

Presented to the Office of the Prosecutor of the Rwanda War Crimes Tribunal

A Comprehensive Analysis of the Current Status of International Law in
Relation to Grounds for Mitigation of Sentence

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I. Introduction

A. Issues

Under the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, only cooperation with the Tribunal is listed as a mitigating circumstance that may reduce a defendant's sentence. However, general international practice has recognized other mitigating circumstances that may be grounds for exculpating or otherwise reducing sentences. It is imperative that the Tribunal is fully aware of what these other recognized circumstances are because cooperation from defendants and a multitude of international States is essential to the success of the Tribunal.

Under Article 26 of the Statute of the International Tribunal for Rwanda, when a defendant is sentenced for a crime under the Tribunal's jurisdiction, "Imprisonment shall be served in Rwanda or in any of the States of a list of States which have indicated to the Security Council their willingness to accept convicted persons."¹ It must be recognized that if other States are to voluntarily host Rwandan war crime convicts, those States must trust the process that sentenced the criminals. The national authorities housing the criminals will generally supervise the sentences of those imprisoned within their jurisdiction.² Clearly the rules permit Rwanda to supervise the sentences of those serving time in other States, however it would be impracticable for Rwanda to assume this

¹ Article 26, *Statute of the International Tribunal for Rwanda*, (November 8, 1994).

² Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, Transnational Publishers, 592 (1998). Citing to Rule 104 of the Rwanda Tribunal Rules of Procedure and Evidence which state as follows: All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.

additional responsibility.³ Because of the great responsibility entrusted to outside States, Rwanda must be cautious to sentence suspects in a manner agreeable to them.

It is crucial that the Tribunal assess the status of mitigating circumstances in order to promote defendants to cooperate with the authorities. If defendants understand that there are mitigating factors which could reduce their sentence, they are more likely to cooperate because of the possibility of leniency.

The need for cooperation from the international community requires the Tribunal to assess international sentencing standards. This is to ensure that States housing Rwandan convicts will continue to support the Tribunal and the decisions it makes. Furthermore, if outside States disagree with the Tribunal's sentencing procedure, the Tribunal will find fewer countries willing to volunteer their time, money, and prison space to support the Tribunal's efforts.⁴ Finally, it is important that the Tribunal recognize a variety of mitigating factors so that individual defendants will be more likely to cooperate.

B. Summary of Conclusions

It is important that the Rwanda Tribunal feel confident that its method of sentencing criminals is acceptable within the international arena. The Nuremberg Tribunal first established mitigating circumstances that may be addressed in dealing with the sentencing of war criminals. They recognized in some manner the following mitigating factors:

³ *See id.* (discussing factors such as time and distance that would make Rwandan supervision much more costly).

⁴ *Prosecuting Genocide in Rwanda: A Lawyers Committee report on the ICTR and National Trials*, (visited November 5, 1998), <<http://www.widopen.igc.org/lchr/pubs/rwanda.htm>>July, 1997 p. 7.

1. Military position
2. Following rules of war
3. Taking affirmative action against military leaders.

The Yugoslavian Tribunal recently set the standard for how current War Crime Tribunals should handle sentencing procedure. It recognized important circumstances, some of which the Rwanda Tribunal has already utilized during its short duration. The Yugoslavian Tribunal has recognized the following mitigating factors:

1. Cooperation
2. Superior orders
3. Duress
4. Remorse
5. Personal circumstances
6. Military position.

To date, the Rwanda Tribunal has dealt with mitigation of sentence in a manner that would seem agreeable to the international community. The United States and Canada recognize an extensive list of mitigating factors that the Tribunal should feel comfortable assigning within its cases. These include:

1. Intoxication
2. Personal circumstances
3. Lack of actual harm
4. Familial situation
5. Cooperation with the authorities
6. Acceptance of responsibility
7. Character of the defendant.

As is noticeable, many of the various courts around the world have recognized similar mitigating circumstances. This is important for the Rwanda Tribunal as it should maintain a position that is consistent with other countries with regard to sentencing.

II. The Nuremberg Tribunal

A. General Discussion

It is necessary to understand the developments of international criminal sentencing law in order to comprehend the present status of sentencing guidelines and mitigating circumstances.⁵ Although a great deal of commentary has been made on the Nuremberg trials, very little of it has been focused on the notable lack of sentencing structure in the judgements.⁶ The judges of the Nuremberg International Military Tribunal were given great opportunity to sentence in any manner they saw fit. Article 27 of the Charter of the International Military Tribunal gave The Nuremberg Tribunal nearly unrestricted sentencing power.⁷ Mitigating a sentence was permitted in Article 8 of the Charter if a defendant was acting pursuant to a government or other superior order; however this was conditioned on the Nuremberg Tribunal finding that justice required a reduction.⁸ This rule essentially permitted a Nuremberg defendant to argue the defense of superior orders at the sentencing stage of the trial. Various domestic codes also permit superior orders to be considered as a mitigating factor. This was evidenced by the sentences of low-ranking combatants being reduced in cases where they complied with commands due to a lack of comprehension or circumstance or were deemed to have lacked the opportunity for deliberation and decision making.⁹ There are two elements for the assertion of superior orders. First, the accused must be subordinately ranked

⁵ Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 Loy. L.A. Int'l & Comp. L.J. 123, 7 (1997).

⁶ *See id.*

⁷ Article 27 of the Charter of the International Military Tribunal: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined to be just."

⁸ *See id.* at Article 8, "The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

within the military structure. Second, the defendant must demonstrate that he was unaware of the illegality of the order.¹⁰

The Charter also provided that the Control Council for Germany could “at any time reduce or otherwise alter the sentences, but may not increase the severity thereof....”¹¹ Essentially, the Charter gave the Nuremberg Tribunal “nearly unfettered sentencing discretion.”¹² This unrestricted freedom in sentencing resulted in more than one-third of the convictions handed down by the Tribunal ending in a death sentence.¹³

Despite the lack of mechanisms under the Charter for a defendant to argue for a reduction of sentence, the Nuremberg Tribunal recognized other mitigating circumstances. The Nuremberg Tribunal made detailed analyses of all of the defendants’ actions and by concluding that some individual circumstances deserved recognition as mitigating, the Tribunal limited its sentence to imprisonment rather than death. The following cases best exemplify the various factors the Tribunal recognized during sentencing.

B. Walter Funk

Defendant Walter Funk was one of Hitler’s personal economic advisors who quickly advanced through the Nazi ranks to become a member of the Ministerial Council

⁹ Mathew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 Dick. J. Int’l , 57 (1996).

