

**INTERNATIONAL CRIMINAL LAW
& PRACTICE**

TRAINING MATERIALS

SENTENCING

*Supporting the Transfer of Knowledge and Materials
of War Crimes Cases from the ICTY to National
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services

1. INTRODUCTION
2. WHAT IS ICL?
3. GENERAL PRINCIPLES
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14. VICTIMS & WITNESSES
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MODULE 13: SENTENCING

Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”

Developed by International Criminal Law Services

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13. SENTENCING, PENALTIES AND REPARATIONS

13.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each Module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

13.1.1. MODULE DESCRIPTION

This Module covers sentencing, penalties and reparations. It begins with a description of the laws applied by the international criminal courts and thereafter discusses the relevant provisions in the laws of BiH, Croatia and Serbia. The present Module therefore focuses primarily on sentencing and penalties imposed following conviction. In particular, the various factors, both aggravating and mitigating, which are taken into account in sentencing, are explored in this Module. Please note that there is a separate Module on victim reparations and compensation (Module 14).

13.1.2. MODULE OUTCOMES

At the end of this Module, participants should understand:

- The different sentences and penalties applied before the ICTY, ICTR and ICC;
- The variety of factors that international criminal courts take into account when imposing sentences;
- Mitigating and aggravating circumstances;
- Guilty pleas and plea-bargaining; and
- The applicability of these principles and practices in the regional domestic courts.

Notes for trainers:

- Participants need to appreciate the wide latitude that exists in sentencing practices before international criminal courts. The overall principle is that each case is assessed on its own merits. However, there are certain factors that the international criminal courts have consistently taken into account when imposing sentences and penalties. Participants should consider the extent to which these factors are or could be usefully applied in their domestic courts.
- In addition, it is important that participants discuss the plea-bargaining mechanism and, if this procedure is used, the pitfalls that may be encountered.
- In order to achieve these objectives you will find “Notes to trainers” in boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion, and make references to the parts of the case study that are relevant and which can be used as practical examples to apply the legal issues being taught.

13.2. INTERNATIONAL CRIMINAL LAW AND JURISPRUDENCE

Notes for trainers:

- This section deals with the following issues:
 1. An overview of the sentencing practices before international criminal courts; which includes a discussion of aggravating and mitigating circumstances;
 2. Sentencing procedures that are followed before international courts;
 3. Guilty pleas and plea-bargaining; and
 4. Reparations.
- Thereafter, these same issues will be discussed in respect of each of the domestic jurisdictions of the region.
- It would be useful to get participants to compare and contrast sentencing practices and procedures before international criminal courts with those applied in their respective domestic jurisdictions.
- The case study can also be employed to engage participants in discussing how to evaluate aggravating and mitigating circumstances when determining sentences. Participants could be invited to act as though they were the judge and identify factors from the case summary which would either be to the advantage or disadvantage of the accused when deciding on the appropriate sentence.
- The following questions could also be posed to stimulate discussion:
 - Should there be a separate sentencing stage in the criminal proceedings, or is it most efficient to combine the determination of guilt and sentencing stages?
 - What length of time should a person who is convicted have to serve of the total sentence imposed before being eligible for pardon or early release?
- What are the factors that should be taken into account as a prosecutor when deciding to accept a proposed sentence when a plea-bargain may be offered? To what extent should the views of victims be taken into account in deciding whether an agreement should be reached with an accused?

13.2.1. SENTENCING PRACTICES BEFORE INTERNATIONAL CRIMINAL COURTS

In this section, the various factors and circumstances that are relevant to sentencing and that have been applied by international criminal courts are discussed.

13.2.1.1. PRINCIPLE OF LEGALITY

The principle of legality prohibits retroactive creation of punishments, expressed as the principle of *nulla poena sine lege*. However, international criminal law rarely provides guidance on penalties and sentencing issues for international crimes. For example, the following international treaties include the following references to sentencing:

- Torture Convention: penalties shall be appropriate taking into consideration the grave nature of the offence;¹
- Genocide Convention: penalties shall be effective;² and
- Geneva Conventions: penalties shall be effective.³

The international tribunals have wide discretion in deciding sentences for accused. Thus, sentencing has become a somewhat contentious issue in international criminal law.

13.2.1.2. DEATH PENALTY

Although the death penalty was applied at the Nuremburg and Tokyo Tribunals following World War II, based on customary international law,⁴ it has since become heavily restricted or abolished in State practice. Capital punishment is heavily restricted by the ICCPR and the ECHR and is prohibited by Protocol No. 13 to the ECHR.⁵ No international court is authorised to apply the death penalty.

13.2.2. PENALTIES BEFORE INTERNATIONAL CRIMINAL COURTS

Sentencing is essentially a discretionary responsibility of the judges at the international tribunals. There are no guidelines or scales for the various crimes, as there might be in domestic jurisdictions. The judges emphasise a principle of equal treatment or consistency in sentencing. However, the appeals chamber of the ad hoc Tribunals has noted that looking at the sentencing practice for past cases is only

Sentencing is essentially a discretionary responsibility of the judges at the international tribunals.

¹ United Nations Convention on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 4(2) (1984).

² Convention on the Prevention and Punishment of Genocide, Art. 5 (1948).

³ Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146 (1949).

⁴ ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 495 (2010).

⁵ International Convention on Civil and Political Rights (ICCPR), Art. 6 (1966); European Convention on Human Rights (ECHR), Art. 2 (1950); Protocol No. 6 to the ECHR (1983); Second Optional Protocol to the ICCPR, (1989).

helpful to the extent that the offence is the same and the circumstances substantially similar.⁶ For example, cases may be comparable through “[...] the number, type and gravity of the crimes committed, the personal circumstances of the convicted person, and the presence of mitigating and aggravating circumstances [...]”.⁷ However, the relevance of previous cases is restricted by the principle of individualisation of sentences.⁸ Thus, trial chambers approach sentencing on a case-by-case basis,⁹ and do not apply a formal hierarchy of crimes.¹⁰

The only penalty allowed at the international tribunals is imprisonment for a term of years or life imprisonment.¹¹ At the ICC, imprisonment is fixed for a maximum term of 30 years, while life imprisonment may be imposed only “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”.¹²

13.2.2.1. GRAVITY OF CRIME

The most important factor considered by the tribunals is gravity of the offence,¹³ including the form and

The most important factor considered by the tribunals is gravity of the offence

⁶ See, e.g., Zejnil Delalić et al. (*Čelebići*), Case No. IT-96-21-A, Appeal Judgement, 20 Feb. 2001, ¶¶ 719 – 20; Jean De Dieu Kamuhanda, Case No. ICTR-99-54A-A, Appeal Judgement, 19 Sept. 2005, ¶¶ 361 – 2; Pavle Strugar, Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, ¶¶ 336, 348; Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, ¶ 250; Milan Martić, Case No. IT-95-11-A, Appeal Judgement, 8 Oct. 2008, ¶ 330.

⁷ *Strugar*, AJ ¶ 348. See also *Čelebići*, AJ ¶ 717; Radislav Krstić, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, ¶ 241; Goran Jelisić, Case No. IT-95-10A, Appeal Judgement, 5 July 2001, ¶¶ 96, 101; Dragan Nikolić, Case No. IT-94-2-A, Appeal Judgement, 4 Feb. 2005, ¶ 19; *Furundžija*, AJ ¶¶ 248-49.

⁸ *Furundžija*, AJ ¶ 250; *Čelebići*, AJ ¶¶ 719, 721, 756-757; Miroslav Kvočka, et al., Case No. IT-98-30/1-A, Appeal Judgement, 28 Feb. 2005, ¶ 681; *Strugar*, AJ ¶ 348. See also Zoran Kupreškić et al., Case No. IT-95-16-A, Appeal Judgement, 23 Oct. 2001, ¶ 443.

⁹ *Čelebići*, AJ ¶ 721; *D. Nikolić*, AJ ¶ 19; *Kvočka et al.*, AJ ¶ 681; Mladen Naletilić & Vinko Martinović, Case No. IT-98-34-A, Appeal Judgement, 3 May 2006, ¶ 615; *Strugar*, AJ ¶ 348.

¹⁰ Drazen Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, Appeal Chamber, 7 Oct. 1997; *Erdemović*, Case No. IT-96-22-T, Separate Opinion of Judge Shahabuddeen, Trial Chambers, 5 March 1998; Duško Tadić, Case No. IT-94-1-T, Separate Opinion of Judge Robinson, Trial Chamber, 11 Nov. 1999; Duško Tadić, Case No. IT-94-1-A, Appeal Judgement, 26 Jan. 2000, ¶ 69; Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, ¶ 69; *Furundžija*, ¶¶ 243, 247; *Čelebići*, Separate and Dissenting Opinion of Judge Hunt, Appeal Chamber; Dragoljub Kunarac et al., Case No. IT-96-23, Appeal Judgement, 12 June 2002, ¶ 171; Ljube Bošković et al., Case No. IT-04-82-T, Trial Judgement, 10 July 2008, ¶ 588.

¹¹ Statute of the International Tribunal for the Former Yugoslavia, Art. 24 (1993); Statute of the International Criminal Tribunal for Rwanda, Art. 23; ICTY and ICTR Rules of Procedure and Evidence, Rule 101. See also ICTY and ICTR RPE, Rule 77 (Fines may be imposed for contempt of court).

¹² Rome Statute of the International Criminal Court, Art. 77 (The two requirements indicated in paragraph 1(b) of Art. 77 are to be considered cumulative).

¹³ See, e.g., *Aleksovski*, AJ ¶ 182; *Čelebići*, ¶ 731; *Kupreškić et al.*, ¶ 442; Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, ¶ 683; Stanislav Galić, Case No. IT-98-29-A, Appeal Judgement, 30 Nov. 2006, ¶ AC 442; Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, ¶ 375.

degree of participation of the accused in the crimes and the circumstances of the case.

In practice, given the specific intent requirement of the *mens rea* for genocide, it has been treated as a more serious crime than war crimes or crimes against humanity.¹⁴ Persecution has also been considered “inherently very serious”, warranting a more severe penalty.¹⁵ Crimes against humanity and war crimes have been treated as equally serious by the tribunals, leading to some debate.¹⁶

The extensive use of cumulative convictions somewhat negates the need for a formal hierarchy of crimes when it comes to sentencing. See section 13.2.2.4.1 and Module 12 for more information on cumulative convictions.

13.2.2.2. ROLE OF PERPETRATOR

The form of responsibility of the accused is also an important factor when considering sentencing. Although there is no statutory distinction in gravity between the different forms of responsibility of the accused, both the ICTY and ICTR have established that aiding and abetting requires a lower sentence than co-perpetration, for example.¹⁷ However, the facts of the case will always determine the sentence, not any hierarchy of modes of liability.

An accused’s individual circumstances, including time already served in detention waiting for the judgement, will also have an impact on sentencing. In fact, according to Rule 101(C) of the ICTY Rules of Procedure and Evidence (RPE), trial chambers are also required to take into account and give credit to any period of time during which the convicted person was detained in custody pending surrender to the tribunal or pending trial or appeal.

13.2.2.3. AGGRAVATING AND MITIGATING CIRCUMSTANCES

The only expressly recognised mitigating circumstance in the ICTY and ICTR RPE is substantial cooperation with the prosecution before or after conviction.

The trial chambers at the ICTY and ICTR are required to consider aggravating and mitigating circumstances when determining a sentence for an accused.¹⁸ However, there are very few provisions in the Statutes and RPE’s that define mitigating and aggravating circumstances.¹⁹ Judges must therefore apply their discretion not only to the type of factors to be taken

¹⁴ See, e.g., Jean Kambanda, Case No. ICTR-97-23-S, Trial Judgement, 4 Sept. 1998, ¶¶ 16 and 42; Radislav Krstić, Case No. IT-98-33-T, Trial Judgement, 2 Aug. 2001, ¶ 700 and *Krstić*, AJ ¶¶ 36 – 7 and 275.

¹⁵ See, e.g., *Blaškić*, TJ ¶ 785; Stevan Todorović, IT-95-9/1-S, Trial Judgement, 31 July 2001, ¶ 31.

¹⁶ See CRYER, *supra* note 4, at 499.

¹⁷ See, e.g., *Vasiljević*, AJ ¶ 182; Juvenal Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgement, 1 Dec. 2003, ¶ 963.

¹⁸ See ICTY Statute, Art. 24 ¶ 2; ICTY and ICTR RPE, Rule 101(B).

¹⁹ ICTY and ICTR RPE, Rule 101; See also Alfred Musema, Case No. ICTR-96-13-A, Appeal Judgement, 16 Nov. 2001, ¶ 395.

into account as aggravating and/or mitigating, but also to the weight to be given to such factors. The weight that judges should attribute to aggravating and mitigating circumstances is again not specified in the Statutes or RPE of the ad hoc Tribunals.²⁰ The ICC, however, has some more detailed provisions, as discussed below.

The prosecution must establish aggravating circumstances beyond a reasonable doubt.²¹ It is essential that prosecutors maintain a record of all circumstances that are aggravating factors during the presentation of the evidence at trial. There is no separate sentencing hearing and prosecutors should thus bear in mind that it is necessary to explore all of these circumstances in the trial itself.

The prosecution must establish aggravating circumstances beyond a reasonable doubt.

Only circumstances directly related to the offence can be considered aggravating.²² A factor that is also an element of the crime that the accused has been convicted of or that has been taken into account in assessing the gravity of the crime cannot be considered as an aggravating factor.²³

Aggravating factors at the ICTY and ICTR include:

- The scale of the crimes;
- The length of time during which the crime continued;
- The age of victims;
- The number of victims;
- The suffering of the victims;
- The nature of the perpetrator's involvement;
- Premeditation;
- Discriminatory intent;
- Abuse of power by the perpetrator; and
- The perpetrator's position as a superior.²⁴

²⁰ See, e.g., *Kupreškić et al.*, AJ ¶ 430 (holding, "The weight to be attached to mitigating circumstances lies within the discretion of a trial chamber, which is under no obligation to set out in detail each and every factor relied upon"). See also: *D. Nikolić*, TJ ¶ 145: "In determining sentence, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances, but the weight to be given to the aggravating and mitigating circumstances is within the discretion of the Trial Chamber".

²¹ *Čelebići*, AJ ¶ 763; *Kajelijeli*, AJ ¶ 294.

²² *Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, ¶ 911; *Aloys Simba*, Case No. ICTR-01-76-A, Appeal Judgement, 27 Nov. 2007, ¶ 82.

²³ *Blaškić*, AJ ¶ 693; *Miroslav Deronjić*, Case No. IT-02-61-A, Appeal Judgement, 20 July 2005, ¶¶ 106 – 7.

²⁴ See, e.g., *Blaškić*, AJ ¶ 686.

The ICC RPE lists aggravating factors including:

- Abuse of power or official capacity;
- Particularly defenceless victims;
- Multiple victims;
- Particular cruelty;
- Discrimination; and
- Relevant prior convictions.²⁵

The defence must prove mitigating circumstances on the balance of probabilities, a lower standard. According to this standard, the circumstances must be more probable than not.²⁶

The only expressly recognised mitigating circumstance in the ICTY and ICTR RPE is substantial cooperation with the prosecution before or after conviction.²⁷ This is also related to the issue of guilty pleas as a mitigating factor, discussed below in section 13.2.2.5.

Other mitigating circumstances have been accepted by the judges during sentencing, even though they were not expressly recognised in the ICTY or ICTR Rules or Statutes. These mitigating circumstances include the actions of the accused after the crime was committed, and demonstrate the tribunals' emphasis on the accuseds' contributions to peace. They include:

The defence must prove mitigating circumstances on the balance of probabilities. The circumstances must be more probable than not.

- An expression of remorse;
- Voluntary surrender; and
- Assistance to detainees or victims.

Personal circumstances can also serve as mitigating factors, including:

- Good character;
- Age;
- Comportment in detention;
- Family circumstances; and
- Exceptionally poor health.

²⁵ International Criminal Court Rules of Procedure and Evidence, Rule 145(2).

²⁶ See, e.g., *Čelebići*, AJ ¶ 590; *Kajelijeli*, AJ ¶ 294.

²⁷ ICTY and ICTR RPE, Rule 101(B)(ii); See, e.g., Miodrag Jokić, Case No. IT-01-42/1-S, Trial Judgement, 18 March 2004, ¶¶ 93 – 6 and *M. Jokić*, AJ ¶¶ 87 – 9.

Other factors, related to the commission of the crime, are also taken into account by the judges:

- Indirect and limited participation;²⁸
- Duress; and
- Diminished mental responsibility.

Again, factors that count towards grounds for excluding criminal liability cannot be counted twice and also serve as a mitigating circumstance (such as lack of mental capacity).

Similar mitigating circumstances are taken into account by the ICC RPE.²⁹

A recent study on the sentencing practice of the ICTY has demonstrated certain patterns in ICTY sentencing:

- High-ranking perpetrators in influential positions receive longer sentences;
- More extensive criminal activities are punished more severely than isolated, single acts;
- Crimes against humanity generate longer sentences than war crimes; and
- Instigators are punished more than all other participants in the atrocities.³⁰

13.2.2.4. SENTENCING PROCEDURES

Guilt and sentencing are determined in a single judgement at the ICTY and ICTR.³¹ This will be the same at the ICC, unless a party requests or the judges decide to adopt a procedure where sentencing is addressed separately from the judgement.³² At the ICC, reparations claims would normally be heard at a separate sentencing hearing.

Guilt and sentencing are determined in a single judgement at the ICTY and ICTR.

At the ICTY, ICTR and ICC, sentences can be appealed separately from the judgement. An appeal against the judgement can also lead to a change in the sentence. At the ICTY and ICTR, this will happen if the appeals chamber finds the trial chamber had committed a “discernable error” in exercising its sentencing discretion.³³ The ICTY and ICTR appeals chambers can either refer the matter back to the trial chamber or decide on a new sentence itself. Sentences have been

²⁸ See, e.g., Milan Babić, Case No. IT-03-72-A, Appeal Judgement, 18 July 2005, ¶¶ 39 – 40.

²⁹ ICC RPE, Rule 145(2).

³⁰ See CRYER, *supra* note 4, at 499 – 500; citing B. Hola, *et al.*, *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, 22 LEIDEN J. INT’L L. 79 (2009).

³¹ ICTY and ICTR RPE, Rules 85 and 87.

³² Rome Statute, Art. 76; ICC RPE, Rule 143.

³³ See, e.g., Čelebići, AJ ¶ 725; Laurent Semanza, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005, ¶ 374.

changed from a term of years to life imprisonment at both tribunals.³⁴ At the ICC, the test is whether “the sentence is disproportionate to the crime”. The ICC appeals chamber will decide the new sentence, unless a retrial is ordered.³⁵

13.2.2.4.1. CUMULATIVE SENTENCES

The final sentence must fairly and appropriately reflect the totality of the accused’s culpable conduct.

