

# PUNISHMENT FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF SENTENCING AT THE ICTY AND ICTR

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## I. INTRODUCTION

Imposing a just penalty for violations of international criminal law is fundamental to the purposes of the International Criminal Tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”). The United Nations Security Council created these Tribunals to prosecute international crimes committed in the two regions. The creation of the Tribunals represents an effort to end impunity for the perpetrators of the crimes and to promote peace

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and reconciliation within the former Yugoslavia<sup>1</sup> and Rwanda.<sup>2</sup> Success in achieving these goals is possible only if the Tribunals impose appropriate sentences for crimes committed within their respective jurisdictions.

Determining an appropriate penalty that contributes to peace and national reconciliation is a difficult task. Perpetrators of heinous crimes and their victims will almost never agree on a just sentence. Likewise, members of the perpetrator's nationality or ethnic group will usually not agree on the appropriateness of a sentence with members of the victim's nationality or ethnic group. In addition, the international and domestic military tribunals set up in the aftermath of World War II left few sentencing guidelines to help the ICTY and ICTR.<sup>3</sup> Finally, the sentencing provisions in the Tribunals' Statutes do not add much guidance.

Even so, in light of their difficult task, the ICTY and ICTR have each developed a fledgling sentencing practice. This Article analyzes the sentencing practices of these Tribunals. Part II details the relevant provisions of their Statutes and Rules of Evidence and Procedure. Part III briefly summarizes the punishment philosophy of the Tribunals and how this philosophy relates to the sentences handed down thus far. Part IV analyzes the following specific areas of the Tribunals' sentencing practices: the use of aggravating and mitigating circumstances in the determination of a sentence and the elimination of a separate sentencing hearing from their procedures. The discussion of these issues reveals several areas in which the Tribunals should make adjustments to their sentencing practices.

## II. RELEVANT PROVISIONS OF THE STATUTES AND RULES OF PROCEDURE AND EVIDENCE OF THE ICTY AND ICTR

Articles 23 and 24 of the ICTY Statute govern the pronouncement of sentences and imposition of penalties at the ICTY. Article 23 reinforces the purpose of the creation of the Tribunal by declaring that the "Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."<sup>4</sup> Article 24 provides the following minimal guidelines to the Trial Chambers regarding the imposition of penalties:

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1. See UN Sec. Council Res. 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (1993).

2. See UN Sec. Council Res. 955, UN SCOR, 49th Sess., 3453rd mtg., UN Doc. S/RES/955 (1994).

3. See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 461 (1997).

4. Statute of the International Criminal Tribunal for the former Yugoslavia Art. 23(1), in Report of the Secretary General Pursuant to Paragraph 2 of UN Sec. Council Res. 808, UN Doc. S/25704 (1993) [hereinafter ICTY Statute].

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.<sup>5</sup>

Almost identical provisions in the ICTR Statute provide the basis for sentencing by the Rwanda Tribunal.<sup>6</sup>

Under their powers to create rules of evidence and procedure,<sup>7</sup> the Judges of the ICTY and ICTR have added to the sparse provisions for sentencing in the Tribunals' Statutes. Rule 101 of the ICTY Rules of Procedure and Evidence ("Rules") states:

- (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
  - (i) any aggravating circumstances;
  - (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
  - (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
  - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the

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5. *Id.* at Art. 24.

6. See Statute of the International Criminal Court for Rwanda, Article 23, in UN Sec. Council Res. 955, UN SCOR, 49th Year, Res. And Dec., at 15, UN Doc. S/INF/50 (1994) [hereinafter ICTR Statute].

7. ICTY Statute, Article 15 states: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." See ICTY Statute, *supra* note 4, at Art. 15. Article 14 of the ICTR Statute gives the judges of the Rwanda Tribunal identical powers. See ICTR Statute, *supra* note 5, at Art. 14.

same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

- (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.<sup>8</sup>

Through the implementation of the above principles, the judges of both Tribunals have created a basic sentencing practice for violations of international criminal law.

### III. THE SENTENCES AND SENTENCING PHILOSOPHY OF THE ICTY AND ICTR

To date, twenty-six defendants at the ICTY and eight defendants at the ICTR have been convicted of crimes over which the Tribunals have jurisdiction, including genocide, crimes against humanity, grave breaches of the Geneva Conventions, and war crimes.<sup>9</sup> ICTY sentences have ranged from

8. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 101, March 14, 1994, as amended [hereinafter ICTY Rules]. Rule 101 of the Rwanda Tribunal is almost identical. See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 101, July 5, 1995, as amended [hereinafter ICTR Rules].

9. See <http://www.un.org/icty> (last visited Dec. 7, 2001) Prosecutor v. Tadic, Case No. IT-94-1-T, Sentencing Judgement, July 14, 1997 [hereinafter Tadic Sentencing Judgement]; Prosecutor v. Erdemovic, Case No. IT-96-22-Tbis, Sentencing Judgement, Mar. 5, 1998, [hereinafter Erdemovic Sentencing Judgement]; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, Dec. 10, 1998, [hereinafter Furundzija Judgement]; Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, Nov. 16, 1998 [hereinafter Delalic Judgement]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, June 25, 1999; Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgement, Dec. 14, 1999; Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, Mar. 3, 2000 [hereinafter Blaskic Judgement]; Prosecutor v. Kupreskic, Judgement, Case No. IT-95-16-T, Jan. 14, 2000 [hereinafter Kupreskic Judgement]; Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, Feb. 22, 2001; Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement, Feb. 26, 2001; Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgement, July 31, 2001; Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, Aug. 2, 2001 [hereinafter Krstic Judgement]; Prosecutor v. Sikirica et al., Case No. IT-95-8, Sentencing Judgement, Nov. 13 2001; Prosecutor v. Kvočka et al., Case No. IT-98-30/1, Judgement, Nov. 3, 2001; Prosecutor v. Kupreskic et al., Case No. IT-95-16-A, Judgement, Oct. 23, 2001. See <http://www.ictr.org> (last visited Dec. 7, 2001) Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgement and Sentence, Dec. 6, 1999 [hereinafter Rutaganda Judgement and Sentence]; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentence, Oct. 2, 1998 [hereinafter Akayesu Sentence]; Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, Sept. 4, 1998, [hereinafter Kambanda Judgement and Sentence]; Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, Feb. 5, 1999 [hereinafter Serushago Sentence]; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement and Sentence, May 21, 1999 [hereinafter Kayishema Judgement and Sentence]; Prosecutor v. Musema, ICTR-96-13-T, Judgement and Sentence, Jan. 27, 2000 [hereinafter Musema Judgement and Sentence]; Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, June 1, 2000 [hereinafter Ruggiu Judgement and Sentence].