¹⁰ See *supra* note 5 at 15.

¹¹ Charter at Article 29: In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.”

¹² Pickard, *supra* note 4.

¹³ See *id.*

for the Defense of the Reich and a member of the Central Planning Board.¹⁴ In addressing Funk at his sentencing trial, the Nuremberg Tribunal took note that Funk was not an active player in the destruction of lives.¹⁵ While he had plans of “financing the war,” and he openly expressed his view about the destruction of the Jewish population, the Nuremberg Tribunal clearly did not consider Funk a “major” player in killing civilians.¹⁶ The Tribunal expressly stated that “Funk was not one of the leading figures in originating the Nazi plans for aggressive war.”¹⁷

In sentencing Funk, the Nuremberg Tribunal recognized Funk’s lack of dominance in Hitler’s regime. It carefully recognized that although he held very powerful positions, Funk was simply “never a dominant figure in the various programs in which he participated.”¹⁸ The Tribunal considered this lack of dominance a mitigating factor and therefor spared him the death penalty, sentencing him instead to life in prison. The Funk judgement suggests that not being a leader in the carrying out of war crimes and crimes against humanity is a mitigating factor that may be recognized by the Tribunal as a means to reduce a sentence.

C. Karl Donitz

Defendant Karl Donitz built and trained the German U-boat arm of the Nazi forces.¹⁹ He became Commander of the Submarine arm and eventually rose to become

¹⁴ *Walter Funk*, International Military Tribunal, Trial of the Major War Criminals, Volume 22, (1946) p. 549.

¹⁵ *See id.*

¹⁶ *See id.* at 551.

¹⁷ *See id.* at 550.

¹⁸ *See id.* at 552.

¹⁹ *Karl Donitz*, International Military Tribunal, Trial of the Major War Criminals, Volume 22, p. 556.

the Commander in Chief of the German Navy.²⁰ The Nuremberg Tribunal found that he was “active in waging an aggressive war.”²¹ Despite this acknowledgement, the Tribunal went on to discuss how Donitz was not an initiator of the aggressive war, nor was he aware of the conspiracy to wage war.²² Despite the power Donitz held, the Nuremberg Tribunal found a significant redeeming quality unique to Donitz - a mitigating factor that helped limit his sentence to a mere ten years.²³ In its opinion, the Tribunal recognized that “the Defense has introduced several affidavits to prove that British naval prisoners of war in camp under Donitz’ jurisdictions were treated strictly according to the [Geneva] Convention.”²⁴ The Nuremberg Tribunal recognized Donitz’ actions as being a mitigating factor.

The Donitz opinion suggests that “playing by the rules” may be considered as a factor in sentencing. The Tribunal created a standard to help adjudicate and sentence war criminals: were the actions of the criminal within the realm of the rules of war? Apparently, enforcing a policy of a rules-based, organized and somewhat predictable war was important to the Nuremberg Tribunal. Reducing the sentence of an individual who stood out and obeyed the rules of war while being swarmed by those who abandoned them is the appropriate course of action. This policy could be used to encourage others to act in a similar manner and thus make war slightly more predictable, civilized, and fair.

²⁰ *See id.*

²¹ *See id.* at 557.

²² *See id.* (The court makes this judgement about Donitz, yet still admits that he was fully aware of the mass amounts of people held captive in concentration camps.)

²³ *See id.* at 588.

²⁴ *See id.* at 560.

D. Ernst Von Weizsaecker

Defendant Ernst Von Weizsaecker was State Secretary under Foreign Minister Joachim Von Ribbentrop, a considerably prominent position, as well as a member of the Resistance Movement.²⁵ In this position, it was his duty only to carry out criminal commands directed to him; he was not so prominent as to be considered a planner or organizer of Hitler's aggressive war.²⁶ At trial, Von Weizsaecker argued the defense of mental reservations. He contended that he countered rather than collaborated with the Nazi regime. He testified that he felt Hitler's policies would lead to "death, disaster and destruction."²⁷ Evidence suggested that Von Weizsaecker had sent subtle messages to other countries providing them with warnings about armed invasions and that he also connived to arrange a peace conference between Germany and Poland.²⁸

As Foreign Secretary, however, he was an advisor on policies pertaining to foreign Jews and was consulted as to how to achieve the Final Solution. The evidence made clear exactly how involved Von Weizsaecker was in the extermination of the Jews.²⁹ He approved the deportation of six thousand Jewish people to Auschwitz from France without questioning aloud whether "from the viewpoint of German foreign policy its execution would be a catastrophic mistake . . . [and] would arouse a wave of horror and resentment throughout the world."³⁰

In refusing to accept Von Weizsaecker's claim that he felt the Jews were safer in the camp rather than in France, "where they were subject to reprisals," the Tribunal

²⁵ Lippman, *supra* note 9 at 92, citing to United States v. Von Weizsaecker, XIV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 314, 340-1 (1950).

²⁶ *See supra* note 9 at 92.

²⁷ *See id.*

²⁸ *See supra* note 9 at 93.

²⁹ *See id.* at 94.

³⁰ *See id.*

sentenced him to seven years.³¹ However, the Tribunal felt obligated to recognize his participation as a resistor in the war and therefor, considered his “harbored mental reservations” as a mitigating factor.³² Von Weizsaecker’s sentence was ultimately reduced to time served.

E. Albert Speer

Defendant Albert Speer was a member of the Central Planning Board and of the Reichstag.³³ The Nuremberg Tribunal found that while he was an active participant in the war, his participation did not amount to “initiating, planning, or preparing wars of aggression or conspiring to that end.”³⁴ Speer utilized as much slave labor as he could because he was very concerned with producing war supplies for the German army. However, unlike many other war criminals, Speer was also concerned with the safety of those working under his command in foreign jurisdictions.³⁵ Speer felt that it was important that those who worked faithfully under his rule would be immune to deportation to the German labor camps. Out of this concern, he established so-called “blocked industries.”³⁶ Employees of these industries were immune from deportation to Germany as slave laborers and any worker who had been ordered to go to Germany was relieved of that obligation by going to work for Speer at one of his “blocked industries.”³⁷ The Nuremberg Tribunal looked highly upon this affirmative action and expressly considered it a mitigating circumstance.

³¹ *See id.* at 95.

³² *See id.*

³³ *Albert Speer*, International Military Tribunal, Trial of the Major War Criminals, Volume 22, p. 577.

