

# Humanity

## **Sentencing at the ICTY: Doing justice to complex realities of international crimes?**

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July 4, 2017

International crimes such as war crimes, crimes against humanity and genocide are manifestations of large-scale serious violations of human rights, which have been defined as the most serious crimes of international concern. They constitute a prime example of collective, systematic criminality. Usually, they are committed by a multiplicity of perpetrators acting within a specific political, ideological and social context. In general, these many individuals take on largely diverse roles, which are often dynamically changing over time and space; they possess different degrees of intent and agency; and have wide-ranging motives and individual histories. Criminologists have argued that in order to explain individual acts of atrocity, one cannot isolate individuals from their criminal context. International criminal law, however, with its exclusive focus on individual criminal responsibility, reduces the extremely complex and ambiguous reality of mass violence to a narrow cause-effect equation. In the legal “realm” the crime is a result of actions or inactions of a single defendant, who is considered “fully responsible” for his deeds. The law gives no room for ambiguity. During sentence determinations, however, international judges are provided with a large amount of discretion and ample space to nuance this rather limited representation of reality. In theory, while deliberating on punishment, judges have the opportunity to reflect upon the complexities of individual involvement in international crimes and tensions between agency and collectivity. They can, in other words, not only “individualize” the punishment to fit a perpetrator but also “contextualize” the crimes and the culpability of the defendant. In this post, I am trying to open a discussion on the question to what extent judges use sentencing as a means to “do justice” to the ambiguous and complex reality of mass violence, in which individual perpetrators operate. I do this on the basis of a review of sentencing judgments of the United Nations International Criminal Tribunal for the former Yugoslavia (UNICTY).<sup>1</sup>

### **Complexity of International Crimes**

According to social scientists, it is the specific political, ideological and societal context of mass violence that distinguishes atrocity crime perpetrators from “ordinary” murderers or rapists. Large-scale atrocities are usually perpetrated within a period of social upheaval, identity based conflicts, or wars. Moreover, they are often politically motivated and considered necessary means in the quest for political power. They are often condoned or promoted by authorities and justified in the name of achieving higher goals such as state security, justice or survival of one’s own group.<sup>2</sup> In contrast to research on perpetrators of ordinary crimes, criminological research trying to explain and understand behavior of perpetrators of international crimes and their motivations is

still in its inception. After WWII, the focus of scholarly inquiry was on individuals and “defects” in their character. The “Bad or Mad thesis” did not hold for long. More and more scholars turned their attention to the context, in which these crimes are committed, rather than on defects in individual character or individual disposition. Increasingly, the behavior of perpetrators of international crimes was explained by “the extraordinary circumstances thesis.” During periods of societal upheavals and atrocities, a social and moral normative order, which is generally based on norms prohibiting inflicting harm on other human beings, becomes reversed. Under these “extraordinary circumstances” people are socialized into considering violence (against a targeted group) as a necessary and legitimate means to achieve their goals.<sup>3</sup> Many otherwise law-obedient and well-socialized individuals are caught up in atrocities and commit horrendous deeds, as if they were “normal.”<sup>4</sup> But “many” of course does not mean “all” and scholars currently acknowledge the complex and dynamic character of involvement in atrocities. Accordingly, they put forward interactionist theories: it is the interaction of individual dispositions (and histories) and situational forces (specific context) that can best explain why some people end up committing violence, why others passively stand by, and why some evade or actively resist the violence.<sup>5</sup>

No matter what theoretical stance one adheres to—situational or interactionist—international crime perpetrators are alleged to be different from ordinary criminals, who are deviant and poorly socialized.<sup>6</sup> Criminologists like Alette Smeulers offer a comprehensive typology of perpetrators of international crimes, derived from a literature review, case-law and (auto-) biographies.<sup>7</sup> She distinguishes nine “ideal” types of perpetrators based on their behavior prior to a conflict period, position and behavior during the conflict and their main motivations to commit crimes. Smeulers’ typology not only reflects the different roles, ranks and motives of perpetrators taking into account societal and ideological context. It also aims to distinguish between (i) perpetrators who “create the situation” in which crimes are committed (and are therefore influential in the reversal of social and moral norms, i.e. leaders) and (ii) those who “merely” accept the situation and as a consequence thereof get involved in international crimes (i.e. followers).<sup>8</sup> The crucial role of the former in creating a social climate promoting or condoning violence results, according to Smeulers, in their elevated culpability for atrocities, as without their encouragement and approval, the argument goes, the followers would not get involved in atrocities.