As noted above, cumulative charges and convictions based on the same underlying conduct are allowed at the international tribunals. At the ICTY, the judges have discretion to apply either a global, concurrent or consecutive sentence. Therefore, practice is not consistent. However, the

final sentence must fairly and appropriately reflect the totality of the accused’s culpable conduct.³⁶

At the ICC, a separate sentence must be pronounced for each crime and a joint sentence specifying the total period of imprisonment. This joint sentence is to be no less than the highest individual sentence pronounced and cannot exceed the highest sentence possible at the court (30 years or life imprisonment).³⁷

13.2.2.4.2. PARDON, EARLY RELEASE, AND REVIEW OF SENTENCE

Prisoners can be eligible for pardon or early release. The final determination in this matter is the responsibility of the tribunal itself. At the ICTY and ICTR, the President of the tribunal will make a decision based on a consideration of the gravity of the crimes, the prisoner’s demonstration of rehabilitation, any substantial cooperation with the prosecutor, and personal circumstances. These decisions cannot be appealed.

At the ICC, a sentence must be reviewed after two-thirds of the sentence has been served or after 25 years.³⁸ A reduction in the sentence can be ordered based on cooperation with the court and prosecutions, and changes in circumstances.³⁹ A decision not to reduce the sentence must be reviewed regularly.

³⁴ See, e.g., Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, ¶ 206; *Galić*, AJ ¶¶ 454 – 5.

³⁵ Rome Statute, Art. 83.

³⁶ ICTY RPE, Rule 87(C). See also *Čelebići*, AJ ¶ 429; *Kambanda*, AJ ¶¶ 102 – 12.

³⁷ Rome Statute, Art. 78(3).

³⁸ *Ibid.* at Art. 110; ICC RPE, Rules 223 – 4.

³⁹ *Ibid.*

13.2.2.5. GUILTY PLEAS AND PLEA BARGAINING

The relevant provisions under the ICTY RPE are:

Rule 62bis: Guilty Pleas

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case, the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

Rule 62ter: Plea Agreement Procedure

(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.

Plea bargains are not allowed before the ICC.

Guilty pleas may involve a plea agreement between the accused and the prosecution, which can include a non-binding recommendation from the prosecution to the trial chamber on sentencing. As a result of a guilty plea, the accused may receive a discount on sentencing.⁴⁰

Guilty pleas may involve a plea agreement between the accused and the prosecution, which can include a non-binding recommendation from the prosecution to the trial chamber on sentencing.

Once a guilty plea has been entered, the trial moves straight to a sentencing hearing.⁴¹ However, judges are not bound to follow the recommendation of the prosecution, although guilty pleas have generally been considered as mitigating circumstances.⁴² Trial chambers have not explicitly guaranteed discounted sentencing if a guilty plea is entered, but instead have adopted a case-by-case analysis of each guilty plea. Thus, there are some instances where the ICTY has found that aggravating circumstances outweigh the mitigating effect of a guilty plea⁴³ or have departed from the sentencing recommendation.⁴⁴

Plea bargaining is used in BiH, where judges deciding on the agreement can either reject it or admit it; if the panel admits the plea agreement it is bound by it and it has to determine the sentence as set out in the agreement. The relevant law and jurisprudence on this is included below in section 13.3.2.3.

Plea bargaining is also possible in the courts of Croatia and Serbia. See the relevant law and jurisprudence on this below in sections 13.3.3.2 (Croatia) and 13.3.4.2 (Serbia).

13.2.2.6. REPARATIONS

The ICTY and ICTR may order the return of property and proceeds of crime to their rightful owners, but this penalty has not been applied. Similarly, the ICC may impose fines or order forfeiture of proceeds, property and assets derived directly or indirectly from the crime.⁴⁵

See the discussion on victim compensation, restitution and reparations, in Module 14, for a more detailed discussion of this issue.

⁴⁰ CRYER, *supra* note 4, at 501.

⁴¹ ICTY RPE, Rules 62*bis* and 100; ICTR RPE, Rules 62(B) and 100; Rome Statute, Art. 76(2).

⁴² CRYER, *supra* note 4, at 501.

⁴³ See, e.g., *Kambanda*, TJ ¶¶ 60 – 2; *Kambanda*, AJ ¶¶ 125 – 6.

⁴⁴ See, e.g., *D. Nikolić*, TJ and AJ.

⁴⁵ Rome Statute, Arts. 57(3)(e) and 93(1)(k); ICC RPE, Rule 99.

13.3. REGIONAL LAW AND JURISPRUDENCE

Notes to trainers:

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross references have been included in the international section to the main regional laws and developments. The sections that follow provide a basis for more in-depth discussion about the national laws with practitioners who will be implementing them in their domestic courts.
- As the SFRY Criminal Code is relevant in relation to sentencing for crimes arising from the conflicts in the former Yugoslavia, it is important to start with the provisions in this code and for participants to discuss the relevance and applicability of these provisions.
- Trainers should bear in mind that Module 5 provides an in-depth overview of the way in which international law is incorporated within the national laws. For this reason, such issues are not dealt with in detail in this section of this Module, and it would be helpful to have trained Module 5 before Modules that deal with substantive crimes.
- After discussing the SFRY Criminal Code, this Module deals with the laws applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. Where available, the most relevant jurisprudence has also been cited. Participants should be encouraged to use their own cases to discuss the application of the laws and procedures being taught.
- **Tip to trainers:** One very effective way of engaging the participants is to ask them to analyse one of the most important cases that concern sentencing in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers.

13.3.1. SFRY

Notes for trainers:

- The SFRY Criminal Code is applied for sentencing in Croatia, Serbia and the BiH entity level courts. It has also been applied in some cases before the Court of BiH. It is thus important for participants from all three countries to discuss the main provisions of the SFRY Criminal Code and how they are applied in each of their national jurisdictions.

13.3.1.1. SFRY CRIMINAL CODE

13.3.1.1.1. OVERVIEW OF THE MAIN PROVISIONS

The SFRY Criminal Code⁴⁶ included the legal framework for sentencing for every individual criminal offence, including criminal offences from Chapter XVI (criminal offences against humanity and international law).

Five years of imprisonment was the minimum sentence and death penalty was the maximum sentence for the following criminal offences:

- Article 141 – Genocide;
- Article 142(1) and (2) – War Crime against Civilians;
- Article 143 – War Crime against Wounded and Sick;
- Article 144 – War Crime against Prisoners of War; and
- Article 148(2) – Use of Forbidden Means of Warfare.

Article 2 of the SFRY Criminal Code prescribes that the basis and limits for deciding on criminal acts and imposing criminal sanctions include:

- The protection of man;
- The protection of other basic values of a socialist self-managing society; and
- The application of criminal justice, when and to the extent necessary to suppress socially dangerous activities.

In accordance with Article 3 of the SFRY Criminal Code, no punishment or other criminal sanction may be imposed on anyone for an act which, prior to being committed, was not defined by law as a criminal act, and for which a punishment had

No punishment or other criminal sanction may be imposed on anyone for an act which, prior to being committed, was not defined by law as a criminal act.

⁴⁶ SFRY Criminal Code, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

not been prescribed by statute.

According to Article 4, the law that was in power at the time when a criminal act was committed shall be applied to the person who has committed the criminal act.

If the law has been altered one or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied.

If the law has been altered one or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied.

In accordance with Article 6 of the SFRY Criminal Code, in the course of the execution of a criminal sanction, certain rights of the convict may be removed or restricted, but only to the extent appropriate to the criminal sanction, and only in a way that respects the convict's personality and his human dignity.

Article 5(2) provides that the general purpose of drafting and imposing the criminal sanctions is to suppress the socially dangerous activities that violate or jeopardise the social values protected by the criminal code.

Article 33 states that the purpose of punishment, within the framework of the general purpose of criminal sanctions (Article 5(2)), is:

- preventing the offender from committing criminal acts and his rehabilitation;
- rehabilitative influence on others not to commit criminal acts; and
- strengthening the moral fibre of a socialist self-managing society and influence on the development of citizens' social responsibility and discipline.

In accordance with Article 36(1), punishments provided by the SFRY Criminal Code may only be imposed if respectively prescribed for a given criminal act. The court may increase or reduce the punishment provided for an offence only subject to the conditions laid down by the SFRY Criminal Code.

13.3.1.1.2. DEATH PENALTY

Note: The death penalty has been abolished in BiH, Croatia and Serbia. See the relevant sections below on abolition of the death penalty in each country and the maximum sentences that are now applicable.

However, for reference, Article 37 of the SFRY Criminal Code provides the following with respect to the death penalty:

- The death penalty may not be imposed as the only principal punishment for a certain criminal act.

- The death penalty may be imposed only for the most serious criminal acts when so provided by the statute.
- The death penalty may not be imposed on a pregnant woman or on a person who was not aged 18 or over at the time of the commission of a criminal act.
- The death penalty may be imposed on an adult person who was under 21 years of age at the time of the commission of a criminal act, under conditions referred to in paragraph 2 of Article 37, only for criminal acts committed against the bases of the socialist self-management social system and security of the SFRY, for criminal acts against humanity and international law, and for criminal acts against the armed forces of the SFRY.
- The death penalty shall be executed by shooting, without members of the public present.

13.3.1.1.3. IMPRISONMENT

In accordance with Article 38:

- The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years;
- The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty;
- For criminal acts committed with intent for which the punishment of 15 years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute;
- The punishment of imprisonment is imposed in full years and months, but prison terms not exceeding six months may also be measured in full days;
- A term of imprisonment is served in closed, semi-open or open institutions for serving sentences; and
- A convicted person who has served half of his term of imprisonment, and exceptionally a convicted person who has served a third of his term, may be exempted from serving the rest of his term on the condition that he does not commit a new criminal act by the end of the period encompassed by his sentence (parole).

13.3.1.1.4. MAIN PROVISIONS APPLICABLE TO PUNISHMENT

13.3.1.1.4.1. GENERAL PRINCIPLES

The general principles on sentencing are included in Article 41 of the SFRY Criminal Code.

Article 41

(1) The court shall fix the punishment for a criminal act within the limits provided by statute for such an act, taking into account the purpose of the punishment, all the circumstances bearing on the magnitude of punishment and all the circumstances influencing the degree of punishment (mitigating and aggravating circumstances), in particular:

- the degree of criminal responsibility,
- the motives from which the act was committed,
- the degree of danger or injury to the protected object,
- the circumstances in which the act was committed,
- the past conduct of the offender,
- his personal situation,
- his conduct after the commission of the criminal act, as well as
- other circumstances relating to the personality of the offender.

(2) In deciding upon the punishment, the court shall take into special consideration:

- whether the most recent offence is of the same type as a previous one,
- whether both acts were committed from the same motive, and
- it will also consider the period of time which has elapsed since the previous conviction was pronounced, or since the punishment has been served or pardoned. [...]

13.3.1.1.4.2. REDUCTION OF PUNISHMENT

Article 42 provides that the court may set the punishment below the limit prescribed by statute, or impose a milder type of punishment:

- when provided by statute that the offender's punishment may be reduced;
- when it finds that such extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser punishment.

13.3.1.1.4.3. LIMITS OF REDUCING PUNISHMENTS

In accordance with Article 43, when there are conditions for the reduction of punishment referred to in Article 42, the court shall reduce the punishment within the following limits:

- If a period of three years' imprisonment is prescribed as the lowest limit for the punishment for a criminal act, it may be reduced for a period not exceeding one year of imprisonment.
- If a period of two years' imprisonment is prescribed as the lowest limit for the punishment for a criminal act, it may be reduced for a period not exceeding six months of imprisonment.
- If a period of imprisonment of one year is prescribed as the lowest limit for the punishment for a criminal act, it may be reduced for a period not exceeding three months of imprisonment.
- If a period of imprisonment not exceeding one year is prescribed as the lowest limit for the punishment for a criminal act, it may be reduced to a period not exceeding 15 days of imprisonment.
- If the punishment of imprisonment is prescribed for a criminal act without indication of the lowest limit, the court may impose a fine in lieu of imprisonment.

In deciding on the extent of the reduction of punishment under the rules set out above, the court shall take into special consideration the smallest and the greatest punishment prescribed for the particular criminal act.

13.3.1.1.4.4. REMISSION OF PUNISHMENT

In accordance with Article 44, the court may refrain from imposing a punishment on a person who has committed a criminal act only when so provided by statute.

Where the court is authorised to refrain from imposing a punishment on a person who has committed a criminal act, it may also reduce the punishment regardless of the limitations prescribed for the mode of reduction of punishment.

In accordance with Article 45, the court may refrain from imposing a punishment on a person who has committed a criminal act by negligence when the consequences of the act committed affect the offender so severely that imposing a punishment in such a case would manifestly not serve the purpose of the punishment.

13.3.1.1.4.5. DETERMINATION OF PUNISHMENT IN THE CASE OF MULTI-RECIDIVISM

In accordance with Article 46, for a criminal act committed with premeditation for which the law provides the punishment of imprisonment, the court may impose a more severe punishment than the one prescribed by statute in the following cases:

- If the offender has been sentenced to imprisonment for a term exceeding one year at least twice before, and if he still demonstrates a propensity toward continuing to commit criminal acts; or
- If a period of five years has not expired between the day when the offender was released after serving his previous sentence and the day when he committed the most recent criminal act.

The more severe punishment must not exceed double the amount of the prescribed punishment of imprisonment, and must not exceed a period of 15 years.

In considering whether to impose the more severe punishment, the court shall take special account of the similarity among the criminal acts committed, the motives from which they were committed as well as the need that such a punishment be imposed for the sake of attaining the aim of punishment.

13.3.1.1.4.6. CONCURRENCE OF CRIMINAL ACTS

In accordance with Article 48, if an offender by one deed or several deeds has committed several criminal acts, and if he is tried for all of the acts at the same time, the court shall first assess the punishment for each of the acts, and then proceed with the determination of the integrated punishment (compound sentence) for all the acts taken together.

The court shall impose the compound punishment by the following rules:

- If capital punishment has been inflicted by the court for one of the combined criminal acts, it shall pronounce that punishment only.
- If the court has decided upon a punishment of 20 years' imprisonment for one of the combined criminal acts, it shall impose that punishment only.
- If the court has decided upon punishments of imprisonment for the combined criminal acts, the integrated punishment shall consist of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, and may not exceed a period of 15 years' imprisonment.
- If for the combined criminal acts several punishments of imprisonment have been decided upon which taken together do not exceed three years, the integrated punishment may not exceed a period of eight years of imprisonment.

13.3.1.1.4.7. DECIDING UPON PUNISHMENT OF CONVICTED PERSONS

In accordance with Article 49, if a convicted person is tried for a criminal act committed before he commenced serving his previous sentence, or for a criminal act he committed while serving a sentence of imprisonment or juvenile custody, the court shall impose a compound punishment for all the criminal acts by applying provisions set forth in Article 48, taking the punishment from the earlier sentence as an already imposed punishment. The sentence or part of the sentence which the convicted person had served shall be credited towards the sentence of imprisonment.

For criminal acts committed in the course of serving a sentence of imprisonment or juvenile custody the court shall determine the offender's punishment independently of the punishment for the earlier sentence, if by applying the provisions set forth in Article 48 the aims of punishment could not be realised due to the short term left to serve from the previous sentence.

If a convicted person, while serving a sentence of imprisonment or juvenile custody commits a criminal act for which a fine or punishment of up to one year of imprisonment is prescribed by statute, he shall be punished disciplinarily.

13.3.1.1.4.8. CREDIT FOR A PERIOD SPENT IN CUSTODY AND CREDIT FOR PUNISHMENT UNDER AN EARLIER SENTENCE

In accordance with Article 50, the period of time spent in custody awaiting trial, as well as each deprivation of liberty relating to the criminal act, shall be counted as part of the sentence of imprisonment.

The period of time spent in custody awaiting trial, as well as each deprivation of liberty relating to a criminal act, shall be counted as part of the sentence of imprisonment, juvenile custody or a fine.

The part of punishment served under an earlier sentence or paid under an earlier fine for a minor offence or economic violation, as well as the punishment or disciplinary measure of the deprivation of liberty which a person has served because of violation of military discipline, shall also be counted as part of the new sentence imposed for a criminal act whose characteristics encompass the characteristics of a minor offence, economic violation or violation of military discipline.

In counting the credit, one day spent in custody awaiting trial, one day of deprivation of freedom, one day of juvenile custody, one day of imprisonment and a fine of 100 dinars shall be deemed equal.

13.3.1.1.4.9. AMNESTY

In accordance with Article 101, persons covered by an act of amnesty are granted immunity from prosecution, complete or partial exemption from the execution of punishment, substitution of the imposed punishment by a less severe one, erasure of the conviction, or annulment of legal consequences incident to conviction.

See also Module 11 (Defences) for a discussion on amnesties.

13.3.1.1.4.10. PARDON

In accordance with Article 102 of the SFRY Criminal Code, by means of pardon, specifically designated persons are granted immunity from prosecution, complete or partial exemption from the execution of punishment, substitution of the imposed punishment by a less severe one, removal of the conviction, or annulment or shortening of the duration of the legal consequences incident to conviction or security measure.

A pardon may terminate or shorten the duration of the following security measures: prohibition to carry out a certain occupation, activity or duty, bar to public appearance, prohibition against driving a motor vehicle for the offenders who are drivers by profession or expulsion of a foreigner from the country.

13.3.2. BiH

Notes to trainers:

- It is important for participants to discuss the application of the BiH Criminal Code in the Court of BiH for the purposes of sentencing. It should be taken into account that in some cases, the SFRY Criminal Code has been applied. Participants should discuss the circumstances in which each of these codes should apply to cases before the Court of BiH. Participants from the BiH entity level courts should discuss the ways in which the SFRY Criminal Code is applied in their courts for the purposes of sentencing.
- All participants should be encouraged to raise cases that they have been involved in where sentencing issues have arisen, and in particular to identify the main factors that have been taken into account by the court when determining the appropriate sentence for each case.
- Jurisprudence from the Court of BiH and the BiH entity level courts, as far as it is known, is included in this section. Participants should discuss these cases and assess the sentences that were imposed.
- Participants can also use the case study to discuss how their national courts would sentence the accused in that case, and what factors, based on the case summary, their national courts would take into account.
- This section on BiH law is structured to first deal with the main provisions of BiH Criminal Code, and thereafter, with the jurisprudence from the Court of BiH and the entity level courts.

13.3.2.1. OVERVIEW

During the 1992-1995 war in Bosnia and Herzegovina, the SFRY Criminal Code was applicable on the territory of Bosnia and Herzegovina.⁴⁷

The SFRY Criminal Code remained in force for the Federation of Bosnia and Herzegovina until 1998 when the Criminal Code of the Federation of Bosnia and Herzegovina was passed,⁴⁸ and for Republika Srpska until 2000, when the Criminal Code of Republika Srpska was passed.⁴⁹

⁴⁷ Decree with the Force of Law on Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia taken over as the republic law during the imminent war danger or during the time of war (R BiH Official Gazette No. 6/92); Law on Confirmation of Decrees with the Force of Law (R BiH Official Gazette No. 13/94); Law on Changes and Amendments of the SFRY Criminal Code (Republika Srpska Official Gazette No. 12/93) changing the title of the SFRY Criminal Code into the Criminal Code of Republika Srpska.

⁴⁸ Federation of Bosnia and Herzegovina, Criminal Code (28 Nov. 1998), Federation of Bosnia and Herzegovina Official Gazette No. 43/98.