five<sup>10</sup> to forty-six years imprisonment,<sup>11</sup> while ICTR sentences have ranged from twelve years<sup>12</sup> to life imprisonment.<sup>13</sup>

The Trial Chambers of the ICTY and ICTR have given various justifications for the punishment of crimes within their respective jurisdictions. Each of the traditional justifications for punishment – retribution, deterrence, isolation from society, and rehabilitation – has been mentioned as an important objective.<sup>14</sup> Several judgments suggest that of these four justifications, deterrence and retribution are the main purposes of punishment at the Tribunals.<sup>15</sup> However, several of the penalties that have been imposed suggest that the Judges consider rehabilitation to be an equally important goal in the punishment of those convicted of serious violations of international law.<sup>16</sup>

#### IV. SENTENCING ISSUES AT THE ICTY AND ICTR

##### A. *The Use of Aggravating and Mitigating Circumstances*

The Statutes and Rules of the ICTY and ICTR do not elaborate on the use of aggravating and mitigating factors for sentencing purposes. They merely require the Trial Chambers to take into account the gravity of the crime, the individual circumstances of the accused, and any relevant aggravating and mitigating factors.<sup>17</sup> The jurisprudence of the Tribunals, however, gives the Trial Chambers full discretion to consider any other aggravating and mitigating circumstances, and to give “due weight” to those factors in the determination of an appropriate punishment.<sup>18</sup> As illustrated by the case discussions below, the Trial Chambers’ discretion is perhaps too broad and should be limited by general sentencing guidelines.

##### i. *Kambanda*

##### a. *Facts of the Case and Aggravating and Mitigating Circumstances*

Jean Kambanda pleaded guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in

10. See Erdemovic Sentencing Judgement, *supra* note 9, at para. 23; Kvocka Judgement, *supra* note 9, at para. 757.

11. See Krstic Judgement, *supra* note 9, at para. 727.

12. See Ruggiu Judgement and Sentence, *supra* note 9.

13. See Kambanda Judgement and Sentence, *supra* note 9, at Verdict; Akayesu Sentence, *supra* note 9; See Musema Judgement and Sentence, *supra* note 9; Kayishema Judgement and Sentence, *supra* note 9, at para. 32; Rutaganda Judgement and Sentence, *supra* note 9.

14. See generally GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 409-18, 461-63, 814-17 (2000).

15. See Kupreskic Judgement, *supra* note 9, at para. 848.

16. See Schabas, *supra* note 3, at 503-05.

17. See ICTY Statute, *supra* note 4, at Art. 24; ICTY Rules, *supra* note 8, at Rule 101; ICTR Statute, *supra* note 6, at Art. 23; ICTR Rules, *supra* note 4, at Rule 101.

18. See Blaskic Judgement, *supra* note 8, at para. 767.

genocide, and crimes against humanity, including murder and extermination.<sup>19</sup> In his role as the Prime Minister of the Interim Government of Rwanda, between April 8, 1994 and July 17, 1994, he was intimately involved with the murder of Tutsi civilians.<sup>20</sup> For example, he exercised control over government ministers and military leaders involved in the genocide, issued directives encouraging the murder of Tutsis, distributed arms and ammunition to groups involved in murdering Tutsis, and gave speeches and made radio broadcasts inciting massacres against the Tutsi population.<sup>21</sup>

In determining an appropriate sentence for Kambanda, the ICTR Trial Chamber considered at length the gravity of his crimes, all of which were aggravating circumstances, and the relevant mitigating factors. Not surprisingly, the Trial Chamber found that Kambanda had committed crimes of the utmost gravity. It explained that the intrinsically heinous nature of genocide and crimes against humanity and the enormous magnitude of his crimes both served as aggravating factors.<sup>22</sup> Furthermore, through his personal participation in the genocide as Prime Minister, Kambanda “abused his authority and the trust of the civilian population.”<sup>23</sup> Finally, he “committed the crimes knowingly and with premeditation,” and failed to take steps to prevent the genocide or punish perpetrators.<sup>24</sup>

In mitigation, the Trial Chamber found that Kambanda had cooperated with the Prosecutor, was willing to do so in the future, and had pleaded guilty.<sup>25</sup> It held, however, “that the aggravating circumstances surrounding the crimes committed by Jean Kambanda [negated] the mitigating circumstances, especially since [he] occupied a high ministerial post, at the time he committed the said crimes.”<sup>26</sup> It sentenced Kambanda to life imprisonment, which is the most severe sentence that an accused can receive under the Statute.<sup>27</sup> The Appeals Chamber later upheld Kambanda’s life sentence.<sup>28</sup>

#### *b. The Decision to Impose a Life Sentence*

Despite the existence of mitigating factors and certain policy arguments in favor of a more lenient sentence, life imprisonment is an appropriate punishment for Kambanda’s crimes. Nonetheless, some critics of the *Kambanda* Judgement argue that a life sentence was unduly harsh, in light of

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19. See *Kambanda Judgement and Sentence*, *supra* note 9, at para. 40.

20. See *id.* at paras. 39-44.

21. See *id.* at para. 39.

22. See *id.* at para. 42.

23. *Id.* at para. 44.

24. *Id.* at para. 61.

25. See *id.* at paras. 46-62.

26. *Id.* at para. 62.

27. See *id.* at Verdict; See ICTR Statute, *supra* note 6, at Art. 23.

28. See *Kambanda v. Prosecutor*, Case No. ICTR-97-23-A, Judgement, Oct. 19, 2000, para. 126.

Kambanda's voluntary guilty plea and substantial cooperation with the Prosecutor. First, as the Trial Chamber noted, a guilty plea is considered a mitigating circumstance in most national jurisdictions, including Rwanda, as well as at the ICTR and ICTY.<sup>29</sup> Here, the guilty plea likely saved the Prosecutor and the Trial Chamber substantial amounts of time and money. Instead of having to devote resources to investigating and prosecuting Kambanda, the Prosecutor could use them towards the prosecution of other persons accused of committing similar atrocities in Rwanda. The guilty plea allowed the Trial Chamber to efficiently dispose of Kambanda's case and move on to try other accused.<sup>30</sup>

As mentioned above, besides pleading guilty, Kambanda substantially cooperated with the Prosecutor. He provided "invaluable information" about the atrocities in Rwanda and those responsible and agreed to testify for the Prosecutor in the trials of others.<sup>31</sup> This cooperation, which is also considered a mitigating factor in most national jurisdictions, is incredibly useful to the Prosecutor. In addition to saving investigation resources, it gives the Prosecutor an unparalleled view into the workings of the Rwandan government and the planning and execution of the atrocities. Such evidence can be used effectively in prosecuting other accused.

