth,[514] its potential of promoting reconciliation within a

[506] *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 81; and *see also Prosecutor v. Momir Nikolić*, *supra* note 80, at para. 148; *Prosecutor v. Češić*, *supra* note 9, at para. 56; *Prosecutor v. Rutaganira*, *supra* note 13, at para. 151-52.
[507] *Prosecutor v. Sikirica*, *supra* note 80, at para. 150; and s*ee also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 231; *Prosecutor v. Deronjić*, *supra* note 9, at para. 234.
[508] *Prosecutor v. Simić* (Sentencing Judgment), *supra* note 153, at para. 87; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 231.
[509] *Prosecutor v. Delalić*, *supra* note 7, at para. 1279; and *see also Prosecutor v. Blaškić*, *supra* note 1, at para. 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).
[510] *Prosecutor v. Tadić* (Sentencing Judgment), *supra* note 96, at para. 58; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 16.
[511] *Prosecutor v. Kambanda*, *supra* note 9, at para. 53; and *see also Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(ii); *Prosecutor v. Banović*, *supra* note 6, at para. 66.
[512] *Prosecutor v. Kambanda*, *supra* note 9 at para. 61(ii); and *see also Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(ii); *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 231; *Prosecutor v. Deronjić*, *supra* note 9, at para. 234.
[513] *Prosecutor v. Kambanda*, *supra* note 9, at para. 52.
[514] *Prosecutor v. Sikirica*, *supra* note 80, at para. 149; *Prosecutor v. Plavšić*, *supra* note 61, at para. 73, 80; *Prosecutor v. Banović*, *supra* note 6, at para. 66; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para.149; *Prosecutor v. Obrenović*, *supra* note 9, at para. 116; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 231, 233, 237; *Prosecutor v. Češić*, *supra* note 9, at para. 28, 58; *Prosecutor v. Deronjić*, *supra* note 9, at para. 234, 236.

strife-torn community,[515] and its being an important step toward rehabilitation of the accused and his or her re-integration in society.[516]

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.[517] Aggravation 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.

(c). *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."[518]

Co-operation with the prosecution, a guilty plea, and evidence of remorse as grounds of extenuation[519] 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,[520] and having been expressed in public

[515] *Prosecutor v. Plavšić*, *supra* note 61, at para. 70, 79, 80; *Prosecutor v. Banović*, *supra* note 6, at para. 66; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para.72, 145, 149; *Prosecutor v. Obrenović*, *supra* note 9, at para. 111, 116; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 121, 231; *Prosecutor v. Češić*, *supra* note 9, at para. 28, 58; *Prosecutor v. Deronjić*, *supra* note 9, at para. 234, 236.
[516] *Prosecutor v. Češić*, *supra* note 9, at para. 28.
[517] *Prosecutor v. Momir Nikolić*, *supra* note 80, at para.148; *Prosecutor v. Obrenović*, *supra* note 9, at para. 113.
[518] RPE, *supra* note 86, Rule 145(2)(a)(ii).
[519] *See* in general *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 20; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 53-55; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 92.
[520] *Prosecutor v. Ruggiu*, *supra* note 28, at para. 56-58, 69-72; and *see also Prosecutor v. Erdemović* (Sentencing Judgmnebt), *supra* note 11, at para. 44, 45; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(i), under the heading, *Character*, para. iii; *Prosecutor v. Kambanda*, *supra* note 9, at para. 36; *Prosecutor v. Serushago*, *supra* note 33, at para. 40-41; *Prosecutor v. Blaškić*, *supra* note 1, at para. 775; *Prosecutor v. Delalić*, *supra* note 34, at para. 788; *Serushago v. Prosecutor*, *supra* note 208, at para. 24; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 89-92; *Prosecutor v. Sikirica*, *supra* note 80, at para. 148; *Prosecutor v. Plavšić*, *supra* note 61, at para. 65, 70; *Prosecutor v. Banović*, *supra* note 6, at para. 62; *Prosecutor v. Obrenović*, *supra* note 9, at para. 121, 141; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 231, 237, 241-42; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156, 234; *Prosecutor v. Serugendo*, *supra* note 147, at para. 91.

was favorably looked upon by the sentencing Tribunal in *Prosecutor v. Serushago*.[521] In *Prosecutor v. Obrenović*, the Sentencing Tribunal accepted genuine remorse as "a substantial mitigating factor."[522] In *Prosecutor v. Plavšić*, the expression of remorse connected with a guilty plea was considered a mitigating factor.[523] In *Prosecutor v. Kupreskić*, the Appeals Chamber of the ICTY decided that "limited acceptance of guilt" ought to be given "some consideration in terms of sentence."[524] However, remorse was treated in *Kambanda* with a great deal of skepticism.[525] The Trial Chamber noted in that case that "remorse is not the only reasonable inference that can be drawn from a guilty plea."[526] It must above all be demonstrated that the expression of remorse is sincere.[527] It is possible, of course, that an accused can express sincere regrets without admitting his or her participation in the crime.[528]