In 2003, the new BiH Criminal Code was passed, along with the new Federation of Bosnia and Herzegovina Criminal Code the new Republika Srpska Criminal Code and the Brčko District Criminal Code.⁵⁰

With regard to crimes arising out of the conflicts in the former Yugoslavia, the BiH entity level courts apply the SFRY Criminal Code, which was in force at the time of the commission of the crimes charged, while the Court of BiH generally has applied the BiH Criminal Code. However, the Court of BiH recently also acknowledged in certain cases that the SFRY Criminal Code should have been applied as more favourable to the accused in the particular cases.

One of the most important consequences of this situation is a different sentencing policy, where the Court of BiH, on the basis of the BiH Criminal Code, can determine a long-term imprisonment sentence ranging from 21 to 45 years imprisonment, while the BiH entity level courts, on the basis of the SFRY Criminal Code, can determine maximum 20 years imprisonment sentence. This has implications for the rule that the court must apply the law more favourable to the accused. For more on this, see Module 5.

13.3.2.2. MAIN PROVISIONS OF THE BIH CRIMINAL CODE ON SENTENCING⁵¹

The BiH Criminal Code includes a legal framework for sentencing for every individual criminal offence, including criminal offences from Chapter XVII (criminal offences against humanity and values protected by international law).

No punishment or other criminal sanctions shall be imposed on a person unless guilty of the committed criminal offence.

Ten years of imprisonment is the minimum sentence and long-term imprisonment is the maximum sentence for the following criminal offences:

- Article 171 – Genocide;
- Article 172 – Crimes Against Humanity;
- Article 173 – War Crime against Civilians;
- Article 174 – War Crime against Wounded and Sick;
- Article 175 – War Crime against Prisoners of War;
- Article 176(1) – Organising a group of people for the purpose of perpetrating criminal offence referred to in Articles 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick) or 175 (War Crimes against Prisoners of War);

⁴⁹ Republika Srpska, Criminal Code (1 Oct. 2000), Republika Srpska Official Gazette No. 22/00.

⁵⁰ BiH, Criminal Code, BiH Official Gazette No. 3/03 and 32/03; FBiH, Criminal Code, FBiH Official Gazette No. 36/03 and 37/03; RS, Criminal Code, RS Official Gazette No. 49/03; Brčko District of Bosnia and Herzegovina, Criminal Code, Brčko District of Bosnia and Herzegovina Official Gazette No. 10/03.

⁵¹ BiH CC, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, available at www.sudbih.gov.ba.

- Article 177(2) and (3) – Unlawful Killing or Wounding the Enemy;
- Article 179 – Violating the Laws and Practices of Warfare;
- Article 191(3) – Taking of Hostages;
- Article 192 – Endangering Internationally Protected Persons; and
- Article 193a(2) – Forbidden Arms and Other Means of Combat.

According to Article 3(a) of the BiH Criminal Code, no punishment or other criminal sanctions shall be imposed on a person unless guilty of the committed criminal offence.

13.3.2.2.1. BASIS AND LIMITS FOR CRIMINAL JUSTICE COMPULSION

In accordance with Article 2 of the BiH Criminal Code, criminal offences and criminal sanctions shall be prescribed only for acts threatening or violating personal liberties and human rights, as well as other rights and social values guaranteed and protected by the Constitution of Bosnia and Herzegovina and international law in such a manner that their protection could not be realised without criminal justice compulsion.

The prescription of criminal offences, as well as the types and the range of criminal sanctions, shall be based upon the necessity for “criminal justice compulsion” and its proportionality with the degree and nature of the danger against personal liberties, human rights and other basic values.

13.3.2.2.2. PRINCIPLE OF LEGALITY

In accordance with Article 3 of the BiH Criminal Code, criminal offences and criminal sanctions shall be prescribed only by law.

No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

13.3.2.2.3. TIME CONSTRAINTS REGARDING APPLICABILITY

In accordance with Article 4, the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

13.3.2.2.4. TRIAL AND PUNISHMENT FOR CRIMINAL OFFENCES PURSUANT TO THE GENERAL PRINCIPLES OF INTERNATIONAL LAW

Article 4(a) provides that Articles 3 and 4 of the BiH Criminal Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.

13.3.2.2.5. PURPOSE OF CRIMINAL SANCTIONS

The purpose of criminal sanctions, as set out in Article 6 of the BiH Criminal Code, is as follows:

- Protecting society from the commission of criminal offences through deterrence so that legal order is respected and criminal offences prevented;
- Preventing perpetrators from perpetrating new criminal offences;
- Encouraging the rehabilitation of criminal offenders; and
- Providing protection and redress to victims of a criminal offence.

13.3.2.2.6. IMPRISONMENT

Article 42 provides that:

- Imprisonment may not be shorter than 30 days or longer than 20 years.
- Imprisonment shall be imposed in full years and months; however, the punishment of imprisonment for a term not exceeding six months may also be measured in full days.
- Imprisonment referred to in this Article cannot be imposed on juveniles. The punishment of juvenile imprisonment may be imposed on juveniles under the conditions prescribed by Chapter X of this Code (Rules on Educational Recommendations, Educational Measures and Punishment of Juveniles). Juvenile imprisonment, by its purpose, nature, duration and manner of execution, represents a special punishment of deprivation of liberty.

13.3.2.2.7. LONG-TERM IMPRISONMENT

In accordance with Article 42(b), long-term imprisonment is prescribed in the following manner:

- For the gravest forms of serious criminal offences perpetrated with intent, long-term imprisonment for a term of 21 to 45 years may be prescribed.
- Long-term imprisonment shall never be prescribed as the sole principal punishment for a particular criminal offence.
- Long-term imprisonment shall not be imposed on a perpetrator who has not reached twenty-one years of age at the time of perpetrating the criminal offence.
- Long-term imprisonment shall be imposed in full years only.
- If long-term imprisonment has been imposed, amnesty or pardon may be granted only after three-fifths of the punishment has been served.

13.3.2.2.8. MAIN PROVISIONS APPLICABLE TO PUNISHMENT

The principles for pronouncing punishment are dealt with Articles 48 – 57 of the BiH Criminal Code.

13.3.2.2.8.1. GENERAL PRINCIPLES

Article 48 sets out the general principles for meting out punishment. In accordance with that Article, the court shall impose the punishment within the limits provided by law for that particular offence:

- Having in mind the purpose of punishment and
- Taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular:
 - the degree of guilt;
 - the motives for perpetrating the offence;
 - the degree of danger or injury to the protected object;
 - the circumstances in which the offence was perpetrated;
 - the past conduct of the perpetrator;
 - his personal situation and his conduct after the perpetration of the criminal offence; as well as
 - other circumstances related to the personality of the perpetrator.

In ruling on the punishment for the criminal offence by an accused who has previously been convicted of a crime, the court shall take into special consideration:

- Whether the most recent offence is of the same type as the previous one;
- Whether both acts were perpetrated from the same motive; and
- The period of time which has elapsed since the pronouncement of the previous conviction, or since the punishment has been served or pardoned.

13.3.2.2.8.1. REDUCTION OF PUNISHMENT

Reduction of punishment is set out in Articles 49 – 50. In accordance with Article 49, the court may set the punishment below the limit prescribed by the law, or impose a milder type of punishment:

- When law provides the possibility of reducing the punishment;
- When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment.

When the conditions for the reduction of punishment referred to in Article 49 (Reduction of Punishment) of the BiH Criminal Code exist, the punishment shall be reduced within the following limits set out in Article 50:

- If a punishment of imprisonment of ten or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to five years of imprisonment;

- If a punishment of imprisonment of three or more years is prescribed as the lowest punishment for the criminal offence, it may be reduced to one year of imprisonment;
- If a punishment of imprisonment of two years is prescribed as the lowest punishment for the criminal offence, it may be reduced to six months of imprisonment;
- If a punishment of imprisonment of one year is prescribed as the lowest punishment for the criminal offence, it may be reduced to three months of imprisonment;
- If a punishment of imprisonment not exceeding one year is prescribed as the lowest punishment for the criminal offence, it may be reduced to 30 days of imprisonment; and
- If a punishment of imprisonment is prescribed for a criminal offence without indication of the lowest limit, the court may impose a fine in lieu of imprisonment.

When deciding on the extent of reducing punishments in accordance with the rules set above, the court shall take into special consideration the smallest and the largest punishment prescribed for the particular criminal offence.

13.3.2.2.8.2. RELEASE FROM PUNISHMENT

In accordance with Article 51, the court may release the perpetrator from punishment when such possibility is explicitly provided by law.

As provided by Article 52, the court may release the perpetrator from punishment for a criminal offence perpetrated by negligence when the consequences of the criminal offence perpetrated affect the perpetrator so severely that imposing a punishment would obviously not serve the purpose of punishment.

In cases when the court is allowed to release the perpetrator from punishment, the court may decide to reduce the punishment without regard to limitations prescribed for reduction of punishment in Article 49 (Reduction of Punishment) of this Code.

13.3.2.2.8.3. CONCURRENCE OF CRIMINAL OFFENCES

If the perpetrator, by a single action or by several actions, has perpetrated several criminal offences for which he is tried at the same time, the court shall, in accordance with Article 53, first mete out the punishment for each of the offences separately, and then proceed with imposing a compound punishment of long-term imprisonment, compound punishment of imprisonment or a compound fine for all the offences taken together.

In doing so, the court shall adhere to the following rules in imposing compound punishment:

- If the court has determined a punishment of long-term imprisonment, or long-term imprisonment and imprisonment, for the concurrent criminal offences, the compound punishment must be higher than each of the individual punishments, but must not exceed a period of forty-five years;
- If the court has determined punishment of imprisonment for the concurrent criminal offences, the compound punishment must be higher than each of the individual

punishments, but the compound punishment may not be as high as the sum of all incurred punishments, nor may it exceed a period of twenty years;

- If the court has determined a punishment of imprisonment exceeding ten years for two or more concurrent criminal offences, the court may impose a compound punishment of long-term imprisonment that shall not be as high as the sum of all individual punishments; or
- If for each of the offences perpetrated in concurrence a punishment of imprisonment not exceeding three years is prescribed, the compound punishment may not exceed eight years.

13.3.2.2.8.4. CONTINUED CRIMINAL OFFENCE

Article 54 of the BiH Criminal Code provides that concurrence of criminal offences shall not apply to criminal offences arising out of the same transaction. A criminal offence arises out of the same transaction when the perpetrator intentionally perpetrates a number of identical criminal offences or offences of the same type in which, according to the manner of perpetration, the temporal connection and other material circumstances connecting them constitute a whole.

When a criminal offence arising of the same transaction comprises offences of the same legal description, the court shall choose the type and the range of the punishment prescribed for such a criminal offence. If criminal offences of the same type are at issue, the court shall choose the type and the range of punishment prescribed for the most serious of these offences.

13.3.2.2.8.5. DECIDING UPON PUNISHMENT OF CONVICTED PERSONS

In accordance with Article 55 of the BiH Criminal Code, if a convicted person is tried for a criminal offence he had perpetrated before commencing the previous sentence, or for a criminal offence he perpetrated while serving a sentence of imprisonment, long-term imprisonment or juvenile imprisonment, the court shall impose a compound punishment for all the criminal offences applying provisions set forth under Article 53 (Concurrence of Criminal Offences) of the BiH Criminal Code, taking the punishment from the earlier sentence as an already fixed punishment. The sentence or part of the sentence, which the convicted person had already served, shall be credited towards the imposed sentence of imprisonment or long-term imprisonment.

For criminal offences perpetrated during the course of serving the punishment of imprisonment, long-term imprisonment, or juvenile imprisonment, the court shall determine the perpetrator's punishment independently of the punishment for the earlier sentence in cases when the application of Article 53 of the BiH Criminal Code would lead to failure to achieve the purpose of punishment considering the duration of the non-served portion of the previous sentence.

13.3.2.2.8.6. CREDIT FOR THE PERIOD SPENT IN CUSTODY AND CREDIT FOR PUNISHMENT UNDER AN EARLIER SENTENCE

In accordance with Article 56 of the BiH Criminal Code, the time spent in custody pending trial, as well as any deprivation of freedom related to the criminal offence, shall be counted as part of the sentence of imprisonment, long-term imprisonment, juvenile imprisonment or the fine.

In counting the credit, one day spent in custody pending trial, one day of deprivation of freedom, one day of juvenile imprisonment, one day of imprisonment, one day of long-term imprisonment and a fine of 100 KM, shall be deemed equal.

13.3.2.2.8.7. CREDIT FOR DETENTION AND SENTENCE SERVED ABROAD

In accordance with Article 57, the detention, deprivation of freedom in the course of an extradition procedure, as well as the punishment which the perpetrator served upon a judgement of a foreign court, shall be credited toward service of the sentence imposed by the domestic court for the same criminal offence, whereas if the punishments are not of the same kind, the deduction of the punishment served abroad shall be effected at the court's discretion.

13.3.2.2.8.8. AMNESTY

In accordance with Article 118 of the BiH Criminal Code, persons covered by an amnesty are granted release from criminal prosecution, complete or partial release from the execution of punishment, substitution of the imposed punishment by a less severe one, deletion of the conviction, or cancellation of legal consequences incident to conviction.

Amnesty for the criminal offences prescribed under the BiH Criminal Code may be granted by the Parliamentary Assembly of Bosnia and Herzegovina by virtue of a law.

13.3.2.2.8.9. PARDON

Article 119 of the BiH Criminal Code provides that by means of pardon, specifically designated persons may be granted complete or partial release from the execution of punishment, substitution of the imposed punishment by a less severe one, deletion of the conviction, or annulment or shortening the duration of the security measure of prohibition to carry out a certain occupation, activity or duty, or a certain legal consequence incident to conviction.

A pardon for the criminal offences determined under the criminal legislation of Bosnia and Herzegovina may be granted by a decision of the Presidency of Bosnia and Herzegovina pursuant to a special law.

13.3.2.2.9. RELEASE ON PAROLE

Release on parole, or conditional release, is dealt with in Article 44 of the BiH Criminal Code, which provides:

- A convicted person who has served one-half of his sentence, and as an exception, a convicted person who has served one-third of his sentence, may be released from

serving the punishment of imprisonment under the condition that he does not perpetrate another criminal offence before expiration of the time of the sentence.

- A convicted person who has served one-half of his sentence may be released from serving the punishment of imprisonment if, in the course of serving his sentence, he has improved to the point where he can reasonably be expected to comport himself appropriately after his release, and in particular, not perpetrate criminal offences. In determining whether to release a convicted person on parole, account shall be taken of his conduct during the term of the sentence, as well as other circumstances indicating that the purpose of the punishment has been attained.
- A convicted person who has served one-third of his sentence may be released on parole, provided that the conditions referred to in paragraph 1 of this Article exist, and provided that special circumstances relating to the personality of the convicted person manifestly indicate that the purpose of the punishment has been attained.
- The person punished by long-term imprisonment may be granted conditional release after three-fifths of the punishment has been served.

Article 45 of the BiH Criminal Code sets out the provisions dealing with the revocation of parole:

- The court shall order revocation of parole if the convicted person, while on parole, perpetrates one or more criminal offences for which a punishment of over one year or a more severe punishment has been imposed.
- The court may also order revocation of parole if the parolee perpetrates one or more criminal offences for which a punishment of imprisonment for a term up to one year has been imposed. In deciding whether to revoke the parole, the court shall take into special consideration the similarity in the nature of the acts perpetrated, their significance, the motives from which they were perpetrated, as well as other circumstances indicating the appropriateness of revoking parole.
- When the court orders revocation of parole, it shall impose punishment considering the previously imposed sentence as an already fixed punishment. The part of the punishment that the convicted person served under the earlier sentence shall be credited towards service of the subsequent sentence, whereas the period of time spent on parole shall not be credited.
- The provisions of paragraphs 1 through 3 of this Article shall also be applied when the parolee is tried for a criminal offence perpetrated prior to his release on parole.

13.3.2.3. PLEA BARGAINING

In accordance with Article 231(1) of the BiH Criminal Procedure Code, the suspect or the accused and the defence attorney may negotiate with the prosecutor about the conditions of admitting guilt for the criminal offence with which the suspect or the accused is charged, until the completion of the main trial or the appellate proceedings.

In plea-bargaining with the suspect or the accused and his defence attorney on the admission of guilt, the prosecutor may propose, pursuant to Article 231(3) of the BiH Criminal Procedure

Code, an imprisonment sentence below the legally prescribed minimum or a more lenient criminal sanction for the suspect or accused in accordance with the BiH Criminal Code.

In the course of deliberation about the plea agreement, the court must examine, *inter alia*, whether the imposed sanction is in accordance with Article 231(3) of the BiH Criminal Procedure Code and whether the accused understands that by the agreement on the admission of guilt he waives his right to trial, and that he may not appeal the criminal sanction imposed.⁵²

If the court accepts the plea agreement, it is bound by it and has to mete out the criminal sanction as set out in the agreement.

In accordance with Article 231(5), the court can either accept the agreement or reject it. If the court accepts the plea agreement, it is bound by it and has to mete out the criminal sanction as set out in the agreement. If the court accepts the plea agreement, the statement of the accused shall be entered into the record and the court shall continue with the hearing for the pronouncement of the sentence foreseen by the agreement.

13.3.2.4. COURT OF BIH JURISPRUDENCE ON SENTENCING

The BiH Criminal Code provisions, as set out above, represent the legal basis for the Court of BiH with regard to the sentencing. A few examples are outlined below to demonstrate how the court has applied these provisions. It should be noted that in some of these cases, the Court of BiH applied the SFRY Criminal Code.⁵³

13.3.2.4.1. MEJAKIĆ ET AL. CASE: AGGRAVATING AND MITIGATING CIRCUMSTANCES

In *Mejakić et al.*, where the accused were convicted for crimes against humanity, the appellants contested the sentence rendered by the trial panel.⁵⁴ The appellate panel noted the fact that the first instance panel had considered all circumstances bearing on the magnitude of punishment, as stipulated by Article 48 of the BiH Criminal Code, including:⁵⁵

- the statutory limits of the punishment for the relevant criminal offence;
- the purpose of punishment;
- the degree of criminal liability of the accused;
- the circumstances in which the offence was committed;
- the degree of danger to the protected object;
- the previous lives of the perpetrators;

⁵² It should be noted here, however, that an appeal could be submitted in relation to the criminal sanction imposed, if the decision pronouncing the sentence exceeded the authority the court has under the law (see Art. 298 of the BiH CPC).

⁵³ See discussion below with regard to the *Kurtović* and *Stupar et al.* cases.

⁵⁴ Court of BiH, *Mejakić et al.*, Case No. X-KRZ-06/200, 2nd Instance Verdict, 16 Feb. 2009, ¶ 163.

⁵⁵ *Ibid.*

- their personal circumstances; and
- their conduct after the fact.

In terms of aggravating factors for the accused Željko Mejačić, the first instance panel considered:⁵⁶

- the long duration of the difficult position of helplessness and fear of the detainees in the Omarska camp where the accused was regularly present;
- the large number of victims;
- the circumstances in which the direct perpetrators committed the criminal acts and their cruel treatment of victims abusing their helplessness and fear;
- the extremely serious consequences the detainees and their family members suffered;
- the duration of the accused's term in the camp, during which he demonstrated determination and persistence in the commission of the criminal offence; and
- Mejačić's earlier experience as a professional police officer due to which he had a special public duty to enforce the law, which he failed to do.

