



Humanitarian Law Center Foundation



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ЗА ТЕБЕ

Policy Paper:
Application of aggravating and mitigating
circumstances in war crimes trials



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Application of aggravating and mitigating circumstances in war crimes trials

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ABBREVIATIONS

BiH	Bosnia and Herzegovina
CC FRY	Criminal Code of the Federal Republic of Yugoslavia
CC SFRY	Criminal Code of the Socialist Federative Republic of Yugoslavia
CPC	Criminal Procedure Code
HLC	Humanitarian Law Center
ICTY	International Criminal Tribunal for the Former Yugoslavia
MICT	International Residual Mechanism for Criminal Tribunals
OUP	Department of Internal Affairs
PPOWC	Public Prosecutor's Office for War Crimes

INTRODUCTION

A large number of crimes were committed during the armed conflicts in the territory of the former Yugoslavia. The perpetrators have been tried by the International Criminal Tribunal for the former Yugoslavia (ICTY), or by national courts in the countries of the region and in Serbia. Initially, war crimes trials in Serbia were conducted by courts of general jurisdiction and military courts. With the adoption of the Law on the Organisation and Jurisdiction of State Authorities in War Crimes Proceedings¹, which entered into force on 1 July 2003, war crimes trials were transferred to the jurisdiction of the Higher Court in Belgrade as the court of first instance, and to the Court of Appeal in Belgrade as the court of second instance. Special war crimes departments were set up in these courts, namely the War Crimes Department of the Higher Court in Belgrade and the War Crimes Department of the Court of Appeal in Belgrade.²

As of August 2024, these courts had conducted and finally adjudicated 68 war crimes trials, sentencing 95 individuals to terms of imprisonment ranging from one year³

1 Law on the Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (Official Gazette of the RS nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 - other law, 6/2015 and 10/2023)

2 *Ibid*, Article 9.

3 Perica Đaković (the *Medak* case), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 9/11 of 11 January 2012.

to 20 years⁴, for war crimes against the civilian population and war crimes against prisoners of war.

Given that the fundamental purpose of war crimes trials is the establishment of all the facts of a case in order to determine the individual criminal responsibility of the accused, an appropriate punishment for those found responsible and arriving at a sense of justice for the victims are of particular importance when considering a sentence.

Whilst there are legal limits within which courts must operate when considering a sentence, and no sentence will satisfy all parties to proceedings, either victims or their family members, the current sentencing practice nevertheless deserves criticism. This applies in particular to the use of mitigating and aggravating circumstances, reductions of sentence, and lack of transparency in the sentencing process following plea agreements, as well as to the non-application of the sentencing standards established by the ICTY.

The Humanitarian Law Center (HLC) has monitored all war crimes trials since the establishment of the War Crimes Departments at the Higher Court in Belgrade and

4 Dragan Jović (the *Bijeljina* case), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1. Po2 6/12 of 25 February 2013; Miroљjub Vujović, Stanko Vujanović and Predrag Milojević (the *Ovčara* case) judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 2/204 of 24 November 2017; Zoran Vukšić (the *Beli Manastir* case), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1. Po2 6/15 of 12 February 2016; Pane Bulat (the *Banski Kovačevac* case), judgment of the Court of Appeal in Belgrade Kž1 Po2 8/2010 of 14 February 2011; Dragan Borojević and Dragan Medić (the *Podujevo*), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 3/2010 of 25 May 2010; Željko Đukić (the *Podujevo* case), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 2/2011 of 11 February 2011; Sladan Čukarić (the *Suva Reka* case), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 4/2010 of 30 June 2010, Radojko Repanović (the *Suva Reka* case), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 4/11 of 6 June 2011; Darko Janković (*Zvornik III* and *Zvornik IV*), judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 2/12 of 4 October 2012.

the Court of Appeal in Belgrade, and has published eleven reports on domestic war crimes trials to date, which provide an overview of the proceedings and the HLC's main findings on each case of public interest. In the course of its long-standing trial monitoring practice, the HLC has identified a number of shortcomings in the assessment of mitigating and aggravating circumstances. This publication is intended to highlight these shortcomings and make recommendations for improving sentencing practice in war crimes cases in the future.

ICTY PRACTICE

The International Criminal Tribunal for the former Yugoslavia was established by United Nations Security Council Resolution 827 of 25 May 1993, to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. During its existence, the ICTY sentenced 93 individuals to terms of imprisonment ranging from two years⁵ to life⁶.

The legal framework for sentencing practice was the ICTY Statute, which provides for only one punishment – imprisonment, without specifying the length of imprisonment.⁷ In determining the term of imprisonment, the Tribunal followed the general practice of the courts in Yugoslavia,⁸ also taking into account all the circumstances of the crime, in particular the gravity of the crime and the individual circumstances of the perpetrator.⁹ In addition to imprisonment, the court could order the perpetrator to return any property and proceeds obtained through criminal activity, including through coercion.¹⁰

The ICTY's Rules of Procedure and Evidence provide for life imprisonment as the maximum punishment.¹¹ They also stipulate that, in determining a sentence, the Trial Chamber shall take into account all the circumstances referred to in the Statute, as well as any aggravating and mitigating circumstances, including substantial cooperation

5 ICTY Trial Chamber Judgment in *Hadžihasanović and Kubura* of 22 April 2008.

6 ICTY Appeals Chamber Judgment in *Lukić and Lukić* of 4 December 2012; ICTY Appeals Chamber Judgment in *Galić* of 30 November 2006; ICTY Appeals Chamber Judgment in *Popović et al.* of 30 January 2015; ICTY Appeals Chamber Judgment in *Zdravko Tolimir* of 8 April 2015; MICT Appeals Chamber Judgment in *Radovan Karadžić* of 20 March 2019; MICT Appeals Chamber Judgment in *Ratko Mladić* of 8 June 2021.

7 Statute of the ICTY, Article 24.

8 This practice is not binding upon the Chamber.

9 Statute of the ICTY, Article 24.

10 *Ibid.*

11 Rules on Procedure and Evidence, ICTY, Rule 101.

of the accused with the Prosecutor before or after the conviction, the general practice of the courts of the former Yugoslavia with respect to imprisonment, and the time the convicted person has already served in another country for the same act.¹²

Although the ICTY Statute does not explicitly state the purpose of punishment, in practice it was repeatedly emphasised that the purpose of punishment was twofold – deterrence and retribution.

The ICTY established a standard of proof for aggravating circumstances, according to which the Prosecutor bears the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. A lower standard applies to mitigating circumstances – the defence must prove mitigating circumstances on the balance of probability, that is, the circumstances must be more probable than not.

The main factors to be taken into consideration when determining a sentence are the gravity of the criminal offence, the circumstances of the offence, and the form and degree of the accused's involvement in the offence.

The aggravating factors most commonly referenced include the vulnerability of the victims, the position of the accused and the abuse of a position of power by the accused, the duration of the incriminated behaviour, premeditation, the motive for the offence, the number of victims, the impact on the victims, and the systematic character of the offence.

In the judgment handed down in the proceedings against Milomir Stakić, the ICTY Trial Chamber stated that it considered the fact that Stakić was a medical doctor was an aggravating factor, albeit not a particularly significant one¹³. In doing so, the Trial Chamber accepted the view of the International Criminal Tribunal for Rwanda that the higher education and intelligence of an accused constitute an aggravating factor, as they imply greater awareness and responsibility on the part of the accused.