³⁴ *See id.*

³⁵ *See id.* at 578.

³⁶ *See supra* note 33.

³⁷ *See id.*

The Nuremberg Tribunal also recognized other affirmative steps Speer took to reduce the number of lives taken by Hitler. First, at the end of the war, Speer was one of the few men who had the courage to tell Hitler that the war was lost and followed this sentiment by taking steps to avoid additional casualties and senseless destruction.³⁸ Second, Speer deliberately sabotaged Hitler's "scorched earth" program at considerable personal risk.³⁹ The Nuremberg Tribunal recognized Speer's actions as mitigating factors, which ultimately helped to reduce his sentence to a twenty-year prison term.⁴⁰ The Tribunal seemed to be moved by Speer's ability and desire to save lives at the end of the war. It saw his affirmative steps as something that deserved recognition and as a "just" reason to reduce his sentence.

F. Konstantin Von Neurath

Defendant Von Nuerath Was the Reich Protector for Bohemia.⁴¹ In this position, he abolished all free press, political parties, and trade unions in Czechoslovakia. Von Nuerath instituted programs where Czechoslovakian laborers worked to produce German war industry goods.⁴² Soon after the war began, though, Von Neurath felt the sting of Czechoslovakian student demonstrations. As a result of these uprisings, he encountered trouble controlling his jurisdiction and the Security Police and the SD who arrested many of the protestors and shot the leaders therefor reinforced his power.⁴³ Van Neurath was not made aware of these actions until after they had occurred. Upon knowledge of the

³⁸ See *id.* at 579. (The Tribunal mentions that Speer took "steps" to avoid further loss, however, does not go into detail as to what those steps were.)

³⁹ See *id.*. The Tribunal mentions the "scorched earth" program but then fails to explain what that program was or how Speer interfered with it.

⁴⁰ See *id.* at 589.

⁴¹ See *supra* note 33 at 580.

⁴² See *id.*

events, Van Neurath became enraged and attempted to intervene with the Security Police and the SP for the release of the Czechoslovakian citizens and students.⁴⁴

Actions such as his were contrary to Hitler's command and thus infuriated Hitler. Van Neurath was reprimanded, told that he was not being "harsh enough" and that therefor another individual would be coming to the region to combat the demonstrating resistance groups.⁴⁵ Van Neurath unsuccessfully attempted to dissuade Hitler from taking such steps and then unsuccessfully attempted to resign from the Regime.⁴⁶ Soon after, Van Neurath refused to act in his position any longer and again attempted to resign. When Hitler rejected his second attempt, Van Neurath simply left the country.⁴⁷ The Nuremberg Tribunal recognized the affirmative action Van Neurath took to save the lives of those under his rule. In sentencing, these actions were considered mitigating and Van Neurath was sentenced to fifteen years in prison.⁴⁸

G. Conclusion

The Nuremberg Tribunal was limited to the Rules which recognized only superior orders as a mitigating factor when rendering its decisions. Through these cases, the Tribunal clearly elaborated what other types of behaviors and circumstances should be considered mitigating. Essentially, these cases promulgated three mitigating circumstances that a Tribunal may consider. First, Funk recognized that one who was a prominent figure in genocide yet was never a dominant figure in carrying out or planning

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 582.

⁴⁶ See *id.*

⁴⁷ See *id.* (The case is unclear how Van Neurath was able to escape Hitler's rule without punishment.)

⁴⁸ See *supra* note 33 at 589.

actual destruction should have that lack of participation considered mitigating.⁴⁹ Second, under Donitz, the Tribunal recognized that abiding by United Nations war treaties, such as the Geneva Convention, might be considered mitigating.⁵⁰ Finally, under Von Weizsaecker, Speer and Von Neurath, the Tribunal insinuated that acting against a war crime leader and taking affirmative steps to save lives and prevent the destruction of property should be considered as mitigating circumstances.⁵¹ These cases shed a great deal of light on how War Crime Tribunals have dealt with sentencing in the past and thus how they should act in the future. Tribunals must tailor each sentence to the individual defendant. Part of this responsibility includes an attempt to actively recognize redeeming qualities in those defendants in order to weigh *all* the facts and circumstances to decide on a fair and agreeable sentence.

III. The International Criminal Tribunal for the Former Yugoslavia

A. General Discussion

The International Criminal Tribunal for the Former Yugoslavia is guided by its Rules of Procedure and Evidence in sentencing. In establishing an acceptable sentence, the Tribunal is to look to the general practice regarding prison sentences in the courts of the former Yugoslavia.⁵² The Tribunal examines the gravity of the offense as well as the individual circumstances of the offender.⁵³ Rule 101 of the Rules of Procedure and Evidence list “substantial cooperation with the Prosecutor by the convicted person before

⁴⁹ *See id.* at 552.

⁵⁰ *See id.* at 560.

⁵¹ *See id.* at 577-582.

⁵² Pickard, see *supra* note 5 at 132, citing to Statute of the International Tribunal: Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR 48th Sess., Annex, art. 24, U.N. Doc. S/25704 (1993).

⁵³ *See id.*

or after conviction.” as the only specifically mentioned mitigating factor.⁵⁴ These rules essentially gave the Tribunal extensive opportunity to sentence in any manner it deemed proper with the exception of the death penalty.⁵⁵

B. Drazen Erdemovic

Defendant Drazen Erdemovic was a Croate serving with the Bosnian Serb forces who confessed to taking part in the killings of approximately 1200 people.⁵⁶ In accordance with the rules of procedure, the Prosecutor submitted a brief regarding Erdemovic’s sentencing.⁵⁷ The brief discussed the gravity of the offense, Erdemovic’s individual circumstances, any possible aggravating factors, any mitigating circumstances, and the general practice regarding prison sentences in the former Yugoslavia.⁵⁸ The Prosecutor’s brief discussed the severity of the offense and argued that it contributed as

⁵⁴ Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, Rule 101, Penalties: (A) A convicted may be sentenced to imprisonment for a term up to and including the remainder of the convicted persons life. (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2 of the statute as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any state on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 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 surrender to the Tribunal or pending trial or appeal.

⁵⁵ *Prosecutor v. Drazen Erdemovic*, International Criminal Tribunal for the Former Yugoslavia, Sentencing Judgment, p. 4 (1998). <<http://www.un.org/icty/erdemovic/trialc/judgment/980305ju2-eh.htm>> Citing to Article 24 of The Statute of the International Tribunal, Penalties: (1) The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the Former Yugoslavia. (2) In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offense and the individual circumstances of the convicted person. (3) In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

⁵⁶ Pickard, see *supra* note 5 at 133.