Critics of the *Kambanda* Judgement argue that imposing a life sentence upon an accused who has pleaded guilty and cooperated with the Prosecutor demonstrates a lack of concern for the policy constraints that affect the ICTR and ICTY.<sup>32</sup> Judicial economy and budgetary constraints, while significant concerns to any court, are particularly important to the operations of the Tribunals. After all, ICTR Trial Chambers have sentenced only eight defendants during the seven years of the Tribunal's existence,<sup>33</sup> while over twenty others await the beginning of their trials.<sup>34</sup>

Because judicial economy benefits greatly from guilty pleas, both Tribunals should encourage those rightfully charged to plead guilty. Many people argue, however, that by imposing the harshest possible penalty upon Kambanda, the ICTR Trial Chamber failed to encourage this behavior. After *Kambanda*, critics contend, "lawyers practicing before the ICTR have less motivation to encourage defendants to plead guilty if there is the possibility that the sentence will be the same as that received following a trial."<sup>35</sup>

Furthermore, because both Tribunals must rely on the co-operation of

29. See *Kambanda Judgement and Sentence*, *supra* note 9, at paras. 53, 61; ICTR Statute, *supra* note 6, at Art. 23; ICTY Statute, *supra* note 4, at Art. 24.

30. See Schabas, *supra* note 3, at 496.

31. See *Kambanda Judgement and Sentence*, *supra* note 9, at para. 47.

32. See Mary Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 383-86 (2000).

33. See ICTR List of Detainees, <http://www.ictr.org>, (last visited Dec. 7, 2001).

34. See *id.*

35. See Penrose, *supra* note 32, at 384.

other authorities to arrest and detain indictees,<sup>36</sup> the Tribunals should do everything in their power to encourage indictees (and those who have committed atrocities but have not yet been indicted) to come forward, confess their crimes, and co-operate with the Prosecutor. The Trial Chamber, many argue, also diminished this goal by imposing the harshest possible sentence on Kambanda.

Nevertheless, despite the policy considerations that point to a more lenient sentence, the Trial Chamber's sentence of life imprisonment for Kambanda was appropriate. One need only look to the sentence that Kambanda would have received had he been tried in Rwanda, the gravity of his crimes, his position of power, and the sentencing goals of both Tribunals to justify the life sentence imposed.

Although ICTR Trial Chambers are not bound by the sentencing practice of Rwanda, the Statute and Rules of the ICTR do require that they take into account the country's sentencing practice. In doing so, the Trial Chamber in *Kambanda* noted that had Kambanda been tried and found guilty in Rwanda, he would have been included in the most serious category of offenders and would have received the death penalty.<sup>37</sup> If the Trial Chamber had given Kambanda anything other than a life sentence, it would have demonstrated a lack of comprehension of the magnitude and seriousness of his crimes. Such a decision could have strained the relationship between the ICTR and the Rwandan government and caused the Tribunal to lose legitimacy in the eyes of the Rwandan people.

Assuming the Trial Chamber had not given Kambanda a life sentence, it would be difficult to imagine the kind of perpetrator deserving of such a sentence. After all, Kambanda held the highest position in a government that systematically planned, instigated, and carried out the murder of hundreds of thousands of people. Kambanda not only knew of the atrocities and failed to take any action to punish the perpetrators, but he voluntarily participated in the

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36. See generally Paolo Gaeta, *Is NATO Authorized or Obligated to Arrest Persons Indicted by the ICTY?*, 9 EMORY J. INT'L L. 174, 174-81 (1998); see Susan Lamb, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, 70 BRIT. Y.B. INT'L L. 165, 165-244 (1999).

37. See *Kambanda Judgement and Sentence*, *supra* note 9, at para. 18. The Trial Chamber based this discussion on Organic Law No. 8/96, the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since Oct. 1, 1990. See *id.* The most serious offenders fall into Category 1 (of 4) and, if found guilty, are punished by death. See *id.* Persons in Category 1 include the following: "a) persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of a crime against humanity; b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organizations, or militia and who perpetrated or fostered such crimes; c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) Persons who committed acts of sexual violence." *Id.*



effort to exterminate all Tutsis. The crimes alone are of the utmost gravity, but are rendered even more shocking by Kambanda's leadership position.

Furthermore, Kambanda's sentence coincides with the twin goals of deterrence and retribution that have served as the prime justifications for the Tribunals' sentencing judgments. By sentencing Kambanda to life imprisonment, the ICTR Trial Chamber both warns future Rwandan leaders that they will be held accountable for their behavior and expresses the shock and outrage of the international community. Any sentence less than life imprisonment would not have sufficiently served these goals.

ii. *Serushago*

On December 14, 1998, Omar Serushago pleaded guilty to genocide and crimes against humanity, including murder, extermination, and torture.<sup>38</sup> He was a leader of the *interhamwe*<sup>39</sup> in Gisenyi and commanded a group of militiamen during the atrocities in Rwanda. He personally killed four Tutsis and ordered militiamen under his command to execute thirty-three other Tutsi and moderate Hutu.<sup>40</sup> The ICTR Trial Chamber considered the following aggravating factors in determining Serushago's sentence: that he committed extremely serious offenses and ordered his subordinates to do so as well, that he played a leading role and participated in the planning of the fate of the Tutsis, and that he committed crimes voluntarily, knowingly, and with premeditation.<sup>41</sup>

The Trial Chamber additionally found substantial mitigating circumstances. For example, Serushago cooperated with the Prosecutor, resulting in the arrest and detention of several high-ranking officials suspected of committing crimes during the genocide, and he agreed to testify as a prosecution witness in other trials before the ICTR.<sup>42</sup> Furthermore, he voluntarily surrendered, even though he had not been indicted by the ICTR and was not on the list of persons wanted by the Rwandan government, and he pleaded guilty.<sup>43</sup> Other mitigating factors included Serushago's highly politicized upbringing, his lack of formal military training, the assistance he gave to certain potential Tutsi victims, his individual circumstances, including his six children and his age of thirty-seven years, and his public expression of remorse and contrition.<sup>44</sup> The Trial Chamber believed that these mitigating circumstances demonstrated a possibility of rehabilitation for Serushago and

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38. See Serushago Sentence, *supra* note 9, at para 4.

