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Comparative Study Of Alternative Punishments To The Death Penalty

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I. Introduction and Summary of Conclusions.

Most jurisdictions impose long-term sentences or life imprisonment as an alternative to capital punishment.[1] When considering a sentence, the courts in common, civil and international tribunal jurisdictions aim to fulfill the purpose of punishment that is commonly accepted in their respective jurisdictions. In addition, the courts consider the gravity of the crime, mitigating circumstances and aggravating factors to decide on an appropriate punishment.

To justify the imposed sentence in common law jurisdictions, the courts most frequently rely on the theories of deterrence, retribution and incapacitation. The civil law courts consider the above three factors; however, a greater emphasis is placed on rehabilitation of the criminal as the accepted purpose of punishment in civil law jurisdictions than is the case in common law jurisdictions. In international tribunals, the Trial Chambers rely on the purposes of punishment as identified in the statute under which they were created.

In common law, civil law and international tribunal jurisdictions, the courts rely heavily on the presence of aggravating factors to justify imprisonment for life. Frequently, courts will take into consideration mitigating circumstances to change the sentence from life imprisonment to confinement for a specified number of years. What constitutes mitigating and aggravating factors varies in each jurisdiction but frequently courts consider an admission of guilt by the accused, the age of the accused when the crime was committed, his culpability, remorse and various other circumstances surrounding the crime as mitigating factors. In an attempt not to lessen the stigma of a

[1] Prepare a comparative study of sentences imposed for murder or mass murder in civil and common law jurisdictions, particularly common law jurisdictions that do not impose the death penalty.

guilty verdict on those convicts who receive a shorter sentence, the international tribunal courts make it very clear that the presence of mitigating factors do not lessen the severity of the crime.

II. Factual Background.

Although most common and civil law jurisdictions have abolished the death penalty as a form of legal punishment for crimes, some have retained it. The United Nations Secretary General issued the following statistics in 1999: "…ninety states retain the death penalty, sixty-one have totally abolished it for all crimes, fourteen have abolished it for ordinary crimes, and twenty-seven have abolished it *de facto*, for a total of 102 abolitionist states."[2] In 2002, the number of states retaining the death penalty fell to seventy-one, and the number of abolitionist states had risen to 123.[3]

Although the Russian criminal code permits the use of the death penalty, the President has signed on to the Council of Europe's Protocol 6, under which the Russian Federation agreed to impose no longer the death penalty.[4] Peru retains capital punishment only in cases of treason, while China only sanctions it for any intentional murder or an

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[2] *United States v. Burns*, 95 A.J.I.L, 666, 670 (2001). [Reproduced in the accompanying notebook at tab 33].

[3] *Id.* [Reproduced in accompanying notebook at tab 33].

[4] Russian Federation Law Digest in Martindale-Hubbell International Law DIGEST (2003). [Reproduced in the accompanying notebook at tab 38].

"especially serious act of corruption."[5] The United States is one of the most prominent developed countries that maintains and implements the death penalty today. In the United States, the death penalty is a matter of state law; many states no longer employ it. Chapter 51 section 1111 of the United States Code defines murder as "the unlawful killing of a human being with malice aforethought."[6] The United States law stipulates that, for states that still use the death penalty, it should be the punishment imposed upon any person who commits a first-degree murder.[7] "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment', in which event he shall be sentenced to imprisonment for life."[8]

Most countries do not retain the death penalty as a legal form of punishment. Ecuador does not impose the death penalty,[9] nor does Canada,[10] Northern Ireland,[11] or the United Kingdom.[12] Italy,[13] South Africa[14], and Namibia[15] no longer employ the death

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[5] Peru Law Digest in Martindale-Hubbell International Law DIGEST (2003). [Reproduced in the accompanying notebook at tab 36]; People's Republic of China Law Digest in Martindale-Hubbell International Law DIGEST (2003). [Reproduced in the accompanying notebook at tab 37].

[6] 51 U.S.C. §1111(1994). [Reproduced in the accompanying notebook at tab 8].

[7] The United States Code Chapter 51 §1111 defines first degree murder as "[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberated, malicious, and premeditated killing." *Id*. [Reproduced in the accompanying notebook at tab 8].

[8] *Id.* [Reproduced in the accompanying notebook at tab 8].

[9] Ecuador Law Digest in Martindale-Hubbell International Law DIGEST (2003). [Reproduced in the accompanying notebook at tab 35].

[10] *Kindler v. Canada*, 1988, 6 W.C.B. (2d) 277, 58. (Hereinafter, *Kindler*). [Reproduced in the accompanying notebook at tab 10].

[11] Northern Ireland (Emergency Provisions) Act, 1973, c.53, §1 (Eng.). [Reproduced in the accompanying notebook at tab 3].

[12] Murder (Abolition of the Death Penalty) Act, 1965, c. 71 (Eng.). [Reproduced in accompanying notebook at tab 2].

penalty. In 1976, Canada officially abolished the death penalty, although it had not executed anyone since 1962.[16] Canadian courts, instead, sentence both first and second-degree murderers to life imprisonment.[17] This sentence is a prescribed minimum.[18] England abolished capital punishment in 1965.[19] The statute abolishing the death penalty also established the alternative punishment—life imprisonment.[20] The statute reads: "(1) No person shall suffer death for murder, and a person convicted of murder shall…be sentenced to imprisonment for life."[21] The statute commutes sentences of all those persons sentenced to death to sentences of life imprisonment.[22]

The statute concerning murder in Northern Ireland is very similar to that of England. Chapter 53 of Northern Ireland's 1973 Emergency Provisions Act reads: "1. Punishment for murder. (1) No person shall suffer death for murder and a person

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[13] "Only two types of punishments are available as principal penalties: monetary sanctions or prison sentences." Elisabetta Grande, *The rise and fall of the rehabilitative ideal in Italian Criminal Justice*, (2002) Global Juris Topics, at http://web7.infotrac.galegroup.com/itw/infomark. [Reproduced in accompanying notebook at 31].

[14] 2002 (6) BCLR 551 (SCA). (Hereinafter, *Bull*). [Reproduced in accompanying notebook at tab 24].

[15] 1996 (7) BCLR 966 (NmS) (Hereinafter, *Tcoeib*). [Reproduced in accompanying notebook at tab 23].

[16] *Kindler* at 58. [Reproduced in the accompanying notebook at tab 10].

[17] Criminal Code, R.S.C., ch. C-46, §235(1) (1985) (Can.). [Reproduced in the accompanying notebook at tab 1].

[18] Id. at §235(2). [Reproduced in the accompanying notebook at tab 1].

[19] Murder (Abolition of the Death Penalty) Act, 1965, c. 71 (Eng.). [Reproduced in the accompanying notebook at tab 2].

[20] *Id*. [Reproduced in the accompanying notebook at tab 2].

[21] *Id*. [Reproduced in the accompanying notebook at tab 2].

[22] *Id*. [Reproduced in the accompanying notebook at tab 2].

convicted of murder shall…be sentenced to imprisonment for life."[23] The Irish provision also commuted death sentence to life imprisonment.[24] Under Chinese law—which still allows for capital punishment—the alternative is incarceration for life.[25] It is clearly established in common and civil law jurisdictions – both those that maintain the death penalty and those that do not – for crimes severe enough to warrant the death penalty, the only alternative to capital punishment is a sentence of imprisonment, possibly for life.

The Statutes establishing the International Criminal Court for Yugoslavia (*ICTY*) and the International Criminal Court for Rwanda (*ICTR*) indicate that the most serious punishment either is able to hand down is a sentence of life imprisonment.[26] The statutes of both the ICTY and ICTR state that the "Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."[27] The relevant provision of the ICTR's Rules of Procedure and Evidence is Rule 101:

> A. A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.
> B. In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:

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[23] Northern Ireland (Emergency Provisions) Act, 1973, c. 53, §1 (Eng.). [Reproduced in accompanying notebook at tab 3].

[24] *Id*. [Reproduced in accompanying notebook at tab 3].

[25] WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA: WITH ENGLISH TRANSLATION AND INTRODUCTION 45-46. (William S. Hein & Co., Inc. Buffalo, New York) (1998). [Reproduced in accompanying notebook at tab 28].

[26] Statute of the International Tribunal for Yugoslavia, art. 24 (1993). (Hereinafter, *ICTY Statute*). [Reproduced in the accompanying notebook at tab 7]; Statute of the International Tribunal for Rwanda, art. 23 (1994). (Hereinafter, *ICTR Statute*). [Reproduced in the accompanying notebook at tab 6].

[27] ICTY Statute at art. 23. [Reproduced in the accompanying notebook at tab 7]; ICTR Statute at art. 22. [Reproduced in the accompanying notebook at tab 6].

i. any aggravating circumstances;
ii. any mitigating circumstances including substantial co-operations with the Prosecutor by the convicted person before or after conviction;
iii. the general practice regarding prison sentence in the court of Rwanda;
iv. the extent to which any penalty imposed by a court of a any State on the convicted persons for the same act has already been served, as referred to in Article 9(3) of the Statute.

C. The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
D. Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.[28]

Rule 101 of the Yugoslavia Tribunal is almost identical to the rule for Rwanda.[29]

When considering sentences, both of the Trial Chambers were instructed to consider a variety of circumstances in assessing the length of incarceration.[30] In addition to considering both the mitigating and aggravating factors unique to each case, the Trial Chambers of both the ICTY and ICTR refer to the national criminal code and precedent from other international tribunals, to hand down a personalized sentenced with the intentions of fulfilling the purposes of punishment discussed below.[31] At Nuremberg, those persons who were found guilty of crimes against humanity and genocide were

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[28]Rules of Procedure and Evidence for Rwanda, 2002, §4, rule 101, www.itcr.org. [Reproduced in accompanying notebook at tab 4].