In terms of the mitigating factors for the accused Željko Mejačić, the appellate panel noted that the first instance panel considered:⁵⁷

- the fact that the accused was a family man and the father of two children;
- had no prior convictions;
- Mejačić helped certain detainees in a few situations; and
- Mejačić's proper conduct before the court.

The appellate panel concluded that the first instance panel gave an "adequate assessment of all aggravating and mitigating circumstances given all the subjective and objective factors related to the criminal offense and the perpetrator" with regard to Mejačić's sentence.⁵⁸ The appellate panel found that the sentence of long-term imprisonment for the term of 21 years imposed by the trial panel represented a proportionate punishment reflecting the gravity of the criminal offence and the protected object endangered by the offence.⁵⁹

The appellate panel noted, in respect of the accused Momčilo Gruban, that the first instance panel had considered the following aggravating circumstances:⁶⁰

- the duration of Gruban's presence in the Omarska camp;

⁵⁶ *Ibid.* at ¶ 164.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at ¶ 165.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at ¶ 166.

- his persistence in the commission of the criminal offence concerned;
- his consent to the mass crimes committed in the camp; and
- the large number of victims who were helpless and afraid in the camp, subjected to everyday tortures and mistreatment.

The trial panel considered the following mitigating circumstances:⁶¹

- the fact that a certain number of witnesses mentioned that the accused had helped some detainees and had not been violent towards them;
- the fact that the accused had no prior convictions;
- that he was a family man and the father of two children; and
- Gruban's proper conduct before the court.

Punishments are not imposed proportionate to the criminal offence only, but also proportionate to the manner and the circumstances in which the offence was committed and the personality of the perpetrator.

The first instance panel held that the accused "selectively resolved specific situations, either on a personal basis or based on another relationship, knowing that the unlawful treatment of inmates in the Omarska camp was recurring and widespread" demonstrating "determination not to oppose such conduct openly and leave the camp, despite his awareness of the incidents that were taking place".⁶²

However, the appellate panel considered that there were highly mitigating circumstances for the accused Gruban to which the trial panel had not attached sufficient weight. In the opinion of the appellate panel, these mitigating circumstances outweighed the aggravating circumstances. The appellate panel held, therefore, that the first instance sentence of 11 years' imprisonment was too strict, and entered a new punishment of seven years.⁶³

The appellate panel stressed that, when meting out the punishment, it "had in mind that punishments were not imposed proportionate to the criminal offence only, but also proportionate to the manner and the circumstances in which the offence was committed and the personality of the perpetrator".⁶⁴ The appellate panel considered, relying on the witnesses' testimonies, that Gruban had attempted to, and did, reduce the suffering of the detainees.⁶⁵ In that sense, the appellate panel noted that the witnesses testified, *inter alia*, that:⁶⁶

- Gruban's shift was "the best, the least severe";
- they felt the safest during the accused's shift;

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.* at ¶ 167.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at ¶ 168.

- “they could have water, talk to each other or go to the bathroom, [sic] without being beaten by anyone”;
- the accused once gave one of them the medication for dysentery; and
- one of the witnesses stated the accused Gruban saved him and that “If it had not been for him, I would not be here today”.⁶⁷

Therefore, the appellate panel concluded that “the purpose of punishment, from the specific and the general deterrence aspects, could also be achieved with the sentence of imprisonment for a term shorter than the one imposed” by the trial panel. The appellate panel’s new sentence of imprisonment for seven years was below the statutory limit.⁶⁸

The appellate panel noted, in respect of the third accused, Duško Knežević, that the trial panel considered the following aggravating circumstances:

- “his persistence and determination in the commission of the crimes at issue”;
- the “large number of beatings resulting in the deaths of victims”;
- “the duration of the period over which the accused committed the acts as charged in two separate camps”;
- “his motives for the crimes”;
- “the circumstances in which he committed the crimes”;
- “treating the victims with utmost violence, abusing their helplessness”; and
- “the consequences he caused by the commission of criminal acts”.⁶⁹

The appellate panel noted that following mitigating circumstances were considered by the first instance panel:

- the accused was “a family man and a father of one child”;
- he “had no prior convictions”; and
- “his conduct before the Court was proper”.⁷⁰

The appellate panel held that, with regard to the accused Knežević, the first instance panel imposed the sentence of 31 years of long-term imprisonment correctly and that it satisfied the general and specific aims of deterrence.⁷¹

The appellate panel also noted that it also took the following into account when deciding on punishment:

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at ¶ 169.

⁶⁹ *Ibid.* at ¶ 170.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at ¶ 171.

- the duties the accused performed in the camps, *i.e.*, “that [...] Mejakić was the Chief of Security Guards in the Omarska camp and [...] Gruban the leader of one of the three guard shifts in the Omarska camp”;⁷²
- “the fact that [...] Knežević did not have an official duty in the Omarska and Keraterm camps [did not] diminish his responsibility, but, on the contrary, show[ed] his willingness to commit criminal acts in an exceptionally cruel manner in order to harm the victims and make their already difficult lives in the camp even more difficult, whereby his conduct was not only unlawful, but also absolutely unacceptable from the human point of view”.⁷³

In each case it is necessary to evaluate all factual circumstances relating to the events and the perpetrators. Verdicts in other cases cannot play a decisive role when meting out punishments but can only serve as a control factor.

Moreover, the appellate panel stressed that when deciding on the punishments for the accused, it reviewed the ICTY judgements related to the Omarska and Keraterm camps and whether the lower sentences given by the ICTY for the same incidents violated the principle of “equality in punishment”.⁷⁴ The appellate panel held that in each case it was “necessary to evaluate all factual circumstances relating to the events [and] the perpetrators”, and that “verdicts in other cases cannot play a decisive role when meting out punishments, but can only serve as a control factor”.⁷⁵

Furthermore, the appellate panel also stressed that:

- “the persons who lost their lives suffered a complete loss”;
- “the suffering of the survivors is a long-lasting one”; and
- that the citizens of BiH had clearly acknowledged “that war crimes, irrespective of by which party and where they were committed, deserved condemnation and could not go unpunished”.⁷⁶

However, the appellate panel opined that it was necessary that the community understood “that a legal solution is the best one and that justice [was] served”.⁷⁷

13.3.2.4.2. RAMIĆ NISET CASE: AGGRAVATING AND MITIGATING CIRCUMSTANCES

In the *Ramić Niset* case, the accused was found guilty for war crimes against civilians and sentenced to a compound sentence of 30 years of long-term imprisonment.⁷⁸ The trial panel

⁷² *Ibid.* at ¶ 172.

⁷³ *Ibid.*

⁷⁴ *Ibid.* at ¶ 173.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at ¶ 174.

⁷⁷ *Ibid.*

⁷⁸ Court of BiH, *Ramić Niset*, Case No. X-KR-06/197, 1st Instance Verdict, 17 July 2007 p. 32 (p. 28 BCS) (upheld on appeal).

noted that Article 2 of the BiH Criminal Code established as a “general principle that the sentence must be ‘necessary’ and ‘proportionate’ to the ‘nature’ and ‘degree’ of danger to the protected objects within the ‘types’ and ‘range’ allowable by the law”.⁷⁹

The panel also noted that the nature of the danger with respect to war crimes was always severe, but stressed, however, that “the degree of that danger will depend on the individual circumstances of each case”.⁸⁰

Considering the relevant provisions of the BiH Law on Execution of Criminal Sanctions, Detention and Other Measures and the BiH Criminal Code, the panel noted that in comparison with the sentence of imprisonment for a term of years, the sentence of long-term imprisonment included:⁸¹

- “a greater period of incarceration”;
- “more severe restrictions on the personal liberties of the convicted person within the prison system”;⁸²
- “less privacy as to correspondence and telephone calls”;⁸³
- “a longer percentage of the sentence to be served before consideration would be given to parole”;⁸⁴ and
- “more intensive and individualised treatment for rehabilitation”.⁸⁵

*The sentence must be necessary
and proportionate to the danger
and threat to the protected persons
and values.*

The panel further stressed that the BiH Criminal Code set out other issues which the court needed to address when determining and pronouncing a sentence, namely:

- “the objective criminal offence and its impact on the community”; and
- issues specifically related to the offender.⁸⁶

With regard to sentencing purposes relating to the “objective criminal offence and its impact on community”, the trial panel noted the following:⁸⁷

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.* at pp. 32-33 (pp. 28-29 BCS).

⁸² BiH Law on Execution of Criminal Sanctions, Detention and Other Measures, Art. 152.

⁸³ *Ibid.* at Art. 155.

⁸⁴ BiH CC, Art. 44.

⁸⁵ BiH Law on Execution of Criminal Sanctions, Detention and Other Measures, Art. 152(3).

⁸⁶ *Ramić*, 1st inst., p. 33 (p. 29 BCS).

⁸⁷ *Ibid.* at pp. 33-34 (pp. 29-30 BCS) referring to the BiH CC provisions.

- “The sentence must be necessary and proportionate to the danger and threat to the protected persons and values”.⁸⁸ The suffering of direct and indirect victims needed to be considered.⁸⁹ In this specific case the trial panel found that:

The direct victims were six unarmed and bound civilians, two women, four men. Both women and one man were killed immediately, three men survived to suffer the physical pain from their wounds, from which one of them shortly thereafter died, and the mental turmoil of witnessing the deaths of their family members.⁹⁰

The panel further held that:

- the impact on those who lost their lives had been total;
- the suffering of the survivors was long-lasting; and
- “the loss of members of two families in a small community created suffering for indirect victims” as well, such as family friends and neighbours.⁹¹

The sentence must be proportionate to the degree of suffering and sufficient to deter others from committing similar crimes.

- “The sentence must be proportionate to this degree of suffering and, in addition, it must be sufficient to deter others from committing similar crimes”.⁹² With regard to this, the panel held that:

The purpose of Geneva Conventions was to outlaw conduct of this type in time of armed conflict. That purpose will not be met if those who commit such acts are not punished sufficiently to put other combatants in future conflicts on notice that there is a serious price to pay for using the cover of war, or the emotions generated in war, to violate the law.⁹³

⁸⁸ BiH CC, Art. 2.

⁸⁹ *Ibid.* at Art. 48.

⁹⁰ *Ramić*, 1st inst., pp. 33-34 (pp. 29-30 BCS) referring to the BiH CC provisions.

⁹¹ *Ibid.*

⁹² BiH CC, Arts. 6 and 39.

⁹³ *Ibid.*

The purpose of the Geneva Conventions will not be met if those who commit such acts are not punished sufficiently to put other combatants in future conflicts on notice that there is a serious price to pay for using the cover of war, or the emotions generated in war, to violate the law.

- “The sentence must reflect [...] community condemnation, that is, the outrage at the loss of human life and the manner in which that human life was sacrificed”.⁹⁴ The panel held that:

The community in this case is the people of [BiH], and the people of world, who have, by domestic and international law, made killing of unarmed civilians a crime. This community has made it clear that war crimes, regardless of the side which committed them or the place in which they were committed, are equally reprehensible and cannot be condoned with impunity. This particular crime was [...] carried out in a cold-blooded fashion by a commander of a small military unit, and was committed contrary to orders that civilians not be harmed. The sentence must reflect the nation’s and the world’s condemnation of this activity.⁹⁵

- “The sentence must [...] be necessary and proportionate to [...] the educational purpose set out in the statute, which is to educate to the danger of the crime”.⁹⁶ The panel noted that trial and sentencing for this conduct “must demonstrate not only that crimes perpetrated in time of war will not be tolerated, but that the legal solution is the appropriate way to recognise the crime and break the cycle of private retribution”.⁹⁷

With regard to sentencing purposes relating specifically to the convicted person, the trial panel noted there were two relevant statutory purposes.⁹⁸

- specific deterrence to keep the convicted person from offending again;⁹⁹ and
- rehabilitation.¹⁰⁰

⁹⁴ *Ibid.* at Art. 39.

⁹⁵ *Ramić Niset*, 1st inst., p. 34 (pp. 29-30 BCS).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ramić*, 1st inst., p. 34 (p. 30 BCS).

⁹⁹ BiH CC, Arts. 6 and 39.

¹⁰⁰ *Ibid.* at Art. 6.

Referring to the aggravating and mitigating circumstances listed in Article 48 of the BiH Criminal Code, the trial panel also noted that there were a number of relevant factors specific to this case, including:¹⁰¹

- Degree of liability, such as:
 - being in charge of a unit of eight men and under specific orders not to harm civilians;
 - being a leader;
 - using a leadership position to harm civilians;
 - having combat experience;
 - knowing the importance of following orders;
 - disobeying orders; and
 - the fact that an accused's independent decision and actions led to the death and wounding of civilians.¹⁰²
- Circumstances surrounding the offence, such as:
 - being an experienced soldier;
 - receiving a brochure explaining the obligation of combatants under the Geneva Conventions;
 - receiving orders that civilians were not to be harmed;
 - continuing to commit serious crimes while still in the military and within two months of the commission of the crime at issue;
 - being tried and convicted of criminal offences that were not war crimes, but committed while using the chaos of war as an opportunity to commit violent acts for personal gain; and
 - the relatively young age of the accused.¹⁰³
- Circumstances since the time of the offence, such as:
 - the fact that the accused had been incarcerated for nearly fifteen years,
 - the accused was serving a 20-year sentence;
 - the accused had received a partial pardon;
 - the accused had been on escape status twice, but had surrendered and was re-incarcerated;
 - the accused had no record of criminal activities while on escape status, or at any relevant time when he was released;
 - the accused received no appropriate treatment for his post-traumatic stress disorder (PTSD) while incarcerated in spite of complaints to prison medical staff of symptoms;
 - the accused had four siblings and parents who were still living.¹⁰⁴
- Conduct of the perpetrator prior to the offence, at or around the time of offence and after the offence, such as:

¹⁰¹ *Ramić*, 1st inst., pp. 34-38 (pp. 30-34 BCS) (referring to the BiH CC, Art. 48).

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

- having been prosecuted, convicted and sentenced to a three-month suspension by the JNA Military Court;
- having no other criminal record prior to the commission of the offence at issue;
- having volunteered to join the army of Croatia;
- having been present on the battlefield;
- having witnessed horrors associated with war conditions;
- being taken captive as a prisoner of war and subjected to mental and physical abuse for nearly four months before escaping;
- joining the fighting in BiH after escaping;
- being given a military unit to command;
- having admitted to the crime at issue;
- having expressed regret at having committed the offence;
- never denying the offence during trial;
- repeatedly expressing regret during trial;
- inconsistent behaviour in court including:
 - being verbally aggressive and rude;
 - apologising for his outbursts;
 - later behaving with appropriate restraint and decorum;
 - being clearly attentive to the proceedings;
 - understanding the proceedings; and
 - closely following the proceedings.¹⁰⁵
- Personality of the accused, such as:
 - suffering from PTSD and an asocial personality disorder;¹⁰⁶
 - being able to understand one's legal responsibility at the time of the offence;
 - being capable of conforming one's actions to the requirements of the law.¹⁰⁷
- Motive, such as:
 - suffering from PTSD at the time the offence was committed;
 - self-medicating by, *inter alia*, consuming alcohol and marijuana;
 - the combination of alcohol and marijuana use with an accused's impulsiveness and low frustration threshold leading to a violent and criminal reaction;
 - the insignificant reduction in the capacity of the accused to control his actions.¹⁰⁸

The panel in this case concluded that the aggravating circumstances in this case were:¹⁰⁹

- depriving several persons of life;
- inflicting injuries to bodily integrity;
- superior responsibility of the accused at the time of the commission of the offence; and

¹⁰⁵ *Ibid.*

¹⁰⁶ For this finding, the panel adopted an expert report on these diseases.

¹⁰⁷ *Ramić*, 1st inst., pp. 34-38 (pp. 30-34 BCS).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at p. 38 (pp. 34 BCS).

- the criminal record.

The panel held that mitigating circumstances were:¹¹⁰

- the fact that the accused was 22 at the time of the commission of the crime;
- his remorse for the offence committed;
- the degree of his diminished capacity at the time of the offence; and
- the fact he had been serving a sentence since late 1992.

The panel noted that admitting “certain facts from the description of the criminal offence” could not “be considered as an admission of guilt for the criminal offence concerned” and, therefore, was not a basis for more lenient punishment and did not “carry the same weight as a full admission of guilt”.¹¹¹

Admitting certain facts from the description of the criminal offence could not be considered as an admission of guilt for the criminal offence concerned.

The panel concluded that, although his mental disorders were “insufficient to relieve him of criminal responsibility”, they were “highly relevant” to sentencing. The panel held it was necessary to address treatment as a form of rehabilitation and that this must be reflected in the sentence.¹¹²

The panel held it was necessary to address treatment as a form of rehabilitation that this must be reflected in the sentence.

Given the severity of the treatment needed in this case, the risk for further criminal offence if such treatment was not met and the requirement that those needs be appropriately met, the trial panel concluded that a sentence of long-term imprisonment was necessary and proportionate to

the sentencing purposes directed at the offender, as well as the offence.¹¹³ The panel added that, by a long-term imprisonment sentence, the prison to which the accused would be sent would be under a greater obligation to customise the accused’s treatment plan.¹¹⁴ However, the panel noted that the sentence must not be so long that it would “undermine any motivation to engage in treatment” and that the sentence must also “reflect the fact that [the accused] committed [the] crime, as well as other serious crimes, at age of 22 within a relatively short period of time, and that he had already served a significant prison sentence for those other crimes”.¹¹⁵

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at pp. 6-7 (p. 6 BCS).

¹¹² *Ibid.* at pp. 37-38 (p. 33 BCS).

¹¹³ *Ibid.* at p. 39 (pp. 34-35 BCS).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* at pp. 39-40 (p. 35 BCS).

Pursuant to Article 55(1) of the BiH Criminal Code, the panel took a previous compound prison sentence of 20 years (imposed by the Zenica Cantonal Court), and pursuant to Article 53(2)(a) of the BiH Criminal Code, imposed another compound sentence of long-term imprisonment for a term of 30 years.¹¹⁶

In dismissing the appeal of both the defence and the prosecution, the appellate panel in this case found that the sentence was “appropriate for achieving the purpose of punishment stipulated in Article 39 of the BiH Criminal Code”, especially because the sentence incorporated time the accused had served for a conviction entered by the Zenica Cantonal Court.¹¹⁷

13.3.2.4.3. *STUPAR ET AL. CASE: DEATH PENALTY & FAVOURABILITY OF BIH CC*

In the *Stupar et al.* case, the accused were charged with the crime of genocide and sentenced by the trial panel on the basis of the BiH Criminal Code. In its appeal, the defence argued that the SFRY Criminal Code should have been applied by the trial panel instead, as it included a 20 year prison sentence as a substitute for the death penalty, which was abolished in Bosnia and Herzegovina, as well as a general provision that the maximum sentence could be 15 years’ imprisonment.

