

# Issues related to the imposition of sentences in international tribunals<sup>1</sup>

## Introduction

This paper is part of the research work carried out from September 2018 to April 2019 by the International Law Clinic, organized by the Universidad del Rosario, Bogotá, Colombia and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (IIH), at the request of the Office of Public Counsel for the Victims (OPCV) of the International Criminal Court (ICC). It answers the following questions:

*In the context of sentencing in all cases before the ICC, how has the scope of victimization caused by the crimes, for which the accused has been convicted, been considered to determine the sentence? In the context of sentencing in all cases before the ICC, have the crimes proved beyond reasonable doubt to establish the contextual elements of crimes against humanity been considered to impose the sentence? Have some of the crimes committed by the convicted person been found to be more serious in quality and/or quantity than others to determine the penalty (i.e. aggravating circumstances)?*

In order to answer these questions, the memorandum will be separated into four chapters. At the outset, there will be a brief analysis of article 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence, which applies transversely to all questions. Once this has been defined, the question of the role of the scope of victimization in determining the sentence will be analyzed. Then, it will be considered whether the crimes that constitute the contextual elements of crimes against humanity are considered as relevant factors when determining the sentence. Finally, we will study how the crimes for which a person has been convicted have been differentiated according to the seriousness of the crimes at the time of the imposition of the sentence.

## **1. The applicable law: article 78 of the Rome Statute and rule 145 of the Rules of Procedure and Evidence**

Article 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence provide for the system of sentencing in the International Criminal Court, hereinafter referred to as the ICC.

Article 78, paragraph 1, states that, when determining the sentence, criteria such as the gravity of the crime, the personal circumstances of the convicted person and the time in detention must be considered, in accordance with the provisions of the Rules of Procedure and Evidence.

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<sup>1</sup> This memorandum has been written by the following members of the eighth promotion (2018) of the International Law Clinic, organized by the *Universidad del Rosario, Bogotá, Colombia* and the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands), under the supervision of Prof. Héctor Olasolo Alonso: Antonio Giraldo, Clara Esperanza Hernández Cortés, Andrés Sánchez Sarmiento, Viviana González, Laura Vargas, Laura Restrepo and Luisa Villarraga.

Rule 145 amplifies Article 78 by providing in paragraphs 1(a) to 1(c) that the following criteria shall be considered in determining the sentence:

- (i) the penalty must reflect the guilt of the convicted person (Rule 145, paragraph 1(a));
- (ii) all relevant factors are weighed, including the circumstances of the crime (which could be understood as the gravity of the crime), the circumstances of the convicted person (which could refer to personal circumstances) and the aggravating and mitigating circumstances provided for in paragraphs 2(a) and 2(b) (Rule 145, paragraph 1(b)); and
- (iii) in addition to the factors mentioned in article 78 (1) (gravity of the crime and personal circumstances of the accused), other factors should be taken into account, mainly, (a) the magnitude of the harm caused, in particular to the victims and their families); (b) the nature of the unlawful conduct and the means employed to perpetrate the crime; (c) the degree of participation of the convicted person; (d) the degree of intentionality; (e) the circumstances of the mode, time, and location of the crime; and (f) the age, education, and social and economic status of the convicted person (Rule 145, paragraph 1(c)).

## **2. Victimization as a factor to determine the sentence**

The doctrine understands victimization as the harm, the level of suffering caused to the victims, or the physical or mental consequences and trauma suffered by the survivors, as well as the number of victims<sup>2</sup>. In light of the interrelation between the first and third questions posed by OPCV, we analyze in this section how international criminal tribunals have dealt with a number of qualitative and quantitative (i.e. number of victims) factors surrounding the commission of the crimes that are part of said notion of victimization.

We leave for section 4, in which we answer the third question posed by OPCV, the discussion on whether international criminal tribunals have assigned different levels of seriousness to some general categories of crimes (i.e. genocide) or to some legal interest harmed by the crimes (i.e. human life).

### **2.1. The International Criminal Court**

The ICC has analyzed the scope of victimization within the gravity of the crime, and not as an independent factor for sentencing. This is evidenced in the judgements handed down against Thomas Lubanga<sup>3</sup>, Germain Katanga<sup>4</sup>, Ahmad Al Faqi Al Mahdi<sup>5</sup> and Jean Pierre Bemba.<sup>6</sup>

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<sup>2</sup> D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC*, (2011), p. 133.

<sup>3</sup> International Criminal Court, Trial Chamber I, Case The Prosecutor v. Thomas Lubanga Dyilo, July 12 2012, "Decision on sentence pursuant to Article 76 of the Statute" No. ICC-01/04-01/06, para. 44, "(...)the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, inter alia, to the extent of the damage caused, and in particular "the harm caused to the victims and their families (...)"<https://www.legal-tools.org/doc/c79996/pdf>

In the judgement of the Lubanga case, Trial Chamber I analyzed victimization based on the nature of the damage and the number of victims to whom it was inflicted. The Chamber stated that the damage had to be assessed in the light of the following elements: (i) the risks that minors under the age of 15 had to run when they were voluntarily enlisted, forcibly recruited and/or actively used in the conduct of hostilities; (ii) the physical and psychological sequelae they suffered as a consequence of the victimizing act; and (iii) the number of victims under the age of fifteen to whom such harm was caused.<sup>7</sup>

In the judgement of the Katanga case<sup>8</sup>, Trial Chamber II analyzed the extent of the damage caused to the victims as a consequence of the attack of 24 February 2003 by the FNI/FRPI troops, including the physical and psychological sequelae they suffered as a result of the event<sup>9</sup>. In addition, the Chamber took into consideration the fact that the aftermath of the Bogoro attack spread over time as the poverty rate increased, as well as the number of

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<sup>4</sup> International Criminal Court, Trial Chamber II, Case The Prosecutor v. Germain Katanga, “Decision on Sentence pursuant to Article 76 of the Statute” May 23 2014, No.: ICC-01/04-01/07, para. 71 “(...) *in examining the gravity of the crimes, the Chamber has already taken into account the cruelty in the commission of the crimes against the inhabitants of Bogoro, including against vulnerable people such as children, and noted the discriminatory nature of the attack (...)*” <http://www.legal-tools.org/doc/5af172/>.

<sup>5</sup> International Criminal Court, Trial Chamber VIII, Case The Prosecutor v. Almah Al Faqi Al Mahdi, “judgement and sentence” September 27 2016, No.: ICC-01/12-01/15, para. 76. “(...) *In addressing the gravity of the crime committed, the Chamber considered, in particular, the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time, place and manner.*” <http://www.legal-tools.org/doc/042397/pdf>.

