Republika e Kosovës
Republika Kosova - Republic of Kosovo

Supreme Court of Republic of Kosovo

Sentencing Guidelines

Sentencing Guidelines

1st Edition

Pristina, 2018

REPUBLIKA E KOSOVËS
REPUBLIKA KOSOVA – REPUBLIC OF KOSOVO

GJYKATA SUPREME E KOSOVES

VRHOVNI SUD KOSOVA- SUPREM CORT KOSOVO

The General Session of the Supreme Court of Republic of Kosovo, after reviewing the Kosovo Sentencing Guidelines, in accordance with Articles 22 and 23 of the Law on Regular Courts, on 15.02.2018, with the majority of votes, adopted:

KOSOVO SENTENCING GUIDELINES[1]

R e a s o n i n g

The practice in Kosovo courts in regards to the sentencing policy has resulted with some trends that indicate serious flaws and disparities in the way in which sentencing is approached by various courts including the absence of, or insufficient reasoning of the decisions.

With the purpose of respecting human rights, as guaranteed by the Constitution of Republic of Kosovo and the international and regional treaties on protection of these rights such as: International Covenant on Civil and Political Rights, European Convention on Human Rights and other international conventions and treaties, as well as the unification of the sentencing policy, the Supreme Court of Republic of Kosovo within its legal mandate, after the continuous work from local and international experts and with the support of the American Embassy in Pristina, respectively the United States Department of Justice, on the general session of the Supreme Court after review and discussion of the Kosovo Sentencing Guidelines draft, it adopted the same with majority of votes on an open voting process.

The purpose of the Sentencing Guidelines is to offer a more detailed elaboration of the existing provisions of the applicable criminal legislation in regards to sentencing,

[1] *Unofficial translation of the decision from Albanian to English*

in this way addressing, through clarification, also the practical problems which are often mentioned as an obstacle as well as a lack of uniform approach in Kosovo. The Guidelines in its aim are not binding, its content does not represent a legally binding instruction and it does not define mandatory provisions during sentencing.

As such, based also on the decisions of the Constitutional Court of Republic of Kosovo, when referencing the case law of European Court of Human Rights in regards to the issue of lack of consistency in decision-making by the regular courts; and in line with the Recommendation of Committee of Ministers of Council of Europe on consistency in sentencing, these guidelines are offered as a means to avoid unwarranted disparity in sentencing impacting also the structuring of the judicial discretion – not to take it away, as a framework of principles that is clear, concise and established in advance.

The Guidelines also contain examples and references to the case law of international courts and tribunals in clarifying a number of individual circumstances of defendants and various ways of assessing all the circumstances foreseen by the Criminal Code of Republic of Kosovo, all this with the purpose of assisting judges during their assessment when calculating the sentence.

Finally, the Guidelines also provide an indicative list of circumstances to be utilized by judges in mitigation and aggravation of sentence in order to ensure a better consistency and uniformity in sentencing Kosovo wide.

Sentencing Guidelines will be printed in sufficient copies for all judges and prosecutors of all levels and other legal professionals with interest in this field.

PRESIDENT OF COURT

Enver Peci

TABLE OF CONTENTS

A PRACTICAL APPLICATION OF GUIDELINESS

INTRODUCTION

Sentencing practice among the courts of Kosovo has come under greater and greater scrutiny since the adoption of the Criminal Code[2] (CC or "Code") and the Criminal Procedure Code[3] (CPC). As courts become more efficient through an increased familiarity with the Codes, more and more decisions are issued. While the settling in is positive for the administration of justice, the increased volume of decisions has resulted in several trends that indicate serious flaws in the way in which sentencing is approached by the Courts, the professionalism of the Courts in authoring opinions and their ultimate impact on the accused. Ultimately, the time to make changes and implement reform in the process is now. Before the problems become too entrenched. It is the purpose of these guidelines to provide an expanded view of the current sentencing laws, address problems that are frequently cited and provide a uniform approach.

It should be clear to the reader that these are not legally binding guidelines. They do not establish mandatory outcomes in sentencing. However, considering that unwarranted disparity and perceptions of injustice might bring the criminal justice system into disrepute, Council of Europe on its Recommendation on consistency in sentencing recommends that states, while taking into account their own constitutional principles and legal traditions, and in particular the independence of the judiciary, take appropriate measures to avoid unwarranted disparity in sentencing. Thus the guidelines are offered as a means to that end and should not simply be dismissed outright as an intrusion into discretion. They serve a clear and laudable goal. The essence of the guidelines is to structure judicial discretion – not to take it away. Ultimately, sentencing will always

[2] Criminal Code of Republic of Kosovo, Code no.04/L-02, Official Gazette of Republic of Kosovo/No.19/13 July 2012, Pristina.
[3] Criminal Procedure Code of Republic of Kosovo, Code no.04/L-123, Official Gazette of Republic of Kosovo/No.37/28 December 2012, Pristina.

require an element of personal judgment, but that judgment should be exercised in a framework of principles that is clear, concise and established in advance. This results in a consistent approach and outcomes that are reasonably predictable.

These guidelines provide useful tools for a court in assessing a variety of individual circumstances of defendants as well as a framework for assessing the sentencing decision. They provide a roadmap in approach, a method for comprehensively addressing the required provisions of the code, and a suggested format for the collection of sentencing evidence and the drafting of opinions. They also provide an indicative list of circumstances to be utilized by the judges in mitigation or aggravation of the sentence; along with an indication of the weight those circumstances should have on the final sentence. If followed they will not only improve the professionalism of the courts, but they will improve the human rights record of Kosovo courts in general.

Although the Guidelines present a significant step towards a more comprehensive approach to sentencing and the circumstances considered in this process, they should not be considered an inflexible document that is set in stone. Courts should take steps to modify and mold these guidelines as the law changes and as unexpected circumstances and practices arise. It is suggested that a sentencing commission be established in the future that will routinely assess the applicability of the guidelines and make adjustments as needed.

Finally, this manual is based on the principles and offenses set forth in the CC and CPC as drafted in 2012 and 2013. Offenses enacted outside this general body of law are generally not used as examples. However, the provisions of the codes pertaining to sentencing apply to all criminal offenses unless otherwise provided for by law.

CHAPTER I

SENTENCING IN KOSOVO: Identified Problems

1.1 Sentencing Disparity

The rule of law means, in the first place, the existence and the effective enforcement of publicly known and non-discriminatory laws. For this purpose, it is the duty of each state to establish institutions that safeguard the legal system, including courts, prosecutors and police. These institutions are themselves bound by human rights guarantees, as laid down in the universal and regional treaties for the protection of human rights, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights, and other international conventions and treaties. One of the fundamental principles of Magna Carta for Judges states: "The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner."[4]

[4] Consultative Council of European Judges, Magna Carta of Judges, Fundamental Principles, Rule of Law and Justice, Strasbourg 17 November 2010.

The right to a fair trial relates to the administration of justice in both civil and criminal contexts. At the outset, it is important to understand that the proper administration of justice has two aspects: the institutional (e.g. independence and impartiality of the courts) and the procedural (e.g. fairness of the hearing). The principle of fair trial upholds a series of individual rights ensuring due process of law from the moment of suspicion to the enforcement of the judgment. All persons shall be equal before courts and tribunals and are entitled to the minimum guarantees of a fair trial in full equality[5].

Identical cases that cause harm to society must initiate identical reactions on behalf of society, as part of concept of equality before the law. Inequalities creates uncertainty and causes harm to clarity in applicability of the legal social control…it encourages the commission of offences. Only when it is clear to the individuals and they know with certainty that any harm to society is treated adequately and proportionally, legal social control is being applied efficiently. When the individual knows that the commission of the offense triggers criminal proceedings that will end in a certain way, he may be deterred from choosing delinquency.

Disparity between courts in similar cases leads to a social subculture that enforcement of the law de jure is different from enforcement de facto. When one court panel is excessively lenient with offenders whereas another panel hands down harsh punishments, the mechanism that deters offenders from reoffending, the identity of the panel becomes a consideration and offenders will make efforts to be sentenced by one panel and not by the other.[6]

The Constitutional Court of Republic of Kosovo, in deciding one of its cases ruled as follows:

"T*he decision taken by the regular courts in legal issues that are completely the same and the disability or non-willingness to create a consistent judicial practice, seriously*

[5] Understanding Human Rights, Edited By Wolfgang Benedek European Training and Research Centre for Human Rights and Democracy (Etc) Manual on Human Rights Education (Pg.205)

[6] Hallevy, Gabriel. The right to be punished: modern doctrinal sentencing. Springer Science & Business Media, 2012.

violates the legal certainty principle as one of the basic principles of the rule of law, therefore, there is no doubt that the decision taking in these circumstances consists violation of article 6 of ECHR and article 31 of the Constitution (see: Case Beian vs Romania, 30658/05, 2007, ECtHR)."[7]

In the context of sentencing, inequality before the law manifests itself in sentencing disparity. Disparity is generally defined as a form of unequal treatment that is often of unexplained cause and is at least incongruous, unfair and disadvantageous in consequence. Stated simply, the concept is fairly straightforward – "generally offenders should expect that crimes of the same seriousness, committed in similar circumstances by comparable offenders should attract similar circumstances."[8] Applied to legal principles, unequal treatment of incriminated individuals violates Kosovo's constitution and contradicts a host of universal and fundamental human rights protections.

Unfortunately, it does not seem to be the case that this principle is being pursued in Kosovo in any meaningful way. Consistent criticism regarding sentencing suggests that defendants are sentenced based on local or regional cultures. Thus a sentencing court in Gjilan may impose a significantly different sentence for a crime than a court in Pristina. Though the crime is the same and the offenders present themselves similarly, they are treated differently. Anecdotal evidence suggests that to a large extent, this disparity exists even in the same courthouses. This indicates that defendants are not being treated equally before the law.

The development of guidelines is a fundamental step in achieving the goal of greater consistency in sentencing. How guidelines can achieve this goal is based on the concept of consistency in approach. As the sentencing law currently exists, the provisions are very broad and offer little to no

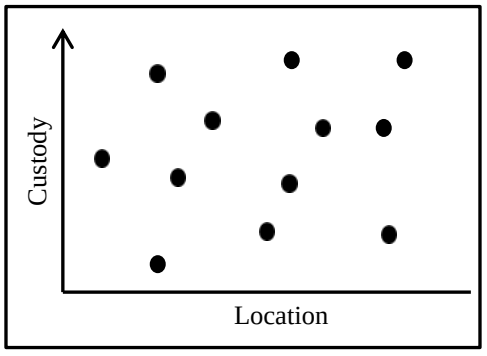


Figure 1.1

[7] Judgment, Pristina, 20 July 2012 Ref. No.: AGJ 285/12, Case No. KI 04/12, Applicant Esat Kelmendi (par.26).
[8] Department of Justice "Consultation on a Sentencing Guidelines Mechanism," 2010.

guidance at all. Instead, the court is given a broad sentencing range with no suggestion of a starting point; general aggravating and mitigating factors to consider with no guidance on how to evaluate, weigh and/or compare the two; and a means to ameliorate sentences, also with little guidance. While this offers substantial discretion, it does little to improve consistency and as long as the general principles are followed, there is little basis to criticize the approach of the court. As illustrated in Figure 1.1, the sentencing results are completely random in terms of both custody and the location of the offense. Each court applies its own approach, which conforms to the letter of the law, and the result is a scattered pattern.

On the other hand, outlining a more narrowly defined approach with strong urging of the courts to follow, narrows the realm of possibility. It still allows for divergent sentencing outcomes, but only in circumstances where the court is able to clearly articulate circumstances that are beyond the typical or common circumstances of the defendant. This is illustrated by Figure 1.2 which shows the concept in practice. Here, the guideline structure or consistency in approach serves to narrow the realm of possible sentences. The structure does not remove the discretion of the courts, but by uniform application of procedure and factors, what appeared initially as dissimilar in character are, in fact, quite similar. The outcome is a series of sentences that are roughly equivalent for a particular offense under similar circumstances, but situations which are not similar or provide, for example, more aggravating or mitigating circumstances, still have the possibility of moving up or down the range of sentences as appropriate.

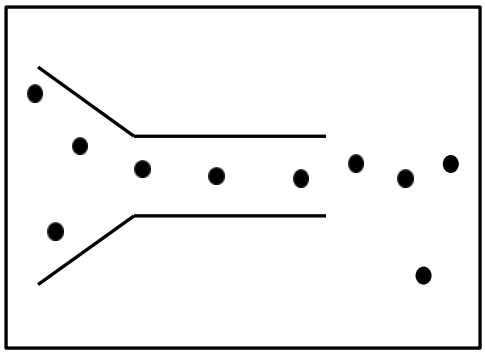


Figure 1.2

In Mucic et al case, the Trial Chamber gave a very thorough statement on the reason for consistency in sentencing: "*One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years*

has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar. This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to consider that range or pattern of sentences, without being bound by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal's administration of criminal justice."[9]

Ultimately, guidelines help address this issue by providing more clearly defined methods for deciding sentences in particular cases and provide a means for producing similar outcomes in similar circumstances. Consistency in approach requires that there is a uniform, consistent approach towards sentence determinations across all cases. Therefore, the sentencing discretion should be exercised in a principled manner. There should be a coherent judicial approach to the exercise of discretion in sentencing, which requires all decisions to be based on common standards – general underlying principles – that are uniformly applied to the facts of each case.[10] Addressing these disparities is necessary to ensure compliance with Kosovo's constitution and fulfilling its obligations under a number of international instruments. Article 53 provides that "*Human rights and fundamental freedoms guaranteed by this constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

[9] Case No.IT-96-21-A, Judgment , Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.756-757.
[10] Ashworth. A., Towards European Sentencing Standards, *European Journal on Criminal Policy and Research*, 1994, p. 9.

In jurisdictions where there was initial apprehension and concern over limitations on independence, Courts have frequently embraced the practice. Fore example, in relation to the U.K's Magistrates' Court Sentencing Guidelines, one magistrate has commented, "*Life as a magistrate without sentencing guidelines now seems inconceivable. More than anything else they allow everyone in court - including the defendant and his or her solicitor - to see a transparent sentencing process at work. . . The guidelines, with their structured approach to offence seriousness, culpability and harm, [are] invaluable in clarifying the issues*."[11]

1.2 Inadequate Assessment of Aggravating/Mitigating Factors

Another problem area is the failure of courts to adequately describe the reasons for a particular sentence. This includes both the process followed by the court and the reasoning behind finding the existence of a particular mitigating and aggravating factor. As noted by the Council of Europe, *"[c]ourts should, in general, state concrete reasons for imposing sentences.*[12]*"*

In broad terms, Article 6 of the ECHR requires that courts give reasons for judgments in both civil and criminal proceedings. Courts are not obliged to give detailed answers to every question, but if a submission is fundamental to the outcome of the case the court must then specifically deal with it in its judgment.

For example, in *HiroBalani v. Spain*[13] the applicant made a submission to the court which required a specific and express reply. By failing to adequately address the issue with specificity, it was impossible to ascertain whether they had simply neglected to deal with

[11] Tiede Lydia Brashear, OSCE Skopje, Macedonia, An Analysis of Macedonian Sentencing Policy and Recommendations for future Directions: Towards a more uniform system, (December 2012), Appendix 6: England and Wales use of sentencing guidelines. Pg.40

[12] Council of Europe, Recommendation No. R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, 19 October 1992.

[13] Rita Hiro Balani v.Spain, Appl. No. 18064/91, judgement of 9 December 1994; cited also on the Kosovo Constitutional Court Dissenting Opinion in Case No.KI 55/09, Constitutional Review of the Decision of the Supreme Court of Kosovo, No.2407/2006, 30 September 2009, par.26

the issue or intended to dismiss it. And if they intended to dismiss it, the party was unable to determine what the reasoning was. This was found to be a violation of Article 6 (1).

Arguably, other than a finding of guilt, there can be no more important decision for a Court than the decision of a sentence. Hence there is an absolute requirement of providing sufficient explanation as to how the sentence was arrived at to inform the defendant and preserve their rights. Additionally, it prevents any claims of discriminatory treatment. As noted by the ECtHR in the Lithgov case[14] that: "*for the purpose of Article 14, discriminatory difference in treatment is discriminatory if this difference has no objective or reasonable justification, i.e. if it does not pursue a legitimate aim"*.

The Organization for Security and Co-operation in Europe Mission in Kosovo ("OSCE") conducted an assessment of court opinions and published its results in July, 2010, in a report entitled "Inadequate Assessment of Mitigating and Aggravating Circumstances by the Courts." The report describes a number of pervasive sentencing problems:

- Generally, courts did not provide sufficient, or in many cases any, reasons for finding the existence of a mitigating factor. Although courts concluded, for example, that the defendant's personal circumstances were a mitigating factor, they did not explain what evidence supported this conclusion.

- Courts frequently departed from the prescribed minimum sentence citing mitigating factors that were not supported by any evidence in the record.

- Courts regularly cited mitigating factors, again without explanation, that were clearly irrelevant to mitigating a particular offense.[15]

[14] Lithgov and others v. United Kingdom, Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Strasbourg, 8 July 1986.
[15] Organization for Security and Co-operation in Europe "Inadequate Assessment of Mitigating and Aggravating Circumstances by the Courts," July 2010.

These systemic shortcomings in sentencing practice are significant and evidence a lack of direction on the part of the courts. At its most basic, a failure to adequately explain the basis for a sentence prejudices both parties. For the accused, the failure to provide a sound justification for the assignment of aggravating factors results in a sentence that is not supported by the facts. This is injustice. Likewise, the receipt of a lower sentence based on unsupported mitigating factors subjects the decision to an appeal that could be avoided and the defendant is denied the right to a fair and speedy trial. Similarly, the prosecution, and the public in general, is denied the larger societal goals of sentencing because the defendant receives a lower sentence than would be received if the court actually adhered to its obligation to conform its sentence to only those factors which were proven. This problem is further compounded when unsupported mitigation is used to justify a sentence below the minimum sentence prescribed for the offense.

The failure to provide justification is also an indication that the court has not adequately discharged its duty under the law. For example, Article 74 of the CC states clearly that a court *"shall consider, but not be limited by"* the listed aggravating and mitigating circumstances. If the court simply parrots the language of the code for a particular mitigating circumstance without providing support for its application, one can only conclude that the court has failed to truly evaluate the factor. If the factors that are specifically listed are suspect, then one can only conclude that there is a strong possibility that the court did not consider and evaluate all of the factors as required by the law.

A finding of an aggravating or mitigating factor which is supported by no facts in the record is also a violation of the law. Article 8, paragraph 2 reflects that *"[t]he court renders its decision on the basis of the evidence examined and verified in the main trial."* Moreover, Article 361 clearly states that *"[t]he court shall base its judgment solely on the facts and evidence considered at the main trial."* Hence the failure of a court to provide a factual basis for the establishment of a particular factor can be seen as a judgment on facts outside the record or no facts at all. The result is a decision which appears to be arbitrary.

Some may consider the foregoing arguments as not strictly a requirement under the law. That the pronouncement of judgment in public is subject to the requirements of Article 366, paragraph 2 that the court *"shall give a brief account of the grounds for the judgment."* But use of the word brief does not discharge the court's obligation to state the reasons in the record that provide support for the decision of the court on both the guilt of the defendant and the imposition of the particular sentence. Article 370, paragraph 8, further explains that in the court's written opinion *"the statement of grounds shall indicate the circumstances the court considered in determining the punishment."* There is no provision of the CPC that discharges or minimizes the duty of the court to provide thorough reasoning for its sentencing decision.

Mitigation without justification, unfortunately, is not the only sentencing problem when it comes to mitigation of sentences. On January 12, 2015, the President of the Supreme Court issued a "Circular on Mitigation of Punishment" expressing concern over the repeated sentencing of offenders below even the mitigation provisions clearly stated within Article 76. As the court described it, judges were replacing the limitations provided by the law with their own personal wills – resulting in illegal and arbitrary sentences. When courts are criticized for an inability to apply basic principles of law in sentencing, there is a clear need for further guidance.

Establishing sentencing guidelines will go a long way in addressing these problems. First, increased guidance on application of the existing provisions will provide reviewing courts with a clearer set of standards to evaluate the sufficiency of the decision. Second, more robust definitions and examples of aggravating and mitigating factors will provide the court with more opportunities to logically explain their reasoning. Finally, adoption of the guidelines will send a clear message to the courts that assessment of irrelevant circumstances and/or the failure to support the finding of factors by facts in the record is illegal an essential violation of the procedure.

1.3 Transparency, Legality and Public Opinion

Current sentencing practices also lead to a decrease in transparency, infringe on the principle of legality and contribute significantly to a negative opinion of the judiciary. All three of these factors further erode the rule of law.

1.3.1 Transparency

The failure of current practice negatively impacts overall transparency in the rule of law. The CC and CPC have put in place requirements that increase the overall transparency of judicial decision making – such as the public nature of judicial proceedings and requirements for announcement of judgments in public. The publication of the laws, clear procedures for the conduct of the trial and specific sentencing ranges also play a large part in the process. Information on the functioning of the justice and the presence of the public at judicial proceedings contribute to the social acceptance of the judiciary. Judges ensure transparency through public hearings and by giving reasons for his/her decisions while maintaining the confidentiality required to respect or because of the need for public order.[16] Overall, the concept is that access to and awareness of the functioning of the system will enhance the overall understanding of the system. It also improves the ability of the public and the appropriate governmental institutions to monitor, assess and, if necessary, modify the existing legal system.

However current sentencing practices do not support transparency – they decrease it. The parties, public and a reviewing court cannot simply divine the basis for a particular sentencing decision if the court fails to refer to the relevant facts. By providing adequate reasoning and following an established procedure, the court and the process are more transparent and accessible.

[16] European Network of Councils for the Judiciary (ECNJ), Judicial Ethics Report 2009-2010, pg.9

1.3.2 The Principle of Legality

Current sentencing decisions also impact the principle of legality. Generally, the principle requires the law to be ascertainable by the parties, particularly the defendant, and that the rules should be declared beforehand. Increasing the clarity of the law yields an increase in the overall fairness of the proceedings for interested parties as well as an increase in justice in general. It also establishes a degree of predictability in outcomes and allows an accused access to the mechanisms that the justice system uses to calculate punishments. When an individual has access to this information, that individual may predict the nature and duration of punishment that would be appropriate for a criminal offense.

Predictability and the principle of legality also increase the efficiency of the justice system – an outcome sorely needed in Kosovo. For example, the CPC is quite clear in establishing requirements for the sharing of evidence with the defendant prior to the main trial. This allows the defendant to make a relatively adequate assessment of the likelihood of prevailing at trial. The Code also provides limitations, under Article 233, for negotiated plea agreements which allow for expedited proceedings in exchange for a lesser sentence. A defendant is capable of receiving a known penalty in exchange for a plea. Both of these provisions establish the front end process for improving the rate of dispositions. But the current practice does not establish any ability to assess the likelihood of a sentence at the end of an unsuccessful trial. **With arbitrary practices – such as where to establish a starting point, departures from minimum sentences with no justification and the assessment of mitigating factors not supported by the record – there is no motivation to take advantage of a plea agreement.** There is simply no logical reason to not risk the outcome at trial, which may be a not guilty, and then risk the outcome of a sentencing decision, which has a strong chance of being below what was offered in a plea agreement.

Ultimately, the erosion of this principle by current practices harms the legitimacy of the justice system as a whole and drastically decreases the efficiency of the judiciary. Coupled with an increase in uncertainty and the resulting arbitrary nature of sentences, the system is in need of additional guidance. This is not to say that absolute certainty is

the needed, or in fact possible, outcome – sentencing practices still require flexibility to address anomalous situations. But providing guidance can improve the situation without undue restriction. By clarifying procedures and ensuring they are uniformly followed, the defendant, and society at large, is provided with the tools to understand and "know" the legal system, and the overall efficiency of the system is improved.

1.3.3 Public Opinion

Finally, the problems are not limited only to the parties; they have greater implications for society in general. A professional court has an impact far beyond the confines of their own courtroom. Their opinions and professionalism will influence how the citizens of Kosovo view the judiciary. Ultimately, sentencing decisions are of great importance to society as a whole and how they view the judiciary is in large part how they view the court's ability to provide justice to them, their loved ones and their friends. Dissatisfaction means that the public does not believe that they live in a just society – one where those that are convicted of a crime are punished or rehabilitated and victims are provided with some form of justice. Belief in the fairness of the justice system will ultimately equate to a feeling of security and trust and will substantially reinforce the principles of the rule of law.

In April of 2015, UNDP in conjunction with USAID published its "Public Pulse Report -IX-" results which, among other things, included a general measurement of satisfaction with the work of the judiciary. The result was that very few of those polled were satisfied with the work of the judiciary and prosecutorial system.

By re-aligning sentencing policies to a more formalized structure and increasing the requirements of factually based mitigation, courts will not be able to sentence a defendant without justification. Arguably, this may result in an increase in the overall punishment level of defendants to increase, which may, in turn, increase the satisfaction level of the public. At the very least, this will force the creation of logically sound and factually supported opinions. The result will be, at the very least, a result that is defensible. To

some degree this will increase public confidence in the judiciary – at the very least, it will increase the overall professionalism of the courts and provide a resource for the public and media to educate themselves more thoroughly on how a sentencing decision was arrived at. A thorough and well-reasoned decision, supported by facts, is far less likely to be criticized as arbitrary and the result of undue or outside interference.

1.4. Judicial Fiat

The final problem area is perhaps the most difficult to address but also the most fundamentally flawed. The argument is that sentences, at least for some offenses, are too low because the particular court does not agree with the sentence structure of the offense itself. Essentially this is judicial fiat of legislation. **Because the court does not believe, for example, that a weapons offense should carry a sentence from range x to y, it hands out the minimum sentence. This not only expresses the court's disapproval of the sentencing range but assuages its moral values as well. By doing this, the court is acting far beyond its authority under the constitution.**

CHAPTER II

PROCEDURAL ASPECTS OF SENTENCING

2.1 Sentencing Hearings

The best possible solution under the current law and in line with its provisions is one which closely resembles the process before the International Criminal Court. The provision in paragraph 2 of Article 76 of the ICC creates the possibility of a distinct sentencing hearing before completion of the trial, in order to hear any additional evidence or submission related to sentencing. The hearing is not mandatory and requires a motion by the parties or the court. It also allows the parties at the end of the trial, after all evidence is submitted and parties have made remarks on the issue of guilt, to submit evidence related to sentencing and make arguments about aggravating and mitigating factors. Application of this procedure is consistent with Kosovo law in all respects other than the separation of closing remarks into two separate instances.

This process should not be seen as an exclusionary process by which the prosecutor bears the sole burden to provide evidence of aggravation and mitigation. It is inclusive. All of the parties must be treated as equals before the court in their ability to present evidence, and just as importantly, to comment on whether that evidence does or does not sufficiently show the existence of a sentencing factor. Only by allowing a full and robust

presentation of argument and evidence by all the parties can the sentencing decision be considered fair in opportunity, inclusive of all evidence available to the parties, and less likely to be overturned on appeal. Similarly, this accords with the principle of Equality of Arms contained in Article 6 of the European Convention of Human Rights[17], which demands that all parties have equal opportunity in the proceedings to present and comment on all evidence presented for the court's review.

2.4 Standard of Proof

In some legal systems the standard of proof for sentencing is separate and apart from the standard required for finding a defendant guilty of a crime. In most instances where that standard is separate, the court's conclusion on whether the existence of facts in aggravation and mitigation are proven is based on a standard of proof that is less than in the determination of guilt. This may in some cases be separated even further such that the burden of proving the existence of an aggravating factor is a higher burden than for mitigation. For example, in the latter case, a court might apply three separate standards: proof beyond a reasonable doubt to determine guilt, proof by clear and convincing evidence to establish an aggravating factor, and proof by a preponderance of the evidence to establish a mitigating factor.

The ICTY in deciding on sentencing has addressed also the issue of standard of proof for aggravation and for mitigation. In Kunarac, Kovac and Vukovic case the Trial Chamber stated: "[*F]airness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt, and that the Defence needs to prove mitigating circumstances only on the balance of probabilities*."[18] Similarly in Simic case the Trial Chamber again

[17] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 6, 'Right to a Fair Trial'.

[18] Case No.IT-96-23-T&IT-96-23/1-T, Judgment , Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, International Criminal Tribunal for the Former Yugoslavia, (22 February 2001), Par.847.

reiterated: "*Mitigating circumstances need only be proven on the balance of probabilities and not beyond a reasonable doubt*."[19]

The foregoing is presented to emphasize– for better or for worse – that this is a fairly common approach in a number of jurisdictions. Considering the lack of guidance provided by the CPC on sentencing issues, a court struggling to adopt its own systematic approach may be applying some form of this dual standard. While the court may be absolutely correct in seeking its own solutions to this deficiency, the problem is that not every court may be arriving at the same standard. Here again, the key to enhancing the overall fairness of the system and maximizing the principle of legality is to ensure consistency in application. Here again, the key to enhancing the overall fairness of the system and maximizing the principle of legality is to ensure consistency in application. Hence the more appropriate questions are the following:

- **Does the code, explicitly or implicitly, contain a standard of proof for determining the existence of aggravating and mitigating factors?**
- **If it does contain a standard, is that standard any different than the standard that applies for determining guilt?**

As to the first question, there is no explicit statement of what the standard of proof is that a court must apply when evaluating the presence of aggravating or mitigating factors. This is similar to the determination of guilt, which also has no explicit provision. However, there are several standards within the code which provide some guidance.

There are five standards within the CPC which apply to various procedures: (1) reasonable suspicion, (2) grounded suspicion, (3) grounded cause, (4) sound probability, and (5) well-grounded suspicion. Each contains components of perspective, information, and some level of belief that the potential defendant committed the crime. When the components are combined, they form a clear standard of proof required to obtain

[19] Case No.IT-95-9/2-S, Sentencing Judgment , Prosecutor v Milan Simic, International Criminal Tribunal for the Former Yugoslavia, (17 October 2002), Par.40. citing Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement ("Krstic Judgement"), para. 713.

whatever action or step in the process is being sought. At the highest level is the concept of a well-grounded suspicion, required for the filing of an indictment, which requires admissible evidence that would satisfy an objective observer that a criminal offense has occurred and that the defendant has committed the offense. As the prosecutor is required to meet this standard in order to obtain an indictment and move forward into the process of the main trial, it follows that the standard of proof required to find guilt is some quantum of proof above a well-grounded suspicion. Considering that the sentencing procedure is likewise part of this process, it makes sense that this standard is, at a bare minimum, a well-grounded suspicion.

As to what exact standard should be applied, the code provides no definite solution. Generally, international sentencing practices and the practice of the ICTY place a higher standard of proof to establish the existence of an aggravating factor as opposed to a mitigating circumstance. Considering that an aggravating circumstance is designed to enhance the penalty meted out against the defendant, the Court must ensure that the evidence submitted established the existence of the aggravating circumstance beyond a reasonable doubt. As to mitigating, there is no consensus, hence the standard, as stated earlier, is a well-grounded suspicion.

Where a court wishes to take account, as an aggravating factor, of some matter not forming part of the definition of the offence, it should be satisfied that the aggravating factor is proved beyond reasonable doubt and before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exist.[20]

2. 5 Evidence to be presented

The types of evidence to be presented by the parties to establish aggravating or mitigating circumstances is fairly straightforward. Any evidence submitted for sentencing

[20] Council of Europe Recommendation no. r (92) 17, of the Committee of Ministers to member states concerning Consistency in Sentencing; Appendix to Recommendation No. R (92) 17; C. Aggravating and mitigating factors, sub.par.3.

consideration should be subject to the same scrutiny as evidence submitted to establish the guilt of the defendant. What is particularly important is that courts must require the parties to actually submit evidence to support a claim that an aggravating or mitigating circumstances exists – assertions by counsel for the parties is not sufficient.

In conclusion, the above procedure will maximize the transparency of the sentencing process and both the implementation of the principle of legality and equality of arms. By clearly articulating the court's expectations prior to beginning the trial, all parties understand their obligations, the procedure to be followed, and the strategic choices they must make. They also understand what evidence must be submitted to establish the existence of any particular mitigating or aggravating circumstance. In the end, the process is uniform in application and results in a decision that is fully informed, based on the decisions of the parties, and ultimately less likely to be overturned on appeal.

CHAPTER III

RELEVANT PRINCIPLES IN DETERMINING A SENTENCE

3.1 General issues

The following provide an in depth step-by-step suggested method for determining a final sentence. Generally speaking, the framework tracks, as best as possible, the provisions of CC Article 73.1 which states *"[w]hen determining the punishment of a criminal offense, the court must look to the minimum and maximum penalty applicable to the criminal offense. The court must then consider the purposes of punishment, the principles set out in this chapter and the mitigating or aggravating factors relating to the specific offense or punishment."*

The evaluation and determination of a sentence can be broken down into the following categories:

1. Determine the principal punishment applicable to the offense and the starting point for the sentence.

2. Consider the purposes of punishment and principles.

3. Evaluate the evidence and arguments of the parties for aggravating and mitigating circumstances and determine which factors exist.