¹² *Ibid.*

¹³ ICTY Trial Chamber judgment in *Stakić* of 31 July 2003, para. 915

Substantial cooperation with the Prosecutor is the only mitigating circumstance explicitly recognised in the ICTY Rules of Procedure and Evidence.¹⁴

The Tribunal recognised the guilty plea as a mitigating circumstance, provided that it was based on the facts of the crimes committed, that it was voluntary, and that the accused was aware of its consequences. For instance, in its judgment in the case of Goran Jelisić, who pleaded guilty after seeing photographs which showed him killing several prisoners, the Trial Chamber stated that “the accused’s guilty plea was considered to have been submitted out of principle”, but pointed out that “the accused did not show any remorse before it for the crimes he had committed.”¹⁵

Some personal circumstances of the accused were often taken into account during sentencing, even though they were not expressly provided for in the ICTY Statute and Rules. They included age, poor health, lack of previous convictions, good character, voluntary surrender and family circumstances.

14 Rules on Procedure and Evidence, ICTY, Rule 101.

15 ICTY Trial Chamber judgment in *Jelisić* of 14 December 1999, para. 127.

APPLICATION OF MITIGATING AND AGGRAVATING CIRCUMSTANCES IN WAR CRIMES TRIALS IN SERBIA

Legal framework

In war crimes trials conducted in the Republic of Serbia, the Criminal Code of the Federal Republic of Yugoslavia has been applied (CC FRY), as the law that is more lenient for the perpetrators. Namely, in accordance with the principle *nullum crimen nulla poena sine lege*, the law that was in force at the time of the commission of a crime has been applied.¹⁶ The applicable law was the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY), which stipulated that the crime of genocide (Article 141), war crimes against the civilian population (Article 142), war crimes against the wounded and sick (Article 143), war crimes against prisoners of war (Article 144) and the use of illegal means of warfare (Article 148 paragraph 2), were punishable by a minimum of five years' imprisonment and a maximum of the death sentence. However, this law requires the courts to apply the law that is more lenient to the perpetrator in cases when the law has changed between the commission of the crime and the trial.¹⁷ The Constitution of the FRY of 27 April 1992 stipulates that the death penalty may not be applied to criminal offences defined by the federal law, which at that time was the CC SFRY, and which became the CC FRY following the amendments adopted in 1992.

Changes to the CC FRY adopted in 1993 (Article 38, paragraph 2) stipulate that the maximum punishment that may be imposed for the most serious criminal offences is 20 years' imprisonment. Although the criminal law was subsequently changed several times and the maximum punishment for the most serious crimes

¹⁶ Only those criminal offences may be found to have been committed and only those legal sanctions may be imposed which have already been provided for by the law.

¹⁷ CC SFRY, Article 4.

was increased, the CC FRY continued to be applied to war crimes as the law most favourable to perpetrators, according to which war crimes are punishable by imprisonment for a minimum of five years and a maximum of 20 years.

According to the CC FRY, when considering a sentence, the court must take into account the general purpose of criminal punishment, which is “to suppress socially dangerous acts that harm or endanger the social values protected by criminal law”¹⁸ and to “prevent an offender from committing a crime, to rehabilitate/re-educate them, thereby deterring others from offending, strengthening moral values, and strengthening social responsibility and discipline among citizens.”¹⁹ The general rules on sentencing must also be respected, which require the courts to “sentence the perpetrator of a criminal offence within the sentencing range prescribed by law for a given offence, bearing in mind the purpose of the punishment and taking into account all the factors that may reduce or increase the sentence (mitigating and aggravating circumstances), in particular the following: the perpetrator’s degree of culpability, motives for committing the act, the degree of peril or injury to the good being protected, the circumstances in which the criminal offence was committed, the perpetrator’s past life, his personal circumstances, his conduct after the crime, and in particular his attitude towards the victim, as well as other circumstances relating to the perpetrator’s personality”.²⁰

It is clear from this definition of the circumstances which have an impact on sentencing that the law does not specify or enumerate mitigating and aggravating circumstances, but only mentions the most important circumstances that the courts must take into account when considering a sentence. This means that the same circumstance can be considered either an aggravating circumstance or a mitigating circumstance, depending on how it was realised in a specific case. These are the circumstances which the legislator specifically mentions, but without ranking them. In addition to them, the court must take into account all other circumstances that may influence its decision on the sentence.

18 CC FRY, Article 5, para. 2.

19 CC FRY, Article 33.

20 CC FRY, Article 41.

On the basis of the mitigating and aggravating circumstances found to exist, the court imposes a sentence that is within the sentencing range prescribed by law for the offence in question. In the case of war crimes, it means a term of imprisonment of between five and 20 years.

An exception is made for perpetrators who were minors between the ages 16 up to (but not including) 18 at the time of the crime. According to the CC FRY, the maximum sentence that may be imposed on them is 10 years' imprisonment²¹.

Exceptionally, if during the proceedings "particularly mitigating circumstances have been found to exist, which indicate that the purpose of the punishment can be achieved by a lesser sentence"²², the court may impose a penalty that is less than the mandatory minimum (sentence reduction). By applying the provisions on sentence reduction, a sentence may be reduced to less than five years, but not to less than one year as a minimum²³. When deciding to what extent the sentence should be reduced, the court must take into account the maximum and minimum sentences prescribed for the offence.²⁴

Inconsistent reasoning in the application of mitigating and aggravating circumstances

When considering a punishment for a perpetrator of a criminal offence in criminal proceedings, the court must take into consideration all mitigating and aggravating circumstances, in order to determine, within the sentencing range prescribed by law, the type and length of sentence by which the purpose of punishment will be most fully achieved. Thus, the mitigating and aggravating circumstances of the criminal offence and of the perpetrator may decrease or increase a sentence, within the sentencing range prescribed by law for the offence in question.

21 CC FRY, Article 78.

22 CC FRY, Article 42.

23 CC FRY, Article 43. para. 1, sub-para 1.

24 CC FRY, Article 43. para. 2.

The legislator has not prescribed which circumstances are mitigating and which are aggravating, it has only indicated the most important circumstances that courts must take into account when determining a sentence.

In a judgment of conviction, the court is obliged to state which circumstances have been considered as mitigating and which as aggravating, and to provide the reasons for the sentence.²⁵

The courts deserve criticism for failing to provide sufficient explanations in their judgments as to why a circumstance has been considered mitigating or aggravating. Instead, these circumstances are merely listed in judgments, along with the statement that the sentence imposed will achieve the purpose of punishment. In the absence of an explanation, it is difficult to determine the extent to which the court individualised culpability when determining the sentence.

For example, in its judgment passed on Milan Španović for the criminal offence of a war crime against a civilian population (the *Stara Gradiška* Case), the Higher Court in Belgrade War Crimes Department, merely stated that in determining the sentence, it had "*taken into account all mitigating circumstances in favour of the accused - the lack of previous convictions and his poor financial situation due of lack of employment.*"²⁶ It is not clear from this general statement on what basis, other than his own statement, the court was satisfied that the lack of a job had led to his poor financial situation.

The same general but vague wording could be found in other judgments of the Higher Court in Belgrade War Crimes Department. For example, the judgment passed on Nebojša Stojanović for the criminal offence of a war crime against prisoners of war (the *Doboj-Kožuhe* Case) states that in determining the form and severity of the punishment, "*the court took into account all circumstances referred to in Article 41 of the CC FRY that may reduce or increase the severity of*

²⁵ CPC, Article 428.