<sup>6</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v. Jean Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016 No.: ICC-01/05-01/08, para. 15, “(...) *The gravity of the crime is a principal consideration in imposing a sentence. In cases of command responsibility, the Chamber must assess the gravity of (i) the crimes committed by the convicted person’s subordinate; and (ii) the convicted person’s own conduct in failing to prevent or repress the crimes or submit the matter to the competent authorities.*” <http://www.legal-tools.org/doc/f4c14e/pdf>

<sup>7</sup> International Criminal Court, Trial Chamber I, Case The Prosecutor v Thomas Lubanga Dyilo, “Decision on sentence pursuant to Article 76 of the Statute” July 10 2012, No.: ICC-01/04-01/06, para. 49 “*The Chamber concluded in the Judgment that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.*” [https://www.icc-cpi.int/CourtRecords/CR2012\\_07409.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF)

<sup>8</sup> International Criminal Court, Trial Chamber II, Case The Prosecutor v Germain Katanga, “Decision on Sentence pursuant to Article 76 of the Statute” May 23 2014, No.: ICC-01/04-01/07, para. 47. “*The Chamber also concluded that, using machetes and/or firearms, the group of Ngiti combatants from Walendu-Bindi intentionally killed at least 30 civilians not taking part in the hostilities. Considering, in particular, the detailed testimony of Witness P-353, the Chamber was satisfied beyond reasonable doubt that the number of victims of the killings carried out on that date by Ngiti combatants far exceeded that figure. The Chamber further found that some elderly people and 13 children, 11 of whom were aged less than six years, 88 were murdered.*” <https://www.legal-tools.org/doc/5af172/pdf/>

<sup>9</sup> International Criminal Court, Trial Chamber II, Case The Prosecutor v Germain Katanga, “Decision on Sentence pursuant to Article 76 of the Statute” May 23 2014, No.: ICC-01/04-01/07, para 56, 57 “...*the after-effects of the fighting were still being felt and there was a high number of widows, widowers and orphans, some of whom had been unable to find a host family. (...) the village chief stated that many families had suffered from the damage caused in Bogoro on that day. He further stated that some locals still suffered from physical disabilities and/or psychological trauma,112 adding that they had a vivid recollection of the attack of 24 February 2003*”. <https://www.legal-tools.org/doc/5af172/pdf/>

orphans in the area and the number of displaced persons<sup>10</sup>. Moreover, from a quantitative perspective, Trial Chamber II found that the number of victims is a factor that should be taken into consideration when establishing the gravity of the crimes for which a conviction has been entered<sup>11</sup>.

In the Al Mahdi judgement, the damage was assessed on the basis of the loss of cultural and economic heritage caused by the destruction of sacred sites declared as cultural heritage by UNESCO. These sites did not only fulfill a religious function but had a symbolic and an emotional value to the people of Timbuktu, Mali and the international society<sup>12</sup>.

Finally, in the judgment of the Bemba case, Trial Chamber III analyzed the physical and psychological consequences of the harmful acts perpetrated against the victims and their families as a factor to determine the extent of the harm. In this case, the victimization was analyzed in accordance with each of the crimes that were the object of the conviction: murder<sup>13</sup>, sexual violence<sup>14</sup> and pillage<sup>15</sup>. It is worth mentioning that, as part of the analysis

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<sup>10</sup> International Criminal Court, Trial Chamber II, Case The Prosecutor v Germain Katanga, “Decision on sentence pursuant to Article 76 of the Statute” May 23 2014, No.: ICC-01/04-01/07, para 52, 55, 56, 59 “52. *The loss of this property had significant consequences for the daily lives of the victims (...) that one of the most persistent consequences of the battle was poverty. Apparently, many locals have since been forced to start life afresh away from Bogoro, where they chose not to return as they would have had to start again from scratch or simply did not have the means. (...) 55. The Prosecution noted that, on the whole and as a result of the crimes that were committed there, its people were now even poorer than before. (...) 56. the after-effects of the fighting were still being felt and there was a high number of widows, widowers and orphans, some of whom had been unable to find a host family. (...) 59. main form of hardship currently endured by the inhabitants of Bogoro was unquestionably poverty.*” <http://www.legal-tools.org/doc/5af172/>.

<sup>11</sup> International Criminal Court, Trial Chamber II, Case The Prosecutor v Germain Katanga, “Decision on Sentence pursuant to Article 76 of the Statute” May 23 2014, No.: ICC-01/04-01/07, paras. 47 e seq.

<sup>12</sup> International Criminal Court, Trial Chamber VIII, Case The Prosecutor v Almah Al Faqi Al Mahdi, “judgement and sentence” September 27 2016, No.: ICC-01/12-01/15, para 80, 108 “*all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community (...) that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.(...) to sufficiently and adequately reflect the moral and economic harm suffered by the victims of the present case and fulfil the objectives of sentencing, the Chamber must impose a sentence that is proportionate to the gravity of the crime and the individual circumstances and culpability of Mr Al Mahdi.*” <http://www.legal-tools.org/doc/042397/>.

<sup>13</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v Jean Pierre Bemba Gombo, “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016, No.: ICC-01/05-01/08, para 30-32, “*Persons who relied on the direct victim for support, whether financial, physical, emotional, psychological, moral, or otherwise, were also affected. The impact rippled through the relevant communities. Due to the prevailing chaotic and traumatic circumstances, family members of, and others with special bonds of affection to, some murder victims were deprived of the comforts that funeral services and burial rituals may provide in periods of grief. (...) For some victims, the impact of the murders was chronic and severe. (...) The indirect victims, in particular, family members, also suffered severe and lasting harm. (...)*” <http://www.legal-tools.org/doc/f4c14e/>

<sup>14</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v Jean Pierre Bemba Gombo, “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016, No.: ICC-01/05-01/08, para. 36, 37, “*rape victims generally suffer from four types of consequences: (i) medical (including lesions to organs, human immunodeficiency virus (“HIV”), loss of virginity, and unwanted pregnancies); (ii) psychological (fear, anxiety, anger, aggression, guilt, isolation, embarrassment and shame, loss of confidence, and washing rituals); (iii) psychiatric (PTSD, reactive depression, melancholia, neuroses, addictive behaviour, and*

of the seriousness of the crime of rape, the high number of victims was taken into consideration, although it did not specify exactly how many victims there were<sup>16</sup>.

## 2.2. The International Criminal Tribunal for the Former Yugoslavia

Article 24, paragraph (2), of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides that, when imposing sentences, Trial Chambers must consider factors such as the gravity of the offence and the personal circumstances of the convicted person<sup>17</sup>. In addition, article 24 (1) states that the Chambers shall also have to apply the general practice of the courts of the former Yugoslavia regarding prison sentences.

Pursuant to Rule 101 of the Rules of Procedure and Evidence, it is stipulated that, in addition to the factors referred to in article 24(2) of the Statute (gravity of the offence and personal circumstances of the accused), Trial Chambers shall also take into account the following factors when imposing the criminal penalty: (i) aggravating and mitigating circumstances (including substantial cooperation with the Prosecutor's Office before or after conviction); (ii) the general practice of the courts of the former Yugoslavia; (iii) the time spent in provisional detention by the convicted person while he was being transferred to the ICTY or the trial took place; (iv) the extent to which the convicted person has served any sentence imposed by a national court for the same acts for which he has been convicted by the ICTY<sup>18</sup>.

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*psychosomatic disorders); and (iv) social (stigmatisation and repudiation (...)) The victims of rape in this case suffered, inter alia, physical problems, such as vaginal and anal ailments, abdominal pains, skin disorders, pelvic pain, high blood pressure, gastric problems, hypertension, miscarriage, infertility, and HIV.110 They also suffered psychological, psychiatric, and social consequences, such as PTSD, depression, humiliation, anxiety, guilt, and nightmares” <http://www.legal-tools.org/doc/f4c14e/pdf>*

<sup>15</sup> International Criminal Court, Trial Chamber III, Case Prosecutor v. Jean-Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016, No.: ICC-01/05-01/08, para. 50, 51 “*The consequences for victims were far-reaching, impacting various aspects of their personal and professional lives, often leaving victims with nothing.(...) The crimes impacted various aspects of the victims’ lives, often leaving them without basic necessities. (...)*” <http://www.legal-tools.org/doc/f4c14e/pdf>

<sup>16</sup> International Criminal Court, Trial Chamber III, Case Prosecutor v. Jean-Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016, No.: ICC-01/05-01/08, Para. 40 “*The Chamber notes that the number of victims of underlying acts of rape is substantial. The underlying acts of rape were committed throughout the geographical and temporal scope of the 2002-2003 CAR Operation. They were committed as part of an attack targeting many civilians throughout the CAR between 26 October 2002 and 15 March 2003. The degree of damage caused to the victims, their families, and communities was severe and lasting. Accordingly, in light of the circumstances of time, manner, and location considered above, and the extent of damage caused, the Chamber finds that, in this case, the crimes of rape are of utmost, serious gravity.*” [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF)

<sup>17</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, september 2009, article 24 (2) “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.*” [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)

<sup>18</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, september 2009, article 24 (2) *announce factors to take into account to impose the penalty as the gravity of the offence and the individual circumstances of the convicted person.* [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf). Rules of Procedure and Evidence

The litmus test, which analyses the gravity of the crime through the particular circumstances of the case, the number of victims, the suffering caused to them and the form of participation of the accused, has been used as a benchmark by the Trial Chambers in their judgments<sup>19</sup>. This also includes long-term extension of the physical, psychological and emotional harm, as shown by the Kupreskic *et al.*<sup>20</sup>, Kvocka *et al.*<sup>21</sup>, Stanišić & Župljanin<sup>22</sup> and Krnojelac<sup>23</sup> *et al.* cases.