The appellate panel first noted the importance of determining the temporal applicability of laws *in concreto*, for every specific case. The appellate panel held that because both the SFRY Criminal Code and the BiH Criminal Code identically defined the criminal offence of genocide, the prescribed punishments for the crime should be analysed.¹¹⁸ The appellate panel noted that the SFRY Criminal Code stipulated the punishment of imprisonment for not less than five years or the death penalty for the criminal offence of genocide, unlike the BiH Criminal Code which prescribed a prison term of not less than ten years or a long-term imprisonment (20 to 45 years in prison) for the same criminal offence.¹¹⁹

Turning to the sentence determined by the trial panel in this case, the appellate verdict noted that, when meting out the punishment, and having balanced all the relevant mitigating and aggravating circumstances, the trial panel had concluded that the necessary and proportionate penalty for the commission of the crime was 40 to 42 years of long term imprisonment.¹²⁰ Considering that the maximum punishment for the criminal offence of genocide is long-term imprisonment of 45 years under the BiH Criminal Code, the appellate panel held it was evident that the intention of the trial panel had been to impose a severe punishment and that it was therefore oriented towards that particular maximum.¹²¹ Furthermore, the appellate panel noted

¹¹⁶ *Ibid.* at p. 40 (p. 35 BCS).

¹¹⁷ Court of BiH, Ramić Niset, Case No. X-KRZ-06/197, 2nd Instance Verdict, 21 Nov. 2007, p. 6 (p. 6 BCS).

¹¹⁸ Court of BiH, Stupar et al., Case No. X-KRZ-05/24, 2nd Instance Verdict, 9 Sept. 2009, ¶¶ 494, 502.

¹¹⁹ *Ibid.* at ¶ 505; Note: the provision of the BiH CC regarding the long-term imprisonment was later changed to read 21-45 years, instead of 20-45 as it was stipulated at the time when the verdict was rendered.

¹²⁰ *Ibid.* at ¶ 515.

¹²¹ *Ibid.* at ¶ 516.

that, in comparing the respective punishments prescribed under the SFRY Criminal Code and the BiH Criminal Code with respect to the maximum prescribed sentence, the SFRY Criminal Code prescribed the death penalty as the maximum punishment, while the BiH Criminal Code foresaw a long-term imprisonment (ranging from 20 to 45 years).¹²² The appellate panel concluded that

In this specific situation, the Criminal Code of BiH is more lenient to the accused as it prescribes the term of imprisonment which is, by all means, more lenient than the death penalty.

“in this specific situation, the Criminal Code of BiH is more lenient to the accused as it prescribes the term of imprisonment which is, by all means, more lenient than the death penalty”.¹²³

The appellate panel dismissed the argument that the SFRY Criminal Code was more lenient, as the death penalty was later abolished in BiH because at the time of the commission of the offence, the death penalty was stipulated by the SFRY Criminal Code for that criminal offence. In the appellate

panel’s view, the defence was implying that the sanction of death penalty could simply be eliminated from the provision of Article 141 of SFRY Criminal Code.¹²⁴ The appellate panel concluded that this approach would mean that the law which actually did not exist would be applied by eliminating one sanction and substituting it with another without any explicit legal provision.¹²⁵ The appellate panel also referred to the BiH Constitutional Court Decision in the *Maktouf* case (now pending before the ECtHR) in which the Constitutional Court held:

In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of *Krstić*, *Galić*, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law.

In this context, the Constitutional Court holds that it is simply not possible to “eliminate” the more severe sanction under both earlier and later laws, and apply only other, more lenient sanctions, so that the most serious crimes

The Constitutional Court held that it is simply not possible to “eliminate” the more severe sanction under both earlier and later laws.

¹²² *Ibid.* at ¶ 517; Note, the provision of the BiH CC regarding the long-term imprisonment was later changed to read 21-45 years, instead of 20-45 as it was stipulated at the time when the verdict was rendered.

¹²³ *Ibid.* at ¶ 518.

¹²⁴ *Ibid.* at ¶ 519.

¹²⁵ *Ibid.* at ¶ 520.

would in practice be left inadequately sanctioned.¹²⁶

13.3.2.4.4. VRDOLJAK IVICA CASE: FAVOURABILITY OF BIH CC

In the *Vrdoljak Ivica* case, the accused was found guilty of war crimes against civilians and sentenced to five years' imprisonment.¹²⁷ The appellate panel held that only where the BiH Criminal Code was found to be less stringent than the law which was in force at the time of the perpetration could it be applied to the specific case.¹²⁸

Subject to this provision, the panel reviewed the relevant provisions of the SFRY Criminal Code and the BiH Criminal Code and held that applying the SFRY Criminal Code was more favourable when the special statutory minimum sentence was concerned, while, on the other hand, the BiH Criminal Code was more favourable with regard to the maximum sentence for the criminal offence at issue.¹²⁹

The appellate panel noted that in the present case the accused was sentenced to five years' imprisonment based on mitigating circumstances.¹³⁰ The appellate panel concluded, therefore, that the trial panel had moved towards the lower limit.¹³¹ The appellate panel noted that this would mean that the SFRY Criminal Code was less stringent, because it provided a minimum sentence of five years as opposed to the ten year minimum provided for by the BiH Criminal Code.¹³²

However, the appellate panel stressed that the court must bear in mind the fact that the accused was found guilty as a co-perpetrator, and thus must have made "a decisive contribution" to the crime as required by Article 29 of the BiH Criminal Code.¹³³ Co-

Only where the BiH Criminal Code was found to be less stringent than the law which was in force at the time of the perpetration could it be applied to the specific case.

perpetration under the SFRY Criminal Code did not require such a high level of participation for co-perpetrators.¹³⁴ The appellate panel held that because the BiH Criminal Code requires a higher degree of participation, the existing BiH Criminal Code was, in the case at hand, less stringent than SFRY Criminal Code in effect at the time the crime was committed. The panel also noted that the BiH Criminal Code in this regard was less stringent than the previous Criminal Codes of the BiH Federation and of Republika

¹²⁶ BiH Constitutional Court, Maktouf, Case No. AP-1785/06, ¶¶ 68-69, in: *Stupar et al*, 2nd inst., ¶ 521.

¹²⁷ Court of BiH, *Vrdoljak Ivica*, Case No. X-KRZ-08/488, 2nd Instance Verdict, 29 Jan. 2009, p. 1 (p. 1 BCS).

¹²⁸ *Ibid.* at p. 12 (p. 12 BCS).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.* (emphasis in original); for more on co-perpetration and the requirement of "decisive contribution" see Module 9.

¹³⁴ *Ibid.*

Srpska, which were interim codes.¹³⁵ The appellate panel, therefore, upheld the trial panel's conclusions and sentence.¹³⁶

13.3.2.4.5. KURTOVIĆ ZIJAD CASE: FAVOURABILITY OF SFRY CC

In the *Zijad Kurtović* case, the accused was charged with war crimes under the BiH Criminal Code and found guilty and sentenced by the trial panel. However, the appellate panel found that the SFRY Criminal Code should have been applied.

The appellate panel first found, stressing the importance of determining the temporal applicability of laws *in concreto*, that both the SFRY Criminal Code and the BiH Criminal Code envisaged the same legal requirements to try and punish the perpetrator for the conduct at issue.¹³⁷ The appellate panel then made an assessment of which of the laws was more lenient to the perpetrator by comparing the prescribed sentences from each code. The panel found that the SFRY Criminal Code envisaged a lower minimum sentence for the crimes in question, *i.e.* five years' imprisonment, while the BiH Criminal Code envisaged ten years' imprisonment as a minimum sentence.¹³⁸ The appellate panel noted that, when meting out the punishment for the accused, and after taking into account all of the mitigating and aggravating circumstances, the trial panel in this specific case had imposed the minimum sentence under the BiH Criminal Code for each of the offences.¹³⁹ Therefore, the appellate panel concluded that the intention of the trial panel in the case at hand was to impose more lenient punishment on the accused.¹⁴⁰ It was concluded by the appellate panel that "when the foregoing is taken into account in comparing the respective punishment prescribed under the Adopted Criminal Code [SFRY Criminal Code] and the Criminal Code B-H with respect to the minimal prescribed sentence, it follows that the Adopted Criminal Code is more lenient to the perpetrator because it carries a more lenient minimum for the relevant offenses (five years and one year)".¹⁴¹ Accordingly, the appellate panel modified the trial panel's judgement so as to apply the SFRY Criminal Code.¹⁴²

13.3.2.4.6. BJELIĆ VEIZ CASE: PLEA AGREEMENT & COMPOUND SENTENCE

On the basis of a plea agreement, the Court of BiH convicted the accused for war crimes against civilians, sentencing him to five years' imprisonment, and for war crimes against prisoners of war, which also resulted in a sentence of five years' imprisonment. The court sentenced him to a compound sentence of six years' imprisonment.¹⁴³

¹³⁵ *Vrdoljak*, 2nd inst., p. 12 (p. 12 BCS).

¹³⁶ *Ibid.*

¹³⁷ Court of BiH, *Zijad Kurtović*, Case No. X-KRZ-06/299, 2nd Instance Verdict, 25 March 2009, ¶¶ 115-126.

¹³⁸ *Ibid.* at ¶¶ 127-129.

¹³⁹ *Ibid.* at ¶ 130.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* at ¶ 131.

¹⁴² *Ibid.* at disposition.

¹⁴³ Court of BiH, *Bjelić Veiz*, Case No. X-KR-07/430-1, 28 March 2008, p. 2-3 (p. 2-3 BCS).

In its reasoning, the court noted that in the plea agreement the accused admitted guilt on all charges and agreed to a proposed sentence of five to seven years' imprisonment.¹⁴⁴ The court also noted that during the hearing on consideration of the agreement, the parties presented mitigating circumstances on the part of the accused.¹⁴⁵

The court noted that sentences of five years' imprisonment for each of the convictions constituted a reduction of the minimum prescribed sentence for the criminal offences at issue, which under Article 150(1)(a) of the BiH Criminal Procedure Code should be ten years' imprisonment.¹⁴⁶ The court assessed, however, that the individually established criminal sanctions were adequate and proportionate to the gravity of the criminal offences and the degree of criminal liability of the accused as the perpetrator of the offences.¹⁴⁷

When meting out the punishment, the court assessed all the circumstances on the part of the accused, both aggravating and mitigating.¹⁴⁸

Mitigating circumstances evaluated by the court included:¹⁴⁹

- the fact the accused cooperated with the prosecutor;
- the accused admitted to the commission of criminal offences; and
- the accused expressed sincere remorse for committed criminal offences.

In addition, the court also considered that the admission of the accused might have a significant positive effect also on the victims of the committed crimes.¹⁵⁰ Moreover, the court assessed the circumstances in which the criminal offences had been committed and the position of the accused at the time.¹⁵¹ The court found no aggravating circumstances with respect to the accused.¹⁵²

As the accused was tried simultaneously for several acts and several criminal offences, the court imposed a compound sentence of six years' imprisonment.¹⁵³ The court considered that this sentence would fulfil the purpose of punishment set out in Article 39 of the BiH Criminal Code and would have an educational impact on the accused, as well as a preventive influence on others.¹⁵⁴

¹⁴⁴ *Ibid.* at p. 3 (pp. 3-4 BCS).

¹⁴⁵ *Ibid.* at p. 4 (pp. 4 BCS).

¹⁴⁶ *Ibid.* at p. 19 (p. 19 BCS).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at p. 19 (pp. 19-20 BCS).

¹⁵² *Ibid.* at p. 19 (p. 20 BCS).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

13.3.2.4.7. ĐURIĆ GORDAN CASE: PLEA AGREEMENT

On the basis of a plea agreement, the accused in this case was convicted for crimes against humanity and sentenced to eight years' imprisonment.¹⁵⁵

When meting out the punishment, the court pointed out that it first reviewed the gravity of crime with which the accused was charged, the degree of his criminal responsibility, the purpose of punishment, as well as all aggravating and mitigating circumstances.¹⁵⁶

The court took into consideration the fact that the accused, by pleading guilty, faced the consequences of what he had done. This was a key aspect of the guilty plea, the court held, even if the accused did it through a plea agreement.¹⁵⁷ The court held that this admission of guilt contributed considerably to the establishment of the truth, especially due to the accused's testimony. The court also considered that the agreement contributed to reconciliation in these areas. These two factors, the court noted, significantly affected the ruling on the significance of the admission of guilt, for the purpose of imposing a more lenient sentence.¹⁵⁸ The court, taking into consideration the range between seven and ten years as submitted in the agreement, found that the imprisonment for a term of eight years was adequate.¹⁵⁹ In doing so, the court assessed as mitigating the following circumstances:¹⁶⁰

- the accused's admission of guilt;
- the accused's degree of responsibility;
- the fact that the accused did not directly participate in the execution of civilians;
- the accused was a family man, father of two minors;
- the accused had no prior convictions; and
- the accused's behaviour before the court was proper.

The court found no aggravating circumstances with respect to the accused.¹⁶¹

13.3.2.5. BIH ENTITY LEVEL COURTS' JURISPRUDENCE ON SENTENCING

13.3.2.5.1. FBIH

In the *Borislav Berjan* case, the accused Berjan was convicted on the basis of the SFRY Criminal Code for war crimes against civilians and war crimes against prisoners of war and sentenced to seven years' imprisonment.¹⁶²

¹⁵⁵ Court of BiH, Đuric Gordan, Case No. X-KR-08/549-2, 10 Sept. 2009.

¹⁵⁶ *Ibid.* at p. 17 (p. 15 BCS).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

The FBiH Supreme Court noted that the SFRY Criminal Code prescribed a minimum sentence of five years' imprisonment as the minimum sentence or death penalty as the maximum sentence for these crimes.¹⁶³ The FBiH Supreme Court held that according to the prohibition on the death penalty in Protocols 6 and 13 to the ECHR, ratified by BiH, only the maximum sentence of 20 years of imprisonment could have been imposed, in accordance with Article 38 of the SFRY CC.¹⁶⁴ The FBiH Supreme Court also noted that the new FBiH Criminal Code, passed in 1998, and the new RS Criminal Code, passed in 2000, envisaged long-term imprisonment as the maximum sentence for war crimes against civilians and war crimes against prisoner of war.¹⁶⁵

The FBiH Supreme Court noted that Article 4 of the SFRY Criminal Code was identical to Article 4 of the BiH Criminal Code, inasmuch as it envisaged that the law that was in force at the time of the commission of the offence should be applied except if the new law was more lenient to a defendant, in which case it would be applicable.¹⁶⁶ In the opinion of the FBiH Supreme Court, the laws passed after the commission of the crimes were not more lenient to the accused, and therefore the SFRY Criminal Code needed to be applied as *tempore criminis* law.¹⁶⁷

The FBiH Supreme Court in this case also held that the first instance court erred in meting out the compound punishment, as it failed to first mete out punishment for each of the offences separately and only then to mete out the compound sentence.¹⁶⁸ In doing so, the FBiH Supreme Court held, the first instance court violated the law in favour of the accused.¹⁶⁹ However, the FBiH Supreme Court concluded that, because this argument was not raised on appeal, it could not intervene in that respect.¹⁷⁰ The FBiH Supreme Court, however, added that it noted this error and gave its reasoning with regard to this issue with the goal that it would have an instructive effect on the first instance court.¹⁷¹

¹⁶² SC of FBiH, Borislav Berjan, Case No. 070-0-Kz-08-000002, 2nd Instance Verdict, 5 March 2008.

¹⁶³ *Ibid.* at p. 8.

¹⁶⁴ *Ibid.* However, note a different opinion than that of the FBiH Supreme Court, according to which the death penalty in BiH was abolished only in 1998 in FBiH and in 2000 in RS, by the 1998 FBiH CC and 2000 RS CC, respectively, as those Codes envisaged that the death penalty, which was imposed as final *until the date the respective Codes entered into force*, would become a sentence of long-term imprisonment. See, e.g., M. Kreso, Problemi vremenskog važenja zakona u predmetima ratnih zločina, (Ne)jednakost pred Zakonom, u: Pravda u Tranziciji, Jul 2006 – broj 5, available at <http://www.pravdautranziciji.com/pages/article.php?id=1222>).

¹⁶⁵ *Berjan*, 2nd inst., p. 8.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* at p. 2.

¹⁷¹ *Ibid.* at pp. 8-9.

13.3.2.5.2. REPUBLIKA SRPSKA

The courts in Republika Srpska (RS) try war crimes arising out of the conflicts in the former Yugoslavia either on the basis of the SFRY Criminal Code or the RS Criminal Code¹⁷² which entered into force in 1993. Thus, when sentencing, the courts in RS also apply the relevant provisions regarding punishment as set out in the SFRY Criminal Code.

For example, in one of the cases before the RS Supreme Court, three accused were convicted by the first instance court for war crimes against civilians and sentenced to 14, 12 and 10 years' of imprisonment, respectively.¹⁷³ The RS Supreme Court held:

- That there were no aggravating circumstances for two of the accused.
- The first instance court failed to take into account the fact that one accused was an invalid and suffered from poor health, which represented an important circumstance in sentencing.¹⁷⁴
- The earlier conviction of one accused was of little importance and influence.¹⁷⁵

The RS Supreme Court concluded that in the absence of aggravating circumstances and in light of substantial mitigating circumstances, given the accuseds' responsibilities within the camp, a lower sentence should be imposed.¹⁷⁶ The RS Supreme Court thus revised the sentences of the three accused to 11, 8 and 6 years' imprisonment, respectively.¹⁷⁷

In another case before the RS Supreme Court, the RS Supreme Court, upholding the first instance court verdict by which the accused was convicted for war crimes against civilians and sentenced to 10 years' imprisonment, noted that the first instance court correctly took into account personal and family circumstances of the accused as mitigating circumstances, including:¹⁷⁸

- The serious illness of the accused; and
- The fact that he was a family man and needed to support his wife and two minor children.¹⁷⁹

The RS Supreme Court also considered that the first instance court took into account the earlier conduct of the accused, circumstances of the perpetration of the criminal offence and degree of injury of the protected persons as aggravating circumstances, including:¹⁸⁰

¹⁷² Law on Changes and Amendments of the SFRY Criminal Code (Republika Srpska Official Gazette No. 12/93) changing the title of the SFRY Criminal Code into the Criminal Code of Republika Srpska.

¹⁷³ Supreme Court of RS, Case No. 118-0-Kz-06 000 191, 2nd inst., 7 Nov. 2006, p. 1-2.

¹⁷⁴ *Ibid.* at p. 8.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Supreme Court of RS, Case No. 118-0-Kzz-07-000 008, 2nd Instance Verdict, 29 June 2007, p. 6.

¹⁷⁹ *Ibid.*

- The earlier conviction of the accused;
- The fact that the aggrieved parties were his neighbours; and
- Serious consequences for the aggrieved party, caused by the seriousness of emotional stress he went through when confronted with the fact that his son was being murdered and he was not able to help him.¹⁸¹

The Supreme Court in this case concluded that a sentence of ten years' imprisonment reflected the correct balance of all the circumstances relevant for the individualisation of the punishment and represented the necessary and sufficient measure of punishment in order to achieve the overall purpose of punishment.¹⁸²

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

13.3.3. CROATIA

Notes for trainers:

- This section deals with the laws applicable to sentencing in Croatia. The courts in Croatia apply the law that was in force at the time when the crimes were committed. For crimes arising out of the conflicts in the former Yugoslavia, the OKZ RH is thus applied.
- The provisions of this code are the only ones discussed in this section. In addition, some case law, as far as it is known, is referenced to highlight the different factors the courts have taken into account when pronouncing sentences.
- Participants should be encouraged to refer to cases that they have been involved in to discuss the principles that were applied by the court in determining sentences.
- Participants should be encouraged to discuss how sentencing might be dealt with by the courts applying the current criminal code to war crimes.
- Participants can also use the case study to discuss how their national courts would sentence the accused in that case, and what factors, based on the case summary, their national courts would take into account.

