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Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals

Christine Bishai*

*Sentencing decisions are “the symbolic keystone of the criminal justice system.”*¹

*[A] slap on the wrist of the offender is a slap in the face of the victims. -- Mark B. Harmon and Fergal Gaynor, ICTY Prosecutors*²

¶1 In the aftermath of the atrocities of the Second World War, international law developed a doctrine under which superiors could be held accountable for the acts of their subordinates during times of conflict such as civil war or genocide.³ This doctrine, known as “superior responsibility”⁴ or “command responsibility,” acknowledges the social environment in conflict-based situations in which superiors’ failure to act provides tacit guidelines for the behavior of their subordinates and others within the superiors’ sphere of influence.⁵ Superiors can thus be held responsible for the criminal acts of their inferiors. The International Criminal Tribunal for the former Yugoslavia (ICTY) has gone as far as to state that “the criminal culpability of those leading others is higher than those who follow.”⁶

¶2 However, successful prosecution of superior responsibility charges remains challenging. For example, on November 16, 2012, the ICTY overturned the convictions of two Croatian Generals notwithstanding the prosecution’s argument that the Generals were aware of the

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¹ RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (Alfred Blumstein, Jaqueline Cohen, Susan E. Martin & Michael H. Tonry eds., 1983).

² Mark B. Harmon & Fergal Gaynor, *The Sentencing Practice of International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes*, 5 J. INT’L. CRIM. JUST. 683, 712 (2007).

³ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 241 (2d ed. 2008).

⁴ “Superior responsibility” is a term that is now often used interchangeably with “command responsibility.” Historically, the command responsibility doctrine was initially confined to military commanders; however, it has been expanded in the ad hoc tribunals such that even civilian superiors can be held liable for failing to prevent or punish the crimes of his or her subordinates. I will use the more current and inclusive term of superior responsibility.

⁵ ILIAS BANTEKAS, PRINCIPLES OF DIRECT & SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW 70 (2002).

⁶ ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vuković*, IT-96-23-T & IT-96-23/I-T, Judgment, ¶ 863 (Feb. 22, 2001).

likelihood that their forces would deport villagers, plunder, and murder in four towns.⁷ The Trial Chamber found that although they were generals, they did not possess “effective control” over their subordinates.⁸

¶3 The full extent of the doctrine of superior responsibility has, however, remained largely theoretical; although several superiors have been charged and convicted within international criminal tribunals, few have been sentenced to the maximum punishments available to judges within the broad scope of the latter’s discretion. Even individuals convicted on behalf of their subordinates’ most serious crimes—for example, torture and willful killing—have received sentences widely considered disproportionately short or lenient.⁹ Observers have noted the startling discrepancy between the destructiveness and notoriety of a convicted individual’s crimes and the judges’ sometimes baffling reluctance to hand down severe sentences.¹⁰

¶4 In this essay, I will examine the doctrine of superior responsibility, its existing jurisprudence within international tribunals, and the relative lack of severity of the sentences courts have issued to individuals convicted under the doctrine. In analyzing the latter, I suggest that judges’ reluctance to severely sentence convicted offenders stems less from limitations on the authority granted to them by statutes and case law than from judges’ analyses overemphasizing a superior’s direct participation in the crime and its perpetration through an ethnic or genocide-based motivation.

¶5 Part I provides an overview of the doctrine of superior responsibility; Part II describes the sentencing guidelines and wide discretion judges have available to them in determining sentences; Part III summarizes the jurisprudence on the subject generated by the tribunals for the former Yugoslavia, Rwanda, Sierra Leone and by the Rome Statute of the International Criminal Court and analyzes the variables affecting judges’ decisions to issue relatively lenient sentences; and Part IV looks to the purposes of punishment and offers arguments in favor of less lenient sentencing and suggestions for potentially more just sentences of individuals convicted on superior responsibility charges.

I. THE DOCTRINE OF SUPERIOR RESPONSIBILITY

¶6 Under the doctrine of superior responsibility, first applied in the controversial Yamashita case¹¹ of 1946, superiors have a duty to refrain from issuing unlawful orders, as well as an obligation to prevent or at least punish crimes perpetrated by their subordinates during the course of a conflict. Scholars consider superior responsibility to be an omission-oriented form of individual criminal liability wherein the commander can be punished for failing to act.¹² Superior responsibility is often cited as one of the primary justice-seeking tools at the disposal of

⁷ ICTY, Prosecutor v. Ante Gotovina & Mladen Markač, IT-06-90-A, Judgment, ¶ 137 (Nov. 16, 2012).

⁸ ICTY, Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač, IT-06-90-T, Judgment (Apr. 15, 2011).

⁹ Harmon & Gaynor, *supra* note 2.

¹⁰ *Id.*

¹¹ ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES: YEAR 1946 266, 269 (H. Lauterpacht et al. eds., 1951). The *Yamashita* case (*In re Yamashita*, 327 U.S. 1 (1946)) has been widely criticized due to the way in which the Military Commission presumed the existence of the requisite knowledge on the part of the accused. In his famous dissenting opinion, Justice Murphy pointed out that nowhere had Yamashita been charged with direct responsibility for having personally committed or ordered the crimes in question, nor had it been alleged even that he had any knowledge of their commission. Yamashita was simply accused of failure to provide the effective control of his troops as required by the circumstances.

¹² RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 147 (Olaoluwa Olusanya ed., 2007).

international tribunals. The doctrine is used to “establish the criminal responsibility of local or central leaders of countries whose military, political, or administrative structures have been involved in the commission of serious international crimes.”¹³

¶7 The doctrine of superior responsibility has been codified in the Statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and, more recently, the International Criminal Court (hereinafter, ICTY, ICTR, SCSL, and ICC, respectively).¹⁴ At the ad hoc tribunals, the contours of the superior responsibility doctrine have been expounded upon in significant ways: superior responsibility applies to civilian or political leaders and not merely to military leaders, and superior responsibility can be implicated in internal conflicts within a given state or territory and need not be for crimes in a cross-border conflict.¹⁵

¶8 The discussion of superior responsibility has included a debate over exactly what crime the accused would be guilty of if convicted: would the superior be indirectly held criminally liable for the crimes (e.g. torture) carried out by his subordinates or is the superior criminally liable for his personal misconduct in failing to prevent or punish those subordinates responsible for the crimes? This underlying idea was clarified in the ICTY Halilović case which articulated that the latter is the basis for culpability—that is, the superior’s failure to act when he had a duty to do so.¹⁶ The Halilović Chamber viewed superior responsibility—and not any imputed criminal responsibility for the subordinate’s acts—as the basis of liability for the superior’s omission. The ICTY stance is not to be confused with either strict or vicarious liability, which the tribunal has consistently rejected as the foundational bases for apportioning guilt to a superior who failed to act.¹⁷

¶9 Another notable aspect of superior responsibility is that causality between the superior’s failure to prevent or punish and his subordinates’ criminal acts need not be demonstrated.¹⁸ Similarly, the charge can only be invoked against a superior when the crimes of his subordinates have actually been completed, and are not still inchoate.¹⁹

¶10 The ICTY first grappled with the scope of superior responsibility in the landmark Delalić (Čelbići Camp) decision of 1998.²⁰ Subsequent case law has continually cited and applied the elements laid out in this decision. Upon acknowledging that the particular crime was committed,

¹³ Carla Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 J. INT’L CRIM. JUST. 516–17 (2004).

¹⁴ ICTY Statute, art. 7(3) (Sept. 2009); ICTR Statute, art. 6(3) (Jan. 31, 2010); SCSL Statute, art. 6(3), (Apr. 12, 2002); and ICC Statute, art. 28 (Nov. 29, 2010).

¹⁵ See generally, discussion on ICTR cases, *infra* Section IV(B)(2).

¹⁶ ICTY, Prosecutor v. Sefer Halilović, IT-01-48-T, Judgment, ¶ 54 (Nov. 16, 2005) [hereinafter Halilović Trial, IT-01-48]. See also ICTY, Prosecutor v. Enver Hadžihasanović & Amir Kubura, IT-01-47-T, Judgment, ¶ 69–75 (Mar. 15, 2006) [hereinafter Hadžihasanović Trial, IT-01-47-T] (“...because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.”).

¹⁷ This has been rejected repeatedly in the ad hoc tribunals’ case law. See ICTY, Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as “Pavo,” Hazim Delić & Esad Landžo aka “Zenga,” IT-96-21-T, Judgment, ¶ 239 (Nov. 16, 1998); Hadžihasanović Trial, IT-01-47-T, *supra* note 16.

¹⁸ Delalić et al., IT-96-21-T, Judgment, *supra* note 17, ¶¶ 398–400; ICTY, Prosecutor v. Tihomir Blaskić, IT-95-14-A, Judgment, ¶ 77 (July 29, 2004).

¹⁹ ICTY, Prosecutor v. Pavle Strugar, IT-01-42-T, Judgment, ¶ 373 (Jan 31, 2005).

²⁰ Delalić et al., IT-96-21-T, Judgment, *supra* note 17, ¶ 346.

tribunals look for three essential elements of liability under superior responsibility: (i) the existence of a superior-subordinate relationship; (ii) the superior's knowledge or reason to know that the criminal act was about to be or had been committed; and (iii) the superior's failure to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.²¹ Generally, one of the most difficult-to-prove elements is that the superior had effective or de facto control over the subordinates. The absence of an existing de jure hierarchical structure does not impede the ability to convict someone under the superior responsibility doctrine.²²

¶11 The other element that is often challenging for the prosecution to show is that of knowledge or breach of the obligation to acquire knowledge about—or “turning a blind eye” to—the crimes.²³ The Rome Statute uses the stricter “should have known” standard of mens rea, instead of “had reason to know,” the latter as defined in the ICTY and ICTR Statutes.²⁴

¶12 Prosecutors often have difficulty in proving that an individual is guilty of superior responsibility and not merely guilty of direct perpetration of specific crimes.²⁵ Superior responsibility is among the forms of liability least likely to result in successful conviction under international criminal law; it has been successfully applied in a very limited number of cases.²⁶ As of 2007, of the ninety-nine accused persons who had faced trial at the ICTY and the ICTR, only fifty-four were prosecuted on a theory of superior responsibility and only ten were convicted.²⁷ This is because the aforementioned effective control and knowledge elements are often very difficult to prove in, or after, a conflict situation. As the doctrine has developed, the Chambers at the ICTY and ICTR have chosen to apply a rigorous and high threshold in finding the existence of superior responsibility's required elements.²⁸ Even when faced with high-level atrocities, the tribunal judges take the prosecution's burden of production seriously. Moreover, even in cases involving atrocious crimes and bolstered by significant evidence, the prosecution has had difficulty overcoming its burden.