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of the International Criminal Tribunal for the Former Yugoslavia, 8 July 2015, rule 101 (B) added new factors to take into account as “aggravating circumstances; mitigating circumstances including substantial cooperation with the Prosecutor by the convicted person before or after conviction, the general practice regarding prison sentences in the courts of the former Yugoslavia, the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.” [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf).

<sup>19</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case Prosecutor v. Miroslav Kvocka, Dragoljub Prcać, Milojević Kos, Mlado Radic, Zoran Zigic, “judgement” ICTY IT-98-30/1-T, 2 November 2001, para. 701. “The Tribunal has often reiterated in its Judgements that the primary factor to be taken into account in imposing a sentence is the gravity of the offence, including the impact of the crimes. The seriousness of the crimes must weigh heavily in the sentence imposed irrespective of the form of the criminal participation of the individual. In this regard, the Trial Chamber subscribes to the approach taken by the Appeals Chamber that the level of penalty in each particular case should “be fixed by reference to the circumstances of the case.” In general, the Trial Chamber will assess the seriousness of the crimes by taking into account quantitatively the number of victims and the effect of the crimes on the broader targeted group and qualitatively the suffering inflicted on the victims and survivors.” <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>; International Criminal Tribunal for the Former Yugoslavia, case Prosecutor v. Dario Kordić & Mario Čerkez, Trial Chamber, “judgement” IT-95-14/2-T, 26 February 2001, para. 852. “The starting point for the consideration of sentence is the gravity of the offences. Both accused have been convicted of numerous offences. However, all arise from the same common design which led to the persecution and “ethnic cleansing” of the Bosnian Muslims of the Lašva Valley and surroundings. This led to a sustained campaign involving a succession of attacks on villages and towns which were characterised by a ruthlessness and savagery and in which no distinction was made as to the age of its victims: young and old were either murdered or expelled and their houses burned. The total number of dead may never be known, but it runs into hundreds, with thousands expelled. Offences of this level of barbarity could not be more grave and those who participate in them must expect sentences of commensurate severity to mark the outrage of the international community.” [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf).

<sup>20</sup> International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, case Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic & Vladimir Santic “appeal Judgement” IT-95-16-A, 23 October 2001, para. 442. “The Appeals Chamber notes Santic’s submission that “the gravity of the offence is the decisive factor in imposing the sentence...The gravity of the crime includes the discussion of the consequences of the crime when imposing the sentence.” 708 The Appeals Chamber concurs. In sentencing, a Trial Chamber must start from the position that “the gravity of the offence is the primary consideration in imposing sentence.” 709 In this case, the Trial Chamber acted no differently. Indeed, the following principle in the Trial Judgement has now been endorsed in several decisions by the Appeals Chamber: The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.” <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>.

<sup>21</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case Prosecutor v. Miroslav Kvocka, Dragoljub Prcać, Milojević Kos, Mlado Radic, Zoran Zigic, “judgement” ICTY IT-98-30/1-T, 2 November 2001, para. 701. “The Tribunal has often reiterated in its Judgements that the primary factor to be taken into account in imposing a sentence is the gravity of the offence, including the impact of the crimes. The seriousness of the crimes must weigh heavily in the sentence imposed irrespective of the form of the criminal

However, it can be noted that in some cases before the ICTY (in particular, in the Blaskic<sup>24</sup> and Brdjanin<sup>25</sup> cases), suffering and trauma of the survivors has been considered as aggravating circumstances rather than factors determining the gravity of the crime.

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participation of the individual. 2 In this regard, the Trial Chamber subscribes to the approach taken by the Appeals Chamber that the level of penalty in each particular case should “be fixed by reference to the circumstances of the case.” In general, the Trial Chamber will assess the seriousness of the crimes by taking into account quantitatively the number of victims and the effect of the crimes on the broader targeted group and qualitatively the suffering inflicted on the victims and survivors.” <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>

<sup>22</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case Prosecutor v. Mico Stanisic & Stojan Zupljanin, “judgement volumen 2” IT-08-91-T, 27 march 2013, para. 892. “The inherent gravity of an offence is the primary consideration in determining a sentence. When assessing the gravity of the offence, a Trial Chamber must take into account the totality of the criminal conduct of the convicted person. In doing so, the Chamber must consider the cruelty, the nature and circumstances of the crimes, the position of authority and degree of participation of the convicted person in the perpetration of those crimes, the number of victims, and the effect of the crimes upon the broader targeted group. The Appeals Chamber has also held that the consequences of the crime upon the victims directly injured, namely the extent of the long-term physical, psychological, and emotional suffering of the victim, is always relevant to sentencing. Further factors, such as the effects of the crime on relatives of the immediate victims, may also be considered.” [http://www.icty.org/x/cases/zupljanin\\_stanisicm/tjug/en/130327-2.pdf](http://www.icty.org/x/cases/zupljanin_stanisicm/tjug/en/130327-2.pdf).

<sup>23</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, case Prosecutor v. Milorad Krnojelac, “judgement” IT-97-25-T, 15 march 2002, para. 512. “The Prosecution has submitted that what it calls an “in personam evaluation” of the gravity of the crime could or should also concern the effect of that crime on relatives of the immediate victims.1526 The Trial Chamber considers that such effects are irrelevant to the culpability of the offender, and that it would be unfair to consider such effects in determining a sentence.1527 Consideration of the consequences of a crime upon the victim who is directly injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part of the definition of the offence, they may not be considered as an aggravating circumstance in imposing sentence, but the extent of the long term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.” <http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf>.

<sup>24</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case Prosecutor v. Tihomir Blaskic, “judgement” IT-95-14-T, 3 march 2000, para. 787. “The physical and mental effects of the bodily harm meted out to the victims were also seen as aggravating circumstances. The criterion is thus characterised by its subjectiveness. In the Tadic, Celebici and Furundcija cases, the Trial Chambers observed that the offences had been committed in circumstances which could only aggravate the crimes and the victims’ suffering. Those cases where bodily injury led to death have also been noted. Consequently, victims’ suffering is one factor to be taken into account when determining the sentence. The Trial Chamber here points not only to the suffering inflicted upon the victims while the crimes were being committed through the use of indiscriminate, disproportionate and terrifying combat means and methods, such as “baby bombs”, flamethrowers, grenades and a booby-trapped lorry, but also the manifest physical and mental suffering endured by the survivors of these brutal events. Thus, along with the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day must also be mentioned.” <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

<sup>25</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case Prosecutor v. Radoslav Brdjanin, “judgement” September 1 2004, No.: IT-99-36-T, para. 1105. “The extent of the long-term physical, psychological, and emotional suffering of the survivors can be an aggravating factor. The Appeals Chamber has held that even if the mental suffering of the survivors constitutes an element of, for example, the crime of inhumane acts, a Trial Chamber is entitled to take the long term effect of the trauma into account as an aggravating factor.” <https://www.legal-tools.org/doc/4c3228/pdf/>

Moreover, in other cases, such as the cases against Dragan Nikolic<sup>26</sup>, Tihomir Blaskic<sup>27</sup>, Miroslav Bralo<sup>28</sup> and Vidoje Blagojevic<sup>29</sup> the number of victims has also been considered as an aggravating circumstance.