²⁶ Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 32/210 of 25 June 2010.

the punishment, and took his family circumstances and the time elapsed since the commission of the crime as mitigating circumstances, and the seriousness of the crime as an aggravating circumstance.”²⁷

Further, in the trial of Miloš Čajević for the criminal offence of a war crime against the civilian population (the *Brčko II* Case), the court “considered the fact that the accused is the father of four children a mitigating circumstance, and his previous convictions and the degree of harm inflicted on the victims as aggravating circumstances”.²⁸

In contrast to these judgments where the court merely listed mitigating and aggravating factors without further explanation (a practice which should be abandoned), in some other judgments the court correctly assessed mitigating and aggravating circumstances and explained the reasons behind its decision on the punishment.

In explaining its decision, for instance, on the sentence imposed on Rajko Kozlina for the criminal offence of a war crime against the civilian population (the *Trnje* Case), the court stated that despite the existence of numerous mitigating circumstances – that Kozlina was a family man, married with one child, without prior convictions, had a job and provided for his family, lived in a rented apartment, owned no immovable property, had modest means and was only 23 at the time of the crime, and that there had been a considerable lapse of time since the commission of the crime – the court held that, given the gravity of the defendant’s actions, which resulted in the deaths of a large number of civilians, including children, the purpose of the punishment could only be achieved by an imprisonment term of 15 years.²⁹

27 Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 no. 4/18 of 15 October 2020.

28 Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 9/2018 of 26 April 2021.

29 Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 no. 10/2013 of 1 April 2019.

An example of the proper explanation of mitigating and aggravating circumstances and their assessment can be found in the judgment of the War Crimes Department of the Higher Court in Belgrade in the case against Željko Đukić (the *Podujevo* Case), who was on trial for a war crime against the civilian population. The court took into account as mitigating circumstances the family status of the accused – that he was married and the father of four children between the ages of 4 and 20, with an absence of previous convictions and a precarious state of health. At the same time, the court took into account the following facts: that Đukić's victims were civilians, including seven children, the youngest of whom was just 21 months old; that five persons who survived the crime were seriously injured and would suffer permanent effects; that the injured parties had lost their siblings; and that other surviving family members of the victims were also affected by the crime, especially the injured party who lost his entire family – parents, wife and four children. The court also took into account the circumstances of the crime that were relevant to the sentencing, such as: the situation before the killings, the forcing of helpless women and children out of their homes, the ransacking of victims' homes, during which even the children were subjected to body searches and had their toys thrown away, the expulsion of the victims into the street, which might have given them a glimmer of hope that they would be spared, the killing of an injured party in front of everyone, the return to the courtyard and the pleas of the mothers to spare the children. Taking into account these very grave consequences of his actions, the age of the victims and the existence of other extremely aggravating circumstances, the court considered that the term of imprisonment of 15 years was necessary in order to achieve the purpose of the punishment.³⁰

The judgment of conviction passed on Radojko Repanović for the criminal offence of a war crime against the civilian population (the *Suva Reka* Case) is another example of a well-individualised finding of guilt and a thorough explanation of the circumstances that the court took into account in imposing the sentence of 20 years' imprisonment on the accused. The court regarded the absence of prior

³⁰ Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 44/2010 of 22 September 2010.

convictions and the fact that the accused was married and the father of two children, as well as his remorse for what had happened in Suva Reka, as mitigating circumstances. As regards the aggravating circumstances, the court found that the accused, in his capacity as Commander of the Internal Affairs Department (OUP) in Suva Reka, ordered the attack and killing of Albanian civilians, that 48 civilians were killed in the attack, that most of the victims were women, including an eight-months pregnant woman, that among the victims were nineteen children, the youngest being only 9 months old, and that the victims were defenceless and helpless and did nothing to provoke his behaviour or make him feel threatened. The court also took into account the physical and mental suffering inflicted on the victims who were killed and the obvious mental suffering inflicted on the survivors. Finally, the court gave weight to the fact that at the time of the crime the accused was a member of the police force - and not only a member but a commanding officer, whose duty was to protect the citizens of the Republic of Serbia, including the victims.³¹

Mitigating circumstances most commonly considered in war crimes trials

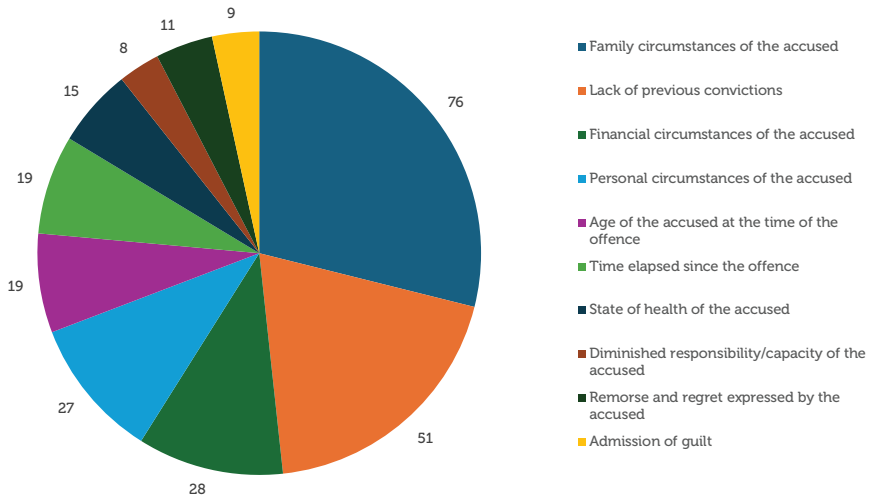
In determining a sentence, the courts are required to consider and weigh all the circumstances that may affect the severity of the sentence, but in practice they tend to give too much mitigating weight to certain factors, such as family circumstances, lack of previous convictions and the time elapsed since the commission of the crime.

An analysis of final convictions shows that the most commonly applied mitigating circumstances in war crimes trials are family circumstances (76), lack of previous convictions (51), financial situation (28), personal circumstances (27), age at the time of the crime (19), and the time elapsed since the commission of the crime (19).

³¹ Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 49/2010 of 10 December 2010.

Other factors taken into account in mitigation are the health of the accused (15), diminished responsibility/capacity (8), expressed regret and remorse (11), and admission of guilt (9).

An analysis of final sentences with regard to mitigating circumstances used



The question arises as to whether the fact that an accused is the father of adult children can really be regarded as a mitigating circumstance, as it unjustifiably privileges those who have children over those who do not. All the more so because the fact that the victims were family men, and most of them had minor children at the time of their murder, has never been considered a significant aggravating circumstance.

As regards the lack of previous convictions, the law-abiding and noncriminal behaviour of the accused should be considered as the expected and implicit norm for any member of society, rather than a mitigating factor.

Nor should the lapse of time since the commission of the crime be regarded as a mitigating factor, because it is universally accepted that there is no statute of limitations for the prosecution of war crimes. Considering the time elapsed since the criminal act a mitigating factor is contrary both to the ICTY 's established

practice that the length of time between the criminal act and the judgment cannot be considered a mitigating factor,³² and to contemporary court practice.³³ Moreover, the application of the lapse of time as a mitigating factor should take into account the slowness and inefficiency of the state in prosecuting war crimes. The fact that war crimes have been prosecuted long after they were committed should not be used to the advantage of the accused. In the period, often of at least 20 years, between the criminal act and the judgment, the accused had plenty of time to live their lives, start families and raise their children - something that their victims were deprived of.

The Court of Appeal in Belgrade War Crimes Department, as the court of second instance, has acted inconsistently in considering the amount of time elapsed since the crime as a mitigating circumstance when deciding on appeals for reduction of sentences.