13.3.3.1. MAIN PROVISIONS OF THE OKZ RH ON SENTENCING

The courts in Croatia apply the law that was in force at the time when the crimes were committed. For crimes arising out of the conflicts in the former Yugoslavia, the OKZ RH is thus applied.

On 26 June 1991, the Parliament of the Republic of Croatia passed the Law on Adoption of the SFRY Criminal Code as the Republic Code, which entered into force on 8 October 1991.¹⁸³ This Law determined that Article 37 of the SFRY Criminal Code (Death Penalty) was removed and that Article 38(2) of the SFRY Criminal Code¹⁸⁴ was amended to state that a sentence of 20 years imprisonment can be imposed only for the most serious criminal acts.¹⁸⁵ This amendment was in line with the Republic of Croatia Constitution of 22 December 1990 which set out that “there is no death penalty in the Republic of Croatia”.¹⁸⁶ The crimes envisaged by the Chapter XVI of the

¹⁸³ Official Gazette of Croatia „Narodne Novine“ No. 53/91 and 39/92.

¹⁸⁴ SFRY CC, Art. 38(2): “The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty”.

¹⁸⁵ Official Gazette of Croatia „Narodne Novine“ No. 53/91, Zakon o preuzimanju Krivičnog zakona SFRJ.

¹⁸⁶ Republic of Croatia Constitution, 22 Dec. 1990, Art. 21.

SFRY Criminal Code (Criminal Acts against Humanity and International Law) remained unchanged.

In 1993, the Parliament of the Republic of Croatia adopted a Consolidated text of the Basic Criminal Code of the Republic of Croatia (OKZ RH),¹⁸⁷ incorporating the Criminal Code of the Republic of Croatia (KZ RH)¹⁸⁸ along with its changes and amendments.¹⁸⁹ OKZ RH was subsequently amended several times,¹⁹⁰ but none of the amendments concerned criminal acts against humanity and international law.

13.3.3.1.1. BASIC PRINCIPLES OF SENTENCING

Guilt, sentencing and the penalty are determined in a single judgement in Croatian law.

Guilt, sentencing and the penalty are determined in a single judgement in Croatian law.

The purpose of criminal penalties, as set out in Article 4 of the OKZ RH, is moderation of socially dangerous activities that harm or jeopardise social values protected under the criminal law

Croatian law does not have a cumulative sentencing principle. In the case of concurrent offences, the court will determine the sentence for each offence. Then, the court determines the combined sentence, which must be higher than the highest individual sentence but cannot be as high as the total of all individual sentences.¹⁹¹

The time spent in pre-trial detention as well as any other deprivation of liberty due to a criminal offence shall be included in the pronounced sentence of imprisonment.¹⁹²

13.3.3.1.2. PRINCIPLE OF LEGALITY

In the Croatian legal system, as in the international system, the principle of legality (*nulla poena sine lege*) prohibits retroactive creation of punishments.¹⁹³

In the Croatian legal system, as in the international system, the principle of legality (nulla poena sine lege) prohibits retroactive creation of punishments.

According to Article 9 of the OKZ RH, no punishment or other criminal sanctions shall be imposed on a person unless guilty of the committed criminal offence.

¹⁸⁷ Official Gazette of Croatia „Narodne Novine“ No. 31/93.

¹⁸⁸ Official Gazette of Croatia „Narodne Novine“ No. 53/91.

¹⁸⁹ Official Gazette of Croatia „Narodne Novine“ No. 39/92 and 91/92.

¹⁹⁰ Official Gazette of Croatia „Narodne Novine“ No. 35/93, 108/95, 16/96, 28/96.

¹⁹¹ Croatia Basic CC, Art. 43 (Official Gazette of Croatia „Narodne Novine“ No. 31/93).

¹⁹² *Ibid.* at Art. 45.

¹⁹³ See Module 5 for a discussion of the principle of legality in Croatia; Basic Criminal Code of the Republic of Croatia - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 31/93), Art. 2.

However, there are cases when later law could, in fact, apply and that is when the new law is more beneficial for the accused. In that case, the accused would not be sentenced according to the law that was in force when the crime was committed, but according to the law that was more beneficial for the accused.¹⁹⁴ This is discussed in more detail in Module 5.

13.3.3.1.3. PENALTIES

The OKZ RH distinguishes two types of penalties: fine or imprisonment.¹⁹⁵ In cases involving genocide, crimes against humanity and war crimes, the accused can be sentenced only to imprisonment.

There is no death penalty in the Republic of Croatia today, nor was the death penalty prescribed in the time crimes arising out of the conflicts in the former Yugoslavia were committed.¹⁹⁶ The death penalty was removed from the Croatian Constitution in 1990.¹⁹⁷

According to the criminal code (OKZ RH) that was in force in the relevant time of most war crimes cases, the highest prison sentence prescribed in the Republic of Croatia was 20 years of imprisonment.¹⁹⁸ In later years, the code was changed and the highest sentence became long term imprisonment of 40 years.¹⁹⁹ However, in war crimes cases arising out of the conflicts in the former Yugoslavia, the accused cannot be punished with this sentence since this law was not binding at the relevant time.

In cases involving genocide, crimes against humanity and war crimes, the accused can be sentenced only to imprisonment.

According to Chapter 15 of the Criminal Code binding for war crime cases (OKZ RH), perpetrators of war crimes could be sentenced as follows:

- Article 119 (Genocide): 5 to 20 years of imprisonment;
- Article 120 (War crimes against the Civilian Population): 5 to 20 years of imprisonment;
- Article 121 (War crimes against Wounded and Sick): 5 to 20 years of imprisonment;
- Article 122 (War crimes against Prisoners of War): 5 to 20 years of imprisonment;
- Article 124 (Unlawful Killing and Wounding of an Enemy): not less than 1 year imprisonment;

¹⁹⁴ Željko Horvatić, Petar Novoselec: Kazneno pravo, opći dio; Ministarstvo unutarnjih poslova, Policijska akademija, Zagreb, 1999.

¹⁹⁵ *Ibid.* at Art. 32.

¹⁹⁶ Constitution of Croatia, Art. 21 (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction).

¹⁹⁷ See 13.3.3.1 above.

¹⁹⁸ Croatia Basic CC, Art. 35 (Official Gazette of Croatia „Narodne Novine“ No. 31/93).

¹⁹⁹ Criminal Code, Art. 53 (Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08).

- In cases where the murder was committed in a cruel way and for the self-interest of the perpetrator or if more persons were killed: 10 to 20 years of imprisonment;
- If an order for committing the crime contains the clause that no person should survive the battle: 5 to 20 years of imprisonment;
- Article 125 (Illegal seizure of possessions belonging to those killed and wounded on the battlefield): 1 to 10 years of imprisonment;
- Article 126 (Use of prohibited combat means): 5 to 20 years of imprisonment;
- Article 127 (Violation of Parliamentarians): 6 months to 5 years of imprisonment;
- Article 128 (Cruel treatment of the wounded, sick and prisoners of war): 6 months to 5 years of imprisonment;
- Article 129 (Unreasonable Postponement of repatriation of prisoners of war): 6 months to 5 years of imprisonment;
- Article 130 (Destruction of cultural and historical monuments): not less than 5 years of imprisonment; and
- Article 131 (Instigation of War of Aggression): 1 to 10 years of imprisonment.²⁰⁰

13.3.3.1.4. FACTORS TO BE CONSIDERED IN SENTENCING

An accused's sentence depends on sentencing limits prescribed by the law and the court panel's assessment of mitigating and aggravating factors. The panel must take many factors into account.

The Criminal Code in Article 56, which is similar to Article 37 of the OKZ RH, stipulates as follows:

In determining the type and range of punishment within the limits established by law for the committed criminal offense, the court, bearing in mind the purpose of punishment, shall take into consideration all the circumstances which result in a less or more serious punishment for the perpetrator of a criminal offense (the mitigating or aggravating circumstances) and in particular the following: the degree of culpability, motives for committing the criminal offense, the degree of peril or injury to the protected good, the circumstances under which the criminal offense was committed, the conditions in which the perpetrator had lived prior to committing the criminal offense and his abidance by the laws, the circumstances he lives in and his conduct after the perpetration of the criminal offense, particularly his relation towards the injured person and his efforts to compensate for the damage caused by the criminal offense, as well as the totality of social and personal grounds which contributed to the perpetration of the criminal offense.²⁰¹

²⁰⁰ Only the most relevant crimes were listed; refer to the OKZ RH for penalties of other crimes.

²⁰¹ Croatia CC, Art. 56 (1998).

The court, bearing in mind the purpose of punishment, shall take into consideration all the circumstances which result in a less or more serious punishment for the perpetrator of a criminal offence.

The range of sentencing in most war crimes cases is between five and 20 years imprisonment. The possibility to mitigate the sentence below the prescribed minimum gives judges wide latitude when determining sentences for

convicted persons. For example, in three cases involving the same crime (Article 120(1) involving war crimes against the Civilian Population), very different sentences were rendered. In the *Borovo* case, the sentences for the five accused ranged between six and 14 years' imprisonment.²⁰² In the *Cerna* case, the sentences ranged between seven and 15 years' imprisonment.²⁰³ In the *Zinajić* case, the court rendered the sentence below the prescribed minimum of four years imprisonment.²⁰⁴

These differences in sentencing can be explained through various aggravating and mitigating factors.

13.3.3.1.5. SPECIFICS REGARDING YOUNG PERPETRATORS

When perpetrators are older than 18 but younger than 21, a special law applies: the Law on Juvenile Courts.

When perpetrators are older than 18 but younger than 21, a special law applies: the Law on Juvenile Courts.²⁰⁵ It was this law that applied to the second accused in the *Cerna* case, wherein the accused was only sentenced to 12 years of imprisonment

instead of the highest possible penalty that then existed because he was 18 years of age when he committed the crime.²⁰⁶

According to the trial panel:

The accused Mario Jurić was sentenced to 12 years of imprisonment, the highest possible sentence in his case. Although under Article 120/1 OKZRH crimes entailing not less than 5 and not more than 20 years of imprisonment were prescribed and although all the circumstances of the crime were directing to the maximum sentence, considering the fact that at the time the crime was committed the accused was 18 years, 2 months and 18 days old and according to the Article 110/1 of the Law on Juvenile Courts younger than full-age men

²⁰² County Court in Vukovar, Ćurčić et al. (*Borovo selo*), Case No. K-12/05, 1st Instance Verdict, 14 Dec. 2005, pp. 2-3 (upheld on appeal).

²⁰³ Supreme Court, *Cerna*, Case No. Kz - 910/08, 2nd Instance Verdict, 25 March 2009.

²⁰⁴ Vukovar County Court, *Zinajić*, Case No. K-11/07, 1st Instance Verdict, 12 June 2009.

²⁰⁵ Law on Juvenile Courts, Art. 110 (Official Gazette of Croatia „Narodne Novine“ No. 111/97, 27/98, 12/02).

²⁰⁶ Vukovar County Court, *Cerna*, Case No. K-5/07, 1st Instance Verdict, 12 Feb. 2008.

cannot be sentenced to more than 12 years of imprisonment, that is the sentence that he should serve.²⁰⁷

The Supreme Court upheld the judgement in the *Cerna* case on appeal without elaborating on the application of the Law on Juvenile Courts. However, in a similar case, the *Marino Selo* case, the Supreme Court reasoned that there was not a 12 years' sentence limit for young offenders if the committed crimes are punishable with long term imprisonment, equating 20 years' imprisonment with long term imprisonment.²⁰⁸

13.3.3.1.6. SUSPENDED SENTENCE AND RELEASE ON PAROLE

Articles 47 – 53 of the OKZ RH deal with suspended sentences. According to the OKZ RH, suspended sentencing was possible only in cases where the defendant is punished with less than two years' imprisonment. If the sentence could not be mitigated to less than one year of imprisonment, the court could not render the suspended sentence. In war crimes cases the sentence could not be mitigated to less than one year, and therefore this rule cannot be applied in war crime trials.

Articles 67 to 72 of the 1997 Criminal Code did not significantly change the rules of suspended sentencing. Both laws retained the rule that the sentence could be rescinded if the defendant during the period of probation is found guilty and sentenced for committing one or more other crimes.

Article 35(6) of the OKZ RH provides for the conditions for release on parole of the convicted persons serving prison sentences. A prisoner may be released on parole after having served at least one-half of the term or, exceptionally, after having served one-third of the term to which he has been sentenced. The 1997 Criminal Code contains the same rule, adding that the release on parole shall be carried out under the conditions determined in the Statute on the Execution of Criminal Sanctions.²⁰⁹ The conditions on release on parole apply to the war crimes convicts equally as to the persons convicted for other crimes.

Article 33 of the 1993 Criminal Code of Republic Croatia specifies that the court shall revoke conditional release if during the probation period the convicted persons commit one or more criminal offences and are sentenced to more than one year imprisonment.²¹⁰ The 1997 Criminal Code changed to some extent the conditions for conditional release on parole and revocation thereof, taking into consideration the introduction of long term imprisonment.²¹¹

²⁰⁷ *Ibid.* at p. 33.

²⁰⁸ Supreme Court, *Marino Selo*, Case No. KZ No. 585/09, 2nd Instance Verdict, p. 7. BCS.

²⁰⁹ Croatian Criminal Code, (Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08).

²¹⁰ *Ibid.* (Official Gazette „Narodne Novine“ No. 32/93, 38/93, 28/96, 30/96).

²¹¹ *Ibid.* (Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08).

Article 45 of the OKZ RH provides that any deprivation of liberty resulting from the perpetration of a criminal offence is counted as the time served in prison after the prison sentence has been rendered. Article 63 of the 1997 Criminal Code contains the same provision.

13.3.3.1.7. PARDON AND AMNESTY

According to the Croatian Constitution, a person can be granted either a pardon or amnesty for the committed crime under certain circumstances and following certain procedure.²¹²

The Croatian Parliament can pass a law so that a certain group of persons who committed a certain group of crimes and in a certain period of time can be amnestied from the criminal procedure or the punishment. For example, after the war, Parliament passed one Croatian General Amnesty Act in 1992 and two in 1996.²¹³

However, the amnesty for criminal acts excludes perpetrators of the most serious violations of humanitarian law having the characteristics of war crimes. That is the reason why the court rejected an argument of the accused in *Čepin* was that he could not be convicted for his crimes due to the application of the General Amnesty Act for the crimes of murder. The court issued a verdict of conviction for war crimes against the civilian population.²¹⁴

According to the Croatian Constitution, a pardon can be made on an individual basis by the President of the State.²¹⁵

13.3.3.2. PLEA AGREEMENTS

Plea agreements are only possible in crimes which carry a maximum penalty of up to 10 years of imprisonment. In war crimes cases, the maximum sentence possible is 20 years, and sentences generally vary between five (the minimum allowed) and 20 years of imprisonment. Consequently, plea agreements are not possible in war crimes cases. In cases where plea agreements are possible, if the investigative judge does not agree with the agreement, it is then sent to an extra-trial panel for a final determination.

However, under Chapter 15 (“Criminal acts against Humanity and International Law”) of the OKZ RH, there are crimes related to war and punishable with a maximum sentence of up to ten years of imprisonment. In theory, plea agreements would be possible in crimes with the below qualifications:

²¹² Constitution of Croatia, Art. 80, (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction).

²¹³ Amnesty Act from 25/09/1992; Amnesty Act from 17/05/1996; Amnesty Act from 20/09/1996.

²¹⁴ Osijek County Court, Čepin, Case No. K-33/06, 1st Instance Verdict, 21 March 2007.

²¹⁵ Constitution of Croatia, Art. 98, (Official Gazette of Croatia „Narodne Novine“ No. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction).

- Article 123(4)—Instigation for the commission of genocide and war crimes - punishable with one to ten years of imprisonment (*inter alia* - genocide, war crimes against civilians, war crimes against wounded and sick, war crimes against POWs).
- Article 125(1)-(2)—Unlawful appropriation of property from killed and wounded in the battlefield - punishable with imprisonment from 1 to 10 years.
- Article 127—Violation of the status of a mediator - punishable with imprisonment of 6 months to 5 years.
- Article 128—Cruel treatment of the wounded, sick and POWs - punishable with six months to five years.
- Article 129—Unjustified delay in the repatriation of POWs - punishable with imprisonment of 6 months to 5 years.

13.3.3.3. JURISPRUDENCE ON SENTENCING

The OKZ RH provisions, as set out above, represent the legal basis with regard to sentencing war crimes arising out of the conflicts in the former Yugoslavia. Examples of how the courts apply mitigating and aggravating circumstances are outlined below to demonstrate how the court has applied these provisions.

13.3.3.3.1. AGGRAVATING FACTORS

The factors that are considered as aggravating have been already described above. Here, factors that judges usually take into account in practice will be discussed.

13.3.3.3.1.1. GRAVE CONSEQUENCES

A grave consequence was considered as an aggravating factor in the *Cerna* case, discussed above.²¹⁶ In that case, when deciding that the accused deserved the maximum sentence possible, the court noted that an entire family had been killed:

The whole family was executed in one moment of time. Father, mother, daughter and son had been murdered in the family surrounding—the symbol of safety.²¹⁷

The same factor was also cited as an aggravating factor in the *Čepin* case.²¹⁸

²¹⁶ See 13.3.3.1.5. For specifics regarding young perpetrators, *Cerna*, 1st inst., p. 33.

²¹⁷ *Cerna*, 1st inst., p. 33.

²¹⁸ *Čepin*, 1st inst., p. 28.

13.3.3.3.1.2. SYSTEMATIC APPROACH IN INFLICTION OF PHYSICAL AND EMOTIONAL PAIN

In the *Borovo* case, the court considered the systematic way in which the crime was committed²¹⁹ as an aggravating factor for sentencing the accused Jovan Ćurčić to 14 years of imprisonment.²²⁰

13.3.3.3.1.3. NUMBER OF VICTIMS

A large number of victims of the crime, among other arguments, had been described in the *Borovo* case as an aggravating factor for sentencing the accused Jovan Ćurčić to 14 years of imprisonment.²²¹

A large number of victims were also considered an aggravating factor when the accused Fred Marguš from the *Čepin* case was sentenced to 14 years of imprisonment: the trial chamber held that the fact that 8 persons had been murdered in only 5 days was an aggravating factor.²²²

13.3.3.3.1.4. STATUS OF THE VICTIMS

The status of the victims, where the victims were predominantly older than 50 and two of them were women, was considered an aggravating circumstance for the sentencing of the accused Fred Marguš in the *Čepin* case.²²³

The status of the victims, such as their age and gender, has been considered an aggravating factor.