4. Assign relative weights to the factors and determine whether and to what extent one predominates over the other.

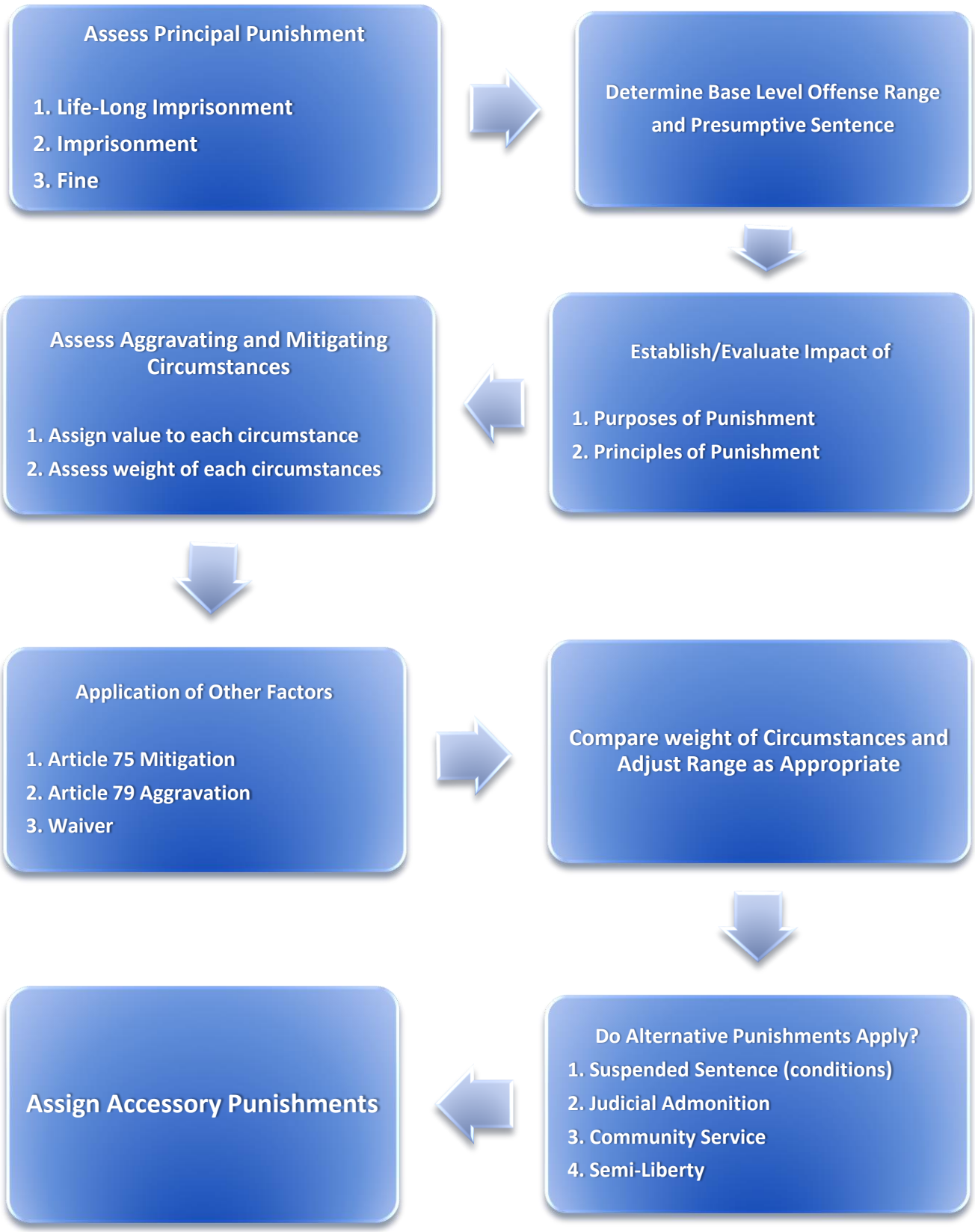
5. Determine whether alternative punishments are available for the offense and whether they apply.

6. Evaluate and assign accessory punishments.

7. Provide a justification for the final sentence.

Generally speaking there are three forms of punishment available for the particular offense(s) the accused has been convicted of. The CC divides punishment into three possible categories: (1) principal punishments, (2) alternative punishments, and (3) accessory punishments. Principal punishments make up the bulk of the punishment scheme for the code as every offense establishes a principal punishment. For purposes of the guidelines, they are best described as the presumptive sentence for any given offender. Alternative punishments, as the name implies, offer an alternative option to a principal punishment. However, they are not available as a substitute in every offense and require specific findings by the court. Finally, the accessory punishment is an additional component available to the court when applying either a principal punishment or an alternative punishment. It is best described as a more defendant specific component of punishment that is employed to address a particular need.

The Sentencing Process Chart



3.2 Principal Punishments

Principal punishments form the basic sentencing provisions of the CC and are generally described in Articles 43-48. Article 43 establishes the three primary principal punishments as (1) life-long imprisonment, (2) imprisonment, and (3) a fine. However, not every option is available and the court must read these general provisions in conjunction with the specific offense provisions. When read together, the court is provided with the following: (1) a range of imprisonment, consisting of a minimum term and a maximum term; (2) whether a fine is available as a substitute for a term of imprisonment; (3) whether a fine is available in addition to a term of imprisonment; and (4) whether there is a maximum or "cap" on the fine.

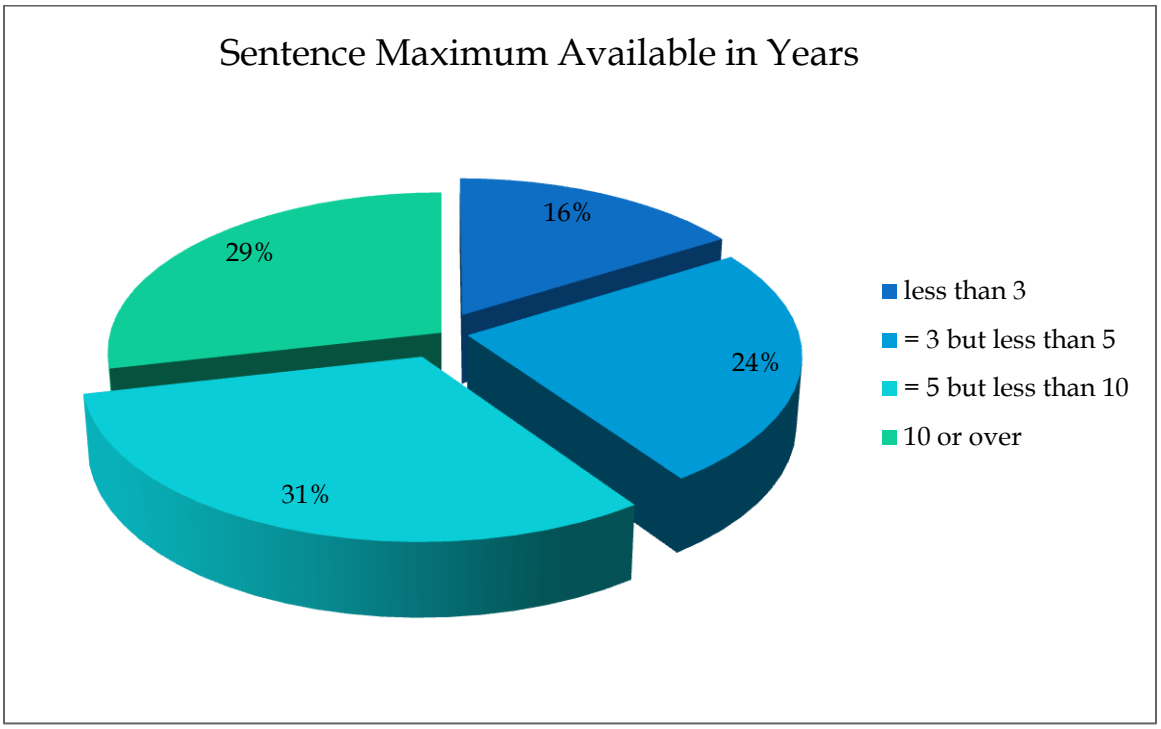
3.2.1 Ranges of Imprisonment

The range of imprisonment available depends upon the particular offense, and a variety of phrases and methods are used to describe it. The bulk of available sentences described in the code provide a definite term of years both for a minimum and a maximum. For example, one of the most popular ranges in the code is a sentence of 6 months as a minimum and 5 years as a maximum.

In addition to definite ranges, the code provides other sentences that contain descriptive terms for maximums and minimums. For a minimum term, the Code uses two phrases: "not less than" and "at least." Both of these phrases are interchangeable and provide the bottom end of the sentence available but are silent on the maximum. The Court must look to Article 45 paragraph 1 to provide the maximum, which is a term of twenty-five (25) years.

Finally, the Code contains a number of sentences that provide the maximum, but are silent on the minimum. These use the descriptor "up to" a period of X years. For example, the most common occurring sentence in the Code is a sentence of "up to 3 years." The minimum is likewise provided by Article 45 paragraph 1 which sets a

minimum sentence of no shorter than thirty (30) days. Hence the available range for an offense indicating a punishment of "up to 3 years" is a range of 30 days to three (3) years.



3.2.2 Sentence of Life Imprisonment

Life imprisonment is reserved for the most serious of offenses defined in the CC and is therefore only available if specifically included in the criminal offense. Life sentence is provided for as a possibility in a number of offenses in the code. In those circumstances, the Court is also given the option of selecting a term of imprisonment within a term of years specified in each offense. The only additional guidance provided to the Court on when to sentence to life imprisonment as opposed to a term of years is Article 44 which specifies the sentence is reserved for violations of the specific provisions under "especially aggravating conditions" or offenses that have "caused severe consequences." Based on this language, which is discussed more in detail below, even within the offense itself, the Court must find sufficient aggravation to elevate the penalty into the range of a life imprisonment sentence.

3.2.3 Fines

Although Article 43 authorizes use of a fine as a principal punishment, it does not specify under what circumstances they may be used. Here again, the Court must consult the specific offense to determine the availability and under what circumstances.

Generally the CC provides two situations in which a fine is used. First, a fine is assigned in addition to a period of imprisonment. These appear in the codes with the modifier "and" in the offense description and impose a mandatory requirement on the Court to impose a fine in addition to some other form of imprisonment. This occurs in 170 offenses throughout the CC and applies to a wide variety of offenses.

Second, the CC provides a fine as an alternative sentence in place of a period of imprisonment, using the modifier "or" in the offense description. This occurs in 215 offenses within the CC and generally applies to what would be considered less serious offenses. Of the 213 offenses, only 11 allow complete substitution for an offense which carries a maximum sentence of over three (3) years.[21]

In all but twenty offenses allowing for substitution or addition of a fine, the offense portion of the Code provides no upper or lower limit. This is provided by Article 46 paragraph 1 which determines that the range is 100-25,000 Euros. In those situations involving terrorism, trafficking in persons, organized crime, or crimes involving material benefit, that range is expanded to an upper limit of 500,000 Euros. For the remaining twenty offenses the CC has provided specifically tailored limitations depending on the offense.

[21] All 11 offenses carry a punishment range of up to 5 years.

3.3 Sentencing Starting Point and the Presumptive Term

The Council of Europe Recommendation concerning consistency in sentencing says: "*Wherever it is appropriate to the constitution and the traditions of the legal system, some further techniques for enhancing consistency in sentencing may be considered. Two such techniques which have been used in practice are "sentencing orientations" and "starting points". Sentencing orientations indicate ranges of sentence for different variations of an offence, according to the presence or absence of various aggravating or mitigating factors, but leave courts with the discretion to depart from the orientations.* ***Starting points indicate a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect aggravating and mitigating factors.*** *In particular, for frequently committed or less serious offences or offences which are otherwise suitable, consideration may be given to the introduction of some form of orientations or starting points for sentencing as an important step towards consistency in sentencing*."[22]

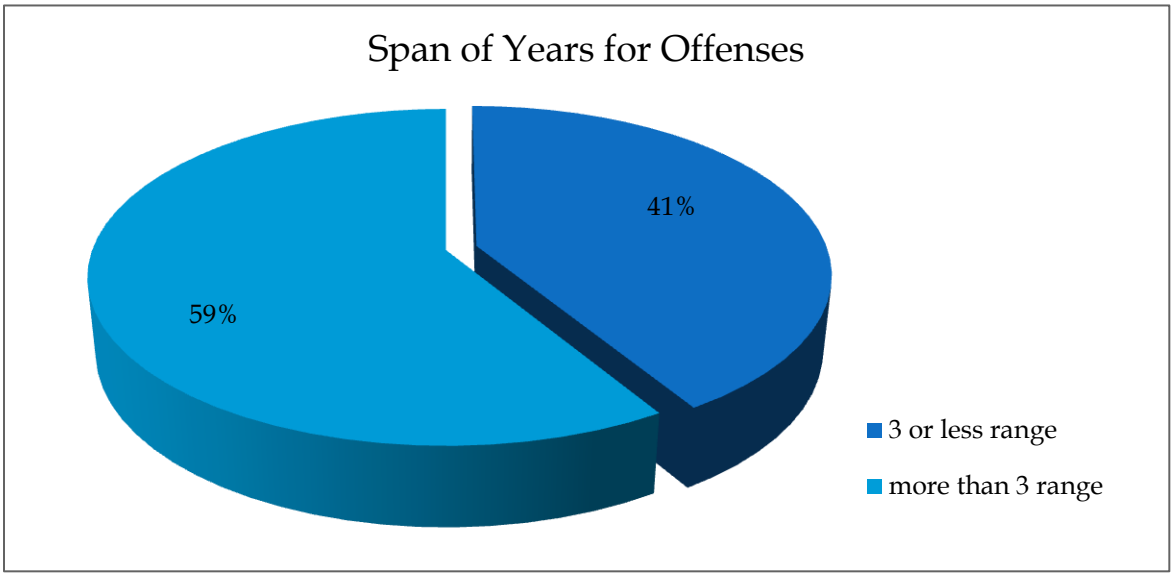
Starting points define the position within a category scale from which to start calculating the sentence. Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only after the appropriate sentence has been identified.

Logically, the beginning point will be the midway point of the available range identified by the Criminal Code for each specific offense. At the halfway point, the Court is given the maximum discretion to move up or down within the statutorily established range. In effect, this establishes a sentence for the "average" offender. Absent the existence of any mitigating and aggravating factors, every offender would

[22] Recommendation No. R (92) 17 of the Committee of Ministers to Member States concerning Consistency in Sentencing (Adopted by the Committee of Ministers on 19 October 1992).

receive an identical sentence of exactly one half of the range available in the statute. For example, a defendant found guilty of participating in a brawl in violation of Article 190.2, faces a possible sentence of 1-3 years in prison as a principal punishment. The starting point will be a sentence of 2 years imprisonment for every offender.

This also makes sense when assessing the ranges provided by the criminal offenses. The CC of Kosovo provides significant ranges for each offense sufficient that the judge can individually tailor a sentence throughout the process. Generally the CC provides a larger range for more serious offenses and a smaller range for less serious offenses. Approximately 73% of all offenses provide at least a three year range from the minimum to the maximum. Less than 100 offenses provide the Court with a range of one year or less, and unsurprisingly, they are also the offenses which carry a maximum sentence of one year or less. This is in stark contrast to the most serious offenses, all of which carry an available range of over 10 years.



Establishing a minimum sentence at the mid-point of the available range addresses a number of issues identified earlier.

- **First, it establishes a baseline sentencing level that is easily ascertainable by the public and increases the legality of the sentencing process.** There is little argument that the public is unaware of what the sentence will be, at least from the outset. This

supports the argument that a primary component of any effective level of general deterrence is awareness of the type and length of penalties attached to each crime.

- Second, it places the system and the defendant in a better position to negotiate a plea bargain. **A defendant that knows that the Court will, absent any mitigating or aggravating factors, impose a known sentence in the middle of the range, is better able to assess whether a negotiated plea is in their best interest. This will increase the overall efficiency of the system.**

- **Finally, it decreases the chances of widely divergent sentencing practices.** While the impact of divergence is relatively minimal when the range provided to the Court is small, the larger the available range there is, the larger the impact of non-uniform starting point. By establishing a known point, all Courts begin the process similarly.

At the end of this step, the Court has identified the baseline information with which to engage in tailoring the sentence to the particular defendant by assessing the aggravating and mitigating factors present. It has a minimum and maximum range within which to work, the starting point, and whether a fine is available as a mandatory addition or a complete substitution. This information should be considered by the Court as the presumptive sentencing information. Meaning the Court, under most or "normal" circumstances, will decide on a sentence within the confines of this information. The Court may only deviate from this baseline when it is able to conclude that there are circumstances sufficiently outside the norm or "average" offenders to justify a departure. This is in conformity with paragraph 1 of Article 74 on the general rules of mitigation and aggravation which states that "[t]he punishment imposed on a perpetrator is the punishment prescribed for the criminal offense, while a more lenient or severe punishment may be imposed only in accordance with the conditions provided for by this Code."

3.4 Prohibition on Double Counting Circumstances

Of significant importance for appropriately evaluating aggravating and mitigating circumstances is the court's awareness of the concept of double counting circumstances. This problem occurs in several scenarios that are discussed in greater detail below.

First, there is the potential for violating the principle of double jeopardy in sentencing by punishing the same defendant twice for the same conduct: first for their individual responsibility and second by using the same facts to enhance the ultimate penalty by applying them as an aggravating circumstance. The court must not consider those circumstances which are an element of the criminal offense also for aggravating a sentence, since they were already considered when the legislature determined the base level range for the offense. For example, for the criminal offence of armed robbery, the court cannot consider as an aggravating factor that the offense was committed with the threat or use of violence as the use/threat of violence is an element of the offense.

It is critically important that the court keep the distinction between aggravation within the sentencing range separate and apart from adjusting the entire range itself. In the above example, a simple theft without the threat of violence carries a penalty of up to 3 years. Once a threat of violence or force is added to the equation as an element, the law changes the entire range available to 3-10 years – aggravating the range itself, as opposed to simply adjusting the penalty within the up to 3 years offense due to the threat. Because the threat of violence was already used in elevating the entire range to 3-10 years it cannot also be used to elevate the final sentence higher within the 3-10 years period.

Similarly, although less common, if some form of reduced sentence was based on a statutory factor, those same facts cannot also be used to lower the sentence through their use as a mitigating factor. For example, Article 165 of the CC describes the crime of Endangering Civil Aviation Safety and provides that someone operating an aircraft in an irregular manner is subject to punishment from 1-10 years of imprisonment. Paragraph 6

of the provisions specifically provides that if the offense is committed negligently the sentence is reduced to up to 5 years imprisonment. As a reduced level of culpability was applied when formulating the sentencing range for the negligent commission of the offense, the court cannot further use these facts to lower the sentence in the range claiming such as mitigation under 3.1 as a circumstance falling short of grounds for exclusion of criminal responsibility. Although these situations are not as pronounced as the situations under the aggravating factors, but nevertheless the court should be wary of mitigation situations as well.

A second area where the court should be concerned about double-counting is the concept of overlapping circumstances, which can occur in the areas of both mitigation and aggravation. This happens because the Code provides a very broad categorical set of aggravating and mitigating circumstances to choose from. Inevitably, the court will be faced with a circumstance that may logically apply to more than one category. While the initial reaction may be to consider it under both categories and consider it as having met two aggravating or mitigating factors, this is also double counting and must be avoided by the court.

For example, the CC considers the entry of a guilty plea to be a mitigating circumstance under factor 3.10. The Code also allows the assignment of a mitigating factor under 3.11 if there is evidence of remorse by the defendant. One can argue that the entry of a guilty plea provides the court with some evidence of remorse and therefore it can be considered in assessing whether remorse exists under 3.11. The logic here is that the defendant, by pleading guilty, is showing that he is taking responsibility for his actions and is remorseful. While this may not be particularly persuasive by itself, it could become important when combined with additional evidence, and assessing the totality of the circumstances. Similarly, one could argue that a defendant who pays restitution under 3.7 is likewise exhibiting some level of remorse. A defendant who attempts to make the victim whole through restitution arguably has taken responsibility for his actions and is expressing some degree of remorse. In both examples, the court must only ascribe the facts to one of the mitigating factors. By ascribing it to more than one, the court double

counts the fact in its consideration and improperly provides more mitigation than the defendant is entitled to.

The same situation applies to aggravating circumstances as well. One might argue that a victim who is young, an aggravating circumstance under 2.7 (the age of the victim) could likewise contribute to the fact that the victim was particularly vulnerable under 2.6. Or if the Court concludes the victim was particularly vulnerable, that finding could contribute to a finding that the crime was committed with "particular cruelty" under 2.4. Here, the logic is that with a vulnerable victim the level of injury is augmented and it may catapult it into the category of "particular cruelty." Again, the court should constrain itself to keeping the circumstances distinct and not applying them to more than one circumstance. If it is a discrete factor enumerated in Article 74, it should remain a separate consideration by the court.

The final area of potential conflict comes when multiple charges are involved with the existence of facts that are both an element of an offense and may also be used in aggravation/mitigation of another offense sentence under Article 74. The key question is what happens when the perpetrator is found not-guilty of the offense that contains the factor as an element of the crime? For example, the perpetrator is charged with two offenses, one in which the use of actual violence is an element of the offense, and elevates the range of possible punishment, and one in which the use of actual violence could be used as a factor in aggravation under Article 74. If the defendant is found not-guilty of the first offense and guilty of the second, the court will need to make a specific evaluation of whether the element of the actual use of violence was a factual component of the finding of not guilty. In other words, has the court found that there was no actual use of violence? If so, then the court is affirmatively finding that this factor does not exist, and it cannot then be used as aggravation for the final penalty for the second offense. If not, the court is free to use it as an Article 74 aggravating factor.

In contrast, if the above scenario results in finding of guilt for both crimes, the situation will be different. In that case, the crime in which the actual use of violence is an element

of the crime will be elevated to a higher-level offense range. However, the court may not apply the Article 74 factor to the second offense.

Finally, in multiple offense convictions, using article 74 factors should be in terms of the overall punishment as opposed to on an individual basis……

3.5 Purposes and Principles of Punishment

Criminal Code Article 73 states:

"1. When determining the punishment of a criminal offense, the court must look to the minimum and maximum penalty applicable to the criminal offense. The court must then consider the purposes of punishment, the principles set out in this chapter and the mitigating or aggravating factors relating to the specific offense or punishment."

3.5.1 Purposes of Punishment

The purposes of punishment defined in Article 41 are:

1.1. *to prevent the perpetrator from committing criminal offenses in the future and to rehabilitate the perpetrator;*

1.2. *to prevent other persons from committing criminal offenses;*

1.3. *to provide compensation to victims or the community for losses or damages caused by the criminal conduct; and*

1.4. *to express the judgment of society for criminal offenses, increase morality and strengthen the obligation to respect the law.*

Before discussing the implications of these purposes of punishment on the sentence, it helps to provide a general discussion of the theories.

3.5.1.1 Specific/Special Deterrence

Paragraph 1.1 asks the Court to consider the traditional concept of special or specific deterrence. In this purpose the Court is focused on the individual who committed the crime and whether the sentence prevents them from committing another crime in the future. According to the modern philosophy of penology the punishment should fit the offender and not merely the crime. It is important to stress that the 'individualization' of the penalty implements the principle that criminal responsibility is an individual form of responsibility at the sentencing stage. In this sense, individualizing the sentence gives protection to accused individuals against punishments that do not strictly address their own acts, and thus ensures fairness. The offender is no longer an abstract violator of the law, but an individual that deserves specific attention.

This is more fully addressed by the second portion of the paragraph which incorporates the concept of rehabilitation. The theory of rehabilitation essentially posits that the objective of the sentence is to re-integrate the offender into society after a certain period, and to shape a sentence in such a way as to re-educate the offender. Here the court is truly engaged in individualization of the penalty because it asks the court to address particular issues that may have been related to the commission of the crime. The ability to do this is contained in the accessory forms of punishment that may be included in the final sentence. For example, if a defendant commits an assault and is under the influence of alcohol, the Court may fashion a sentence that not only prevents them from committing future assaults, but addresses a possible alcohol issue as well. Only by looking at the whole individual can the Court hope to prevent future crimes and re-integrate the offender back into society as a productive member.

3.5.1.2. General Deterrence

Paragraph 1.2 asks the Court to consider the purpose of general deterrence. In this traditional concept the sentence serves the purpose of preventing other individuals from committing crimes, either of a similar nature or in general. General deterrence is not focused on the individual but society as a whole. The hope is that a perpetrator will see

that crime "does not pay" and factors the potential for punishment into the calculus of whether to commit a criminal act.

In Naletilic and Martinovic case, the Trial Chamber held that "*Deterrence and retribution are the underlying principles in relation to sentencing of an individual by the Tribunal. While retribution entails a proportionate punishment for the offence committed, deterrence ensures that the penalty imposed will dissuade others from commission of such crimes*."[23]

While the future perpetrator may not be "rehabilitated" in the traditional sense, they may just forego the commission of the crime. In Mucic et al. case the Appeals Chamber held that "*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.*"[24]

3.5.1.3 Victims and the Community

Paragraph 1.3 asks the Court to consider the impact of the crime on the victim or the community and requires that any sentence needs to provide compensation for loss. This purpose represents a relatively recent development in sentencing theory that recognizes the importance of the rights and needs of victims of crime. From this perspective, the primary aim of the sentence would become to ensure that the offender compensate the victim(s) of crimes and the wider community. This has several implications.

- **First, it is an acknowledgment of the importance of victim rights in the calculus of the punishment**. This is not an ancillary consideration for the Court that can be offloaded to societal compensation mechanisms if the offender has the ability to restore the victim to their previous state. **It must be a primary consideration in formulating the sentence.**

[23] Case No.IT-98-34-T, Judgment , Prosecutor v Mladen Naletilic and Vinko Martinovic, International Criminal Tribunal for the Former Yugoslavia, (31 March 2003), Par.739, citing Todorovic Sentencing Judgement, para 29&30; Plavšic Sentencing Judgement, para 23.

[24] Case No.IT-96-21-A, Judgment , Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.806.

- Second the inclusion of the community in the purpose indicates a clear expression that victims can include the community writ large. In crimes where this involves, for example, destruction of property, compensation will take the form of monetary compensation. But the consideration does not stop there. The impact to the community may take the form of damage to the overall psyche of individuals in the community. This may include feelings of safety and/or community reputation. While these may be somewhat intangible or quantifiable in monetary terms, the Court must strive to restore those intangibles to their previous state.

3.5.1.4 Judgment of Society, Increased Morality and the Obligation to Respect the Law

The final paragraph of Article 41 is a general statement of the purposes of punishment and their relationship to the overall concept of rule of law. Here the consideration goes beyond the individual, the victim, and the community, to the impact of the sentence on society as a whole. This requires the Court to elevate its consideration beyond the corners of the community in which it sentences in and seeks to establish consistency across Kosovo as a whole.

3.5.1.5 Implications of Purposes of Punishment on Sentencing

Article 41 provides a general framework which should guide the Court as it moves through the sentencing process. However, the CC does not establish any hierarchical structure. There is no requirement, for example, to place greater emphasis on the rehabilitation of the offender over general public deterrence. Moreover, there is no indication that the sentence must only meet one of the purposes. This lack of guidance places the Court in a particularly difficult situation as two courts faced with identical offenses and offenders can arrive at very different sentences when applying different purposes. For example, one court, focused on deterrence, may choose incarceration as a final sentence. While another court, focused on rehabilitation, may select a suspended sentence with ancillary provisions. Without any guidance, each sentence is equally valid

under the law. This potential problem is generally recognized among sentencing theorists as problematic for enhancing sentencing inconsistencies and is partially addressed by the Council of Europe in stating that:

1. The legislator, or other competent authorities where constitutional principles and legal traditions so allow, should endeavor to declare the rationales for sentencing.
2. Where necessary, and in particular where different rationales may be in conflict, indications should be given of ways to establish possible priorities in the application for such rationales.
3. Whenever possible, and in particular for certain class of offenses or offenders, a primary rationale should be declared.[25]

Although this issue is not specifically addressed in overt terms by the Code, establishment of a starting point in combination with these guidelines, along with the available ranges for certain offenses does ameliorate the problem to a large degree. Generally, the code provides that as the seriousness of the crime increases, the availability of alternate forms of punishment diminishes. This places greater emphasis on specific and general deterrence as the overall purpose of punishment. As the seriousness decreases, rehabilitation becomes available as a possible sentence. However, it must be emphasized that the availability of alternate forms of punishment does not mandate their use. Finally, considerations of victim restoration must be present in all facets of sentencing. In large part, the individual circumstances the Court faces in any given situation will largely dictate where the specific purposes of punishment come into play and whether one should take greater priority than another.

3.5.2 Principles and Other Factors

In addition to requiring the purposes of punishment be considered, Article 73 requires the consideration of the principles established in the chapter. Although no specific principles are established within a particular Article, general principles are embodied throughout the

[25] Council of Europe Recommendation no. r (92) 17, of the Committee of Ministers to member states concerning Consistency in Sentencing; Appendix to Recommendation No. R (92) 17; A. Rationales for sentencing.

chapter when addressing particular circumstances. Hence the court is not mandated to consider a particular principle itself, but rather consider and apply any article aligning with the particular facts of a case. For example, under Article 78, the Court may waive punishment for offenses committed negligently in specific circumstances. This embodies the principle that not all crimes committed negligently deserve the same punishment as those committed with purposeful conduct. The principles are not addressed in individual detail as most of the articles contained in the chapter will apply to particular factual situations. The court must consider each provision that applies to the particular factual scenario and consider the particularities.

As stated in Article 73 of the Criminal Code, "The punishment shall be proportionate to the gravity of the offense and the conduct and circumstances of the offender." In line with this provision and other provisions of the Code, when determining the punishment the court shall consider the level of crime. Such assessment shall be done by considering Paragraph 3 of Article 73 requiring the Court to consider a series of factors. These factors in large part are general categories under which the specific mitigating and aggravating circumstances fit. However they can also be considered general principles under which the Court should be guided accordingly. They are:

3.1 the degree of criminal liability;

3.2 the motives for committing the act;

3.3. the intensity of danger or injury to the protected value;

3.4. the circumstances in which the act was committed;

3.5. the past conduct of the perpetrator;

3.6. the entering of a guilty plea; and

3.7. the personal circumstances of the perpetrator and his or her behavior after committing a criminal offense.

3.5.2.1 The degree of criminal liability

The level of criminal liability is generally determined based on the degree of accountability combined with the level of guilt of the offender. The general principle at

work is that the degree of criminal liability of an individual will directly impact the degree of penalty imposed on the offender.

In determining the degree of accountability, the court shall consider whether the crime was committed in a state of significantly reduced or reduced accountability. This can take a variety of forms and requires an adequate assessment of the participation in commission of the offense. The general concept is that the greater the attenuation of the individual to direct commission of the offense, the greater there may be potential for reduction in the final punishment. In addition

The level of guilt is to be assessed considering the type of guilt (premeditation or negligence), as required by the law for the particular crime committed. In determining the level of guilt, in cases of premeditated crimes, the court shall consider if there is a direct or prospective premeditation, as well as whether in the specific case, one may identify the presence of one of the special types of premeditation, which may be an indicator of a lesser or greater level of guilt. In establishing various levels of guilt for negligent crimes, the court shall have to consider whether the crime is a result of a conscious or oblivious negligence and also whether the crime involves some special type of negligence.

3.5.2.2 The motives for committing the act

In assessing the motivation behind the crime, the court shall generally establish what the motivation was and take the object into consideration when imposing a penalty. This may take the form of a positive nature such as helping another person, humane reasons or other socially advantageous reasons or a negative reason such as hatred, abjection, greed, self-interest, envy, or socially detrimental incentives.

The concept that acts committed for respectable and altruistic motives or with the intention to benefit other members of society are generally considered to deserve lesser punishments is based on the theory that crimes committed because of “strong human compassion” are less reprehensible. For example, society generally considers that a perpetrator who commits a theft of money to purchase medication to treat the disease of a

family member is deserving of a lesser punishment than one who commits the theft purely for financial gain. In contrast, those that are committed with unacceptable or reprehensible motives easily call for harsher punishments.

However, it is important for the court to cautiously apply these principles as they can be highly personal in nature. The court thus runs the risk of imposing its own personal principles into the evaluation of a penalty which may not be considered universal or awarding greater significance to a value than may be generally held. This is particularly applicable to mitigation of punishment based on grounds such as nationalism or so called "honor" of the individual or the family.

3.5.2.3 The intensity of danger or injury to the protected value

When establishing the level of the specific crime, the court shall consider the severity of the committed crime. In the case of identifying seriousness, this will include an evaluation of the intensity of the harmfulness of the consequences of the crime. When the issue is primarily a threat or endangerment the evaluation will focus on the protected right and the probability of violation or nearness to completion.

In assessing the seriousness of the endangerment or violation of the protected right, the court shall consider the following elements in particular:

- the seriousness and permanence of the consequence;
- the number of injured parties or victims;
- the value of the crime proceeds or damages caused; and
- other circumstances which in the specific case, may indicate higher or lower effect of the crime on the specific right, value or interest in question.