When ruling on an appeal in the proceedings against Zoran Vukšić and others (the *Beli Manastir* Case) for a war crime against the civilian population, the court, upholding the first-instance judgment, stated as follows: "*Having considered all mitigating and aggravating circumstances, with the exception of the length of time that has elapsed since the commission of the criminal offence, **which should not be considered a mitigating factor in war crimes cases and was therefore not considered as such by the court of second instance, the War Crimes Department of the Court of Appeal in Belgrade holds that the court of first instance correctly determined the type and length of sentence for the accused.***"³⁴

32 ICTY Trial Chamber Judgment in *Dragan Nikolić* of 18 December 2003, paras. 263-273.

33 BGH, 1 StR 538/01, Judgment of 21 February 2002 – the German Federal Court of Justice (Bundesgerichtshof) in a murder case made a reference to the length of the time period between the criminal conduct and the judgment as a possible mitigating factor, but emphasized that due to the seriousness of the crimes that the accused (now 90 years old) committed in 1943-44 during World War II, that mitigating factor is not applicable.

34 Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 6/15 of 12 February 2016.

In contrast to this, the Court of Appeal, when ruling on the appeal against the sentence in the proceedings against Milanko Dević (the *Ključ – Šljivari* Case) for the criminal offence of a war crime against the civilian population, took a completely opposite stance and reduced Dević's sentence. Explaining its decision, the Court stated that the court of first instance had failed to give sufficient weight to mitigating circumstances, **"as well as the fact that 25 years had passed since the criminal offence was committed."**³⁵

This court has done the same in some other war crimes, reducing sentences on the basis of the length of time since the commission of the crime. In the *Lovas* and *Bosanska Krupa* cases, for instance, this circumstance was used to impose sentences below the mandatory minimum sentence for the offence (see the section on sentence reduction).

Admission of guilt/guilty plea was taken into account for mitigation in respect of nine accused persons, but without careful consideration. First of all, the court must assess the sincerity of the plea and whether and to what extent it has contributed to the establishment of the facts and, in particular, at what stage of the criminal proceedings it was made.

Pero Petrašević (the *Scorpions* Case), convicted of the execution of six Srebrenica residents in Trnovo (BiH), had his sentence reduced after the court took his confession to all charges against him as a mitigating circumstance.³⁶ It is true that Petrašević confessed to the criminal offence he was charged with, but the confession was made with the sole purpose of obtaining a lesser sentence, as any denial would have been pointless since the whole event had been videotaped. The video, which clearly shows members of the "Scorpions" unit, including Petrašević, shooting six Bosnian prisoners, was released before the trial. It was shown at the ICTY on 1 June 2005 during the trial of Slobodan Milošević and broadcast in

35 Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 2/19 of 8 April 2019.

36 Judgment of the War Crimes Chamber of the District Court in Belgrade K. V. no. 08/08 of 28 January 2009.

Serbia shortly afterwards. It was subsequently shown as key evidence by Public Prosecutor's Office for War Crimes (PPOWC). In the light of all this, his admission of guilt should not have been considered a mitigating circumstance.

Any mitigating factor that may have an impact on sentencing should be taken into account. In practice, however, there are examples where factors that do not constitute mitigating circumstances have been considered as such.

One such example is the case of Damir Sireta (the *Ovčara II* Case), who was found guilty of participating in the killing of 200 prisoners of war at Ovčara (Vukovar, Croatia), where his status as a refugee from Croatia was considered a mitigating circumstance.³⁷ Sireta fled Croatia in an attempt to escape criminal responsibility and moved to Norway before being extradited to Serbia (Croatia also sought his extradition). Refugee status should in no way be considered a mitigating circumstance in the case of absconders who have become refugees only in order to escape justice.

In the trial of Stanko Vujanović (the *Vukovar* Case) for the murder of four Croatian civilians, the fact that *"weapons were distributed to civilians without prior training and they immediately engaged in fighting and actions"* was used to reduce Vujanović's sentence.³⁸ At the same time, among the personal details about Vujanović, the judgment stated that he was 32 years old at the time of the crime, that he had completed his military service, and that he was a conscript. Given the duration of military service in the SFRY and the system of regular military training for all conscripts until 1990, it is more than obvious that the accused was trained in the use of infantry weapons and that the mitigating circumstances cited are unacceptable.

³⁷ Judgment of the District Court in Belgrade – War Crimes Department K. V. no. 9/2008 of 23 June 2009.

³⁸ Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 40/2010 of 1 November 2010.

Similarly, in the proceedings against Branko Popović and Branko Grujić, (the *Zvornik II* Case) for the criminal offence of a war crime against the civilian population, the accused had their sentences reduced on the basis of *“the obvious involvement of many other persons in the events, either direct perpetrators or persons with similar powers to those of the accused, who have not yet been brought to justice.”*³⁹ The fact that there are other people who should have been prosecuted for the same act is something that should be the concern of the PPOWC, not of the court when determining a sentence. Regarding Branko Grujić, the court considered his voluntary surrender to the authorities of the Republic of Serbia while living in Zvornik (BiH) as a mitigating circumstance. But the truth is that by “voluntarily surrendering” to Serbia Grujić secured a far better position for himself than if he had remained in BiH. Instead of being charged with a crime against the civilian population, as was the case in Serbia, in BiH he would have faced the much more serious charge of a crime against humanity, because of his position as the Head of the Interim Government and member of the War Staff and War Secretariat in the then newly established Serb Municipality of Zvornik, and because of the number and scale of the crimes committed during the critical period.

Aggravating circumstances most commonly considered in war crimes trials

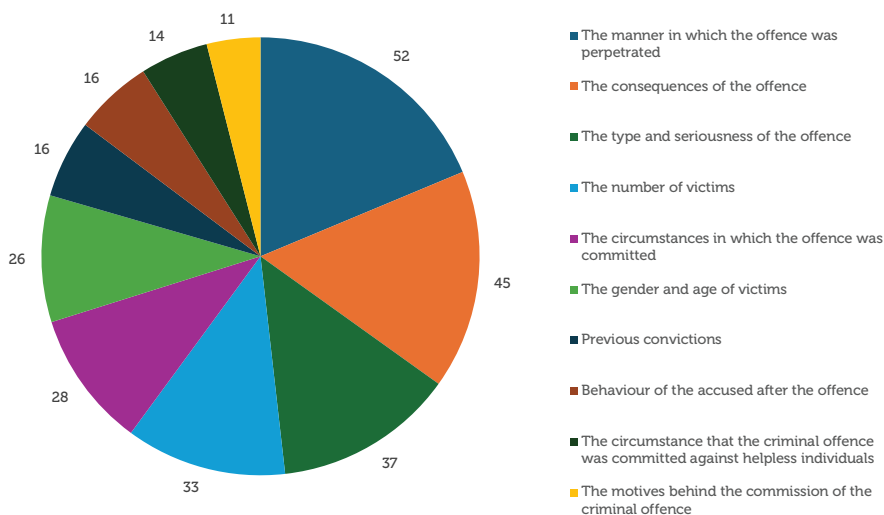
In war crimes trials, the usual aggravating circumstances considered in criminal proceedings are applied, but they are sometimes not given adequate weight in determining the sentence. One purpose of punishment in war crimes trials is to recognise the victims as such and to acknowledge their suffering and loss. Sentences should also reflect the attitude of society as a whole towards this type of criminal offence. What is more, applying more severe penalties and giving greater weight to aggravating circumstances would send a clear message that such behaviour is unacceptable.