### 2.3. The International Criminal Tribunal for Rwanda

Article 23(2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR), and Rule 101 of the Rules of Procedure and Evidence, establishes a system of sentencing similar to that provided for the ICTY.

The ICTR has sometimes analyzed the scope of victimization as part of the gravity of crimes. Other times, it has considered the scope of victimization (or some elements of it, such as the number of victims) as an aggravating circumstance.

In the Kambanda<sup>30</sup> and Gatete<sup>31</sup> cases, the Trial Chambers considered the number of victims in the analysis of the seriousness of the crime. Nevertheless, the Trial Chambers stated that it would be considered as an aggravating factor.

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<sup>26</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, case The Prosecutor v. Dragan Nikolic, sentencing judgement, No. IT-94-2-S, December 18 2003, para. 213 “(vii) Finally, the high number of victims in Sucica camp and the multitude of criminal acts have to be taken into account.” <https://www.legal-tools.org/doc/f8722c/pdf/>

<sup>27</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case The Prosecutor v. Timohir Blaskic, judgement, No. IT-95-14, March 3 2000, para. 784 “The number of victims has been raised on several occasions as an aggravating circumstance and reflects the scale of the crime committed. By noting that the crimes were committed systematically, the Trial Chambers also took into account as aggravating circumstances the recurrence of the crimes. The number of victims must also be considered in relation to the length of time over which the crimes were perpetrated In this case, the Trial Chamber not only points to the high number of victims but also the violence of the crimes and the fact that they were repeated, discriminatory and systematic. The Trial Chamber recalls that a very large number of Muslim civilians had their homes forcibly taken away from them. This excludes the very large number of victims who had to take flight. The brutal murder of Muslim civilians in Ahmici over a brief time-span is a blatant illustration.” <https://www.legal-tools.org/doc/e1ae55/pdf/>

<sup>28</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case The Prosecutor v. Miroslav Bralo, sentencing judgment, No. IT-95-17, December 7 2005, para. 30 “The scale of the attack and the number of victims who were persecuted by Bralo in its course serve to further aggravate the seriousness of his criminal conduct, which is a factor taken into account by the Trial Chamber in its determination of sentence.” <https://www.legal-tools.org/doc/e10281/pdf/>

<sup>29</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, case The Prosecutor v. Vidoje Blagojevic & Drajan Jokic, No. IT-02-60-T, January 15 2005, para. 841. “The Prosecution submits that, in accordance with the Blaskic Trial Chamber, this Trial Chamber should consider the vast number of victims an aggravating circumstance.2304 While agreeing that the number of victims of the crimes of both Vidoje Blagojević and Dragan Jokić is, indeed, very large, the Trial Chamber finds that the scale of the crimes committed is reflected in the crimes for which each accused has been convicted, specifically complicity in genocide and extermination, respectively” <https://www.legal-tools.org/doc/7483f2/pdf/>

<sup>30</sup> International Criminal Tribunal for Rwanda, case Prosecutor v. Jean Kambanda, “judgement and sentence” ICTR 97-23-S, 4 september 1998, para. 42 “In the brief dated 10 August 1998 and in her closing argument at the hearing, the Prosecutor stressed the gravity of the crimes of genocide, and crimes against humanity. The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact.” <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-97-23/trial-judgements/en/980904.pdf>

In the Bagosora *et al*<sup>32</sup> case, the Trial Chamber studied the brutality and cruelty to which the victims were subjected, which was a relevant factor when analyzing the seriousness of the crimes charged.

Finally, in the Bizimingu *et al.* case,<sup>33</sup> the Trial Chamber stated that the number of victims and the consequences of crimes on direct victims are elements that must be considered when analyzing the seriousness of the crime. However, a detailed analysis of these factors is not provided for throughout the ruling.

## 2.4 The Special Court for Sierra Leone

The Special Court for Sierra Leone has considered victimization as part of the gravity of the crime, considering the number of victims, the harm caused to the victim's physical, emotional and psychological health and the repercussions caused to the victim's relatives and society.<sup>34</sup> In particular, the Trial Chamber in the case against Charles Taylor<sup>35</sup>, in determining the sentence, took into consideration, as part of the gravity of the crimes, the suffering caused to the victims by (i) the large amount of lost lives; (ii) the brutality with which the crimes were committed; (iii) the substantial change in the lives of the survivors who will not be able to return to a productive life; (iv) the stigma attached to the raped girls; and (v) the rejection of the children recruited by their own families or communities. The Chamber also recognized that the crimes for which Charles Taylor was convicted are

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<sup>31</sup>International Criminal Tribunal for Rwanda, Trial Chamber III, Case The Prosecutor v. Jean-Baptiste Gatete, 31 March 2011, Case No. ICTR-2000-61-T. Par. 678. *The Chamber further finds that the number of victims of the attacks in Rwankuba sector, and at the Kiziguro and Mukarange parishes, for which Gatete is individually responsible, is an aggravating factor....*” <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-72/trial-judgements/en/081202.pdf>

<sup>32</sup> International Criminal Tribunal for Rwanda, Trial Chamber I, case Prosecutor v. Theoneste Bagosora “judgement and sentence”, ICTR-98-41-T 18 December 2008, para. 2266 “(...) *Simple murder was compounded with extreme brutality and cruelty: after the killing of Prime Minister Agathe Uwilingiyimana her genitals were mutilated with a bottle; Alphonse Kabiligi’s arm was cut off with a machete in front of his family before he was shot to death; refugees were herded to places of worship, such as Gikondo Parish, before being brutally killed as peacekeepers and priests were forced at gunpoint to watch the carnage, including the mutilation of sexual organs; women stopped at roadblocks were raped before being killed, their naked corpses left by the road.*” [http://www.worldcourts.com/ictr/eng/decisions/2008.12.18\\_Prosecutor\\_v\\_Bagosora.pdf](http://www.worldcourts.com/ictr/eng/decisions/2008.12.18_Prosecutor_v_Bagosora.pdf)

<sup>33</sup> International Criminal Tribunal Rwanda, Trial Chamber II, Prosecutor v. Bizimingu “judgment and sentence” , ICTR-90-50-T, 30 September 2011, para. 1991 “*The gravity of the offences committed is the deciding factor in the determination of the sentence. Gravity entails the particular circumstances of the case, the form and degree of the participation of the accused in the crimes, and the number of victims. The consequences of the crime upon any victims who were directly injured are also relevant.*” <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-99-50/trial-judgements/en/110930.pdf>

<sup>34</sup> Special Court for Sierra Leone; Trial Chamber, Case No. SCSL-03-01-T, (The Prosecutor v. Charles Taylor). Sentencing Judgment. 30 may 2012, para 20; AFRC sentencing judgement, Case No. SCSL 04-16-T, para. 19.

<sup>35</sup> Special Court for Sierra Leone; Trial Chamber, Case No. SCSL-03-01-T, (The Prosecutor v. Charles Taylor). Sentencing Judgment. 30 may 2012, para 70.

most serious for targeting vulnerable groups such as girls and women, the elderly and child soldiers<sup>36</sup>.