This issue will be less important when the severity of the offense is largely included in the formulation of the offense itself, which is discussed in greater detail in later provisions of the guidelines.

3.5.2.4 The circumstances in which the act was committed

When establishing the level of the crime, the court must take under consideration all the circumstances that characterize the specific crime and the conditions under which it has been committed. This will include a thorough evaluation of all of the specifics facts of the crime which may or may not directly apply to an evaluation of guilt, but may impact the ultimate sentence.

These shall include but should not be limited to:

- the time, location and manner in which the crime was committed;
- the means used to commit the crime;
- the intensity of the crime;
- the persistence in committing the crime;
- any difficulties and obstacles that the offender had to overcome while committing the crime;
- any special circumstances that have been provided to the offender, which he or she used and benefited from in order to commit the crime easier;
- personality and character of the victim;
- abuse of any special relationships of mutual trust with the victim;
- the type and form of participation in the crime committed;
- whether it was just an attempt or the crime was actually committed; and
- other objective or subjective circumstances that existed prior, during and after the commitment of the crime and can influence the type and duration of the sentence.

3.5.2.5 The past conduct of the perpetrator

This general category relates to past behavior of the perpetrator that may have an impact on sentencing either through direct application of other provisions of the code or incremental modifications of the final sentence.

These shall include but should not be limited to:

- any prior criminal convictions, regardless of their similarity in nature to the current offense;

- prior misdemeanor offense convictions;
- whether the person has any diagnosed addictions/dependences or exhibits behavior consistent with such;
- whether he or she a violent person or exhibits indicative behavior;
- antisocial behavior;
- the person's reputation within the society, i.e. community in which he or she lives in; and
- other facts that might serve as indicators of the prior life and character of the offender before committing the crime, which might have an effect on the sentencing.

3.5.2.6 The entering of a guilty plea

The issue of mitigation in case of plea and plea agreement is generally regulated with the provisions of the Criminal Code and Criminal Procedure Code. In terms of plea agreements, the CPC establishes specific maximum reductions of negotiated sentences at specific phases in the Criminal Procedure. However, there are no similar limitations established for the Court when the defendant simply pleads guilty to an indictment at some stage prior to a finding of guilt. The Court should be particularly cautious when applying mitigation based on the entering of a guilty plea as the lack of structure in this area can and does cause substantial deviation in similar factual situations. The Court should consider the provisions of the CPC governing the entry of plea agreements as roughly applicable to a perpetrator simply pleading guilty.

Additionally, when guilty pleas and plea bargaining are concerned, a proper assessment of the final penalty should also include the evaluation of a number of other circumstances 'surrounding' and related to the plea of guilty. These include issues such as genuineness of the assertion of guilt, the expression of remorse by the accused, the overall behavior of the accused towards victims and behavior towards the Court.

3.6 Classification of factors for consideration in sentencing

The origins of the debate regarding a set of circumstances that may modify the penalty can be traced back to the XII century, when penalties were so rigidly established and were frequently so harsh that legal scholars began to appreciate the need for a graduation of the penalty according to the specific factual situation of a particular case. The penalty provided for a certain crime would be known as the *poena ordinaria*, being the penalty established by the legislator in connection with a specific crime under the normal circumstances of a case; further, the judge would also have the power to dissociate him/herself from the statutory penalty, aggravating or attenuating it, in the presence of a reason, or particular circumstance which would modify the 'normality' of the case. The diversity and number of such circumstances impacting the penalty needed to be evaluated with regard to the 'ordinary penalty', in other words, the average penalty that would result from legislative prescriptions. It was within this complex and evolving process of theory that a number of common mitigating and aggravating circumstances developed The frequency of these circumstances being used eventually led to the codification of the process of individualization and the development of a common set of core modifications.

This ultimately developed into a far more complex and thorough evaluation of a variety of circumstances, theories and rationales. As noted by the Council of Europe modern sentencing "…*should be consistent with modem crime policies, in particular in respect of reducing the use of imprisonment, expanding the use of community sanctions and measures, pursuing policies of de-criminalization, using measures of diversion such as mediation, and of ensuring the compensation of victims…In proposing or imposing sentences, account should be taken of the probable impact of the sentence on the individual offender, so as to avoid unusual hardship and to avoid impairing the possible rehabilitation of the offender*."[26]

[26]Recommendation No. R (92) 17 of the Committee of Ministers to Member States concerning Consistency in Sentencing (Adopted by the Committee of Ministers on 19 October 1992).

Historically the entirety of circumstances can be divided into two broad categories that are further refined. Generally, there are "case" related factors and "proceeding" related factors. While there is some overlap between the two categories, and even between the subcategories, the former typically focuses on the commission of the offense and the personal circumstances of the offender, while the latter focuses more on the procedures and situation after commission of the offense. The following sections provide an overview of broad sentencing considerations and are offered as a means of orienting the Court. The specific Kosovo enumerated factors are discussed in detail in later sections.

3.6.1 Case Related Factors

The case related factors impacting the height of sentence may be divided further in three categories represented by all those circumstances that are specific to the case:

- Circumstances related to the commission of the crime
- Circumstances related to victimization and the victim.
- Circumstances related to the accused and his/her personal situation

3.6.1.1 Circumstances Related to the Gravity or Commission of the Offense

It is possible to distinguish between gravity *in abstracto*, based on the legal definition of the crime (its subjective and objective elements) – which leads to the problem of a hierarchy of crimes – and gravity *in concreto*, which depends on the harm done in the particular case and on the degree of culpability of the offender. While the *in abstracto* considerations are usually subsumed in the general penalty assigned by the law *in concreto* requires a more in depth analysis of the facts of the case.

Gravity of the offence includes aspects related to the perpetration of the crime such as:

- the type of criminal act,
- the way in which the crime was perpetrated,
- cruelty or sadism in the perpetration, etc.

In Mucic at al case, the Appeal Chamber stated :" *The Trial Chamber found, in its general considerations before addressing the factors relevant to each individual accused, that by far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence… The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime… The Appeals Chamber reiterates this endorsement of those statements and confirms its acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence.*[27]

i. Cruelty

The manner of perpetrating crimes is always germane to sentencing. Based on the intrinsic characteristics of this factor, it is logically more applicable to direct perpetrators who commit a crime and less towards indirect offenders or crimes involving superiors. With direct offenders the imposition of cruelty is directly attributable to the individual who inflicts it. Whether as an element of the crime or as aggravating circumstance, the Court should consider brutality, zeal, cruelty or sadism used by the offender in carrying out the crime(s).

Circumstances and factors for consideration include:

- The level of brutality can depend on additional severe suffering inflicted upon the victims, or be due to the heinous means of perpetration utilized in committing the crime(s).
- The use of cruelty should be consistently considered a significant aggravating factor linked to the role of the accused in the commission of crimes and demonstrating particular evil towards the victims.
- The zeal with which the crimes were committed should constantly be an aggravating factor taken into account in the determination of the appropriate sentence.

[27] Case No.IT-96-21-A, Judgment , Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.731. citing Kupreškic Judgement, para 852, cited in the Aleksovski Appeal Judgement at para 182.

ii. Premeditation

Premeditation is one factor in which there is potential application in multiple categories. While it is generally considered a personal circumstance that can be attributed directly to the perpetrator, it can also be seen as a circumstance directly applicable to the offense itself. In the latter category, premeditation will normally be a statutorily prescribed enhancement to the crime itself – elevating it to an entirely new penalty level. In the former, it may be a factor to consider in penalty refinement by either aggravation or mitigation.

For instance, where the accused is found to have committed the offence charged with cold, calculated premeditation, suggestive of revenge against the individual victim or group to which the victim belongs, such circumstances necessitate the imposition of aggravated punishment. On the other hand, if the accused is found to have committed the offence charged reluctantly and under the influence of group pressure and, in addition, demonstrated compassion towards the victim or the group to which the victim belongs, these are certainly mitigating factors which the judges will take into consideration in the determination of the appropriate sentence.

More generally, attention should be paid to the motives related to the commission of the crimes, considering them not as an essential element of the criminal liability but rather as a factor to be evaluated in mitigation or in aggravation of the appropriate sentence after individual responsibility has been established.

3.6.1.2 Circumstances Related to Victimization and the Victim

The second case related factor is that of "victimization," which comprises both the level of harm to victim(s) as well as the various circumstances and personal characteristics related to the victim(s).

Such factors should always be considered significant aggravating circumstances likely to cause the imposition of harsher penalties and important to establishing the overall magnitude of the crime. Similar to the personal circumstances of the offender, circumstances related to the victim(s) allow the court to take into consideration the

particularities of the victim, ultimately tailoring a sentence that reflects the impact on the victim(s).

A fundamental concept is that a victim for purposes of this evaluation can include more than those encompassed by traditional concepts of victims. A court may consider the impact on any of those that may have reasonably been impacted by the commission of the crime. For example, witnesses to the crime and family members or love ones may all be considered victims of the direct actions of the perpetrator depending on their nature and impact.

Circumstances and factors for consideration include

- the number of victims;
- the length of time over which the crime occurred or victimization took place;
- whether the crime was repetitively perpetrated against the same victim(s) or part of a crime in continuation;
- the degree of humiliation inflicted on the victim(s);
- the intentional or reasonably expected suffering of victim(s) beyond the level needed to accomplish the elements of the crime;
- the vulnerability and/or defenselessness of the victim(s);
- the mental trauma and psychological suffering caused to the victim(s);
- the age of the victim(s) - whether youthful or aged;
- whether the crime was committed by misuse of a position of superiority over the victim or exploitation of trust or authority;
- the long-term physical and mental trauma suffered by the survivor(s) as a consequence of the crime; and
- whether commission was based on racist, ethnical, religious, sexual orientation or gender motivated discrimination or any other form of bias based on a protected category or value.

Judges must always keep in mind that the punishment should be in proportion to the seriousness of the offense. While satisfaction of the victim, the victim's family and

friends, and the public will likely prevent further retaliation or private revenge, dissatisfaction is not an absolute gauge of the appropriateness of the penalty.

3.6.1.3 Individual/Personal Circumstances of the Accused

Individual/Personal Circumstances of the accused can take the form of mitigation or aggravation. While mitigation typically focuses on the offender themselves and their personal characteristics and circumstances, aggravation tends more towards the perpetrator's role in the crime and circumstances related to the crime itself.

i. Personal Mitigation

Personal mitigation is a complex series of considerations for the court. They can be confusing and sometimes at odds with the personal beliefs of a particular judge. What one judge considers personal mitigation, another may consider personal aggravation. They may also take on differing levels of significance depending on which purpose of punishment is driving the court's decision.

International practice in this area, while cognizant of the importance of this category to individualization of the sentence, has not established a clear set of circumstances that should always be considered personal mitigation. In many respects, personal mitigation may be determined by the culture of the sentencing authority or scientific advancements. For example, the development of psychology and research has led to a series of personal mitigation factors focused on the psychological condition of the perpetrator and the impact it has on culpability. In some cultures these developments have been considered germane and included as specific mitigation factors for consideration, while in others they have been rejected.

Generally, personal mitigation refers to the offender rather than the offense, and can include

- the offender's past (e.g. good character, productive life, deprived background);
- the offender's circumstances at the time of the offence (e.g. financial pressures, psychiatric problems, intellectual limitations, immaturity);

- the offender's response after the offense and during prosecution (e.g. remorse, acts of reparation, seeking help for problems contributing to the crime, cooperation with the police, prosecutors and the court);
- the offender's present and future prospects for rehabilitation (e.g. family responsibilities, supportive partner, capacity to address problems underlying the criminal behavior).

They can also be categorized into a number of factors such as

- those that indicate reduced culpability, such as youth or mental health problems, pressing need, previous good character and exceptional disadvantage those that indicate limited risk of further offending - relating to remorse and attempts to make reparation, the offender's circumstances, or steps taken towards rehabilitation;
- those that indicate particular sensibility to punishment, such as the strain of prosecution, the loss of reputation and standing or the fact that the offender is unusually poorly equipped to handle a prison sentence; and
- factors that call for clemency, such as the victim's support for the offender, family responsibilities and the 'collateral damage' that imprisonment would inflict on relatives, or the social contribution made by the offender.

Considering the potential controversial nature of these factors, courts should be particularly aware of whether they have been specifically included in legislation for evaluation or they are referred to generically. General references to personal mitigation of the defendant or allowances for any other considerations by the court should increase the level of scrutiny of the court to a particular personal circumstance and the evidence of its existence.

ii. Personal Aggravation

As indicated, personal aggravation is less concerned with the inherent qualities of the individual and more focused on the facts of the crime itself and the role of the accused.

Circumstances and factors for consideration include

- the level of participation in the offense by the defendant,

- whether the defendant was in a leadership position,
- whether the defendant was in a superior position in a hierarchical structure,
- the domestic situation or relationship between the victim(s) and the defendant,
- whether the defendant was in a position of authority in relation to the victim(s),
- whether the defendant was in a position of trust in relation to the victim(s),
- whether the defendant exhibited religious, ethnic, political, discriminatory and/or revenge motivations,
- prior criminal activity regardless of whether the same or similar in type, and
- a lack of remorse.

As can be seen, some of the factors or concepts listed above are simply the opposite of those factors listed in personal mitigation. This is a further example of how convoluted and unsettled the personal aspects of mitigation and aggravation are.

3.6.2 Proceeding Related Factors

As with the foregoing, proceeding related factors are a mix of mitigating and aggravating factors that concern the procedural or proceeding aspects of the case. They typically focus on the actions of the defendant once the crime is completed and place particular emphasis on the behavior of the defendant towards law enforcement, the court and the victim(s).

Circumstances and factors for consideration include

- the behavior and/or attitude of the defendant after committing the criminal acts, both prior and subsequent to arrest;
- whether the defendant voluntarily surrendered to law enforcement and at what stage in the investigation;
- whether information and/or testimony was provided by the defendant about the crime committed and/or against any co-perpetrators;
- whether information and/or testimony was provided about other crimes or criminal activity the defendant had knowledge of;

- whether the defendant confessed participation in the crime and at what stage in the proceeding;
- whether the defendant took proactive action to correct situations that contributed to commission of the crime;
- compensation of damages or the return of proceeds prior to completion of the proceedings;
- attempts to make restitution or reparation to the victim(s);
- whether the defendant attempted to destroy evidence and/or influence witnesses during the investigation and prosecution
- the entering of a plea agreement or plea of guilty to the charges and at what stage in the proceedings; and
- any other circumstances in the specific case that indicate the attitude of the offender towards the crime, which may have an effect on the sentencing.

Depending on the type of the offence some of the categories overlap or have blurred boundaries: for instance, courts may consider testimony or information provided by the accused as part of co-operation with the prosecutor, or there are times when the two categories may be treated independently. The court should be particularly aware of the potential for overlap as these circumstances frequently qualify as the most significant factors for mitigation of a defendant's sentence.

AGGRAVATION AND MITIGATION:

Application in Kosovo

CHAPTER IV
GENERAL ISSUES ON AGGRAVATION AND MITIGATION UNDER ARTICLE 74 OF THE CRIMINAL CODE

The factors set forth in Article 74 of the CC largely fall under the broad categories and factors discussed earlier as typically considered in mitigation and aggravation. None of them are controversial. As is traditionally the case, the aggravating factors tend to be more specific and unambiguous than the mitigating circumstances. This aligns with the accepted concept that factors which enhance sentences need to be concise, unambiguous and capable of being proven. The defendant and the public are clearly on notice of what actions will result in greater punishment.

However, the mitigating provisions are rather generic in scope. To some degree this is attributable to the fact that it is impossible to account for every possible set of circumstances that may appear before a judge or authoritatively decide in what way a factor should be applied. But while this approach allows great flexibility, it provides little in the way of guidance, and increases the likelihood of divergent sentencing practices. This further contributes to inconsistencies in sentencing, decreases legal certainty, and increases criticism of the judiciary. In sentencing terms, the code provides little "legal individualization" and significant "judicial individualization."

The issue of guidance is further exacerbated by the open ended or "catch all" provisions of both aggravating and mitigating circumstances provided for in the code. Courts are required to consider the enumerated factors, but are "not limited" by them. Hence the court is free to consider and incorporate any other factor it so chooses. Again, while this is certainly a consistent and legitimate international practice, it does little to guide the discretion of the court in any meaningful way. Courts should view the use of a non-enumerated factor as reserved for very rare situations in which the factor is clearly appropriate and strongly supported by evidence.

The OSCE, in evaluating sentencing practice since the inception of the Criminal Code, note that in many cases judges lack a proper understanding of how different circumstances may, respectively should, affect the decision on punishment. Although the range of mitigating and aggravating circumstances is extensive, and the courts have discretion on how to apply these to the punishment, there are certain factors that clearly should or should not be taken into consideration. A mitigating or aggravating circumstance must be relevant to the criminal offence or to the offender's personal circumstances. Standard references to, or listing of, mitigating or aggravating factors sometimes lead to references being made to circumstances that are not relevant to the specific case[28].

The following sections provide the court with a more specific approach to each aggravating and mitigating factor. They offer a brief discussion of each factor and examples of what each factor should/could include, as well as considerations of when a factor should be excluded. They also discuss how significant the factor should be in the court's overall assessment and what facts might change the assessment and/or what questions should be asked.

The evaluation and application of the below factors, is the primary means by which the court will tailor a sentence to an individual and the specific circumstances surrounding

[28] Organization for Security and Co-operation in Europe, OSCE Mission in Kosovo, Department of Human Rights and Communities, Inadequate Assessment of Mitigating and Aggravating Circumstances by the Courts, Issue 5, July 2010, pg.4.

the crime. The end result of analyzing these factors is to arrive at a sentence as stated in Article 73 of the CC that is "proportionate to the gravity of the offense and the conduct and circumstances of the offender."

Article 74 of the Criminal Code of Kosovo lists the following factors for the court's consideration:

2. When determining the punishment the court shall consider, but not be limited by, the following <u>aggravating circumstances</u>:

2.1. a high degree of participation of the convicted person in the criminal offense;

2.2. a high degree of intention on the part of the convicted person, including any evidence of premeditation;

2.3. the presence of actual or threatened violence in the commission of the criminal offense;

2.4. whether the criminal offense was committed with particular cruelty;

2.5. whether the criminal offense involved multiple victims;

2.6. whether the victim of the criminal offense was particularly defenseless or vulnerable;

2.7. the age of the victim, whether young or elderly;

2.8. the extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;

2.9. any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;

2.10. evidence of a breach of trust by the convicted person;

2.11. whether the criminal offense was committed as part of the activities of an organized criminal group; and/or

2.12. if the criminal offence is committed against a person, group of persons or property because of ethnicity or national origin, nationality, language, religious beliefs or lack of religious beliefs, color, gender, sexual orientation, or because of their affinity with persons who have the aforementioned characteristics;

2.13. any relevant prior criminal convictions of the convicted person.

3. When determining the punishment the court shall consider, but not be limited by, the following <u>mitigating circumstances</u>:

3.1. circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity;

3.2. evidence of provocation by the victim;

3.3. the personal circumstances and character of the convicted person;

3.4. evidence that the convicted person played a relatively minor role in the criminal offense;

3.5. the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another;

3.6. the age of the convicted person, whether young or elderly;

3.7. evidence that the convicted person made restitution or compensation to the victim;

3.8. general cooperation by the convicted person with the court, including voluntary surrender;

3.9. the voluntary cooperation of the convicted person in a criminal investigation or prosecution;

3.10. the entering of a plea of guilty;

3.11. any remorse shown by the convicted person;

3.12. post conflict conduct of the convicted person; and/or

3.13. in the case of a person convicted of the criminal offense of Hostage Taking, Kidnapping or Unlawful Deprivation of Liberty or as provided for in Article 175, 194 or 196 of this Code, effectively contributing to releasing or bringing the kidnapped, abducted, taken or detained person forward alive or voluntarily providing information that contributes to identifying others responsible for the criminal offense.

Each of the factors listed under article 74 of the Criminal Code of Kosovo will be elaborated in depth in the following Chapters.

CHAPTER V
AGGRAVATION FACTORS UNDER ARTICLE 74

5.1 A high degree of participation of the convicted person in the criminal offense[29]

A correct assessment of the participation of the accused in the commission of crimes should distinguish between different forms of individual liability. Factors related to the position and role occupied by the accused in the commission of crimes (such as 'superior position', 'abuse of authority or trust') should always be very significant aggravating circumstances. However, the circumstance 'direct participation' is a factor that relates more to the elements of the offence and the participation of the accused therein.

Assessment of this aggravating factor is premised on several considerations. First, that the crime will involve participation by at least two individuals. Second, that there is a level of participation by one of those individuals that is considered "high" or greater than the other.

Although the first factor is relatively straightforward, the second is more challenging and will require careful consideration by the Court. As with many provisions in sentencing, this is not a factor that provides clear instruction to the Court as to exactly how it is to be applied. However, there are two assessments the Court should primarily focus on when

[29] Criminal Code, Article 74, par.2.1

considering whether this aggravating factor exists. The first is to consider the factual scenario of the crime and the relative contribution of each of the actors. The second is to consider the role of the defendant and whether he/she can be considered a leader.

- Comparison of Individual Actions

As for the first evaluation, the Court should consider the individual contribution of each of the actors in relation to one another. However, what is clear from the language is that the Court is not engaging in a finely detailed assessment of whether one defendant has simply participated more than another. In most instances, once the requisite level of culpability has been achieved, all of the defendants will be ascribed the participation level of the "average" offender. Therefore, minor differences in participation that might lead to the conclusion that one participant has engaged in more "acts" than another should generally not be considered sufficient to warrant a finding of this aggravating factor.

Instead, the Court should consider whether the disparity in participation is significant and that the conduct is far more important to the success of the crime. The facts should leave no doubt in the Court's mind that this particular actor's participation is obviously more important than other actors and therefore deserving of more punishment.

Example: Two armed defendants enter a grocery store intending to rob it. One of the defendants (D1) remains at the door of the store acting as a lookout, while the second (D2) approaches the clerk. D2 takes out a weapon and points it at the clerk and demands all of the money. The clerk refuses and D2 shoots the clerk in the leg. D2 opens the cash register and takes all of the money out. Both defendants then leave the store and flee in a vehicle. D1 does nothing more than wait at the door acting as a lookout and never takes the weapon out of his pocket.

In this example, the Court must consider all of the acts of both defendants in relation to the crime as well as in comparison to one another. There is no doubt that both defendants have participated with the sufficient culpability to make them responsible for the crimes committed. However D2 has clearly conducted the vast majority of the criminal acts in

comparison to D1. While D1 simply remained by the door acting as the lookout, D2 brandished a weapon, used it against a victim, and removed the money from the cash drawer. In fact, it is not implausible that had D1 not been present at all, D2 could have completed the crime by himself. Although sufficient acts by one party to complete the crime without the presence of the other actor is not the standard by which to judge this aggravating factor, it provides an excellent example of a situation where one actor has achieved a "high degree" of participation. In this particular situation, the Court can easily conclude that this aggravating factor applies to D2.

This naturally leads to the question of what the impact of D2's aggravation for "high degree" of participation will have on the remaining defendant(s). Specifically, whether such aggravation will always trigger a finding of mitigation under factor 3.4 "evidence that the convicted person played a relatively minor role in the criminal offense;" or factor 3.5 "the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another." While it is certainly possible that in the facts described above, the Court could conclude that D1 is deserving of mitigation, it is not an automatic conclusion. Under most circumstances it will be possible for one or more defendants to still be considered average participants while another defendant's acts rise to the level of "high degree" of participation. The Court should be particularly cognizant of the potential for mitigation in situations where there are two defendants and one has clearly participated more than the other.

- Organization and Direction

The second consideration by the Court should focus on the leadership role of the defendant both in organization and direction in the overall criminal act. This evaluation can be broken down into two primary categories.

First, the Court should evaluate the defendant's role in any preparatory acts leading up to completion of the criminal act. In most situations, the events leading up to the commission of the crime will have a strong influence on the Court's evaluation. This will be particularly relevant in the commission of complex crimes where the final crime itself

is the outcome of a series of steps that may not be crimes themselves, but are important to the completion of the final crime itself. They can also be present in less complex crimes. In the above example, one defendant may have obtained plans of the building, obtained the weapons or conducted surveillance of the location. This may all have taken several weeks before the event or only several hours. Regardless of the timeframe, it can contribute to the level of participation by the defendant in the crime and contribute to aggravation.

Second, the Court should look at any actions or facts that indicate that the defendant is controlling or directing the other individuals. This can be both prior to the commission of the crime during the preparation stage and during the actual act(s) amounting to the crime itself. In the latter, the defendant may tell other participants how to conduct themselves, what to do during the actual robbery and direct their actions as the crime itself unfolds. In both instances, the Court can also look to whether there are relationships, both formally or informally that indicate direction by one of the others. These can be current or prior relationships. Examples include familial relationships, work structures (employer/employee), contracts, former military and/or prior business relationships.

- <u>International Practice</u>

Although there is no direct parallel in international practice to this factor, it can be considered in the context of a leadership position in a hierarchical structure. This conforms to the belief that leaders, particularly in organized hierarchical structures, should be punished to a greater extent than subordinates. As noted by the ICTR in the Stakic Trial**30**:

…as with white collar crimes, the perpetrator behind the direct perpetrator – the perpetrator in white gloves – might deserve a higher penalty than the one who physically participated depending on the particular circumstances of the case.

30 Case No.IT-97-24-T, Judgment , Prosecutor v Milomir Stakic, International Criminal Tribunal for the Former Yugoslavia, (31 July 2003), Par.918.

Not surprisingly, the factor is most frequently cited by international tribunals in war crimes cases or genocide. In those cases, the existence of a leader, particularly in a formal hierarchical structure, was considered fundamentally important to completion of the crime. Without the existence of the formal military structure and all of the attendant circumstances that came with it, the crimes may never have occurred. Hence courts considered there needed to be aggravation of the offense. Although there are some international cases where aggravation does not take place, it predominantly occurs in situations where the leadership position was an element of the crime.

It is very interesting to see the nuances of the reasoning of ICTY in Plavsic, and how they have considered her role in Presidency as aggravating factor. The Trial Chamber in its judgment stated: "*The Trial Chamber accepts that the superior position of the accused is an aggravating factor in the case. The accused was not in the very first rank of the leadership: others occupied that position. She did not conceive the plan which led to this crime and had a lesser role in its execution than others. Nonetheless, Mrs. Plavsic was in the Presidency, the highest civilian body, during the campaign and encouraged and supported it by her participation in the Presidency and her pronouncements.*"[31]

Indirect participation of the accused in the commission of crimes on the other hand should be linked to a better formulated theory of modes of liability, rather than being a mitigating circumstance. For example, in the opinion of the ICTY Appeals Chamber "*proof of inactive participation by a superior in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and may therefore aggravate the sentence…Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability*."[32]

[31] Case No.IT-00-39&40/1-S, Sentencing Judgment , Prosecutor v Biljana Plavsic, International Criminal Tribunal for the Former Yugoslavia, (27 February 2003) par. 57:
[32] Case No.IT-96-21-A, Judgment , Prosecutor v Zejnil Delalic, Adravko Mucic, Hazim Delic and Esad Landžo, International Criminal Tribunal for the Former Yugoslavia, (20 February 2001), Par.736-737, citing Aleksovski Appeal Judgement at para 183.

As such, an act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission.

Same applies also for the unwillingness in the commission of crimes. Unwillingness should not be generally play any role on the mitigation or aggravation of the offence. The factor 'willingness/enthusiasm' in the commission it regards elements more properly related to the necessary mens rea for the crime(s) committed. The degree of involvement of the accused is already assessed (and accordingly weighed) in relation to the mental element, with no need to consider it in aggravation or mitigation a second time.

Concerning the possibility that the existence of a superior order be regarded as a mitigating circumstance for the accused who had to follow that order (i.e., a form of 'duress'), it should be specified that such a circumstance does not necessarily constitute a mitigating factor, and clearly does not grant a complete defense to soldiers. Certainly, for the case in which the accused was a subordinate but also a willing participant in the criminal conduct, there will be no mitigation to his/her sentence. The existence of a superior order qualifies as a mitigating circumstance only when the subordinate commits crime(s) not of his own will but under absolute coercion, as a result of the compulsory nature of the order received from his superior, disobedience to which could have endangered the accused own life.

- Overlap and Caution

As with other offenses, it is particularly important to evaluate whether the charge already incorporates the role of the individual. For example, Article 143 on Organization and Participation in a Terrorist Group provides a penalty of five to ten years for participation, but ten to twenty years for someone serving in a leadership role. Thus this factor could not be applied in that particular situation.

With this factor there is also a significant potential for overlap in other categories, particularly when the court considers the planning involved in the crime as well as the existence of an organization. When the court evaluates a situation where there is significant pre-planning, factor 2.2, a high degree of intention and/or pre-meditation my come into play as well. It is entirely possible for the pre-planning to indicate both a degree of pre-meditation as well as separating one defendant from another in terms of a high degree of participation. Likewise, there may be overlap when there is an organized structure that involves a more formal structure such as a government or military organization in which the defendant is a formal leader. In that case it is possible to ascribe factor 2.9 because it will involve some "abuse of power or official capacity." Depending on the facts, the abuse of power may propel the defendant into a high degree of participation in the crime.

Ultimately the Court must be aware of the interplay between these factors and carefully consider the importance of each factor in the outcome. The Court must not simply ascribe maximum weight to each factor simply because they exist, but carefully apportion the degree that each weighs independently of one another. This is no easy task, but considering the impact it may have in increasing the penalty it must be carefully considered. Nonetheless, when there is overlap of all three factors, it will indicate to the Court that in their entirety there is a need for aggravation.

- Eagerness in Participation

This factor also does not require an assessment of "eagerness" to participate in a crime. While some sentencing structures consider the need to aggravate an offense where the defendant's state of mind shows particular zeal in commission of the offense, Kosovo's code does not. Once the requisite state of mind is reached for criminal liability, there is no enhancement for a participant who exhibits exuberance in carrying out the criminal acts. Similarly, a lack of willingness to participate in the crime is already considered in the mens rea associated with the offense. This is discussed more fully under the section on mitigation.

- General considerations include:

- Actions significantly greater than other participants.
- Planning activities to improve the likelihood of success of the crime
- Recruitment and funding of other participants
- Directing the activities of others
- Obtaining the instrumentalities to complete the crime
- Incremental steps to further the crime

- Relevant questions include:

- Was the defendant in a hierarchical position?
- Was the structure formal or informal?
- Was the defendant a leader in the structure or group?
- Was the defendant's role important in the planning of the crime?
- Did the defendant's position contribute to the commission of the crime?
- Did the defendant's actions or authority enhance the seriousness of the crime?
- Would the crime have been successful without the participation of the defendant?

5.2 A high degree of intention on the part of the convicted person, including any evidence of premeditation[33]

Generally, the concept of premeditation is considered as planning prior to commission of the criminal act. It is considered as a greater degree of threat to society as it is essentially an attack on social values and indicates a greater commitment and perhaps continuity than spontaneous crime. Its threat to society is primarily rooted in the concept that this heightened dedication to the commission of the crime indicates perhaps less likelihood for successful rehabilitation and hence greater leniency. As stated by the ICTY Trial Chamber in Krstic case: "*Premeditated or enthusiastic participation in a criminal act necessarily reveals a higher level of criminality on the part of the participant. In determining the appropriate sentence, a distinction is to be made between the individuals*

[33] Criminal Code, Article 74, par.2.2

who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm."[34]

Premeditation generally falls under the category of a personal circumstance related to the offender but also within the general circumstances related to the commission of the offence. It not only describes the individual, but what occurs during the stages leading up to the specific offense. Hence this factor will require careful consideration of the specific facts of the situation.

In assessing this factor there are two primary considerations for the Court. First, the degree of planning and preparation prior to commission of the offense. This is a fairly straightforward evaluation and was discussed in greater depth under Factor 2.1. The Court should consider the degree of planning and particularly the time involved in the preparation.

The second factor deals primarily with situations where the perpetrator is acting based on a belief that he/she has been wronged by someone or something. The classic situation could be described as revenge motivated or defending of "honor." In these situations, the relevant assessment will be focused on the time and opportunity of the defendant to reflect on the circumstances causing the need for revenge. A defendant who has had sufficient opportunity to "cool off" and still chooses to exact revenge, must be assessed the maximum degree of aggravation, particularly when significant planning was involved.

- Overlap and Caution

The existence of a high degree of intent or premeditation may have overlap with Factor 2.1 in situations where there are multiple perpetrators involved. In an effort to avoid double counting, the Court should ascribe planning to this factor. This is based on the fact

[34] Case No.IT-98-33-T, Judgment , Prosecutor v Radislav Krstic, International Criminal Tribunal for the Former Yugoslavia, (2 August 2001), Par.711.

that planning is only one of several considerations that may impact the degree of participation. Whereas the existence of planning is direct evidence of premeditation.