³⁹ Judgment of the Higher Court in Belgrade – War Crimes Department K. Po2 28/2010 of 22 November 2010.

The aggravating circumstances most commonly considered in war crimes trials are: the manner in which the crime was committed (52), the consequences of the crime (45), the type and gravity of the crime (37), the number of victims (33), the circumstances in which the act was committed (28), the gender and age of the victims (26), and previous convictions (16).

Other aggravating circumstances considered include: the conduct or demeanour of the accused after the offence (16), whether the offence was committed against helpless persons (14), and the motive for the commission of the offence (11).

An analysis of final sentences with regard to aggravating circumstances used



A positive example of the application of aggravating circumstances is the conviction of Đuro Tadić (the *Bihać* Case) for a war crime against the civilian population. In this case, the court considered the aggravating circumstances to be *“the serious consequences of the act and the fact that a number of surviving victims are still*

*experiencing trauma and effects caused by the act in which their closest family members were killed.*⁴⁰

The consequences suffered by the injured party as a result of the loss of his father were taken as an aggravating circumstance in the trial of Mitar Čanković (the *Sanski Most – Kijevo Case*).⁴¹

Ruling on appeal in the case of Pana Bulat (the *Banski Kovačevac Case*), accused of a war crime against the civilian population, the War Crimes Department of the Court of Appeal in Belgrade considered his extreme ruthlessness in trying to cover the traces of his crime as an aggravating factor. Bulat threw the bodies of six Croatian civilians into a well and then threw an explosive device into the well and demanded that the bodies be burned. As a result, their children never had an opportunity to give them a proper burial.⁴²

The courts should follow these examples in other cases as well, where victims' family members suffer from lifelong consequences. The ICTY also considered the above facts to be aggravating circumstances.⁴³

40 Judgment of the War Crimes Department of the Higher Court in Belgrade K. Po2 5/13 of 6 February 2014.

41 Judgment of the War Crimes Department of the Higher Court in Belgrade K. Po2 7/2014 of 18 May 2016.

42 Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1. Po2 8/2011 of 14 February 2011.

43 ICTY Trial Chamber Judgment in *Lukić and Lukić* of 20 July 2009; ICTY Trial Chamber Judgment in *Blaškić* of 3 March 2000.

Application of mitigating and aggravating circumstances in trials for sexual violence

Domestic courts have rendered final judgments in 11 trials for offences with elements of sexual violence, and convicted 13 persons.⁴⁴ In only three cases were the defendants charged with rape only (the *Bijeljina II*, *Brčko* and *Kalinovik* cases), whilst in the others they were also charged with other offences such as killings, intimidating and terrorising the victims, inhumane treatment and inflicting bodily harm. Also, in several of the cases, the defendants' acts containing sexual violence elements (forcing captured men to have sexual intercourse with one another or to perform oral sex on other prisoners, and cutting off of a sexual organ) were categorised as elements of the criminal offence of a war crime against the civilian population under Article 142 of the CC FRY (inflicting bodily harm and inhumane treatment). This is because only rape and enforced prostitution are listed in Article 142 of the CC FRY as criminal acts with sexual violence elements.

In these cases, the consideration of mitigating and aggravating circumstances was in accordance with the law; but the practice of applying aggravating circumstances specific to sexual violence has varied.

In the case against Damir Bogdanović and others (the *Skočić* Case), the War Crimes Department of the Court of Appeal in Belgrade found some aggravating circumstances in respect of the accused Tomislav Gavrić, Zoran Alić and Zoran Đurđević, who were found guilty of the multiple rape of three Roma girls in Zvornik (BiH), and stated as follows: "*The consequences of and circumstances in which the crime was committed, along with the motives, together with the numerous criminal*

44 Cases *Bijeljina* (Dragan Jović et al.), *Bijeljina II* (Miodrag Živković), *Skočić* (Damir Bogdanović et al.), *Brčko* (Nikola Vida Lujčić), *Brčko II* (Miloš Čajević), *Kalinovik* (Dalibor Krstović), *Bratunac* (Dalibor Maksimović), *Grnjilane Group* (Fazli Ajdari et al.), *Đakovica* (Anton Lekaj), *Zvornik III and IV* (Goran Savić et al.), and *Zvornik II* (Grujić and Popović).

*actions committed, exceed the minimum required to qualify as the criminal offence of a war crime under Article 142 of the CC FRY.*⁴⁵

What the court failed to take into account as an aggravating factor was the complete lack of compassion on the part of the accused for the suffering of the three rape victims, two of whom were only 13 and 15 years old at the time. These young women were subjected to sexual humiliation and raped repeatedly over a long period of time, which has left lasting effects on them. Moreover, the Court of Appeal deserves serious criticism for the manner in which it assessed the aggravating circumstances in respect of the accused Zoran Đurđević. Namely, the court failed to mention, let alone consider as an aggravating circumstance, his prior conviction for the same criminal acts. Đurđević had already been finally convicted of a war crime against the civilian population committed in Bijeljina, which also involved rape and sexual abuse, and sentenced to 13 years in prison.⁴⁶ In the light of the above, the prison sentence of eight years' imprisonment imposed on Zoran Đurđević was unduly lenient. Since he had already been finally sentenced to 13 years' imprisonment for the same type of criminal offence involving the same criminal actions, he should have received a more severe sentence for the repetition of the offence, especially considering that he had repeatedly raped one of the victims, and that two of the victims were minors.

In the proceedings against Dalibor Maksimović (the *Bratunac* Case), who was found guilty of the murder of three Bosniak civilians and the repeated rape of a victim in Milići (BiH), the court only took into account his demonstrated persistence in the commission of the act,⁴⁷ but failed to consider the specific effects on the victim, which, given the nature of actions taken by the accused, have been of a lasting

45 Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 5/15 of 28 March 2018.

46 *Bijeljina* case – Judgment of the War Crimes Department of the Higher Court in Belgrade K. Po2 no. 7/2011 of 4 June 2012, upheld by the Judgment of the Court of Appeal in Belgrade Kž1 Po2 6/12 of 25 February 2013.

47 Judgment of the War Crimes Department of the Higher Court in Belgrade K. Po2 8/2017 of 23 September 2019.

nature. Moreover, the court denied the motion by the PPOWC and the victim's legal representative for a medical examination of the victim, which would have determined the extent of the victim's psychological suffering and whether she suffers from PTSD, stating that it would have delayed the proceedings, and adding that the victim could pursue her rights through civil proceedings. The court also turned down the request of the victim's legal representative to submit to the court the findings and opinions of the forensic psychiatrists who had examined the victim, on the grounds that such an examination had not been ordered by the court.⁴⁸

An important issue is the insensitivity of the courts to the lasting effects of rape experienced by rape survivors. The most common effect found in many victims is loss of amenity, the existence and degree of which should be considered an aggravating factor when meting out a sentence.

In some cases, the courts did take into account the nature of sexual violence and its specific effects as aggravating factors.

By the judgment of the War Crimes Department of the High Court in Belgrade in the proceedings against Dragan Jović and others (the *Bijeljina* Case), the accused Dragan Jović, Alen Ristić and Zoran Đurđević were found guilty of the rape of two Bosniak women in Bijeljina (BiH). The aggravating circumstances found to exist in relation to all the accused included the utter ruthlessness displayed in the commission of the crime, the extreme humiliation and mental suffering inflicted on the victims, the disregard of the fact that one of the victims had given birth only four days before the critical event, and the fact that the health of the victims was impaired as a result and that they had to leave their place of residence as a consequence of the trauma.⁴⁹

⁴⁸ *Ibid.*

⁴⁹ Judgment of the Higher Court in Belgrade K. Po2 7/2011 of 4 June 2012.