⁵⁷ *See id.* Citing to Prosecutor’s brief on Aggravating and Mitigating Factors re: Drazen Erdemovic, *Prosecutor v. Erdemovic*, Sentencing Judgment of Trial Chamber 1 for International Tribunal, Case No. IT-96-22-T (Nov. 29, 1996).

⁵⁸ *See supra* note 91.

an aggravating factor. The Prosecutor suggested multiple mitigating factors, including superior orders, duress, cooperation with the Tribunal (including his surrender and prompt guilty plea), and his expressed remorse for his criminal conduct.⁵⁹

In his discussion of the concept of superior orders, the Prosecutor examined the required elements to assess its applicability.⁶⁰ The Prosecutor noted that although acting under superior orders is a permissible reason to mitigate a sentence under Article 7(4) of the Yugoslavian Statute, it was not applicable in the case at bar because the orders to execute civilians were *prima facie* illegal.⁶¹ The Prosecutor acknowledged that it was important for the Tribunal to take into account that the defendant was a very low ranking soldier who may have been under significant pressure to comply.⁶² This comment suggests that when a Tribunal is considering mitigating a sentence based on superior orders, it should consider the defendant's rank in the military and the possible retaliation he may suffer if considered disobedient by his superiors.

The Prosecutor and the Trial Chamber both accepted that duress played a part in Erdemovic's actions.⁶³ There are three elements of duress. First, duress requires a threat of imminent danger posed by another person.⁶⁴ Second, the accused must not have been able to escape or otherwise avert the threat of harm without actually committing the crime at issue.⁶⁵ Third, the choice to commit the crime must have been one that any reasonable person in the same or similar circumstances would have chosen.⁶⁶ A defendant is prohibited from asserting duress if he knowingly placed himself in a

⁵⁹ *See id.*

⁶⁰ *See infra* at 3 for the elements of the defense of superior orders.

⁶¹ *See supra* note 91.

⁶² *See id.*

⁶³ *Drazen Erdemovic*, Sentencing Judgement, p. 10.

⁶⁴ Pickard, *supra* note 5 at 16.

⁶⁵ *See id.*

situation which he could foreseeably commit a criminal offense.⁶⁷ Duress is permitted in many jurisdictions as a complete defense, an excuse that may relieve the defendant of any wrongdoing. However, in Yugoslavia, duress is permitted only as a way to mitigate a sentence, not as a complete defense.⁶⁸ Although Erdemovic did not claim duress as a defense, the Prosecutor suggested that it might be considered a factor to mitigate his sentence.⁶⁹

In sentencing, Erdemovic's youth was viewed as important because unlike many of the organizers of the genocide, he was a fairly young man. "The Trial Chamber believes that his circumstances and character (see below) indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so."⁷⁰

The Tribunal also examined his familial situation in determining sentence. It noted that Erdemovic had a wife and young child who he had the obligation of supporting. The Tribunal noted that his wife and child "will suffer hardship due to his serving a prison sentence."⁷¹ It is unclear whether this consideration effected Erdemovic's sentence.

The Tribunal focused extensively on the defendant's good moral character in sentencing.⁷² Erdemovic came forward and confessed to his role in the murders before he was even a suspect. Furthermore, the evidence showed that on one occasion, Erdemovic saved the life of an old colleague. Witness X testified that Erdemovic was

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See supra* note 97 at 8.

⁷¹ *See id.*

with other soldiers when they came across him, and the accused prevented his fellow soldiers from killing him. It was upon Erdemovic's insistence that Witness X was finally released unharmed.⁷³ Evidence also showed that the defendant had helped Serb families and had been imprisoned and beaten by his own forces for acting in such a manner. The Tribunal took note of these actions in mitigating his sentence.

In addressing Erdemovic's admission of guilt, the Tribunal looked very favorably upon him. "The Trial Chamber notes the submission of Defense Counsel that the accused's statements as to guilt should above all be taken as his moral attitude toward the truth on the one hand and as a plea for understanding how far the limits of the abuse of man in this region were stretched, not only in his local environment but also in the wider scope. An admission of guilt demonstrates honesty . . . Furthermore, this voluntary admission of guilt which has saved the International Tribunal time and effort of a lengthy investigation and trial is to be commended."⁷⁴ The policy behind such acknowledgement is to encourage people to come forth to the Tribunal whether already indicted or as unknown perpetrators.

The Tribunal recognized Erdemovic's feelings of guilt and remorse. A defense witness testified that "he had no doubt that the accused's feelings of sorrow and remorse were genuine and real."⁷⁵ Furthermore, the Tribunal recognized that whenever Erdemovic was forced to testify as to the details of his actions, he would repeatedly apologize for his actions.⁷⁶ Finally, the record indicated that Erdemovic had suffered

⁷² See *id.* [Recall Canadian sentencing procedure, that good character is assumed and may not be considered in mitigation. *Infra* at 11.]

⁷³ See *supra* note 97 at 9.

⁷⁴ See *id.*

⁷⁵ See *id.* at 10.

⁷⁶ See *id.*

“post-traumatic stress” because of the atrocities he had committed.⁷⁷ This acknowledgement may suggest that the surfacing of physical symptoms that accompany the guilt and remorse felt by an accused is an important factor in determining whether a defendant’s feelings are genuine.

Finally, the Tribunal examined Erdemovic’s cooperation with the Tribunal, the only mitigating factor specifically listed under Rule 101 of the Rules of Procedure and Evidence of the International Tribunal.⁷⁸ The Tribunal agreed with the Prosecutor that “the collaboration of Drazen Erdemovic has been absolutely excellent.”⁷⁹ The Tribunal also recognized that Erdemovic offered his cooperation and testimony without requesting any assistance from the Prosecutor. This action and the policy reasons supporting a reduced sentence for those who cooperate “justify considerable mitigation.”⁸⁰

The many mitigating factors the Tribunal recognized lead to sentence of only five years for Drazen Erdemovic. It should be noted, however, that Erdemovic was merely a foot soldier in the war. His role was never one of leader, planner, or organizer, nor did he ever incite hatred or violence. The overall sense that Erdemovic’s role was so insignificant seems important. Perhaps these mitigating factors would be less applicable if the defendant was higher up in the chain of command, if he were giving orders rather than receiving them.

⁷⁷ *See id.*

⁷⁸ *See supra* note 88.