39. The *interhamwe* was a Hutu youth militia that participated in the genocide in Rwanda. See PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 93 (Picador USA 1998).

40. See Serushago Sentence, *supra* note 9, at paras. 25-29.

41. See *id.* at paras. 27-30.

42. See *id.* at paras. 31-33.

43. See *id.* at paras. 34-35.

44. See *id.* at paras. 36-42.

sentenced him to a single term of fifteen years imprisonment.<sup>45</sup> The Appeals Chamber subsequently upheld this sentence.<sup>46</sup>

iii. *Erdemovic*

Drazen Erdemovic pleaded guilty to murder as a crime against humanity on May 31, 1996 and was sentenced to ten years imprisonment.<sup>47</sup> However, in his appeal against the Sentencing Judgement, the Appeals Chamber held that his guilty plea was not informed, and directed that he be allowed to replead.<sup>48</sup> In the new hearings in front of the Trial Chamber, Erdemovic pleaded guilty to a violation of the laws and customs of war and was sentenced to five years imprisonment.<sup>49</sup>

As a member of the 10th Sabotage Detachment of the Bosnian Serb Army, Erdemovic participated in one of the many massacres of Muslim men that occurred during the fall of Srebrenica.<sup>50</sup> Busloads of Muslim civilian men, who had surrendered to the Bosnian Serbs, were transported to a collective farm where Erdemovic and the other members of his unit awaited them.<sup>51</sup> As the Muslim men arrived, Erdemovic and other soldiers lined them up and executed them by shooting them in the back with automatic rifles.<sup>52</sup> The killings lasted through July 16, 1995 and resulted in the deaths of over one thousand Bosnian Muslim men.<sup>53</sup> Erdemovic personally killed between seventy and one hundred of these men.<sup>54</sup>

In arriving at a sentence of five years, the ICTY Trial Chamber found few aggravating circumstances and myriad mitigating factors. In aggravation, it considered "the magnitude of the crime and the scale of [Erdemovic's] role in it," as well as the fact that Erdemovic continued to kill throughout most of the day of the massacre.<sup>55</sup>

In mitigation, it cited positive factors relating to Erdemovic's personal circumstances, his character, his admission of guilt, his remorse, his cooperation with the Prosecutor, and the duress under which he committed the

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45. *See id.* at paras. 39, Verdict.

46. *See* Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement, Apr. 6, 2000, para. 34.

47. *See* Erdemovic Sentencing Judgement, *supra* note 9, at paras. 5-6.

48. *See id.* at para. 7. The Appeals Chamber found that Erdemovic's guilty plea was not informed because he pleaded guilty to murder as a crime against humanity instead of murder as a war crime, without knowing that the Trial Chamber would consider murder as a crime against humanity a more serious crime. *See id.*

49. *See id.* at paras. 8, 23.

50. *See id.* at para. 13.

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at paras. 13-15.

55. *Id.* at para. 15.

crime. The Trial Chamber believed Erdemovic to be ripe for reform.<sup>56</sup> It found his youthful age (of twenty-three years) at the time of the commission of the crime, his lack of command authority in the crime, and his pacifist and anti-nationalist beliefs all demonstrated a likelihood for successful rehabilitation.<sup>57</sup> It further held that Erdemovic's genuine remorse for his crimes and his admission of guilt were considerable mitigating factors.<sup>58</sup> The Trial Chamber rationalized that the admission of guilt encourages others to come forward and confess to the Tribunal, which saves it valuable time and resources.<sup>59</sup>

The Trial Chamber also found that Erdemovic's substantial cooperation with the Prosecutor justified considerable mitigation. Erdemovic gave the Prosecutor valuable information regarding the killings at Srebrenica and the Bosnian Serb Army. Moreover, he testified in a Rule 61<sup>60</sup> hearing against Karadzic and Mladic and expressed willingness to testify in the future.<sup>61</sup> Finally, the Trial Chamber acknowledged that Erdemovic participated in the massacre under duress. He initially protested against shooting the prisoners, but his superiors threatened to kill him if he did not participate. Thus, although duress could not be a complete defense to Erdemovic's crime, the Trial Chamber considered it a mitigating circumstance.<sup>62</sup>

#### a. *Sentences of Five and Fifteen Years*

The Trial Chambers in the *Erdemovic and Serushago* Sentencing Judgements placed excessive emphasis on relevant mitigating factors and, as a result, imposed exceedingly lenient terms of imprisonment. Prison sentences of five and fifteen years, respectively, do not reflect the gravity of the crimes committed and do not further the goals of deterrence and retribution.

Such light prison sentences for genocide, crimes against humanity, and war crimes are inconsistent with the sentencing practices of several national jurisdictions, including Rwanda, the former Yugoslavia, and the United States, as well as the sentencing practice of the ICTR. While the Tribunals are not bound by the sentencing practice of any national jurisdiction, punishments that are completely out of line with domestic sentencing practice are suspect.

56. *Id.* at para. 16.

57. *See id.*

58. *See id.* Erdemovic came forward voluntarily and confessed to the Tribunal before his involvement in the massacre was known to any investigating authorities. *See id.*

59. *See id.*

60. Rule 61 sets out a detailed procedure in case of failure to execute a warrant for arrest for a person indicted pursuant to the jurisdiction of the ICTY. *See* ICTY Rules, *supra* note 8, at Rule 61.

61. *See* Erdemovic Sentencing Judgement, *supra* note 9, at para. 16. Erdemovic was also a prosecution witness in *Prosecutor v. Krstic*, Case No. IT-98-33-T. *See id.*

62. *See id.* at para. 17.

For example, Chapter 16 of the former Socialist Federal Republic of Yugoslavia ("SFRY") Criminal Code, entitled "Criminal Offenses Against Humanity and International Law," penalized genocide, crimes against humanity, and war crimes. Articles 141-144 covered crimes analogous to those brought against Erdemovic and direct punishment "by no less than five years in prison or by the death penalty."<sup>63</sup> Although Erdemovic did not deserve the maximum sentence because of significant mitigating circumstances, sentencing him to the minimum term of imprisonment possible in the former Yugoslavia is inexplicable, considering the magnitude of his crimes.