- Relevant questions include:

- Was there revenge or an alleged affront to the defendant involved?
- How much time elapsed between the alleged affront and the crime?
- How much planning was involved in committing the offense?
- How complex were the preparations for commission of the offense?
- Was it possible to complete the offense without planning?
- Did the perpetrator purchase items to complete the crime?
- If there was a victim involved, did the perpetrator lie in waiting prior to committing the crime?

5.3 The presence of actual or threatened violence in the commission of the criminal offense[35]

Evaluation of this circumstance focuses on the use or threat to use actual violence in the commission of the crime. In most instances, the use of actual violence or a threat will already be factored into the penalty structure for an offense. For example, the use of actual violence or the threat will aggravate a simple theft to a robbery. In those circumstances, the aggravating factor will be ignored by the Court. Application of this factor will be limited to only those crimes in which violence by act or threat is absent from the legislative qualification of the crime. Generally, actual violence should be considered more aggravating than a threat of violence.

One consideration for the court will be the involvement of third parties. There may be situations in which the threat of violence is not directed at the victim of the offense, but rather at a third party. In these situations, the court should consider the totality of the

[35] Criminal Code, Article 74, par.2.3

circumstances and the relationship between the offense and the threat. If the threat bears some relationship to the overall crime, the court should consider it as an aggravating factor, regardless if the threat was not directed at the ultimate victim. The factor makes no distinction between the victim of the crime and a third party. Therefore, there should not be a reduction in the severity of the factor simply because the threat was directed towards a third party.

In the context of domestic violence offenses, the court should be particularly aware of the threat of violence and its possible use against 3rd parties. The presence of a weapon in the home is often a critical component in creating fear in the victim through a constant state of jeopardy. The weapon may have been used in a previous incident of either actual violence or a threat, and its continued presence implies the ongoing possibility that the behavior will reproduce itself. It also serves to deter the victim from leaving the aggressor or reporting previous incidents to the authorities. Research shows that the use of weapons or dangerous tools or threats to use these in the context of domestic violence represents a clear indicator of escalation and a decisive indicator in fatal outcomes.

- Relevant questions include:

- Was there actual violence used?
- Was a weapon involved?
- What were the nature and extent of any injuries?
- Was the use/threat of violence necessary for the completion of the offense?
- If a threat was involved, did the defendant have the ability to carry out the threat?
- Was the use/threat of violence against a third party?
- Was the threat overt and obvious?
- Was the threat implied?

5.4 Combination of Factors relating to Victims

Factors 2.4, 2.5, 2.6, 2.7 and 2.8 of Article 74 all refer to victims and specific criteria that will aggravate the sentence for a conviction. The fact that five of the aggravating factors focus on the victims of crime is a testament to the importance this evaluation will play in the assessment of a final sentence. In many sentencing schemes, there is a direct correlation between the impact on the victim and the overall seriousness of the offense – and they are frequently considered the most important factors to be considered. As the seriousness of the offense increases in this manner, there is an increased need to protect the public through general deterrence and to compensate the victim for the impacts of the crime.

The importance of the treatment of victims is acknowledged in EU directive 2012/29/EU which succinctly states "[v]ictims of crime should be protected from secondary and repeat victimization, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice."**36** This is further described in the directive itself and states that "Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence."[37] When the Court considers an individual assessment of the victim and the circumstances of the crime it must "take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime. They should also take into account the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive, sexual violence, violence in a close relationship, whether the offender was in a position of control, whether the victim's residence is in a high crime or

36 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012,) establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/22/JHA, (9).
[37] Ibid Article 10 Paragraph 1.

gang dominated area, or whether the victim's country of origin is not the Member State where the crime was committed." [38] Ultimately, "[j]ustice cannot be effectively achieved unless victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities. [39]

While the primary focus of the directive is to establish a baseline of services and obligations each member state must offer to victims, it nonetheless clearly establishes the obligation of courts to comprehensively consider the victim throughout the proceedings. This not only includes the right to present evidence and be heard by the Court, but the obligation of the Court to consider the individual circumstances and status of the victim.

These principles are clearly embodied within both the CC and the CPC. As discussed earlier the CC provides that one of the overarching purposes of punishment is to provide compensation to victims and the community for losses or damages caused by the criminal conduct.[40] This should not be seen as limited only to financial or property loss in the more traditional sense of the word, but to provide some degree of restorative justice – to make the victim whole. To that end, the CPC provides the victims mechanisms through the opportunity to participate in the trial and present evidence. This includes contributing evidence and testimony to the court's evaluation of aggravating and mitigating factors for sentencing. It is important to keep in mind that some of the factors may involve considerations that may not normally be presented by the prosecutor to establish a prima facie case against a defendant. Hence the Court should provide latitude to the victim's presentation of evidence in order to fairly and adequately assess the full extent that any of these factors may play in determining aggravation.

The large scale of victimization is naturally a very important element and, very often, a significant indicator of the magnitude of the crimes(s). It generally encompasses a number of circumstances and factors, such as:

- The number of victims,

[38] Ibid (56).
[39] Ibid. (34)
[40] Criminal Code of Kosovo, Article 41, paragraph 1.3.

- The length of time over which the crime was perpetrated,
- if the crime was in continuity perpetrated against the same victim/s,
- the degree of suffering and humiliation inflicted,
- intentional and inhumane increase of the suffering of victims;
- the vulnerability of the victims- defenseless victim;
- harm, trauma and level of suffering caused to the victims,
- the age, infancy or youth of the victims,
- commission of the offence by misuse of a position of superiority over the victim/exploitation of trust;
- physical and mental trauma suffered by the survivors as the consequence of the crime;
- commission based on racist, ethnical, religious or gender motivated discrimination or any other form of bias.

The court must always keep in mind that if the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge.

5.4.1 Whether the criminal offense was committed with particular cruelty[41]

Cruelty is a common concept throughout sentencing systems when dealing with victims. It is a universal belief that actions committed against victims that include some component of cruelty should include an additional quantum of punishment beyond what would be considered punishment for the "average" offense. As such, the presence will frequently be included as a factor where the victim and the circumstances personal to the victim will be a major contributing factor in the evaluation. It is important for the Court, however, to keep in mind that aggravation in this situation is limited to only those situations in which cruelty rises to the level of "particular" cruelty.

The code itself does not provide a definition of what constitutes cruelty. The concept generally is considered to be an action which causes pain and suffering to another with no

[41] Criminal Code, Article 74, par.2.4

consideration or concern over causing the condition or its impacts on the recipient. The focal points for consideration then are the elements required for commission of the crime in conjunction with the actions of the defendant i.e. the level of injury and the intent of the defendant to cause those injuries.

Any injury beyond that required to meet the requirements of the crime or typically associated with the crime will naturally infer some degree of cruelty. In other situations, when gradation of injury beyond that necessary to commit the crime is more difficult, for example in murder, the focus will be on the actions of the defendant that indicate that there was mutilation and/or suffering beyond that necessary to cause death, and that the defendant intended such gratuitous violence.

Whether the level of cruelty rises to the level of "particular" cruelty requires a more thorough evaluation of the overall circumstances, including the impact of the offense on the particular victim. Particular cruelty will exist when the offense involves the gratuitous infliction of pain and cruelty significantly in excess of that usually associated with the commission of the offense in question. In appropriate circumstances, the level of the injury, in comparison to the level required for the offense, will be a compelling indicator when coupled with the intent of the defendant. This will involve to some degree the assessment of the offense by the Court in light of its prior experience and exposure to similar situations. There is no formulaic or quantitative approach to determine whether this factor is present.

To some extent, this factor has been addressed by many International Tribunal cases concerning the gravity of crimes during conflicts. For example, in Blaskic case the Trial Chamber concluded: "*The fact that the crime was as egregious as it was is a qualitative criterion which can be gleaned from its particularly cruel or humiliating nature." "The cruelty of the attack is clearly a significant consideration when determining the proper sentence. In this case, the heinousness of the crimes is established by the sheer scale and*

planning of the crimes committed which resulted in suffering being intentionally inflicted upon the . . . victims regardless of age, sex or status."[42]

- *Psychological Impact*

Adequate assessment of this factor will require sufficient evidence indicating the nature and extent of the injuries. This should not simply be limited to physical injuries, but must include injuries of a psychological nature as well. This can include both short term and long term psychological implications and the ability of the particular victim to recover after the crime.

Psychological violence against a victim in a domestic relationship can sometimes constitute the most significant injury to the victim. Modern medicine and developed legal systems recognize that psychological damage over time can have permanent and long lasting impacts on a victim. Long after the signs of physical violence disappear, the psychological component of the injury remains. It may take many forms and be diagnosed as a wide variety of conditions many of which are permanent and debilitating.

Though infrequent, there may be minimal or even no physical violence component in the history of the relationship. This does not mean that the relationship history should be discounted. The impact of psychological and emotional damage needs to be evaluated over the long term and considered carefully by the Court.

In the end, the Court must consider the psychological implications of not only the instant crime but the long-term relationship and the psychological implications. This has an impact on both the seriousness of the present offense as well as constituting aggravation under this factor. The greater the seriousness of the psychological injury and behavior over a longer period of time, the greater the likelihood of finding "particular cruelty" existed and enhancement of the penalty for the offense. Both the physical and emotional injury's permanency must be considered by the court in assessing this factor.

[42] Case No.IT-95-14-T, Judgment , Prosecutor v Tihomir Baskic, International Criminal Tribunal for the Former Yugoslavia, (March 3, 2000), Par.783.

- Impact on 3rd Parties

The court may also consider the impact of the injury on others as well. For example, a murder case in which the defendant buries the body in an unknown location may have extreme psychological impacts on the family of the victim. Inclusion of the family members as victims in homicide cases has been recognized by the ICTY Trial Chamber, who stated: "*Along with the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes to this day must also be mentioned.*[43]

These factors may be considered further evidence of the defendant's lack of concern for the impacts of the crime. Similarly the actual presence of children may be sufficient or that they saw, heard or otherwise witnessed the commission of the offense.

- Repetitive Acts against the Same Victim

It is important to emphasize the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act or activity over a period of time. Repetition will always have a significant impact on aggravating a final sentence, especially when considering whether the circumstances arise to the level of particular cruelty.

Repetition frequently occurs in situations of domestic violence, where the overall injury and harm is created over a long period of time, which can include significant gaps in time between particular acts. While the length of time between acts is relevant, it should not be used to discreetly separate or exclude the harm caused by one episode from that of another. The court must consider the type of crime, the object of the crime and the intentions of the perpetrator in determining whether a particular action should be considered in conjunction with the instant offense. Additionally, if an act is not technically available to aggravate a sentence as a recidivist, it should not be ignored. It may still be relevant in aggravating the particular offense within the available range.

[43] Ibid. Par.787.

Finally, incidents that were not formally charged or adjudicated may still be used to aggravate the sentence, as long as the Court is satisfied that they occurred.

- Overlap and Caution

As with other factors, the court must be aware of the potential for overlap. However, the court should not hesitate in essentially aggregating or combining a number of factors that do not independently qualify for aggravation into a single factor which does. For example, the defendant commits an act of violence against the victim and there are indications that it was committed with cruelty. However, the court is not convinced that there are sufficient grounds to truly consider it to be particularly cruel. After further review, the court comes to the conclusion that, similarly, there are indications that the victim was defenseless, but not so defenseless as to warrant a finding of particularly defenseless under factor 2.6. In this situation, it is reasonable to consider the two factors together to combine into a single finding of particular cruelty and hence aggravation under factor 2.4.

The key to this conclusion is that the two issues are so closely related. In many respects, it is difficult to isolate them completely into separate considerations. Any finding that a victim is defenseless/vulnerable will naturally lead the Court to believe that some degree of cruelty has been imparted on the victim. This is especially the case when the vulnerability is readily apparent to the reasonable observer. If, however, the basis of a finding of some level of cruelty is wholly dependent on the Court's conclusion that the victim was defenseless, there should be no aggregation.

Finally, there are no offenses in the Code that statutorily enhance the penalty based on an element of particular cruelty. However, there are several offenses that do increase the penalty range for the existence of any cruelty. If the particular offense for a finding of guilt has a cruelty component involved, there should be no aggravation based on this factor as it was already considered.

- Relevant questions include:

- Were the injuries significantly in excess of those required to meet the statutory elements of the offense?
- Are there separate injuries in addition to a primary injury that meets the statutorily required level of injury?
- Are there indicators that the defendant intended the level of injuries?
- Are there long term side effects of the injuries?
- Are there mental injuries involved as either a direct or indirect result of the offense? If so, are they permanent or long term?
- Are there injuries or psychological implications for the family members? What are the nature and extent?
- Are there overt indications of gratuitous infliction of injuries?
- Are there indications that the defendant committed the crime against the victim with zeal or enjoyment?
- Did the defendant leave the victim in a helpless situation?

5.4.2 Whether the criminal offense involved multiple victims[44]

The primary purpose of this factor is to codify the principle that a defendant who commits an act of violence or a crime likely to cause harm to several people is more culpable than a defendant who harms only one person. In such a situation, a sentence of the average level offender is simply not sufficient acknowledgment that each individual victim received recognition in the overall sentence of the court. Depending on the nature of the crime and the number of victims, the court should adjust the range of the sentence to give due regard for increased culpability. It is important to keep in mind that this factor may apply to situations that do not fit traditional beliefs of what qualifies as a victim – namely that victims only exist when there is a formal charge for a crime and the victim is specifically identified or labeled as a "victim."

There are two primary situations where this factor will play a role in increasing the final sentence. The first is when there is a victim whose injuries are caused by a crime, but

[44] Criminal Code, Article 74, par.2.5

there are no ch5rges linked to the victim. The second is when the charge by definition includes multiple victims, but makes no distinction based on numbers.

In the first situation, the victim is typically a third party who has not been injured in a physical manner, but subjected to some form of emotional or psychological injury. This is typically present when there is a significant degree of cruelty or violence used in the criminal act. It can be caused by a single act or over an extended period of time. These injuries, though not formally charged as a crime by the prosecution, are increasingly being considered in international practice as contributing to the overall harm caused by the act and the recipients are considered as victims.

This factor is significant in domestic violence situations where courts frequently focus solely on the custody arrangement and ignore the impact on a child who is present in the home If there is a child present in the home during the offense, the Court must, once again, look at the history involved and the impact on the child. Even if the crime charged does not include an offense for actions directly against the child, the presence of the child can be considered an aggravating factor under 2.5 as the child will be an additional victim. Once presence is established, the Court will need to determine the extent of the injury and consider the degree of appropriate aggravation (similar to considerations against the primary victim).

Even if a child is not subjected to physical abuse, they often suffer emotional and psychological trauma from living in a home where their fathers abuse their mothers. Those who grow up observing their mothers being abused, especially by their fathers, grow up with a role model of intimate relationships in which one person uses intimidation and violence over the other person to get their way. Experts believe that children who are raised in abusive homes learn that violence is an effective way to resolve conflicts and problems. There is a strong likelihood they will replicate the violence they witnessed as children in their teen and adult relationships and ultimately their parenting experiences. Children from violent homes who are subjected to violence or witness it also have higher

risks of alcohol/drug abuse, post-traumatic stress disorder, juvenile delinquency and ultimately adult criminal activity.

The court should strongly consider this aggravating factor in cases when:

- Child (or other) witnesses were physically present when the violence was taking place.
- Child (or other) witnesses were not physically present, but able to hear the violence/abuse.
- Child (or other) witnesses were not physically present and cannot hear the violence/abuse, but can see its consequences afterwards.

The second situation involves criminal charges in which there is more than one victim but the sentence is not adjusted proportionately in relation to the number of victims. This situation will most frequently occur in large scale economic crimes or atrocities. For example, although Article 289 on damaging creditors or debtors increases the sentence level when the aggregate damage changes from 5,000 to 250,000 Euros, it provides no reflection for the number of victims. Applying this factor to the ultimate sentence gives appropriate acknowledgment to the number of victims involved.

In the violent crime context, Article 164 on hijacking aircraft provides an example. Here the CC enhances the sentence of the perpetrator based on their intent and the degree of injury to passengers, but does not differentiate based on number of victims. Hence, the range available to the court is the same if one passenger is killed in the course of the hijacking or one hundred passengers are killed (p. 2 – provides for a range of at least 5 years). Considering how extensive the available sentencing range is once a death takes place, it is clear that the authors intended that the court consider the actual number of victims in determining where within the range the sentence should ultimately fall.

- Overlap and Caution

Aggravation based on the number of victims is clearly an aggravating consequence that should always be considered. However, because of the potential seriousness of this

consideration it should be approached with caution and only upon sufficient findings by the court.

One consideration will be whether there was an independent charge for each victim of the crime. If victims are all independently reflected in individual charges then this factor will normally not be a consideration. The only time the court should take this into consideration would be aggravation of a consecutive sentence under Article 80 in which there are similar acts against multiple victims. Although the court pronounces a sentence for each individual act, paragraph 2.2 precludes simply aggregating the individual punishments and requires a sentence lower than the sum total. If the court is inclined to give a final sentence substantially lower than the aggregate of the individual sentences, it should provide justification as to why, and explain why the existence of multiple victims does not justify aggregation close to the sum total of the sentences.

Additionally, the court cannot consider this aggravating factor if the prosecution has failed to prove a crime against a particular victim or their status as a victim. Essentially this means that the court cannot use a victim that was the subject of a not guilty verdict/adjudication as a victim for purposes of aggravating some other offense. Likewise, if the court has doubts sufficient doubts over the facts describing a victim, it should not consider them as a victim in aggravation.

- Relevant questions include:

- Were there witnesses or others present at the time?
- Is there a domestic/family relationship involved?
- Were there non-physical injuries that were inflicted on others such as psychological, emotional etc.?
- Does the offense sufficiently account for the number of actual victims?
- Can the offense be adjusted based on the number of victims?
- Is the activity of a nature that the greater the number of victims the greater the level of punishment should be?

5.4.3 Whether the victim of the criminal offense was particularly defenseless or vulnerable[45]

Vulnerability or defenselessness of a victim is another factor that must always be considered by the court and taken into consideration for final sentencing. The notion that those that are at a disadvantage due to personal attributes or based on a set of circumstances are deserving of greater protection is a generally held belief as well as the concept that a perpetrator taking advantage of that situation or condition is deserving of greater punishment. The prominence of the concept of vulnerable/defenseless throughout the CC lends further support to its significance in sentencing. Not only is it considered in aggravating factor in sentencing, but it serves to enhance the sentencing range for crimes more frequently than any other factor. Clearly, the legislator intends for this factor to be a prominent one.

Perhaps the greatest consideration for the court will be the level of defenselessness/vulnerability and the ability of the perpetrator to perceive that status. In other words, does the ability of the perpetrator to perceive the status of the victim impact the application of this factor and its significance? Generally, the victim is taken as the perpetrator finds them and their ability to recognize the condition is irrelevant. This is supported by the language of the factor that simply requires a finding of defenselessness or vulnerability and mentions nothing about the perpetrators knowledge of the condition. A finding of this factor will not be dependent on the ability to perceive the vulnerability. But the court should still consider this in assessing to what degree it will aggregate the sentence. If the condition is obvious and easily capable of perception, the court can increase the sentence to a greater degree on the basis that the perpetrator clearly and consciously disregarded the condition of the victim when the act was committed. This would need to be assessed from the viewpoint of the average person for all considerations under this factor.

The definitions portion of the CC at Article 120 Paragraph 37 defines a vulnerable victim as "a child, a physically or mentally handicapped person, a person suffering from

[45] Criminal Code, Article 74, par.2.6

diminished capacity, a pregnant woman, or a domestic partner." Most of these terms are further refined by reading other portions of the code[46] or are subject to commonly understood definitions (i.e. pregnant). Unfortunately, there is no further meaningful guidance on the issues of mental or physical handicap or diminished capacity. Hence the court will need to rely on its ability to evaluate the evidence offered in support or take judicial notice of the condition if so appropriate. The more obvious and easily assessed the condition, the greater the factor will enhance the sentence. Notably, there are specific offense provisions within the code that expand the definition of vulnerable victim by incorporating "age" and "disability."

It is important to note that the CC has placed the modifier "particularly" before defenseless, indicating that a simple finding of defenselessness will not trigger this aggravating factor. Although it is impossible to quantify exactly what is meant by this enhancement, it should be viewed as something more than the traditional concept that comes to mind in the victim context, such as without a weapon or means to defend oneself from attack. It is a level of defenselessness slightly beyond average or derived from some other temporary or permanent vulnerability.

The only assessment that remains to be done is the level of aggravation that exists in a particular situation. This can occur due to enhanced levels of defenselessness or some other aspect of vulnerability. Like perpetrators in general, those who commit crimes in a domestic relationship prey on vulnerable and defenseless individuals. Additionally, perpetrators know that those people who are defenseless are less likely to be able to defend themselves or seek prosecution. For example, *age* (very old, very young), *disability* (psychological, mental, physical), pregnancy or recent child birth, *immigration or residence status* (undocumented, no papers), association with a *minority ethnic or religious community* (Roma) or *sexual orientation* (gay or lesbian) are all factors that may increase the victim's risk of dependency on the perpetrator. These factors may make

[46] Child is defined as under the age of 18 per Article 120, p 20. Domestic partner can be understood in the context of a domestic relationship as defined under p. 23, but is more in line with relationships further defined by p. 23.1. The intent of domestic partner is to describe, without reference to sex, a relationship that can produce vulnerability due to bonds of affection as opposed to basic familial relationships.

it difficult or impossible for victims to seek help, report the violence or leave the abusive relationship[47].

In cases where a perpetrator has exploited a victim's vulnerability (for instance, when the circumstances have been used by the perpetrator to prevent the victim from seeking and obtaining help), this circumstance will usually aggravate the offence. Similarly, domestic relationships that involve a prolonged period of mental and physical abuse will increase the defenselessness of the victim and the likelihood of a finding of significant aggravation.

- Overlap and Caution

This factor is easily subject to overlap as well as the possibility of double counting. The court should ensure that the offense itself was not already enhanced based on the vulnerability of the victim. These are particularly present in sexual offenses. Likewise, there is substantial opportunity for overlap as many of the categories may contribute to the level of vulnerability or defenselessness. For example, factor 2.7, the age of the victim has direct impact on vulnerability.

- Relevant questions include:

- Did the victim qualify for any of the conditions contained in the definition of vulnerable under Article 120 Paragraph 37.
- Is there a relationship between the victim and defendant? What is the nature and power structure of the relationship?
- Does the relationship exhibit properties of dependence or control?
- Are the conditions of vulnerability obvious or easily recognizable?

5.4.4 The age of the victim, whether young or elderly[48]

While this factor may initially appear easy to apply, there are no clear definition or ranges to answer the natural questions that arise of where "young" ends and "elderly" begins.

[47] DCAF, Judicial Benchbook, Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina, Sarajevo (2014), Pg.20.
[48] Criminal Code, Article 74, par.2.7

While this allows maximum flexibility for the court to determine the circumstances, it can contribute to deviations in sentencing practices because of multiple interpretations. Although this will not be present where age clearly falls into this category (for example a child of 5 years of age) it becomes increasingly difficult as the age becomes less universally considered within the category. The fact that "child" is defined by the code under Article 120 Paragraph 20 as being under the age of 18 can be somewhat definitive in qualifying the victim as "young," especially considering that "adult" is defined under Paragraph of 20 as reaching the age of 18. However, it should not be considered authoritative. As is discussed in detail later under the mitigating factor of the age of the perpetrator, international practice in war crimes has sometimes considered an individual "young" who was well into adulthood by accepted standards. Generally, the court should consider victims under the age of 18 as young, while considering those beyond it with increasing skepticism.

Unfortunately, there is no similar situation for evaluating the status of "elderly." The court is left entirely within its discretion to determine the application of this factor. As a starting point, mandatory retirement ages for public servants can be consulted as well as general access to retirement benefits or pensions. As this factor becomes increasingly difficult to assess, it should begin to impact the level of aggregation that is applied based on the factor, ultimately being eliminated completely at some point.

- Overlap and Caution

Sexual offenses or offenses against children are primarily where an offense level is enhanced due to the age of the victim. As in all cases, aggravation should not occur under this factor if the offense level charged has already considered age.

As discussed under factor 2.6 the concept of age will frequently have some bearing on the level of vulnerability of the victim. However, the court should bear in mind that this factor can be applied as an aggravating factor solely based on the age of the victim - without reference to vulnerability or a finding of vulnerability. Simply membership within the category is sufficient to trigger an enhanced level of punishment.

- Relevant questions include:

- Is the victim under the age of 18?
- Is the victim over the age of 65?
- Was there a finding of vulnerability of the victim? If so, to what extent did the age of the victim contribute to such a finding?
- Can age of the victim be completely separated from additional findings of factors related to the victim?

5.4.5 The extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family[49]

Although the extent of the harm caused to the victim will almost always be considered in determining the ultimate level of the offense, there is still significant room for enhancement within the final range. This factor makes it clear that the job of the court is to consider fully all injuries, whether they fall within the more traditional sphere of physical injuries or into expanded areas os consideration.

Aggravation will include severe immediate physical and/or psychological harm that present a serious risk to the life of the victim. It will also include aggravation for longer term suffering caused by permanent injury or the consequences of the transmission of a disease. It should also include long term psychological impact such as post-traumatic stress disorder. The court will need to solicit from the victim and/or medical expert the impact on the victim's life in the near term as well as the long term.

The court will also need to consider the impact on the victim's family. This can be fairly wide ranging as well. It should not only include injuries to family members that might witness the crime (such as in the domestic violence context), but also include the impact on the family members in dealing with the aftermath. This can include psychological injury, emotional damage and/or loss of caregiver abilities. This factor can also apply to

[49] Criminal Code, Article 74, par.2.8

children present in the home who witness the crime as more fully described under factor 2.5. Additionally, long-term abuse present in the relationship can cause permanent psychological injury, even in the absence of actual physical injury. Again, the Court will need to assess the history in its entirety to arrive at an appropriate level of aggravation.

As noted in the EU Directive of 25 October 2012, **"***It is possible that family members of victims are also harmed as a result of the crime. In particular, family members of a person whose death has been directly caused by a criminal offence could be harmed as a result of the crime. Such family members, who are indirect victims of the crime, should therefore also benefit from protection under this Directive*."[50]

In terms of psychological injury, the court should be cognizant of any indication that the perpetrator humiliated, shamed or degraded the victim by taking photographs, making video or audio recordings, posting comments on social networks (on the internet) or threatening to reveal private or personal information about the victim, these actions may be considered aggravating factors because they were performed to degrade the victim further.

The court is encouraged to pay special attention if a specific case of degrading involves a juvenile victim, which would additionally increase the gravity of the perpetrated offence and its consequences, given that the victim's personality is not fully developed and he/she is dependent on others.[51]

- Overlap and Caution

Perhaps no other aggravating factor has more potential for overlap and double counting than this factor. As mentioned earlier, this factor weighs heavily on the seriousness of the crime, and if the crime is charged correctly, should provide an accurate gross assessment of the injury to the victim. However, the calculus does not stop there and international

[50] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, (9) establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/22/JHA, (19).
[51] DCAF, Judicial Benchbook, Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina, 2014, Sarajevo (2014), pg.21.

practice has increasingly sought to expand the areas considered in the calculus. In many respects, this is a catch all factor that requires the court to look at all facets of the impact on the victim and consider them in arriving at a final sentence – fine tuning the sentence to accurately reflect the entire amount of impact. This includes physical and/or psychological as well as whether they are short-term or immediate and/or long-term and permanent. Thus any quantum of injury in excess of the bare minimum needed to commit the crime charged will be considered as aggravating the sentence within the appropriate range.

Additionally, this factor emphasizes that injury will <u>not</u> be limited only to the "traditional" victim, but include family members in a variety of situations, as direct victims or as indirect victims. Overlap should be considered in virtually every additional aggravation category and the court must make a careful assessment.

- <u>Relevant questions include:</u>

- What are the short-term direct physical injuries? Are there long-term conditions/disabilities/impacts associated with them?
- What are the short term direct psychological injuries? Are there long-term conditions/disabilities/impacts associated with them?
- Was the degree of injury more than the minimum amount required to meet the element of the offense?
- Was there transmission of a disease? Are there long term impacts from the disease?
- Were family members present at the time of the crime? Did they observe the crime? Is there psychological injury in short-term and/or long-term?
- Was there a loss of services to family members as a result of the crime? What was there duration?
- Did the victim die as a result? What was the proximity? What was the impact on the family members in financial terms and psychological terms?
- Is there harm other than physical or psychological injury to the victim as a result of victimization?

- Are there other means of financial recourse? Is the perpetrator able to make restitution? Does this offset some forms of injury and if so to what degree?

5.5 Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense; and Evidence of a breach of trust by the convicted person[52]

Factors 2.9 and 2.10, though considered separately under the code, have a number of important commonalities. Both fundamentally involve a relationship between the victim and the perpetrator in which the perpetrator has power over the victim or the ability to exercise some control over the victim's person or property. This power may have been delegated by the victim or it may exist as the result of a social norm, relationship or more formal power structure. Regardless of how the imbalance is created, the crime results in full or some part from improper exercise of that power or taking advantage of the disparity.

The second shared concept is that the relationships embodied by both are important to the functioning of society. When breaches or abuses occur, they involve damage to more than just the victim; they involve damage to society's collective belief in entering into or trusting those relationships in the future. This is especially true when the relationship was the primary basis for commission of the crime. For example, when law enforcement uses their position to commit a crime, it has an impact on both the victim and society. Citizens who hear about the crimes may be less likely to cooperate with law enforcement investigations in the future or legitimate legal requests. This degrades the overall stability of society. As such, some quantum of punishment enhancement is to promote and/or restore trust in these structures and deter future abuses.

The court must keep in mind that there is no minimum level the abuse or breach must contribute to the successful commission of the crime. The mere fact that the relationship

[52] Criminal Code, Article 74, par.2.9 and 2.10.

existed and was violated is sufficient to trigger a finding. The level of contribution is more applicable to the weight this factor will have in aggravation within the range than whether the factor exists.

a. Abuse of Power or Official Capacity

Factor 2.9 specifies an abuse of power or official capacity within the range of the base level offense. This implies the existence of some formal or government created structure of granted authority that is being exercised. Abuse of power (or authority) is traditionally considered exercising of relevant government, political or administrative functions within a formalized legitimate structure. This can be improper exercise of government granted power within the context of the individual's position or it can mean using the power in an indirect manner that may be unrelated to the inherent authority within the position, but based on the victim's perception of the power vested in the perpetrator.

This factor is best described when referring to the decision upheld by Chambers of the ICTY and ICTR. For example, in the Ntakirutimana case[53], the Trial Chamber, in determining the sentence, considered as relevant the status of the accused as a medical doctor and the fact that he abused his position by destroying lives instead of saving them and he betrayed an ethical duty owed to the community. The reasoning was similar when the Todorovic Trial Chamber observed that "*[i]nstead, in his position as chief of an institution that is responsible for upholding the law, Stevan Todorovic actively and directly took part in offences which he should have been working to prevent or punish. … his abuse of his position of authority and of people's trust in the institution clearly constitute an aggravating factor*."[54]

[53] Case No.ICTR-96-17-T, Judgment and Sentence, Prosecutor v.Elizaphan and Gorard Ntakirutimana, International Criminal Tribunal for Rwanda (ICTR), (21 February 2003).
[54] Case No.IT-95-9/1-S, Sentencing Judgment , Prosecutor v Stevan Todorovic, International Criminal Tribunal for the Former Yugoslavia, (31 July 2001), Par.61, also citing Aleksovski Appeals Judgement, para. 183; Celebici Appeals Judgement, par.745.

b. Abuse of Trust

Abuse of trust, in light of factor 2.9, should be considered a less formalized non-governmental sanctioned power structure. These will fall under the more traditional concepts of abuse of trust in which there is a fiduciary or quasi-fiduciary relationship between the victim and the perpetrator. This can be one in which the perpetrator was willingly accorded discretion by the victim, such as in a financial relationship, or the discretion was created by a societal norm or traditional trust situation, such as a parent to a child. It is important that the relationship or trust be viewed from the perspective of the victim, however, it must exist as more than simple reliance by the victim on misleading statements or conduct by the perpetrator, and it must be based on a reasonable belief.

c. In a Domestic or Similar Context

This factor may generally cover situations where the offence was committed in a variety of familial contexts. This can include a former or current marital partner, or non-marital partner. It can also include members of the victim's family, such as parents and grand-parents, children, or persons having a family related dependent relationship with the victim. The common element of these cases is the position of trust has a high degree of connection to specific emotional harm which may emerge from the misuse of this trust.

Trust in a domestic context implies a mutual expectation of conduct that shows consideration, honesty, care and responsibility. An abuse of trust relates to a violation of this understanding that can occur through direct violence or emotional abuse. An additional consideration includes evaluating the abuse of power in a relationship by restricting another individual's autonomy. This is frequently a component of domestic violence situations and can include maintenance of control through psychological, physical, sexual, financial or emotional means.