[29] Rules of Procedure and Evidence for Yugoslavia, 1995, §4, rule 101, www.un.org/icty/basic/rpe/IT32_rev6.htm. [Reproduced in the accompanying notebook at tab 5].

[30] ICTY Statute at art. 24. [Reproduced in the accompanying notebook at tab 7]; ICTR Statute at art. 23. [Reproduced in the accompanying notebook at tab 6].

[31] *Id.* [Reproduced in accompanying notebook at tabs 6 and 7].

frequently put to death, unless the Court decided another punishment was just.[32] Of the twenty-two people tried at Nuremberg, sixteen were convicted of crimes against humanity.[33] Of those sixteen, four received prison terms, one for fifteen years, two for twenty, and one for life, and twelve were sentenced to death by hanging.[34] The Trial Chamber of the ICTR has sentenced convicts for terms between twelve years and life imprisonment.[35] The ICTY has sentence people from five years in prison up to forty-six years.[36]

There is a very unique feature in the International Tribunals—their consideration of national level law. When the ICTY and ICTR consider a punishment for a murderer, the Trial Chambers must consider the type of punishment the criminal would be subject to in the national courts where the harm was committed.[37] That is, the ICTY must consider the law of the former Yugoslavia, and the ICTR must take in to account the law of Rwanda. Furthermore, Trial Chambers of Rwanda and Yugoslavia must "take into account the extent to which any penalty imposed by a national court on the same person

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[32] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment and Sentence, Oct. 2, 1998. www.ictr.org. (Hereinafter, Akayesu). [Reproduced in the accompanying notebook at tab 12]; *Prosecutor v. Erdemovic*, Case No. IT-96-22-T*bis*, Judgment, Nov. 29, 1996 at Para 29. www.un.org/icty. (Hereinafter, *Erdemovic I*). [Reproduced in the accompanying notebook at tab 14].

[33] *Erdemovic I* at Para. 29. [Reproduced in the accompanying notebook at tab 14].

[34] Id. [Reproduced in the accompanying notebook at tab 14].

[35] Keller, Andrew N., *Punishments for Violations of International Criminal Law: An Analysis of Sentencing and the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53, 56-57 (2001). [Reproduced in accompanying notebook at tab 32].

[36] *Id.* [Reproduced in accompanying notebook at tab 32].

[37] ICTR Statute at art. 26. [Reproduced in the accompanying notebook at tab 6]; ICTY Statute at art. 24. [Reproduced in accompanying notebook at tab 7]; see *supra* note 28 and 29.

for the same act has already been served."[38] This is clearly not relevant in civil and common law jurisdictions because they are not supra-national judicial bodies. The law these courts rely on to convict and sentence someone is national law.

At the national level of both the Tribunals—that is, Yugoslavia's national law for the ICTY and Rwanda's national law for the ICTR—the criminal codes call for severe punishment for crimes against humanity or genocide (or the corresponding national level crimes).[39] In Rwanda, the Organic law is divided up into three categories.[40] Category (a) covers "persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of crimes against humanity."[41] The mandatory punishment for persons falling in category (a) is the death penalty.[42] Category (b) includes "persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organization or militia and who perpetrated or fostered such crimes."[43] The punishment for category (b) crimes is life imprisonment.[44] In Yugoslavia, there is not a categorical

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[38] ICTR Statute at art. 9. [Reproduced in the accompanying notebook at tab 6]; Similar phrasing in ICTY Statute at art. 10. [Reproduced in accompanying notebook at tab 7].

[39] *Erdemovic I* at Para. 34. [Reproduced in the accompanying notebook at tab 14]; *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, June 1, 2000 at Para. 28. www.ictr.org. (Hereinafter, *Ruggiu*). [Reproduced in the accompanying notebook at tab 17]; *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, Sept. 4, 1998 at Para. 18. www.ictr.org. (Hereinafter, *Kambanda*). [Reproduced in the accompanying notebook at tab 15].

[40] *Ruggiu* at Para. 28. [Reproduced in the accompanying notebook at tab 17].

[41] *Id*. [Reproduced in the accompanying notebook at tab 17].

[42] *Id*. at Para. 29. [Reproduced in the accompanying notebook at tab 17]; *Kambanda* at Para 19. [Reproduced in the accompanying notebook at tab 15].

[43] *Ruggiu* at Para 28. [Reproduced in the accompanying notebook at tab 17].

[44] *Id*. at Para. 29. [Reproduced in the accompanying notebook at tab 17]; *Kambanda* at Para. 19. [Reproduced in the accompanying notebook at tab 15].

system.[45] Under Chapter XVI, Articles 141 through 156 of the former Yugoslavia's criminal code, genocide and crimes against humanity are punishable by a minimum of five years and a maximum of 15 years in prison, or twenty years or death in cases of aggravating circumstances.[46] Unlike the national levels, the Statutes of the Tribunals do not rank the penalties according to the gravity of the offenses.[47] The Trial Chamber in *Kambanda* concluded: "[i]n theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment."[48]

III. Legal Analysis

a. A comparison of the purposes of punishment in common law, civil law and international tribunal jurisdictions.

There are four widely accepted theories of punishment: retribution, deterrence, incapacitation and rehabilitation.[49] Most penal systems incorporate more than one of these theories when establishing a sentence.[50] First, the retributive theory "presupposes that human actors are responsible moral agents who are capable of making choices for good or evil. [I]t is right to punish one who offends against societal norms because it is wrong to violate these norms. The offender 'owes a debt to society'… [so] the offender

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[45] *Erdemovic I* at Para. 34. [Reproduced in the accompanying notebook at tab 14].

[46] *Id*. [Reproduced in the accompanying notebook at tab 14]; *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, Aug. 2, 2001 at Para. 697. www.un.org/icty. (Hereinafter, *Krystic*). [Reproduced in the accompanying notebook at tab 16].

[47] *Kambanda* at Para 12. [Reproduced in the accompanying notebook at tab 15].

[48] *Id*. [Reproduced in the accompanying notebook at tab 15].

[49] RICHARD J. BONNIE, et al., CRIMINAL LAW 1-30, 1 (6th ed. 1997). [Reproduced in accompanying notebook at tab 25].

[50] *Id*. at 2. [Reproduced in accompanying notebook at tab 25].

must now atone by suffering punishment for the transgression."[51] Proponents of the death penalty often cite retributivist theory as justification for taking someone's life.[52] Second, the theory of deterrence, both general (deterring society as a whole) and special (deterring the individual), is purported to prevent people from committing crimes because they wish to avoid the punishment that is the consequence of the illegal action.[53] Third, incapacitation serves to keep the criminal from committing more illegal acts by removing him from society.[54] Finally, under the theory of rehabilitation, "criminal conduct is caused by the pathology of individual offenders." [55] Rehabilitation is a form of "humanitarian intervention that promises to cure offenders and return them to law-abiding ways."[56] Each of these theories has its advantages and disadvantages, which a jurisdiction must weigh when adopting a theory of punishment on which to base its sentences.[57]

In *Kindler v. Canada*, the dissenting opinion by Justice Hugessen summarized the commonly accepted theories of punishment in the common law system and addressed how the death penalty fits into the various categories.[58] Hugessen outlined the test for a legitimate punishment: "… is [it] necessary to achieve a valid purpose, …is [it] founded

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[51] *Id*. at 3. [Reproduced in accompanying notebook at tab 25].

[52] *Id*. at 6. [Reproduced in accompanying notebook at tab 25].

[53] *Id*. at 11. [Reproduced in accompanying notebook at tab 25].

[54] *Id*. at 22. [Reproduced in accompanying notebook at tab 25].

[55] *Id*. at 26-27. [Reproduced in accompanying notebook at tab 25].

[56] *Id*. at 27. [Reproduced in accompanying notebook at tab 25].

[57] *Id*. at 30. [Reproduced in accompanying notebook at tab 25].

[58] *Kindler* at 70. [Reproduced in the accompanying notebook at tab 10].

on recognized sentencing principles, and [do] valid alternatives to the punishment imposed [exist]."[59] These tests are "…all guidelines which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate."[60] Concerning the theory the death penalty serves, Justice Hugessen adopted the dissenting opinion of Justice McIntyre in *Regina v. Miller and Cockriell*. Justice McIntyre stated that a punishment lacks value if it does not serve as a deterrent or some other social purpose.[61] If the proposed punishment does not serve either of these purposes, it "'would surely be cruel and unusual.'"[62] Justice McIntyre continued:

> Capital punishment makes no pretence at reformation or rehabilitation and its only purpose must then be deterrent or retributive. While there can be no doubt of its effects on the person who suffers the punishment, to have a social purpose in the broader sense it would have to have a deterrent effect on people generally and thus tend to reduce the incident of violent crime.[63]

Justice Hugessen affirmed that the purpose of punishment is the "regulation of affairs in the community and the protection of society from injury caused by those who break the laws."[64]

Justice Hugessen concluded that it is not reasonable for a society to seek to attain more than those aims of punishment.[65] He stated, "since capital punishment is the

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[59] *Id.* [Reproduced in the accompanying notebook at tab 10]. (Referring to a list compiled by a Professor Tarnopolsky.)

[60] *Id*. [Reproduced in the accompanying notebook at tab 10]. (Cited to Page 1074 of Professor Tarnopolsky's book that is not identified).

[61] *Id*. [Reproduced in the accompanying notebook at tab 10] (Citing Justice McIntyre's dissenting opinion in *Regina v. Miller and Cockriell* 63 D.L.R. (3d) 193.).

[62] *Id*. [Reproduced in the accompanying notebook at tab 10].

[63] *Id*. [Reproduced in the accompanying notebook at tab 10].