Special attention was paid to the consequences of sexual violence also in the judgment handed down by the War Crimes Department of the High Court in Belgrade in the proceedings against Nikola Vida Lujčić (the *Brčko* Case) for the rape of a Bosniak woman in Brčko (BiH). After considering all the circumstances of the case, the court found no mitigating circumstances. As factors aggravating his criminal responsibility, the court considered the ruthlessness with which he committed the crime and the fact that his actions against the victim were aimed at violating her integrity and personal dignity, constituting exceptionally offensive and humiliating treatment of the victim; and also the consequences suffered by the victim, the intensity of the psychological harm she was subjected to during the critical event, with the trauma for which she is still receiving treatment.⁵⁰

As in other war crimes cases, in cases involving sexual violence the most commonly considered mitigating circumstances have been the family and personal circumstances of the accused, and their age and financial situation.

What is unacceptable in the PPOWC's handling of these cases is that it did not seek a medical examination of the survivors of sexual violence. Such an examination could have helped to determine, even at the investigative stage, the degree of the victims' mental anguish and suffering, and the presence of PTSD as a result of the traumatic event, and establish a causal link between the act and the harmful consequences for the mental health of the victims, whose lives have thus become more difficult on a long-term basis. Their psychological conditions may well be interfering with their daily functioning and relationships with other people, and may have lasting effects in the form of loss of amenity.

An expert examination can establish the consequences of a crime for the victims and thus provide the courts with an accurate and very important element to consider when determining the punishment for a perpetrator who has been found responsible. It can also provide victims with the necessary evidence which would enable them to precisely formulate their compensation claims during the course

⁵⁰ Judgment of the Higher Court in Belgrade K. Po2 5/18 of 19 September 2019.

of the criminal proceedings. The findings of an expert examination would provide the PPOWC with a reliable element on which to base its proposal on the sentence to be imposed, and enable it to fulfil its legal obligation to collect evidence for compensation claims. According to the CPC, the authority conducting the proceedings, which in the case of an investigation is the prosecutor, is obliged to collect the evidence to be used for a compensation claim even before the compensation claim is filed.⁵¹

Plea agreement

A plea agreement is a written agreement between the accused and the prosecutor whereby the punishment for the accused is determined without a trial in exchange for a guilty plea. This practice, which was introduced into domestic criminal law in 2009, was used for the first time in a war crime case in 2013.

The main purpose of this practice was to expedite criminal proceedings and make them less costly, by encouraging the accused to enter a plea agreement in exchange for a more lenient punishment.

So far, six plea agreements have been concluded in war crimes cases conducted by the War Crimes Department of the Higher Court in Belgrade.⁵² The plea agreement with Milan Škrbić (the *Sanica* Case) in 2013⁵³ was the first, followed by those with Marko Crevar (the *Sremska Mitrovica* Case) in 2015⁵⁴, Brano Gojković (the *Srebrenica – Branjevo* Case) in 2016⁵⁵, Dragan Maksimović (the *Caparde* Case) in 2018⁵⁶,

51 CPC, Article 256.

52 Previously concluded plea agreement related to persons charged with assisting in harbouring ICTY fugitives.

53 Judgment of the Higher Court in Belgrade SPK Po2 2/13 of 13 September 2013.

54 Judgment of the Higher Court in Belgrade SPK Po2 1/15 of 18 February 2015.

55 Judgment of the Higher Court in Belgrade SPK Po2 no. 1/2016 of 27 January 2016.

56 Judgment of the Higher Court in Belgrade K. Po2 no. 10/17, SPK Po2 no. 1/2018 of 6 June 2018.

Ramadan Maloku (the *Gornje Nerodimlje* Case) in 2019,⁵⁷ and Miomir Jasikovac (the *Srebrenica III* Case) in 2023.⁵⁸

Under these agreements, the accused received prison sentences ranging from 18 months to ten years. In its judgments confirming the defendants' plea agreements with the PPOWC, the Higher Court failed to explain the reasons for its decisions. Instead, the Court merely enumerated the articles of the CPC on the basis of which it established that the plea agreements contained all the necessary elements required by law, that all the legal requirements regarding the evidence attached to the agreement had been met, that the penalties imposed were in accordance with the Criminal Code, and that there were no legal obstacles to the conclusion of the plea agreements.

According to the CPC, where a plea agreement is accepted, the judgment must contain a "*partial reasoning*" for accepting the plea agreement.⁵⁹ Since the CPC requires courts, when deciding on whether or not to accept a plea agreement, to ascertain whether the sentence has been agreed in accordance with the law, the court is certainly supposed to provide at least partial reasons for the sentence. Essentially, the CPC does not require courts to omit these reasons altogether from a judgment, but only suggests that they are not obliged to provide them. Given that these plea agreements concern war crimes, which are among the most serious crimes, and that the general public is poorly informed about them, as well as that there are many unknowns about the application of plea agreements, the court should not have chosen to omit the reasons for the sentence as the easier solution.

This is all the more so because the sentences in these cases are not determined by the court but in fact agreed between the parties to the proceedings. In view of the sentences agreed, the general public and, in particular, the victims and their family members, could easily get the impression that these agreements are a privilege granted to some of the accused.

57 Judgment of the Higher Court in Belgrade Spk. Po2 1/19 of 19 March 2019.

58 Judgment of the Higher Court in Belgrade Spk. Po2 no. 1/22 of 13 January 2023.

59 CPC, Article 429, paragraph 3, sub-paragraph 2.

For example, in the plea agreement reached with Brano Gojković, who was charged with participating in the execution-style killings of several hundred captured male Bosniak civilians from Srebrenica at the Branjevo farm on 16 July 1995, the agreed sentence was 10 years' imprisonment. By way of comparison, the same court that accepted this plea agreement sentenced Miroljub Vujović, Stanko Vujanović and Predrag Milojević each to 20 years' imprisonment for their participation in the killing of 200 prisoners of war at Ovčara on 20-21 November 1991.⁶⁰ Furthermore, Radojko Repanović and Slađan Čukarić⁶¹ were each sentenced to 20 years' imprisonment for their participation in the killing of 49 Albanian civilians in Suva Reka on 26 March 1999, and Željko Đukić,⁶² Dragan Medić and Dragan Borojević⁶³ were each sentenced to 20 years' imprisonment for killing 14 Albanian civilians and wounding another five in Podujevo on 28 March 1999.

In order to dispel any doubts that plea bargaining is a privilege only granted to some of the accused, and bearing in mind its own sentencing policy in war crimes cases, the court should provide detailed reasons for the sentences imposed in its judgments confirming plea agreements.

Sentence reduction

Sentence reduction is a practice prescribed by criminal law, which allows the courts to set the punishment below the limit prescribed by law, i.e. below the mandatory minimum sentence prescribed for the offence, provided that the legal

60 Judgment of the War Crimes Chamber of the District Court in Belgrade Kv no. 4/06 of 12 March 2009.

61 Judgment of the War Crimes Chamber of the District Court in Belgrade Kv no.2/2006 of 24 April 2009 and judgment of the War Crimes Department of the Higher Court in Belgrade K. Po2 49/2010 of 15 December 2010.