²¹ *Id.*

²² *Id.* ¶¶ 377–78; ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić & Esad Landžo (aka “Zenga”)*, IT-96-21-A, Judgment, ¶¶ 197–98 (Feb. 20, 2001); ICTY, *Prosecutor v. Dario Kordić & Mario Čerkez*, IT-95-14/2-T, Judgment, ¶¶ 405–07 (Feb. 26, 2001).

²³ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 249 (2d ed. 2008).

²⁴ ICTY Statute, art. 7(3) (Sept. 2009); ICTR Statute, art. 6(3) (Jan. 31, 2010); and ICC Statute, art. 28(a)(i) (Nov. 29, 2010).

²⁵ Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUST. 599, 602 (2007).

²⁶ *Id.*

²⁷ These do not include accused persons who have pleaded guilty under either article 7(3) of the ICTY Statute (Todorović and Obrenović) or article 6(3) of the ICTR Statute (Kambanda and Serushago). These also do not include the problematic cases of defendants convicted under *both* direct and command responsibility modes of liability (Kayishema, Musema, Barayagwiza and Nahimana). See ICTY, *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment (July 31, 2001); ICTY, *Prosecutor v. Dragan Obrenović*, IT-02-60/2-S, Sentencing Judgment (Dec. 10, 2003); ICTR, *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Judgment & Sentence (Sept. 4, 1998); ICTR, *Prosecutor v. Omar Serushago*, ICTR-98-39-A, Reasons for Judgment (Apr. 6, 2000); ICTR, *Prosecutor v. Clément Kayishema & Obed Ruzindana*, ICTR-95-1-A, Judgment (Reasons) (June 1, 2001); ICTR, *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Judgment & Sentence (Jan. 27, 2000); ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze*, ICTR-99-52-T, Judgment & Sentence (Dec. 3, 2003).

²⁸ “[M]odern [tribunal] case law has relied on a more rigorous definition of command responsibility to make it conform more closely with the principle of individual criminal responsibility and its corollaries, and in order to draw a clear distinction between ‘direct’ and command responsibility. [A]d hoc tribunals have gradually displayed an explicit preference for ‘direct’ criminal liability, where the accused can be convicted under both ‘direct’ and command responsibility.” Bonafé, *supra* note 25, at 602.

¶13 Prosecutors at the tribunals already face seemingly insurmountable hurdles in the routine arenas of evidence-gathering, state cooperation, and their inability to arrest indicted persons.²⁹ Consequently, prosecution teams at the tribunals sometimes make the strategic decision as to whether to strive for the extremely difficult-to-prove charge of superior responsibility, in lieu of the oftentimes simpler charge of direct perpetration. When the crimes are severe enough and there is believed to be enough evidence, the prosecutor will hope for a conviction of superior responsibility which, as a graver form of culpability, will presumably be given a harsher sentence than the one accompanying a conviction of direct perpetration.

¶14 The overall sentencing practice at the tribunals has been widely criticized by commentators as “inexplicably lenient” and an analysis of the sentences for those persons actually convicted on superior responsibility charges shows that as a class, they too are receiving seemingly light sentences.³⁰ In the next two parts of this essay, I will analyze the factors affecting judges’ decisions to issue such disproportionately light sentences.

II. EXISTING SENTENCING GUIDELINES AND METHODOLOGY

¶15 The tribunal sentencing parameters afford judges a great deal of discretion in determining the appropriate punishment for convicts of superior responsibility.³¹ The statutes of the ICTY and ICTR do not provide guidelines or suggestions as to the length of appropriate sentences for any of the crimes that fall under their jurisdiction. Chamber judges have “recourse to the general practice regarding prison sentences”³² and are obliged to consider (but are not bound to follow) the home countries’ respective sentencing practices for similar crimes.³³ The only stipulation is that the penalty imposed by the Trial Chamber shall be limited to “imprisonment for a term up to and including the remainder of the convicted person’s life,”³⁴ as the death penalty is not an available form of punishment at the tribunals.³⁵ The SCSL Statute is essentially the same, but forecloses the option of a vague “life sentence” by going further and saying that (non-juvenile) convicted persons shall be subject to “imprisonment for a specified number of years.”³⁶ This slight difference reflects the SCSL’s move toward a clear articulation of the number of years a convicted person can expect to be imprisoned. Similarly, the Rome Statute prefers “a term of imprisonment not to exceed thirty years”³⁷ but “life imprisonment” can be used only “when justified by the extreme gravity of the individual circumstance of the convicted person.”³⁸

²⁹ Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT’L CRIM. JUST. 403, 426 (2004).

³⁰ Harmon & Gaynor, *supra* note 2.

³¹ WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* 563 (2006).

³² ICTY RPE, Rule 101(b)(iii) (July 24, 2009); ICTR RPE, Rule 101(b)(iii) (Oct. 1, 2009); SCSL RPE, Rule 101(a)-(d) (May 31, 2012).

³³ Delalić, IT-96-21-A, Judgment, *supra* note 22, ¶¶ 813, 816; ICTY, Prosecutor v. Dušan Tadić, IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals, ¶ 21 (Jan. 26, 2000); Prosecutor v. Tihomir Blaškić, IT-95-14-A, Judgment, ¶ 681 (July 29, 2004).

³⁴ ICTY Statute, art. 24 (Sept. 2009); ICTR Statute, art. 23 (Jan. 31, 2010).

³⁵ In accordance with the abolition of the death penalty in the International Covenant on Civil and Political Rights art. 6(6), March 23, 1976, 999 U.N.T.S. 171.

³⁶ SCSL Statute, art. 19(1) (Apr. 12, 2002).

³⁷ ICC Statute, art. 77(1)(a) (July 1, 2002).

³⁸ ICC Statute, art. 77(1)(b).

¶16 Beyond these basic limits, the statutes state that in “imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”³⁹ In fact, the Appeals Chamber of the ICTY has gone so far as to call these the “primary consideration” and that “the sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused,”⁴⁰ again left up to the judges’ discretion. The Chambers have repeatedly emphasized the case-by-case nature of specific criminal occurrences and the need to contextualize the particular circumstances of the case.⁴¹

¶17 Thus far, most tribunal judges (particularly at the ICTY)⁴² have gradually rejected some legal scholars’ notions that there exists—or should exist—a hierarchy of crimes or an abstract ranking of criminal offenses.⁴³ Rather, they emphasize that all crimes under their jurisdiction—genocide, war crimes, and crimes against humanity—are extremely serious violations of international humanitarian law.⁴⁴ Accordingly, the judges affirm their freedom to evaluate the “gravity” of a crime given its specific context.⁴⁵ That said, the concept of gravity has generally been construed to be comprised of two prongs: (i) ‘the particular circumstances of the case,’ i.e., magnitude of harm caused by the offender that can be shown through the scale of the crime or number of victims, and (ii) ‘the form and degree of participation of the accused in the crime,’ i.e., the offender’s culpability.⁴⁶ As I will discuss below, the ICTR has instead adopted an approach which deems genocide to be the most grievous of all crimes.⁴⁷

III. FACTORS AFFECTING TRIBUNALS’ SENTENCING PATTERNS

¶18 Given the sentiment that the criminal culpability of leaders should be greater than that of followers⁴⁸ and given the aforementioned broad discretion afforded to tribunal judges in determining sentences, we might naturally expect that persons convicted of superior responsibility would receive harsh sentences. However, an analysis of the tribunal case law at the ICTY, ICTR, and SCSL paints a very different picture. Particular emphasis on the sentencing judgments illustrates that judges ascribe varying degrees of importance to mitigating and aggravating factors. The former may result in a lighter sentence, and the latter in a heavier sentence than what might otherwise be considered a reasonable punishment for the specific crime at issue. The Chambers have been careful to note that a judicial finding of mitigating

³⁹ Delalić, IT-96-21-T, Judgment, *supra* note 17, ¶ 1191; ICTR, Prosecutor v. Rutaganda, ICTR-96-3-A, Judgment, ¶ 591 (May 26, 2003).

⁴⁰ Delalić, IT-96-21-A, Judgment *supra* note 22, ¶ 731 (citing ICTY, Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić & Vladimir Šantić, IT-95-16-T, Judgment, ¶ 852 (Jan. 14, 2000)); ICTY, Prosecutor v. Zlatko Aleksovski, IT-95-14/1-A, Judgment, ¶ 182 (Mar. 24, 2000).

⁴¹ ICTY, Prosecutor v. Ranko Česić, IT-95-10/1-S, Sentencing Judgment, ¶ 32 (Mar. 11, 2004).

⁴² *Id.*; See also *infra* notes 109, 114 on ICTR ranking of crimes.

⁴³ Andrea Carcano, *Sentencing and the Gravity of the Offence in International Criminal Law*, 51 INT’L & COMP. L. Q. 583, 607-609 (2002); Allison M. Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001); see also Olaoluwa Olusanya, *Do Crimes against Humanity Deserve a Higher Sentence than War Crimes?*, 4 INT’L CRIM. L. REV. 431 (2004).

⁴⁴ ICTR, Prosecutor v. Tharcisse Renzaho, ICTR-97-31-T, Judgment & Sentence, ¶ 18 (July 14, 2009).

⁴⁵ Česić, IT-95-10/1-S, Sentencing Judgment, *supra* note 41.

⁴⁶ ICTY, Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić, IT-05-87-T, Judgment, ¶ 1213 (Feb. 26, 2009).

⁴⁷ See *infra* notes 109, 114 on ICTR ranking of crimes.

⁴⁸ ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vuković, IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 863 (Feb. 22, 2001).

circumstances relates to the determination of the sentence and “in no way derogates from the gravity of the crime nor diminishes the responsibility of the convicted person, or lessens the degree of condemnation of his/her actions.”⁴⁹ It mitigates the punishment, but not the crime.