⁷⁹ *See supra* note 97 at 10.

⁸⁰ *See id.* (The policy reasons are generally to encourage similar behavior from other accused criminals in the hopes of efficient trials and speedy justice.)

C. Dusko Tadic

Defendant Dusko Tadic was a Bosnian Serb who took part in various brutal and deadly civilian beatings during the course of the ethnic cleansing.⁸¹ Tadic was well aware of the brutal conditions suffered by detainees in camps and over time, took a larger role in reinforcing these conditions.⁸² Throughout the war, Tadic expressed a conscious desire to contribute to the elimination of non-Serbs in his area, and effectuated this goal by severely beating multiple victims in the detention camps. “To have willingly participated in the brutal treatment and exacerbated these conditions serves only to increase the harm which Dusko Tadic inflicted on his victims and accordingly to aggravate his crimes.”⁸³ Because the Tribunal considered the heinousness of his crimes as aggravating, mitigation was a difficult task.

The first mitigating factor the court recognized was that Tadic was never an important leader or organizer in the events at Prijedor.⁸⁴ The Tribunal recognized Tadic as being unimportant in the war, noticing that Bosnian Serb authorities only considered him an ordinary soldier. However, the Tribunal admitted that Tadic may have been a man of some importance in the ethnic cleansing of the Kozarac region, because Tadic played major political role after the cleansing of Muslims from the area.⁸⁵ This admission seems to contradict the principal that one who was a leader in the criminal action at hand should not be offered mitigation for that role. The Tribunal is drawing a very fine line between who should be considered a leader and who should not. The Tribunal is promulgating a rule that the relative power of the defendant should be judged

⁸¹ *Prosecutor v. Dusko Tadic a/k/a "Dule"*, International Criminal Tribunal for the Former Yugoslavia, Sentencing Judgement, p. 2 (1998). <<http://www.un.org/icty/tadic/trialc2/jugement-e/70714se2.htm>>

⁸² See *id.* at 20.

⁸³ See *id.* at 21.

based on how the accuser's superiors viewed him and not on his actual participation.

In examining whether his familial situation should be a mitigating, the Tribunal looked at the effect a lengthy sentence could have on his family and at his upbringing.⁸⁶ The Tribunal recognized that Tadic was raised by his parents "in a spirit of ethnic and religious tolerance and [being] capable of compassion towards and sensitivity for his fellows."⁸⁷ Surprisingly, this type of upbringing was not looked upon favorably. In fact, the Tribunal felt that because Tadic was once such a compassionate individual, his actions were even more horrifying. It expressed a belief that for "such a man to have committed these crimes requires an even greater evil will on his part than that for a lesser man."⁸⁸ The Tribunal considered Tadic's positive upbringing an aggravating rather than mitigating factor. This decision suggests that a Tribunal would look more favorably upon a defendant who claims that he was raised by bigoted and hateful parents rather than parents similar to Tadic's. Upon sentencing, the Tribunal ultimately considered the totality of the circumstances, Dusko Tadic was sentenced to ~~ten~~²⁰ years in prison.⁸⁹

D. Conclusion

The Yugoslavian Tribunal is obligated to examine the gravity of the offense as well as the offender's individual circumstances. In *Erdemovic*, the Tribunal recognized superior orders, duress, cooperation with the Tribunal, including surrender and prompt guilty plea, expressed remorse for criminal conduct, and individual circumstances all as

⁸⁴ See *id*

⁸⁵ See *id.* at 23.

⁸⁶ See *id.* at 22. (The Tribunal never discusses how a particular sentence could effect Tadic's family, it only mentions that this should be a consideration.)

⁸⁷ See *supra* note 115 at 21.

⁸⁸ See *supra* note 115

⁸⁹ See *supra* note 115 at 22.

possible mitigating factors. *Tadic* elaborated these concepts by holding that a leadership position may aggravate specific crimes, thus being only a footsoldier may be a mitigating factor.

IV. The International Criminal Tribunal for Rwanda

A. General Discussion

Sentencing by the International Criminal Tribunal for Rwanda is guided by rule 101 of the Rwanda Tribunal Rules.⁹⁰ This rule dictates that the Tribunal must take into account all aggravating factors, all mitigating factors including substantial cooperation with the Prosecutor, and the general practice regarding prison sentences in the courts of Rwanda. The rule fails to elaborate what factors should be considered mitigating other than substantial cooperation with the authorities. However, the Tribunal's rulings, as well as the general practice of Rwandan courts, have established other acceptable mitigating factors.

With the vast destruction of the 1994 tribal conflict, most judges, Prosecutors, and criminal investigators were killed or fled the country.⁹¹ Furthermore, most court records, law journals, legal equipment, and supplies were destroyed or stolen.⁹² As a result,

⁹⁰ Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda Rule 101, Penalties: (A) A convicted may be sentenced to imprisonment for a term up to and including the remainder of the convicted persons 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: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of Rwanda; (iv) the extent to which any penalty imposed by a court of any state on the convicted person for the same act has already been served, as referred to in Article 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 surrender to the Tribunal or pending trial or appeal.

⁹¹ *Prosecuting Genocide*, *supra* note 4 at 25.

⁹² *See id*

obtaining actual case law from Rwandan courts is impracticable. In 1996, the Rwandese Transitional National Assembly and the Constitutional Court passed the genocide law that now controls genocide cases in the national courts of Rwanda. This law provides a basis for the Tribunal to use in assessing the general practice regarding prison sentences in the courts of Rwanda. The genocide law establishes degrees of culpability based on several factors and then offers reduced sentences, in many cases, if the accused admits guilt.⁹³

Article 2 of the law establishes culpability based on the accused's actions. Category 1 covers criminals deemed most culpable, the organizers, planners, instigators, supervisors, and leaders of the genocide. These offenders are considered the worst type of criminals under the law and as such are not given the possibility of having their sentences mitigated; they receive the death penalty.⁹⁴ Category two offenders are those who are the perpetrators or accomplices of intentional homicide or serious assaults resulting in death. The law provides that if a category two offender confesses guilt, the sentence will be between seven and fifteen years in prison depending on when the accused offers a confession. Comparatively, a category two offender who does not plead guilty will receive life in prison. The law provides a defendant great opportunity to have his sentence reduced by cooperating with the authorities. This law suggests that the Tribunal should also have to mitigate due to cooperation. However, Rule 101 does not expressly mandate that the Tribunal follows the lead of the Rwandan courts, only that they "take into account" the general court practices of Rwanda.⁹⁵ The idea that the general practices are not mandatory for the Tribunal to follow is exemplified by the

⁹³ *Prosecuting Genocide*, supra note 4 at 28.