Serushago's sentence appears to be similarly inadequate in comparison to the sentence he would have received had he been tried in Rwanda. Under Rwandan law, Serushago would have been most likely tried as a Category I offender and would have received the death penalty if convicted.<sup>64</sup> In the unlikely event that he would have been tried as a Category II offender, he would have received a sentence of life imprisonment upon conviction.<sup>65</sup> Serushago's punishment, therefore, suggests that the ICTR Trial Chamber completely ignored Rwandan sentencing practice.<sup>66</sup>

Likewise, Erdemovic and Serushago would have likely received significantly higher sentences had they committed their crimes in the United States. Under federal law, a conviction for genocide or war crimes resulting in death carries with it a serious fine and/or life imprisonment.<sup>67</sup> A court may also impose the death penalty upon conviction for either of those crimes.<sup>68</sup>

Furthermore, Serushago's punishment is inconsistent with ICTR sentencing judgments issued both before and after Serushago's sentence. In addition to Serushago, the ICTR has convicted six persons accused of genocide. Five of them received sentences of life imprisonment while the other received a sentence of twenty-five years imprisonment.<sup>69</sup>

Even after considering the substantial mitigating factors, it remains difficult to justify Serushago's sentence of fifteen years in light of the sentences that others have received for committing genocide and crimes against humanity. For example, similar to Serushago, Musema was not a de

63. SFRY Penal Code, Arts. 141-144; *See Furundzija Judgement, supra* note 9, at para. 285 (citing Art. 142 and *Tadic Sentencing Judgement, supra* note 9, at para. 8).

64. *See supra* note 37.

65. *See Kambanda Judgement and Sentence, supra* note 9, at paras. 18-19.

66. The Trial Chamber was obviously aware of Rwandan sentencing practices; however, this is not reflected in the final sentence. *See Serushago Sentence, supra* note 9, at paras. 17, Verdict.

67. *See* 18 U.S.C.A. § 2441 (2001).

68. *See Id.*

69. Kambanda, Akayesu, Kayishema, Rutaganda, and Musema were sentenced to life imprisonment. *See Kambanda Judgement and Sentence, supra* note 9, at Verdict; Akayesu Sentence, *supra* note 9; Kayishema Judgement and Sentence, *supra* note 9, at para. 32; Rutaganda Judgement and Sentence, *supra* note 9; Musema Judgement and Sentence, *supra* note 9. Ruzindana was sentenced to twenty-five years imprisonment. Kayishema Judgement and Sentence, *supra* note 9.

jure official.<sup>70</sup> Both men acted with the intent to destroy the Tutsi in Rwanda, but Musema was sentenced to life imprisonment<sup>71</sup> while Serushago received a sentence of only fifteen years. Pleading guilty, cooperating with the Prosecutor, and demonstrating remorse are all significant mitigating factors; however, they do not justify the difference between life and fifteen years imprisonment in these cases.

Both Serushago and Erdemovic committed heinous crimes. They were each responsible for the deaths of defenseless civilians. Erdemovic personally killed between seventy and one hundred people and participated for hours in a massacre that resulted in the deaths of possibly 1,200 people, while Serushago killed and commanded others to kill with the intent to destroy the Tutsi. The Trial Chamber consequently held that in committing genocide, Serushago committed the "crime of crimes" and should be sentenced accordingly.<sup>72</sup> Thus, the sentences of five and fifteen years that Erdemovic and Serushago received, respectively, appear grossly disproportionate to the gravity of their confessed crimes.<sup>73</sup>

Additionally, the two sentences are completely inconsistent with the goals of retribution and deterrence. Even though these defendants confessed their guilt and expressed remorse, they should be punished accordingly for committing such horrendous crimes. The damage resulting from the crimes is not limited to the victims who lost their lives. It also includes the effect of the crimes upon the victims' families and their communities. Although both Tribunals may recognize that an accused must receive due punishment<sup>74</sup> and that they "must not lose sight of the tragedy of the victims and the sufferings of their families,"<sup>75</sup> the sentences imposed upon Erdemovic and Serushago do not adequately reflect the retributive aspect of punishment.

If the Trial Chambers correctly surmised that both defendants were remorseful for their actions, then a lengthy prison sentence seems unnecessary for the purpose of specific deterrence. Arguably, these defendants understand and regret the serious and heinous nature of their crimes and would refrain from committing similar acts in the future.

However, as discussed above, general deterrence is possibly a more significant goal of sentencing for international criminal crimes than specific deterrence. The sentences imposed as punishment for international crimes must be sufficiently severe to deter potential perpetrators from committing

70. Musema was the Director of the Gisovu Tea Factory. See Musema Judgement and Sentence, *supra* note 9, at para. 12.

71. See Musema Judgement and Sentence, *supra* note 9, at Sentencing. The Appeals Chamber recently affirmed Musema's sentence of life imprisonment. See Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement, Nov. 16, 2001.

72. Serushago Sentence, *supra* note 9, at para. 15.

73. See Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123, 134-37 (1997).

74. See Serushago Sentence, *supra* note 9, at para. 20.

75. Erdemovic Sentencing Judgement, *supra* note 9, at para. 21.

such acts. Unfortunately, neither Erdemovic's nor Serushago's prison sentences "communicate the appropriate disgust or intolerance necessary to dissuade" potential perpetrators in the Balkans or Rwanda from massacring other innocent civilians.<sup>76</sup> In her criticism of the Erdemovic sentence, Mary Penrose comments: "The level of hate still festering in the Former Yugoslavia may encourage men and women to sacrifice five years of their respective lives to 'settle a score.'"<sup>77</sup> Sentences at the ICTY and ICTR should demonstrate that "no one is permitted to engage in ethnic cleansing, rape, genocide, torture, murder, or any other crime against humanity."<sup>78</sup> Unfortunately, Erdemovic's and Serushago's sentences do not adequately fulfill this goal. General sentencing guidelines, which place certain limits on a Trial Chamber's discretion with regard to aggravating and mitigating circumstances, can help Trial Chambers make more appropriate sentencing determinations in the future.