62 Judgment of the War Crimes Department of the Higher Court in Belgrade K. Po2 44/2010 of 22 September 2010.

63 Judgment of the War Crimes Chamber of the District Court in Belgrade Kv no. 4/2008 of 18 June 2009.

requirements for such a reduction are met. Sentence reduction may be applied to all criminal offences, including war crimes, which means that a prison sentence could be reduced to less than five years but not less than one year, which is the minimum sentence prescribed for a war crime.

Sentence reduction, is, by its nature, an exception from the regular sentencing practice of imposing the punishments that are within the limits prescribed by law, which is why courts have a duty to explain in detail why a punishment has been reduced.

19 out of 95 persons convicted of a war crime have received sentences below the minimum prescribed by law for a war crime. As this constitutes 20% of all convicted persons, it is clear that this practice is being applied excessively. One year's imprisonment has been the lowest sentence imposed for a war crime.

An analysis of the cases in which sentence reduction was applied shows that it has always been based on the existence of particularly mitigating circumstances. According to the law, sentence reduction on the basis of particularly mitigating circumstances is allowed, provided that the purpose of the punishment is achieved with a reduced sentence. Courts are obliged to state and explain which particularly mitigating circumstances they have taken into account when deciding on a reduction of a sentence, and how both the general and specific purposes of the punishment can be achieved with a reduced sentence.

The main shortcoming of these judgments has been the absence of a detailed, clear and logical explanation of which particularly mitigating circumstances have been found to exist, why they have been considered as such, and how they led to the reduction of the sentence. Instead, the explanations are usually limited to a list of mitigating circumstances, a statement that the court considered all mitigating circumstances to be particularly mitigating, and that the purpose of the punishment would be achieved with a reduced sentence. With those cases where there were also aggravating circumstances, when the courts are obliged to explain in detail why a sentence has nevertheless been reduced, their explanations are again limited to the phrase that the aggravating circumstances did not have a dominant influence on the sentencing decision.

This practice is particularly worrying in the case of the judgments of the War Crimes Department of the Court of Appeal in Belgrade, as the Court of Appeal is the court of second instance whose role is to correct the errors of the trial courts and ensure the strict application of the law in court decisions. Instead, the Court of Appeal itself is applying this practice excessively and without justification.

Thus, in the proceedings against Željko Krnjajić and others (the *Lovas Case*)⁶⁴ for the criminal offence of a war crime against the civilian population, the Court of Appeal found the following mitigating circumstances: in relation to the accused Radovan Vljaković, his family status – married, the father of two children – and lack of previous convictions; in relation to the accused Jovan Dimitrijević, lack of previous convictions; and in relation to the accused Zoran Kosijer, the fact that he is the father of two adults and the lack of previous convictions. An aggravating factor for all the accused was the seriousness of the consequence of the crime – that is, the number of victims experiencing serious consequences as a result of the crime. Having considered all of these consequences, as well the time elapsed since the crime was committed as an additional mitigating factor, the court found the mitigating consequences to be particularly mitigating and sentenced the accused to prison sentences below the mandatory minimum for the offence: Zoran Kosijer and Jovan Dimitrijević each to three years, and Radovan Vljaković to four years.

The court's view that the lapse of time since the commission of the crime should be considered a mitigating circumstance is not justified for all the reasons discussed above.

Nor was it justified in giving too much weight to ordinary mitigating circumstances and considering them particularly mitigating, because the very definition of "*particularly mitigating circumstances*" describes them as exceptional circumstances which are specific and different from ordinary mitigating circumstances, in that they make the offence less serious, with a consequent impact on sentencing.

64 Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 2/20 of 20 November 2020.

In the proceedings against Ranka Tomić (the *Bosanska Krupa Case*),⁶⁵ who was accused of the criminal offence of a war crime against prisoners of war, the Court of Appeal in Belgrade, acting as the court of second instance, found that the court of first instance had correctly and completely established the facts of the case, but had erred in not considering the lapse of time since the commission of the crime as a mitigating circumstance. In the Court of Appeal's view, the facts that more than 26 years had elapsed since the crime was committed, that the accused had no criminal record and that she was born in 1957 were sufficient to justify mitigation. Particularly mitigating circumstances for the accused were the absence of a criminal record and her age, while *"the existing aggravating circumstances were not of such significance as to have an overriding influence on the court's decision in the present case"*. The aggravating circumstances found by the court of first instance and upheld by the Court of Appeal, were: the seriousness of the criminal offence committed, the fact that it was directed at a helpless wounded girl under the age of 18, the fact that the accused was the commander of the "Bosanski Petrovac" women's unit at the relevant time, and aware of her position and power over the victim whom she was supposed to protect. The absence of previous convictions and the defendant's age do not constitute, either individually or cumulatively, circumstances which should be considered particularly mitigating - the more so because the defendant was 35 years old at the time of the crime, an adult and mature person. The crime was premeditated, and the defendant had power over the other participants in the event and a duty to protect the victim, which she could have done at any moment if she had wanted to. Instead of preventing the crime, she took part in it. The manner in which the crime was committed was particularly cruel: the accused ordered the young girl to strip naked in front of the crowd that had gathered to watch the event, and then made her crawl on the ground and dig her own grave, while she herself was thrusting blackthorn branches between her legs, pushing her head into cow dung, beating her on the buttocks with a shovel and forcing her to sing Serbian songs. Finally, the victim was killed by a third person. Such inhumane and bestial treatment of a person whom the accused was obliged to protect deserves the most

65 Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 3/19 of 27 May 2019.

severe punishment, not a punishment below the mandatory minimum. The court's view that "*the existing aggravating circumstances are not of such significance to have an overriding influence on the court's decision in the present case*" defeats the purpose of punishment. The accused's lack of previous convictions and the time elapsed since the crime are given more weight in determining the sentence than the monstrosity of the crime and the persistence in the commission of the crime, thus defeating the very purpose of punishment.

An example of the improper application of sentence reduction can also be found in the judgment of the Court of Appeal in Belgrade in the proceedings against Milorad Jovanović for the criminal offence of a war crime against the civilian population (the *Sanski Most - Lušci Palanka* Case).⁶⁶ As stated in the judgment, the accused's personal and family circumstances – the fact that he is a family man, married, and the father of two adult children, that he was 22 years old at the time of the commission of the criminal offence, and that he had no previous convictions, along with the lapse of time since the commission of the criminal offence – were considered particularly mitigating circumstances, "*allowing the court to mete out a sentence that is lighter than the mandatory minimum sentence for the offence*". Aggravating circumstances included the seriousness of the offence, its consequences, the number of criminal actions, the persistence and determination in the commission of the crime, the extreme brutality and aggressiveness displayed, and the fact that the accused showed no pity for the victims afterwards.

The time elapsed since the commission of crime as a mitigating circumstance should not be applied to this type of criminal offence. What is more, other mitigating circumstances relating to the personality of a defendant and his family circumstances, either individually or cumulatively, cannot be regarded as particularly mitigating circumstances. On the contrary, they are characteristic of an ordinary man and can in no way be considered mitigating circumstances. Conversely, the abundance of aggravating factors, which outweigh the mitigating

⁶⁶ Judgment of the War Crimes Department of the Court of Appeal in Belgrade Kž1 Po2 1/22 of 31 January 2023.

ones, is a more than valid reason for imposing a sentence within the sentencing range prescribed by law.

It is unacceptable that the Court of Appeal gives no explanation as to why it decided to reduce the sentence, despite its obligation to do so, nor why it completely disregarded the numerous aggravating factors which the court itself found to be present.