[64] *Id*. at 72. [Reproduced in the accompanying notebook at tab 10].

extreme sanction, if it is to be applied it must be shown that its application is necessary in the sense that the object of social protection could not otherwise be achieved."[66] He maintains that the "punishment imposed for a crime should be in proportion to the offense."[67] It must be "…limited to what is reasonably necessary to restrain the offense and punish the offender."[68] When a state imposes the death penalty, it must first establish a "compelling justification for using it instead of a less severe penalty."[69] He agrees with Justice Lamer that the only theoretical purpose of punishment the death penalty serves is the incapacitation of the offender.[70] He argues though that this is a grossly disproportionate punishment, similar to cutting a thief's hand off, because there is a legitimate and workable alternative, i.e., life imprisonment.[71] Justice Hugessen is not convinced that the death penalty serves as a deterrent, and therefore, deems it cruel and unusual punishment.[72]

Because some of the states of the U.S.A. still employ the death penalty, it can be concluded that those states maintain that it effectively serves their accepted theory of punishment. However, there is as much variety of opinion on the effectiveness and morality of the death penalty in the U.S. as there is in the international arena. In *Trop v.*

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[65] *Id.* [Reproduced in the accompanying notebook at tab 10].

[66] *Id*. [Reproduced in the accompanying notebook at tab 10].

[67] *Id*. [Reproduced in the accompanying notebook at tab 10].

[68] *Id*. [Reproduced in the accompanying notebook at tab 10].

[69] *Id*. [Reproduced in the accompanying notebook at tab 10].

[70] *Id*. at 73. [Reproduced in the accompanying notebook at tab 10].

[71] *Id*. [Reproduced in the accompanying notebook at tab 10].

[72] *Id*. [Reproduced in the accompanying notebook at tab 10].

Dulles, the court stated, "[w]hatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purpose of punishment—and they are forceful—the death penalty has been employed throughout our history."[73] An argument that the United States makes in defending its acceptance of the death penalty is that the electorate deem it appropriate.[74] At the fifty-fifth session of the United Nations Commission on Human Rights, the European Union proposed a text that called for a moratorium on executions and encouraged the complete abolition of the death penalty.[75] The United States took exception to the proposed text stating that international law allows for the death penalty in properly adjudicated cases and under appropriate safeguards and that, "the decision whether to support the death penalty properly belonged to the electorate."[76] In *Kindler*, the Canadian court seems to support the United States' position. The Court stated "[o]ver the centuries the popular mind has turned away from the worst forms of punishment… [w]e must consider all legal impositions of punishment in relation to today's condition and attitudes."[77] Although the 'popular mind' of Canada has turned away from the death penalty, this assertion by the Canadian Court seems to indicate that the decision of the legality and appropriateness of the death penalty rests with the electorate. In *United States v. Burns*, the court affirms that "…Canada had itself

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[73] *Trop v. Dulles*, 356 U.S. 86 (1958). [Reproduced in accompanying notebook at tab 11].

[74]Michael J. Dennis, *The Fifty-fifth Session of the U.N. Commission on Human Rights*, 94 A.J.I.L. 189, 191 (2000). [Reproduced in the accompanying notebook at tab 29].

[75] *Id.* [Reproduced in accompanying notebook at tab 29].

[76] *Id*. [Reproduced in the accompanying notebook at tab 29].

[77] *Kindler* at 72. See *supra* notes 58-72. [Reproduced in the accompanying notebook at tab 10].

abolished the death penalty and that the abolition of the death penalty has emerged as a major Canadian initiative at the international level."[78]

In civil law jurisdictions, the focus of punishment turns from retribution to deterrence and rehabilitation.[79] Criminal civil law developed in Europe from Roman law[80] over the centuries based on the ideas of the Enlightenment.[81] The purpose of punishment developed in this time was based on the views of scholars like Beccaria and Bentham.[82] The purpose of punishment was to "minimize general suffering by preventing crime and to minimize the pain of criminals by imposing on them the smallest penalties needed for prevention."[83]

Under civil law systems, the main objective of punishment is deterrence and incapacitation, but these systems also tend to consider rehabilitation as an important aim. The Italian system of law has pursued the ideal of rehabilitation as the purpose for its penal system since 1975.[84] In fact, under Italian law, each person convicted is to receive special assistance from either social workers, priests or other persons of similar regard

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[78] *United States v. Burns*, 95 A.J.I.L. 666, 667 (2001). [Reproduced in the accompanying notebook at tab 33].

[79] "(2) The function of the Prisons Service shall be: (a)…(b) as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of industry or labour (*sic.*)." Quoted *Tcoeib* at 18-19. [Reproduced in accompanying notebook at tab 23].

[80]Civil Law in *Wikipedia, the Free Encyclopedia* at http://en.wikipedia.org/wiki/Civil_law (October 24, 2003). [Reproduced in accompanying notebook at tab 34].

[81] JAN GORECKI, CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION 3-5, 48-63, 54. (Columbia University Press, New York) (1983). [Reproduced in accompanying notebook at tab 26].

[82] *Id*. [Reproduced in accompanying notebook at tab 26].

[83] *Id*. [Reproduced in accompanying notebook at tab 26].

[84] Grande at pg. 4. [Reproduced in accompanying notebook at 31]. Citing to Italian law n.354 of 26 July 1975.

and qualifications to help rehabilitate and re-socialize the offender.[85] Recent Namibian law exemplifies the emphasis on rehabilitation in civil law. In the Namibian Constitution, article 6 states "[t]he right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia."[86] In Namibia, a life sentence, though normally indicating imprisonment for the rest of the convicts natural life, has recently taken on a lesser severity due to the Prisons Act 8 of 1959, which provides for a system of parole.[87] Prison Service is instructed to "'apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation.'"[88] The Namibian Court outlines what the values of society require of the penal system. "[S]ociety should continuously and consistently care for the condition of its prisoners and should seek to reform and rehabilitate those prisoner during their incarceration and induce in them a consciousness of their dignity, a belief in their worth and hope in their future."[89]

In China, the penal system is viewed as a means of protecting

> …the national security and the power of the people's democratic dictatorship and the socialist system; to protect property-owned by the State and the property collectively-owned by the laboring masses; to protect citizens' privately

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[85] *Id.* Citing to the 1975 reform of Italian law, art. 1 and art. 13. [Reproduced in accompanying notebook at 31].

[86] *Tcoeib* at 10. [Reproduced in accompanying notebook at tab 23]. Namibia is a mixed common law and civil law jurisdiction, but the emphasis on rehabilitation is indicative of the civil law theories of punishment that Namibia has adopted.

[87] *Id*. at 3. [Reproduced in accompanying notebook at tab 23].

[88] *Id*. [Reproduced in accompanying notebook at tab 23].

[89] *Id*. at 5. [Reproduced in accompanying notebook at tab 23].

> owned property; to protect the citizens' personal rights and their democratic rights and other rights; to maintain social and economic orders; and to safeguard the smooth progress of the cause of the socialist construction.[90]

The punishment handed down in China must "…be equivalent to the criminal acts committed by the offenders and the criminal responsibilities that the offender shall bear."[91] This indicates that the Chinese penal system is concerned most with deterrence and incapacitation because the law is intended to protect the citizens and ensure economic and social order.

Under South African law, a mixed civil and common law jurisdiction, the courts are enabled to declare someone a dangerous criminal if it is convinced that the person "represents a danger to the physical or mental well-being of other persons and that the community should be protected against him."[92] When the court declares a person a "dangerous criminal" they shall be imprisoned for an indefinite period and be brought before the court at a later date, set by the court, for re-evaluation.[93] These procedures were clearly put in place to prevent further commission of crimes under the theory of incapacitation.[94]

In the South African case of *Bull and Chavulla v. S*, the defendants committed an armed robbery of a bakery where they killed the owner's son and a customer. The

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[90] LUO, *supra* note 25, at pg. 33-34. [Reproduced in accompanying notebook at tab 28].

[91] *Id.* [Reproduced in accompanying notebook at tab 28].

[92] Section 286A of South African Law, cited in *Bull* at 9. [Reproduced in accompanying notebook at tab 24].

[93] Section 286B of South African Law, cited in *Bull* at 9. [Reproduced in accompanying notebook at tab 24].

[94] *Bull* at 12. [Reproduced in accompanying notebook at tab 24].

defendants were convicted on two counts of murder, one count of robbery, one count of attempted robbery and one count each for illegal possession of a firearm.[95] The South African court determined that the defendants were dangerous criminals and sentenced them to imprisonment for an indefinite period.[96] After appeal, the court sentenced the defendants to incarceration for an indeterminate time to be reconsidered again in fifty years.[97] The court stated that "[i]n recent years the protection of the community and the purpose of prevention of future offenses have received greater emphasis by our courts, particularly in cases of violent crime."[98] The court expressed its concern about recidivism and the need for the courts to protect society against it. "With the abolition of the death penalty society needs the firm assurance that the unreformed recidivist murderer or rapist will not be released from prison, however long the sentence served by the prisoner may have been, if there is a reasonable possibility that the prisoner will repeat the crime. Society need to be assured that in such cases the State will see to it that such a recidivist will remain in prison permanently."[99]

In *Bull*, the South African court stated "[s]ince the abolition of the death penalty this Court has consistently recognized thsiluat (*sic*.) life imprisonment is the most severe and onerous sentence which can be imposed and that it is the appropriate sentence to

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[95] *Bull* at 45. [Reproduced in accompanying notebook at tab 24].

[96] *Id.* at 6. [Reproduced in accompanying notebook at tab 24].

[97] *Id*. at 12. [Reproduced in accompanying notebook at tab 24].

[98] *Id*. at 24-25. [Reproduced in accompanying notebook at tab 24].