## 2.5 The Extraordinary Chambers in the Courts of Cambodia

The ECCC has dealt with the extent of victimization as part of the seriousness of the crime in cases 002/01<sup>37</sup>. and 002/02<sup>38</sup>, against Nuon Chea and Khieu Samphan.

Nevertheless, the number of victims has sometimes been treated by the ECCC as an aggravating circumstance, as shown by the decision of the Appeals Chamber in case 001, against Kaing Guek Eav “Duch”<sup>39</sup>, which confirmed the analysis made by the Trial Chamber.

### 3. The degree of consideration of the contextual elements of crimes against humanity in the determination of sentencing.

From a theoretical perspective, the Legal Clinic understands that crimes proven beyond reasonable doubt to establish the contextual elements of crimes against humanity should be considered in assessing some of the factors set out in article 78 (1) of the Rome Statute (in particular, the gravity of the crimes) and in Rule 145(1) of the Rules of Procedure (in particular, the magnitude of the harm, the number of victims, the means employed in the

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<sup>36</sup> Special Court for Sierra Leone; Trial Chamber, Case No. SCSL-03-01-T, (The Prosecutor v. Charles Taylor). Sentencing Judgment. 30 may 2012, para 74-75.

<sup>37</sup> Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, case Prosecutor v. Nuon Chea and Khieu Samphan, August 7 2014, Case No. 002/19-09-2007/ECCC/TC, para 1075 “*The Trial Chamber has found that a minimum of 250 LON Nol officials were murdered at Tuol Po Chreyand as a minimum, between 2,330,000 to 2,430,000 people were victims of crimes committed during the first two phases of forced population movement. The number of victims is among the highest of any decided case concerning international crimes. The crimes were committed across the whole of Cambodia during an almost two-year period. The Trial Chamber considers that the gravity of the crimes is illustrated by the vast number of victims, as well as the broad geographic and temporal scope of victimisation.*”. Para 1077 “*The gravity of the crimes is further demonstrated by their serious and lasting impact upon the victims and their relatives and Cambodia in general. For the victims who died as a result of the crimes, the consequences were absolute. Many of those who survived suffered ongoing physical trauma, as well as mental and psychological disorders. The grave impact of these crimes on the victims and their relatives is both devastating and enduring.*”  
[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_ENG.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf)

<sup>38</sup> Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, case Prosecutor v. Nuon Chea and Khieu Samphan, November 16 2018, Case No. 002/19-09-2007/ECCC/TC, para 4362 “**Gravity of the crimes:** *The Chamber recalls the large number of victims, the fact that many victims were extremely vulnerable, the disastrous impact of the crimes upon them and their relatives, as well as the massive scale and brutality of these crimes.*”  
<https://drive.google.com/file/d/1LA9ttO7C4fgC1aSb1cAoe9ofzwDuERx5/view?ts=5c9c9bb0>

<sup>39</sup> Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, case Prosecutor v. Kaing Guek Eav, “Appeal Judgement”, case No . 001/18-07-2007-ECCC/SC, February 3 2012, para. 361 “*The Chamber has further noted a number of aggravating features, including the shocking and heinous character of the offences, which were perpetrated against at least 12,273 victims over a prolonged period. Such factors, when considered cumulatively, warrant a substantial term of imprisonment.*”  
<https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>

commission of the wrongful acts and the circumstances of time, and place in which the acts occurred.

Nevertheless, the situation is rather different in the jurisprudence of International Criminal Tribunals. In order to analyze such jurisprudence in relation to the question raised, it is necessary to differentiate two types of cases.

On the one hand, there are those cases related to high commanders, where all the crimes that form part of the systematic or widespread attack against the civilian population are charged.

On the other hand, we find a second type of cases, normally directed against direct perpetrators or middle commanders, in which the crimes attributed, are only a small part of the crimes that constitute the systematic or widespread attack directed against the civilian population. This type of cases, in contrast to the first, discern between crimes specifically attributed to the convicted person and other acts of violence that are only part of the contextual elements of crimes against humanity. Therefore, it is in the second type of cases that the question under investigation can be analysed.

The ICC's jurisprudence is not useful in providing an answer to this question neither in the Bemba case nor in the Katanga case (which are the only cases where there has been a conviction for crimes against humanity). When determining the penalty in these cases, it is not possible to differentiate between the crimes specifically attributed to the convicted person and those crimes that are proven beyond reasonable doubt to establish the contextual elements of crimes against humanity.

Although the ICTR has dealt with many cases of crimes against humanity, it focused on analyzing Genocide cases. Therefore, its jurisprudence is not the most adequate to differentiate between the crimes specifically attributed to the convicted person and the crimes that constitute the contextual elements of crimes against humanity.

The SCSL exclusively dealt with cases relating to the first type of cases before mentioned, which were directed against the former President of Liberia (Charles Taylor) and the senior living leaders of the three main armed groups involved in the conflict in Sierra Leone (Revolutionary United Front ('RUF'), Armed Forces Revolutionary Council ('AFRC') and Civil Defence Forces ('CDF')).

Likewise, the two cases completed before the Extraordinary Chambers in the Courts of Cambodia also belong to the first model. In the 001 case, Kaing Guek Eav<sup>40</sup> was charged with all crimes as a superior since he was a deputy and director of Detention Centre S-21.

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<sup>40</sup> Extraordinary Chambers in the Courts of Cambodia, case Prosecutor vs Kaing Guek Eav "judgement", July 26 2010, No.: 001/18-07-2007/ECCC/TC, para 549. *"The Chamber is satisfied that the Accused's criminal liability for these crimes could also be established on the basis of his superior responsibility. Indeed, the Accused exercised effective control over the rest of the S-21 staff, knew that his subordinates were committing crimes, and failed to take necessary or reasonable measures to prevent their commission or punish their perpetrators"* <https://www.legal-tools.org/doc/dbdb62/pdf/>

The same occurred in case No. 002 against Nuon Chea (former Head of State of the Republic of Kampuchea)<sup>41</sup> and Khieu Samphan (former President of the State Council of the Republic of Kampuchea)<sup>42</sup>.

As a result, the most suitable cases to analyze the question under consideration belong to the ICTY, since they correspond to the second type of cases. The most noteworthy cases are Kunarac et al.<sup>43</sup>, Kvočka et al.<sup>44</sup>, Momir Nikolić<sup>45</sup> and Dragan Obrenović<sup>46</sup>.

In the Kunarac et al case, the Prosecution sought that certain acts of violence (crimes), which were part of the same course of conduct or common plan but not specifically

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<sup>41</sup> Extraordinary Chambers in the Courts of Cambodia, Case Prosecutor vs. Nuon Chea y Khieu Samphan, "judgement" August 7 2014, No.: 002/19-09-2007/ECCC/TC, para. 941. *"Further, the Chamber has found that NUON Chea is both directly responsible and responsible as a superior for all crimes committed in the course of movement of population (phases one and two) and at Tuol Po Chrey. Having found that the Accused was directly responsible for these crimes through his participation in the JCE, the Chamber declines to enter a conviction under the doctrine of superior responsibility. (...)"* <https://www.legal-tools.org/doc/4888de/pdf/>

<sup>42</sup> Extraordinary Chambers in the Courts of Cambodia, Case Prosecutor vs. Nuon Chea y Khieu Samphan, "judgement" August 7 2014, No.: 002/19-09-2007/ECCC/TC, para. 1052. *"(...)In turn, the Chamber adopts its reasoning provided in the sections relevant to the charge that KHIEU Samphan was responsible as a superior for the crimes committed in the course of phase one (...)"* <https://www.legal-tools.org/doc/4888de/pdf/>

<sup>43</sup> International Criminal Tribunal for the Former Yugoslavia, Kunarac et al. (IT-96-23 & 23/1), 12 June 2002 Trial Chamber, judgement. Kunarac was the leader of the VRS (Bosnian Serb Army), part of the tactical group of Foča and was sentenced to 28 years in prison. He was convicted for torture and rape as crimes against humanity and war crimes and slavery as a crime against humanity. These crimes were committed as part of a campaign against the Serbian forces in the municipality of Foča and the towns of Gacko and Kalinovik from 1992 to 1993. At this time all Muslims in the area were expelled from the region. <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>

<sup>44</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Kvočka, (IT-98-30/01), October 1 2016. Professional police officer attached to the Omarska police station; participated in the operation of the Omarska Camp in northwestern Bosnia and Herzegovina as the equivalent to the subcommander of the guard service. He was convicted of persecution based on political, racial or religious discrimination as a crime against humanity, and murder and torture as war crimes. The contextual elements referred to the events that took place in the municipality of Prijedor in the north of Bosnia and Herzegovina and in particular to the events that took place in the Omarska camp, where the mistreatment of the detainees was a constant and were systematically beaten or subjected to cruel and inhuman treatment as a result of a policy against non-Serbs.