In drafting some of its judgments, the Court of Appeal not only fails to state the reasons for reducing the sentence, it even fails to state the legal grounds for sentence reduction, which it is obliged to do when applying a particular legal provision.

The Appeal Court Judgment in the proceedings against Osman Osmanović (the *Brčko – logor Rasadnik* Case)⁶⁷ is a good example of this. Osmanović was sentenced to a prison term of three years and six months for the criminal offence of a war crime against the civilian population. In both the operative provisions of the judgment and the reasoning, the Court of Appeal invoked Article 5 of the CC FRY (criminal sanctions and the general purpose of criminal sanctions), Article 38 (prison sentence) and Article 41 (sentence determination), but without referring to Article 42 (sentence reduction), as it was obliged to do. Furthermore, the Court of Appeal's judgment does not mention that it considered certain circumstances to be particularly mitigating. Consequently, it does not explain why these circumstances, taken individually or cumulatively, constitute particularly mitigating circumstances justifying a reduction of the sentence.

The same situation occurred in the Court of Appeal judgment in the proceedings against Husein Mujanović (the *Hrasnica* Case).⁶⁸ The legal grounds for the reduction of the sentence cannot be found in the operative provisions of the judgment, as there is no reference to the application of Article 42 of the CC FRY. That this was not

67 Judgment of the Court of Appeal Kž1 Po2 2/22 of 26 January 2023.

68 Judgement of the Court of Appeal Kž1 Po2 3/22 of 22 December 2022.

just an inadvertent omission of a single article from the judgment is demonstrated by the fact that the court, in giving the reasons for its judgment, failed to mention that it had reduced the sentence below the mandatory minimum, nor did it provide any reasons for doing so.

With regard to mitigation following a plea agreement, the judgments confirming plea agreements have not contained any reasons for sentencing decisions.

One such judgment is the judgment of the Higher Court in Belgrade confirming the plea agreement concluded between the PPOWC and the accused Ramadan Maloku (the *Gornje Nerodimlje* Case), who was charged with the criminal offence of a war crime against the civilian population.⁶⁹ Maloku was sentenced to 18 months' imprisonment. The only explanation given for the length of the sentence was that it was in accordance with the law and served the purpose of punishment.

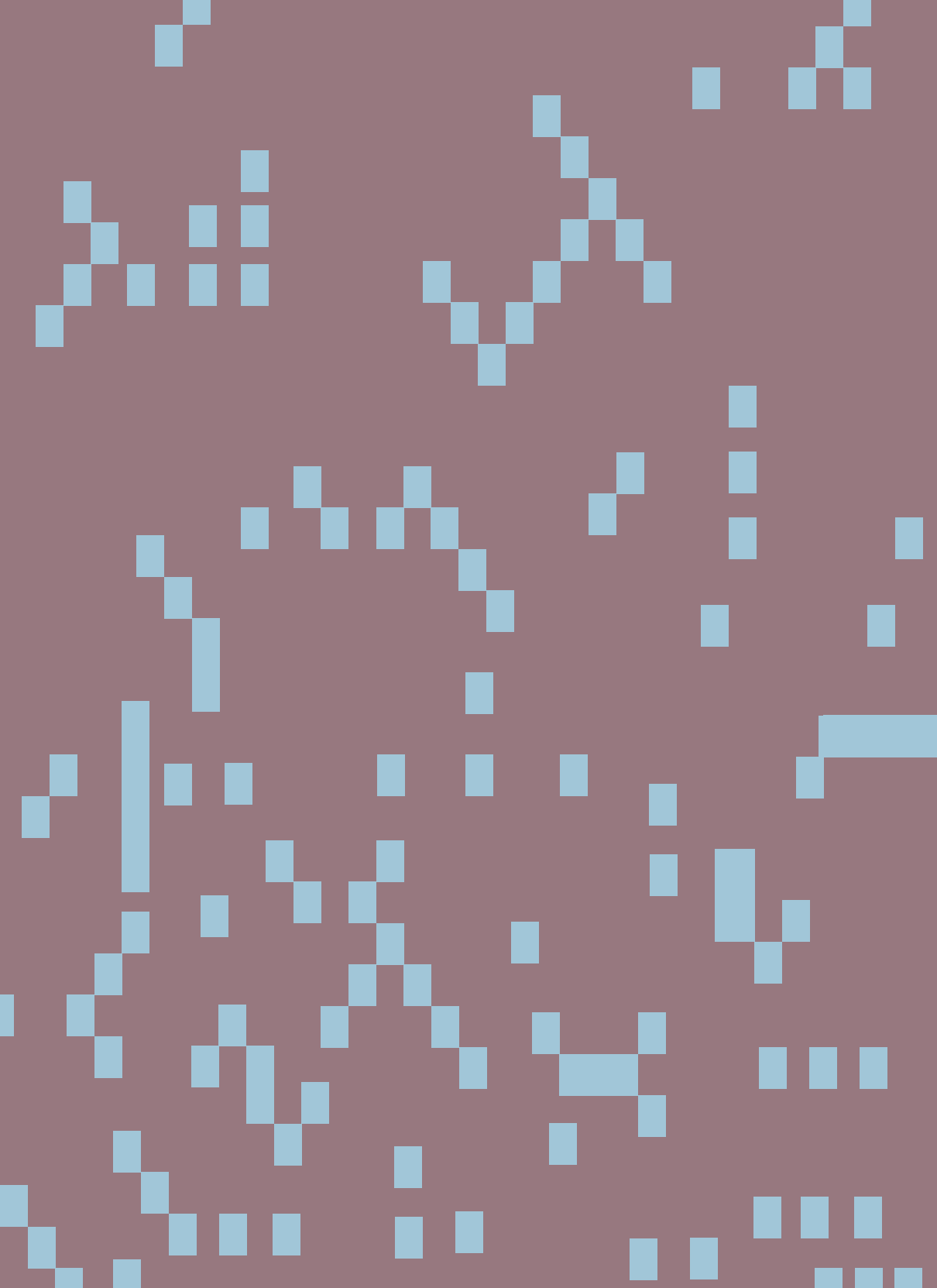
The same wording can be found in the judgement confirming the plea agreement between the PPOWC and Marko Crevar (the *Sremska Mitrovica* Case) for a war crime against prisoners of war. Crevar was also sentenced to 18 months' imprisonment.⁷⁰

69 Judgment of the War Crimes Department of the Higher Court in Belgrade Spk. Po2 1/19 of 19 March 2019.

70 Judgment of the War Crimes Department of the Higher Court in Belgrade Spk. Po2 no. 1/15 of 18 February 2015.

RECOMMENDATIONS

1. Courts should provide a detailed explanation of their sentencing decisions when determining sentences, rather than merely listing the mitigating and aggravating circumstances they find to be present;
2. In the consideration of a defendant's family circumstances, such as marital status, the presence of children (especially adult children), personal circumstances and lack of previous convictions, as mitigating circumstances, these circumstances should be assessed reasonably and should not be given overriding weight;
3. Sentence reduction should be applied only in exceptional situations. Courts should be required to explain in detail the reasons for sentence reduction, after careful consideration of whether sentence mitigation is applicable where there exist aggravating circumstances;
4. The lapse of time since the commission of the crime should not be applied as a mitigating circumstance in war crimes cases;
5. In their judgements confirming a plea agreement, courts should explain their sentencing decisions;
6. In determining sentences for perpetrators of war crimes involving sexual violence, courts should give careful consideration to the specific consequences of this type of violence.



Policy Paper:

Application of aggravating and mitigating circumstances in war crimes trials

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