In virtually every situation involving a crime committed in a domestic relationship, there will be a component of a violation of trust. This naturally occurs because this factor is traditionally considered to enhance punishment for crimes involving family or romantic relationships. The primary job of the court will be to assess the degree of aggravation and

the level of the penalty enhancement. This will, of course, depend on the nature of the crime and to some extent the closeness of the relationship. When the victim cohabitates with the victim and is currently involved in a romantic relationship, or is a parent, the breach will be at its greatest. As the relationship and living relationship diminishes, the degree of aggravation will be reduced proportionally.

- Overlap and Caution

As is the case with other factors, the primary concern will be double counting this factor as both an element of the offense and a factor to aggravate the sentence within the range. The court should pay particular attention to the wording of the statute as the distinction between, although generally as described above, will not always be as formally distinguished. Hence a relationship involving a more informal structure may be referred to as an abuse of authority. The important concern is whether there is some form of unequal power structure that is used and is important to commission of the offense. If this exists as an element then the court should not further aggravate the offense from the range.

Overlap with other aggravating factors can occur as well. The court may factor the abuse of the relationship in the ultimate injury or seriousness of the offense. There may also be overlap into the level of cruelty. Due to the nature of the relationship, there may also be an argument that it enhances the level of vulnerability of the victim.

- Relevant questions include:

- Is there a relationship or inequity in power between the perpetrator and the victim?
- Is there a formal fiduciary or quasi-fiduciary relationship between the perpetrator and the victim?
- Did the perpetrator owe some financial or personal duty to the victim?
- Is the victim dependent on the perpetrator for caretaking or financial support?
- Is there a high degree of emotional dependence by the victim?

- Did the crime depend on the existence of the relationship or abuse? If not, was it a factor in the overall success of the crime?
- Was the relationship or reliance reasonable in light of the situation?
- Did the violation contribute to the level of the harm to the victim?
- Did the breach contribute to some other aggravating factor or was it included in determining the overall offense level?

5.6 Whether the criminal offense was committed as part of the activities of an organized criminal group[55]

Aggravating factor 2.11 considers the functioning of an organized criminal group as an aggravating factor in considering the final sentence. As criminal activity becomes more structured and elaborate, it poses an increasing threat to the effective functioning of society. It erodes societal trust in law enforcement, impacts economic development, and contributes to the overall level of crime as organized structures are more capable of significant achievements. Because of the threat, a finding of this factor by the court should have a significant impact on the ultimate punishment.

Fundamental to the determination of this factor is the existence of an "organized criminal group" which is specifically defined under Article 120 Paragraph 13 of the Criminal Code as "a structured association, established over a period of time, of three or more persons for the commission of a certain criminal offense that acts in concert with the aim of committing one or more serious criminal offenses in order to obtain, directly or indirectly, a financial or other material benefit." This is further refined under the definition of a "structured association" contained in Paragraph 14, which is defined as "an association that is not randomly formed for the immediate commission of an offense, but it does not need to have formally defined roles for its members, continuity of its membership, or a developed structure."

[55] Criminal Code, Article 74, par.2.11

There are several elements to this aggravating factor that need to be carefully considered by the court. The first is that there must be a structured association that must not be "randomly formed" but without the need for ongoing association or a more formalized hierarchical structure. This is to prevent the mere participation of multiple individuals to trigger an increased penalty. A good example of random formation for the immediate commission of an offense would be bystanders observing an assault who decided to take part in the crime. In this situation, although organized to the extent that all individuals are participating in the crime (and sufficient to meet the definition requirements), they have organized for the purpose of committing the crime, but the perpetrators have come together in a random formation to commit the offense. The association can be said to have formed in the midst of commission of the crime, not in order to carry out the crime. They are therefore not a structured association. However, any finding of an ongoing association or formalized structure will contribute significantly to a finding that this factor is applicable.

The additional aspects that need highlighting are the requirement of a minimum of three persons to form the group, that it has as its aim to commit one or more serious offenses, and that it be established over a period of time. The numerical requirement is relatively straightforward. However, the court should only eliminate this factor if the number is insufficient at the outset or sufficient numbers were eliminated on a finding of not guilty. The group must also have as its aim the commission of one or more offenses. This is a specific finding by the court that the organization was formed or formation was strongly linked to commission of at least one crime. Whether that crime is the crime at issue before the court is not required by the definition. The perpetrators may, for example, formed the group previously with the aim of committing a serious crime, but only actually been found guilty of the present offense. Finally, group needs to have been established over time. Although there is no specific period of time that must have passed while forming the group, as long it was not formed "randomly" for the purpose of commission of the crime, it will be sufficient to fulfill this criterion.

- Overlap and Caution

The primary concern with this factor is the interplay between it and a formal charge of organized crime under the Criminal Code. Obviously, as the organized crime charge includes the functioning of an organized criminal group, a finding of guilt of this crime cannot include aggravation within the range under this factor. Alternatively, the lack of an organized crime charge or a finding of not guilty on the offense will not automatically exclude application of this aggravating factor. The court will need to carefully evaluate why the charge does not exist, and whether that finding excludes an element of the aggravating factor as well. If there is no exclusion of the element, the factor can still apply. The primary consideration will be whether the intent and purpose of the participation in the crime was simply the commission of the crime or further facilitation of the existence and prosperity of the organized criminal group.

On terms of overlap into other categories of aggravation there may be some overlap based on the threatening nature of a group activity. In situations where more than one was involved in the commission of a crime against a single victim, it is significant that the victim is likely to be in greater fear and feel a greater sense of helplessness. Additionally, there may be an argument that the group pressures itself into completion of the crime and the dynamics may lead to greater damage of harm.

- Relevant questions include:

- Did the group exist to any extent prior to the commission of the crime?
- Were there at least 3 contributors to the commission of the crime?
- Did the actions of each individual contribute to the commission of the crime?
- Was the general aim of the group to commit a crime for the purpose of financial gain or a material benefit (directly or indirectly)?
- Was a charge of organized crime disproven? If so what was the basis for the finding?
- Did the existence of the group contribute to the damage or play some role in the successful completion of the crime?
- Was there a structured or quasi-structured hierarchy in place?

5.7 If the criminal offence is committed against a person, group of persons or property because of ethnicity or national origin, nationality, language, religious beliefs or lack of religious beliefs, color, gender, sexual orientation, or because of their affinity with persons who have the aforementioned characteristics[56]

The court needs to distinguish between motive and *mens rea*, the former being what causes a person to act, and the latter being the mental element or criminal intent required for a given offence. In this situation, the court will specifically find that the perpetrator committed the act with the motive being the victim's membership in the specifically protected group. It is important to note that there is no explicit requirement that the court determine that the person or group of persons is in fact a member of the protected group. This should not be an inquiry by the court. It is enough that the perpetrator had a reasonable belief of the victims' membership in the protected category.

This factor also includes motivations for the affinity of an individual for a protected group. Again, there is no specific requirement that the person actually have an affinity for the group, merely that the perpetrator believed it existed and it contributed to the motive for the crime. Affinity is a broad category that goes well beyond more formal relationships such as marriage or familial bonds. It can include friendships, acquaintances, and general goodwill.

Determining the motivation of the perpetrator will be a matter of looking at all surrounding circumstances. While the vocalization of motives by a perpetrator during commission of the crime or during subsequent interviews is sufficient to find this factor, it is not necessary. The court may use any past actions, behavior, and/or attitudes towards the group to establish the existence of this factor.

[56] Criminal Code, Article 74, par.2.12

- Overlap and Caution

The primary concern with this factor is the interplay between it and other charges which include some element of motive based on membership or belief of membership in one of the enumerated categories. This primarily occur in the area of hate crimes such as crimes against humanity or incitement of hatred. Although these crimes primarily focus on racial, religious and ethnic targeting, their place as specific crimes within the code does not diminish the importance of the additional protected groups. Thus, aggravation for an offense motivated by the victim's sexual orientation deserves the same degree of aggravation as a crime motivated by the victim's ethnicity. Likewise, there is no distinction or discount for victimization based on membership in the group as opposed to affinity for members of the group – the level of aggravation is the same.

There may be some overlap in the calculation of the degree of seriousness as well as the number of victims. Particularly in situations where the crime is a widely viewed one and the motive is more clearly connected to the crime. A crime that is in an openly public place and is purposely overtly connected to the category can be linked to more victims and/or an overall increase in the level of harm caused.

- Relevant questions include:

- Is there evidence the crime was motivated by membership or affinity for members of one of the protected categories?
- Did the defendant make statements before, during or after the crime indicating a motive?
- Are there multiple protected categories involved?
- Is there prior behavior or statements by the defendant indicating targeting of the category?
- Was the crime designed purposely to impact a larger number of persons than the particular victim?
- Does the perpetrator have a prior history of negative interaction with the category or predispositions?

5.8 Any relevant prior criminal convictions of the convicted person[57]

This factor recognizes the generally held belief that individuals who have committed crimes in the past should be punished more severely than those that have not. It also recognizes that previous sentences or punishment schema have failed to rehabilitate or reform the perpetrator. In essence, the purpose of the sentence begins to shift away from the prospects of rehabilitation and moves more towards the concept of preventing further crime by the perpetrator.

Here the court will need to examine the prior conduct and consider a variety of factors including:

- the number of prior convictions;
- the seriousness of the prior offenses;
- the nature of the offenses and their similarity to the current offense (similar offenses in nature will be indicative of a continuing pattern of behavior as well as a failure of the prior sentence to deter the perpetrator);
- the separation in time between the convictions (a long gap between a prior conviction and the current will generally be less relevant than a more recent prior conviction); and
- the sentences received for the prior offenses (offenses resulting in a minimal prison sentence or alternative sentence will be less relevant than those resulting in a significant prison sentence).

It is important to note that this is a separate consideration from the expansion of the sentencing range maximum under Article 79 for recidivism. Unlike article 79, which has very definite qualifications for the consideration of a prior conviction, this aggravating factor does not. **Hence any prior convictions can be considered, regardless of their**

[57] Criminal Code, Article 74, par.2.13

final sentences and their temporal relationship to the current conviction as long as the court considers them relevant to the sentence.

This aggravating factor must be considered when the perpetrator has previously been convicted of prior offences, particularly those of a similar nature. Due to the nature of domestic violence, which thrives on repetition, this factor is particularly important in assessing the overall nature of the relationship and the need for an enhanced penalty. In order to prevent the continuation of the cycle of violence, the presence of prior convictions bearing a reasonable relationship to the maintenance or exertion of control over the victim should result in considerable aggravation of the sentence.

In cases of recidivism (repeated offence) the victim of domestic violence, as a rule, has taken an active role in seeking the assistance of the criminal justice system and allied institutions. Thus recidivism is indicative of consecutive failures by the institutions legally obligated to offer protection (and justice) to the victim. In cases of recidivism, prevention as one of the intended purposes of the sanction was obviously not achieved. Moreover, recidivism may denote a pattern of domestic violence or battering, particularly in combination with other forms of abusive behavior (extreme domination, obsessive jealousy, etc.)[58]. Generally, a finding of this aggravating factor should result in a more serious penalty for the offender.

Article 73 par.4 of the Criminal Code states that when determining the punishment for a recidivist, the court shall especially consider whether the perpetrator has previously committed a criminal offense of a similar nature as the new criminal offense, whether the two (2) acts were committed for the same motives, and the period of time that has elapsed since the previous conviction was pronounced or since the punishment was served or waived. This portion of the Code allows the Court to adjust the statutory maximum penalty of the offense by up to one half. Although any prior criminal offenses can be considered in adjusting the range upward, if the Court encounters offenses commonly

[58] Case No.IT-95-9/1-S, Sentencing Judgment , Prosecutor v Stevan Todorovic, International Criminal Tribunal for the Former Yugoslavia, (31 July 2001), Par.61, also citing Aleksovski Appeals Judgement, para. 183; Celebici Appeals Judgement, par.745.

associated with domestic violence situations, it is strongly suggested to apply this provision in order to enhance the overall offense level.

- Overlap and Caution

The primary concern with this factor will be the potential conflict between it and Article 73 on recidivism. However, it is possible for the perpetrator to be subject to both the recidivism enhancement as well as aggravation within the elevated range. Such a situation will need to independently meet the criterion of both situations without applying any of the offenses to both criteria.

- Relevant questions include:

- Does the prior conviction fulfill the criteria of Article 73 and warrant application of a recidivism enhancement?
- Are the prior convictions similar in nature without being against the same victim?
- Does the prior conviction indicate ongoing reliance on criminal behavior?
- Have there been prior sentences similar in nature and duration as that proposed?
- How long was the intervening period between the prior conviction and the present offense? What was the perpetrator doing during any gap between convictions? Was the perpetrator a productive member of society during this time?
- Is the prior conviction relevant to the determination that aggravation should take place?

5.9 Other Aggravating Factors

The list of aggravating factors provided in the Criminal Code is not exhaustive[59], therefore the court may consider other factors in aggravation. However, the court should be particularly careful and especially sure that there is evidentiary support for its application. As mentioned previously, the code contains most of the provisions that are regularly considered in international practice as generally aggravating circumstances. However, there may be situations in which aggravating circumstances outside the code are appropriate to consider based on the specific type of offense and the particularities of the perpetrator.

Throughout the guidelines there has been discussion of situations in which a particular factual scenario might be included in the evaluation or assessment of one of the enumerated categories. If the court believes it is appropriate, it is perfectly acceptable to isolate the factual scenario and consider it as an independent aggravating factor under the catch all provision.

Other Possible Factors may include:

5.9.1 Lack of Remorse

Factual indicators that the perpetrator has no remorse over committing the crime should always be an aggravating factor. Not only does it indicate a lack of respect for the impact on the victim(s) but a general lack of respect for the law as well. A perpetrator without remorse is a strong indicator that rehabilitation will fail and therefore should not be considered a driving influence in the final sentence. The court should be more inclined towards a sentence that removes the perpetrator from interaction with society via incarceration.

[59] Criminal Code, Article 74, par.2

5.9.2 Violation of Court Orders

Commission of an offence that in the process breaches a non-molestation order imposed in civil proceedings, or while subject to an ancillary order, such as a restraining order, or in violation of a court order prohibiting particular behavior, will significantly aggravate the seriousness of the offence. Breaching an order imposed for the purpose of protecting a victim can cause significant harm and/or anxiety. It also represents disrespect for the authority of the Court and jeopardizes compliance with more than just the order in question. A failure to aggressively aggravate offenses that include a violation of court orders will erode general adherence in both domestic and non-domestic situations.

5.9.3 Repeated Commission of Acts

In domestic violence cases, it may not be possible to accurately assess reasonableness by looking at an isolated incident; the history of violence on the part of each party is often essential. This refers to any of the offences which are committed by the same perpetrator more than once during a period of time. This is a very important factor as it emphasizes the particularly devastating effect on a victim who is repeatedly subjected to the same type of criminal act. This circumstance is particularly relevant in domestic violence cases where the perpetrator and the victim live in the same household which automatically requires consideration of increasing the sentence.

5.9.4 Repeated Threats of Violence

A proven history of violence or threats by the offender in a domestic setting is crucial in the assessment of the seriousness of an offence as it recognizes the cumulative effect of a series of violent incidents or threats over a prolonged period, where such conduct has been proved or accepted. Prior assaults are admissible to show motive or intent in domestic violence cases even when they are quite remote in time.

If a person has engaged in repeated violence against an intimate partner over time, the victim may have a reasonable belief that danger is imminent on the basis of small behavioral clues that might have little relevance in a case involving violence between strangers.

CHAPTER VI

MITIGATING FACTORS UNDER ARTICLE 74

6.1 General Issues

Unlike aggravating factors, which tend to focus on the victim and the seriousness of the crime, mitigation tends to diminish the penalty based on the redeeming qualities of the perpetrator such as acceptance of responsibility or cooperation, circumstances beyond the perpetrator's control, and facts that reduce culpability. They conform to the concept of proportionality as well as the goals of rehabilitation. As with aggravation, the court should demand factual support before concluding a factor exists, particularly when expert opinion is required, and avoid duplicate consideration and application.

Unlike aggravating circumstances, in which some of the circumstances qualify as offense elements, mitigation is not specifically included in offenses. As many of the mitigating circumstances are attributable to the person or their interaction with law enforcement, they are broadly construed to be applicable to any situation. There is little concern with elemental double counting and the court can primarily focus its concern on the overlap between the particular circumstances.

Of primary concern for the court will be entering into areas of mitigation that are controversial. This can be within a particular factor that is specified in the code or by finding a factor under the permissive introductory language. Regardless, unlike aggravating circumstances, which are relatively narrowly defined and broadly accepted within the international community, mitigation is a more fluid concept that is constantly evolving. Broad categories make the evaluation more difficult. For example, personal circumstances can encompass virtually anything connected to the perpetrator's life. While this is important to ensure that the court does not settle on punishment that is more than necessary, it significantly increases the potential for the personal preferences or beliefs of the court to impact the sentence. This, in turn, increases the opportunity for inconsistent sentencing for similar offenses as two courts may disagree on whether a scenario is mitigating or not. Ultimately the court must carefully evaluate whether the factor is truly mitigating and consistent with appropriate standards, or whether it is a personally held belief of the court that has larger implications for sentencing practices in general. In the assessment of facts and decisions a judge finds a measure between empathy, compassion, kindness, discipline and severity so that his application of law is perceived as legitimate and fair.[60]

6.2 Circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity[61]

This mitigating factor is premised on circumstances reducing criminal responsibility, such as some mental condition that falls short of complete exclusion. Although the category is not limited, and other factors are discussed in brief below, the specific reference to diminished mental capacity reflects an intent to focus on mental health as the primary means by which this factor will exist. Perpetrators argue that although they broke the law, they should not be fully criminally liable for doing so as their mental functions were diminished or impaired.

[60] European Network of Councils for the Judiciary (ECNJ), Judicial Ethics Report 2009-2010, pg.12
[61] Criminal Code, Article 74, par.3.1

It is defined more fully by Article 18 of the CC, paragraph 2:

A person who commits a criminal offense is considered to have diminished mental capacity if, at the time of the commission of a criminal offense, his or her ability to understand the nature and importance or consequences of his or her actions or omissions was substantially diminished because of the conditions in paragraph 1 of this Article. Such person is criminally liable but the court shall take these conditions into consideration when deciding the duration and the type of sanction or measure of mandatory treatment it imposes.

The reference to paragraph 1 requires that the diminished capacity originate from some "permanent or temporary mental illness, mental disorder or disturbance in mental development that affected his or her mental functioning.[62]"

Read in conjunction, the court is required to determine 2 facts before concluding that a reduction is warranted. First, that the perpetrator's ability to understand the nature of the actions is substantially diminished. And second, that the diminished ability is directly related to a mental condition of some form.

Ultimately, the required consideration by the court under Article 18 is fulfilled by this mitigating factor and there should be no more reduction for a mental condition under another factor or theory of reduced responsibility. As such, a finding can result in a substantial reduction. However, due to the technical nature of such a finding, the court must rely on medical testimony or expert opinion in concluding that the condition both exists and is substantial.

Additional theories under this mitigating factor include the possibility of a reduction of punishment based on reduced liability under Chapter II depending on the circumstances.

[62] Criminal Code, Article 18, par.2.

- Article 13 - Extreme necessity – the conditions are fulfilled but
    - The harm created to avert the danger exceeds the harm threatened;
    - Or the harm created is due to the negligence of the perpetrator

- Article 14 – Violence or threat
    - The criminal offense is committed under the danger or threat of bearable violence and is reported immediately after the danger ceases.

- Article 15 – Acts committed under coercion
    - The criminal act was committed in a reduced form of coercion as a result of the perpetrator being expected to accept the danger – particularly if under a legal obligation to face such imminent force or threat of violence.

Overlap and Caution

There is little likelihood of overlap with this category and other mitigating factors, although, if mental health becomes a substantial issue in the case, it may overlap into the personal circumstances of the perpetrator. Although mental health will contribute substantially to the measures of treatment or ancillary orders attached to the final sentence, there are no offenses in which the category or offense level is reduced with mental capacity as an element.

Relevant questions include:

- Was there a medical evaluation to make this determination?
- What is the seriousness of the medical condition?
- Is there a diagnosed history of the condition or did the diagnosis occur only after commission of the offense?
- Is the ability of the perpetrator to understand the consequences or nature of their actions substantially diminished or only partially? Is such a determination possible?
- Is the perpetrator completely unable to understand the consequences of their actions?
- Is the conclusion one consistent with standards generally accepted within the medical community?

- Will the perpetrator's mental condition improve or is it permanent in nature?
- Was the condition a temporary one created by the perpetrator?
- Did the perpetrator commit the offense due to extreme necessity but the harm created exceeded the harm threatened?
- Was the extreme necessity created by the perpetrator's negligence?
- Was the offense committed under the threat of bearable violence that was immediately reported to the competent authority? What was the level of threat of violence?
- Was the offense committed in proportion to the threat?
- Was the perception/reality of threat reasonable in light of the attendant circumstances?
- Was the offense committed under coercion, but the perpetrator could be expected to accept the danger?
- Was the offense committed under coercion, but the perpetrator created or caused the danger or was under legal obligation to face the danger?

6.3 Evidence of provocation by the victim[63]

The issue of provocation is one that perhaps arouses the most controversy of any of the mitigating factors present in the law. It is a deeply emotional issue that often involves human relationships and the impact of jealousy, anger, and fear. As many of the situations in which it is claimed as a mitigating factor involve the dynamics of gender and sexual relations it will inevitably involve social, cultural and moral values. It may very well be that social and moral attitudes of an individual judge may strongly influence whether the court considers the particular actions of a victim to be "provocation" and, to some extent, justifying the actions of the perpetrator. As such, the court must tread lightly in this area to ensure that its own personal beliefs do not cloud the appropriate use of this factor.

Provocation by the victim is traditionally described as a loss of self-control by the perpetrator. However, modern theories have called this approach into question as it

[63] Criminal Code, Article 74, par.3.2

focuses on the emotional reaction of the offender. Newer approaches evaluate both the conduct of the victim and the reasons behind the perpetrator's response. This approach focuses on whether the actions of the victim were sufficient to give a perpetrator a justified sense of being severely wronged. And that the perpetrator's reaction was reasonable. In order to make this determination, the court must focus on the following:

- The nature, degree, and context of the provocation.
- The duration and degree of the acts in response to the provocation.
- Whether the response was disproportional to the provocation.

In extreme situations, such as homicide, courts must find similarly extreme levels of provocation. For example, courts have been willing to consider provocation when the victim admitted to molesting the defendant's children or the victim had been intentionally injuring the defendant's children over a prolonged period of time.

Heat of passion

In some circumstances courts have concluded that a single incident is sufficient to trigger a reaction by the perpetrator. Here there must be an immediately identifiable triggering event that resulted in the actions of the perpetrator. Moreover the triggering event will need to be extreme and vary appropriately to offset the offense committed by the perpetrator. Consequently the greater the responding offense level by the perpetrator the more extreme the provoking event will need to be. For example, a court might find sufficient provocation to warrant a sentence reduction if the perpetrator finds his wife in bed with another person and then responds by damaging that person's vehicle.

Provocation in domestic abuse context

Abusers often assert provocation as a mitigating factor. The Court must scrutinize the assertion of provocation in the context of the domestic violence relationship, taking into account that abusers often consider any threat to their ability to control the victim as provocation. On the other hand, an at-risk partner who has retaliated against her abuser

may appropriately raise the issue of provocation based on a history of violence by the abuser.

The first consideration is whether the party claiming provocation is the abuser or an at-risk partner who retaliated. Such assertions need to be treated with great care, both in determining whether they have a factual basis and also considering whether the alleged conduct amounts to provocation sufficient to mitigate the seriousness of the offence. This requires the court to consider the totality of the information regarding the nature of the domestic violence relationship.

For provocation to be a mitigating factor for an at-risk partner who retaliates, it will usually involve actual or anticipated violence - including psychological abuse. Provocation is a stronger mitigating factor in this context if it has taken place over a significant period of time. Finally, the court will need to establish the level of provocation experienced by the at-risk retaliating partner.. As an example, paragraph 4 of Article 188 of the Criminal Code has recognized the impact of extreme provocation in cases of bodily injury: "The *court may impose a judicial admonition on the perpetrator for the offense provided for in paragraph 1 or 2 of this Article if the perpetrator was provoked by the inhumane or brutal conduct of the injured party."*[64]

An at-risk partner's "provocation" of the perpetrator through a refusal to follow the perpetrator's rules, such as becoming romantically involved with another person, or taunting the respondent, do not qualify as provocation. Likewise, threats to leave a relationship, disobedience by the victim, or any real or perceived violations of the abuser's "honor" do not amount to provocation.

<u>Relevant questions include:</u>

- What was the nature of the relationship between the victim and the defendant?
    - Are they strangers or family?
    - Is there a romantic relationship?
    - Is there a third party involved?

[64] Criminal Code, Article 188, Light Bodily Injury.

- Was the provocation criminal in nature – whether formally charged or not? How serious was the crime?
- Did the provocation occur repetitively or only a single time?
- Did the provocation occur over a significant period of time
- Was there a significant period of time between the act of provocation and the reaction?
- Was there violence involved or the threat of violence?
- Were the provocative acts or threats real or perceived?
- Were the provocative acts seeking equality rights in a relationship such as beginning or ending a relationship, seeking an education, seeking employment etc.?
- What was the balance of power between the perpetrator and the provocateur?
- Was the criminal act proportional to the provocation?
    - Was it similar in nature?
    - If there were multiple smaller events, do they aggregate to a sufficient level?
- Does the reaction in light of the provocation shock the conscience?
- Would a reasonable person similarly situated consider the acts a provocation?

6.4 The personal circumstances and character of the convicted person[65]

Personal circumstances and good character of the convicted are common mitigating factors in sentencing structures throughout the world. In fact, many sentencing studies conclude that personal circumstances are one of the most commonly cited mitigating circumstances and that their impact on the final sentence can be quite significant. They are frequently considered the best way to arrive at a truly personalized sentence that takes into account all facets of the perpetrator's life and situation.

Unfortunately, whether a particular personal circumstance is worthy of considering in mitigation is often a subjective decision and can depend largely on the personal opinion

[65] Criminal Code, Article 74, par.3.2

of the judge. What is considered by one judge as mitigating, may not be considered as such by another, and may even be considered by a third as an aggravating factor. The code's general reference to "personal circumstances" further supports the notion that a list of universally accepted personal circumstances in mitigation is non-existent. The discussions that follow are a general attempt to reasonably describe some factors that frequently appear.

Good character

The 'good character' of the accused should be considered relevant in mitigation of the penalty because it shows that the criminal conduct is not part of a regular pattern/behavior by the accused. This factor may relate to other factors such as admission of guilt, cooperation with the authorities, voluntary surrender, remorse, assistance to victims, etc. These factors should give influence to the weight. Caution needs to be made related to this factor and the weight given to it in sentencing whether good character was shown after the crime or was it only before the judge.

In Domestic Violence cases, one factor that is frequently cited by defendants is the good character of the perpetrator. The Court should be particularly suspicious of any claim of mitigation for good character. One of the dynamics these relationships that may allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have two personae. The persona displayed to the community is often dramatically different than the persona the abuser displays in the context of the relationship. The Court should only consider the character of the defendant as it pertains to the relationship. If there is a proven pattern of domestic violence behavior, this factor should not be considered. Often abusive partners present well, as they are skilled at maintaining control.[66]

The good character factor is also taken into account by courts as to the possibility of rehabilitation of the accused. In Blaskic case, ICTY pointed out that "*the character traits*

[66] Domestic Violence Bench book for Judges and Prosecutors, Personal circumstances and character of the convicted person, par.10.6.4. Pristina (2016) , pg.76.

are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused." Nevertheless, just like in Furundjia case when the court was assessing whether to include the young age as mitigating, in both cases the Trial Chamber stated that "*… in a case as serious as this and also insofar as many accused share these personal factors, the Trial Chamber must find that their weight is limited or even non-existent when determining the sentence*."[67]

The 'good character' evidence, comprising evaluation of aspects such as reputation, credibility, personality and social conduct of the accused, is usually intended to show that the crime committed is out of character and, on the whole, aims at providing judges with more complete information concerning the life of the accused, his background and characteristics. In Sikirica case , the ICTY Trial Chamber concluded that evidence of good character should be rewarded: "*The Chamber has heard ample evidence of Dragan Kolundzija's efforts to ease the harsh conditions in the Keraterm camp for many of the detainees. . . . On the basis of the testimony as to his benevolent attitude towards the detainees, Dragan Kolundzija should receive a significant reduction in his sentence.*" [68]

State of health of the accused

The case-law is rather scant with regard to the factor of the state of health of the accused and in many instances it concerned with issues of post-traumatic stress and personality disorders suffered by the offenders after the commission of the crime. For instance, if the accused has suffered some form of depression accompanied by a feeling of guilt and incapacity to follow the trial for certain period, these elements could be taken into account especially as a demonstration of the sincerity of his repentance.

Need

Where defendants have acted in circumstances of obvious and desperate need, this carries weight as a mitigating factor for some judges. In a number of cases the use of false

[67] Case No.IT-95-14-T, Judgment , Prosecutor v Tihomir Baskic, International Criminal Tribunal for the Former Yugoslavia, (March 3, 2000), Par.782, citing IT-95-17/1-T, Prosecutor v Anto Furundjia Judgement, (10 December 1998)para. 284.

[68] Case No.IT-95-8-S, Sentencing Judgment , Prosecutor v Dusko Sikirica, Damir Dosen, Dragan Kolundzija, International Criminal Tribunal for the Former Yugoslavia, (November 13, 2001), par. 229.

passports or other identity documents, and in some of these cases, the judges appeared to be swayed by accounts of desperate hardship.

Drug or alcohol addiction

Where acquisitive crime is committed in order to fund a drug habit, this might be treated as a mitigating or aggravating, depending on whether the judge views this as a manifestation of diminished or increased culpability.

Employment

In some cases, a defendant's steady job, or involvement in studies or vocational training, can be a mitigating factor. A good work record may be very influential in less serious offences due to the destruction of a defendant's long-term economic prospects if sent to prison for a short period of time. Generally, employment by a perpetrator demonstrates some responsibility, that they are an organized person unlike most who appear in court and possibly less likely to offend again.

In the alternative, some courts may consider this to be immaterial to the consideration. A court may argue, particularly when there is sufficient culpability that a perpetrator was fully aware of the potential punishment that might result from the commission of the crime, including the loss of employment, and still chose to disregard the consequences. An additional argument may be that consideration of employment in serious cases is in fact penalizing those that are unemployed – possibly through no fault of their own in difficult economic times.

Ultimately, courts should give less weight to this factor as the seriousness of the offense increases. This is especially applicable to crimes of violence.

Personal and family situation

In general, courts have regularly given some consideration to the "family situation" of the accused and the impact incarceration would have on others. In particular, having young or many children is frequently considered in mitigation as is being an only parent where

incarceration would render a child a ward of another relative. Specific consideration may include the following situations:

- The number of children.
- The age of the children.
- Whether the perpetrator is the sole provider for the family.
- Whether the perpetrator is caring for others.
- Whether the perpetrator is the sole parent.
- The health of other individuals.
- All other living circumstances of the offender that might have an effect on the sentence.

If the court decides to consider familial circumstances in mitigation the focus must be on the specific impact separation will have on the family. In practice, its use should be limited to those situations in which the impact on the family is significant because of particular circumstances. For example, if the children have limited support from others if the perpetrator is incarcerated. Mitigation is discouraged simply based on the existence of a family.

Another reason why the courts could, in principle, consider 'family concerns' as mitigating would be based on the principle of restorative justice that the personal and family situation of the accused can lead judges to believe in the accused chances of rehabilitation. In principle the defendant's care for his family demonstrates certain positive personal qualities and possibly militated against further offending. Someone who looks after vulnerable dependents could be said to be doing work for the community, and this should be taken into account in sentencing such a person, since 'we're all indebted to those who look after others.

It is extremely important for the court to consider the role of all family members in the crime. If a family member is the victim of the perpetrator's crime, there should be NO mitigation for family circumstances that relate to the victim or put other family members

in jeopardy. For example, if a perpetrator committed a sexual offense against a child, they should not receive mitigation because they need to take care of that child, nor should they receive mitigation because they need to take care of other children in the home.

Ultimately, any mitigation based on family must come with a careful assessment of all of the attendant circumstances and careful consideration of whether mitigation is a benefit or a risk. The court must not just consider, for example, that there are young children, but whether the perpetrator has been providing for their welfare and contributing to their upbringing? If there are other sickly relatives in the home, is the perpetrator actually providing care for them in a meaningful and productive way? If the perpetrator committed a violent crime, is there the potential for injury to family members in subsequent crime?

Other situations

- Level of education
- Unemployment
- Health of the perpetrator

Overlap and Caution

There may be overlap in consideration of health of the perpetrator if there are mental issues contributing to diminished mental capacity.

Relevant questions include:

- How serious is the crime and what are the injuries if any?
- Is the perpetrator employed? What is the nature and extent of the employment?
- Will the possible
- Are there dependent family members? If so, what are the ages?
- What is the extent of the dependence of family members on the perpetrator?
- Is there a family member involved as the victim?