## B. *The Lack of a Separate Sentencing Hearing*

### i. *The Change in Procedure*

Both the ICTY and ICTR formerly held separate sentencing hearings and issued separate sentencing decisions in their initial cases. The Rules of Procedure and Evidence of both Tribunals implied this distinction, although neither their Rules nor their Statutes specifically mandated a sentencing hearing distinct from the trial.<sup>79</sup> Under Rule 100 (Pre-Sentencing Procedure), the Prosecutor and Defense could submit information that would be relevant to the Trial Chamber in determining an appropriate sentence after a defendant had pleaded guilty or the Trial Chamber had rendered a guilty verdict.<sup>80</sup> The original version of Rule 85, which governed the presentation of evidence at trial, did not include evidence pertaining to sentencing in the types of evidence that were appropriate to present at trial.<sup>81</sup>

76. Penrose, *supra* note 32, at 382.

77. *Id.* at 382-83.

78. *Id.* at 383.

79. See William A. Schabas, *Article 76: Sentencing*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 980, 981 (Otto Triffterer ed., 1999).

80. The Nov. 12, 1997 version of Rule 100, entitled "Pre-sentencing Procedure," stated: "If the accused pleads guilty or if a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence." Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12 (1997).

81. The Nov. 12, 1997 version of Rule 85, entitled "Presentation of Evidence," stated: (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98. (B) Examination-in-chief, cross-examination and re-

In practice, the Trial Chambers refused to hear evidence relevant only to sentencing before rendering a verdict.<sup>82</sup> For example, in the *Tadic* case, the ICTY Trial Chamber held as follows:

[N]o information that relates exclusively to sentencing should be presented by a witness during the trial as to the guilt or innocence of the accused. So, if a witness is testifying about guilt or innocence of the accused, that witness should not be able at the same time to offer evidence exclusively as to sentencing.<sup>83</sup>

Pursuant to this policy, the Trial Chambers in both *Tadic* and *Akayesu* held sentencing hearings after they had already determined the guilt of the accused.<sup>84</sup>

The separation of the guilt or innocence phase of the proceedings from the sentencing hearing is characteristic of several common law jurisdictions. Criminal trials held in Canada and England, as well as those held in the federal courts of the United States include a sentencing hearing that is distinct from the part of the trial in which the judge or jury determines the guilt or innocence of the defendant.<sup>85</sup>

The Tribunals' practice of holding a separate sentencing hearing after an accused had been found guilty ended in July 1998. The Judges abandoned the common law approach and modified the Rules to conform with the civil law approach to sentencing. The Judges eliminated any suggestion of a separate sentencing phase from the Rules and added language requiring that the guilt or innocence and sentencing phases occur as part of the same proceeding.<sup>86</sup> Rule 85 currently allows the Prosecutor and Defense to present "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the

examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness. (C) If the accused so desires, the accused may appear as a witness in his or her own defence. Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12 (1997).

82. See Schabas, *supra* note 79, at 981.

83. *Tadic Sentencing Judgement*, *supra* note 9, Transcript of Trial, May 3, 1996 (*cited in* Schabas, *supra* note 79, at 981).

84. See *Tadic Sentencing Judgement*, *supra* note 9; *Akayesu Sentence*, *supra* note 9.

85. Section 720 of the Canadian Criminal Code states: "A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed." Martin's Annual Criminal Code (2000); See also Archbold, Chapter 5, Section I "Procedure Between Verdict or Plea and Sentence" (2000) for sentencing procedures in England; See also FED. R. CRIM. P. 32 for sentencing procedures in the United States.

86. See Schabas, *supra* note 79, at 981; See Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 92 (1999).

indictment.”<sup>87</sup> Rule 86 states that the parties shall “address matters of sentencing in closing arguments.”<sup>88</sup> Finally, Rule 87 requires the Trial Chamber to determine the penalty to be imposed if it finds the accused guilty of the charge or charges against him or her.<sup>89</sup>

The motivation behind this change in procedure is not entirely clear because the Judges do not publish the reasoning behind their decisions to change the Rules of Evidence and Procedure. However, this change was probably an effort to save time and money by having only one proceeding instead of two. For example, following the change in the Rules, a witness who was a victim of atrocities in the Balkans could testify about the guilt of the accused and about the effect of the injury during the same proceeding. This avoids the need to have a break between the guilt or innocence phase and the sentencing hearing and allows the Prosecutor and Defense time to prepare their sentencing submissions. It also eliminates the administrative hassle of scheduling and holding a second proceeding, thereby freeing the Trial Chamber to move on to other cases.

Furthermore, the change can be cost-effective with regard to particular witnesses. If the victim considered in the above example still lived in the Balkans, he or she would have to come to The Hague twice – once to testify regarding the guilt of the accused and a second time to testify about the impact of the injury on the victim. Two trips are both more costly to the Tribunal and more disruptive to the victim’s life. The Judges eliminated this problem by amending the Rules.

Nevertheless, the Judges may have compromised the fairness of the trials through their efforts to save time and money. Their decision to eliminate a distinct sentencing hearing from the Tribunals’ proceedings could put an accused at a serious disadvantage by limiting possible strategies for his defense.<sup>90</sup> Furthermore, this change could jeopardize an accused’s right to be tried by neutral and objective Judges. Thus, the risks involved in conducting only one proceeding heavily outweigh any savings of time and money.

The elimination of a separate sentencing hearing may limit the tactical decisions that an accused can make at trial. “As a general matter, an indictor who has pleaded not guilty may not wish to present evidence relevant to sentencing prior to a conviction, so as not to prejudice the outcome on the merits . . .”<sup>91</sup> After all, there is a certain lack of logic in having an accused present evidence on an appropriate sentence for crimes to which he pleaded not guilty and has not yet been convicted.

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87. See ICTY Rules, *supra* note 8, at Rule 85.

88. See *id.* at Rule 86.

89. See *id.* at Rule 87.

90. See Schabas, *supra* note 79, at 981.

91. Murphy, *supra* note 86, at 92.



Furthermore, this change diminishes a defendant's right to silence at trial.<sup>92</sup> Article 21 of the ICTY Statute and Rule 85 of the ICTY Rules give an accused the right to testify in his own defense, but protects him from being "compelled to testify against himself or to confess guilt."<sup>93</sup> A defendant "may be in a position to submit relevant evidence in mitigation of sentence, for example concerning the individual's specific role in the crimes vis-à-vis accomplices, or efforts by the offender to reduce the suffering of the victim."<sup>94</sup> Unfortunately, the "only way to introduce such evidence may be for the accused to renounce the right to silence and the protection against self-incrimination."<sup>95</sup>

Finally, the rule change may negatively impact the fairness and legitimacy of trials at the Tribunals beyond the tactical disadvantages to the accused discussed above. It may undermine the right of a defendant to be presumed innocent until proved guilty,<sup>96</sup> as well as his right to a fair trial.<sup>97</sup> Without a separate sentencing hearing, evidence that is often relevant only to sentencing, such as victim-impact testimony, must be heard at trial. This evidence is often poignant and extremely disturbing. It has minimal probative value concerning the primary issue of guilt or innocence, and the danger of unfair prejudice to an accused is substantial. Therefore, the presentation of sentencing evidence during the guilt and innocence phase may endanger the integrity of the judicial process at the Tribunals.