[99] *Id*. at 25. [Reproduced in accompanying notebook at tab 24].

impose in those cases where the accused must effectively be removed from society."[100] The Court indicated that the one factor that saves life imprisonment from being cruel, inhumane and degrading punishment is the possibility of parole.[101]

International tribunal jurisdictions rely less on the theory of rehabilitation than do civil law jurisdictions. International tribunal jurisdictions rely on the theories of punishment they were intended to serve based on the statutes creating them. The theories used by the international tribunals are deterrence, retribution and incapacitation. The preambles of both the statutes establishing the International Tribunals indicate the purpose of the prosecution and the punishment of the criminals they prosecute. The United Nations created the ICTY and ICTR because of the "grave concerns," the international body had about the "…reports indicating that genocide and other systemic, widespread and flagrant violations of international humanitarian law have been committed…" in Rwanda and Yugoslavia, especially in Bosnia and Herzegovina.[102] In *Kambanda,* the Trial Chamber of the ICTR stated, "the aim for the establishment of the Tribunal was to prosecute and punish the perpetrators of the atrocities in Rwanda in such as way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace."[103] Both statutes pronounced that the prosecution of these people

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[100] *Id.* at 35. [Reproduced in accompanying notebook at tab 24].

[101] *Id*. at 38. [Reproduced in accompanying notebook at tab 24].

[102] ICTY Statute, Preamble. [Reproduced in the accompanying notebook at tab 7]; ICTR Statute, Preamble. [Reproduced in the accompanying notebook at tab 6].

[103] *Kambanda* at Para. 26. [Reproduced in the accompanying notebook at tab 15]; Similar language is also used by the Court in *Ruggiu* at Para. 32. [Reproduced in the accompanying notebook at tab 17].

would "contribute to ensuring that such violations are halted and effectively redressed."[104]

The Trial Chamber in *Ruggiu* proclaimed that "[t]he jurisprudence of the ICTR with regard to penalties has addressed the principal aims of sentencing, namely retribution, deterrence, rehabilitation and justice."[105] These statements seem to indicate that the purpose of punishment in the international arena is deterrence, incapacitation, and retribution. Because the maximum punishment that either of the Tribunals can hand down is life imprisonment, a conclusion can be drawn that the framers of the Tribunals' statutes maintained that life imprisonment served the purposes of punishment that they held most important. Although the statutes do not provide an outline of appropriate punishments, the Trial Chambers are expected to hand down a sentence that they think is suitable to the crime.[106]

When the ICTY and ICTR consider a punishment for a murderer the Trial Chambers must consider the type of punishment the criminal would be subject to in the national courts in which the harm was committed.[107] At the national level, Yugoslav law maintained rehabilitation, deterrence and incapacitation as its accepted theories of

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[104] ICTY Statute, Preamble. [Reproduced in the accompanying notebook at tab 7]; ICTR Statute, Preamble. [Reproduced in the accompanying notebook at tab 6].

[105] *Ruggiu* at Para. 33. [Reproduced in the accompanying notebook at tab 17]. The Trial Chamber in *Erdemovic* rules out the theory of rehabilitation because of the nature of the crimes committed by a person to bring them within the jurisdiction of the tribunals. See *infra* note 120, 121.

[106] ICTY Statute, art. 2, 4, 5. [Reproduced in the accompanying notebook at tab 7]; ICTR Statute, art. 3, 2, 22. [Reproduced in the accompanying notebook at tab 6]; Danner, Allison M., *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing,* 87 VA. L. REV. 415, 418-419 (2001). [Reproduced in the accompanying notebook at tab 30].

[107] ICTR Statute at art. 26 [Reproduced in the accompanying notebook at tab 6]. ICTY Statute at art. 24. [Reproduced in accompanying notebook at tab 7]. See *supra* notes 28, 29, 37-45.

punishment. The Criminal Code of the Former Yugoslavia that was in effect at the time the crimes were committed stated:

> Within the general purpose of criminal sanctions (article 5(2)), the purpose of punishment is to:
>
> (1) Prevent the perpetrator from committing criminal offenses and re-socialise (*sic*.) him.
>
> (2) Pedagogically influence others not to commit criminal offenses;
>
> (3) Strengthen the morals of the socialist self-managing society and to influence the development of social responsibility and of discipline amongst the citizens.[108]

Article 5(2) reads: "'[t]he general purpose of prescribing and imposing criminal sanctions is the repression of socially dangerous activities, which threaten or harm the social values protected by the penal legislation.'"[109]

In the ICTY case, *Erdemovic I*, the Trial Chamber discussed at length the purpose of punishment under the Statute of the ICTY. The Trial Chamber consented that the ICTY Statute does not provide any indication as to what is an appropriate prison term for criminals in its jurisdiction.[110] The Trial Chamber stated that the criminal code of the former Yugoslavia called for the most severe punishments for those people who commit genocide or war crimes.[111] The Chamber concluded that the use of the most severe punishment for the gravest crimes is a "general principle of law common to all

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[108] Criminal Code of the Former Yugoslavia, Art. 33, Quoted in *Erdemovic I* at Para. 61. [Reproduced in the accompanying notebook at tab 14].

[109] Criminal Code of the Former Yugoslavia, Art. 5(2), Quoted in *Erdemovic I* at Para. 61. [Reproduced in the accompanying notebook at tab 14].

[110] *Erdemovic I* at Para. 26. [Reproduced in the accompanying notebook at tab 14].

[111] *Id*. at Para. 30. [Reproduced in the accompanying notebook at tab 14].

nations…"[112] Thus, the commission of a crime against humanity is such a heinous act that it deserves the most severe penalties when no mitigating circumstances exist.[113]

In considering the appropriate sentence length for a convict, the Trial Chamber asserted that it must focus on the "very object and purpose" of the Tribunal, as seen by the U.N. and its member states.[114] The Trial Chamber declared that the U.N. conceived of the International Tribunals as a means of deterring the commission of crimes and atrocities.[115] In addition, the Security Council Members "were marked by the idea of a penalty as proportionate retribution and reprobation by the international community of those convicted of serious violations of international humanitarian laws."[116] The Trial Chamber continued, "[t]he International Tribunal's objective as seen by the Security Council – i.e. general prevention (or deterrence), reprobation, retribution (or "just deserts"), as well as collective reconciliation – fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia."[117]

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[112] *Id*. at Para. 31. [Reproduced in the accompanying notebook at tab 14].

[113] *Id*. [Reproduced in the accompanying notebook at tab 14].

[114] *Id*. at Para. 57. [Reproduced in the accompanying notebook at tab 14].

[115] *Id*. at Para. 58. [Reproduced in the accompanying notebook at tab 14].

[116] *Id*. [Reproduced in the accompanying notebook at tab 4].

[117] *Id*. [Reproduced in the accompanying notebook at tab 14]; In considering the intentions of the U.N. when it created the Tribunals, the ICTR in Prosecutor *v. Rutaganda* declared, "[t]he objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such as way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace." *Prosecutor v. Rutaganda*, Case No. ICTR 96-3, Sentence, Dec. 6, 1999 at Para. 455. www.ictr.org. (Hereinafter, *Rutaganda*). [Reproduced in accompanying notebook at tab 18].

The Trial Chamber stated that the only precedents in international law are from the judgments at Nuremberg and Tokyo.[118] The purpose of those sentences was general deterrence and retribution.[119] The rehabilitative purpose of punishment is ruled out by the Trial Chamber because of the "particularities of the crimes falling within the jurisdiction of the International Tribunal,"[120] (although it consented that rehabilitation might have been the aim of Article 27 of the ICTY Statute).[121] Because of its review of the precedents, both international and national, the Trial Chamber held that the most important purpose of punishment is deterrence and retribution, and stigmatization of the criminal conduct being punished.[122] The Trial Chamber then accepted retribution (or, "just deserts"), as an appropriate reason for sentencing, as long as the punishment is proportional to the "gravity of the crime and the moral guilt of the convicted."[123]

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[118] *Erdemovic I* at Para. 59. [Reproduced in the accompanying notebook at tab 14].

[119] *Id*. [Reproduced in the accompanying notebook at tab 14]; *Id*. at Para. 62. [Reproduced in the accompanying notebook at tab 14].

[120] *Erdemovic I* at Para. 66. [Reproduced in the accompanying notebook at tab 14].

[121] *Id*. [Reproduced in the accompanying notebook at tab 14]; Article 27 states: "Enforcement of sentences. Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall e in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal. ICTY Statute at art. 27 [Reproduced in the accompanying notebook at tab 7].

[122] *Erdemovic I*. at Para. 64. [Reproduced in the accompanying notebook at tab 14]; In *Krstic*, the Trial Chamber against asserted that the two main objectives of punishment are deterrence and retribution. *Krstic* at Para. 693. [Reproduced in the accompanying notebook at tab 16]; In the ICTR case, *Kambanda*, the Trial Chamber accepts retribution and deterrence as the most important purpose of sentencing. *Kambanda* at Para. 28. [Reproduced in the accompanying notebook at tab 15]; Also, *Akayesu* supports this conclusion. *Akayesu*. [Reproduced in the accompanying notebook at tab 12]; As does *Rutanganda*. *Rutanganda* at Para. 456. [Reproduced in the accompanying notebook at tab 18].

[123] *Erdemovic I*. at Para. 65. [Reproduced in the accompanying notebook at tab 14]; The ICTR in *Kambanda* expresses the "predominant standard of proportionality between the gravity of the offense and the degree of the responsibility of the offender." It concludes that "[j]ust sentence contribute to respect for the law and maintenance of a just, peaceful and safe society." *Kambanda* at Para. 58. [Reproduced in the accompanying notebook at tab 15]; *Akayesu* [Reproduced in the accompanying notebook at tab 12].

b. The various jurisdictions consider mitigating circumstance, aggravating factors, and the gravity of the offense when determining an appropriate sentence.