6.5 Evidence that the convicted person played a relatively minor role in the criminal offense; & the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another[69]

Both mitigating factors 3.4 and 3.5 of Article 74 focus on the role of the offender and essentially their culpability in the crime itself. In many respects, this factor is the converse of aggravating factor 2.1. Factor 3.4 is similar in nature to 3.5, but the focus of 3.4 is more on actual participation in the offense, as opposed to more ancillary assisting of the offense. One example of 3.4 would be acting as a lookout during the commission of a robbery. While the penalty available and the charge is the same, the factor establishes that the lookout is less culpable and therefore deserving of a lesser punishment.

Factor 3.5 is addressed as well under Article 33 which describes assistance in criminal offenses. The Article specifically provides for more lenient punishment when the individual, for example, make available the means to commit the offenses, creates conditions or removes impediments to the commission of the offense or makes preparation in advance to conceal evidence of the commission of the offense, the perpetrator or identity of the perpetrator, the means used for commission of the offense or the profits or gains which result from the commission of the offense. Article 33's requirement of more lenient punishment for those that provide assistance is fulfilled by applying factor 3.5 and arriving at a punishment more lenient than those that participate more formally. There is no requirement by Article 33 that there be a larger reduction in offense level through mitigation of punishment unless it is appropriate.

It is important for the court to keep in mind that a finding of aggravation under 2.1, that a perpetrator had a high degree of participation, does <u>not</u> require that the remainder of the perpetrators are therefore minor participants under 3.4. or an assistant under 3.5. Nor

[69] Criminal Code, Article 74, par.3.4 & 3.5

does the finding that one perpetrator was an average level offender mean that one or more of the others will therefore be minor participants.

As for a minor role, any conclusion that the participant played a minor role will mean a finding by the court that the defendant minimally contributed to commission of the crime first, in terms of meeting the elements of the crime, and second in comparison to the other perpetrators. If the perpetrator's contribution could be removed with minimal impact on completion of the crime, the court can safely conclude that factor 3.4 was present.

Factor 3.5 requires the court to evaluate not only the level of participation between the perpetrator and other participants, but it will require some assessment of the proximity of the perpetrator and how direct he contribution is in commission of the offense. It is more likely that the court can find 3.5 exist when the perpetrator is not present at the scene of the crime. Another indicator will be temporal timing of the perpetrator's contribution. If the contribution of the perpetrator was close in time to the final completion of the crime then the perpetrator is less likely to be considered an ancillary participant.

Overlap and Caution

There should be little concern for overlap other than between factor 3.4 and 3.5 themselves. The court should not find both factors present at the same time. As mentioned earlier, factor 3.4 should be limited to only those situations where the perpetrator is physically present and taking part in the actual commission of the crime but in a minor role. As opposed to 3.5 where the contribution took place before or after and occurred in a supporting or panning role. Pressure or reluctance on the part of the perpetrator to commit the crime should not be assessed under 3.4 or 3.5 as it is more appropriately considered under factor 3.1.

Relevant questions include:

- Did the perpetrator possess some skill or specialty needed for planning or carrying out of the crime?
- Did the perpetrator plan or contribute information or materials needed for commission of the crime?

- Was the perpetrator's contribution temporally distant from the commission of the crime itself (before or after)?
- Was there a perpetrator that principally contributed or dominated commission of the crime?
- Was the perpetrator physically present at the scene of the crime?
- Could the crime have taken place without the contribution of the perpetrator? Was the contribution materially important to success of the crime?
- Can the actions of the perpetrator be isolated and quantified in comparison to those of the other participants?

6.6. The age of the convicted person, whether young or elderly[70]

Age is amongst the classic 'personal circumstances' to be considered in the determination of punishment for a perpetrator. Generally speaking, two main circumstances are to be considered as mitigating factors: **the young age of** the perpetrator and **the advanced age** of the perpetrator. While both are age related, they differ in terms of the logic for mitigation. For young perpetrators, mitigation is typically premised on the immaturity of the perpetrator. Here the perpetrator, to some extent, was too young or inadequately developed to truly understand the nature of their conduct. Therefore the penalty should be reduced. In terms of elderly, the concept is that the health of the perpetrator may be compromised or the length of the sentence may be such that there is little likelihood for the perpetrator to return to society.

Both situations share a similar logic in terms of the ability of the perpetrator to bear the punishment. An additional justification frequently put forth for considering age in mitigation is the concept that for the young or old, the sentence might have an exceptional impact on the particular offender. Here a sentence within the "normal" range may be especially hard to bear. In these situations the concern is that sentences should

[70] Criminal Code, Article 74, par.3.6

have roughly the same impact on all offenders and when the offender falls into this category it violates this principle.

The difficulty with both of these factors it that there is no clear definition as to what constitutes youth or elderly as a mitigating factor. Thus the court must approach application of this factor with a great deal of caution and focus on uniform application. In both situations, the extreme end of the range is less difficult to deal with and it is less controversial to simply look at the age and determine that mitigation should apply. As the age becomes more controversial, the court will need to increasingly rely on an evaluation of the reasoning for mitigation in the first place. For instance, to properly assess the factor of a 'young age' applies elements such as an inexperienced, fragile, immature or naïve personality should be taken into account; similarly, the factor of an 'advanced age' should be assessed in conjunction with health, infirmities, diseases, and so on.

Some of the difficulties in application of this factor can be seen in the practice of ICTY towards assessing 'young'. Generally, the Trial Chambers have, on average, considered 'young' to be between 19 and 23 years at the time when the crime occurred. While one might consider this average to be the outer limits of what might be considered young, it is not difficult to sympathize with its use. But there have been instances when the court went so far as to apply mitigation to someone well beyond that age. Thus the determination of 'young' age depends on the type of crime committed and how much would be expected from a 'young' perpetrator to understand the gravity of his actions or ability to withstand extreme pressure from superiors. As the age increases, the court will need to provide greater and greater justification of the perpetrator's inability to understand the nature of their actions, which increasingly may justify diminished mental capacity.

When considering application of the 'elderly' factor, there should be no consideration of the perpetrator's ability to understand their actions or comprehend their nature, i.e. senility or disability. If there are concerns with understanding, it is more appropriately addressed under the diminished capacity factor. For this factor to apply, the court should

evaluate the overall health conditions of the perpetrator and the ability to adequately serve the sentence. The traditional theory under this reduction is that because of the advanced age of the perpetrator, the sentence will have a disproportionately harsh effect in comparison to a younger perpetrator given the same sentence. The court can certainly discount this factor if there is evidence the condition was used for the benefit of the perpetrator in committing the crime. In Plavsic case advanced age of the accused was considered for two reasons: First, physical deterioration associated with advanced years makes serving the same sentence harder for an older than a younger accused. Second, an offender of advanced years may have little worthwhile life left upon release."[71]

Contrary to the Plavsic case, the ICTY had a very interesting approach in Simic case, while deciding whether the medical condition impacts the sentence has given a very broad reasoning on why such condition not necessarily is considered as mitigating factor. In this case the defense had presented a medical report stating that Mr.Simic's condition would require full time medical attention for the remainder of his life; that he would also require daily assistance for personal hygiene, food preparation, moving his wheelchair and transferring him from the bed to his wheelchair". Despite the medical report presented, considering the gravity of the crime committed by the offender, the Trial Chamber observed that "…there is no indication in the medical report (Exhibit A) regarding the extent to which Milan Simić's life expectancy would be effected by virtue of being incarcerated. A medical condition that may at some future date effect life expectancy does not, in the opinion of this Trial Chamber, automatically give rise to a reduction in sentence." It was the Chamber's opinion that only in exceptional circumstances or "rare" cases ill health should be considered in mitigation.

Additionally, although the Trial Chamber was aware that the detention facility could not meet the needs of Mr. Simic, it did not impact their decision for incarceration. The Chamber issued the sentence and stated that:

[71] Case No.IT-00-39&40/1-S, Sentencing Judgment , Prosecutor v Biljana Plavsic, International Criminal Tribunal for the Former Yugoslavia, (27 February 2003) par. 95-106.

"it necessary to state that the prison facility to which Milan Simić will eventually be assigned should, as far as possible, be in a position to accommodate his medical needs…. Although sympathetic with the medical complications that Milan Simić has suffered and his current medical condition, the Trial Chamber is not satisfied that the medical problems are present to such a degree as would justify a reduction of the sentence. Milan Simic's medical condition is not to be taken into account as a mitigating factor in the determination of sentence."

Overlap and Caution

As discussed earlier, this factor may have considerable overlap with diminished capacity, particularly when applying this factor in the context of an inability to comprehend acts or consequences.

Relevant questions include:

- Was the perpetrator under the age of 18 or over the age of 65?
- Was the perpetrator of sufficient age that they should understand the nature of their actions?
- Are there facts or evidence that indicates the perpetrator did in fact understand their actions despite their age?
- Is there evidence the perpetrator assessed or consciously disregarded the potential negative outcomes of their actions?
- Is the perpetrator suffering from an acute health condition? Will the perpetrator survive the contemplated sentence?
- Is there a mental condition contributing to an inability to contemplate the perpetrator's actions?
- Did the perpetrator consciously take advantage of this factor in commission of the crime?
- Are the applicable conditions to meet this mitigation medically diagnosed? Is this a condition that pre-dated commission of the crime?

6.7 Factors indicating remorse and cooperation by the perpetrator[72]

Factors 3.7 through 3.12 of Article 74 are grouped together to warn the court of a strong potential for overlap between the factors. If not approached with careful consideration and caution, there is a strong likelihood that the perpetrator will receive a greater degree of mitigation than entitled.

All six of these factors feed into the concept of rehabilitative justice. Namely that the defendant has to some extent accepted they have committed some wrong, accepted responsibility, and are willing to make amends. By indicating as much, the focus of the court should be on re-integration of the perpetrator into society as opposed to removing them in order to protect society. As each of these factors can play an important role in determining the overall sentence, being considered powerful indicators of rehabilitative prospects, the court must not allow facts applied to one factor also support one of the others.

No other area for confusion and potential overlap can be found than the concept of remorse. Every single factor in this cluster can arguably support a finding of remorse and boost the rehabilitative prospects of the perpetrator. Restitution to the victim can be considered an indicator of remorse. Cooperation with the court could be considered acceptance of responsibility and remorse. Entry of a guilty plea can be considered acceptance of responsibility and remorse. In sentencing schemes and historically perhaps no other factor is as significant to mitigation as the concept of remorse. It emotionally impacts judges, prosecutors, and even victims to lessen their judgment and their demands for incarceration. Because of the potential for such a significant impact, to ultimately ensure that sentencing is consistent across perpetrators, and to ensure mitigation is not inappropriately inflated, it is absolutely imperative that the court strictly construe the meaning of factors 3.7-3.12 and not allow cross application.

[72] Criminal Code, Article 74, par.3.7-3.12

6.7.1 Evidence that the convicted person made restitution or compensation to the victim [73]

The concept with this factor is that it is beneficial for the victim to have been restored, at least financially, to some sort of pre-crime state. Additionally, there is some consideration that the actions should be considered meritorious in terms of contributing to the goals of the criminal justice system as it will offset state supported legislation to provide victim compensation. This is particularly appropriate if the restitution occurs without prompting by the court.

However, if the court applies victim compensation to this factor, it cannot apply it to evidence of remorse as well. Not only is there the concern that it will double count mitigation, but there is some concern that the offender is attempting to gain the benefit of the discount without really truly engaging in the act because it is the "right" thing to do.

Another area of concern is whether this factor focuses on the ability to pay and, therefore, whether it is appropriate to award mitigation simply because the particular party has the ability to pay. This concern is more obvious when there are co-defendants, both with the desire to pay, but only one with the ability. In that situation, the court must consider whether it is, in effect, penalizing the perpetrator who has no money and rewarding the one that does. This is not to say that the concept has no merit, especially depending on the ability of the state to provide compensation if the defendant cannot. The fact that in a particular case the victim is able to pay for medical bills or lost wages is a definite benefit. It simply means that the court must assess the totality of the circumstances in determining whether to mitigate and to what level. The court should particularly consider the ability of the perpetrator to pay in proportion to the amount paid.

<u>Relevant questions include:</u>

- Was restitution made prior to arrest or formal intervention by law enforcement?

[73] Criminal Code, Article 74, par.3.7

- Was the perpetrator aware of the strength of the case against them at the time restitution was made?
- Was restitution made as the result of some agreement with the victim in relation to pursuing/supporting prosecution of the case?
- What was the ability of the perpetrator to pay in proportion to the amount paid? Were there co-defendants with varying ability to pay?
- Was the victim made whole as a result of the restitution?
- Was restitution considered in concluding the perpetrator was remorseful for their actions? Was restitution considered in support of any other mitigating factor?
- Was compensation/restitution made in some form other than monetary?

6.7.2 General cooperation by the convicted person with the court, including voluntary surrender[74]

Factor 3.8 focuses on the behavior of the perpetrator after commission of the crime; specifically on the interaction between the perpetrator and the court. This will inevitably focus on conduct of the perpetrator during the conduct of the trial and will ultimately be based on the perception of the court. This is not and should not be considered a portion of cooperation with the prosecution which is specifically reserved for 3.9.

Voluntary surrender of an accused can have implications for the sentencing process and the ability for the court to conclude the proceedings and has thus been considered a factor in mitigation of the penalty. Courts also assume that voluntary surrender and submission to the process has larger implications and may inspire other perpetrators to act accordingly, improving the overall effectiveness of the work of the courts. But, voluntary surrender diminishes **substantially** when the proceedings are purely domestic in nature.

However, this factor has had primary significance in sentencing in international tribunals due to the inherent nature of the proceedings. As their success relies heavily on inter-State cooperation, which can be problematic in the best of scenarios, courts have awarded

[74] Criminal Code, Article 74, par.3.8

mitigation to perpetrators who have willingly submitted themselves to the jurisdiction of the court. In Erdemovic case the cooperation of the accused, his voluntary surrender and admission of guilt were considered as mitigating factor: "…*The Prosecution stated that they found no inconsistencies with the information which he gave them; their investigations have confirmed much of what he told them, indicating that the accused is of an honest disposition. This is supported by his confession and consistent admission of guilt, in particular by the fact that he came forward voluntarily and told of his part in the massacres before his involvement was known to any investigating authorities.*"[75]

Regardless of whether the proceeding relies on domestic or international tribunals, the ultimate question for the court should be whether it is appropriate to consider this factor at all. Awarding mitigation for cooperation with the court is in essence rewarding behavior that should otherwise be expected from a defendant. A more appropriate approach would be to reserve cooperation mitigation for activity that is in excess of that otherwise expected or generally appropriate behavior. Instead, many tribunals have rejected the awarding of mitigation for behavior, opting instead to punish poor behavior with aggravation of the sentence. Examples include behavior that is disruptive and verges on lack of awareness of the gravity of the offense, threatening or intimidation of witnesses, and a general lack of respect for the solemnity of the judicial process.

<u>Relevant questions include:</u>

- Was the surrender to the tribunal or to prosecution?
- Was the surrender due to impending law enforcement intervention?
- Did the perpetrator surrender from international location or domestic?
- Is the behavior generally expected by the court from a perpetrator? Was it simply a lack of bad behavior by the perpetrator?
- Was surrender or cooperation fundamentally important to resolution of by the court? Did it contribute to closing of the matter?

[75] Case No.IT-96-22-Tbis, Sentencing Judgment , Prosecutor v Drazen Erdemovic, International Criminal Tribunal for the Former Yugoslavia, (5 March 1998), par.16.i.

6.7.3 The voluntary cooperation of the convicted person in a criminal investigation or prosecution[76]

Cooperation can assume many forms from merely facilitating the presentation of the prosecutor's case, testifying and providing evidence in other cases, disclosing new information or corroborating known information, and also contributing to the identification of other perpetrators of crimes. This can be cooperation with the police during the investigation stage as well.

It is very important that the court keeps this factor separate and distinct from a plea or a formal cooperation agreement. When there is a formal structure in place it clearly outline the terms of mitigation, its limitations, and the expectations of the prosecution. The court should presume, unless suggested otherwise by the prosecutor, that full cooperation at the level in the matter before the Court was calculated into the agreement. The court should not use this factor to further reduce an agreed to sentence or reduction as this will undermine future agreements and amount to double counting cooperation.

The evaluation of the cooperation of the perpetrator depends both on the quantity and quality of the information they provide. It also depends on the spontaneity and selflessness of the cooperation. The court must assess whether the information was shared without the expectation of something in return and willingly, or only reluctantly based on the impending action of law enforcement or prosecutorial success. The court should use its authority to elicit from the prosecutor or law enforcement the level or importance of benefit provided by the cooperation of the perpetrator.

If the court determines that the cooperation was substantial this factor is generally considered as significant in mitigation as it also facilitates an expeditious trial. On the other hand, when judges ascertain that cooperation was forthcoming reluctantly, was sporadic or connected to some extraneous factor, mitigation will be reduced.

[76] Criminal Code, Article 74, par.3.9

Relevant questions include:

- Is there a formal plea or cooperation agreement in place? If so, are the terms of reduction clearly outlined?
- If there is an agreement in place, did the perpetrator provide information above or beyond that envisioned within the agreement?
- Was the information provided in expectation of a reduction in sentence?
- Did the perpetrator provide cooperation substantially important to resolution of the matter? Resolution of some other matter?
- Did the perpetrator confess to the crime?
- Did the perpetrator provide incriminating testimony against another perpetrator during the investigation and/or the trial?
- Was evidence in support of conviction recovered as a result of cooperation of the perpetrator?

6.7.4 The entering of a plea of guilty[77]

Guilty pleas have long been a source of mitigation in sentencing for a variety of reasons. Some argue they indicate acceptance by the perpetrator of their actions, readiness to be rehabilitated and reintegrated, a willingness to be punished for their crimes, and a sign of remorse to the victim and society. However, haphazard application of this factor leads to double counting factors in mitigation and overvaluation of the ultimate discount. Current practice in Kosovo strongly supports that when present, this factor is disproportionately important in comparison to other factors – indicating double counting and overlapping application. Furthermore, there is little evidence to suggest that a broad application of a guilty plea into other factors is actually warranted. Considering that each of the factors that a plea can possibly support is capable of independent evaluation, and a guilty plea is afforded its own discrete factor, the court must focus its evaluation solely on the fact that the defendant pleads guilty. It should not consider the plea as support for remorse, cooperation or indeed any other factor.

[77] Criminal Code, Article 74, par.3.10

There are several benefits that inherently derive from a plea of guilty that form the basis for mitigation. The primary reason relates to all of the societal benefits that derive from avoiding a trial. A guilty plea prevents the expenditures associated with having witnesses testify, police to produce defendants, security for the proceedings, perhaps translation costs, and the focus of several judges on one case at the expense of many others. There are also psychological savings as victims and witnesses forego the heavy mental stress of being present and testifying at trial. And the system itself can ultimately focus its time and attention on cases that are perhaps more worthy of society's limited financial resources. Finally, to a limited extend, mitigating punishment for those that voluntarily plead indicates to others that they will be dealt with fairly. It encourages others to come forward, whether already indicted or as unknown perpetrators.

The act of a guilty plea should, in principle, give rise to some reduction in the sentence that the accused would otherwise receive. However, the extent of the mitigating value of guilty pleas depends largely on the moment at which the plea is entered. An early plea is accorded more weight than a late one, as the benefits to the system and the economy of trial are at their peak. It is also generally believed to be more genuine and spontaneous, as opposed, for example, to a last minute effort to minimize punishment for a trial that is going poorly for the defendant. As the proceedings progress, the mitigation afforded should decrease proportionally. However, once trial begins there should be a significant drop in the mitigation awarded as the benefits of avoiding a trial have largely been lost – especially if victims have been called to testify. If the plea occurs in the midst of trial the court should seriously consider awarding a minimal or no reduction. In Sikirica case the Chamber gave this same assessment of the time of entering the guilty plea "*While an accused who pleads guilty to the charges against him prior to the commencement of his trial will usually receive full credit for that plea, one who enters a plea of guilt any time thereafter will still stand to receive some credit, though not as much as he would have, had the plea been made prior to the commencement of the trial*."[78]

[78] Case No.IT-95-8-S, Sentencing Judgment , Prosecutor v Dusko Sikirica, Damir Dosen, Dragan Kolundzija, International Criminal Tribunal for the Former Yugoslavia, (November 13, 2001), par. 150

It is important to keep in mind that this significant reduction in mitigation after trial starts is not a penalty for exercising the right to trial. It is simply an acknowledgement that the primary reward for a guilty plea is derived from avoiding societal costs. Ultimately, a defendant who exercises their right to trial has one opportunity that is unavailable to the defendant who pleads guilty, and that is to be found not guilty and forego punishment entirely.

Finally, this factor should not be confused with a plea agreement. They are completely separate considerations. The requirements of a plea agreement and its limitations in sentence reduction are clearly outlined in the Criminal Procedure Code. Moreover, a plea agreement involves all parties essentially agreeing to the final sentence for the perpetrator – there is not an additional reduction based on this factor as it would represent double counting. The agreement itself should adequately represent the societal savings as well as all additional mitigating factors that are appropriate. This factor is reserved solely for those situations in which the defendant pleads guilty without an agreement in place with the prosecutor.

If the court is faced with a situation in which plea negotiations took place but failed, but the defendant ultimately pled guilty to the court without an agreement in place, it should consider the sentence offered by the prosecutor that was rejected. If the court finds that circumstances surrounding negotiation of the plea agreement indicate that the perpetrator forewent the plea offer in hopes of receiving a lower sentence from the court, it should strongly consider the potential impact if the court does indeed decide on a lower sentence. Sentencing below the plea offered without justification can discourage future plea negotiations from taking place.

<u>Relevant questions include:</u>

- Is the defendant pleading at the earliest possible opportunity?
- Has the defendant had an opportunity to evaluate all of the proposed evidence and proposed testimony prior to pleading guilty?
- Has the trial formally started? Has testimony occurred?

- Has the victim testified?

6.7.5 Any remorse shown by the convicted person[79]

Among the other circumstances related to the person of the accused, 'remorse' has traditionally been a significant consideration in mitigation of a sentence in almost every system. Ideally it represents an acknowledgement of the victims' suffering, recognition that the act was wrong, assumption of responsibility and a willingness to accept the consequences. When the remorse is coupled with more than an expression of sorrow, but some actual act that demonstrates repentance, there is a compelling argument for mitigation. In those situations, the defendant has exhibited all of the traits for successful rehabilitation and reintegration under the rehabilitative model of sentencing.

In order to accept remorse as a mitigating circumstance in sentencing, the judge must be satisfied that the remorse expressed is sincere. This assessment is clearly difficult, considering this factor is of a subjective nature, the truthfulness of which resides solely within the perpetrator. It requires the court to consider not only the words of the perpetrator but the circumstantial evidence and inferences that can be drawn from actions and behavior. These have traditionally included such things as:

- Statements made by the perpetrator indicating remorse and repentance.
- Positive direct actions Specific towards the victim such as an apology.
- If there is injury to the victim, immediately seeking or providing medical assistance.
- Emotions of the perpetrator observed by the victim, prosecutor and/or court.
- If the perpetrator's actions were caused or exacerbated by some extraneous condition, such as alcohol or narcotic use, seeking medical treatment.
- Subsequent behavior of the perpetrator such as in the courtroom, surrender to police, cooperation with prosecution.
- Plea of guilty at the earliest possible moment.

[79] Criminal Code, Article 74, par.3.11

An example of remorse expressed by the accused can be taken from the Simic case, tried by the ICTY, in which the trial chamber concluded as follows:

…the fact that Milan Simic … apologized to two of his victims…[and]…of the statement made by Milan Simic at the sentencing hearing in which he expressed his "sincere regret and remorse" for what he had done to his "fellow citizens and friends at the elementary school", and that he took the opportunity to "publicly extend apology to all of them".[80]

Overlap and Caution

As was discussed at the outset of factors 3.7-3.12, many exhibit a strong potential to overlap into one another. As can be seen from the list above, many of those factors are traditionally cited as circumstantial evidence to support a finding of remorse of the perpetrator, thereby resulting in significant mitigation. However, time and experience has shown that the utility of using those factors as indicators is diminishing. With the increased use in plea bargaining and pleas of guilty, modern sentencing has recognized that actions traditionally attributed to remorse on the part of the perpetrator are perhaps more appropriately considered calculated choices to reduce sentence exposure. The Criminal Code acknowledges this consideration by giving many of them their own specific factor. This means that the court must limit its consideration to only those facts and circumstances that are not directly attributable to another factor.

While remorse can be a significant and compelling factor in mitigation, the lack of remorse should not be considered an aggravating factor. This applies to situations in which there is a plea or plea agreement as well.

Generally, statements or apologies from the defendant should be viewed with skepticism as false remorse can be an integral part of the cycle of violence present in domestic violence relationships.

[80] Case No.IT-95-9/2-S, Sentencing Judgment , Prosecutor v Milan Simic, International Criminal Tribunal for the Former Yugoslavia, (17 October 2002), Par.94.

Relevant questions include:

- If injury to a victim is involved did the perpetrator provide medical treatment? At what point in time?
- Has the perpetrator expressed direct remorse to the victim or witnesses?
- Has the perpetrator taken steps to indicate remorse or acceptance of responsibility?
- Did the perpetrator express emotion supporting remorse?
- Did the perpetrator seek medical/psychological help after the crime? At what point in time? Did the perpetrator do so when capture was imminent or after proceedings began?
- Did the activity or action exhibit genuine remorse or was it done to reduce liability and punishment?
- Did the perpetrator exhibit remorse in an attempt to persuade the victim to lobby for a reduced or no sentence? If this a domestic violence situation?
- Did the perpetrator mitigate damages or the potential to spread to other victims if possible?

6.7.6 Post-conflict conduct of the convicted person[81]

Factor 3.12 is in many respects a catch all provision, hence its failure to provide examples or additional detail. If the court finds that the perpetrator's conduct warranted some degree of mitigation, but is incapable of application under any of the other factors, the court may consider it here. This can include attitude, behavior, actions, admissions, or any other conduct as appropriate.

In some respects, the focus on post-conflict behavior can provide more support for aggravation. This can include:

- destroying any traces or evidence of the crime (unless that is a separate criminal offense);
- taking certain actions in order to pressure witnesses and expert witnesses into false testimonies or promising any rewards to that end (unless that is a separate criminal offense);

[81] Criminal Code, Article 74, par.3.12

Relevant questions include:

- Is the conduct deserving of mitigation?
- Does the conduct support application of another mitigating factor?
- Does the conduct appear related to or as a reaction to imminent law enforcement or official action?

6.7.7 In the case of a person convicted of the criminal offense of Hostage Taking, Kidnapping or Unlawful Deprivation of Liberty or as provided for in Article 175, 194 or 196 of this Code, effectively contributing to releasing or bringing the kidnapped, abducted, taken or detained person forward alive or voluntarily providing information that contributes to identifying others responsible for the criminal offense[82]

Factor 3.13 will only be applicable for the court in limited circumstances. Specifically, when dealing with the abduction related crimes of Hostage Taking (175), Kidnapping (194), and Unlawful Deprivation of Liberty (196). In these limited circumstances, the court will need to evaluate all of the surrounding circumstances to determine whether this factor will indeed apply. In some respects, the factor is indicative of some remorse on the part of the offender or at the very least an affirmative act in relation to the victim in an effort to ensure a safe return. It also provides mitigation in circumstances when the perpetrator provides information towards identifying others, in effect cooperating with law enforcement. The goal is to provide some mitigation when there is some abandonment of a crime that was likely headed towards more serious consequences.

In addition to falling under one of the enumerated offenses, there are several additional requirements before the court can consider mitigation. For mitigation in relation to the victim, the code is clear that the victim must, in fact, survive. The perpetrator must also provide some effective contribution to the safe return of the victim. This must be more than surrendering the person in the face of law enforcement, a failed crime or an accidental occurrence. There must be some evidence that the actions were designed or

[82] Criminal Code, Article 74, par.3.13

formulated to return the victim, and that in evaluating the totality of circumstances, they helped bring about that result.

For mitigation in the second situation it will require voluntary provision of information about co-perpetrators. The amount of mitigation will depend on the court's evaluation as to the voluntariness of the perpetrator's contribution. If the perpetrator voluntarily abandons the crime and provides information about co-perpetrators prior to law enforcement involvement, it will be entitled to more mitigation than if it was provided at the end of a long interrogation in the face of a lengthy period of incarceration.

Overlap and Caution

As mentioned briefly above, there is the potential of overlap with this factor and other mitigating factors. An affirmative act on the part of the perpetrator that contributes to the safe release of the victim supports the theory that the perpetrator partially abandoned their original intent and is seeking to mitigate the end result. A court can conclude that this exhibits some level of remorse and hence there is opportunity for overlap. Likewise, voluntary provision of information related to co-perpetrators overlaps into the concept of cooperation with law enforcement. As the circumstances are so narrow for the application of this factor, any evidence supporting a finding should be focused into this factor.

Relevant questions include:

- Did the victim live?
- Are the perpetrator's actions responsible for the safe return of the victim? If not completely, to what extent? Was the contribution negligible?
- Would the victim have returned safely without the contributions of the perpetrator?
- Was the goal of the actions the safe return of the victim?
- Were the actions motivated by law enforcement intervention?
- Was failure of the crime imminent at the point of contribution?
- Was law enforcement aware of the crime?

- Was the contribution based on some degree of voluntary abandonment by the perpetrator?
- Was the perpetrator in custody when providing the information or contribution?
- Did the identification result in apprehension of other perpetrators?
- Was their contribution greater than just the identification of other perpetrators?

6.8 Other Mitigating Factors

As with aggravating factors, there is no limitation on the court to only those factors enumerated in the Code. However, the list is generic and expansive enough that many factual scenarios evidencing traditional mitigating factors will fit within one of the factors. Before venturing beyond these limits, the court should carefully assess whether the factor contemplated is one that is in conformity with sentencing practices and not simply based on personal opinion. Mitigation is far more subject to social values, norms and customs than aggravation and can easily disrupt the goal of decreasing sentencing disparities.

6.8.1 Elapse of Time

An additional mitigating factor the court may consider is the elapse of a significant period of time between the commission of the offense and when the matter is finally brought before the court. The theory behind this potential factor is somewhat multifaceted. Perhaps the court finds before it an individual who after committing the offense has lived a model life, prospered and shown indications of abandoning any semblance of a life of crime, obviating the need for personal deterrence. Perhaps the court believes the matter has sufficiently faded from the minds of the public that there is no longer an immediate call for justice or a perceived need for general deterrence. Or maybe the case is very old as a result of neglect or the prior political situation.

Any of the foregoing may seem like possible reasons for awarding mitigation for the defendant, however, the court should approach this factor with some skepticism.

Although the court is not bound only to the mitigating factors enumerated in the code, it nevertheless should proceed with caution, as venturing beyond means the factor may be controversial or at the very least less widely acknowledged. Regardless, the court should keep several considerations in mind.

First, the mere passage of time itself is not sufficient to award mitigation. The legislature has provided the courts with quite specific procedural deadlines on hearings as well as statute of limitations for various offenses. Those procedural controls are in place for the purpose of determining when justice is no longer capable in light of continuing delays. Moreover, alternative methods to detention likewise serve the purpose of minimizing or preventing impact on the defendant during any delays. To offer some form, even graduated, of mitigation simply due to delays creates the perverse incentive to delay the proceedings further in hopes of deriving an additional benefit.

Any consideration of some mitigation benefit to the perpetrator should not be awarded without a thorough evaluation of the actions of the perpetrator. Particularly whether the perpetrator's own actions contributed to any of the delays or passage of time that the court is seeking to provide mitigation for (in whatever capacity). If the perpetrator has actively participated in the creation of delays, or avoiding detection or identification, there should be no consideration, to any extent, of mitigation based on this theory. The court should evaluate the perpetrator's potential contribution liberally as the behavior of passively continuing on as if nothing happened, over an extended period of time, does indicate a lack of acknowledgment that the behavior was criminal. In fact, there is some logic to the argument that if a significant period of time has passed and the perpetrator has failed to do such things as make amends to the victim, turn themselves in or cooperate with the court, it actually represents behavior of a lack of rehabilitation or remorse.

Similarly, the court should look to the prosecution and law enforcement and evaluate whether there was significant mishandling causing unjust delays. Whether this will warrant mitigation is a controversial and difficult issue to asses. Regardless, there should

be clear evidence of mismanagement beyond the mere passage of time. As mentioned earlier, the legislation in place should guide the court accordingly as to how to deal with governmental delays, particularly because there is some merit to the fact that the prosecution ultimately took the time and effort to file and pursue the matter before the court.

Overlap and Caution

As the simple passage of time is insufficient to warrant mitigation, the court will need to look to other behaviors or actions in support of this factor. It is very likely that this will overlap with other factors. Take for example the situation where the perpetrator has lived for a long period of time as a law abiding citizen, held a job, made positive contributions to the community etc. At first glance it would appear to the court that there is support for a reduced sentence as the perpetrator is somewhat rehabilitated. However, many of these facts can equally apply to the personal circumstances factor as well. Likewise, if the perpetrator made amends to the victim, it might apply here as well as under factors relating to the victim. Regardless, the court must avoid double application of the facts.