⁹⁴ *See id.*

Tribunal's refusal to sentence criminals to death and by its refusal to ignore mitigating factors.⁹⁶

The discrepancy between the court practices and those of the Tribunal were also an issue in Yugoslavia. The Yugoslavian Tribunal recognized this conflict, yet maintained its position that it is very important that those charged with war crimes cooperate in order to efficiently try criminals. The Tribunal also felt that cooperation by less significant offenders would ultimately lead to the capture and conviction of those persons responsible for instituting the policies without which the violence would never have been carried on such a widespread basis.⁹⁷

B. Jean Kambanda

Defendant Jean Kambanda was the Prime Minister of Rwanda at the time the genocide occurred in 1994.⁹⁸ Kambanda plead guilty to all counts set forth in the indictment against him.⁹⁹ Upon his admissions, the Tribunal did not expressly agree to lessen the charges or the sentence against Kambanda. In assessing his sentence, the Tribunal, in accordance with Rule 101, examined the practice of the Rwanda courts, examined all aggravating factors, and all mitigating factors. The court concluded that Kambanda should spend the remainder of his life in prison.

Upon a review of applicable "local" law, the Tribunal found Kambanda was a category 1 offender. As such, he should be sentenced to death with no possibility of mitigation. However, the Tribunal felt that "having recourse to the general practice

⁹⁵ See *supra* note 123.

⁹⁶ Prosecuting Genocide, *supra* note 4 at 29.

⁹⁷ Morris and Scharf, *supra* note 2 at 588.

regarding prison sentences in the courts of Rwanda” was not a command to follow those courts’ lead.¹⁰⁰ Furthermore, the Rwanda courts mandated death for a defendant guilty of category one offenses. The Rwanda Tribunal, under its Rules has no authority to sentence one to death. The Tribunal recalled that unlike the local courts, it was also bound to examine mitigating and aggravating factors as well as the general practice in the courts of Rwanda.¹⁰¹

Regarding aggravating factors, the Tribunal noted the absolute heinousness of the crimes Kambanda was guilty of. It considered the gravity of the crime of genocide, of which Kambanda pled guilty, so awful that merely its commission is inherently aggravating.¹⁰² The Tribunal also found it particularly bothersome that Kambanda, as Prime Minister, had a diplomatic duty to be responsible for the maintenance of peace and security in his region. Further, the Tribunal found that such an abuse of power is generally considered an aggravating factor.¹⁰³

In mitigation, the Tribunal recognized the guilty plea submitted by Kambanda. The plea agreement stated that “Jean Kambanda agrees that he is pleading guilty to the crimes because he is in fact guilty and acknowledges full responsibility for his actions that are the subject of the indictment. . . Jean Kambanda and the Office of the Prosecutor acknowledge that sentencing is at the discretion of the Trial Chamber.”¹⁰⁴ While the Tribunal noted that this agreement was a positive step for Kambanda, it had problems with its submission because “Kambanda has offered no explanation for his voluntary

⁹⁸ *The Prosecutor v. Jean Kambanda*, The International Criminal Tribunal for Rwanda, ICTR 97-23-S.p.1. <<http://www.ictt.org/english/judgements/kambanda.html>> (visited October 3, 1998).

⁹⁹ See *supra* note 131 at 2.

¹⁰⁰ See *id.* at 8.

¹⁰¹ See *id.*

¹⁰² See *id.* at 14.

¹⁰³ See *id.*

participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims in Rwanda, even when given an opportunity to do so.”¹⁰⁵ This assertion alleviates the general principal that simply pleading guilty is a sufficient show of remorse. Even with these reservations, the court affirmatively recognized that his prompt guilty plea is considered a major mitigating factor.¹⁰⁶

Even with this recognized mitigating factor, the Tribunal sentenced Jean Kambanda to lifetime imprisonment.¹⁰⁷ In its reasoning the Tribunal focused on the extreme brutality and callousness of the offender and of the offense. It noted that Kambanda was possibly the most powerful man in Rwanda at the time of the genocide. It also recognized that in this position, keeping peace in the region was his specific obligation and by acting in such an adverse role, his situation was aggravated. “On the basis of all of the above, the Chamber is of the opinion that the aggravating circumstances surrounding the crimes committed by Jean Kambanda negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post, at the time he committed the said crimes.”¹⁰⁸

This decision will undoubtedly be appealed. The Tribunal boldly sentenced Kambanda regardless of the fact that he had cooperated extensively with the authorities. Rule 101 specifically mentions this type of behavior as that which should be mitigating. The court recognized this obligation and did examine all of the possible mitigating factors as evidenced by its statement that his cooperation was a “significant” mitigating

¹⁰⁴ *Kambanda Appeals Life Sentence*, Press Release AFR/98 L/2899 (11 September 1998) p.1.

¹⁰⁵ See *supra* note 131 at 15.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 18.

¹⁰⁸ See *id.* at 17.

factor.¹⁰⁹ However, Rule 101 also mandates that the Tribunal examine aggravating factors surrounding the criminal activity.¹¹⁰ These factors could not be overcome with any amount of cooperation. The Tribunal had a duty to recognize that Kambanda organized the widespread policies used to destroy 500,000 lives and millions of dollars worth of property. Under local Rwandan law, Kambanda would have been sentenced to die regardless of his cooperation. Because of his significant role, justice required that he be sentenced to life in prison.

V. Domestic Approaches

A. Canada: Starting – Point Approach

Canada has employed a two-step “Starting – Point Approach” to sentencing.¹¹¹ First the judge determines the range of sentences available to him as applicable to a specific defendant. Using that range as a starting point, the judge must then adjust the sentence upward or downward based on factors relating to the individual accused, what the crime was, and how it was carried out.¹¹² The Starting – Point Approach employed in Canada mandates that the sentencing judges consider all aggravating and mitigating factors that are relevant to the accused. This approach, followed by many Canadian jurisdictions is consistent with the Canadian belief that all sentences assigned should reflect not only the crime committed, but also the individual circumstances of the

¹⁰⁹ See *infra* at 29.

¹¹⁰ See *supra* note 123.

¹¹¹ *Terry McDonnell v. Her Majesty the Queen* [1997] 1S.C.R. 948, p. 22.