¶19 The tribunals’ statutes themselves have codified judges’ ability to take certain factors into consideration upon determining sentences. Whereas the judges may consider an accused person’s mere following of a superior’s orders as a “mitigating” factor, in the case where the accused held the position of authority, his punishment will not be mitigated.⁵⁰ The Appeals Chambers at the tribunals have held that aggravating circumstances must be proven beyond a reasonable doubt, while mitigating circumstances can be established by a balance of probabilities.⁵¹

¶20 The judges also examine a myriad of mitigating and aggravating factors that they have total discretion to use in determining their sentences. Commonly cited mitigating factors in tribunal jurisprudence are the accused person’s: (1) substantial cooperation with the Prosecutor; (2) operating under “superior orders”; (3) nature of the relatively minor or remote participation; (4) personal circumstances, such as family situation or his health or age; (5) good character; (6) admission of guilt; (7) expressions of remorse; (8) benevolent actions towards some of the victims; (9) voluntary surrender to the Tribunal; and (10) comportment in detention.⁵²

¶21 On the opposite end, aggravating factors include: (1) the abuse of a position of authority; (2) the personal or direct involvement of the accused in the commission of the crimes; (3) the discriminatory state of mind with which the acts were committed; (4) reprehensible or depraved motives; (5) premeditated or enthusiastic participation in the commission of the crimes; (6) the number of victims, their age and vulnerability, and the effects of the crimes on them; (7) the brutal or vicious manner of circumstances in which the crimes were committed; and (8) the time period during which the crimes were committed and their subsequent repetition.⁵³

IV. ANALYSIS OF PROMINENT SUPERIOR RESPONSIBILITY CASES AND SENTENCES

¶22 In this section, I will analyze the primary cases that resulted in superior responsibility convictions at the ICTY, ICTR, and SCSL. I will then analyze a broader set of trends that can be extrapolated from the tribunal decisions. In analyzing the sentences for individuals convicted of serious crimes under a theory of superior responsibility, I argue that the sentences are disproportionately and inappropriately lenient, irrespective of how the judges weighed the mitigating and aggravating factors, and independent of the judges’ own characterization of a sentence as lenient or severe. I argue that the lack of consistently severe sentences for the most heinous crimes frustrates the very purpose of the tribunals—that is, avoiding impunity by perpetrators and fostering tangible consequences with the hope of deterring future crimes. Indeed, the doctrine of superior responsibility was conceived of to hold superiors more

⁴⁹ Milutinović, IT-05-87-T, Judgment, *supra* note 46, ¶ 1150; ICTR, Prosecutor v. Elizaphan & Gérard Ntakirutimana, ICTR-96-10 & ICTR-96-17-T, Judgment & Sentence, ¶ 886 (Feb. 21, 2003).

⁵⁰ ICTY Statute, art. 7(2) (Sept. 2009); ICTR Statute, art. 6(2) (Jan. 31, 2010); SCSL Statute, art. 6 (2) (Apr. 12, 2002).

⁵¹ Delalić, IT-96-21-A, Judgment, *supra* note 22, ¶ 763; Kunarac, IT-96-23-T & IT-96-23/1-T, Judgment, *supra* note 48, ¶ 847; ICTY, Prosecutor v. Milan Simić, IT-95-9/2-S, Sentencing Judgment, ¶ 40 (Oct. 17, 2002).

⁵² GUENAE METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS, 351–53 (2005). *See also* Stephen M. Sayers, *Defense Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT’L L. 764–72 (2003).

⁵³ For more detailed analysis of the ICTY and ICTR jurisprudence summarizing these factors, see METTRAUX, *supra* note 52, at 350–51 nn.10–17.

criminally and morally culpable for their failures to take action, in the face of their subordinates' commission of crimes.⁵⁴

A. Sentencing patterns at the ICTY

¶23 I offer two reasons underlying the ICTY's handing down of relatively lenient sentences for superior responsibility: (i) the literal-minded court continually ascribes more culpability to "active participation" or direct involvement in crimes, even when the metaphorical harm from "passive participation" is greater, and (ii) the international community and tribunals' heightened sensitivity to the lessons of WWII, with a particular opprobrium reserved for ethnically, religiously, or nationally-motivated crimes.

1. "Active participation"

¶24 In 1998, the Čelebići camp case was the first superior responsibility case to be tried at the ICTY.⁵⁵ The notorious case involved the prosecution of three former commanders and a prison guard of the Čelebići prison-camp where Bosnian Serbs were detained, tortured, and sometimes killed. Of the four men on trial, two of them—Zejnil Delalić and Zdravko Mucić—were indicted pursuant to the doctrine of superior criminal responsibility, and two of them—Hazim Delić and Esad Landžo—based on individual criminal responsibility. Delalić was acquitted on all charges as the initial Trial Chamber deemed him to have lacked the required command or control over the Čelebići prison-camp and over the guards who worked there; therefore, he could not be held criminally responsible for their actions. By contrast, Mucić, the commander of the Čelebići prison camp, was found guilty of eleven of the thirteen counts for crimes committed by his subordinates, by virtue of his position as de facto (and de jure) superior over the camp. The Trial Chamber judgment held that Mucić had individual responsibility under article 7(1) for the confinement of civilians and superior responsibility under article 7(3) for grave breaches of the Geneva Conventions and for violations of the laws or customs of war. He wilfully caused the murder of nine victims, the torture of six victims and the great suffering of or serious injury to four victims, committed inhumane acts towards six victims, and participated in the unlawful confinement of civilians in inhumane conditions.⁵⁶

¶25 In spite of this, Mucić was sentenced to seven years imprisonment, a sentence substantially lighter than the sentences many jurisdictions in the U.S. assign to individual counts of manslaughter or even, in some states, aggravated assault. The Chamber cited as a mitigating factor that Mucić was not named by any witness as having had "active, direct participation, in person, in respect of any act of violence or inhuman treatment." Additionally, the Chamber conceded that Mucić's actions were a result of "human frailty" and self-preservation and not "individual malice," and that there were times where Mucić attempted to help some of the detainees.⁵⁷

¶26 When one considers the Chamber's stated aggravating factors, however, its decision to sentence Mucić to just seven years appears questionable. The judges stated emphatically that

⁵⁴ See generally, Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. OF COMP. AND INT'L L. 1 (2001); Eugenia Levine, *Command Responsibility: The Mens Rea Requirement*, GLOBAL POLICY FORUM, Feb. 2005.

⁵⁵ Delalić, IT-96-21-T, Judgment, *supra* note 17.

⁵⁶ *Id.* ¶ 1242.

⁵⁷ *Id.* ¶¶ 1247–48.

they were “particularly appalled” by the fact that he was derelict in his duty as a commander to oversee the detention center’s substandard living conditions and that he allowed his subordinates to commit “the most heinous of offences without taking any disciplinary action.” They cite as aggravating Mucić’s alleged attempt to intimidate a witness in the ICTY courtroom and his attempts to fabricate evidence with his co-defendant.⁵⁸ The Chamber also noted Mucić’s blithe demeanor and general attitude throughout the trial and the fact that he often failed to display “appropriate respect” for the solemn proceedings, exhibiting “a seeming lack of awareness of the gravity of the charges against him.”⁵⁹ Mucić appealed the decision while the Prosecution appealed the inadequacy of his seven-year sentence, given the gravity of the crimes that occurred under his supervision. In 2001, the second Trial Chamber again found Mucić guilty and sentenced him to nine years imprisonment, later reducing the sentence by two years due to the “credit” from his time in custody before the initial 1998 judgment.

¶27 A possible explanation for Mucić’s relatively light sentence was that the Chamber took a very literal view of the crimes that occurred at Čelebići. The fact that they considered it a mitigating circumstance that he did not have a physical hand in the commission of crimes seems a misconstruing of the gravity of liability under the theory of superior responsibility. The Chamber explicitly stated that Mucić was at all material times the ultimate commander of the Čelebići prison camp and responsible for its “deplorable” and “inhumane” conditions.⁶⁰ Additionally, the Chamber noted that “by means of deliberate neglect of his duty to supervise his subordinates, thereby enabling them to mistreat the detainees in the Čelebići prison-camp... [Mucić] was consciously creating alibis for possible criminal acts of subordinates.”⁶¹ I argue that he should be punished under the doctrine of superior responsibility appropriately – that is heavily – for fostering and encouraging a culture of lawlessness and impunity as its ultimate superior.

¶28 Contrasting Mucić’s sentence with that of the young prison guard Esad Landžo is instructive in analyzing the Court’s emphasis on literal participation in crimes. Landžo was sentenced to fifteen years on the same indictment for his direct participation in the willful torture, murder, cruel treatment and for causing suffering and serious injury of camp prisoners. Although not charged as a superior, Landžo’s direct liability for committing these crimes of torture resulted in his stronger sentence. The Court took care to emphasize that despite the mitigating factors of his youth, “impressionability and immaturity,” there were aggravating circumstances in the “grotesque” and “sadistic” nature of his crimes⁶² and the “perverse pleasure” he took in committing them.⁶³

¶29 Similarly, the Čelebići camp’s Deputy Commander Hazim Delić who was directly under Mucić’s authority, was not convicted on superior responsibility but was sentenced to twenty years imprisonment (downgraded on appeal to eighteen years) for his individual responsibility for torture, willful killings, and causing serious suffering or injury to detainees.⁶⁴ As with Landžo, Delić was apparently given a harsher sentence for having directly perpetrated several of the crimes. The Court noted as aggravating circumstances his “singular brutality” in killing two

⁵⁸ *Id.* ¶¶ 1244, 1251.

⁵⁹ *Id.* ¶ 1244.

⁶⁰ *Id.* ¶ 1242.

⁶¹ *Id.* ¶ 1250.

⁶² *Id.* § VI (e.g., beating detainees to death, burning and cutting detainees’ tongues off, and nailing their foreheads).

⁶³ *Id.* ¶ 1281.

⁶⁴ *Id.* ¶ 1253.

detainees and raping two defenseless women;⁶⁵ he “took a sadistic pleasure” in the infliction of pain on the detainees, often laughing during such acts.⁶⁶

¶30 The glaring discrepancy between the sentences for Mucić and the two direct perpetrators, Landžo and Delić, suggests that the Court underestimates the significance of a prison camp commander’s role and authority. On Mucić’s watch, his subordinates committed numerous serious crimes he knew of but left unpunished. By the nature of direct perpetration, the prison guard and Deputy Commander were more involved physically; they were the individuals who oversaw the prisoners every day. They may have known the detainees by name or by number—predictably, they were more actively involved in the crimes. However, the professed purpose of the superior responsibility doctrine is to punish the architects or commanders who allow the commission of inhumane acts with impunity. If anything, the fact that Mucić created the culture of criminality under which many more detainees suffered should mitigate the culpability of lower level offenders like Landžo, not that of the commanders who set the tone and shaped the atmosphere of the Čelebići prison camp.