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

[521] *Prosecutor v. Serushago*, *supra* note 33, at para. 40.
[522] *Prosecutor v. Obrenović*, *supra* note 9, at para. 121.
[523] *Prosecutor v. Plavšić*, *supra* note 61, at para. 73.
[524] *Prosecutor v. Kupreškić*, *supra* note 293, at para. 464; and *see also Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 146; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156.
[525] *Prosecutor v. Kambanda*, *supra* note 9, at para. 51-52.
[526] *Id*., at para. 52; and see *id*., at para. 61; and *see also Prosecutor v. Jelisić (T)*, *supra* note 80, at para. 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), upheld on appeal in *Prosecutor v. Jelisić*, *supra* note 80 (A), at para. 119-23; *Prosecutor v. Momir Nikolić*, *supra* note 80, at para.161 (the Sentencing Tribunal accepting the expression of remorse as a mitigating factor but in view of the circumstances of the case declining to :afford "substantial weight to this factor.").
[527] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 96-98; *Prosecutor v. Drazen Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16; *Prosecutor v. Jelisić (T)*, *supra* note 80, at para. 127; *Prosecutor v. Blaškić*, *supra* note 1, at para. 775; *Prosecutor v. Todorović* (Sentencing Judgment), *supra* note 10, at para. 89; *Prosecutor v. Serushago*, *supra* note 33, at para. 41; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 69-72; *Prosecutor v. Sikirica*, *supra* note 80, at para. 152, 194, 230; *Prosecutor v. Simić* (Sentencing Judgment), *supra* note 153, at para. 92; *Prosecutor v. Banović*, *supra* note 6, at para. 72; *Prosecutor v. Vasiljević*, *supra* note 80, at para. 177; *Prosecutor v. Češić*, *supra* note 9, at para. 66; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156; *Prosecutor v. Rutaganira*, *supra* note 13, at para. 158.
[528] *Prosecutor v. Vasiljević*, *supra* note 80, at para. 177.

and witnesses present, and thus this ostensible, belated contrition seems to merely have been an attempt to seek concession in the matter of sentencing."[529]

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.[530]

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:

> The 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.[531]

E. CONCLUDING OBSERVATIONS

This is not the time and place to record and to evaluate the American sentencing practices. However, are some lessons in the above analysis for 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.[532] 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

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[529] *Prosecutor v. Delalić*, *supra* note 7, at para. 1279.
[530] *Prosecutor v. Erdemović* (Sentencing Judgment), *supra* note 11, at para. 111; *Prosecutor v. Erdemović* (Second Sentencing Judgment), *supra* note 25, at para. 16(iii), 17; *Prosecutor v. Kambanda*, *supra* note 9, at para. 34, 50-52; *Prosecutor v. Delalić*, *supra* note 7, at para. 1270; *Prosecutor v. Serushago*, *supra* note 33, at para. 38, 40; *Prosecutor v. Kayishema & Ruzindana*, *supra* note 25, at Sentence para. 20; *Prosecutor v. Rutaganda*, *supra* note 61, at para. 50, 297; *Prosecutor v. Ruggiu*, *supra* note 28, at para. 73-74; *Prosecutor v. Delalić*, *supra* note 34, at para. 775-76; *Serushago v. Prosecutor*, *supra* note 208, at para. 24; *Prosecutor v. Sikirica*, *supra* note 80, at para. 242; *Prosecutor v. Krnojelać*, *supra* note 14, at para. 518; *Prosecutor v. Banović*, *supra* note 6, at para. 83; *Prosecutor v. Obrenović*, *supra* note 9, at para. 134; *Prosecutor v. Dragan Nikolić*, *supra* note 34, at para. 146; *Prosecutor v. Češić*, *supra* note 9, at para. 78; *Prosecutor v. Deronjić*, *supra* note 9, at para. 156; *Prosecutor v. Rutaganira*, *supra* note 13, at para. 155.
[531] *Prosecutor v. Delalić*, *supra* note 7, at para. 1244; and *see also id*., at para. 1217, 1244, 1251.
[532] *See*, for example, *Weems v. United States*, 217 U.S. 349, at 367 (1910) (holding that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offence".

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."[533] 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";[534] that taking into account mitigating factors for sentencing purposes "has no support in the text and history of the Eighth Amendment";[535] 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."[536] Individualisation 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,[537] and life imprisonment of juveniles without the option of parole as a mandatory sentence,[538] 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 the "unusual" prong of the Eighth Amendment to reach its admirable conclusion in the life sentence without parole decision. No less than 29 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.[539]

[533] *Solem v. Helms*, 463 U.S. 277, at 292 (1983).
[534] *Harmelin v. Michigan*, 501 U.S. 957, at 965 (1991).
[535] *Id*., at 994.
[536] *Id*., at 994-95.
[537] *Roper v. Simmons*, 354 U.S. 551 (2005).
[538] *Miller v. Alabama*, 567 U.S. 460 (2012).
[539] *Id*., at 483-89.

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,[540] and the requirement of "individualised sentencing."[541] It emphasised 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."[542] The U.S. Supreme proclaimed quite admirably that juveniles have "lessened culpability" and therefore "are less deserving of the most severe punishments".[543] 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."[544]

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.

[540] *Graham v. Florida*, 560 U.S. 48, at (2010) 69, 74; *Miller v. Alabama*, *supra* note 357, at 465.
[541] *Miller v. Alabama*, *supra* note 357, at 465.
[542] *Roper v. Simmons*, *supra* note 356, at 560; *Miller v. Alabama*, *supra* note 357, at 469.
[543] *Graham v. Florida*, *supra* note 359, at 68; *Miller v. Alabama*, *supra* note 357, at 471.
[544] *Roper v. Simmons*, *supra* note 356, at 569-570; and *see also Graham v. Florida*, *supra* note 359, at 68; *Miller v. Alabama*, *supra* note 357, at 471.

It is to be hopes 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*!