13.3.3.3.1.5. CRUELTY

Cruelty was also an aggravating factor considered in the *Jurić* case, described above.²²⁴ However, it is worth noting that murder of Olujić family—where the accused Mario Jurić was directly involved by shooting and setting off the explosion—was considered brutal, frightening, cruel and monstrous, which was considered an aggravating factor in sentencing.

²¹⁹ From the context of the judgement, the court considered the following as indicating a “systematic approach” to the crime: the accused ordered a number of prisoners to be put in a basement, to be deprived of food throughout the time of their internment, to be kept in inhuman conditions and exposed to unlawful labour. Additionally, throughout the period of imprisonment, the accused Ćurčić ordered that they be beaten and humiliated. *Borovo selo*, 1st inst., p. 3.

²²⁰ *Borovo selo*, 1st inst., p. 54.

²²¹ *Ibid.*

²²² *Čepin*, 1st inst., p. 28.

²²³ See also 13.3.3.1.3 for specifics regarding young perpetrators; *Cerna*, 1st inst. p. 33.

²²⁴ See *Ibid.*

The same factor was considered as an aggravating factor in a number of other cases, such as the *Čepin* case and the *Borovo* case.²²⁵

13.3.3.3.1.6. PREVIOUS CONVICTIONS

A previous conviction was one of the aggravating factors in the *Borovo* case in which the accused Mladen Maksimović received the sentence of seven years of imprisonment.²²⁶

13.3.3.3.1.7. MOTIVE OF REVENGE

The judgement in the *Čepin* case held that an aggravating factor for sentencing is that the crime had been committed in revenge.²²⁷

The same was described in *Dalj*.²²⁸

13.3.3.3.2. MITIGATION OF PUNISHMENT

Mitigating factors in Croatian jurisprudence is described below.

In cases when only aggravating factors and no mitigating factors exist, aggravating factors are considered as particularly aggravating and result in higher sentences.

However, when both aggravating and mitigating factors exist but aggravating factors are very grave, the court does not have to take mitigating factors into account.²²⁹

When both aggravating and mitigating factors exist but aggravating factors are very grave, the court does not have to take mitigating factors into account.

13.3.3.3.2.1. PERSONAL CIRCUMSTANCES

In the *Borovo* case, a mitigating factor for the accused Jovan Ćurčić was that he was the father of two sons.²³⁰

In the *Cerna* case, the fact that the accused was a family man, and married with two children, was considered a mitigating factor.²³¹

²²⁵ *Čepin*, 1st inst.; *Borovo selo*, 1st inst.

²²⁶ *Borovo selo*, 1st inst.

²²⁷ *Čepin*, 1st inst.

²²⁸ Osijek County Court, Dalj, Case No. K-42/07, 1st Instance Verdict, 21 April 2008.

²²⁹ *Cerna*, 1st inst., p. 33.

²³⁰ *Borovo selo*, 1st inst.

²³¹ *Cerna*, 1st inst.

Also in the *Dalj* case, the fact that the accused was a model family man led to the mitigation of his sentence.²³²

13.3.3.3.2.2. BAD MATERIAL CIRCUMSTANCES

The fact that the accused faced poor financial circumstances was a mitigating factor for the accused Jovan Ćurčić in the *Borovo* case.²³³

13.3.3.3.2.3. NO PRIOR CONVICTIONS

The fact that the accused Neven Pupovac in the *Pupovac* case had never before been convicted of a crime was considered a mitigating factor.²³⁴

The same factor was taken into account in the *Borovo* case and in many other cases.²³⁵

13.3.3.3.2.4. HV SOLDIERS

The fact that the accused Fred Marguš from the *Čepin* case was an HV member during the war mitigated his ultimate sentence because of the honour that this membership implied.²³⁶ This was also a mitigating factor in the *Cerna* case.²³⁷ Additionally, Norac was honoured for war attendance, which was also considered as a mitigating factor in the case against him.²³⁸

13.3.3.3.2.5. THE CRIME WAS COMMITTED BY OMISSION

The fact that the crime was committed by omission in the case against Ademi and Norac and was considered as a mitigating factor.²³⁹

Recall that according to the Supreme Court of Croatia, commission of an offence by “omission” under Article 28 of the OKZ RH occurs when the perpetrator omits to undertake an action which he was obliged to undertake.²⁴⁰

Please see Modules 9 and 10 for discussion of committing a crime by omission.

²³² *Dalj*, 1st inst.; see also Zadar County Court, Neven Pupovac, Case No. K-64/05, 1st Instance Verdict, 19 May 2006.

²³³ *Borovo selo*, 1st inst.

²³⁴ *Neven Pupovac*, 1st inst.

²³⁵ See, e.g., *Borovo selo*, 1st inst.

²³⁶ *Čepin*, 1st inst.

²³⁷ *Cerna*, 1st inst.

²³⁸ Zagreb County Court, Medački džep (*Ademi and Norac*), Case No. K-rz-1/06, 1st Instance Verdict, 30 May 2008.

²³⁹ *Ibid.*

²⁴⁰ SC of Croatia, Medački džep (*Ademi and Norac*), Case No. Kž-1008/08, 2nd Instance Verdict, 18 Nov. 2009, p. 9.

13.3.3.3.2.6. REGRET

Regret for committing the crime has been regarded as a mitigating factor such as in the *Cerna* case.²⁴¹

13.3.3.3.2.7. AGE

The fact that the accused was younger than 20 was considered as a mitigating factor in the *Čepin* case.²⁴²

In the case against Norac, the fact that he was only 26 years of age when he committed the crime was considered a mitigating factor.²⁴³

The fact that Neven Pupovac was 23 when he committed the crime was a mitigating factor in the case against him.²⁴⁴

Age can not only be a mitigating factor, but is also sometimes an obligatory factor for setting a lower sentence. As described above, the Law on Juvenile Courts stipulates that the highest sentence for minors can be 12 years of imprisonment regardless of the gravity of crime;²⁴⁵ however, the jurisprudence is not consistent.²⁴⁶

13.3.3.3.2.8. SUPERIOR ORDERS

The fact that an accused was following someone else's order is usually considered as a mitigating factor. In the *Petrinja* case against Jovo Begović, the fact that the accused received the command from his superior and committed the crime on this basis was considered as a mitigating factor in his case. Ultimately, he was sentenced to five years of imprisonment.²⁴⁷

In the *Čepin* case, the accused argued that he committed the crime following his superior's order and that he therefore should be acquitted. The court reasoned that this could not have been a valid reason for acquittal since the Defence Law sets forth that an order is not binding for any soldier if the commander is ordering a crime. However, this fact can be used to mitigate the sentence.²⁴⁸ In addition, Article 190 of the OKZ RH stipulates that the perpetrator cannot be excused from liability for committing a crime based on an order, if the order related to

²⁴¹ *Cerna*, 1st inst.

²⁴² *Čepin*, 1st inst.

²⁴³ *Medački džep*, 1st inst.

²⁴⁴ *Neven Pupovac*, 1st inst.

²⁴⁵ See section **Error! Reference source not found.**

²⁴⁶ See, e.g., *Marino Selo*, 2nd inst., p. 7 BCS.

²⁴⁷ Sisak County Court, *Petrinja*, Case No. K-25/06, 1st Instance Verdict, 25 April 2007.

²⁴⁸ *Čepin*, 1st inst.

commission of a crime against international criminal law or some other serious criminal offence.²⁴⁹

In the case of *Miloš Lončar*, the Supreme Court affirmed the verdict of the Osijek County Court, which mitigated the sentence because the accused did not issue the order to shell Osijek, but rather was conveying an order from his superiors.²⁵⁰ Also, in the case of case against *Žarko Tkalčević*, the Vukovar County Court considered the fact that the defendant was only conveying orders for the shelling of Vukovar as a mitigating circumstance.²⁵¹ The court followed the Defence Code and found that superior's order to commit the crime was not binding for the HV soldier.²⁵² The fact that the accused Dilber was acting upon the order was, however, taken as a mitigating factor.²⁵³

13.3.3.3.2.9. TIME LAPSED SINCE THE CRIME

The length of time that has passed since the crime was committed should be considered as a mitigating factor according to the court in the *Begović* case.²⁵⁴ The same was affirmed by the Supreme Court of the Republic of Croatia in the judgement against Ademi and Norac in the *Medački džep* case.²⁵⁵

13.3.3.3.2.10. CIRCUMSTANCES OF THE CRIME

The fact that the location where the crime was committed was attacked by Serb nationals (the same ethnicity as the victims), and that the climate of fear and mistrust influenced the accused were mitigating factors in the *Čepin* case.²⁵⁶

13.3.3.3.2.11. CONDUCT OF THE ACCUSED DURING TRIAL

The way the accused conducted himself before the court and his participation in the proceedings was considered a mitigating factor in the *Dalj* case.²⁵⁷

²⁴⁹ Basic Criminal Code of the Republic of Croatia - OKZ RH (Official Gazette of Croatia „Narodne Novine“ No. 31/93).

²⁵⁰ County Court Osijek, Miloš Lončar, Case No. K-18/02, 1st Instance Verdict, 12 June 2001.

²⁵¹ County Court Vukovar, Žarko Tkalčević, Case No. K-38/99, 1st Instance Verdict, 11 April 2001.

²⁵² Art. 48 of the Defence Code from 20 Sept. 1991 (Official Gazette of Croatia „Narodne Novine“ No. 49/1991).

²⁵³ *Čepin*, 1st inst., p. 28.

²⁵⁴ *Petrinja*, 1st inst.

²⁵⁵ *Medački džep*, 2nd inst.

²⁵⁶ *Čepin*, 1st inst., p. 42.

²⁵⁷ *Dalj*, 1st inst.

13.3.3.3.2.12. STATUTORY GROUNDS FOR MITIGATION AND PARTICULARLY MITIGATING CIRCUMSTANCES

The Criminal Code in Article 57 (1), which is very similar to Article 38 of the OKZ RH, reads as

Criminal Code Article 51(7)

The punishment prescribed by law for a criminal offense may be mitigated below minimum proscribed with the law when the statute expressly prescribes so, or when the court holds that, in view of the existence of particularly obvious mitigating circumstances, the purpose of punishment may also be attained by a more lenient punishment.

follows:

The statutory grounds for mitigation below the prescribed minimum encompasses:

- Essentially reduced mental capacity (Article 10(2) of the OKZRH);
- Exceeding the limits of self-defence' (Article 7(3) of the OKZ RH);
- Exceeding the limits of necessity or duress (Article 8(3) of the OKZ RH);
- Attempt to commit a crime (Article 17(2) of the OKZ RH); and
- Ignorance of law (Article 15 of the OKZ RH).

See also Module 11 for more information on specific defences.

In the *Čepin* case the accused argued that his reduced sanity should be of such importance that it should lead to an acquittal. However, the court held that although the accused's mental sanity was reduced, he was still able to understand all important elements of the crime: that the crime was directed against the civilians and that it was against international law. For this reason, the accused was not acquitted, but his reduced sanity was taken into account and ultimately led to a lower sentence.²⁵⁸

Although the accused's mental sanity was reduced, he was still able to understand all important elements of the crime.

The second accused, Tomislav Dilber, argued that he acted under duress while murdering a man. He stated that he had been terrified for his own life, and that his superior, Fred Marguš, threatened Dilber that he would kill him if Dilber did not kill the prisoner. The court did not find

²⁵⁸ *Čepin*, 1st inst.

the accused Dilber's defence reliable and decided that his superior's threat was not grave enough and that the accused Dilber could have saved the victim's life.²⁵⁹

In the second situation, the court decides, without external input, on the existence of especially mitigating circumstances and whether the purpose of punishment may also be attained by a more lenient sentence. For example, when there are only mitigating factors and no aggravating factors, these may be considered by court as particularly mitigating factors which usually results in a lower sentence for the accused. The accused Dilber in the *Čepin* case was sentenced to 3 years of imprisonment since only mitigating factors existed in the case against him.²⁶⁰ The same applied in the *Dalj* case where the accused was sentenced to four years imprisonment.²⁶¹

²⁵⁹ *Ibid.* at p. 27.

²⁶⁰ *Ibid.*

²⁶¹ *Dalj*, 1st inst.

13.3.4. SERBIA

Notes for trainers:

- This section deals with the laws applicable to sentencing in Serbia. The courts in Serbia apply the law that was in force at the time when the crimes were committed. For crimes arising out of the conflicts in the former Yugoslavia, the SFRY CC or FRY CC is thus applied.
- The provisions of this code are the only ones discussed in this section. In addition, some case law, as far as it is known, is referenced to highlight the different factors the courts have taken into account when pronouncing sentences.
- Participants should be encouraged to refer to cases that they have been involved in to discuss the principles that were applied by the court in determining sentences.
- Participants should appreciate the particularities of war crimes cases in comparison to sentences imposed in ordinary criminal cases.
- For the purposes of these materials, only the SFRY CC or FRY CC are discussed. Participants should be encouraged to discuss how sentencing might be dealt with by the courts applying the current criminal code to war crimes.
- Participants can also use the case study to discuss how their national courts would sentence the accused in that case, and what factors, based on the case summary, their national courts would take into account.

13.3.4.1. MAIN PROVISIONS OF THE SFRY / FRY CRIMINAL CODE ON SENTENCING

War crimes cases arising out of the conflicts in the former Yugoslavia in the Republic of Serbia have been tried on the basis of the laws that were in force in the Republic of Serbia at the time when the crimes charged were committed, *i.e.* either the SFRY Criminal Code or the Criminal Code of the FRY, or on the basis of the FRY Criminal Code as the most lenient law (as explained below).

On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia (FRY) established that the death penalty cannot be applied for criminal acts defined by the federal law.²⁶² At that time, the SFRY Criminal Code was in force.²⁶³

Article 37 of the SFRY Criminal Code (Death penalty) was removed from the Serbian criminal legislation on 16 July 1993, when the Law on Changes and Amendments of the Criminal Code of

²⁶² FRY Official Gazette, No. 1/92.

²⁶³ See, *e.g.*, WCC, Belgrade County Court, Zvornik, Case No. K.V. 5/2005, 1st Instance Verdict, 29 May 2008, pp. 174-175.

the Federal Republic of Yugoslavia was passed.²⁶⁴ Article 38(2) of that Law provided that for the most serious crimes, twenty years' imprisonment can be sentenced.²⁶⁵

The Law on Changes and Amendments of the FRY Criminal Code of 2001 included the possibility of a sentence of forty years' imprisonment for certain crimes, including the crimes from the chapter dealing with the war crimes.²⁶⁶

Therefore, under the FRY Criminal Code, the law that is applied as the most lenient for the accused, the range of sentences for war crimes is from five to 15 years (which was set as a general maximum) and 20 years for the most serious crimes or most aggravated forms of serious crimes.²⁶⁷

The provisions of Article 41 of the FRY Criminal Code on sentencing, including aggravating and mitigating circumstances are the same as those in the SFRY Criminal Code (see above, section 13.3.4.).

The new Criminal Code, which was passed in 2005 and entered into force on 1 January 2006, provides a sentencing range between five and 20 years and for 30 – 40 years for the gravest forms of certain crimes from Chapter XXXIV (*e.g.*, genocide, crimes against humanity, war crimes against civilians, wounded and sick or prisoners of war in time of war, armed conflict or occupation).²⁶⁸ These provisions do not apply to crimes committed in the 1990s.

13.3.4.1.1. CREDIT FOR A PERIOD SPENT IN CUSTODY

According to Article 50 of the FRY Criminal Code, the period of time spent in custody awaiting trial, as well as each deprivation of liberty relating to a criminal act, shall be counted as time served; juvenile custody or a fine shall also be considered.

The time spent in custody in a foreign country also counts as time served.

The time spent in custody in a foreign country also counts as time served. In the *Damir Sireta* case, a part of the pre-trial detention was spent in Norway,²⁶⁹ which counted towards time served. In

the *Nenad Malić (Stari Majdan)* case, the court decided that the accused's time in the custody of the Military Court of Banja Luka, in December 1992, should be counted as served. However, in the *Malić* case, the court decided it could not count the time spent in the Banja Luka Military

²⁶⁴ FRY Official Gazette, No. 37/93; see *Zvornik*, 1st inst., pp. 174 – 175.

²⁶⁵ See *ibid.* at p. 175.

²⁶⁶ FRY Official Gazette No. 61/2001; WCC, Belgrade County Court, *Scorpions*, Case No. K.V.6/2005, 1st Instance Verdict, 5 April 2007, p. 110.

²⁶⁷ FRY Criminal Code, Chapter XVI read in conjunction with Art. 38.

²⁶⁸ Serbia Criminal Code, Official Gazette of the Republic of Serbia No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, Chapter XXXIV read in conjunction with Art. 45.

²⁶⁹ WCC, Belgrade District Court, *Damir Sireta*, Case No. K.V. 9/2008, 1st Instance Verdict, 23 June 2009, p. 58.

Court's custody because the court was not provided with any evidence as to how many days the accused spent there. The court decided that the custody would be counted subsequently, upon obtaining the necessary data about the time spent in Banja Luka custody.²⁷⁰

13.3.4.1.2. CREDIT FOR A PERIOD SPENT IN CUSTODY OF THE ICTY

Article 14b of the Law on Organization and Jurisdiction of State Authorities in War Crime Proceedings, as amended in 2009, provides that the length of time a person spent in detention pending a trial before the ICTY will be included in the sentence imposed by the domestic court.

13.3.4.2. PLEA AGREEMENTS

The recent amendments to the Criminal Procedure Code envisaged that plea agreements are also possible. Furthermore, after the 2009 amendments to the Law on the Organisation and Competence of Government authorities in War Crimes Proceedings, in War Crimes Cases such plea agreements can be made without the limitations for general crimes (that the crime in question is punishable for up to 12 years).²⁷¹

The concept envisaged by the Criminal Procedure Code is to a certain extent different than the plea bargain found in the ICTY RPE. Namely, it is envisaged that the agreement on the admission of guilt must always be made in writing and that the accused person will fully admit to committing the criminal offence for which he is charged.²⁷² The prosecutor has the discretion to abandon the criminal prosecution even for the criminal offences that are not included in the agreement on the admission of guilt.²⁷³

In general, the penalty agreed between the prosecutor and the accused cannot be below the statutory minimum for the criminal offence with which the accused is charged.²⁷⁴ Only by exception can the penalty be below the statutory minimum:

[W]here it is obviously justified by the significance of the confession of the accused person for clearing up the criminal offence with which he is charged and where proving the offence without such confession would be impossible or very difficult, or for the prevention, detection or successful prosecution of other criminal offences, or due to the existence of the especially extenuating circumstances from Article 54 paragraph 2 of the Criminal Code.²⁷⁵

²⁷⁰ WCC, Belgrade District Court, Nenad Malić (Stari Majdan), Case No. KV 3/2009, 1st Instance Verdict, 7 Dec. 2009, p. 37.

²⁷¹ See Serbian Criminal Procedure Code, Official Gazette of FRY, No. 70/01 and 68/02 and Official Gazette of RS, No. 58/04, 85/05, 115/05, 49/07 and 20/09 state law; and its 2009 Amendments "Official Gazette of the Republic of Serbia" No. 72/09, Art. 282a; see also Law on organisation and competence of Government authorities in War Crimes proceedings, Art. 13b.