## ii. *The Krstic Trial*

The trial of General Radislav Krstic demonstrates the negative impact that the presentation of sentencing evidence during the trial can have on the perception and possibly the reality of the fairness of the proceedings. General Krstic was the Chief of Staff and Commander of the Drina Corps of the Bosnian Serb Army,<sup>98</sup> which was responsible for "crimes committed following the take-over of Srebrenica."<sup>99</sup> He was tried for genocide, crimes against humanity, and war crimes for his role in the events that occurred in Srebrenica in July 1995.<sup>100</sup> The Prosecutor contended that Krstic was responsible for the murder of over seven thousand Muslim men and the deportation of Muslim women and children from the Srebrenica enclave to Bosnian government held

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92. See Schabas, *supra* note 79, at 981.

93. See ICTY Statute, *supra* note 4, at Art. 21(g); ICTY Rules, *supra* note 8, at Rule 85.

94. Schabas, *supra* note 79, at 981.

95. *Id.*

96. See ICTY Statute, *supra* note 4, at Art. 21(3) (stating that the "accused shall be presumed innocent until proved guilty according to the provisions of the Statute.").

97. See *id.* at Art. 21(2) (stating that the "accused shall be entitled to a fair and public hearing...").

98. See Krstic Judgement, *supra* note 9, at para. 3.

99. *Id.*

100. See *Id.*

territory, specifically Tuzla.<sup>101</sup> General Krstic pleaded not guilty to the charges against him and argued that a parallel chain of command, under the control of General Mladic, planned and carried out the atrocities that occurred during and after the fall of the enclave.<sup>102</sup> ICTY Trial Chamber I, consisting of Presiding Judge Almiro Rodrigues, Judge Fouad Riad, and Judge Patricia Wald, heard the case and found General Krstic guilty of genocide, crimes against humanity, and war crimes.<sup>103</sup>

The Prosecutor ended its case against Krstic by calling three victim impact witnesses to testify. One of these witnesses, witness DD,<sup>104</sup> was a Bosnian Muslim woman who had been deported from Srebrenica to Tuzla by the Bosnian Serbs.<sup>105</sup> The other two witnesses were a psychologist and therapist, who worked with the women and children in Tuzla that comprised the remnants of the Bosnian Muslim community of Srebrenica.<sup>106</sup>

These witnesses gave intensely moving and emotional testimony about the disastrous effect that the massacres have had on the surviving Muslims of Srebrenica. Witness DD gave the following testimony regarding her youngest son who was taken away by a Bosnian Serb soldier and is presumed dead:

As a mother, I still have hope. I just can't believe that this is true. How is it possible that a human being could do something like this, could destroy everything, could kill so many people? Just imagine this youngest boy I had, those little hands of his, how could they be dead? I imagine those hands picking strawberries, reading books, going to school, going on excursions. Every morning I wake up, I cover my eyes not to look at other children going to school, and husbands going to work, holding hands.<sup>107</sup>

She then concluded her testimony by imploring the Judges to ask General Krstic to give her information on her missing child, asking if he is still alive and if he will return.<sup>108</sup> Next, Witnesses Zecevic and Ibrahimfendic described at length the patriarchal nature of the Muslim community that

101. See Amended Indictment, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter *Krstic Amended Indictment*].

102. See Trial Transcript, Oct. 16, 2000, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001; See also *Krstic Judgement*, *supra* note 9, at para. 308.

103. See *Krstic Judgement*, *supra* note 9, at paras. 687-89, 727.

104. "DD" is a pseudonym given to the witness as a protective measure to keep the witness' identity from becoming public. See Trial Transcript, July 26, 2000, at 5742, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter *Krstic Trial Transcript I*].

105. See *Krstic Trial Transcript I*, *supra* note 101, at 5744.

106. See *id.* at 5769-803; See also Trial Transcript, July 27, 2000, at 5804-60, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter *Krstic Trial Transcript II*].

107. *Krstic Trial Transcript I*, *supra* note 101, at 5761.

108. See *id.* at 5769.

existed in Srebrenica. They explained that because of this phenomenon, the surviving women have had major difficulties adjusting to life without their husbands, sons, fathers, and brothers. They also testified as to the impoverished conditions in which the Srebrenica Muslims live and the difficulties that they have had in adjusting from their rural life in Srebrenica to city life in Tuzla.<sup>109</sup>

The Judges' reaction to this testimony shows that they are not immune from such powerful images. In response to Witness DD's testimony, Judge Riad told her that "we understand and feel for your pain, but there is a life ahead of you, and the whole world is on your side."<sup>110</sup> Judge Riad's consolation of this witness is commendable; however, stating that the "whole world" is on the side of a prosecution witness is, at the same time, troubling because the Judges have a duty to remain neutral and objective throughout the trial.

Furthermore, when Witness DD finished testifying, Judge Wald thanked her and said that her testimony "will help us in making our decision."<sup>111</sup> The potential implications of Judge Wald's comment are disturbing when one considers that Witness DD's testimony was relevant only to sentencing. One interpretation is that Judge Wald meant that the testimony would help the Trial Chamber determine guilt or innocence. If so, evidence relevant only to sentencing colored the Judges' analysis of the evidence pertaining to guilt or innocence. A second interpretation is that Judge Wald believed that the testimony would help the Judges decide on an appropriate sentence for General Krstic. When one considers that only those defendants that have been found guilty are sentenced, this interpretation suggests that Judge Wald had already found Krstic guilty. This result is particularly troubling because the General had not yet begun his defense. Most likely, neither of the above interpretations is correct, and Judge Wald made the comment merely out of politeness to the witness. Regardless, her statement demonstrates the danger that the elimination of a separate sentencing hearing poses to the perception of justice at the ICTY.