## **Collective Crimes, Individual Criminal Liability and Sentencing**

The challenge international criminal judges face is that they are supposed to attribute criminal responsibility and deliver “appropriate sentence” to individuals for collective, mass atrocity crimes. The positive law of sentencing is vague. It vests in judges a broad discretion to determine sentences on a case-by-case basis. Applicable penalties are limited to imprisonment. Article 24 of the ICTY Statute contains very general instructions as to what factors should be taken into account in imposing sentences: the gravity of the offence and the individual circumstances of the convicted person. What is actually meant by the “gravity of crime” or which “individual circumstances” are relevant is unclear. Rule 101 of the Rules of Procedure and Evidence clarifies the regulation of the sentence determinations only to a very limited extent. It limits the range of applicable sentences with a maximum sentence of life imprisonment. It also instructs judges to take into account any aggravating and/or mitigating circumstances. However, no list or any other

guidelines regarding aggravating and mitigating factors is provided. Only two potential mitigating factors are explicitly mentioned: “superior orders” and “substantial cooperation with the Prosecutor.”

Effectively, judges are left to determine on a case-by-case basis what factors justify a particular severity of sentence. In theory, they are thus given ample space to reflect upon the complex reality of individual perpetrators of international crimes, their individualities and the situational context. Judges are thus free to not only individualize but also contextualize actions of a defendant and make an assessment of culpability reflecting both individual dispositions and situational forces. To evaluate culpability of perpetrators of international crimes and do justice to their complex character, one arguably needs to not only look at what the perpetrator did, to whom, where and when, but also consider the way how he or she (inter)acted with the specific, “extraordinary” context.

### **Sentencing at ICTY: Turning a Blind Eye to Complexity**

So, do sentencing narratives of the ICTY judges do justice to the complex reality of perpetrators of international crimes? And how is the culpability of individual perpetrators for essentially collective crimes assessed? In this section, I will present a few observations, which stood out in my review of the sentencing arguments of judges at the ICTY.

In general, ICTY judges seemed to be very reluctant to discuss and acknowledge the complexities of one’s involvement in atrocities. The main and most important consideration for determining sentence severity according to the ICTY judges is the gravity of crimes, which is usually elaborately discussed in sentencing judgments. These often detail the harm caused by the offender, the impact on victims, their relatives and close-ones, and even on society at large. Judges predominantly “individualize” a sentence by meticulously examining the defendant’s role and how his/her particular actions contributed to the specific criminal acts at hand. In *Kvočka et al.*, for example, while discussing how each of the five defendants contributed to the system of maltreatment of individuals detained in the Omarska camp, the judges noted that:

the defendants worked in the camp from between 17 days to 3 months. If during this time they had relentlessly sought to improve the conditions, prevent crimes, and alleviate the suffering, they would likely escape liability for participating in the persecutory scheme. None of the defendants in this case fits that bill. We have instead a spectrum that runs from actively participating in the physical and mental abuse of prisoners, to watching passively while detainees were abused, to those who pretended everything was normal in the face of emaciated inmates hobbling around with broken bones, black and blue marks, and other indicia of violence and abuse. All three attitudes deserve to be punished. In this case, those directly inflicting the pain and suffering deserve a harsher punishment than those remaining indifferent to the abusive treatment and conditions.<sup>9</sup>

In this sense, a defendant’s action is situated within its context and compared with co-defendants, who were on trial for crimes committed within the same detention camp. This is the only manner

in which judges systematically “contextualize” defendant’s actions and acknowledge the collective character of international crimes. The comparison, however, often extends beyond a trial at hand. The so-called principle of gradation,<sup>10</sup> which has developed in the sentencing case law over time, mandates judges to consider a relative significance of a defendant in the broader context of the conflict as such. The principle of gradation should bring into the evaluation of defendants’ culpability his/her level in command structure, “compared to his/her superiors ... or the very architects of the strategy of ethnic cleansing ...”<sup>11</sup> Consequently, according to the principle of gradation, sentences are to be gradated along the hierarchy of authority of a defendant, within a state or organizational structure and ... significance of his/her role in crimes. In this sense, judges also acknowledge the way in which actions of perpetrators occupying a position of authority can contribute to creating a social reality promoting violence. Judges sometimes explicitly mention how involvement in crimes by those in a position of authority, who ideally should act as an example, possibly encourage others to commit crimes, promote a “culture of violence or impunity” or “an atmosphere of terror.”<sup>12</sup>