To decide on an appropriate sentence for a person convicted of murder or mass murder, each sentencing chamber in common law, civil law and international jurisdictions considers the gravity of the crime, the mitigating circumstances surrounding the crime and the aggravating factors. Each jurisdiction weighs each factor and decides what an appropriate prison term would be. What a jurisdiction considers when assessing the gravity of the crime, or what it considers to be mitigating circumstances and aggravating factors does not vary much from common law, to civil law to international jurisdictions.

In common law jurisdictions, courts determine a sentence for a person found guilty of murder or mass murder, by looking to the combined weight of the gravity of the offense, the mitigating circumstances and aggravating factors. The sentence should be proportional to the crime, and serve the functions of the penal system most commonly relied on in common law –deterrence, retribution, and incapacitation. Aggravating factors are anything that justify a greater sentence, such as the circumstance of the offense, the status of the victim, or the state of mind of the offender.[124] When the judge or jury weighs the factors, both mitigating and aggravating, it is a "consideration of how credible, important, substantial, or persuasive the factors on each side are in their totality."[125] In common law, judges and juries consider the gravity of the offense in

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[124] LIBRARY IN A BOOK: CAPITAL PUNISHMENT 40-47, 256,257, 41 (Harry Henderson ed., 2000). [Reproduced in accompanying notebook at tab 27].

[125] *Id*. at 41. [Reproduced in accompanying notebook at tab 27].

assigning the charge of murder in the first or second-degree, where murder in the first-degree is assumed graver because of the requirements of premeditation.[126] For the gravest offenses, where the aggravating factors outweigh the mitigating ones, the penalty is most often life imprisonment. Where the mitigating factors outweigh the aggravating factors and the gravity of the offense, the sentences cover a wide range of years.

In the United States case of *Rhode Island v. Pacheco, Jr*., the accused did not actually participate in the murder, but it was committed at his prompting and under his instruction.[127] The accused's friend (Tretton) killed the accused's lover who was pregnant with the accused's baby.[128] Pacheco prompted his friend to kill Pacheco's lover to hide his infidelity.[129] The jury found Tretton guilty of first-degree murder and conspiracy to commit murder, and sentenced him to life imprisonment, but made him eligible for parole.[130] The jury at Pacheco's trial, however, found that there were several aggravating factors, and sentenced him to life without parole.[131]

In *Pacheco*, the Supreme Court of Rhode Island stated that after a jury had "found at least one aggravating circumstance [enumerated in the statute] the trial justice may impose a sentence of life imprisonment without parole."[132] Tretton bludgeoned the victim over the head with a window weight, stabbed and slit her throat multiple times, all

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[126] The United States Code Chapter 51 §1111. [Reproduced in accompanying notebook at tab 8].

[127] *Id*. at 975. [Reproduced in accompanying notebook at tab 21].

[128] *Id*. [Reproduced in accompanying notebook at tab 21].

[129] *Id*. [Reproduced in accompanying notebook at tab 21].

[130] *Id*. [Reproduced in accompanying notebook at tab 21].

[131] *Id*. [Reproduced in accompanying notebook at tab 21].

[132] *Id.* at 981. [Reproduced in accompanying notebook at tab 21].

while she was conscious.[133] The jury found Pacheco guilty of aggravated battery and torture.[134] The trial judge defined the terms as follows, "aggravated battery is the malicious causing of bodily harm to the victim before her death by seriously disfiguring her body or a member thereof… [whereby]… [t]orture requires evidence of serious physical or mental abuse of the victim while she remained alive and conscious."[135] In addition to the charge of aggravated battery and torture, the jury found the aggravating factor of murder for hire because Pacheco hired Tretton to kill the victim.[136] The trial judge, in rationalizing why Pacheco, who did not actually participate in the killing, should receive a harsher sentence than Tretton, who actually committed the murder, stated, "Pacheco was the one who conceived the plan to kill [the victim]. It was Pacheco, not Tretton, who truly was motivated by some perverse, angry reason to have her killed…Pacheco was the one who prompted and conscripted Tretton to kill [the victim] with inducements of money, a job, and a car."[137] Finally, the trial judge affirmed that the Pacheco's sentence was proportional to the crime.[138]

Pacheco cited "his youth, his 'mild history of trouble with the law' and lack of evidence 'to imply that [he] had encouraged the torture or battery of the intended victim" as mitigating circumstances.[139] The trial court considered that Pacheco had the "benefit

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[133] *Id*. at 975. [Reproduced in accompanying notebook at tab 21].

[134] *Id*. at 981. [Reproduced in accompanying notebook at tab 21].

[135] *Id*. at 982. [Reproduced in accompanying notebook at tab 21].

[136] *Id*. at 983. [Reproduced in accompanying notebook at tab 21].

[137] *Id*. [Reproduced in accompanying notebook at tab 21].

[138] *Id*. [Reproduced in accompanying notebook at tab 21].

[139] *Id*. at 984. [Reproduced in accompanying notebook at tab 21].

of a caring, intact family throughout his life, but his behavior displayed an avoidance of responsibility" in considering the aggravating and mitigating factors.[140] The court found that the mitigating factors did not outweigh the aggravating factors and gravity of the crime.[141] The court, therefore, deemed life imprisonment without parole, on top of a ten-year sentence for conspiracy to commit murder, an appropriate and proportional sentence.[142]

In *Kelly v. South Carolina*, the jury at trial found the accused guilty of murder, kidnapping, and armed robbery.[143] He was sentenced to death.[144] The trial judge told the jury, in order to decide between death and life imprisonment, it should consider the possible presence of "five statutory aggravating circumstances, and three possible statutory mitigating circumstances," (although the court did not list what these circumstances are).[145] The jury found that all five of the statutory aggravating factors were present beyond a reasonable doubt and sentenced Kelly to death.[146] Similarly, in *Sattazahn v. Pennsylvania*, the defendant was found guilty and sentenced to death due to the presence of aggravating factors.[147] The trial jury found that the defendant was guilty

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[140] *Id*. [Reproduced in accompanying notebook at tab 21].

[141] *Id*. [Reproduced in accompanying notebook at tab 21].

[142] *Id*. [Reproduced in accompanying notebook at tab 21].

[143] *Kelly v. South Carolina*, 534 U.S. 246, 249 (2002) (Hereinafter, *Kelly*). [Reproduced in accompanying notebook at tab 9].

[144] *Id*. at 249. [Reproduced in accompanying notebook at tab 9].

[145] *Id.* at 250. [Reproduced in accompanying notebook at tab 9].

[146] *Id*. [Reproduced in accompanying notebook at tab 9].

[147] *Sattazahn v. Pennsylvania*, 537 U.S. 101, 104, (2003). (Hereinafter, *Sattazahn*). [Reproduced in accompanying notebook at tab 22].

of aggravated murder because he committed the murder "while in the perpetration of a felony."[148] The Supreme Court of the United States affirmed the conviction and the sentence of death. The Supreme Court reiterated the idea that the presence of aggravating circumstance warrants a greater sentence because it increases the gravity of the crime. The Supreme Court held on a prior occasion:

> that aggravating circumstances that make a defendant eligible for the death penalty '"operate as 'the functional equivalent' of an element of a *greater offense.*"' That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of "murder plus one or more aggravating circumstances': (*sic.)* Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.[149]

In the Irish case of *R v Graham*, the defendant was convicted of bludgeoning the victim to death with a hockey stick.[150] The judge sentenced him to life imprisonment.[151] Upon deciding when the defendant would be eligible for parole, the court listed the various aggravating and mitigating factors it should consider:[152]

> 14. Aggravating factors relating to the offence can include:
> (a) the fact that the killing was planned;
> (b) the use of a firearm;
> (c) arming with weapons in advance;
> (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body;
> (e) particularly in domestic violence cases, the fact that the murder was culmination of cruel and violent

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[148] *Id.* [Reproduced in accompanying notebook at tab 22].

[149] *Id*. at 11. [Reproduced in accompanying notebook at tab 22].

[150] *R. v. Graham*, Ir.L.T.R. (Cr. Cas. 2002). [Reproduced in accompanying notebook at tab 19].

[151] *Id.* [Reproduced in accompanying notebook at tab 19].

[152] *Id*. [Reproduced in accompanying notebook at tab 19].

behaviour (*sic*.) by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk

16. Mitigating factors relating to the offence will include:
    (a) an intention to cause grievous bodily harm, rather than to kill;
    (b) spontaneity and lack of pre-mediation.

17. Mitigating factors relating to the offender may include:
    (a) the offender's age;
    (b) clear evidence of remorse or contrition;
    (c) a timely plea of guilty.[153]

The guidelines for sentencing in Irish courts are based on the number of mitigating or aggravating circumstances present.[154] The lowest point is set at eight or nine years until eligible for parole (when mitigating factors outweigh aggravating circumstances), the middle point is 14 years, and the highest point is 17 or 18 years (when aggravating circumstances outweigh mitigating factors).[155] The court then stated that a defendant should be denied parole longer if the killing was, among a list of things, contracted, politically motivated, racially motivated, based on religion or sexual orientation of the victim, as a means of gain, or one of many other murders.[156] In the case before the court,

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[153] *Id.* [Reproduced in accompanying notebook at tab 19]. Citing to the advice published in April 2002 by the Sentencing Advisory Panel to the Court of Appeal.

[154] *Id.* [Reproduced in accompanying notebook at tab 19]. Citing to the advice published in April 2002 by the Sentencing Advisory Panel to the Court of Appeal.

[155] *Id.* [Reproduced in accompanying notebook at tab 19]. Citing to the advice published in April 2002 by the Sentencing Advisory Panel to the Court of Appeal.