¶31 Prosecutor v. Strugar resulted in another ICTY conviction under the theory of superior responsibility.⁶⁷ In 1991, Pavle Strugar was Commander of the Second Operation Group, which was formed by the JNA (the Yugoslav Peoples’ Army) to conduct the notorious military campaign against the Dubrovnik region of Croatia. He surrendered in 2001 and was charged and convicted under both individual and superior modes of liability for violations of the laws of the customs of war (article 3) including murder, cruel treatment, attacks on civilians, and devastation not justified by military necessity. In 2005, the Trial Chamber identified as mitigating factors Strugar’s voluntary surrender, family circumstances, old age, and deteriorating health,⁶⁸ but ultimately found that Strugar had wielded effective control over the perpetrators of the 1991 Dubrovnik shelling campaign, that he had the material ability to prevent the crimes and to punish his subordinates, and that he had failed to take reasonable measures to do so. Strugar was sentenced to eight years’ imprisonment. On appeal in 2008, his sentence was reduced to seven-and-a-half years, but he was granted early release in the early part of 2009 due to his good behavior in detention and significantly precarious health circumstances.

¶32 Observers may wonder why the Appeals Chamber would not recognize the extreme culpability inherent in a superior’s allowing—if not planning—a massacre such as that of Dubrovnik. Even if he did not “actively participate”—in the literal standards of the Court—in the unlawful shelling, Strugar’s acceptance of the act renders him responsible for it. He failed to punish his subordinates who conducted the literal shelling campaign against the coastal town, a UNESCO World Heritage Site. The Chamber’s interpretation notwithstanding, I argue that Strugar’s unwillingness to punish the perpetrators makes him an “active participant” in a meaningful—though perhaps not literal—sense of the term, and as such, should be subject to an appropriately heavy sentence.

¶33 Prosecutor v. Krnojelac arose out of events at the Kazneno-Popravni Dom (KP Dom), a large prison complex situated in the town of Foča, where for fifteen months Milorad Krnojelac served as a warden over the large number of non-Serb men who were detained for long periods

⁶⁵ *Id.* ¶¶ 1261–62.

⁶⁶ *Id.* ¶ 1254.

⁶⁷ Strugar, IT-01-42-T, Judgment, *supra* note 19.

⁶⁸ *Id.* ¶ 469 (“...71 years old and in poor health; he suffers in particular from some degree of vascular dementia and depression and experiences memory losses”).

of time.⁶⁹ He was initially convicted of both individual crimes (cruel treatment and persecution) and superior responsibility charges (inhumane acts and cruel treatment) and sentenced to seven and a half years' imprisonment. The Court acknowledged his conformist personality that would be reticent to confront aggressive subordinates⁷⁰ and took into account as mitigating circumstances his relatively advanced age,⁷¹ that he was a civilian mathematics teacher for most of his adult life and not a well-trained military commander, the narrow geographic scope of the crimes to which he was party,⁷² and that he was not a direct participant in the counts of murder and torture. Although finding him guilty of individual (article 7(1)) and superior responsibility (article 7 (3)), the Court chose to sentence him more as an individual aider and abettor of his subordinates' crimes, determining that his weak personality could undermine the fact that he was truly a superior.⁷³ Here again we see the Court reduce a sentence under superior responsibility conviction because he had not directly perpetrated certain crimes at issue.

¶34 The Chamber cites as aggravating circumstances the fact that Krnojelac willingly accepted the position as a superior at KP Dom,⁷⁴ the "particular vulnerability of the direct victims, the length of time over which the crimes continued during the accused's tenure as warden of the KP Dom, and the extent of the long-term physical, psychological and emotional suffering of those victims,"⁷⁵ as well as the fact that he appeared remorseless over his complicity in the crimes that occurred under his watch.⁷⁶ Both the accused and the Prosecution appealed the Trial Chamber's holding and Krnojelac was found guilty of additional crimes as a co-perpetrator and not merely as an accomplice in imprisoning Muslim and Non-Serb civilians in inhumane conditions and subjecting them to cruel treatment. This direct participation led the Appeals Chamber to increase his sentence to fifteen years' imprisonment.⁷⁷ The Krnojelac decision is reminiscent of the one in the Esad Landžo case: both men were guards or wardens with more "hands-on" roles, and both, accordingly, received heavier sentences (fifteen years) than those of their superior commanders (five to nine years). The case law corroborates this interpretation of the respective responsibilities by suggesting that the form and degree of participation of an accused in the crime is one of the elements constituting "gravity" that the judges will look to in sentence determination.⁷⁸

¶35 When the above cases are taken together, the ICTY's emphasis on "active participation" appears to be a misguided departure from the roots of the doctrine of superior responsibility. The superior responsibility doctrine was developed precisely so that the failure to act becomes a source of liability for culpable individuals who may not have "pulled the trigger," so to speak. For this reason, the ICTY made clear that "[t]he fact that the accused did not directly participate may be taken as a mitigating circumstance when the accused holds a junior position within the civilian or military command structure. However, the Trial Chamber considers the fact that commanders, such as... [Blaškić] at the time of the crimes, played no direct part cannot act in

⁶⁹ ICTY, Prosecutor v. Milorad Krnojelac, IT-97-25, Judgment (Mar. 15, 2002).

⁷⁰ *Id.* ¶ 515.

⁷¹ *Id.* ¶ 519.

⁷² *Id.* ¶ 509.

⁷³ *Id.* ¶ 173.

⁷⁴ *Id.* ¶¶ 514, 516.

⁷⁵ *Id.* ¶ 517.

⁷⁶ *Id.* ¶ 513.

⁷⁷ ICTY, Prosecutor v. Milorad Krnojelac, IT-97-25-A, Judgment, ¶ 264 (Sept. 17, 2003).

⁷⁸ Milutinović, IT-05-87-T, Judgment, *supra* note 46.

mitigation of the sentence when found guilty.”⁷⁹ Despite this explicit endorsement of superior responsibility theory, which supersedes direct perpetration, tribunal case law has taken a different course. Thus, when a court convicts pursuant to superior responsibility but sentences leniently because of a perceived lack of “active participation,” it frustrates the purpose of the doctrine itself.

2. Sensitivity to ethnically and religiously-motivated crimes

¶36 In *Prosecutor v. Blaškić* (the “Lasva Valley case”), Tihomir Blaškić was a Colonel in the Croatian Defence Council (HVO) and was subsequently appointed a General and Commander of the HVO in 1994. After being indicted on charges of both individual and superior responsibility in connection with the ethnic cleansing of Bosnian Muslims, he voluntarily surrendered in 1996. In 2000, the Trial Chamber found him guilty, sentencing him to forty-five years’ imprisonment. At trial, although the Chamber cited the fact that he did not directly participate in the crimes and his considerable responsibility at a relatively young age as mitigating factors,⁸⁰ it found that in this case, the aggravating circumstances—his non-cooperation with the prosecution, the great number of victims, and Blaškić’s ideological and discriminatory motives— “unarguably outweighed the mitigating circumstances.”⁸¹ During the attack in which Blaškić was implicated to have given orders, many Muslim women, children, and adults were systematically murdered and burnt alive in their homes, and their mosques destroyed. However, upon Blaškić’s appeal of his sentence, the Appeals Chamber in 2004 reversed the majority of the Trial Chamber’s convictions and sentenced him to a much reduced nine years’ imprisonment, subject to shortening based on credit from his previous time in custody. Specifically on the count of superior criminal responsibility, the Appeals Chamber found no evidence to show that he “knew or had reason to know” beforehand about many of the crimes that occurred, and therefore the issue of failure to prevent did not apply in this realm of the case. After the Appeals decision, Blaškić was granted his request for early release in 2004.

¶37 The Blaškić Appeal decision is noteworthy in that although the majority of the counts were stricken down, the accused’s culpability in convictions of ordering cruel and inhuman treatment of civilians under superior responsibility remained. In sentencing, the Appeals Chamber cited as mitigating factors his voluntary surrender,⁸² overall good character, status as a father to young children,⁸³ apparent remorse,⁸⁴ and, most notably, his generally equitable treatment of Bosnian Muslims before and during the war. The Court determined that in fact he was not particularly discriminatory or ideologically biased against Bosnian Muslims; rather, he participated as a professional soldier and a man of duty.⁸⁵ This special aversion to ethnically or religiously-based violence or persecution emerges as a trend underpinning many of the ICTY superior responsibility decisions. The twentieth century’s developments in international human rights law have been fueled to a great degree by the specter of the ideologically-driven atrocities of World War II; as the Blaškić case demonstrates, aversion to this specter continues to affect courts’ rulings into the new millennium.

⁷⁹ ICTY, *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, ¶ 768 (Mar. 3, 2000); see Blaškić case discussion *infra*.

⁸⁰ *Id.* ¶ 778.

⁸¹ *Id.* ¶¶ 774, 808.

⁸² ICTY, *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgment, ¶ 702 (July 29, 2004).

⁸³ *Id.* ¶ 708.

⁸⁴ *Id.* ¶ 705.

⁸⁵ *Id.* ¶ 708.

¶38 Indeed, subsequent cases at the ICTY make a point of noting the aggravated nature of discrimination-related crimes; in the absence of this special aggravating factor, even especially destructive or heinous crimes are punished with objectively light sentences. In *Prosecutor v. Hadžihasanović & Kubura*, Brigadier General Enver Hadžihasanović was formerly a commander and then Supreme Command Staff of the Army of Bosnia and Herzegovina (ABiH).⁸⁶ In 2006, he was found guilty on the basis of superior criminal responsibility for murder and cruel treatment and was sentenced to five years' imprisonment for failing to take necessary and reasonable measures to punish members of his forces who murdered prisoners of war and for failing to punish his subordinates who treated civilians and prisoners of war cruelly in five detention facilities throughout 1993. As in *Blaškić*, the Trial Chamber in *Hadžihasanović* cited several ancillary mitigating factors—his voluntary surrender, status as a husband and father, testimony as to his professionalism and good manners⁸⁷—and one potent factor: “that he was not ideologically driven by any religious or ethnic nationalist movements.”⁸⁸ Although the Chamber identified as an aggravating factor the “particularly heinous nature of [one victim’s] beheading” and stated that “the prolonged period over which [the] crimes were committed [and the large number or victims]⁸⁹ warranted a more severe sentence,”⁹⁰ the Brigadier General was sentenced to only five years of the Prosecution’s requested twenty years.