The following are offered as examples of possible additional mitigating factors or situations that have appeared in other sentencing schemes that should not be considered or questioned extensively by the court.

6.8.2 Superior Order

Concerning the possibility of a traditional claim of superior order for the accused who had to follow that order (i.e., a form of ‘duress’), Article 16 specifically prohibits complete exclusion except under very narrow circumstances. As to its application as a mitigating factor, such an assessment will be highly fact dependent and only possible in extreme situations. Certainly not when there is evidence that the perpetrator was a willing participant to the crime. In the rare situation when the circumstances may lead to application of mitigation, the court must consider whether it is more appropriately categorized under mitigating factor 3.1

6.8.3 Honor crimes

Judges should not consider any reduction of penalty for a crime committed by a family member based on the perpetrator's claim to have acted out of respect for culture, tradition, religion or custom, or to restore their so-called "honor". Courts must ensure that the prohibition on these justifications is never considered as a restriction of the perpetrator's cultural or religious rights and freedoms. This is fundamentally important in societies where distinct ethnic and religious communities live together and in which the prevailing attitudes towards the acceptability of domestic violence differ depending on the cultural or religious background. In fact, Article 46 of the Istanbul Convention[83] actually demands harsher punishment if the crime is committed by a family member or by two or more people acting together.

6.8.4 Lack of prior criminal convictions

The circumstance that an offender does not have previous criminal convictions (thus being a so-called first offender) is often considered a mitigating factor, on the assumption that an accused person who never committed crimes before has better rehabilitative prospects and responds more positively to the deterrent effect of the whole trial process. This can lead to a discount in sentencing for the accused. Being a first offender is also consistent with findings of a 'good character' prior to the offence(s), thus the two circumstances are often considered in conjunction. The significance of the previous conduct of the accused is, however, a complex factor that has enormous implications on social influences, wealth etc. If the court assesses a lack of prior criminal convictions in mitigation may be warranted, it will require finding of facts supporting a conclusion of adherent behavior and pre-disposition to rehabilitation.

6.8.5 Victim's prior sexual behavior

In many countries, the victim's prior sexual history continues to be used to inappropriately deflect attention away from the accused onto the victim. The victim's past sexual history is not relevant to her credibility. Nor should it be a reason to reduce an

[83] Council of Europe Convention on preventing and combating violence against women and domestic violence, opened for signatures on 11 May 2011 in Istanbul, Turkey. The Convention is effective as of 1 August 2014.

offender's sentence.[84] Ultimately, evidence of complainant/survivor's sexual history should not to be considered in mitigation of a perpetrator's punishment.

6.8.6 Support from the victim

The wishes of the victim or the victim's family for lenient treatment of the perpetrator are sometimes considered in mitigation of a sentence. If the court is considering such a reduction, it should be mindful of several issues. First, the wishes of the victim (and restoration), although very important, are only one component to the overall sentence. Even if the court nullifies victim considerations based on the victim's wishes, it must still provide a sentence that meets the needs of society in terms of justice, deterrence etc. It should not be the ultimate factor determining a final sentence. When victimization is based on property or financial loss, the wishes of the victim may be more prominently considered in the final sentence. However, a sentence imposed for an offence of violence should be determined by the seriousness of the offence, not by the expressed wishes of the victim.

Second, the court must be extremely wary if there are indications of domestic violence in the offense. In order to award mitigation the court must ensure that the victim will not be exposed to a high risk of further violence. This is a very hard task in most of the domestic violence cases. Reconciliation is a fundamental part of the cycle of violence in domestic violence cases and in many situations there are periods in which the victim will decide against pursuing claims or forgive the defendant. For any such request the prior history of the relationship must be thoroughly evaluated, especially whether there have been similar situations where the victim has aborted prosecution. There are a number of additional reasons why it may be particularly important that this principle is observed in a case of domestic violence:[85]

- It is undesirable for a victim to feel responsible for the sentence imposed.

[84] Domestic Violence Bench book for Judges and Prosecutors, Background of the victim, par.10.7.3 Pristina (2016) pg.78.
[85] Domestic Violence Bench book for Judges and Prosecutors, Wishes of the victim and effect on sentence, Pristina (2016), pg.79.

- There is a risk that a plea for mercy made by a victim will be/was induced by threats made by, or by a fear of, the offender.
- Granting requests will increase the likelihood of a repeat offense in the future and indicate to the perpetrator and other abusers that they can control the outcome by controlling the victim.

A PRACTICAL APPLICATION OF GUIDELINESS

CHAPTER VII
SENTENCING ADJUSTMENTS

7.1 Assigning Weight to the Circumstances

Once the court has thoroughly evaluated all of the possible aggravating and mitigating circumstances, their factual support, and whether they are relevant or not, it must then engage in a quantitative evaluation. Step 4 involves the evaluation and assignment of weight for each factor present, comparing and balancing aggravating and mitigating, and evaluating whether additional adjustments are available. These steps should be done in conjunction with reference to Appendix 1.

Assigning weight to the circumstances requires the court to engage in a two-step process. First, evaluating whether each factor has internal significance. Second, the court must determine the overall seriousness of the offense.

7.2 Internal Significance of the Factor

In many situations, the evaluation of the circumstances will simply be an evaluation of whether they exist. For those situations when a factor is non-existent, the Court can simply move on to the next factor and eliminate it from consideration. However, when a factor does exist, the evaluation does not stop there. The Court must then assess the weight that will be given to the circumstance. Determining the weight of a circumstance

requires the Court to establish a hierarchical structure within the particular circumstance and then assess where the particular case falls within the hierarchy. This will then create a relative weight for the circumstance.

A classic example involves a defendant who pleads guilty during the proceeding.
Just because the defendant pleads guilty, he is not automatically entitled to the maximum amount of mitigation for doing so. Within this circumstance there are a series of levels that impact the significance of the individual factor. A defendant who pleads guilty at the first opportunity should be given the maximum mitigation available for this mitigating circumstance. In comparison, a defendant who pleads guilty on the eve of trial may be given credit in mitigation, but it will be substantially less. A defendant who pleads guilty during the trial would be given almost no credit for the plea. If we consider that the overall benefit to the system in terms of expenditure of resources is the purpose of allowing mitigation for a plea of guilty, the greater resources saved, the more mitigation will be offered.

For each factor the court must undergo a thorough analysis of whether the defendant is entitled to the full benefit of the factor based on the facts present. Each factor presented in the foregoing sections on mitigation and aggravation provide some possible divisions for the Court's consideration, but the list is not exhaustive.

7.3 Seriousness of the Offense

Once the Court has completed consideration of all factors, determined their presence and evaluated their internal value, the next step is to determine the overall seriousness of the offense based on statutory and non-statutory factors. Seriousness is a major component of determining the final sentence and is the combination of two critical considerations, the culpability of the defendant in commission of the offense and the harm caused by the offense. Generally, the higher the culpability of the defendant and harm caused, the greater the sentence must be. Seriousness will not include all factors listed in the code,

only those that are traditionally considered appropriate. Once seriousness is evaluated, the remaining factors can be considered.

As the court evaluates these two factors it must be stressed yet again that there must be NO double counting of factors if the factors are an element of the offense. As was discussed earlier, the Criminal Code contains many derivative offenses that ALREADY take into consideration the statutory factors listed below. If the offense charged already takes into consideration any of the factors listed below, they cannot be used again for consideration of the seriousness of the offense. Additionally, as explained earlier, the factors listed below have the potential for overlap into one another. The Court must be cautious not to consider any of the facts of a particular case for more than one factor.

7.3.1 Factors Indicating Culpability of the Defendant

The following factors are relevant factors in determining the level of culpability of the defendant. These factors will indicate that the defendant was a willing participant and was a significant contributor or architect of the crime or, in the alternative, participation was minimal or there were circumstances impacting the assessed level of participation. Generally, the level of culpability will be other than the level of the average offender.

7.3.1.1 Increased Culpability

a. *Statutory Factors*

2.1. A high degree of participation of the convicted person in the criminal offense;

2.2. A high degree of intention on the part of the convicted person, including any evidence of premeditation;

2.11. Whether the criminal offense was committed as part of the activities of an organized criminal group; and/or

2.9. Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;

2.10. Evidence of a breach of trust by the convicted person;

b. Non-Statutory Factors

- Whether the defendant deliberately caused harm greater than necessary for commission of the crime
- Whether the defendant targeted victims because of vulnerability, age or defenselessness

7.3.1.2 Decreased Culpability

3.1. Circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity;

3.4. Evidence that the convicted person played a relatively minor role in the criminal offense;

3.5. The fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting another;

3.2. Evidence of provocation by the victim;

3.6. The age of the convicted person, whether young or elderly;

7.3.2 Factors Indicating Level of Harm

The following factors are relevant factors in determining the level of harm caused by the crime. Generally, these factors will indicate that the crime had a greater or lesser level of harm than was embodied by the specific provisions of the crime in the code. This may include the number of victims or the degree of injury to the victims.

7.3.2.1 Increased Harm

a. *Statutory Factors*

2.3. The presence of actual or threatened violence in the commission of the criminal offense;

2.4. Whether the criminal offense was committed with particular cruelty;

2.5. Whether the criminal offense involved multiple victims;

2.6. Whether the victim of the criminal offense was particularly defenseless or vulnerable;

2.7. The age of the victim, whether young or elderly;

2.8. The extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;

b. Non-Statutory Factors

- Whether the degree of harm was greater than that needed to commit the crime and the level of injury is not included in a factor listed above.
- The level of non-physical damage caused or financial loss was significantly higher than needed or was in addition to physical harm.

7.3.2.2 Decreased harm

3.7. Evidence that the convicted person made restitution or compensation to the victim;

7.4 Relative Importance and Aims of Sentencing

In addition to the general rules of application for determining the weight of each factor described above, the Court should also consider the following points to further fine tune the sentence.

- **The first is relative importance.** As has been discussed throughout the manual, not all factors should/will be considered equal to one another in the overall calculus. The Council of Europe Recommendation concerning Consistency in Sentencing states: "*Wherever possible, the law or practice should also attempt to define those factors which should not be considered relevant in respect of certain offences*."**86** Generally the following principles should be applied:

- Significant Aggravation
    - of the victim(s)

86 Council of Europe Recommendation no. r (92) 17, of the Committee of Ministers to member states concerning Consistency in Sentencing; Appendix to Recommendation No. R (92) 17; C. Aggravating and mitigating factors, sub.par.2

    - Cruelty inflicted Trauma/injury suffered by the victim(s)
    - Vulnerability
    - Abuse of authority or trust
    - Significant participation
- Significant Mitigation
    - Remorse/efforts to minimize impact
    - Plea of guilty
    - Indirect participation/ pressured participation
    - Cooperation with authorities
    - Limited cognizance of actions
- Minor consideration
    - Previous criminal record (unless recidivist)
    - Age
    - Good character
    - Family status

- **The second element which must be considered when assessing the relevant aggravating and mitigating circumstances for sentencing is that they must be coherent with the intended aims of sentencing.** For example, if one of the main aims is rehabilitation or re-socialization, then factors such as remorse and cooperation of the offender will assume a central role and importance in sentencing; whereas if a retributive approach prevails in sentencing, circumstances linked to the role of the accused in the commission of crimes and to the harm inflicted on victims should prevail. This would encourage, for example, harsher sentences for crimes in which a position of trust or authority was abused, and for crimes perpetrated with cruelty, sadism, or motivated by prejudice, discrimination or hate towards particularly vulnerable victims; and impose less severe sentences in connection with sincere remorse, and cooperation of the accused with the prosecutor and the judicial authorities. As with the significance factor consideration, for simplicity, it is suggested that there simply be a reduction of up to 25% for those factors that are not

directly related to the overall purposes of sentencing that the court has identified. If the court has taken the approach that all purposes of sentencing are equally important, it will not need to engage in this adjustment.

What appears evident is that factors taken into account in the determination of sentences are of a various nature but essentially are connected to: the purposes assigned to punishment, the influence exercised by general principles, the specific circumstances of the case and its procedural aspects.

7.5 Sample Considerations on Relevance of Factors

CRIMINAL OFFENCES AGAINST LIFE AND BODY

Below is a description of potential factors that could be used when determining the level of mitigation/aggravation in this category of offences and an example of the process of evaluation. The list is not exhaustive nor needs to be considered cumulatively as this category could include offences which are minor in nature to very serious crimes. Depending on the circumstances of the case, gravity of the specific offence under this category and the elements of that particular offence the judges need to consider which factors would apply to this category. The narrative description of the various mitigation and aggravation factors in the Guidelines includes more thorough analysis of the factors and judges are encouraged to refer to the specific part of the text for the individualization of the sentence and in particular on the explanation of impact of factors on the appendix Table.

The individual starting points are defined based on the specific sentence or range foreseen for the offence. Aggravation and mitigation will be considered only after the starting point has been specified:

Samples of some potential relevant mitigation factors and their use in mitigation	
Mitigation factors	**Explanation**
Provocation by the victim	Depending on the specifics of the offence the provocation could play a highly important role in mitigation or have no role at all. Provocation can be a more powerful factor in particular if it was for a longer period of time. In cases involving a violent relationship provocation is often used as defense by the offenders but in such cases provocation should not serve as mitigation, neither should a honor or unfaithful relationship be counted as provocation. In the narrative part of the Guidelines referring to provocation, judges can find some more guidance on the use of provocation as mitigation factor to various circumstances and the questions asked in order to determine what can be considered a valid provocation (for more information see pg.104-107).
Excessive self-defense	This factor could be used in mitigation in particular in cases of continuous bullying by the victim (ex. bullying of a person by their peers) or in a domestic context when there has been continuous violence present in the relationship. These situations may trigger stronger

	reactions by the victim who in this case becomes the perpetrator. There is scientific research on the so called battered women syndrome which is a physical and psychological condition of a person who has suffered persistent emotional, physical, or sexual abuse from a domestic partner. Victims of such continuous abuse may react excessively and not necessarily react at the moment when the abuse happens and as such does not meet the criteria of necessary defense but it may be considered as a very important factor in mitigation.
Social disadvantage	Such as persons receiving social assistance, orphans, offender living in environment prone to violence and other crimes. Because of the personal situation and/or environment in which these persons live they have more potential to being involved in this type of offence, often in order to survive in the area. This potential mitigation factor though may only be used as lesser mitigation.
Minor role played by the offender or cases when the offender was not a principal perpetrator such as aiding, abetting, or otherwise assisting another.	If the offence was committed by more than one person the Court needs to assess the role and contribution of each offender in commission of the crime and if lesser role, or in comparison with the other offender/s this particular offender did not use weapon or was not cruel to the victim etc. anything that might show lesser role by this offender (for more information see pg.113-115).
Age and/or lack of maturity where it affects the responsibility of the offender	If the offender is of a younger age ex. less than 18 it may be a factor showing lack of maturity. An elderly offender may also be unaware on the gravity of his actions and that the same raises to the level of criminal offence. Depending whether the offender is young or elderly the judge needs to assess the level of mitigation under this factor to determine the final sentence but it should not automatically be counted as mitigation (for more information see pg.115-118).
Single blow/Isolated incident	This factor relates to the lack of premeditation. While premeditation plays a very important role in aggravation of the offence, the lack of such premeditation always needs to be assessed in conjunction with other factors, ex. whether the person is repeat offender etc. The circumstances would then determine how much weight it has.
Determination/demonstration of steps taken to address addiction of offending behaviors	One example of this factor would be if the perpetrator is a drug or alcohol addict and commits the crime while under the influence of such substances. The mitigation would be possible if the same would take voluntarily steps to address this issue going for some treatment. The same would be for persons who might have anger issues and voluntarily goes for anger management or even couple's therapy if a domestic incident. This factor though would not have significant or any weight if not done voluntarily but were ordered by the Court.
Conduct of the offender after the offence/ Remorse;	An exemplary conduct of the offender may be considered as mitigation factor. In every circumstance the weight of this factor should be assessed how it correlates with other circumstances such as: offering assistance and sending the victim to the hospital remorse. It

	is important to assess what remorse means and when it takes place as well as it relates to the actions taken to prove such remorse. This is also evidence of steps the offender has taken to mitigate the harm done by him. Depending on the overall circumstances this factor may have minor or higher role in mitigation (for more information see pg.108, 119-130).
Offender made restitution or compensation to the victim	There should be a difference between the time when the compensation done, whether immediately after the offence, or a short period after, from when the compensation took place under the threat of punishment. This could impact the weight is given to this circumstance in sentencing (for more information see pg.120-121).
General cooperation of the offender with the court	If considered this should be cumulatively calculated as one mitigating circumstance to include: voluntary surrender, good behavior during the court proceeding, respecting other court orders. The weight it is given it depends on the level of such cooperation. Maybe an example of two persons voluntarily surrendering, with having also good behavior at trial and the other one not a good behavior at trial. The assessment could be that for the second one he loses the chance of calculating his voluntary surrender as mitigating. Caution is needed in domestic violence cases considering the overall dynamics of a violent relationship and the conduct of offender as rule in these crimes should not bear any weight in mitigation (for more information see pg.119-124).
Guilty plea	This is a more expansive matter that relates to several categorizations when and how the Plea took place, whether there was any restitution to the victim and if it is associated with other factors such as remorse etc. (for more information see pg.31,42,124-126 and more reference throughout the text of the Guidelines)
Plea agreement	Just like in other cases the impact Plea Agreement will have on a particular offence depends on the time when the defendant enters into agreement, the content of the agreement, whether the restitution is also included, any cooperation and the usefulness of such cooperation, if the offender and/or his family could potentially be at risk because of the assistance etc. More on the value of Plea Agreement in mitigation see on the narrative, (for more information see pg.13,126, 187-190 and more reference throughout the text of the Guidelines)
Sole or primary caregiver for the dependent relatives	This factor may be used in mitigation depending on the circumstances of the case such as the "collateral damage" that the imprisonment would have on the dependent family members of the perpetrator and not be included automatically just because the offender has family. Caution is needed when assessing such factor in cases of a domestic crime (see pg.116).
Lapse of time from the occurrence of the crime	There needs to be a very thorough assessment of such circumstance. The first step is to assess whether the perpetrator contributed to the lapse of time in which case this factor would be used in aggravation. On the opposite the lapse of time if not by the fault of the offender and if coupled with other exemplary behavior of the offender etc, then it could play an important role in mitigation (for more information see pg.132-134)

Samples of some potential relevant aggravation factors and their use in aggravation	
Aggravation factors	**Explanation**
Presence of others such as members of the family or the public	This factor can have some aggravation weight in sentencing. It could expand to include the humiliation in front of others but also the effect it would have on the victim and others. In particular if the assault for example occurred in a school environment the victim could further be bullied by others. Another example would be for example if the victim is a public figure and the assault happened in the public (for more information see pg.47,73 etc.)
Use of weapon or weapon equivalent *(for example use of acid, animal etc.)*	Depending on the means used to commit this category of crime, this factor could have a serious weight in aggravation. There is no need to only have weapons involved. Other means as described in the column could be even more serious (for more information see pg.67)
Intention to commit more serious harm than actually resulted from the offence	An example of this aggravation would be hitting the victim with wooden or metallic stick with the intention to kill or seriously injure the victim but fortunately the victim ends up with less serious injury. The intention should carry serious weight in aggravation.
Commission of offence in cruel or inhumane manner/Deliberately causes more serious harm than is necessary for commission of offence	The narrative part of the Guidelines contains an expanded description of such factor aggravation (for more information see pg.32,45, 68-75 and throughout the text of the Guidelines). The factor is very important in serious aggravation of the sentence.
Abuse of position of trust	Aggravation factor if the perpetrator is the caretaker, nurse or someone who is entrusted a defenseless person. This relates to other aggravating factors such as vulnerable, elderly victim etc (for more information see pg.41, 88-90).
Prior convictions and/or repeated bad behavior towards the victim	Very important as aggravating factor in particular if for the same or similar aggressive conduct and/or against the same victim/s. (for more information see pg.47, 73-75, 95-99, and throughout the text of the Guidelines in particular referring to a domestic crime)
Offence committed in a group of two or more / High degree of participation of the convicted person	An offence of this category committed by more than one individual could have more potential for harm. The aggravation depends on the vulnerability of the victim, the cruelty of the offence, combined with the use of means to commit the crime etc. Just like low participation is assessed in mitigation, a higher degree of participation of a perpetrator in crime committed by more than one

	person must be assessed as a very important aggravating factor (for more information see pg.57, 64-66, 90-92 etc).
Any evidence of premeditation	Premeditation is serious aggravation factor especially when coupled with other factors (for more information see pg.46, 64-66).
Offence committed against multiple victims	Very important factor in aggravation. It should be considered also in Domestic violence cases when there are children in that relationship. The child even if not direct victim of physical abuse living in a violent home has a very serious psychological impact on that child (for more information see pg.75-78, 142 and throughout the text referring to victimization).
Offence committed against defenseless victims and/or hostility to the victim based on the victim's disability, child, elderly etc.	In frequent cases crimes against life and body are committed against the most vulnerable categories as described in the column. The offender is much more powerful than the victim, or they are visibly on an unequal position with one another (for more information see pg.46-47, 68, 79-83).
Offence committed against a person or group of persons due to origin, nationality, sexual orientation or other	Hostility and crimes targeting a particular group or individual must be included at all times as aggravating (for more information see pg.93-96)
Psychological effect on the victim or the victim's family;	This factor is very important in very serious crimes leading to disability of the victim or even death. Continuous assault against the same victim can lead to long-term effects and make victims feel threatened at all times. The impact the crime has on the family must at all times be calculated in aggravation (for more information see pg.46-47, 72-83 etc).
Location where the offence was committed	This factor could mean committing the offence near schools or other such areas. In particular the judge could consider this a very aggravating offence when the perpetrator has intentionally lured the victim to a distant and/or isolated area with no access to medical assistance as this could mean that premeditation is also involved and attempt to conceal evidence, thus will trigger a maximum sentence (see also pg.41).

7.6 Balancing the Circumstances – Assessing the sentence

The concept of balancing aggravating and mitigating circumstances is the core function of the court in arriving at a final sentence. The concept, which directly fits into the structure of the criminal code, is that as the Court determines that aggravating or mitigating factors apply, the Court will move the sentence up or down within the established range. Once the court has evaluated each and every mitigating and aggravating factor, considered its existence, and determined a weight for it, it must then determine whether one factor outweighs the other and arrive at a final sentence. This is accomplished through the use of the sentencing chart in Appendix 1.

Appendix 1 establishes the sentencing minimums for all statutory sentences within the Criminal Code and existing legislation. The numbers and letters along the top and side of the appendix are for reference purposes only and do not impact how the sentence is calculated. Every crime in the Code and existing legislation is represented in column 1 as described in the code. There is no distinction between different offenses that have the same sentence. Thus, the sentence listed in cell A1 of 3 months-1 year will apply to EVERY offense that carries a penalty of 3 months-1 year. There are seven groups of sentences arranged based on similar minimum sentences. For example, all sentences with no minimum sentence appear in category I, minimum sentences of 1 year appear in category III etc. This is for ease of reference only.

Along the top of the chart are 9 columns. Column 2 is a quick reference as to whether the particular offense is eligible under ANY circumstance for a suspended sentence as defined and limited based on Article 52. Columns 3 and 4 apply only when article 75 mitigation is available. Finally, the majority of the table, columns 5-9 establish the possible sentencing range minimums depending on the amount of mitigation and aggravation present.

As was described earlier in the manual, the sentence in column 7 amounts to the starting point for a Court when determining a final sentence and amounts to approximately one-

half of the statutorily defined sentence. However, this is not JUST the starting point. This sentence will also be the final sentence in situations when the Court determines that there are NO aggravating or mitigating circumstances or that they cancel one another out, i.e. they are equal to one another.

7.6.1 Differentiating the Categories

An important decision in determining the final sentence is deciding which column applies to the specific situation of the defendant. Although there is no mathematical way to make this determination, there are some principles that should guide the court. It is important to note that the information at the head of each column in Appendix 1 is for general guidance only. Below are some considerations and descriptions that provide greater detail as to what circumstances apply for each column

Column 7: Starting Point

- There are no aggravating or mitigating circumstances;
- Aggravating and mitigating circumstances are equivalent and neither one prevails (makes no difference whether these are insignificant or significant amounts – only that they cancel each other out).

Column 6: Mitigation Greater than Aggravation

- Existence of at least one factor for reduced culpability, reduced harm or other mitigation, in any amount, and no aggravation;
- Existence of minor aggravation along with multiple mitigating factors or mitigation (individual factor or combined factors) in greater quantity than aggravation.

Column 5: Mitigation Significantly Greater than Aggravation

- Existence of at least two factors for reduced culpability and/or reduced harm and no/minor aggravation (can be two factors of one type or combination);
- Plea agreement or guilty plea at early stage in proceedings with no/minor aggravation;

- Overall combined mitigation factors (of any valid type) significantly greater than quantity of aggravation.

Column 4: Article 75 Mitigation

- Particularly significant mitigation based on existence of significant mitigation in multiple factors and no/minor aggravation;
- Existence of at least two factors for reduced culpability and/or reduced harm (can be two factors of one type or combination) along with other mitigation and no/minor aggravation;
- Plea agreement or guilty plea at early stage along with additional mitigation and no/minor aggravation;

Column 3: Article 75 Mitigation

- Existence of at least two factors for reduced culpability and/or reduced harm (can be two factors of one type or combination) along with other significant mitigation and no aggravation;
- Extraordinary mitigation and no aggravation;
- Plea bargain or guilty at earliest stage with mitigation evidencing orientation to rehabilitation and/or cooperation and no aggravation.

Aggravation

Column 8: Higher Culpability or Harm

- One factor of increased culpability or harm with no/minor mitigation;
- Total aggravation in excess of mitigation.

Column 9: Significantly Higher Culpability or Harm

- Two or more factors of increased culpability or harm with no mitigation;
- Significant aggravation with no mitigation;
- Total aggravation significantly in excess of mitigation.

Example:

Defendant commits a robbery in violation of Article 329 Robbery Paragraph 1 which carries a statutory penalty of 3 years to 12 years and a fine. Appendix 1 at Table V row e. shows the following guidelines:

V.	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
e.	3-12years	No	min. 1 year	min. 2 years	min. 3 years	min. 5 years	7years	max. 10 years	max. 12 years

If the Court determines that there are no mitigating or aggravating factors, or that the weight of the two cancel one another out, then the defendant will receive the basic sentence of 7 years.

If we add that the defendant played a relatively minor role in the robbery, supporting less culpability, and there are no additional mitigating or aggravating circumstances, mitigation outweighs aggravation. In this case, the Court might find that the next lowest range is appropriate, i.e. E6 carrying a minimum sentence of 5 years. Here, the Court is free to sentence anywhere in the range of 5 years to the next highest level of 7 years. It is important that the Court keep in mind that the sentence DOES NOT HAVE TO BE 5 years. This is simply the MINIMUM that must be sentenced based on the level of mitigation. This rule applies to all sentence levels below the starting point. Hence if the court determines that there is significant mitigation it may determine that a minimum sentence of 3 years is appropriate (E5) and is free to sentence from 3 years up to 5 years.

In the alternative, in situations where there is an increased level of harm or culpability, the Court will move into higher ranges such as E8 or E9. In both cases the Court is given a MAXIMUM sentence to be imposed. As with the lower level sentences, the Court is not restricted to the sentence in the cell but is free to sentence somewhere in between the categories. If E8 is applicable, then the court can sentence from 7 years (starting point) up to the 10-year maximum in cell E8. E9 would allow a sentence between 10 years up to a maximum of 12 years.

7.7 Additional Adjustments to Sentences – Modifications to Calculation

7.7.1 Principle of Mitigation

It stands to reason that the qualitative and quantitative level of mitigating outweighing aggravating will naturally place the defendant in a situation well outside the norm of normal or typical cases. Thus the court should be well convinced that this is not the typical situation. When the situation is especially uncommon the code provides several special circumstances in which the lower end of the sentencing range can be adjusted downward. Articles 75 and 76 provide the court with the restrictions under which additional mitigation and range lowering can take place. As this type of mitigation can have a very significant impact on the final sentence, particularly as the amounts are not adjusted in proportion to the range of the original sentence, the court must be very cautious in application and only reserve them for the most appropriate situations.

Article 75 provides adjusting the lower end of the range for sentences under 3 specific circumstances as follows:

1. The court may impose a punishment below the limits provided for by law or impose a lesser type of punishment:
   1.1. when the law provides that the punishment of the perpetrator may be mitigated or reduced; or
   1.2. when the court finds that there are particularly mitigating circumstances which indicate that the purpose of punishment can be achieved by imposing a lesser punishment; or,
   1.3. in cases when the perpetrator pleads guilty or enters into a plea agreement.

If the court finds that one of the above circumstances exists, it is allowed to lower the bottom end of the sentencing rage down to the amount specified in Article 76 of the code. Thus, for example, all sentences which have 10 years or more established as a minimum final sentence can be mitigated to a new minimum sentence of 5 years. Under paragraph

1.2 sentences of a minimum of five years, and less than 10, can be adjusted down to a minimum sentence of 3 years. This structure progresses down to a possible fine substitution for any sentence which under the law does not possess a minimum incarceration period.

7.7.1.1 Principle of Mitigation as applied and calculated in Appendix 1

Before discussing how application of mitigation is determined and accounted for in the guidelines appendix, several considerations must be addressed:

- **First,** there is NO requirement that if Article 75 applies, the court must apply the reduction under Article 76. Moreover, there is also NO requirement that the maximum amount be awarded in any given situation. It is perfectly permissible for the court to determine that based on the totality of the circumstances and in consideration of the specific case, mitigation is not warranted and therefore no adjustment is made. It is also permissible for the court to determine that the maximum reduction is not appropriate – only a portion.

  For example, defendant is guilty of committing an offense carrying a range of 3-5 years (Category V sentence b.). If the defendant eventually pleads guilty then the court may consider mitigation as applies under Article 75 paragraph 1.3. Under Article 76, the court may lower the sentence to 1 year. As explained above, the court IS NOT OBLIGATED to apply mitigation under Article 75 - it is merely a possibility. Just as the court is not obliged to give the defendant a sentence of 1 year per Article 76. If, for example, the defendant pled guilty at the last possible moment, the court might determine that even though mitigation is available, it is not warranted, or warranted in less than the maximum amount.

- **Second**, the court must "specially" consider the maximum and minimum sentence provided for by the code. This provision is to temper the approach of the court in light of the voluminous number of sentences that are used within the code and especially that their maximum's can be extremely varied. If mitigation is simply applied pro

forma to every sentence that falls within Article 75 it can have wildly disproportionate impacts. Take for example a 3-5 year sentence. If mitigated, the new minimum possible is one year. That same reduction is available to a sentence of at least 4 years. In the first instance, the maximum benefit possible from reduction to one year is 4 years (from the 5 year maximum). In the case of at least 4 years, which has no maximum (25 years per the code), the possible reduction available is 24 years.

Columns 4 and 5 are dedicated to those situations in which the court has determined that Article 75 mitigation is available and in fact applies. When there is sufficient allowance for it, Appendix 1 divides available mitigation into two separate columns. Column 4 is dedicated solely to situations where the maximum mitigation is warranted. Column 5 is reserved for situations where mitigation is applicable but does not warrant the maximum reduction.

7.7.1.2 Determining applicability of Principles of Mitigation

As described above, there are three situations in which the court can apply the mitigation provided for in Article 76. However, in order to systematize and proportionally apply them, there are certain restrictions and limitations the court must keep in mind.

Situation 1: Article 75 paragraph 1.1 provides that the court may consider mitigation when the law specifically provides that the punishment can be mitigated or reduced. Although this does not appear in many specific offenses within the criminal code, it does have some application under Chapter II on criminal liability for offenses that fall short of exclusion in very narrow exceptions. Here, the court may award mitigation under the appropriate provisions of Article 13 Extreme necessity, Article 14, Violence or threat, Article 15 Acts committed under coercion, Article 18 Mental incompetence and diminished mental capacity, Article 26 Mistake of law, Article 28 Attempt, Article 33 Assistance, and Article 34 Criminal association. The court must find that the specific requirements listed in the provision are met and then determine whether mitigation should be awarded.

Situation 2: Article 75, paragraph 1.2 is an affirmative finding of "particularly" mitigating circumstances that indicate the purposes of punishment will be achieved with a lesser sentence. While this is not clearly defined, it indicates a situation that is well outside the norm or at the level of the average offender. Here the court must be quite clear about what the purposes of the punishment are in relation to the perpetrator and that the particularities of the perpetrator, or their situation indicate, those purposes will be met by a lesser sentence. The perpetrator, for example, may have shown significant acts of remorse and attempts at making amends to the victim that are well outside the norm of what might be considered normal. In these situations, the court is permitted to apply mitigation and adjust the range accordingly. The court must then consider the factors in relation to the new range. Generally, the court should reject application of mitigation under this Article if aggravating factors outweigh mitigating.