<sup>45</sup> International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Prosecutor v. Nikolić (IT-02-60/1-S), 2 December 2003, Trial Chamber, judgement. origin bosnio (Brutanac, ByH). Ethnicity: Serbian. He studied defense and protection in the political science faculty of Sarajevo, and later he dedicated himself to military intelligence. He was part of the Brutanac Territorial Defense Force as part of intelligence. He became the Assistant Commander and Head of Intelligence of the VRS (Army of the Republic of Srpska, an ally of Serbia). Later he held other public positions.

<sup>46</sup> International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Prosecutor v. Obrenović (IT-02-60/2-S), 10 December 2003, Trial Chamber, judgement. : origin bosnio (Rogatica, ByH). Ethnicity: Serbian. He made a military career in the former Yugoslavia, and was subsequently sent to serve in the VRS. He started as logistics manager and subcommander (because he already had military experience as an officer in Yugoslavia), and subsequently held various positions. During the conflict in BiH he was elected commander of the Zvornik Infantry Brigade in 1995, a position he held between August 8 and September 15. Then he continued as chief of staff until April 1996, until he was appointed interim commander of the same brigade. In 1998 he was appointed commander in the same brigade. He was arrested in 2001.

indicted against the accused, were taken into consideration by the Trial Chamber in determining the sentence. Nevertheless, the Chamber rejected the Prosecutor's request, as only the acts of violence, which have been proven and attributed beyond a reasonable doubt to the convicted person (as well as those directly related to them), may be considered as aggravating factors for the imposition of the sentence<sup>47</sup>. Despite the fact that there are other acts of violence within the context in which the acts attributed to the convicted person took place, they cannot be considered as aggravating circumstances if they are not directly related to what is attributed specifically to the convicted person.

Likewise, in the case of Kvočka et al, the Prosecution requested the Trial Chamber to take as a factor in assessing the gravity of the crimes that they had been committed as part of a broader policy of general and systematic prosecution<sup>48</sup>. Although the repetitive and continuous nature of the crimes was critical in determining the existence of crimes against humanity, the Chamber rejected the Prosecution's request. The reasons given by the Chamber to reach this conclusion were as follows, despite proving the crimes beyond a reasonable doubt when establishing the contextual elements of crimes against humanity: (i) only the conduct attributed to the convicted person can be considered when determining the sentence and (ii) the conduct not attributed to the convicted person, cannot be considered when determining the sentence as an aggravating circumstance<sup>49</sup>.

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<sup>47</sup> International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Prosecutor v. Kunarac et al. (IT-96-23 & 23/1), 12 June 2002 Trial Chamber, judgement, para 850. "...She [The Prosecution] appeared rather to have argued that only uncharged acts and omissions that were part of the same course of conduct or common scheme or plan as the offence of conviction would be relevant for sentencing purposes. Even assuming, however, that the Defence was put on notice to put its case with respect to such uncharged acts and omissions, that those uncharged offences were established beyond reasonable doubt and that they can be said to be part of the same plan as the offence of conviction, the Trial Chamber would not allow such an uncharged crime being used as an aggravating circumstance. The reason is this: an offender can only be sentenced for conduct for which he has been convicted. The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence.") and aggravating circumstances should of course also be considered when imposing sentence. Mitigating circumstances not directly related to the offence, such as co-operation with the Prosecutor, an honest showing of remorse and a guilty plea, may be considered. However, the position with respect to aggravating circumstances is quite different. Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. In other words, circumstances not directly related to an offence may not be used in aggravation of an offender's sentence for that offence. To permit otherwise would be to whittle away the purpose and import of an indictment. Either the Prosecutor should charge such conduct as an offence, or, where it is not directly related to another charged offence, she should desist from citing such conduct as an aggravating factor. The Trial Chamber understands that the multiplicity of humanitarian law violations committed during an armed conflict as part of a common criminal scheme often cannot be succinctly captured in an indictment. Considerations of fairness to the accused and judicial economy, however, outweigh the wish to have each and every crime committed during a war brought to light and adjudged in whatever way – that is something which this International Tribunal simply cannot do."

<sup>48</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Kvočka, (IT-98-30/01), October 1, 2016, para 696. "The Prosecution submits that the gravity of the offences and the harm caused is very high and account should also be taken of the fact that the crimes were committed on a widespread and systematic basis". <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>

<sup>49</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Prosecutor v. Kvočka, (IT-98-30/01), October 1, 2016, para. 705. "The Trial Chamber agrees with the Appeals Chamber that only

The cases of Momir Nikolić and Dragan Obrenović both discuss the events that occurred during the Srebrenica massacre. The Trial Chambers have followed the same argumentative line. In both cases, the Prosecutor's Office requested the Chamber to consider the acts of violence related to the general context, in which the massacre took place, including the events that occurred before the massacre occurred in July 1995. However, the Chambers ruled out the possibility of using those facts to determine the sentence. For the Chambers such facts could only be considered to provide a general background to the history of the attack on Srebrenica prior to 1995.

In the case of Nikolić, the Court considered that the criminal responsibility of the accused and the corresponding assessment of the penalty had to be assessed in light of the acts of violence that occurred from early July 1995 and had been attributed to him<sup>50</sup>.

In the case of Obrenović, the Chamber was even more explicit when it emphasized it would only consider those crimes directly attributed to the perpetrator to assess the gravity of the crime<sup>51</sup>. To determine the criminal responsibility of the perpetrators who committed the acts of violence that were part of the general context of the attack, the prosecutor would need another trial.