¶39 In the same case, Amir Kubura was formerly the Chief of Staff and then Commander of the 7th Muslim Mountain Brigade of the ABiH. He was also found guilty on the basis of superior criminal responsibility, for plunder of public and private property and was sentenced to two-and-a-half years' imprisonment. The Chamber held that he failed to take necessary and reasonable measures to punish his subordinates who plundered private or public property in several villages during the hostilities of 1993. The Chamber cited similar mitigating factors for Kubura as it did for Hadžihasanović, once again highlighting that the accused did not seem to have harbored any peculiar animosity against his opponents other than that of a commander for an enemy army.⁹¹ Thus, although the Court emphasized that “Kubura was deeply involved in the commission of the offence[s],” the sentence it handed down was a far lighter one than that available to it within the broad discretionary parameters of the ICTY Statute. This landmark case was the first in ICTY history in which individuals were convicted solely on the basis of superior responsibility, enshrined in article 7(3) of the Statute, for their failures to prevent the crimes or punish the perpetrators.⁹²

¶40 Both men appealed their sentences.⁹³ The Appeals Chamber upheld the Trial Chamber’s finding that Hadžihasanović failed to take necessary and reasonable measures to prevent or punish his subordinates for the cruel treatment of detainees. However, in overturning the Trial Chamber’s finding that he did not take necessary and reasonable measures to punish those

⁸⁶ ICTY, *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, IT-01-47-T, Judgment, ¶ 2 (Mar. 15, 2006).

⁸⁷ *Id.* ¶¶ 2078–80.

⁸⁸ *Id.* ¶ 2080.

⁸⁹ *Id.* ¶¶ 2083–84 (“In this case, the Chamber notes that there were some one hundred detainees at the Zenica Music School, while at the five detention centres in Bugojno, the detainees numbered several hundred.”).

⁹⁰ *Id.* ¶ 2082 (“...the cruel treatment at the Zenica Music School took place over approximately a seven-month period, and that the cruel treatment in the other detention centres created in Bugojno was inflicted over a period of about three and a half months. In the view of the Chamber, the prolonged period over which these crimes were committed warrants a more severe sentence.”).

⁹¹ *Id.* ¶ 2089.

⁹² *Id.* ¶ 2075.

⁹³ ICTY, *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, IT-01-47-A, Judgment (Apr. 22, 2008).

responsible for the murder and abuse of prisoners, the Appeals Chamber reduced an already light five year sentence to just over three years in prison. Likewise, the Appeals Chamber upheld Kubura's convictions for having failed to adequately punish the plunder that occurred under his watch, but reversed the Trial Chamber's holding that he did not take reasonable measures to prevent further acts of plunder. His sentence was downgraded to two years' imprisonment, but he was released early in 2006 due to credit given to him for his time in detainment up till that point. Neither the Trial Chamber sentence nor the downgraded Appeals Chamber sentence can be characterized as heavy ones.

¶41 Here again, the ICTY demonstrates a heightened sensitivity to crimes that appear motivated by ideology—ethnocide, racism, religious persecution—as opposed to crimes committed entirely due to status as a military member engaged in relatively routine acts of war. Defendants deemed by the court to lack an ideological “agenda” are therefore subject to lighter sentences often dissonant with the destructiveness and gravity of the crimes of which they have been convicted. While it is true that crimes expressing animus towards groups as a whole are particularly insidious in many societies—hence the existence of “hate crimes” as a separate category in many domestic jurisdictions around the world—the charges upon which these men were convicted pursuant to superior responsibility should, I argue, result in far heavier sentences than those issued by the ICTY.

¶42 Superiors' responsibility over their subordinates directly contributes to and shapes an atmosphere of lawlessness and impunity for crimes. Relatively light sentences such as those in the above Eastern European cases undermine the very purpose of the doctrine, which developed precisely to heighten, not diminish, the culpability of individuals in positions of authority who may not have had direct “active participation” in the crimes they nonetheless helped cultivate or hide.

¶43 Prosecutor v. Naletilić & Martinović provides further support for my suggestion that tribunals' heightened sensitivity to ideologically-driven crimes is one of the lynchpins of sentencing practice in superior responsibility cases.⁹⁴ Naletilić was the founder and commander of the Bosnian Croat “Kažnjenička Bojna” (“Punishment Battalion” or “Convicts' Battalion”) (KB), a 200 to 300-strong militia based in south-eastern Bosnia and Herzegovina.⁹⁵ Mladen Naletilić was convicted on the basis of both individual criminal responsibility (article 7(1) of the ICTY Statute) and superior criminal responsibility (article 7(3)) with several grave breaches of the Geneva Conventions, acts of torture, forcible transfer, and persecution as crimes against humanity. Significantly, the accused's crimes were deemed to have indeed been committed on political, racial, and religious grounds.⁹⁶ The Chamber was emphatic that it considered no mitigating circumstances and assigned Naletilić a single sentence of twenty years of imprisonment, the longest of any superior responsibility convict at the ICTY. His status as commander and co-founder of the KB, and his prominent stature and legendary reputation in the region afforded him particular influence over his subordinates, who looked to him as the example.⁹⁷

¶44 Vinko Martinović was Commander of the “Vinko Škrobo” unit of the KB and subordinate to Naletilić. Martinović “at least participated in the murder” of a man who had been brutally

⁹⁴ ICTY, Prosecutor v. Mladen Naletilić & Vinko Martinović, IT-98-34-T, Judgment (Mar. 31, 2003).

⁹⁵ ICTY, Prosecutor v. Mladen Naletilić & Vinko Martinović, IT-98-34-PT, Second Amended Indictment, ¶ 14 (Sept. 28, 2001).

⁹⁶ *Id.* ¶ 34.

⁹⁷ Naletilić, IT-98-34-T, Judgment, *supra* note 94, ¶ 751.

beaten and mistreated before being killed by a gunshot through his cheek.⁹⁸ He was also responsible for and directly participated in rounding up the Muslim civilian population of Mostar and unlawfully transferring, physically harming, and detaining them at the Heliodrom detention center. Martinović was charged on the basis of both individual criminal responsibility and superior criminal responsibility. As aggravating factors, the Chamber noted that he was found guilty of “most heinous crimes,” including murder, and that his command role and influence on his unit was significant.⁹⁹ Rather than wield his considerable influence to prevent crimes, he “permitted the commission of atrocities and was often a direct participant.”¹⁰⁰ Martinović was given a single sentence of eighteen years’ imprisonment. The sentences of both Naletilić and Martinović were affirmed on appeal.¹⁰¹

¶45 It may be that the Chambers sentenced Naletilić and Martinović to such comparatively long sentences for their direct participation in some of the crimes that occurred on their watch, but the Court emphasized the atmospheric persecution and particular targeting of Bosnian Muslims during this conflict. Under the command of both defendants, the KB and other HVO units identified persons of Bosnian Muslim ethnic background and prominently led their evictions, arrests, and forcible transfers across the confrontation lines to the territories under ABiH control. The defendants’ crimes were part of the broader Croatian Army and HVO’s campaign to gain municipal control and force the Bosnian Muslim population to leave those territories or to substantially reduce and subjugate that population, “commonly referred to as ethnic cleansing.”¹⁰² This campaign is widely acknowledged to have displaced tens of thousands of Bosnian Muslims and relied on “killings, beatings, torture, evictions, destruction of cultural and religious heritage, looting, deprivation of basic civil and human rights, and mass expulsions, detentions and imprisonments, all of them executed following a systematic pattern of ethnic discrimination.”¹⁰³ This subsequent extermination of Bosnian Muslims based on ethnicity and religion appears to have been the dispositive factor in the relatively lengthy—by ICTY standards—imprisonments to which both men were sentenced.

¶46 Whether or not the court reached an accurate or fair conclusion that certain defendants were ideologically motivated while others were not is beyond the scope of my discussion here. In focusing on the sentences resulting from the convictions summarized above, it is apparent that the ICTY is willing to assign light sentences to individuals convicted of war crimes or crimes against humanity under superior responsibility doctrine, provided the accused did not appear personally or fundamentally motivated by an ethnic or religious supremacist ideology.

B. Sentencing patterns at the ICTR and why they are heavier than the ICTY

¶47 I offer two possible reasons for why superior responsibility-related sentences at the ICTR have been significantly heavier than those in other tribunals including the ICTY: (1) the underlying offense in the Rwandan cases was genocide, and (2) the ICTR Chamber seemed particularly critical of the fact that the majority of superiors on trial were political or civilian leaders—not military officers—who derogated their ethical duty to protect the community by inciting hatred between segments of Rwandan society.

⁹⁸ *Id.* ¶¶ 497–500.

⁹⁹ *Id.* ¶ 758.

¹⁰⁰ *Id.*

¹⁰¹ ICTY, *Prosecutor v. Mladen Naletilić & Vinko Martinović*, IT-98-34-A Judgment, (May 3, 2006).

¹⁰² Naletilić & Martinović, IT-98-34-PT, *supra* note 95, ¶ 11.

¹⁰³ *Id.*

1. Genocide as “the crime of crimes”

¶48 A major point of departure from the ICTY cases is the fact that, while the ICTY superior responsibility indictments were for crimes against humanity and war crimes, the ICTR cases were largely related to the Rwandan genocide of 1994, where approximately one million ethnic Tutsis (and moderate Hutus) were massacred by members of the Hutu community.¹⁰⁴ As discussed above, although the ICTY has rejected an overt ranking of crimes, their sentencing practice for persons convicted under superior responsibility appears to recognize the particular grievousness of crimes motivated by ethnic or religious animus.

¶49 In 1998’s *Prosecutor v. Akayesu*,¹⁰⁵ the first case to be heard at the ICTR, the Trial Chamber found former school-teacher Jean Paul Akayesu guilty on nine counts related to genocide and crimes against humanity in connection with the murder of at least two thousand civilians who died in Taba, the rural commune where Akayesu was mayor.¹⁰⁶ Signifying the first instance where rape and sexual assault were deemed to constitute genocidal acts,¹⁰⁷ he was sentenced to serve nine concurrent life sentences for the charges. Akayesu had been charged under individual responsibility (article 6(1)), but additionally, or alternatively, under superior responsibility (article 6(3))¹⁰⁸ for the crimes alleged. The Trial Chamber found as mitigating factors that he had no prior criminal record, was “not a very high level official in the governmental hierarchy in Rwanda and acknowledged that he made efforts to prevent the Taba massacres.”¹⁰⁹ Yet the Chamber held that the aggravating factors outweighed the mitigating: Akayesu “consciously chose to participate in the systematic killings.”¹¹⁰ Although the Chamber ultimately did not convict him under superior responsibility,¹¹¹ it noted that his status as burgomaster made him more responsible for protecting the population, and he failed.¹¹² Indeed, “he publicly incited people to kill... he also ordered the killing of a number of persons, some of whom were killed in his presence and he participated in the killings.”¹¹³

¶50 In *Prosecutor v. Ntagerura, Bagambiki, & Imanishimwe*,¹¹⁴ Imanishimwe was the commander of the Cyangugu military camp where almost 3,000 civilian refugees were killed by his subordinates. The Trial Chamber established his “direct” criminal liability for crimes against humanity and war crimes (murder, imprisonment and torture). Beyond that, it found him guilty of extermination and genocide under superior responsibility alone, which was unprecedented. The court considered no mitigating factors and deemed it “particularly egregious” that as a military officer with the mandate to protect, he allowed his subordinates to attack countless civilians.¹¹⁵ He was sentenced to twenty-seven years, but on appeal in 2006, the court set aside

¹⁰⁴ ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, (Sept. 2, 1998).