In contrast, however, with respect to the “followers,” judges hardly ever accept that such culture of violence, atmosphere of terror or virulent propaganda might have impacted their actions and potentially “mitigate” their level of culpability.<sup>13</sup> Almost in all the instances, when the defence raised such specific contextual considerations and asked judges to consider broader social realities and their importance to the actions of a defendant, judges dismiss these submissions “in light of the gravity of crimes.” The reasoning used by judges in *Bralo*, who pleaded guilty to killing, sexual violence and torture, among others, and was sentenced to 20 years imprisonment, epitomizes this logic. In this case, judges outright dismissed the relevance of the specific context to the assessment of one’s level of culpability and severity of sentence:

While it is notorious that such [“enormous pressures placed on many people of good character and of bad character”] existed, the Trial Chamber nonetheless finds that they cannot be considered in any way relevant to the sentence to be imposed upon Bralo.... Large sections of the population of Vitez municipality, and indeed of many parts of Bosnia and Herzegovina, were subjected to the same or similar pressures, and yet did not respond in the same manner as Bralo.<sup>14</sup>

Indeed. Therefore, as opposed to “the large section of populations” Bralo was prosecuted, tried and convicted for his crimes. But should not the fact that Bralo acted within this very specific, coercive context, arguably following orders, impact the assessment of level of his culpability and consequently severity of his sentence? Should not his sentence be “gradated” taking into account role of those, who engineered and created the enormous pressures, under which he arguably operated? Only in very extreme cases, such as the confessant Drazen Erdemovic, the judges went on to a lengthy discussion individualizing but also contextualizing defendant’s actions.<sup>15</sup> Not only the immediate context of his precarious situation within his military unit and during the events in Srebrenica, where he admitted to shooting over 70 individuals, but also the broader context of the conflict and its impact on his behavior were discussed and used to evaluate his culpability for the purposes of sentencing. In the end, Erdemovic, despite the magnitude of his crimes, faced a sentence of 5-year imprisonment. This case, however, forms an exception to the rule. In all the other cases, despite the defence often raising particular personal circumstances, individual

histories and specific contexts of international crimes, judges ignored these submissions, rejected them or assigned them only a very limited weight.

It seems that there is a certain level of discomfort in accepting that “ordinary” people are capable of such atrocious acts, especially when it comes to hands-on perpetrators. Almost all defendants judged at the ICTY are portrayed in their defense submissions as perfect, conscientious and tolerant citizens, prior to and after their involvement in atrocities. On the balance of probabilities, judges accept these “facts.” Most often, however, they “sweep” them under the carpet “given the extreme cruelty of crimes” or “sheer brutality of the offences.” The good character of an accused, a prior history of tolerance and crime-free behavior are usually given only very limited weight in mitigation of a sentence. The violent context and the way how it might have had affected the individual is just ignored or outright rejected. Judges seem to be pre-occupied with condemning atrocities, fighting the impunity and holding individuals responsible. They are hardly trying to understand how it can be that the family men who are allegedly well liked and law-obedient are suddenly capable of committing, promoting or condoning atrocious acts. Certainly, criminal trials are not about understanding “the why.” Nonetheless, the individual- and context-related considerations can arguably help to more accurately reflect one’s level of culpability for mass atrocity crimes. The ICTY judges, however, seem to have, to a large extent, turned a blind eye to these considerations.

## **Conclusion**

These observations are relevant not only to the ICTY, which slowly and surely is closing its doors and is busy crafting and engineering its “legacy,” but to all the courts and tribunals. One might only wonder, for example, how the former child soldier Dominic Ongwen’s culpability is going to be balanced in sentencing, in case he is convicted at the International Criminal Court. This case of a former child soldier turned vicious perpetrator has generated heated discussions regarding his agency and capacity to stand trial. In the scenario he is convicted, sentencing could provide the ICC judges with a possibility to take into account his victim-perpetrator status and factor it in in the assessment of his level of culpability.