Many observers argue that the current system does not adversely affect the quality of justice at the ICTY. They claim that the Tribunal, like courts in civil law countries, is staffed by "professional judges." After years of training and experience, these judges supposedly can isolate the effect of the victim impact testimony and insure that it only affects their sentencing determination and not the determination of guilt or innocence.

These arguments are unpersuasive for several reasons. First, trial judges in civil law systems normally do not handle cases involving crimes of the same magnitude, complexity, and shocking nature as those attributed to General

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109. See *id.* at 5769-803; See also Krstic Trial Transcript II, *supra* note 103, at 5804-60.

110. Krstic Trial Transcript I, *supra* note 101, at 5763.

111. *Id.* at 5768.

Krstic. A civil law judge, judging a defendant accused of committing a single murder, will preside over a shorter trial with less witnesses and exhibits. In theory, therefore, it is easier for such a judge to guard against evidence relevant only to sentencing from improperly affecting his or her determination of guilt or innocence.

In contrast, *Prosecutor v. Krstic* was massive, both in terms of the crimes charged in the indictment and the trial itself. As discussed above, the Prosecutor charged Krstic with individual and command responsibility for the deportation of between 17,000 and 35,000 Bosnian Muslim women and children and the murder of approximately 7,500 Bosnian Muslim males.<sup>112</sup> The trial lasted ninety-eight days, and the Trial Chamber heard testimony from over 110 witnesses and examined approximately 1,000 exhibits.<sup>113</sup> Accordingly, the potential for victim-impact testimony to impede an objective analysis of the evidence relevant to guilt or innocence is significantly greater in *Prosecutor v. Krstic* than in a typical criminal case in a civil law system.

Furthermore, the background of judges in civil law jurisdictions is different from the background of the judges at the Tribunals. A lawyer in a civil law jurisdiction usually must undergo extensive judicial training and testing before he or she becomes a judge. After becoming a judge, he or she will routinely make decisions concerning both law and fact because most civil law jurisdictions do not rely on juries to make decisions of fact.

In contrast, the judges at the Tribunals often are not "professional judges" in the civil law sense. Although some of them were judges in their respective national jurisdictions prior to arriving at the Tribunals, many of them had no prior experience on the bench. Of those that had prior judicial experience, it was often in common law countries, where juries, not judges, make factual determinations.

Examining the background of the Judges in the *Krstic* trial highlights these differences. Judge Almiro Rodrigues, the Presiding Judge, took a one year training course before becoming a judge in Portugal in 1982.<sup>114</sup> This course reflects his only judicial experience prior to working at the ICTY.<sup>115</sup> Afterwards, he worked as a prosecutor in Portugal and taught law at the university level.<sup>116</sup> Similarly, Judge Fouad Riad had not had any experience as a judge before arriving at the Tribunal. His legal career was almost exclusively in academia.<sup>117</sup> On the other hand, Judge Patricia Wald had extensive judicial experience before arriving at the Tribunal. She served as a justice on the U.S. Court of Appeals for the D.C. Circuit for twenty years prior

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112. See *Krstic Amended Indictment*, *supra* note 98.

113. See *Krstic Judgement*, *supra* note 9, at para. 4.

114. See *ICTY Yearbook (1998)*, at 38.

115. See *id.*

116. See *id.*

117. See *id.* at 37.

to assuming her position at the ICTY.<sup>118</sup> Her experience, however, was completely different from that of a civil (or common law) judge at the trial level. As an appellate judge, her work did not consist of listening to highly emotional witness testimony, and she dealt primarily with questions of law, not fact. Therefore, even though Judge Wald has many years of experience on the bench, she does not have the relevant trial experience that would make her comparable to a trial judge in a civil law system. The Judges' backgrounds consequently reveal that they have not had extensive experience with lengthy and emotional trials such as *Prosecutor v. Krstic*.

The separate sentencing phase enhanced the perception of justice even if, as some people argue, it did not enhance the reality of justice. Present-day observers and tomorrow's historians will perceive the ICTY and ICTR as legitimate institutions only if the proceedings are eminently fair. Unfortunately, the elimination of a separate sentencing hearing jeopardizes the perception of fairness at the Tribunals in return for mere marginal increases in operating efficiency.

### iii. *The Rome Statute of the ICC*

The Judges of the ICTY and ICTR should look to the Rome Statute of the International Criminal Court (ICC)<sup>119</sup> for guidance on the issue of a separate sentencing phase. Article 76 of the Rome Statute states, "the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence."<sup>120</sup> Commentators on the ICC explain that this provision "creates a strong presumption in favour of a distinct sentencing hearing following conviction."<sup>121</sup> Therefore, in a lengthy, complex, and highly emotional case, such as *Prosecutor v. Krstic*, the parties or the Trial Chamber may demand a separate sentencing proceeding. In contrast, a Trial Chamber may consider all relevant evidence in one proceeding when both parties and the Trial Chamber agree that the accused will not be unfairly prejudiced. If adopted by the ICTY and ICTR, a similar provision would enhance the legitimacy of the Tribunals' proceedings and, when appropriate, save time and money.

## V. CONCLUSION

The ICTY and ICTR should reassess certain aspects of their sentencing practices, as revealed by the above discussion. With regard to the use of

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118. Patricia M. Wald, *Judging War Crimes*, 1 Chi. J. Int'l L. 189, n.a1 (2000).

119. Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 [hereinafter ICC Statute].

120. *Id.* at Article 76.

121. Schabas, *supra* note 79, at 980.

aggravating and mitigating circumstances, the Trial Chambers must refrain from deviating substantially from the principles of deterrence and retribution merely because of the existence of mitigating factors. In light of the complexity of many of the Tribunals' cases, the Judges should stress legitimacy over marginal cost-effectiveness and adopt a provision similar to that of Article 76 of the Rome Statute of the ICC. Such a provision, which would enable either party or the Trial Chamber to call for a separate sentencing hearing, would help ensure the neutrality and objectivity of the Judges.

The ICTY and ICTR are "developing an unprecedented jurisprudence of international humanitarian law."<sup>122</sup> Although the evolution of substantive international criminal law receives the most attention, the Tribunals must also concentrate on sentencing law and procedure. The development of appropriate sentencing law and procedure will help ensure that punishments imposed by the Tribunals are fair and legitimate, and it will serve as a valuable precedent for the ICC and other courts tasked with judging those accused of similar atrocities. Perhaps most importantly, it will advance the Tribunals' roles as vehicles for peace and reconciliation in the former Yugoslavia and Rwanda.

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122. Murphy, *supra* note 86, at 95.