¹⁰⁵ *Id.* ¶¶ 178–93.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 731.

¹⁰⁸ *Id.* ¶ 691.

¹⁰⁹ ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Sentence, 3 (Oct. 2, 1998).

¹¹⁰ *Id.*

¹¹¹ Akayesu, ICTR-96-4-T, Judgment, *supra* note 104, ¶ 691.

¹¹² Akayesu, ICTR-96-4-T, Sentence, *supra* note 109, at 8.

¹¹³ *Id.*

¹¹⁴ ICTR, *Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe*, ICTR-99-46-T, Judgment & Sentence (Feb. 25, 2004) [hereinafter *Cyangugu Trial*, ICTR-99-46-T, Judgment & Sentence].

¹¹⁵ *Id.* ¶ 818.

his superior responsibility convictions for genocide and extermination and his sentence was reduced to twelve years in prison.¹¹⁶

¶51 As these cases demonstrate, the sentencing for genocide-related crimes is uniformly harsher than for other types of crimes committed during times of conflict. This is not surprising given the ICTR's famous description of genocide as "the crime of crimes."¹¹⁷ In determining Akayesu's sentence, the Chamber described genocide¹¹⁸ as "unique because it is of its element of *dolus specialis* (special intent) which requires that the crime...be committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group, [as such... is] crucial in determination of a sentence."¹¹⁹ In their sentencing, the ICTR Chambers tended to emphasize the systematic brutality, savagery, and depravity of the crimes that were committed in connection with the Rwandan genocide.

¶52 Another explanation for the uniformly harsher sentences—usually life terms—at the ICTR may be the collective feeling of guilt stemming from the perception in some quarters that the United Nations and the international community stood by and allowed the Rwandan genocide to occur. Much has been written about the failures of the international community to intervene in the bloody and senseless Rwandan situation in 1994. Now, with the ICTR in place, it appears that justice can perhaps be served retroactively by holding some of the superiors involved in the atrocities accountable. The longer sentences appear to reflect this goal.

2. Increased Role of Civilian Leaders in Rwandan Crimes

¶53 While the superior responsibility cases at the ICTY primarily involved only military superiors or prison wardens, the ICTR tried many cases featuring civilian community and political leaders. This expansion of the tribunal jurisprudence on superior responsibility led to new prosecutorial challenges, particularly with establishing that the non-military superiors in question had "effective control" over the actions of their "subordinates."

¶54 In *Prosecutor v. Kayishema*,¹²⁰ Clément Kayishema, the Prefect of Kibuye from July 1992 to 1994, was indicted for his superior responsibility for four massacres at various churches, each resulting in the death of thousands of men, women and children. Kayishema was accused of twenty-four counts of genocide, crimes against humanity, violations of the Common article 3 and of Additional Protocol II, including murder, extermination, and other inhumane acts. In 1999, the Trial Chamber found Kayishema guilty of four genocide counts related to each of the massacres. He was sentenced to life in prison, and the Appeals Chamber confirmed his sentence in 2001.¹²¹ The Trial Chamber noted that Kayishema was responsible as a superior under article 6(3): he exercised clear, definitive control over the assailants at every massacre site set out in the Indictment and it had been proved beyond a reasonable doubt that Kayishema ordered the attacks

¹¹⁶ ICTR, *Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe*, ICTR-99-46-A, Judgment, ¶¶ 379, 444 (Feb. 25, 2006).

¹¹⁷ Akayesu, ICTR-96-4-T, Sentence, *supra* note 109, at 3; *see also* ICTR, *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Judgment and Sentence, ¶ 9 (Sept. 4, 1998) (defining genocide as "the crime of crimes," crimes against humanity as "crimes of an extreme seriousness," and war crimes as "crimes of a lesser seriousness.").

¹¹⁸ ICTR Statute, art. 2 (Nov. 8, 1994).

¹¹⁹ Akayesu, ICTR-96-4-T, Sentence, *supra* note 109, at 3.

¹²⁰ ICTR, *Prosecutor v. Clément Kayishema & Obed Ruzindana*, ICTR-01-95-1-T, Judgment, ¶ 505 (May 21, 1999).

¹²¹ ICTR, *Prosecutor v. Clément Kayishema & Obed Ruzindana*, ICTR-01-95-1-A, Judgment (Reasons), ¶ 363 (June 1, 2001).

or, knowing of their imminence, failed to prevent them.¹²² Kayishema's command responsibility was inferred from his proven "direct" criminal liability.¹²³

¶155 The Trial Chamber cited several aggravating factors, including the fact that Kayishema abused the trust civilians had in him as a Prefect, the zeal with which he executed his crimes, and, notably, his inaction with regard to punishment of the perpetrators.¹²⁴ Further, the court noted, "the massacres [of civilians] were carried out solely on the basis of ethnicity."¹²⁵

¶156 The Kayishema decision demonstrates the ICTR's confirmation of increased culpability for direct perpetration of crimes, analyzed above, in the ICTY cases. Although it is difficult to determine what Kayishema's sentence might have been absent direct participation, the heavy sentence also demonstrates that civilian leaders prominent in the community can sometimes be found to have as much or more culpability than military ones based on the former's status as community leaders.

¶157 In *Prosecutor v. Musema*,¹²⁶ the notion of superior responsibility was addressed and expanded for Alfred Musema, the director of a profitable state-owned tea factory. Along with other convictions for crimes for which he was found directly responsible, Musema was held liable under superior responsibility for the acts carried out by the employees of his factory over whom he was found to have effective control. This case was an important expansion of the doctrine of superior responsibility outside the military context and into the context of a civilian workplace.¹²⁷ In *Musema*, the ICTR also provided interpretive guidance as to what sorts of attacks could constitute crimes against humanity.

¶158 The only mitigating circumstances the Trial Chamber considered for sentencing were that Musema admitted that a genocide had been committed against the Tutsis, his expression of regret that the Gisovu Tea Factory facilities may have been used by perpetrators of crimes, and that he was cooperative during the trial proceedings.¹²⁸ The Trial Chamber found the aggravating circumstances outweighed the mitigating: the extremely serious offense of which Musema was found guilty, genocide, was described as "the crime of crimes"; armed with a rifle, he led attackers, who killed a large number of Tutsi refugees; he raped a Tutsi woman, which set an example for others to rape; he did not try to prevent the participation of the tea factory employees or use of the factory's vehicles in attacks; and he failed to use his considerable influence to prevent or thwart the commission of the crimes, then took no steps to punish the perpetrators over whom he had control.¹²⁹ Musema was sentenced to life imprisonment, which was later affirmed on appeal.¹³⁰

¶159 *Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyuma*¹³¹ included the trial of Théoneste Bagosora, the most senior official at the Rwandan Ministry of Defense in 1994. He and Kambanda are often cited as the primary architects of the Rwandan genocide.¹³² Bagosora

¹²² Kayishema, ICTR-01-95-1-T, Judgment, *supra* note 120, ¶¶ 515–16.

¹²³ *Id.* ¶ 505.

¹²⁴ Kayishema, ICTR-01-95-1-A, Judgment (Reasons), *supra* note 121, ¶ 36.

¹²⁵ Kayishema, ICTR-01-95-1-T, Judgment, *supra* note 120, ¶ 638.

¹²⁶ ICTR, *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Judgment & Sentence (Jan. 27, 2000).

¹²⁷ *Id.* ¶¶ 141–48.

¹²⁸ *Id.* ¶¶ 1005–07.

¹²⁹ *Id.* ¶¶ 966, 1001–04.

¹³⁰ ICTR, *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Judgment, ¶ 399 (Nov. 16, 2001).

¹³¹ ICTR, *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze & Anatole Nsengiyumva*, ICTR-98-41-T, Judgment, ¶¶ 2022, 2270 (Dec. 18, 2008).

¹³² *Id.*

was found guilty of genocide and a variety of crimes against humanity. The Chamber stated that life imprisonment was the appropriate sentence for Bagosora: “[t]he toll of human suffering was immense as a result of crimes which could have only occurred with his orders and authorization.”¹³³ On appeal, the Chamber overturned a count of his article 6(1) direct responsibility, but affirmed his other convictions, including superior responsibility and his life sentence.¹³⁴

¶60 Also found guilty by the Trial Chamber were Colonel Anatole Nsengiyumva and Major Aloys Ntabakuze, commanders of the Para Commando Battalion, an elite unit within the Rwandan Army. The Chamber found each of them guilty, as a superior, of genocide and several crimes against humanity, sentencing each to life in prison. This case demonstrates that non-military figures such as Bagosora, who was also given life imprisonment, were deemed by the Court to have authority and influence over their followers to a degree comparable to that of military commanders.

¶61 Prosecutor v. Nahimana, Barayagwiza & Ngeze (“Media trial”),¹³⁵ was an instance where three civilian media-producers were charged with several crimes under individual responsibility and also superior responsibility, as the masterminds of a Rwandan media campaign to disseminate genocidal propaganda, dehumanizing the Tutsi population and inciting the Hutu masses to engage in the slaughter of Tutsis. The three were found guilty on most counts and their “positions of leadership and public trust”¹³⁶ served as aggravating factors. The Chamber emphasized how renowned university professor Ferdinand Nahimana used the radio, aware of “the power of words,” to disseminate hatred and violence: “[w]ithout a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians.”¹³⁷ Former lawyer, diplomat, and radio executive Jean-Bosco was described as “the lynchpin of the conspiracy” to commit genocide.¹³⁸ As owner and editor of a prominent newspaper, Hassan Ngeze abused his public forum when he “poisoned the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians.”¹³⁹ The trio were deemed in “the category of the most serious offenders” with Nahimana and Ngeze sentenced to life imprisonment and Barayagwiza sentenced to twenty-seven years (reduced from an initial thirty-five).¹⁴⁰ On appeal, Barayagwiza and Ngeze’s superior responsibility convictions were struck down, but their individual responsibility convictions were affirmed. Barayagwiza’s sentence changed to thirty-two years and Ngeze’s to thirty-five years. Nahimana’s individual convictions were vacated yet his superior responsibility for persecution and incitement to genocide was affirmed and his sentence changed to thirty years.¹⁴¹

¹³³ *Id.* ¶ 2266.