[156] *Id.* [Reproduced in accompanying notebook at tab 19]. Citing to the advice published in April 2002 by the Sentencing Advisory Panel to the Court of Appeal.

the judge found that murder was committed without mercy, a savage attack and as a means of gaining the affection of a woman.[157] The court concluded that the victim was subject to "gratuitous violence of the grossest degree."[158] The defendant did not fulfill any of the mitigating factors that would warrant a reduced sentence.[159] Therefore, the judge decided the defendant should not be eligible for parole until he has served twenty years of his life sentence.[160]

In another Irish case, *R v Johnston*¸ the two defendants were found guilty of savagely attacking a man with a learning disability with at least three different knives while he was sleeping and then lighting the room on fire to cover up the crime.[161] The judge sentenced Stephen Johnston, who was 25 years old at the time of the crime, to life imprisonment with parole available only after having served twenty-one years of the term.[162] Paul, who was 17 years and ten months at the time he committed the murder, was sentenced to indefinite detention, denied parole for at least nineteen years.[163] The reason for the discrepancy in years until eligibility for parole was that Paul was below the age of eighteen, which courts frequently consider as a mitigating factor.[164] The judge stated, "every such case in which a life sentence is imposed requires to be considered

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[157] *Id.* [Reproduced in accompanying notebook at tab 19].

[158] *Id.* [Reproduced in accompanying notebook at tab 19].

[159] *Id.* [Reproduced in accompanying notebook at tab 19].

[160] *Id.* [Reproduced in accompanying notebook at tab 19].

[161] *R v. Johnston & Johnston*, Ir. L. T. R. (Cr. Cas. 2002). (Hereinafter, *Johnston*). [Reproduced in accompanying notebook at tab 20].

[162] *Id.* [Reproduced in accompanying notebook at tab 20].

[163] *Id.* [Reproduced in accompanying notebook at tab 20].

[164] *Id.* [Reproduced in accompanying notebook at tab 20].

carefully in the light of its own particular circumstances and in the knowledge of the individual offender. There are gradations of murder as there are gradations of culpability that may render one offence of murder more serious than another."[165] The judge considered the following as aggravating factors: the murder was in cold blood; the victim had learning difficulties, and the defendants inflicted "extensive and multiple injuries" on the victim before killing him. Further aggravating factors of the crime were the sadistic nature of the crime, the criminal history of the defendants, their lack of remorse, the use of at least three knives in the murder, and finally the "attempted destruction of the scene of the crime by fire."[166] In this case, there were no mitigating factors aside from Paul's age.[167] The court stated that in considering the sentence the court must "satisfy the requirements of retribution and deterrence having regard to the seriousness of the offense in question."[168] The court concluded that the long prison term handed to each defendant was proportional to the crime committed in relation to the aggravating factors present and the absence of any factors that would mitigate the term.[169] Thus it is clear, in common law jurisdictions, the presence of an aggravating factor serves to increase the gravity of the crime and, absent compelling mitigating factors, increases the sentence to mandatory life, or in those states that have not abolished it, death.

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[165] *Id.* [Reproduced in accompanying notebook at tab 20].

[166] Stephen had been convicted of ninety offenses from 1987 until 1999—many violent—and Paul has been convicted of 42 separate offences, including some violent convictions. *Id.* [Reproduced in accompanying notebook at tab 20].

[167] *Id.* [Reproduced in accompanying notebook at tab 20].

[168] *Id.* [Reproduced in accompanying notebook at tab 20].

[169] *Id.* [Reproduced in accompanying notebook at tab 20].

Civil courts function much the same as common law courts do in deciding upon a sentence. The courts consider the gravity of the offense, the mitigating circumstances and aggravating factors to decide upon a sentence that best fits the jurisdiction's theory of punishment and is proportionate to the crime committed. Under Chinese law punishment is determined based "…on the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this law."[170] The Chinese penal code calls for consideration of mitigating circumstances that would serve to lessen the severity of the imposed punishment. In the absence of mitigating circumstances as provided by law, the court may lessen the punishment if the prescribed minimum would be too severe for the crime.[171] Similarly, Italian courts determine sentences by balancing the mitigating and aggravating factors.[172] Examples of aggravating factors are concerns about recidivism and status as a multiple offender.[173]

In the Namibian case, *S. v. Tcoeib,* the accused intended to kill his employer's entire family because his employer accused him of stealing wine a few days prior to the murders.[174] He succeeded in killing two in cold blood.[175] The jury convicted the defendant on two counts of murder. The jury sentenced him to a term of life

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[170] LUO at pg. 55. [Reproduced in accompanying notebook at tab 28].

[171] *Id.* [Reproduced in accompanying notebook at tab 28].

[172] Grande at pg. 2. [Reproduced in accompanying notebook at tab 31].

[173] *Id.* [Reproduced in accompanying notebook at tab 31].

[174] *Tcoeib.* at 10. [Reproduced in accompanying notebook at tab 23].

[175] *Id*. [Reproduced in accompanying notebook at tab 23].

imprisonment for each count, to run concurrently.[176] The court decided that the defendant should not be eligible for parole for at least eighteen years from the date of sentencing.[177]

There are no mandatory sentences under Namibian law that requires life imprisonment for murder or any other offense.[178] Life imprisonment, therefore, is "a discretionary sentence…available for a court to impose should such court believe that the particular circumstances of a particular case warrant the imposition of such a sentence."[179] The Namibian court held that "[a] sentence of life imprisonment [is] a punishment of extreme severity to be resorted to only in extreme cases."[180] A sentence of life imprisonment does not deny a person of his/her life, but deprives them of the liberty to enjoy it and "therefore [can] only be upheld if it were demonstrably justified."[181] As mitigating factors, the defense offered the following: the young age of the defendant, the fact that this was his first offense, that he lacked sophistication, that he was angry when he committed the crimes, that he was a good worker; and finally, that he co-operated with the police and prosecution upon his arrest.[182] As an aggravating factor, the prosecutor pointed to the fact that the accused carefully planned in cold blood the murder of

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[176] *Id.* [Reproduced in accompanying notebook at tab 23].

[177] *Id.* [Reproduced in accompanying notebook at tab 23].

[178] *Id.* at 17. [Reproduced in accompanying notebook at tab 23].

[179] *Id.* [Reproduced in accompanying notebook at tab 23].

[180] *Id.* at 5. [Reproduced in accompanying notebook at tab 23].

[181] *Id.* [Reproduced in accompanying notebook at tab 23].

[182] *Id.* [Reproduced in accompanying notebook at tab 23].

"'unsuspecting and helpless people."[183] The court decided that the "factors of deterrence, prevention and retribution" required "more emphasis and weight [;]"[184] and the aggravating factors –that he is a "dangerous person who murdered for the flimsiest of reasons"—outweighed the mitigating factors. [185]

Similar to both common law and civil law courts, the chambers of the international tribunals consider gravity of the offense, mitigating and aggravating factors to decide the appropriate punishment for convicts in their jurisdictions. Although the Trial Chamber of each should refer as much as practicable to the national laws, it also will exercise its "unfettered discretion to determine sentence, taking into account the facts of the case and the circumstances of the accused."[186] In *Krstic*, the Trial Chamber of the ICTY enumerated the factors that should be considered when deciding what a proper sentence is; it listed: general practice in sentencing in the former Yugoslavia, the gravity of the crime committed, and the individual circumstances of the accused.[187] Similarly, the ICTR considered the following factors in *Kambanda*: general sentencing practice in national courts of Rwanda, the gravity of the crime, the personal circumstances of the convict, the existence of aggravating or mitigating circumstances, and substantial

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[183] *Id.* at 13. [Reproduced in accompanying notebook at tab 23].

[184] *Id*. at 14. [Reproduced in accompanying notebook at tab 23].

[185] *Id*. [Reproduced in accompanying notebook at tab 23].

[186] *Ruggiu* at Para. 31. [Reproduced in the accompanying notebook at tab 17]; In *Kambanda,* the ICTR agreed that reference to the national practice in sentencing is important but not determinative of sentence. It agreed that there is a need to reference the national practice, but that it is only one of many factors to be considered. The ICTR agrees that it will place more emphasis on its 'unfettered discretion' to pass sentence. *Kambanda* at Para 23 and 25. [Reproduced in the accompanying notebook at tab 15]; In *Krstic* the Trial Chamber states that "[i]t is well established that the general sentencing practice of the former Yugoslavia is not binding on the Tribunal, although the Tribunal should have regard to it." *Krstic* at Para. 697. [Reproduced in the accompanying notebook at tab 16].

[187] *Krstic* at Para. 694, 696. [Reproduced in the accompanying notebook at tab 16].

cooperation by the convict before or after conviction.[188] In *Krstic*, the ICTY Trial Chamber cited a prior case – *Celebici* – in which the court stated that the gravity of the offense is "…by far the most important consideration which may be regarded as the litmus test for the appropriate sentence."[189] The Trial Chamber in *Krstic* agreed and stated that considering the gravity of the offense avoids "excessive disparities in sentences imposed for the same type of conduct."[190]

To assess the gravity of a crime the Trial Chambers must take into account "quantitatively the number of victims and qualitatively the suffering inflicted on the victims."[191] In *Krstic*, the Trial Chamber stated that it is the Trial Chamber's duty to determine based on the unique facts of each case, an appropriate punishment for the individual.[192] The Trial Chamber cautioned against establishing a set punishment for a crime because of the varying factors that can mitigate the sentence.[193] The severity of the penalty must be in proportion to the gravity of the offense committed.[194] The Trial Chamber in *Akayesu* concurred with the assertion that the gravity of the offense is one of the determinative factors in sentencing.[195] The Chamber stated that it is "of the opinion

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[188] *Kambanda* at Para 11. [Reproduced in the accompanying notebook at tab 15]; Similar phrasing in *Rutaganda* at Para. 457. [Reproduced in the accompanying notebook at tab 18].

[189] *Krstic* at Para. 698. (Citing prior case—*Celebici*). [Reproduced in the accompanying notebook at tab 16].

[190] *Id.* [Reproduced in the accompanying notebook at tab 16].