¹¹² See *id.* (Citing to *R. v. Hessam*, 43 A.R. 247 (C.A.) (1983) and *R. v. Sandercock*, 22 C.C.C. (3d) 79 (Alta. C.A.) (1985).

accused.¹¹³ As such, Canadian sentences must be individually tailored in every criminal circumstance. With this mandate, however, extenuating circumstances may be used not only to reduce an individual's sentence, but some criminals' circumstances warrant a sentence in excess of the "usual range of punishment."¹¹⁴ This procedure differs from the Nuremberg Tribunal that could only use one's personal circumstances to decrease a sentence.¹¹⁵

The rules are quite vague as to exactly what mitigating factors a Canadian court may consider in sentencing. It is clear, however, that having a strong moral character and a lack of criminal record will not affirmatively aid a defendant. The Starting – Point Approach is based on the assumption that offender is a good person with high moral character and no prior criminal record.¹¹⁶ Because of this standard courts are not permitted to use character and lack of prior criminal acts to mitigate one's sentence.

In *Terry McDonnell v. Her Majesty the Queen*, the court mentions intoxication as an example of a personal circumstance that may be considered in sentencing. The defendant was being sentenced for a number of sexual assault counts and argued that he was so intoxicated that he "spontaneously" committed these crimes.¹¹⁷ The court recognized that while being drunk may be considered, it should bear very little weight in proscribing a sentence. An individual being sentenced to a singular offense by claiming that he was drunk when the act was committed may argue intoxication. However, in the context of a war crime, this circumstance should be subject to much stricter scrutiny. For an individual to assert drunkenness at a trial for genocide or for war crimes, that person

¹¹³ See *supra* note 52 at 23.

¹¹⁴ See *id.*

¹¹⁵ See *infra* at 3.

¹¹⁶ See *supra* note 52 at 33.

would probably need to show a long history of abuse and constant intoxication. This is because generally those being tried for war crimes have participated in criminal acts over a long period of time, and are not simply on trial for one act.

The Canadian courts look not only to the individual circumstances of the accused, but also to exterior factors. Under Canadian law, in order for there to be a criminal trial, there must be a victim who suffered actual harm.¹¹⁸ The court will explore the extent of the victim's injury in determining a sentence. For example, if evidence shows that a victim was only slightly traumatized, the court may use this evidence as a way to mitigate the accused sentence. However, this method of examination can be a double-edged sword because factors such as this may also be used to increase the severity of a sentence. In the context of a trial for Genocide, it is unclear how effective this factor would be. For example, if a defendant killed three hundred people, would it matter how he perpetrated those crimes, should he receive a shorter sentence for a more "civilized" execution as opposed to a painful, drawn out, excruciating one? It does not seem that the "lessened" harm to the victim should justify a reduction of sentence.

The Canadian courts also look to the parties not involved with the actual case when determining an appropriate sentence. In the case at bar, the accused had responsibility for caring for his family.¹¹⁹ The court considered this a mitigating factor.¹²⁰ Furthermore, because his family was so willing to support the rehabilitation of

¹¹⁷ See *supra* note 52 at 35.

¹¹⁸ See *id.* at 35.

¹¹⁹ See *supra* note 52 at 35.

¹²⁰ See *id.*

the accused, it recognized that one's familial situation should be considered in sentencing.¹²¹

Concerned with obtaining some amount of uniformity in its rulings, the Canadian Courts also take the individual circumstances of each defendant into consideration when determining an appropriate sentence.¹²² Personal factors that could be considered as mitigating may encompass a wide range of circumstances such that compiling a list of acceptable personal factors that may be used to mitigate a sentence would be impossible.¹²³ Because of the emphasis placed on individual circumstances, these factors are very important to the sentencing procedure in Canada.

B. United States: Federal Sentencing Guidelines

In the United States, the Federal Sentencing Guidelines are the primary source for Federal judges to look toward in sentencing criminals. The Guideline system is similar to the Starting – Point Approach used in Canada. Under the Guidelines, every crime is assigned a base range of sentences that can be deviated from upwardly or downwardly based on the circumstances of each individual case. Like Canada, the United States courts have a duty to individualize the imposed sentence.¹²⁴ Appellate courts will overturn the sentence of a lower court if it finds that the lower court “adopted a rigid, mechanistic approach to sentencing and failed to consider the individual mitigating

¹²¹ *See id.*

¹²² *See infra* at 13.

¹²³ *See supra* note 52 at 35.

¹²⁴ *United States of America v. Armando Jimenez-Rivera, United States of America v. Jose Francisco Rivera-Lopez*, 842 F2d 545, 548 (1st Cir. 1998).

circumstances of each defendant.”¹²⁵ Although, having one’s sentence overturned for this reason is a very difficult task because American judges have such broad discretion in sentencing.

The broadest Guideline principal used to determine sentences with regard to personal circumstances is section 1B1.4.¹²⁶ The broad language of 1B1.4 permits a court to examine nearly every characteristic of a defendant during the sentencing procedure.¹²⁷ For example, under 18 USCS section 401, fear for personal safety and the safety of one’s family are legitimate factors that may be used to mitigate one’s sentence.¹²⁸ Another example is mental condition. Although in many instances mental illness, permanent or temporary may not be considered as a defense, it may be factored in at sentencing as mitigating.¹²⁹ Other factors that seemingly may be considered are the age of the defendant, his family background, and the role he played in the crime. The broad language in section 1B1, 4 allow a sentencing judge to consider almost anything about the defendant, his family, or the offense when determining an appropriate sentence.

¹²⁵ See *id.* Citing to *United States v. Wardlaw*, 576 F2d 932, 938 (1st Cir. 1978) and *United States v. Foss*, 501 F2d 522, 527-29 (1st Cir. 1974).

¹²⁶ *Federal Sentencing Guidelines Manual*, United States Sentencing Commission (1988 Edition), section 1B1.4. Information to be Used in Imposing Sentence: “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law.”

¹²⁷ See *id.* (For example, recently the Florida House of Representatives addressed the issue of intoxication as a mitigating factor. Citing to *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), the Florida House recognized the right of the state to preclude a jury from considering a criminal’s intoxication as a defense. Based on this right and on the fact that the Guidelines do not affirmatively provide for a reduction based on alcohol or drug dependency, the Florida House voted against allowing such a factor to be considered in mitigation.) Florida House of Representatives Bill 0417 (1997).

¹²⁸ 18 USCS section 401, commentary notes, “Fear for personal and family safety is legitimate factor in mitigation of sentence for criminal contempt under 18 USCS s. 401”, citing to *United States v. Gomez* (1977, CA5 Tex) 553 F2d 958.