¹³⁴ ICTR, Prosecutor v. Théoneste Bagosora & Anatole Nsengiyumva, ICTR-98-41-A, Judgment, ¶¶ 720–21 (Dec. 14, 2011).

¹³⁵ ICTR, Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze, ICTR-99-52-T, Judgment & Sentence (Dec. 3, 2003).

¹³⁶ *Id.* ¶ 1098.

¹³⁷ *Id.* ¶ 1099.

¹³⁸ *Id.* ¶ 1100.

¹³⁹ *Id.* ¶ 1101.

¹⁴⁰ *Id.* ¶¶ 1103, 1105–08.

¹⁴¹ ICTR, Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze, ICTR-99-52-A, Judgment (Nov. 28, 2007).

¶62 Prosecutor v. Kambanda¹⁴² was a long-awaited case. As Prime Minister of the interim government, Kambanda held the highest position in the Rwandan government. He pleaded guilty to genocide and crimes against humanity and was found liable as a superior; he exercised control over government ministers and military leaders involved in the genocide, issued orders encouraging the murder of Tutsis, distributed arms and ammunition to groups involved in murdering Tutsis, and gave public speeches for radio broadcasts, inciting massacres against the Tutsi population. According to the Trial Chamber, “Kambanda committed the crimes knowingly and with premeditation despite his being entrusted with the authority and duty to protect the population.”¹⁴³ The Court also found that “the aggravating circumstances...negate the mitigating...especially since Jean Kambanda occupied a high ministerial post at the time he committed the said crimes.”¹⁴⁴ For this he was convicted of all six counts and sentenced to life imprisonment (affirmed on Appeal).¹⁴⁵

¶63 These cases demonstrate that the ICTR regards hate speech and the engineering of ethnic or religiously-motivated persecution among the severest of crimes, and thus deserving of at least one life sentence or its functional equivalent. Unlike the ICTY cases in which a lack of literal “active participation” merited a lighter sentence, judges in the ICTR seem to more clearly acknowledge the destructive influence wielded by those with power, whether conferred by military rank or by the obedience of community members. The discrepancy can be attributable to the notion, analyzed above, that genocide is sometimes considered a higher order of crime for which active participation need not be found; hence, sentences for genocide-related crimes related to superior responsibility may be harsher than for their non-genocidal counterparts.

¶64 However, the cases are also notable in illustrating the peculiar role that civilian community leaders and public figures play in propagating genocide. Military leaders may have coercive power over the civilians of their region or country, but not necessarily the power to cultivate ideologies within large segments of the community. By contrast, civilian community leaders such as the school administrators, diplomats, and radio and media figures in the above cases wielded a uniquely potent form of power over local populations. Such powers contributed to the incitement of genocidal ideologies within Rwandan communities, and the appropriately lengthy ICTR sentences reflect that fact.

3. SCSL cases and emerging trends

¶65 The SCSL was created in 2002 as a hybrid court of the United Nations and government of Sierra Leone to “try those who bear the greatest responsibility for serious violations of international humanitarian law” during the Sierra Leonean civil war and since November 30, 1996.¹⁴⁶ The court’s jurisdiction does not extend to genocide, but is primarily for crimes against humanity, war crimes, and violations of Article 3 of Geneva Conventions and of Additional Protocol II.¹⁴⁷ Two important cases have resulted in convictions for superior responsibility in connection with war crimes and crimes against humanity. Both involved military commanders, not civilian leaders.

¹⁴² ICTR, Prosecutor v. Jean Kambanda, ICTR-97-23-S, Judgment and Sentence (Sept. 4, 1998).

¹⁴³ *Id.* ¶ 44.

¹⁴⁴ *Id.* ¶ 62.

¹⁴⁵ ICTR, Prosecutor v. Jean Kambanda, ICTR-97-23-A, Judgment (Oct. 19, 2000).

¹⁴⁶ *About the Special Court for Sierra Leone*, SCSL WEBSITE, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> (last visited Nov. 3, 2012).

¹⁴⁷ *See generally*, SCSL Statute (Apr. 12, 2002).

¶66 The first judgments rendered by the SCSL were in 2007, for *Prosecutor v. Brima, Kanu & Kamara*, known as the Armed Forces Revolutionary Council (“AFRC trial”). Brima and Kamara were Staff Sergeants, and Kanu was a Sergeant. The three were convicted as individually responsible (under article 6(1)) and as superiors (pursuant to article 6(3)) for eleven of fourteen counts for terrorism, collective punishments, extermination, murder (as a crime against humanity), murder (as a war crime), rape, outrages upon personal dignity, physical violence (a war crime), conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, enslavement, and pillage. This was the first instance that an international court had ruled on charges connected to child soldiers or forced marriage, and the first time such a court delivered a guilty verdict for the military conscription of children.

¶67 Brima was found guilty of direct perpetration of the murder of at least twelve civilians and for being a “zealous participant” in crimes; he, Kamara and Kanu were directly responsible for a host of the mutilations, looting, and civilian murders. Brima, Kamara and Kanu were convicted of superior responsibility for the “particularly grotesque and malicious” mutilations that their subordinates routinely engaged in.¹⁴⁸ The Chamber found no mitigating circumstances for the men and deemed as aggravating their lack of remorse for the crimes which were “heinous, brutal, and targeted very large numbers of unarmed civilians and had a catastrophic and irreversible impact” on the victims and their families; further, as professional soldiers, they had the knowledge of their responsibility and “duty to protect the people of Sierra Leone,” which they certainly failed to uphold.¹⁴⁹ The Chamber details the particular vulnerability of many of the victims (civilians in places of worship and women or children subjected to sexual violence) and the long timeframe within which the crimes were committed. Brima and Kanu were each sentenced to fifty years in jail, and Kamara was sentenced to forty-five years’ imprisonment. In 2008, the Appeals Chamber denied their appeals and reaffirmed the sentences.¹⁵⁰

¶68 The other relevant case at the SCSL is that of *Prosecutor v. Sesay, Kallon, & Gbao* in the Revolutionary United Front (“RUF case”).¹⁵¹ Issa Hassan Sesay was Interim Leader of the Revolutionary United Front of Sierra Leone and was indicted on seventeen counts for crimes against humanity and war crimes; Morris Kallon was a former commander of the RUF, and Augustine Gbao, was a senior officer and commander of the RUF. The RUF rebels were notorious for their brutal attacks on civilians during civil war in Sierra Leone (1991–2002), often cutting off the victims’ limbs. Although the three men pleaded not guilty, in early 2009 both Sesay and Kallon were found guilty on sixteen of the eighteen counts on which they had been charged, including liability as superiors for murder, enlistment of child soldiers, amputation, sexual slavery, and forced marriage. Gbao was found guilty of fourteen of the eighteen charges. Sesay received fifty-two years, Kallon forty years, and Gbao twenty-five years. The convictions and sentences were appealed, but the Chamber reversed minor counts and affirmed the Trial Chamber’s sentences.¹⁵²

¹⁴⁸ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, SCSL-2004-16-T, Judgment, ¶¶ 45–46 (June 20, 2007).

¹⁴⁹ *Id.*

¹⁵⁰ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, SCSL-2004-16-A, Judgment (Feb. 22, 2008).

¹⁵¹ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, SCSL-04-15-T, Sentencing Judgment (Apr. 8, 2009) [hereinafter RUF Case].

¹⁵² SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, SCSL-04-15-A, Judgment (Oct. 26, 2009).

¶69 The Sierra Leone cases are of note in that they fall in the middle of the spectrum for superior responsibility-related crimes. Although the crimes were not classified as genocide-related as in the Rwandan tribunal, convicted defendants received lengthy sentences that are, I argue, commensurate with the destructiveness and severity of the corresponding crimes. Although one of the possible interpretations of SCSL sentencing patterns is that the perpetrators demonstrated “active participation” in addition to their superior responsibility, it is my hope that the Sierra Leone tribunal’s appropriately lengthy sentences signal a shift among all tribunals towards longer sentences.

IV. REVISITING SENTENCING GUIDELINES AND PRACTICE: THE CASE AGAINST LENIENCY

¶70 Thus far, we have examined tribunals’ pattern of superior responsibility sentencing practice and the factors affecting their choice of sentence. In this final section, I make a case for the necessity of sentencing reform, and offer suggestions for tribunals’ sentencing practice with regards to individuals convicted under the doctrine of superior responsibility.

¶71 Persons in superior positions are generally afforded a heightened degree of respect and societal influence due to their role of authority. Yet this augmented status and power are counter-balanced by the superior’s responsibility to not abuse his position or duties. In an armed conflict setting, the superior—often a high-ranking military commander or political leader—is uniquely situated to explicitly support or condemn, or tacitly condone their soldiers’ or subordinates’ ostensibly criminal acts. Therefore, when a commander fails to punish his underlings, he ultimately endorses or acquiesces to their offenses, and affirms the offenses’ legitimacy.¹⁵³ The superior’s failure to punish, sanction, or censure bolsters the acceptability of the direct perpetrator’s act.

¶72 Superior responsibility is sometimes criticized on the grounds that it potentially permits “a few bad apples” or rogue subordinates’ crimes to impute liability on an innocently ineffectual or unaware superior.¹⁵⁴ Yet the superior responsibility doctrine indeed creates space for preventing this injustice from occurring; the superior may not have had “actual knowledge” of his subordinates’ crimes, but he can attempt to mete out an appropriate punishment or sanction once made aware of the acts. As to the factual finding of “constructive knowledge,” where the Court determines that the superior did not know but “should have known,” the burden of proof for the prosecution is intentionally high. That way, superiors will not be easy targets for international courts looking to make a statement and apportion blame for atrocities that occurred.

¶73 It is not only the superiors’ position that must be considered, but that of the crimes’ victims. There is “expressive” harm to the victim when a person of authority permits a crime to go unpunished and it is tacitly accepted.¹⁵⁵ The concept of expressivism in ethics theory is that communication (or expression) is not simply a neutral stating of facts; rather, it is speech or acts that represent emotions, beliefs, or evaluative judgments. The literal physical harm or injury to a victim is accompanied by the psychological and emotional harm.¹⁵⁶ Injuries of this sort result from the perpetrator’s symbolic communication to the victim (and victim’s broader community)

¹⁵³ Amy Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT’L L. 251, 256–57 (2009).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 292.