[191] *Id.* at Para. 701, 703. [Reproduced in the accompanying notebook at tab 16].

[192] *Id*. at Para. 700. [Reproduced in the accompanying notebook at tab 16].

[193] *Id*. [Reproduced in the accompanying notebook at tab 16].

[194] *Id*. [Reproduced in the accompanying notebook at tab 16].

[195] *Akayesu*. [Reproduced in the accompanying notebook at tab 12].

that genocide constitutes the crime of crimes and is therefore crucial in determination of a sentence."[196] The Trial Chamber in *Rutaganda* concluded that it is difficult to rank genocide and crimes against humanity in terms of which is graver.[197] Even though it contended that establishing a rank is difficult, it agreed with the opinion in *Akayesu*, that genocide is the 'crime of crimes'. [198]

The individual circumstances of the convict serve as either mitigating or aggravating circumstances. Each circumstance should be given consideration by the Trial Chamber because they "bring to light the reasons for the accused's criminal conduct" and help the Trial Chamber assess "the possibility of rehabilitating the accused."[199] For example, a high-ranking military or political official who abuses his power would deserve a more severe punishment that a person acting on his own.[200]

Sentencing is a matter of "individualising (*sic*.) the penalty, in consideration of the totality of the circumstances."[201] Mitigating circumstances are those "which are such that they indicate that the objective of the sentence may be achieved equally well by a reduced sentence."[202] For example, a guilty plea or cooperation with the Prosecutor[203]

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[196] *Id*. [Reproduced in the accompanying notebook at tab 12].

[197] *Rutaganda* at Para 450. [Reproduced in the accompanying notebook at tab 18].

[198] *Id*. at Para 451. [Reproduced in the accompanying notebook at tab 18].

[199] *Krstic* at Para 704. [Reproduced in the accompanying notebook at tab 16].

[200] *Id*. at Para. 709. [Reproduced in the accompanying notebook at tab 16].

[201] *Ruggiu* at Para 17. [Reproduced in the accompanying notebook at tab 17].

[202] *Krstic* at Para. 713. [Reproduced in the accompanying notebook at tab 16].

[203] In *Krstic*, the Trial Chamber states "this co-operation often becomes a question of the quantity and quality of the information provided by the accused." *Krstic* at Para. 716. [Reproduced in the accompanying notebook at tab 16].

before or after conviction may cause the Trial Chamber to shorten the prison sentence.[204] It is important to note that in neither the ICTY nor the ICTR does a reduction of penalty diminish the gravity of the offense.[205]

In the ICTY case, *Prosecutor v. Drazen Erdemovic*, Erdemovic was charged with crimes against humanity and/or war crimes because of his involvement in the killing of unarmed Muslim men.[206] The indictment contended that the men were taken from their homes by bus to a farm where they were taken in "…groups of ten and escorted…to a field next to the farm building, where they were lined up with their backs to a firing squad."[207] The men were then killed execution style.[208] The accused plead guilty to the charge of crime against humanity. Because of his guilty plea, the prosecution dropped the war crimes charge.[209] The sentence stated, "[t]he Trial Chamber considers that in light of all the legal and factual elements which it has reviewed and accepted, it is appropriate to sentence Drazen Erdemovic…to a prison sentence of 10 years with credit given for previous periods spent in custody.[210] Erdemovic appealed the sentence on the grounds that his guilty plea was not informed, and that while duress does not "afford a complete defence to a soldier charged with a crime against humanity and/or a war

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[204] Keller, at pg. 59. [Reproduced in the accompanying notebook at tab 32]; *Kambanda* at Para. 9. [Reproduced in the accompanying notebook at tab 15]; *Erdemovic I* at Para. 42. [Reproduced in the accompanying notebook at tab 14].

[205] *Erdemovic I* at Para. 46. [Reproduced in the accompanying notebook at tab 14]; *Ruggiu* at Para. 80. [Reproduced in the accompanying notebook at tab 17].

[206] *Erdemovic I* at Para. 1. [Reproduced in the accompanying notebook at tab 14].

[207] *Id*. at Para. 2. [Reproduced in the accompanying notebook at tab 14].

[208] *Id*. [Reproduced in the accompanying notebook at tab 14].

[209] *Id*. [Reproduced in the accompanying notebook at tab 14].

[210] *Id*. at Para. 111. [Reproduced in the accompanying notebook at tab 14].

crime…it is admissible in mitigation."[211] Because of the new weight to the mitigating factors, the accused was sentenced on March 5, 1998 to five years imprisonment with credit for time spent in jail since March 28, 1996.[212]

In *Erdemovic I*, the accused plead guilty to crimes against humanity and the Prosecutor dismissed the alternative charge of war crimes.[213] To his guilty plea, the accused added the following statement:

> Your Honour (*sic.*), I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me 'If you're sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.[214]

The Trial Chamber said that the list of reasons that Erdemovic gave for committing these atrocities might mitigate the penalty and depending on the 'value and force' of them, might be used as a defense to the criminal conduct or perhaps even "eliminate the *mens rea* of the offense and therefore the offence itself."[215] In cases of obedience to a superior's order, acting pursuant to those orders does not negate the criminal conduct of the accused.[216] However, the fact that he was acting under orders may serve to mitigate

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[211] *Prosecutor v. Erdemovic*, Case No. IT-96-22-T*bis*, Sentencing Judgments, Mar. 5, 1998 at Para. 7. www.un.org/icty. (Hereinafter *Erdemovic II*). [Reproduced in the accompanying notebook at tab 13].

[212] *Id*. [Reproduced in the accompanying notebook at tab 13].

[213] *Erdemovic I* at Para. 3. [Reproduced in the accompanying notebook at tab 14].

[214] Quoted in *Erdemovic I* at Para. 10. [Reproduced in the accompanying notebook at tab 14].

[215] *Id*. at Para. 14. [Reproduced in the accompanying notebook at tab 14].

[216] *Id*. at Para. 47. [Reproduced in the accompanying notebook at tab 14].

the punishment.[217] The Chamber commented that neither the Statute nor the Rules of Evidence and Procedure of the ICTY require that all the factors enumerated therein be considered in every case.[218] For example, the Trial Chamber said that when crimes against humanity are at issue, the existence of aggravating circumstances is irrelevant.[219]

In deciding on the sentence for Erdemovic, the Trial Chamber also considered the fact that he surrendered voluntarily, "confessed, plead guilty, showed sincere and genuine remorse or contrition and stated his willingness to supply evidence…against others individuals."[220] Based on these factors, the Trial Chamber found Erdemovic guilty of crimes against humanity and sentenced him to one prison sentence of ten years.[221] In *Erdemovic II*, the Trial Chamber took into account more factors as mitigating circumstances.[222] It considered his age, stating that he was young and 'reformable' and deserved a second chance to set his life right.[223] It also took account of his wife and young son, who it said, would suffer if he served a long sentence.[224] It also pointed to his admission of guilt and remorse.[225] Finally, the Trial Chamber said that he took no

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[217] *Id*. [Reproduced in the accompanying notebook at tab 14].

[218] *Id*. at Para. 43. [Reproduced in the accompanying notebook at tab 14].

[219] *Id*. at Para. 45. [Reproduced in the accompanying notebook at tab 14].

[220] *Id*. at Para. 55. [Reproduced in the accompanying notebook at tab 14]; In *Krstic*, the Trial Chamber re-affirms this list of mitigating factors. *Krstic* at Para. 715. [Reproduced in the accompanying notebook at tab 16].

[221] *Id*. at Para. 111. [Reproduced in the accompanying notebook at tab 14].

[222] *Erdemovic II* at Para. 16. [Reproduced in the accompanying notebook at tab 13].

[223] *Id*. [Reproduced in the accompanying notebook at tab 13].

[224] *Id*. [Reproduced in the accompanying notebook at tab 13].

[225] *Id*. [Reproduced in the accompanying notebook at tab 13].

perverse pleasure from his acts.[226] These factors, combined with a change in charge to which he plead guilty (on appeal), resulted in a reduction of sentence to five years, with credit for time served.[227]

In another ICTY case, *Prosecutor v. Radislav Krstic*, General Krstic was charged with genocide, crimes against humanity, and murder.[228] The Trial Chamber concluded that Krstic participated in the ethnic cleansing of Muslim members of the Srebrenica enclave and the killing of military age men in Srebrenica.[229] The Trial Chamber found the accused guilty of murder, cruel and inhumane treatment, terrorizing the civilian population, persecutions and genocide.[230] In considering the punishment the accused should receive, the Trial Chamber stated, "[t]he commission of those crimes would have justified the harshest of sentences in the former Yugoslavia."[231] General Krstic was sentenced to forty-six years imprisonment with credit given for time served.[232] This is the harshest penalty the ICTY has handed down.[233]

In *Krstic*, the Trial Chamber listed factors that may and may not be considered a mitigating circumstance.[234] Factors that might be considered mitigating are assistance to

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[226] *Id*. at Para. 20. [Reproduced in the accompanying notebook at tab 13].

[227] *Id*. at Para. 23. [Reproduced in the accompanying notebook at tab 13].

[228] *Krstic* at Para. 3. [Reproduced in the accompanying notebook at tab 16].

[229] *Id*. at Para. 719. [Reproduced in the accompanying notebook at tab 16].

[230] *Id*. at Para. 727. [Reproduced in the accompanying notebook at tab 16].

[231] *Id*. [Reproduced in the accompanying notebook at tab 16].

[232] *Id*. [Reproduced in the accompanying notebook at tab 16].

[233] Keller, *supra* at 35, 36. [Reproduced in accompanying notebook at tab 32].