#### **4. Whether some of the crimes committed by the convicted person have been found to be more serious in quality and/or quantity than others to determine the penalty**

As for any possible distinction between general categories of crimes, neither the ICC nor the ICTY make such differentiations. However, the ICTR has highlighted that genocide is

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*those matters which are proven beyond reasonable doubt against an accused may be taken into account in the aggravation of a sentence*". <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>

<sup>50</sup> International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Prosecutor v. Nikolić (IT-02-60/1-S), 2 December 2003, Trial Chamber, judgement, para 106. "*The Prosecution avers that in making a determination regarding the seriousness of the crime, the circumstances and consequences of the crime need to be considered.*151 *The Prosecution notes that the campaign of persecutions to which Momir Nikolić pled guilty was enormous in scale and encompassed a criminal enterprise to murder over 7,000 Bosnian Muslim men and displace over 30,000 people. This was a campaign that began in the spring of 1992 against the Muslim residents of the Drina Valley, from several municipalities including Zvornik, Vlasenica and Srebrenica. The Prosecution further submits that this campaign was conducted with particular brutality prior to the attack as the Srebrenica enclave was deprived of humanitarian aid at a time when food and health care were scarce and during the period of forcible transfer, people were forced to seek shelter in warehouses and were exposed to intense heat, with little or no water. The Prosecution further notes that detained men were exposed to terrible conditions, were abused and were not given any food or water for days preceding execution. At the execution sites such as Orahovac, victims were gunned down, were further abused while dying, and eventually died agonising deaths.* [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf)

<sup>51</sup> International Criminal Tribunal for Former Yugoslavia, Trial Chamber, Prosecutor v. Obrenović (IT-02-60/2-S), 10 December 2003, Trial Chamber, judgement, Para 78. "*It is recalled that the basis of liability for crimes within the jurisdiction of the Tribunal is individual criminal responsibility. An accused shall be held liable for his actions and omissions – no more and no less. In crimes as massive as those committed following the fall of Srebrenica, the Trial Chamber finds that it must be particularly vigilant in ensuring that its consideration of the gravity of the offence focuses on those acts or omissions of the individual accused for which he is personally responsible*". <http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf>

more serious than crimes against humanity and war crimes. This differentiation between categories of crimes is exclusive to the ICTR.

Moreover, the ICTY, the ICTR and the ICC have emphasized that qualitative and quantitative circumstances surrounding the commission of the crimes for which a conviction is entered should be considered when setting the sentence. Nevertheless, they do not agree on whether such circumstances should be considered for the purpose of assessing the gravity of the crimes or as an aggravating circumstance.

As we have already analyzed this issue when answering to question 1 in relation to quantitative circumstances (i.e. the number of victims) we will focus our analysis in this section on other qualitative circumstances that were not addressed before. Specifically, we will study whether or not the protected legal rights harmed by the crime have any impact when imposing the sentence.

#### **4.1 The International Criminal Tribunal for the Former Yugoslavia**

The case law of the ICTY distinguishes between crimes committed against: (i) objects and persons; (ii) objects with different connotations; and (iii) different types of persons.

Regarding the first category, in the case against Zejnil Delalic, the Appeals Chamber stated that it is more serious not to prevent nor sanction murder and torture, than not to prevent nor sanction crimes committed against property, such as pillage<sup>52</sup>.

In the same regard, the Appeals Chamber in the case against Anto Furundzija established that crimes involving the loss of human life must be punished more severely than others<sup>53</sup>. However, the Chamber stressed that it is necessary to analyze the circumstances of the case in order to reach a conclusion regarding the sentence to be imposed. The different circumstances of the crimes affect the length of the prison sentence imposed<sup>54</sup>.

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<sup>52</sup> International Criminal Tribunal for the Former Yugoslavia, The Appeals Chamber, Case The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Judgment, No. IT-96-21-A, February 20 2001, para.732: “*The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute: (1) the gravity of the underlying crime committed by the convicted person’s subordinate; and (2) the gravity of the convicted person’s own conduct in failing to prevent or punish the underlying crimes. The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior’s conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.*” <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>

<sup>53</sup> International Criminal Tribunal for the former Yugoslavia, The Appeals Chamber, case The prosecutor against Anto Furundzija, Case IT-95-17/1-A, Para 244. “*The Appellant submits, and the Prosecutor agrees in principle, that crimes which result in the loss of human life should be punished more severely.*” <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

<sup>54</sup> International Criminal Tribunal for the former Yugoslavia, The Appeals Chamber, case The prosecutor against Anto Furundzija, Case IT-95-17/1-A, Para 249. “*In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness.*” <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

Concerning crimes against property in the case against Pavle Strugar, Trial Chamber II noted that there is a substantial difference between the act of attacking property relevant for the community (such as the old town of Dubrovnik) and the act of attacking civilian property, assessing a higher level of seriousness to the special protected property<sup>55</sup>.

Finally, regarding crimes committed directly against persons, the ICTY has considered particular circumstances, such as the age of the victims, when assessing the gravity of the crimes. An example of this is the case against Dragoljub Kunarac, where the Trial Chamber stated that, when the crimes were committed, some of the victims were between 15 and 19 years old, which should be taken into consideration to increase the sentence<sup>56</sup>.

## 4.2 The International Criminal Tribunal for Rwanda

As seen above, the ICTR recognizes genocide as the most serious category of international crimes, and therefore considers that the Court must condemn all genocidal acts with the utmost severity. However, the ICTR sometimes treats this issue as an aggravating circumstance and other times treats it as an element to determine the gravity of the crime.

For instance, in the cases of Kanyarukiga<sup>57</sup> and Bikindi<sup>58</sup>, the Trial Chambers affirmed that genocide is a crime of such gravity, it affects the foundations of society and the conscience of humanity. Therefore, it should be considered when determining the gravity of the crime.

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<sup>55</sup> International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case The Prosecutor v. Pavle Strugar, Judgment, No. IT-01-42-T, January 31 2005, para.232: *“As regards the seriousness of the offence of damage to cultural property (Article 3 (d)), the Chamber observes that such property is, by definition, of “great importance to the cultural heritage of every people”. It therefore considers that, even though the victim of the offence at issue is to be understood broadly as a “people”, rather than any particular individual, the offence can be said to involve grave consequences for the victim. In the Jokić case, for instance, the Trial Chamber noted that the destruction and damage inflicted to the Old Town of Dubrovnik were very serious crimes. It found that “since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik].” In view of the foregoing, the Chamber finds that the offences under Articles 3(b) and 3(d) of the Statute are serious violations of international humanitarian law. Hence, the third Tadić condition is satisfied.*” <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>

<sup>56</sup> International Criminal Tribunal for the former Yugoslavia, case The prosecutor against Dragoljub Kunarac, Case IT-96-23-T, Para. 864 *The youthful age of certain of the victims of the offences committed by Dragoljub Kunarac is considered as an aggravating factor. At the time of the commission of the offences against them, FWS-87 was about fifteen and a half years old, A.S. and D.B were about nineteen years old, FWS-50 was about sixteen years old, FWS-191 was about seventeen years old and FWS-186 was about sixteen and a half years old.* <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>

<sup>57</sup> International Criminal Tribunal for Ruanda, Trial Chamber II, Case The Prosecutor v. Gaspard Kanyarukiga, 1 November 2010, Case No. ICTR-2002-78-T. Par. 674. *“The Chamber has found Kanyarukiga guilty of genocide and extermination as a crime against humanity. Genocide is, by definition, a crime of the most serious gravity, which affects the very foundations of society and shocks the conscience of humanity.”* <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-02-78/trial-judgements/en/101101.pdf>

<sup>58</sup> International Criminal Tribunal for Ruanda, Trial Chamber III, Case The Prosecutor v. Simon Bikindi, 2 December 2008, Case No. ICTR-01-72-T. Par. 448. *“Genocide is, by definition, a crime of the most serious gravity, which affects the very foundations of society and shocks the conscience of humanity.”* <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-01-72/trial-judgements/en/081202.pdf>

In contrast, in the cases of Gacumbitsi<sup>59</sup> and Kambanda<sup>60</sup>, the Trial Chambers established that the seriousness of the crime of genocide should constitute an aggravating circumstance.

The Trial Chambers have also analyzed the seriousness of sexual offences, in particular rape. An example of this is the Gacumbitsi case,<sup>61</sup> which states that the violations, classified as "atrocious", must be considered as aggravating circumstances of the sentence.