²⁷² See Serbian CPC, Article 282a.

²⁷³ *Ibid.* at Article 282b.

²⁷⁴ *Ibid.* at Article 282b(2).

²⁷⁵ *Ibid.* at Article 282b(3).

On its face it can be seen that this possibility envisaged in the law can be of great importance in war crimes cases.

For more on plea agreements, see the discussion in Module 12.

13.3.4.3. JURISPRUDENCE ON SENTENCING

The War Crimes Chamber applies the FRY Criminal Code as the law that is more lenient for the accused. This has not been particularly deliberated in all the judgements, although some judgements, such as *Nenad Malić (Stari Majdan)* or *Damir Sireta* provide an explanation about why the FRY CC is applied instead of the SFRY Criminal Code or the current 2006 Serbian Criminal Code (see more about the temporal application of laws in Module 5).²⁷⁶

When deciding on a sentence, the court takes into consideration the level of participation and engagement in carrying out the crime.²⁷⁷ For example, in the *Suva Reka* case, the trial chamber made a distinction between the levels of participation of the individuals who participated in the crime, noting that not all of them showed the same degree of involvement in the commission of the crime. The appeals chamber found that this reasoning and the distinction in sentencing between the co-perpetrators was proper.²⁷⁸

When deciding on sentence, the court takes into consideration the level of participation and engagement in carrying out the crime.

A number of relevant cases are discussed below as case studies, as well as other mitigating and aggravating factors taken into consideration by the courts in Serbia in war crimes cases.

13.3.4.3.1. ŠKORPIONI CASE

In the *Škorpioni* case, the War Crimes Chamber of the Belgrade District Court found four of the accused guilty of war crimes against civilians and sentenced them to 20 (two of the accused), 13 and five years' imprisonment, respectively.²⁷⁹ One of the accused was acquitted.²⁸⁰

With regard to one of the accused sentenced to 20 years' imprisonment (Slobodan Medić), the Supreme Court of the Republic of Serbia upheld the War Crimes Chamber finding. In doing so, the Supreme Court noted the following facts:

- The accused was the commander of the Škorpioni unit;

²⁷⁶ *Malić (Stari Majdan)*, 1st inst., p. 37.

²⁷⁷ WCD, Appellate Court in Belgrade, *Suva Reka*, Case No. Kž1 Po2 4/2010, 2nd inst., 30 Jun 2010, section 2.2.4., available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-4-2010.html>.

²⁷⁸ *Ibid.*

²⁷⁹ *Škorpioni*, 1st inst., p. 3.

²⁸⁰ *Ibid.* at pp. 4-5.

- The accused ordered the killing of the civilian population;
- If there had not been such an order, the six of the civilians would not have been killed;²⁸¹
- There were minors among the victims; and
- The civilians did not contribute in any way to the decision of the accused.²⁸²

The Supreme Court also considered that:

- The lives of six persons, especially those who were minors, are irreplaceable; and
- The victims were innocent and, in the given circumstances, could not influence the order on their execution to be changed.²⁸³

The Supreme Court concluded that other reasons could not mitigate Medić's sentence, including his family situation, the circumstances of war and his position as the commander of a military unit.²⁸⁴

The Supreme Court held that the War Crimes Chamber's decision to give the maximum sentence was justified, based on the law and should not be reduced.²⁸⁵ The Supreme Court added that only the maximum sentence for this accused could, to a certain degree, mitigate the pain of the deceased's families and show respect to the deceased.²⁸⁶

With regard to the second accused, who was sentenced to 20 years' imprisonment (Branislav Medić), the Supreme Court found that the aggravating circumstances had been overestimated.²⁸⁷ The Supreme Court held that the conduct of the accused as the co-perpetrator of the crime was of less importance than that of Slobodan Medić who gave the order.²⁸⁸ Taking into account the mitigating circumstances regarding his personal and family status (married with children), as well as the aggravating circumstances (execution of the order to kill six civilians and inhuman treatment towards the civilians), the Supreme Court sentenced the accused to 15 years of imprisonment.²⁸⁹

The Supreme Court added that only the maximum sentence for this accused could, to a certain degree, mitigate the pain of the deceased's families and show respect to the deceased.

The Supreme Court upheld a sentence of 13 years imprisonment for the third accused (Pero Petrašević).²⁹⁰ The Supreme Court found that the War Crimes Chamber correctly evaluated all

²⁸¹ Supreme Court of Serbia, Škorpioni, Case No. Kz I r.z. 2/07, 2nd Instance Verdict, 13 June 2008, p. 12.

²⁸² *Ibid.*

²⁸³ *Ibid.* at pp. 12-13.

²⁸⁴ *Ibid.* at p. 13.

²⁸⁵ *Ibid.* at pp. 12-13.

²⁸⁶ *Ibid.* at p. 13.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.* at pp. 13-14.

²⁹⁰ *Ibid.* at p. 15.

the mitigating and aggravating circumstances.²⁹¹ The Supreme Court noted that the accused admitted the conduct with which he was charged, expressed his remorse in an honest manner and called for the other accused to admit to what they had done.²⁹² The Supreme Court held that, in doing so, the accused contributed to establishing the factual situation regarding not only his role in the event, but also the roles of the other accused.²⁹³ The Supreme Court also noted that the War Crimes Chamber evaluated other mitigating circumstances, such as the personal and family circumstances of the accused and his earlier conduct, as well as the aggravating circumstances, including the inhumane treatment toward victims prior to their execution.²⁹⁴ The Supreme Court concluded that 13 years of imprisonment was correctly established and that it was the only sentence capable of achieving the purpose of punishment.²⁹⁵

On re-trial, the War Crimes Chamber sentenced Aleksandar Medić to the same sentence of five years of imprisonment. The aggravating circumstances taken into account were the age of the victims, their inhuman treatment and humiliation prior to the execution (video recording of the crime, laughing at the victims before their execution), while the mitigating factors included the remorse of the accused and the fact that he is father of a minor. The court also took into account the provision of Art 24(1) of the FRY CC which allows for a milder sentence to the accused who only aided and abetted the main perpetrators.²⁹⁶ The Supreme Court of the Republic of Serbia upheld the sentence on appeal.²⁹⁷

13.3.4.3.2. OVČARA CASE

In *Ovčara*, the War Crimes Chamber found the accused guilty of war crimes against prisoners of war and sentenced seven of the accused to 20 years' imprisonment, one of the accused to 15 years' imprisonment, one of the accused to 13 years' imprisonment, one of the accused to nine years' imprisonment, one of the accused to six years' imprisonment and two of the accused to five years' imprisonment.²⁹⁸ The Supreme Court modified the first instance verdict with regard to the nine years' sentence and one of the 20 years' sentences.²⁹⁹

With regard to the accused sentenced by the War Crimes Chamber to nine years' imprisonment, the War Crimes Department of the Appellate Court in Belgrade noted that the trial chamber failed to evaluate the fact that the accused expressed her persistence and wantonness during the perpetration of the offence by mistreating and killing a person and claiming that he had fired

²⁹¹ *Ibid.* at p. 14.

²⁹² *Ibid.* at pp. 14-15.

²⁹³ *Ibid.* at p. 15.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ WCC, Belgrade District Court, Škorpioni (Aleksandar Medić), Case No. K.V.8/2008, 1st inst. after retrial, 28 Jan. 2009, p. 17.

²⁹⁷ Supreme Court of Serbia, Škorpioni (Aleksandar Medić), Case No. Kz I r.z. 1/09, 2nd inst. after re-trial, 9 Oct. 2009, p. 6.

²⁹⁸ WCC, Belgrade District Court, Ovčara, Case No. K.V.4/2006, 1st inst. after re-trial., 12 March 2009, pp. 1-12.

²⁹⁹ WCD, Appellate Court in Belgrade, Ovčara, Case No. PO2-1/2010, 2nd inst., 14-23 June 2010, ¶¶ 1, 184.

her from work only because she was of a different ethnicity.³⁰⁰ The appellate court held that such conduct should be considered an aggravating circumstance and warranted a higher sentence and, consequently, sentenced the accused to 11 years' imprisonment.³⁰¹ The Supreme Court noted that this sentence was proportional to the seriousness of the offence and to all the circumstances under which this offence had been committed, as well as to personal circumstances of the accused and the purpose of the punishment.³⁰²

With regard to one of the accused sentenced to 20 years' imprisonment, the appellate court held that a lower sentence should have been imposed.³⁰³ The appellate court held that the trial chamber failed to place adequate importance on the following mitigating circumstances:

- The accused had not been engaged in armed conflict in Vukovar from the beginning; and
- The accused had been evading the war because he was a child from an ethnically mixed marriage.³⁰⁴

According to the appellate court, this meant that in order to achieve the purpose of punishment, a lower sentence was required.³⁰⁵ The appellate court therefore lowered the sentence to 15 years' imprisonment.³⁰⁶

In relation to the other accused, the appellate court found that the trial chamber correctly established both mitigating and aggravating circumstances.³⁰⁷

Mitigating circumstances included:

- family circumstances of the accused;
- health conditions; and
- no prior criminal records.³⁰⁸

Aggravating circumstances included:

- persistence in committing the crime;
- wantonness;
- the fact that at least 200 persons (victims) were killed;
- the age and sex of the victims; and
- the manner of burial of the killed persons

³⁰⁰ *Ibid.* at ¶ 189.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.* at ¶ 190.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.* at ¶ 185.

³⁰⁸ *Ibid.*

13.3.4.3.3. LEKAJ CASE

In *Lekaj*, the accused was convicted for war crimes against civilians and sentenced to 13 years' imprisonment.³⁰⁹ The Supreme Court of the Republic of Serbia held that the War Crimes Chamber correctly established and evaluated all the mitigating and aggravating circumstances.³¹⁰

Mitigating circumstances included:

- The fact that the accused was 20 years old at the time of the commission of the crime; and
- The fact that the accused was married and was father of one 5-year-old child.³¹¹

Aggravating circumstances included:

- The seriousness of the consequences of the offence, as three persons were still missing;
- The impaired mental health of the victims who survived;
- The fact that the victims moved out from Kosovo and Metohija; and
- The wantonness during perpetration of the offence, considering the fact that there was a wedding procession and the seriousness of humiliation caused by profanation of the bride.³¹²

On the other hand, the Supreme Court did not consider that the accused's membership in the "Cipat" group within the KLA—which was in charge of establishing illegal prisons for Serb and other non-Albanian population—as an aggravating circumstance because this fact had not been proven in the course of the proceedings.³¹³ Moreover, the Supreme Court also dismissed the argument that other circumstances should have been evaluated as aggravating factors—including the failure to act in accordance with the requirements of the international community to surrender the arms and demilitarization of the KLA—as it held that these circumstances formed the elements of the criminal offence itself and, thus, could not have been evaluated during meting out the punishment.³¹⁴

13.3.4.3.4. OTHER MITIGATING FACTORS IN THE JURISPRUDENCE

One of the most common mitigating factors is the fact that the accused has family or has no criminal record.

One of the most common mitigating factors, the fact that the accused has family or has no criminal record was appealed by the War Crimes Prosecutor.

³⁰⁹ Supreme Court of Serbia, *Lekaj*, Case No. Kz.I RZ 3/06, 2nd Instance Verdict, 26 Feb. 2007, p. 1.

³¹⁰ *Ibid.* at p. 15.

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.* at p. 14.

³¹⁴ *Ibid.* at pp. 14-15.

In the appeal of the *Suva Reka* case, the prosecutor submitted that these are common circumstance for an average person which, therefore, should not be given additional weight as mitigating circumstance. The appellate court did not accept the prosecutor's submission, and confirmed the relevance of these mitigating factors.³¹⁵

In other cases before the first instance and appellate War Crime Chambers/Departments, mitigating circumstances included:

- the age of the accused at the time of commission of the crime (where the accused was between 18 and 21 at the time of commission);³¹⁶
- personal circumstances:
 - the family circumstances of the accused (where the accused was divorced and the father of two underage children);³¹⁷
 - economic hardship (such as no real estate, modest salary for circumstances in Norway where the accused lived³¹⁸, or no permanent employment³¹⁹) and refugee status of the accused;³²⁰
 - disability of the accused;³²¹
- partially admitting guilt (where the accused recognised being at the crime site during the commission of the crime);³²²
- conduct after the crime (helping the victim to get medical assistance);³²³
- a compassionate attitude towards hostages;³²⁴
- remorse expressed at the trial;³²⁵ and
- the seriously diminished mental capacity of the accused (*bitno smanjena uračunljivost*), which is also a direct basis for mitigation of punishment under Art 12(3) of the FRY Criminal Code.³²⁶

³¹⁵ *Suva Reka*, 2nd inst., sections 2.2.4 and 2.3.2.

³¹⁶ Supreme Court of Serbia, Zvornik I (Korac and Slavković), Case No. Kz. I RZ 3/08, 2nd Instance Verdict, 8 April 2009, p. 15 (reducing on appeal the sentence for one of the accused from 13 to 9 years of imprisonment); WCC, District Court in Belgrade, Podujevo II (Đukić et al.) Case No. K.V. 4/2008, 1st Instance Verdict, 18 Jun 2009, p. 60 (upheld on appeal).

³¹⁷ WCD, Appellate Court in Belgrade, Damir Sireta, Case No. Kž1 Po2 2/2010, 2nd Instance Verdict, 24 Jun 2010 (the sentenced reduced from 20 to 15 years), available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-2-2010.html>.

³¹⁸ *Ibid.*

³¹⁹ *Nenad Malić (Stari Majdan)*, 1st inst., p. 36.

³²⁰ *Ibid.*, *Damir Sireta*, 2nd inst.; WCC, District Court in Belgrade, Boro Trbojević (Velika Peratovica), Case No. K.V.5/08, 1st Instance Verdict, 27 May 2009, p. 29 (upheld on appeal).

³²¹ War Crimes Chamber of the Belgrade District Court, Zdravko Pašić (Slunj), Case No. K.V 42/07, 1st Instance Verdict, 8 July 2008, p. 43 (upheld on appeal).

³²² *Suva Reka*, 2nd inst., section 2.3.2.

³²³ WCD, High Court in Belgrade, Medak (Lazić et al.), Case No. K. Po 2, 36/2010, 2nd Instance Verdict, 23 Jun 2010, p. 47 (upheld on appeal).

³²⁴ *Boro Trbojević (Velika Peratovica)*, 1st inst., p. 29.

³²⁵ *Nenad Malić (Stari Majdan)*, 1st inst., p. 36.

In the *Trbojević* case, the court declined to consider a personal characteristic of the accused, that he was a good, calm and non-violent man, as a mitigating circumstance. The court reasoned that these characteristics relate to the accused before the crime was committed, and that in the extraordinary context of widespread violence and conflict, in which the crime took place, even a non-violent person can commit a crime.³²⁷

Accumulation of the mitigating circumstances may amount to an exceptionally mitigating factor which leads to conviction to a sentence below the minimum prescribed for the war crimes (as allowed by Articles 42 and 43 of the FRY Criminal Code).³²⁸

13.3.4.3.5. OTHER AGGRAVATING FACTORS IN THE JURISPRUDENCE

Some of aggravating circumstances in the practice of the first instance and appellate War Crimes Chambers/Departments include:

- a previous conviction for a different crime³²⁹ (but lapse of time after the conviction will be considered for taking it as an aggravating circumstance³³⁰);
- a personal motive (such as revenge for a killed brother) and the nationality of the victims;³³¹
- the vulnerability of the victims:
 - the age of the victims (which included minors, including a 9-month infant),³³² or young age of the victims together with their treatment (which included a search of children, and throwing away their toys);³³³
 - the sex of the victims (which were women, including an expectant mother);³³⁴
- the characteristics of the victim (victim was a doctor, committed to his work, helping both civilians and wounded combatants);³³⁵
- grave consequences: the fact that the surviving victims lost their mothers, brothers and sisters and sustained heavy injuries with permanent consequences;³³⁶
- the fact that the perpetrator in a war crime against civilians who were Serbian citizens was a police officer whose duty was to protect citizens of the Republic of Serbia,³³⁷ and

³²⁶ *Ibid.* at p. 37 (upheld on appeal).

³²⁷ *Boro Trbojević (Velika Peratovica)*, 1st inst., p. 30.

³²⁸ *Medak (Lazić et al.)*, 2nd inst., p. 47.

³²⁹ *Suva Reka*, 2nd inst., section 2.1.3.

³³⁰ *Medak (Lazić et al.)*, 2nd inst., p. 47.

³³¹ WCD, High Court in Belgrade, *Španović (Stara Gradiška)*, Case No. K-Po2 32/2010, 1st Instance Verdict, 25 Jun 2010, p. 36 (upheld on appeal).

³³² WCC, District Court in Belgrade, *Suva Reka (Mitrović et al.)*. Case No. K.V.2/2006, 1st Instance Verdict, 23 April 2009, p. 189.

³³³ WCD, Appellate Court in Belgrade, *Đukić (Podujevo II)*, Case No. Kž1 Po2 2/2011, 2nd inst. appeal after retrial, 11 Feb 2011, available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-2-2011.html>.

³³⁴ *Suva Reka (Mitrović et al.)* 1st inst., p. 189.

³³⁵ *Zdravko Pašić (Slunj)*, 1st inst., p. 42-43 (upheld on appeal).

³³⁶ *Ibid.*

- the manner the crime was committed:
 - the stubbornness and determination in committing the crime (where a murder was carried out by several physical acts);³³⁸
 - grave disrespects towards the victims (such as placing the corpses in a shape of a Latin letter 'U' standing for Ustasha);³³⁹
 - deceiving the victim, who was a doctor prepared to cure the wounded;³⁴⁰
 - multiple acts by which the crime was committed.³⁴¹

The first instance courts also considered the fact that civilians were object of the attack as an aggravating circumstance for committing war crimes against civilians under Article 142, although this already constitutes an element of this crime.³⁴² This was confirmed on appeal.³⁴³

Participants should note that considering an element of the crime as an aggravating factor diverges from ICTY jurisprudence.³⁴⁴

³³⁷ *Ibid.*

³³⁸ *Nenad Malić (Stari Majdan)*, 1st inst., p. 36.

³³⁹ *Ibid.* at p. 36 (upheld on appeal).

³⁴⁰ *Zdravko Pašić (Slunj)*, 1st inst., p. 42-43 (upheld on appeal).

³⁴¹ *Boro Trbojević (Velika Peratovica)*, 1st inst., p. 29 (upheld on appeal).

³⁴² *Ibid.*

³⁴³ Supreme Court of Serbia, *Boro Trbojević (Velika Peratovica)*, Case No. Kz.I RZ 2/09, 2nd Instance Verdict, 24 Nov. 2009 p. 6.

³⁴⁴ See, e.g., *Blaškić*, AJ, ¶ 693; *Deronjić*, AJ, ¶¶ 106 – 7. See also, *Milan Simić*, TJ (Sentencing Judgement), ¶ 70; *Mrdja*, TJ (Sentencing Judgement); ¶ 46, which deny that the fact the civilians were the object of an attack can be taken as an aggravating factor in sentencing for crimes against humanity which already requires attack on civilians as an element of crime.

13.4. FURTHER READING

13.4.1. ARTICLES

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