[234] *Krstic* at Para. 714. [Reproduced in the accompanying notebook at tab 16].

a crime instead of participation as principle of the crime and duress (though not as a complete defense to the crime).[235] In addition, personal circumstances of the accused such as no prior convictions for violent crimes, significant mental handicap, an immature and fragile personality, and a poor family background, might be considered mitigating "if they illustrate the character and the capacity of the convicted person to be reintegrated in society."[236] A factor that could not be considered mitigating is a personality disorder, such as borderline narcissistic and anti-social characteristics.[237] Krstic did not cooperate with the Prosecutor or the Trial Chamber, which evidenced to the Trial Chamber that he lacked remorse for his actions.[238] The Chamber found that he was "a professional soldier who willingly participated in the forcible transfer of all women, children and elderly from Srebrenica."[239] Factors outlined as aggravating are such things as the level of criminal participation, premeditation, and motivation of the convict.[240] His rank in the VRS Corps serves as an aggravating factor because he exploited his position to participate in genocide.[241] In General Krstic's case, the Trial Chamber found that the aggravating

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[235] *Id*. [Reproduced in the accompanying notebook at tab 16].

[236] *Id*. [Reproduced in the accompanying notebook at tab 16].

[237] *Id*. [Reproduced in the accompanying notebook at tab 16].

[238] *Id*. at Para. 722. [Reproduced in the accompanying notebook at tab 16].

[239] *Id*. at Para. 724. [Reproduced in the accompanying notebook at tab 16].

[240] *Id*. at Para. 705. [Reproduced in the accompanying notebook at tab 16].

[241] *Id*. at Para. 721. [Reproduced in the accompanying notebook at tab 16].

circumstances outweighed the mitigating circumstances.[242] He was found guilty on all counts and sentenced to forty-six years imprisonment.[243]

In a similar case, the ICTR charged Ruggiu with the crime of direct and public incitement to commit genocide and of crimes against humanity.[244] He pled not guilty at first, but then applied for leave to change his plea to guilty.[245] The accused was convicted of both counts and sentenced to twelve years imprisonment for each count to be served concurrently.[246] The Trial Chamber considered the following as aggravating factors: the inherent nature of genocide and crimes against humanity as aggravating offenses, the crimes committed by accused fall under Category (a) of the Rwandan Penal Code,[247] the role of the accused as a radio broadcaster who incited hatred and violence, and finally his awareness of the incitement caused by his words.[248] The Trial Chamber stated, "it is a good policy in criminal matters that some form of consideration be shown towards those who have confessed their guilt…" because it encourages others to come forward.[249]

The Trial Chamber considered the following as mitigating circumstances, the guilty plea that shows his awareness of his guilt and the acknowledgement of his

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[242] *Id* at Para. 726,727. [Reproduced in the accompanying notebook at tab 16].

[243] *Id*. [Reproduced in the accompanying notebook at tab 16].

[244] *Ruggiu* at Para 24. [Reproduced in the accompanying notebook at tab 17].

[245] *Id*. at Para 4, 7. [Reproduced in the accompanying notebook at tab 17].

[246] *Id*. at Verdict. [Reproduced in the accompanying notebook at tab 17].

[247] See *supra* notes 41, 42.

[248] *Ruggiu* at Para. 47-51. [Reproduced in the accompanying notebook at tab 17].

[249] *Id*. at Para. 55. [Reproduced in the accompanying notebook at tab 17].

mistakes, cooperation with the Prosecutor and the absence of a criminal record. In addition, the character of the accused (that he was strongly influenced by people who had an advantage over him), and that he was a 'person of good character imbued with ideals' prior to his involvement in the crimes, are both considered mitigating circumstances. Furthermore, his expression of regret and remorse, his profound sense of guilt and responsibility, his assistance to the victims, his position at the radio station and in political life, and finally, the fact that he did not personally participate in the killings serve to mitigate his sentence.[250] The Trial Chamber believed that the mitigating factors outweighed the aggravating factors, and warranted some clemency.[251] Therefore, the Trial Chamber believing that "the accused has undergone a profound change and that there are good reasons to expect his re-integration into society, sentenced him only to 12 years imprisonment.[252]

In *Prosecutor v. Kambanda*, the ICTR Trial Chamber found Kambanda guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and two counts of crimes against humanity.[253] He was committed to life imprisonment.[254] Kambanda plead guilty to all six counts of the indictment.[255] At the time of the commission of the crimes, the accused was serving as

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[250] *Id*. at Para. 53-56, 59, 61, 67, 69, 71, 73, 75, 77. [Reproduced in the accompanying notebook at tab 17].

[251] *Id*. at Para. 79. [Reproduced in the accompanying notebook at tab 17].

[252] *Id*. at Para. 68, Verdict. [Reproduced in the accompanying notebook at tab 17].

[253] *Kambanda* at Para 40. [Reproduced in the accompanying notebook at tab 15].

[254] *Id*. at Verdict. [Reproduced in the accompanying notebook at tab 15].

[255] *Id.* at Para. 3. [Reproduced in the accompanying notebook at tab 15].

Prime Minister of the Interim Government of Rwanda.[256] He was head of the government and had authority and control over it. [257] The defense listed three factors as mitigating: his guilty plea, his remorse, and cooperation with the prosecutors.[258] The Chamber asserted that a guilty plea should serve as a major mitigating factor.[259] It stated "[i]n civil criminal law systems, a guilty plea may be favorably considered as a mitigating factor, subject to the discretionary faculty of a judge. An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth."[260] The Chamber considered the mitigating factors versus the aggravating factors, that is, the gravity of the crimes committed knowingly and with premeditation, and his position as leader of the government.[261] The Chamber decided that the aggravating factors negate the mitigating ones, and sentenced the accused to life imprisonment.[262]

In *Prosecutor v. Rutaganda*, the Trial Chamber found Rutaganda guilty of genocide, crimes against humanity, extermination; and crimes against humanity, murder.[263] The accused plead not guilty. [264] The Chamber concluded that he played an

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[256] *Id*. at Para. 39. [Reproduced in the accompanying notebook at tab 15].

[257] *Id*. [Reproduced in the accompanying notebook at tab 15].

[258] *Id*. at Para. 46. [Reproduced in the accompanying notebook at tab 15].

[259] *Id*. at Para. 52. [Reproduced in the accompanying notebook at tab 15].

[260] *Id*. at Para. 53. [Reproduced in the accompanying notebook at tab 15].

[261] *Id*. at Para. 61. [Reproduced in the accompanying notebook at tab 15].

[262] *Id*. at Para. 62, Verdict. [Reproduced in the accompanying notebook at tab 15].

[263] *Rutaganda* at Ruling. [Reproduced in the accompanying notebook at tab 18].

[264] *Id*. at 465. [Reproduced in the accompanying notebook at tab 18].

important leading role in these "indisputably, extremely serious" crimes.[265] The defense offered as mitigation the assistance Rutaganda gave to certain victims.[266] However, the Chamber decided that his high position in the *Interahamwe* at the time the crimes were committed, and his knowing and conscious participation in them, and his lack of remorse outweighed his assistance to a few victims.[267] The Trial Chamber decided that the mitigating factors were not enough to negate the aggravating factors.[268] The Trial Chamber sentenced him to one life sentence for all the counts.[269]

Similarly, in *Akayesu*, the Trial Chamber found the accused guilty of all counts of the indictment and sentenced the accused to one term of life imprisonment because it decided that the aggravating circumstances outweighed the mitigating circumstances.[270] The Trial chamber found the accused guilty of one count of genocide; four counts of crimes against humanity, murder or extermination; and one count direct and public incitement to commit genocide among many others.[271] He was sentenced to life imprisonment for genocide, extermination and direct and public incitement to commit genocide.[272] He was sentenced to 15 years for crimes against humanity, murder for each

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[265] *Id.* at Para. 468, 470. [Reproduced in the accompanying notebook at tab 18].

[266] *Id*. at 471. [Reproduced in the accompanying notebook at tab 18].

[267] *Id*. at 473, Ruling. [Reproduced in the accompanying notebook at tab 18].

[268] *Id.* at Para. 473. [Reproduced in the accompanying notebook at tab 18].

[269] *Rutaganda* at Ruling. [Reproduced in the accompanying notebook at tab 18].

[270] *Akayesu*. [Reproduced in the accompanying notebook at tab 12].

[271] *Id.* [Reproduced in the accompanying notebook at tab 12].

[272] *Id*. [Reproduced in the accompanying notebook at tab 12].

of the three counts of murder.[273] The Trial Chamber decided that each sentence should be served concurrently; he was therefore, sentenced to life imprisonment.[274]

IV. Conclusion

As an alternative punishment to the death penalty for persons convicted of murder or mass murder, common law, civil law and international tribunal jurisdictions impose imprisonment. The length of the term is to serve the accepted theories of punishment adopted by each respective jurisdiction and be proportionate to the crime. Proportionality is determined by weighing and considering a variety of factors. Among these factors are the gravity of the offense, the mitigating circumstances and the aggravating factors. While some jurisdictions have explicit rules that the existence of any of a list of aggravating factors necessarily invokes a harsher penalty absent any substantial mitigating factors, others leave this determination up to the discretion of the judge or jury. Most jurisdictions consider premeditation, pleasure from the act, and unprovoked lethal action, among others, as aggravating factors. Similarly, most jurisdictions consider a guilty plea, cooperation with the prosecutor, age, and remorse among factors that mitigate. It is likely for convicts who committed aggravated murder with no mitigating factors that the sentence will be very substantial. Conversely, the sentence for those people who committed murder absent any aggravating factors and with factors that mitigate, the sentence could be as short as five years imprisonment or the minimum

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[273] *Id.* [Reproduced in the accompanying notebook at tab 12].

[274] *Id.* [Reproduced in the accompanying notebook at tab 12].

required by law. Each jurisdiction weighs these factors and considers a punishment that is proportional to the crime in view of these factors, and that fulfills the jurisdiction's theoretical approach to punishment as a legitimate and just punishment.