Sentence considerations can give judges a leeway to reflect on the complexities of international crimes and their perpetrators, the diverse and multifaceted personal histories and the ever-evolving context, under which atrocities are perpetrated. It provides judges with an opportunity to, at least partially, nuance the black and white, reductionist imagery that emerges from dealing with atrocities using black letter law.

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<sup>1</sup> As of 11 May 2017 the ICTY has convicted 82 individuals for their participation in international crimes committed during the conflicts in the Former Yugoslavia. 7 are still on appeal either at the ICTY or before the UN Mechanism for International Criminal Tribunals (MICT).

<sup>2</sup> Cf. JE Waller, "The Ordinarity of Extraordinary Evil: the Making of Perpetrators of Collective Violence," in *Collective Violence and International Criminal Justice: An Interdisciplinary Approach*, ed. Alette Smeulers (Intersentia 2010) 19; A Alvarez, *Governments, Citizens, and Genocide: A Comparative and Interdisciplinary Approach* (Indiana University Press, 2001) etc.

<sup>3</sup> Cf. HC Kelman, VL Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (Yale University Press, 1989)

<sup>4</sup> Cf. JA Waller, "The Ordinarity of Extraordinary Evil: The Making of Perpetrators of Collective Violence," in *Collective Violence and International Criminal Justice*, 19; M.A. Drumbl *Atrocity, Punishment and International Law* (Cambridge University Press, 2007); A Smeulers, "Perpetrators of International Crimes: Towards a Typology," in *Supranational Criminology: Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roelof Havemen (Intersentia, 2008)

<sup>5</sup> There are scholars arguing that criminal acts during conflict periods are often committed by already "rogue" elements in society such as released prisoners and criminals: J Mueller, "The Banality of Ethnic War," *International Security* 25 (2000): 42. These accounts should be compared to scholars within the "ordinary individuals under extraordinary circumstances" line of reasoning such as Smeulers or Drumbl. The existing empirical research is very limited to provide "validation" to any of these. Cf. S Strauss, *The Order of Genocide, Race Power and War in Rwanda* (Cornell University Press, 2006); P Verwimp, "An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda," *Journal of Development Economics* 77 (2005): 297

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<sup>6</sup> Smeulers, *ibid.*; Drumbl (n 96); F Neubacher, “How Can It Happen that Horendous State Crimes are Perpetrated? An Overview of Criminological Theories,” *Journal of International Criminal Justice* 4 (2006): 787. See also the audit of the ICTY Detention Unit, which concluded that ICTY detainees “are characterized by a lack of a sense of criminal identity, relatively high average age [and] substantial resources.” The Independent Audit of the Detention Unit at the International Criminal Tribunal for the former Yugoslavia, May 4, 2006, para. 2.3.

<sup>7</sup> For other typologies cf. DK Gupta, *Path to Collective Madness – A Study in Social Oder and Political Pathology* (Preager, 2001); M Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (CUP, 2005); R Crelinsten, “In Their Own Words; The World of the Torturer,” in *The Politics of Pain – Torturers and Their Masters*, ed. RD Crelinsten and AP Schmid (COMT, 1993)

<sup>8</sup> A Smeulers, B Hola, “ICTY and the Culpability of Different Types of Perpetrators of International Crimes,” in *Collective Violence and International Criminal Justice*, 203.

<sup>9</sup> Judgment, *Kvocka et al.* (IT-98-30/1) Trial Chamber Judgment, 2 November 2001, para. 709.

<sup>10</sup> Judgment, *Tadic* (IT-94-1) Appeals Chamber, January 26, 2000, paras. 55-58.

<sup>11</sup> *Ibid.*, para. 56.

<sup>12</sup> Judgment, *Sikirica et al.* (IT-95-8-S) Trial Chamber, 13 November 2001, para. 140; Judgment, *Mucic et al.* (IT-96-21) Trial Chamber, November 16, 1998, para. 1266; Judgment, *Bala* (IT-03-66-T) Trial Chamber, November 30, 2005, para. 726.

<sup>13</sup> For a notable exception see Sentencing Judgment *Tadic* (IT-94-1-T,) July 14, 1997, para. 70. Not that judges elaborately analyze it, though.

<sup>14</sup> *Prosecutor v Bralo* (IT-95-17), December 7, 2005, para. 51.

<sup>15</sup> *Prosecutor v Erdemovic* (ICTY-96-22).