¹²⁹ 18 USCS section 856, commentary notes, “Although mental condition may not be such that it would operate as defense to offense committed, it might well be mitigating factor in determining sentence”, citing to *United States v. Haas*, 22 CMR 868 (1956), petition den. 22 CMR 331.

Section 5K2.0 reiterates that a sentence may be reduced or increased because of aggravating or mitigating circumstances.¹³⁰ The statute goes on to acknowledge that listing all of these circumstances would be nearly impossible. “Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.”¹³¹

The Guidelines dedicate specific sections to other substantial mitigating factors the United States courts *may* consider in sentencing a defendant. Section 5K1.1 states the court may depart from the guidelines if the defendant “has provided substantial assistance in the investigation or prosecution of another who has committed an offense.”¹³² The statute addresses factors that a court should examine before deciding whether a defendant’s cooperation with the authorities warrants a reduction of sentence. The court will examine the usefulness of the defendant’s information; the truthfulness, completeness, and reliability of the defendant’s information; the timing of the defendant’s assistance; and whether the defendant or his family risked or suffered any injury resulting from the defendant’s cooperation.¹³³ This statute effectively gives a court the power to reduce (and presumably increase) a defendant’s sentence from a base guideline range if

¹³⁰ Guidelines section 5K2.0. Grounds for Departure (Policy Statement): Under 18 U.S.C. s. 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the sentencing commission in formulating the guidelines that should result in a sentence different from that described.”

¹³¹ *Id.*

¹³² Guidelines section 5K1.1. Substantial Assistance to Authorities (Policy Statement): Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines. (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following: (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the governments evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant’s assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant’s assistance.

that defendant substantially assists the authorities with a different case. It is crucial to note, however, that under no conditions is a court obligated to reduce a sentence based on the cooperation of a defendant. The statute is carefully worded using the term “the court *may* depart” rather than “the court *shall* depart” from the guidelines.¹³⁴

Acceptance of responsibility is another mitigating factor the Guidelines recognize as important.¹³⁵ Unlike most other sections in the Guidelines, when a defendant accepts responsibility for his crime, judges are often required to reduce his sentence. This section lacks words of choice, such as “may” and “should” but rather mandates action on the part of the judge. Subsection (a) states that “if the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by two levels.”¹³⁶ Subsection (b) provides for a court to decrease the sentence further if the defendant accepts responsibility quickly and notifies the prosecution early in the trial as to his admissions so that the entire proceedings may be conducted in a timely, efficient manner.¹³⁷ Generally, the acceptance of guilt must come early enough in the proceedings that the prosecution can employ some benefit from the defendant’s admissions.¹³⁸ Therefor, a defendant who pleads guilty is usually not afforded the opportunity to argue for mitigation based on his admission. This sentencing rule is less flexible than many other court rules, as it

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ Guidelines section 3 E1.1. Acceptance of Responsibility: (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels. (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of the subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps: (1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by one additional level. (The reference to levels is unimportant is pertaining to this discussion. Essentially, acceptance of responsibility is a mandatory mitigating factor.)

¹³⁶ *Id.*

¹³⁷ *Id.*

mandates when a judge must reduce or otherwise alter a sentence. Case law has dealt with this restriction by giving judges leeway in addressing this issue. *United States v. Urregolinales* recognized that “the sentencing judge is in a unique position to assess the defendant’s acceptance of responsibility . . . and [thus] held [that] the determination of whether a defendant is entitled to an acceptance of responsibility adjustment is a factual issue reviewable under a clearly erroneous standard.”¹³⁹ This case law gives courts more flexibility than if it were guided solely by the statute.

In the United States, aggravating factors and mitigating factors often play a role in sentencing. The courts often weigh these factors against each other in order to decide whether a sentence should be increased or decreased. For example, if a defendant was a “leader, organizer, manager, or supervisor” in any criminal activity, his sentence *must* be increased.¹⁴⁰ However, if the defendant’s role in the crime was “minor or minimal” the Guidelines mandate a reduction in sentence.¹⁴¹ General United States law recognizes that just as there are innumerable mitigating factors, there are also aggravating factors. Because of this, sections 3B1.1 and 2 often act to counterbalance each other. For example, if a defendant was a major planner of organized crime, his sentence would be increased. However, if he surrendered himself early in the investigation and allowed himself to be used as an informant, his sentence may be reduced. It is possible, though,

¹³⁸ See *supra* note 76 at commentary.

¹³⁹ *United States of America v. Wilson Fernely Urregolinales*, 879 F2d) 1234, 1239 (4th Cir. 1989).

¹⁴⁰ Guideline section 3B1.1. Aggravating Role: Based on the defendant’s role in the offense, increase the offense level as follows: (a) If the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels. (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels. (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels. Guideline section 3B1.2.

¹⁴¹ Guidelines section 3B1.2. Mitigating Role: Based on the defendant’s role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

that even with such a strong mitigating factor, his sentence would still not be reduced below the guideline amount due to his active role in planning the crime, an aggravating factor.

The United States' complicated sentencing procedures leave a great deal of leeway as to what a court may consider mitigating. The courts "may consider, without limitation, any information concerning the background, character, and conduct of the defendant."¹⁴² The court may also depart from the guidelines if the defendant "has provided substantial assistance in the investigation or prosecution of another who has committed an offense."¹⁴³ Finally, under the Guidelines, when a defendant accepts responsibility for his crime, judges are often required to reduce his sentence. Generally, the acceptance of such guilt must come early enough in the proceedings as to benefit the Prosecutor.¹⁴⁴

VI. Conclusion

It is important that the Rwanda Tribunal feel confident that its method of sentencing criminals is acceptable within the international arena. The Nuremberg Tribunal first established mitigating circumstances that may be addressed in dealing with the sentencing of war criminals. The United States and Canada recognize an extensive list of mitigating factors that the Tribunal should feel comfortable assigning within its cases. The Yugoslavian Tribunal recently set the standard for how current War Crime Tribunals should handle sentencing procedure. The Yugoslavian Tribunal recognized important circumstances which the Rwanda Tribunal has already utilized during its short

¹⁴² See *supra* note 67.

¹⁴³ See *supra* note 73.

duration. To date, the Rwanda Tribunal has dealt with mitigation of sentence in a manner that would seem agreeable to the international community.

¹⁴⁴ See *supra* note 76.

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