### 4.3 The International Criminal Court

At the ICC, Trial Chamber II, in the case against Germain Katanga, noted that crimes for which a conviction is entered are not equivalent in terms of gravity. It is therefore necessary to weigh each of the crimes to determine their gravity. In this regard, the Chamber emphasizes that crimes against persons are more serious than crimes against property.<sup>62</sup>

Trial Chamber VIII addressed the difference between the gravity of crimes committed against objects and persons in the case against Al Mahdi. For Trial Chamber VIII, a crime committed against a person is always more serious than a crime committed against property<sup>63</sup>. In addition, for Trial Chamber VIII the cultural and psychological impact caused by the destruction of important property to the community, affects the determination of the gravity of the crimes<sup>64</sup>. Consequently, crimes committed against objects are more serious when the property i) is a religious site, ii) has a strong cultural significance, or iii)

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<sup>59</sup> International Criminal Tribunal for Ruanda, Trial Chamber III, Case The Prosecutor v. Sylvestre Gacumbtsi, 17 June 2004, Case No. ICTR-2001-64-T. Par. 345. "*The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances.*" <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-72/trial-judgements/en/081202.pdf>

<sup>60</sup> International Criminal Tribunal for Ruanda, Trial Chamber, Case The Prosecutor v. Jean Kambanda, 4 September 1998, Case no.: ICTR 97-23-S. Par. 42. "*The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating.*" <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-97-23/trial-judgements/en/980904.pdf>

<sup>61</sup> International Criminal Tribunal for Ruanda, Trial Chamber III, Case The Prosecutor v. Sylvestre Gacumbtsi, 17 June 2004, Case No. ICTR-2001-64-T. Par. 345. "*The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances.*" <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-01-72/trial-judgements/en/081202.pdf>

<sup>62</sup> International Criminal Court, Trial Chamber II, Case The Prosecutor v Germain Katanga, "Decision on Sentence pursuant to Article 76 of the Statute" May 23 2014, No.: ICC-01/04-01/07, paras. 47 e seq. <http://www.legal-tools.org/doc/5af172/>

<sup>63</sup> International Criminal Court, Trial Chamber VIII, Case The Prosecutor v. Ahmad Al Faqi Al Mahdi "Judgment and Sentence" 27 September 2016 No.: ICC-01/12-01/15, par. 77. "*The Chamber first notes that, unlike other accused convicted by this Court, Mr Al Mahdi is not charged with crimes against persons but with a crime against property. In the view of the Chamber, even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons.*" [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF)

<sup>64</sup> International Criminal Court, Trial Chamber VIII, Case The Prosecutor v. Ahmad Al Faqi Al Mahdi "Judgment and Sentence" 27 September 2016 No.: ICC-01/12-01/15, par. 79. "*Thus, the Chamber considers that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed.*" [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF)

affects the population psychologically. Trial Chamber VIII reached these conclusions when analyzing the gravity of the crime.

In the Bemba case, Trial Chamber III analyzed the gravity of the crime and the aggravating circumstances for each specific crime attributed to the convicted person: murder, rape and pillage as war crimes, and murder and rape as crimes against humanity. Regarding the seriousness of the crimes, Trial Chamber III affirmed that crimes committed against certain groups of persons, such as women and children, are more serious than others. For this reason, they deserve a more severe punishment<sup>65</sup>.

Additionally, in the same case Trial Chamber III reiterated that crimes of a sexual nature are especially serious if the victims are minors and if the number of victims is very large<sup>66</sup>. Finally, it attributed a special gravity to the crime of pillage when the crime i) affects the essential goods of a population<sup>67</sup>, ii) has a substantial number of victims, or iii) impacts the geographical scope.

When analyzing aggravating circumstances, Trial Chamber III considered if i) the victims were in state of vulnerability, ii) the location where the crimes occurred were shrines, churches, hospitals or homes, iii) the victims who were raped were minors iv) the conduct was repetitive or sustained) the perpetrator had particular motives; and (vi) the conduct was violent and humiliating. <sup>68</sup>.

Finally, in the Lubanga case, Trial Chamber I discussed the implications of the crimes committed directly against children under the age of fifteen within the gravity of the crime. The analysis focused on the physical and psychological impact the armed conflict had on such young victims.<sup>69</sup>

## 5. Concluding Remarks

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<sup>65</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v. Jean Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016 No.: ICC-01/05-01/08, párr 29. [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF)

<sup>66</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v. Jean Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016 No.: ICC-01/05-01/08, párr 35. [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF)

<sup>67</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v. Jean Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016 No.: ICC-01/05-01/08, párr 49-51. [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF)

<sup>68</sup> International Criminal Court, Trial Chamber III, Case The Prosecutor v. Jean Pierre Bemba Gombo “Decision on Sentence pursuant to Article 76 of the Statute” June 21 2016 No.: ICC-01/05-01/08, párr 77. [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF)

<sup>69</sup> International Criminal Court, Trial Chamber I, Case The Prosecutor v. Thomas Lubanga Dyilo, “Decision on sentence pursuant to Article 76 of the Statute” July 10 2012, No.: ICC-01/04-01/06, Para. 37. *The crime of using children to participate actively in hostilities involves exposing them to real danger as potential targets. The vulnerability of children mean that they need to be afforded particular protection that does not apply to the general population, as recognised in various international treaties.* [https://www.icc-cpi.int/CourtRecords/CR2012\\_07409.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF)

Before presenting the final considerations related to each of the legal problems, the Legal Clinic must highlight there is a notable lack of consistency in the jurisprudence of the international criminal tribunal. Specially, when regulating and applying relevant factors to determine the gravity of the crimes and the aggravating circumstances. This arbitrariness causes legal uncertainty and risks to breach the convicted person's rights. As a consequence, the Clinic has attempted to identify, to the extent possible, relevant patterns.

As a result of the research carried out by the International Law Clinic with regard to the questions referred to in the introduction, the following conclusions can be reached:

A. In regard to the first question, the ad hoc tribunals (ICTY and ICTR), the hybrid tribunals (CESL and ECCC) and the ICC similarly define victimization as including: i) the damages and suffering caused to the victims, ii) the consequences on their physical and mental health in the short and long term and iii) the number of victims. Moreover, they all consider the scope of victimization when setting the penalty.

Nevertheless, the Clinic found inconsistencies regarding whether the scope of victimization should be addressed for the purposes of assessing the gravity of the crimes, or when analyzing the aggravating circumstances.

The ICC and SCSL have been more consistent in addressing that all elements of victimization are dealt with when analyzing the gravity of the crimes.

The ad hoc tribunals have been more inconsistent. While qualitative elements have been, for the most part, dealt with when assessing the gravity of the crimes, quantitative elements (in particular, the number of victims) have sometimes been treated as an aggravating circumstance.

B. Regarding the second question, the ICTY has been the only tribunal to address this issue in cases (normally directed against direct perpetrators or middle commanders), in which the crimes attributed to the convicted person, are only a small part of the crimes that constitute the systematic or widespread attack directed against the civilian population. This type of cases differentiates between crimes specifically attributed to the convicted person and other acts of violence that are only part of the contextual elements of crimes against humanity.

In these cases, the jurisprudence of the ICTY has systematically rejected requests from the Prosecutor's Office to consider such acts of violence when determining the sentence, as long as they have been proven beyond reasonable doubt.

C. Finally, and in regard to question number three, while the ICTR assigns a higher level of gravity to the crime of genocide, the ICC and the ICTY do not consider different levels of gravity for general categories of crimes falling within their jurisdiction (genocide, crimes against humanity and war crimes).

Nevertheless, both the ICC and the ICTY consider that the legal protected rights harmed by the crimes have an impact on the assessment of their gravity. Moreover, from a quantitative perspective, both tribunals consider that the number of victims is a factor for increasing the

penalty. However, while the ICC deals with number of victims when assessing the gravity of the crimes, the ICTY has considered it an aggravating circumstance on a number of occasions.

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