¹⁵⁶ See, e.g., Kenworthy Bilz & John M. Darley, *What’s Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1233–35 (2004).

that, as the afflicted party, they have less value or worth. Accordingly, punishing the perpetrator or wrongdoer can serve to restore the victim and mitigate his or her feeling of subordination.¹⁵⁷ This re-balancing of the equilibrium between the parties is essentially a form of modern retributive theory, which is less about punishment's intrinsic goodness in matching moral evil, and more about punishment's authoritative expression of morally condemning the offense's evil.¹⁵⁸

C. Purposes of Punishment

¶74 In domestic jurisdictions, the primary justifications for punishment are often cited as retribution, incapacitation, rehabilitation, and deterrence.¹⁵⁹ The latter three are from the Utilitarian school of thought, which emphasizes their socially beneficial effects.¹⁶⁰ Mid-twentieth century reformers in the United States were successful in deemphasizing the retributivist ("revenge-like") purpose, instead framing the articulated purposes of criminal punishment as incapacitation, rehabilitation, and deterrence.¹⁶¹ However, the judgments at the various tribunals indicate that a different mixture of objectives underpins sentencing in the international criminal justice system—retribution, rehabilitation, and deterrence of future mass crimes.¹⁶²

1. Retribution

¶75 In fact, ICTY decisions have stated the primacy of retribution, and that rehabilitation and deterrence should not be afforded too much weight in sentencing.¹⁶³ A fundamental goal of retribution is that the "punishment fit the crime," yet in cases of mass atrocity there is literally no way to construct a punishment proportionate to the gravity of the crime.¹⁶⁴ This inherent impossibility was acknowledged when the Krajisnik Trial Chamber explained: "A sentence, however harsh, will never be able to rectify the wrongs, and will be able to soothe only to a limited extent the suffering of the victims, their feelings of deprivation, anguish, and hopelessness."¹⁶⁵ The Hadžhadonivić Trial Chamber affirmed retribution as the primary objective of punishment in determining a sentence, noting that it "...is not to be understood as

¹⁵⁷ JEFFRIE G. MURPHY, FORGIVENESS AND MERCY 14 (1988).

¹⁵⁸ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 234–35 (1968) ("In its most interesting form modern retributive theory has shifted the emphasis from the alleged justice or intrinsic goodness of the return of suffering for moral evil done, to the value of the authoritative *expression*, in the form of punishment, of moral condemnation for the moral wickedness involved in the offense." (emphasis added)). See also Michele Cotton, *Back with A Vengeance: The Resilience of Retribution As an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313–14 n.5 (2000) ("This expression of condemnation is retributive in that it is not intended to achieve deterrence but is considered to have moral value in itself.")

¹⁵⁹ HART, PUNISHMENT, *supra* note 159, at 234–35.

¹⁶⁰ Cotton, *Back with A Vengeance*, *supra* note 159, at 1314.

¹⁶¹ *Id.*

¹⁶² Mark B. Harmon & Fergal Gaynor, *The Sentencing Practice of International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 711 (2007); see also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 409–18, 461–63, 814–17 (2000).

¹⁶³ Tadić, IT-94-I-A & IT-94-I-Abis, Judgment in Sentencing Appeals, *supra* note 33, ¶ 48; Delalić, IT-96-21-A, Judgment, *supra* note 22, ¶ 806.

¹⁶⁴ ICTY, Prosecutor v. Milan Babić, IT-03-72-S, Sentencing Judgment, ¶ 44 (June 29, 2004).

¹⁶⁵ ICTY, Prosecutor v. Momčilo Krajišnik, IT-00-39-T, Judgment, ¶ 1146 (Sept. 27, 2006).

fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.”¹⁶⁶

2. Rehabilitation

¶76 Participants in mass atrocities tend to not fit the characteristic profile of career criminals in domestic jurisdictions, the latter of whom are often prone to violent outbursts or require maximum security measures. As described at length *supra*, many of the accused persons at the tribunals occupied positions of military or political leadership. A report on the United Nations Detention Unit in The Hague noted that ICTY detainees are characterized by a high average age, strong internal discipline, and relatively good social skills.¹⁶⁷ They do not appear to pose a significant threat to society at this point, and have already been re-socialized. For this reason, tribunal Chambers have explicitly downplayed the weight afforded to rehabilitation in determining sentences for mass atrocities.¹⁶⁸

3. Deterrence

¶77 As with rehabilitation, the ICTY has deemed deterrence a relatively low factor in determining sentences for persons convicted of mass atrocities.¹⁶⁹ It is impossible to assess the deterrent effect that international tribunals have, whether “specific deterrence” of the accused from committing further crimes or “general deterrence” of would-be perpetrators of similar crimes and mass atrocities around the world.¹⁷⁰ Yet supporters of the effort cite the importance of the public message tribunals send to not only individuals, but also political leaders, governments, and militaries – that there are legal consequences and potential punishment for the architecture or participation in mass atrocities.

4. Sentencing Guidelines

¶78 Currently, the lack of any tangible sentencing guidelines complicates the predictability and perhaps justness of sentencing. “The sentencing practice of international institutions remains confusing, disparate, inconsistent, and erratic; it gives rise to distributive inequities.”¹⁷¹ One

¹⁶⁶ Hadžhadonović Judgment, IT-01-47-T, *supra* note 86, ¶¶ 2070–71 (citing Aleksovski, IT-95-14/1-A, Judgment, *supra* note 40, ¶ 185). See also ICTY, Prosecutor v. Drazen Erdemović, IT-96-22-T, Sentencing Judgment, ¶ 64 (Nov. 29, 1996); Delalić, IT-96-21-A, Judgment, *supra* note 22, ¶ 1234.

¹⁶⁷ Independent Audit Of The Detention Unit At The International Criminal Tribunal For The Former Yugoslavia, ICTY WEBSITE (May 4, 2006), http://icty.org/x/file/Press/PR_attachments/DU-audit.pdf.

¹⁶⁸ Delalić, IT-96-21-A, Judgment, *supra* note 22, ¶ 806 (“Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal. On the contrary, the Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight.”). See also ICTY, Prosecutor v. Miroslav Deronjić, IT-02-61-A, Sentencing Appeal Judgment, ¶ 136 (July 20, 2005).

¹⁶⁹ Tadić, *supra* note 65, ¶ 48; Appeals Judgment, Delalić, IT-96-21-A, Judgment, *supra* note 22, ¶ 801. See also ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vuković, IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 840 (Feb. 22, 2001).

¹⁷⁰ ICTY, Prosecutor v. Ranko Češić, IT-95-10-S, Sentencing Judgment, ¶¶ 25–26 (Mar. 11, 2004).

¹⁷¹ MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 15 (2007).

commentator has likened it to a “lottery system” or game of “Russian Roulette,” in that the particular judges may have differing personal feelings on which crimes are most severe.¹⁷² The ad hoc tribunals, particularly the ICTY, have garnered criticism from scholars who make note of the seemingly lenient sentences that are sometimes bafflingly lower than those imposed by municipal courts for crimes on a much smaller scale.¹⁷³

¶79 Additionally, the lack of transparency and clarity in sentencing determination arises from the fact that the sentencing hearings are not held after the judgments have been rendered. Rather, the prosecution and defense teams at the ICTY and ICTR present any relevant information, including during closing arguments, that may “assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more charges in the indictment.”¹⁷⁴ Initially, the two courts employed the common law system’s separate sentencing hearings, but they eventually amended their respective rules of procedure in favor of the civil law system’s combined judgment and sentencing decisions.

¶80 The exact reasoning behind the shift in sentencing procedure was never announced, particularly since the change may preclude a fair trial for the defendant, but it was likely that the tribunals were attempting to streamline and expedite the trial process (bearing in mind the need to bring in witnesses for testimony, and the added cost and time that a separate sentence hearing entails).¹⁷⁵

¶81 Beyond this, the tribunal sentencing practice at the ICTY and ICTR does not itemize what portion of a convict’s counts result in what portion of their sentence. The SCSL has slightly different procedural rules and has a separate sentencing hearing, which includes an enumeration of the sentences for each count. Ad hoc tribunals generally can benefit from more transparent sentencing procedures that, taking their cues from the SCSL, attribute specific sentences or parts of sentences to specific individual crimes or counts.

¶82 In my analysis here, I have pointed out several factors I believe have contributed to the discrepancies in sentencing severity among the various tribunals adjudicating superior responsibility-related cases. I believe that courts’ literal-minded conception of “active participation” negates the very principles that the superior responsibility doctrine was set up to enforce. It is true that many individuals, described above, have been tried and convicted on the basis of crimes that fall within their superior responsibility. However, their typically light sentences do not always reflect that culpability. If tribunals are to fulfill the promise of justice inherent in the doctrine, they must, in determining their sentences, relinquish their adherence to literal-minded notions of active participation; only then will sentences correspond to the crimes for which the superiors have been convicted.

¶83 Further, although it was likely not the intention of either tribunal, a comparison of the ICTY and ICTR cases suggests that sentences vary in severity based on how the crimes can be classified within international human rights law and policy. I argue that sentences should be distributed based on the severity of the individual crimes, and not with respect to whether these crimes fit within politically-informed parameters for “genocide,” or any other ranking of crimes.

¹⁷² OLAOLUWA OLUSANYA, SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 139 (2005).

¹⁷³ Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 Nw. U. L. REV. 539, 578–79 (2005); see also Harmon & Gaynor, *Sentencing Practice*, *supra* note 2, at 684–89.

¹⁷⁴ See ICTY RPE, Rules 85–86 (July 24, 2009).

¹⁷⁵ Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 INDIANA INT’L & COMP. L. REV. 53 (2001).

¶84 The tribunals have also generated some “best practices,” as well. The Sierra Leone tribunal’s issuance of appropriately heavy sentences for crimes not classified as genocide is promising. So, too, is the ICTR’s willingness to prosecute and convict civilians—especially notable community leaders and media figures—for their indirect but no less instrumental roles in inciting and propagating crimes of the most reprehensible nature. Currently at the ICC, the trial of Jean- Pierre Bemba and his militia’s involvement in the Central African Republic is unfolding. This is the first superior responsibility case to be heard there, and it would be interesting to observe his sentence should he be convicted as a superior of crimes against humanity and war crimes.

¶85 I argue that the ICC Chamber should move away from an “active-participation” understanding of superior responsibility and hand down sentences in line with other criminal tribunals more faithful to the original underlying concept of this doctrine. Given the ICC’s unsatisfactory sentencing record for crimes associated with superior responsibility, I find especially compelling Immanuel Kant’s contention that if those with the authority to punish “fail to do so, they may be regarded as accomplices... [and the] ‘bloodguilt’ of the perpetrator’s crime will come to rest with them.”¹⁷⁶

¹⁷⁶ Sepinwall, *Failures to Punish*, *supra* note 154, at 292 (citing Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 131 (Jeffrie G. Murphy & Jean Hampton eds., 1998) (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans., 1965) (1797))).