Situation 3: The third opportunity has two components under Article 75, paragraph 1.3:

- The first component is that the court can adjust the range whenever the perpetrator pleads guilty to the court without a plea agreement in place.
- The second is when a guilty plea agreement is in place.

In this first situation, the court's decision must be tempered by the timing of the plea. Mitigation is not available to the defendant simply because somewhere in the process they chose to plead guilty. The substantial benefit awarded for a plea is premised on the preservation of societal costs in terms of time, money and the emotional expenditures associated with testimony and victimization. Those benefits dissipate significantly once trial begins. Therefore, mitigation under Article 75 should not be available once the trial begins. If the perpetrator pleads in time and the court finds mitigation is appropriate, as with the first two categories, the court must still undergo the evaluation process to determine what the final range should be and whether additional mitigation is available. Although the code provides that a plea of guilty may be sufficient to award mitigation, the additional language requiring consideration of the opinions of all interested parties indicates a strong bias against applying Article 76 mitigation when there is opposition. This makes sense when considering that a plea (not a plea agreement) is simply one of 13

stated mitigating possibilities under the code. Considering that the primary reason for mitigation based on a plea is conservation of resources, opposition by the parties premised on some reasonable justification indicates that there are other considerations that offset such a significant benefit to the defendant. Hence, objection by any of the parties, based on reasonable grounds, or a finding of any aggravating factor, should eliminate automatic award of Article 76 mitigation by simple virtue of a plea and require a finding of particular mitigation in line with the guidelines. Whether the arguments of the parties in opposition amount to reasonable grounds for denial is obviously left to the careful consideration of the court.

In the second situation under Article 75 Paragraph 1.3, mitigation is available for the perpetrator who has entered into a plea agreement with the prosecutor. Although plea agreements and sentencing are discussed in greater detail later, this provision essentially allows the prosecutor to enter into plea negotiations with the full mitigated range at his/her disposal. Thus in the appropriate situation, the prosecutor is able to offer the full range of mitigated sentences that are available by law for the court. This is separate and apart from the court's final approval of such a sentence. This provision does not bind the court to accept a plea agreement if it finds that the sentence agreed to is not warranted.

7.7.1.3 Narcotics Offenses

Generally narcotics offenses should be charged by prosecutors appropriately based on whether the drugs were possessed, intended for distribution or actually distributed. The code provides several statutes under which the prosecutor can proceed as with each providing a greater level of punishment. However, international practice and studies have shown that an important component of this distinction is based on the quantity of the narcotics. Generally, as the amount possessed increases, so does the likelihood that the narcotics were intended for distribution and that the perpetrator poses a greater threat to society. Although many narcotics offenses under Chapter 23 of the CC are eligible for mitigation under Article 75 and 76, the following guidelines should be applied:

- Substances or preparations declared by law to be narcotic drugs, psychotropic substances or analogues in a quantity **greater than 5 grams** should not be subject to mitigation if charged under Articles 273,274,275.

- If the offense is charged under Article 281, 1.1-1.8, and the quantity of drugs involved is **greater than 3 grams** the offense should not be subject to mitigation.

- If the offense is charged under Article 281, 1.9, and the quantity of drugs involved is **greater than 15 grams** the offense should not be subject to mitigation.

7.7.2 Waiver of Punishment

Article 77 and 78 allow the court to completely waive the perpetrator's punishment in two situations. Under Article 77, the court is permitted to waive punishment when the code specifically allows for waiver regardless of the limitation on mitigation provided for under Article 76. This form of waiver occurs in two situations. The first is a waiver in a particular criminal offense when specific appropriate conditions are met. The court will need to evaluate the specific criminal offense under the code to determine application of Article 77. Second, any offense committed with certain forms of modified criminal liability or collaboration will also potentially qualify for waiver. These include Article 12 Necessary defense, Article 13, Extreme Necessity, Article 29 Inappropriate Attempt, Article 29 Voluntary abandonment of attempt, and Article 34 Criminal association.

Article 78 waiver is specific to offenses committed negligently and on fulfilling of two criteria. First, the perpetrator must be affected so severely by the consequences that additional punishment is unnecessary to achieve its purpose. Second, the perpetrator must immediately make effort to eliminate or reduce the consequence and completely or substantially compensates for the damage. The first criteria will require a thorough evaluation of the impact on the perpetrator. This is not an objective evaluation but subjective and directly connected to the particular perpetrator. The second criteria require immediate action to mitigate. This will naturally be a crucial element of determining whether the first criteria is met, as attempts to mitigate will evidence impact on the

perpetrator. However, there is no requirement that those efforts do indeed succeed. What is required is an objectively reasonable attempt to do so. Finally, there must be some form of compensation. As the ability to pay may be a factor in determining waiver, the court should not premise this finding on immediate payment. If the perpetrator is able and willing to do so over time the court should waive punishment after monitoring successful payment.

7.7.3. Aggravation for multiple recidivism

Article 79 offers the only opportunity in the Code to add or adjust upward the maximum sentence provided by law for a particular offense. In cases where a life sentence is not involved, the court is permitted to add ½ the maximum sentence for the offense as an additional penalty. However, the perpetrator's prior offenses must meet several qualifications:

- Two prior offenses that
  - Resulted in one year of imprisonment or more and
  - Were committed intentionally
- Less than 5 years has elapsed from the termination of the prior punishment

Once the court determines that the perpetrator meets these factors, it is required to consider in particular the entry of a guilty plea, the motives, circumstances and similarity of the prior offenses, and the need to impose a punishment to fulfill the purposes of punishment. These considerations are relevant but are not absolute in terms of requirement. Hence, while it is certainly relevant if the crimes were similar in nature etc., it is not required that they be similar before the court aggravates the sentencing range. The more similar in nature, the more the court should consider the maximum aggravation possible as it will also imply that prior penalties for the same offense have failed to rehabilitate or prevent the perpetrator from offending again and the purposes of punishment will adjust more towards the protection of society from the perpetrator.

7.7.4 Punishment of concurrent criminal offenses

As the complexity of the sentencing process increases substantially when there are multiple offenses involved or aggravation based on recidivism, it is exceedingly difficult to represent the process in a chart format. However, once the court has comprehensively evaluated aggravation and mitigation, it is simply a matter of applying the process described above to each offense and aggregating the sentence. The available final range, to comply with the provisions of Article 80, is a matter of aggregating the arrived at sentence as a maximum and determining a minimum.

For example, defendant commits three offenses, two carry a range of 3-5 years and one a range of 1-4 years. If the court sentences the defendant to two 4-year and one 3 year sentence, Article 80 requires that the final sentence be higher than each individual (i.e. more than 4 years) but less than the aggregate of the total (i.e. 11 years). Unfortunately, the code provides little guidance beyond this in determining where the final sentence should be and in the above example.

One important point to note is the assumption that aggravating/mitigating value was the same for all offenses. While in many situations this may be true, it does not preclude the court from finding different values or factors apply for different offenses. The court may find that a perpetrator, for example, was very remorseful for committing one offense, but not another. One victim may be a vulnerable victim while another is not. The example simply illustrates the process. The court must evaluate each offense individually.

Additional considerations the court may use in adjusting the final concurrent sentence above or below the presumptive sentence may include:

- Where each sentence individually falls within the spectrum of the available range. If there is substantial mitigation of each individual sentence, the final sentence should enjoy substantial mitigation as well and vice versa.

- The prevalence of the criminal behavior in the community and the need to deter future perpetrators.
- Whether each offense involved a victim other than the state.
- The seriousness of the criminal offenses in relation to one another (minor offenses may have less of a need to be reflected in cumulative sentences than serious ones).
- The similarity of the offenses to one another based on their elements.
- The likelihood of rehabilitation and reintegration vs. the need to protect society from the perpetrator.
- Is there sufficient reflection of each offense in the final sentence such that there are no "free" crimes or "free" victims?

7.8 Trial Panel sentencing decisions

Another important consideration for the court is how to determine a final sentence when a panel is involved. The recommended method is to determine an average sentence value from all of the final decisions for those judges finding the defendant guilty of the offense. Any finding of not guilty should be eliminated from the final calculation. It is suggested that each judge independently evaluate the circumstances before the court and determine a final value for aggravation and mitigation.

In situations where one judge has a significantly different sentencing outcome than the others, there should be an additional step in which the judges consult with one another over what factors were considered found/not found in mitigation/aggravation. This should happen in any situation where one member of the panel arrives at a sentence that is substantially different from the others. This is to ensure that the court has not accidently omitted or failed to consider a factor. It is emphasized that though this additional consultation may ultimately have the impact of changing the opinion of the judge; it should not be considered the primary purpose of the consultation. It is merely to further protect the verdict on appeal. If the decision remains the same, it will again be the average of each sentence.

CHAPTER VIII
APPLICATION OF ALTERNATIVE PUNISHMENTS

8.1 General issues

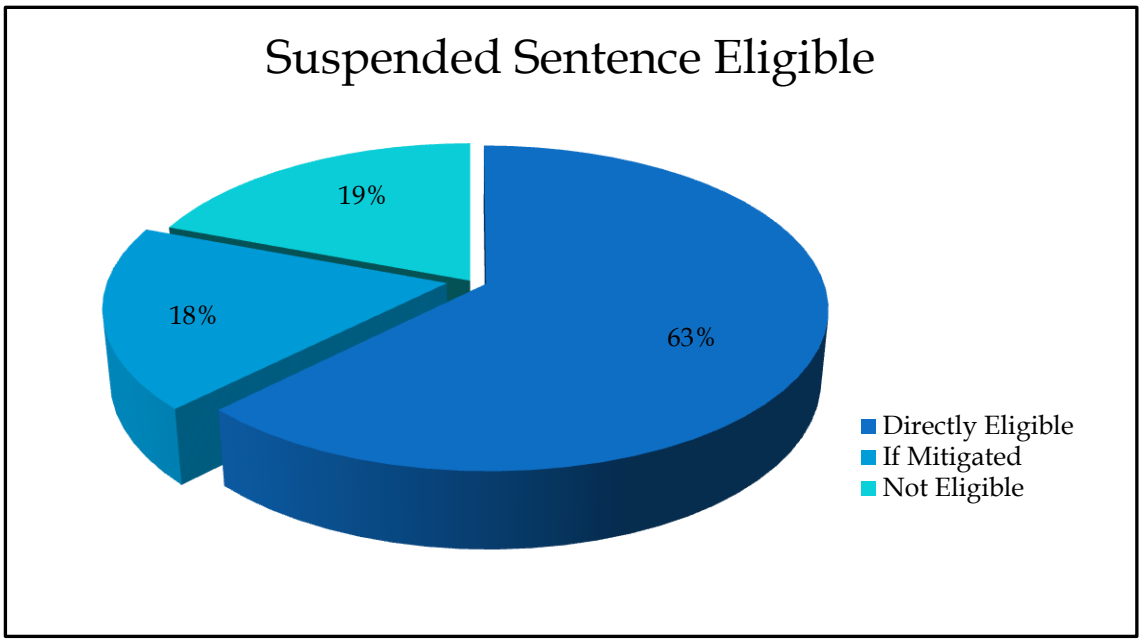
Once the court arrives at step 5 it will in most cases have arrived at a final term of imprisonment or punishment. The next step is to determine the manner in which that sentence will be served and whether it can be substituted with some other form. Article 49 describes the possibilities as alternative punishments. Judicial admonition is included in this discussion as it is a substitution for a term of imprisonment, although for relatively minor offenses.

8.2 Suspended Sentences

Suspended sentences are perhaps the most widely used form of alternative punishment and the Code outlines the process and procedure in Articles 50-59. A suspended sentence can be extremely useful and preserve human rights when used in the proper situation, but it can also easily become controversial because it can readily appear as the complete release of the perpetrator from all liability without consequence. First and foremost, then, the court must provide justification for the substitution that is thorough and clearly meets

all of the provisions of the law – particularly that the substitution will equally meet the purposes of punishment. The requirements of Article 50 clearly lay out that the suspended sentence is reserved for offenses that are not severe and when the threat of punishment is sufficient to prevent the perpetrator from committing another offense. The background, mental make-up, and attitudes of the perpetrator are of paramount importance in the evaluation process. If a court does not address clearly its obligations under Article 50 and Article 52 a reviewing court should automatically return the decision to the lower court

The basic mechanics of the suspended sentence are that the court determines a sentence whose execution is suspended for a period of time, provided that the perpetrator does not commit another criminal offense and completes and/or complies with all conditions mandated by the court. Violation of the condition(s) can lead to the immediate execution of the sentence as it was already determined. Proponents of the suspended sentence believe that a pre-determined absolute sentence is a more effective deterrent and motivator than an undetermined one that still has an opportunity for attempts to mitigate by the perpetrator. Regardless, the effectiveness of suspended sentences are directly related to the willingness of a court to revoke them and the assignment of appropriate additional conditions.



Article 81 establishes the framework and eligibility for a sentence to be suspended. There are two guidelines that control suspension. First, any criminal offense that carries a maximum of 5 years or less is eligible for suspension.

Second, any criminal offense that carries a maximum of 10 years or less is eligible for suspension but only if the provisions of mitigation are applied. Implicit from these two guidelines is that any criminal offense that carries a maximum penalty over 10 years is not eligible for suspension.

Column 3 of Appendix 1 provides a quick reference for the court to determine whether a criminal sentence is initially eligible for suspension. The court must keep in mind that just because a sentence is initially eligible for a suspended sentence, it does not mean that the court is automatically entitled to use this alternative. It must engage in the evaluation and ultimately arrive at a sentence in the permissible range of 2 years or less.

8.2.1 Suspensions under 5-year maximum provision

If the court is faced with one or more offenses of a maximum of five years it must evaluate each offense on its own merits as outlined in these guidelines and arrive at a sentence within the ranges provided in Appendix 1.

If the perpetrator is guilty of a single offense, and the sentence arrived at is two years or less, it may suspend the sentence per paragraph 3 of Article 52. However, the court must also conclude that based on the factors listed in paragraph 4, which focus on the particular past behavior of the perpetrator as well as personal circumstances, the candidate is suited for a suspended sentence and the purposes of punishment are fulfilled. If the sentence is greater than two years, the court cannot suspend the sentence. For example, the perpetrator is convicted of a crime that carries a penalty possibility of 1-5 years. According to Appendix 1, this carries a presumptive range of 3 years. At this point, unless there is sufficient mitigation to move to column 5, the court cannot suspend the sentence because the presumptive term is greater than 2 years. Only sentences that carry a maximum sentence of 5 years as a possibility have a presumptive term incapable of being suspended and require adjustment with the aid of mitigating factors.

While the same requirements apply when there are multiple convictions for offenses of 5 years and under, the court must engage in the aggregation process as outlined in Article 80 (described under Step 4 above). The court must arrive at an individual sentence based on the guidelines for each offense and then aggregate them into a final sentence. If it is impossible to aggregate them as defined in Article 80 without arriving at a sentence greater than 2 years, the court cannot suspend the sentence.

A suspended sentence must not be considered when there has been a breach of a protective order, particularly when the act that constituted the breach is of a violent nature. The perpetrator in these cases has already shown disobedience to court orders by failing to respect the Protection Order.

8.2.2 Suspensions under 10 year maximum provision

Unlike suspended sentences for offenses of 5 years or less, offenses carrying possible sentences of 10 years or less require an additional step. Before they can even be considered for suspension they must first undergo the process of mitigation. This means that they MUST meet one of the qualifications under Article 75. Namely, (1) that the law specifically provides for lesser punishment, there are (2) particularly mitigated circumstances or the (3) defendant has pled guilty (or has entered into a plea agreement). The process of mitigation is described in greater detail in Step 4 under provisions for additional sentencing adjustments. However this is only an initial qualification step, it does not automatically entitle the court to award a suspended sentence. The court must then undergo the process of evaluating mitigating and aggravating circumstances and independently arrive at a sentencing range that permits a sentence of 2 years or less as required by Article 52. The court must also conclude that based on the factors listed in paragraph 4, which focus on the particular past behavior of the perpetrator as well as personal circumstances, the candidate is suited for a suspended sentence and the purposes of punishment are fulfilled.

8.2.3 Obligations and conditions of suspended sentences

Because the primary purpose of a suspended sentence is to avoid incarceration when the threat of punishment is sufficient, the court must ensure that the perpetrator is also given the appropriate tools to avoid re-offending and re-integrate into the community. As suspended sentences will generally apply to situations were behavior is abnormal, there will typically be something that contributed or motivated the actions. Suspended sentences with no conditions other than a general prohibition on re-offending should be rare occurrences and reserved for the most minor of situations where there are strong indicators of remorse, restitution to any victim and cooperation with courts and law enforcement. In essence there is no obvious purpose or tool available to the court. Courts are strongly advised that suspended sentences without conditions will be scrutinized carefully and the lack of conditions must be thoroughly explained. Finally, barring

mitigating and verifiable circumstances suspended sentences without conditions MUST be revoked when violated.

The court must carefully assess the situation and impose obligations and conditions on the sentence that address the behavior. The code provides 15 potential conditions per Article 59 with the possibility of probation supervision. In addition to these provisions, Article 62 Accessory punishments are available as well and should always be considered in addition to the conditions of suspended sentences. These are dealt with in greater detail under Step 6 below.

> ***1.1. To receive medical or rehabilitation care in a health care institution;***
> ***1.2. To undergo a medical or rehabilitation treatment program;***
> ***1.3. To visit a psychologist and/or another consultant and act in accordance with their recommendations;***

Conditions 1.1-1.3 should always be assigned in situations where there are mental health problems or medical conditions as motivators for committing the crime. 1.3 should be used judiciously by the court if there are indications that mental health may be a contributing factor but there is no medical diagnosis at the time of sentence.

> ***1.4. To receive vocational training for a certain profession;***
> ***1.5. To perform a work activity;***
> ***1.6. To use wage and other income or property to fulfill a family obligation;***

Any minor offenses involving a failure to provide some form of financial support should carry provisions to comply with payment. This can include sale of property to fulfil the obligation as long as livelihood of the perpetrator is not destroyed. If there are indications the crime is motivated by lack of financial means or even boredom, the court should assign conditions requiring the perpetrator to obtain skills to become a productive member of society.

1.7. To refrain from changing residence without informing the probation service;

If probationary supervision is used, this should be a mandatory provision. Additionally, this provision should always be used if there are indications that the perpetrator has the means/ability to relocation. Intent to move without justification/purpose is a possible indicator of relocation to continue the bad behavior and can be prevented by requiring notification.

1.8. To abstain from the use of alcohol or drugs;

Any indication of drug/alcohol abuse, whether directly present in commission of the crime or not, should be accompanied by a restriction on its use in addition to some form of evaluation under 1.3. If drug/alcohol addiction was the primary motivating factor behind commission of the offense, mandatory rehabilitation treatment is mandated under Article 57.

1.9. To refrain from frequenting certain places or locales;

1.10. To refrain from meeting or contacting certain people;

If the crime is not a random occurrence but is more focused/centered on a particular person or location, the court should always include a restriction on frequenting the place or contacting a person. These should be used particularly in domestic situations where the crime is directly related to contact with a particular person. Considering that the very nature of domestic violence relationships is to perpetuate the situation through repetition, it is **unlikely** that a simple suspension will be effective without restrictions. The court should be very specific in naming/describing the persons and places the perpetrator is to avoid including any extended family members. Violations of these provisions should be immediate grounds for revocation of the suspended sentence. Probation monitoring should also be imposed.

1.11. To refrain from carrying any kind of weapon;

Any offense related to possession of a weapon or its use for injury or intimidation should carry suspension with restriction on the carrying or possession of weapons. The

restriction should be general in nature and not simply limited to the particular weapon used. This provision should include possession in addition to carrying a weapon.

If there are indications that there is a domestic violence component to the crime, restrictions on access/possession of weapons should be included, regardless of whether the possession is directly related to the offense itself. Just possession itself may be coercive and intimidating to a victim. The scientific research shows that presence of a firearm in the possession of domestic violence offender exponentially increases the risk of serious bodily harm or death to his victim, children and others. As a result, it becomes paramount for the Court to make inquiries and order the confiscation of any firearms accessible to the offender. This is permissible even if the abuser has lawful possession of the weapon.[87] The presence of a weapon in the home is often a critical component in creating fear in the victim through a constant state of jeopardy. The weapon may have been used in a previous incident of either actual violence or a threat, and its continued presence implies the ongoing possibility that the behavior will reproduce itself. It also serves to deter the victim from leaving the aggressor or reporting previous incidents to the authorities. Research shows that the use of weapons or dangerous tools or threats to use these in the context of domestic violence represents a clear indicator of escalation and a decisive indicator in fatal outcomes.[88]

1.12. To compensate or restitute the victim of the offense;

Every suspended sentence involving a victim wherein the perpetrator has the ability or means to provide restitution must be accompanied by this condition. This will prevent the need for litigation in civil matters, relieve the State from any obligation it may have and provide the victim with the immediate or direct relief that they are entitled to.

1.13. To return the material benefit acquired from the commission of the criminal offense;

[87] Domestic Violence Bench book for Judges and Prosecutors, Confiscation of item used or may be used to commit violence, par.6.9 Pristina (2016) , pg.44, citing also the provisions of the Law No.05/l-22 on Weapons, (2015) Article 10, Article 36 and Article 38.
[88] Ibid. pg.66

Any situation in which there is a material benefit acquired as a result of the offence should include a return provision. If the perpetrator has converted the material benefit to some other form, the court should order sale or return of the converted form if still solely owned by the perpetrator.

1.14. Not to possess or use a computer or to access the internet as directed by the court; or,

Offenses that are committed by computer or have an internet component to them should be accompanied by these restrictions. This should not be limited to computer offenses. Any offense where the court finds that the use of a computer was reasonably related to completion of the crime or facilitated its commission should carry a limitation provision. If the perpetrator has business connections or legitimate uses outside of committing the offense, the court should narrowly tailor the restrictions as appropriate.

1.15. To provide financial reports as directed by the court.

If there is a financial component to commission of the crime and/or it is motivated for financial gain, this factor should be assigned. Periodic reports are an excellent means for the court to monitor whether income from the perpetrator is legitimate or connected to criminal activity.

In addition to the provisions of Article 59, the code makes repeated reference to paragraph 3 of Article 51 as setting forth possible conditions for suspended sentences. However, only one factor mentioned differs materially from conditions in Article 59. This is that the court may require the perpetrator to make restitution for the damage caused by the offense. This is a more generic condition than the restitution Article 59 provision.

All of these conditions are designed to monitor the actions of the defendant and are adaptable to virtually any crime or situation. The suggestions provided for each condition are specific to offenses/motivations they are typically designed to monitor. However, the code does not limit application of these conditions, and the court is encouraged to

combine them as appropriate to develop an effective means to monitor the progress of the perpetrator and ensure that the suspended sentence is successfully completed. Regardless of the number of conditions, the court must include deadlines for each condition with appropriate monitoring provisions built in that will allow adjustments for conditions.

When imposing these conditions the court should be mindful of the surrounding conditions and circumstances of the perpetrator's life. Some of these considerations are outlined in Article 51, paragraph 3 and indicate a general awareness that the court should not impose conditions that are impossible or exceedingly difficult to complete because of other valid/relevant circumstances. This does not mean that the court should simply rely on the word of the perpetrator that such conditions exist. The court should require proof of such circumstances and if received search for other alternatives.

8.2.4 Verification Period

The code provides for a verification or compliance period for a suspended sentence lasting from 1-5 years. Although the court is free to determine the appropriate duration, it is strongly suggested that the court increase the period in proportion to the seriousness of the offense. The following are suggested verification periods:

- Any offense that requires the application of Article 76 mitigation in order to suspend (Article 52, paragraph 2)
  - At least 3 years verification
  - 5 years verification if 10 year maximum sentence was possible
- Concurrent offenses suspended – at least 3 years
- Single offenses without mitigation (Article 52, paragraph 1)
  - Less than 3 years possible

8.2.5 Probation monitoring

Article 58 allows the court to assign probationary monitoring to a suspended sentence. This can be for active monitoring of the perpetrator for compliance with mandated conditions or simply a periodic reporting requirement that compels the perpetrator to

meet with the probation service. While some of the conditions set forth in the code do not need active monitoring, practice shows that active, regular of monitoring of progress towards completing conditions is the most effective means of ensuring compliance, reintegration and the overall success of the suspended sentence. At the very least, the perpetrator is aware of the court's presence and continued interest in results, and is regularly reminded that failures will be swiftly identified and met with punishment. Suspended sentences without conditions are far more likely to fail than those that have conditions and are actively monitored. However, the Code only allows for a period of monitoring from 6 months to a maximum of 3 years. Although this period cannot monitor the full potential suspended sentence verification period of five years, courts should still actively use the period allowed. It is strongly suggested that any verification period of 3 years or more that includes obligations for the perpetrator be accompanied by a 3 year period of probationary monitoring.

8.2.6 Violations

Violations are relatively straightforward in the code and are generally governed by Article 53-55 which describe conditions for revocation after committing new offenses, failing to meet conditions, and being sentenced for a previously committed offense.

Article 53 requires mandatory revocation of a suspended sentence whenever a new crime is committed resulting in a sentence of 2 or more years. The court must then apply Article 80 in aggregating the punishments. If, however, the sentence is less than two years or a fine, revocation is not mandatory, however the court is encouraged to evaluate the violation in light of the circumstances, motive and type of the crime. It is strongly suggested to the court that a new offense committed despite a suspended sentence being in place is a strong indicator that a suspended sentence has **failed** to serve its purpose. Revocation should be presumed unless compelling evidence to justify the acts is provided by the perpetrator. If the crime is identical/similar in nature, the motive is the same, or the victim is the same, revocation should be immediate.

The commission of a new criminal offense can be compelling evidence to revoke a suspended sentence; however, a violation of conditions requires more thorough analysis and consideration. Article 55 permits the court to revoke a suspended sentence and impose the previously determined sentence for failure to comply with condition(s) imposed under paragraph 3 of Article 51 or Article 59 in its entirety. The code is fairly flexible in allowing the court to assess the circumstances surrounding performance of the condition and consider whether revocation is appropriate or extension is justified. If the failure to complete the conditions is justifiable, the court is required to waive the condition or replace it with a more appropriate condition. However, any extension of the period for completion of the conditions or for completion of newly imposed conditions must be by the end of the performance period.

If the court chooses to revoke for failure to complete a condition, under Article 56 it must be done within 1 year of the determined deadline (and prior to expiration of the verification period). For example, the court requires the perpetrator to complete a drug program within 1 year and provides a 5 year verification period. If the court does not find out about the failure until year 4 year, it may not revoke the sentence for failure to complete the condition. It must happen prior to the end of year 2.

The following are relevant considerations for revocation/extension of a condition:

- The court should not simply extend the period of performance for completion repeatedly until the verification period expires. There must be justification provided for the failure.
- Defendant bears the burden of justifying their failure to meet the conditions of the suspended sentence or showing that the condition should be substituted.
- Substitutions or waivers of conditions should be failures based on factors beyond the control of the perpetrator (For example – the defendant is unable to complete vocational training because the vocational school closed).

- Failures that show a lack of seriousness or disrespect for the authority of the court should result in revocation of the suspended sentence. Extensions in light of these conditions are unlikely to be met and erode respect for the judicial system as a whole.
- Extensions based on questionable justifications can be extended, but never more than once for the same questionable justification.
- If probationary monitoring is not assigned, the court should actively review files or hold hearings at the deadline period set for conditions to determine compliance.
- The court should hold at least one hearing close to the end of the verification period to determine whether all conditions have been fulfilled and/or make a final decision on revocation.

Suspended sentences are an effective tool available to the court to minimize incarceration and maximize rehabilitation of perpetrators. However, they are not particularly effective without clear conditions, compliance monitoring, and a readiness by the court to revoke them when conditions are not met. They should not be used as a means to dispose of cases that are considered non-serious as they will serve no useful purpose and rehabilitation will fail. The court must be willing to take the time to create an effective suspended sentence in order for society to reap the rewards.

8.3 Community Service/ Semi-Liberty

Both semi-liberty and community service are alternative means to serve a court ordered sentence of incarceration of up to one year. Both carry the possibility of additional conditions as part of the sentence. These should be used by the court to address contributing issues and design a program for appropriate re-integration.

As community service potentially replaces and reduces a one-year incarceration period to a maximum of 30 days of work, it should be used more sparingly than semi-liberty, which still requires periods of incarceration. As the period of performance is not more

than a year, the court should provide an initial completion period of substantially less duration in order to assess compliance and maximize the court's options.

8.4 Judicial Admonition

Article 85 and 86 provide the court with the possibility of a Judicial Admonition. Judicial admonition is essentially the substitution of a punishment of imprisonment for a formal warning from the court that if the behavior repeats itself, there will be a more severe punishment. As noted by the code, admonition is available for all offenses up to one year imprisonment and offenses up to 3 years that specifically provide for admonition. Only Article 188 Light bodily injury carries any possibility of judicial admonition for an offense up to 3years.

The use of a judicial admonition for offenses carrying a sentence possibility of up to one year is further restricted to only those cases where there are mitigating circumstances sufficient to render the offense particularly minor. Thus the court must go through the process of evaluating the aggravating and mitigating circumstances. If the court determines that aggravating circumstances are equal or greater than mitigating it may not substitute sentence with a judicial admonition. Moreover, if there are not sufficient mitigating circumstances to render the offense particularly minor, the court cannot use a judicial admonition. One method of evaluation is to consider the proximity of the perpetrator's actions to not fulfilling the basic criteria of the crime. Injuries that barely meet the threshold for the offense are more likely to qualify the offense for judicial admonition. As noted in paragraph 5 of Article 86, important considerations for meeting the minor offense level are the actions of the perpetrator during and after commission of the crime. The court's focus is not solely on whether the actions of the perpetrator qualified as aberrant behavior, but that the perpetrator recognized the behavior and took corrective measures.

CHAPTER IX

ACCESSORY PUNISHMENTS AND OTHER PROVISIONS

9.1 Accessory Punishments

The Accessory provisions of Article 62 are available together with ANY alternative or principle punishment. Although they vary in their mandatory application, the court should evaluate the applicability before rendering any final sentence. This applies particularly for suspended sentences as this increases the opportunity to tailor a sentence to the particular needs of the perpetrator and maximize prospects for re-integration.

9.1.1 Deprivation of the right to be elected[89]

Deprivation of the right to be elected is a mandatory accessory punishment. It includes crimes under Chapter 18 (Criminal Offences against Voting Rights) and any offense carrying a possible minimum sentence of 2 years this is perpetrated with the intent to get elected. The period of deprivation is 1-4 years.

The court should use this provision judiciously as these offenses indicate fundamental disrespect for democratic values. Generally, if the court has imposed a term of imprisonment, at least 3 years of deprivation should be imposed. If an alternative punishment of a suspended sentence is imposed, the period of deprivation should be at least as long as the sentence that is suspended

9.1.2 Order to pay compensation for loss or damage[90]

This is a mandatory provision that must be included in every case where there is some sort of loss or damage to a victim's property. Unlike restitution for medical injury or physical harm, this measure is focuses solely on property loss. In addition to the value of the property itself the court must award loss of income to the victim related to the offense. There is no restriction on restitution based on the ability to pay of the perpetrator or the ability of the victim to recover compensation in another venue.

[89] Article 62 of Criminal Code, par.2.1
[90] Article 62 of Criminal Code, par.2.2

9.1.3 Prohibition on exercising public administration or public service functions[91]

Prohibitions under 2.3 are mandatory assessment for the court. 1-5 years is available if imprisonment is the final sentence and 1-3 years if the final sentence is a fine or suspended sentence. Important for the court's determination is that there be some abuse of the functions while/from exercising public service or public administration. This is not limited only to formal charges of abuse of authority or even official corruption offenses under chapter 34. The court is free to assign this prohibition if there is simply some component of abuse of power in or aiding in the commission of the crime.

Any crime with a possible sentence of 5 years or more should include a suspension period of at least 3 years, regardless of the final term of imprisonment or the period of suspended sentence. Any crime involving official corruption under Chapter 34 (Official Corruption and Criminal Offences against Official Duty), sentenced to a period of imprisonment, should carry a 5-year period of prohibition. Generally, the period of prohibition should be in proportion to the seriousness of the offense.

9.1.4 Prohibition on exercising a profession, activity or duty[92]

Provision 2.3 is directed at individuals who abuse their authority as part of the offense or directly in furtherance of committing the offense by limiting their ability to exercise that position or other duties as described in Article 66. This is not limited to public authority positions and does not limit the court to only offenses where abuse of authority is a formal element. The court need only find or determine that authority was abused in commission of the crime. The prohibition period is 1-5 years and the period of incarceration and health care institutional oversight does not count towards the period of prohibition.

[91] Article 62 of Criminal Code, par.2.3
[92] Article 62 of Criminal Code, par.2.4

In determining whether to restrict the exercise of profession, activity or duty, the court is not limited to only restrict that which was abused during the commission of the crime. The court may also limit the access if they have reason to expect it might be abused in the future. For example, the court may prohibit a perpetrator's employment as a teacher when the authority was abused to sexually assault a child. It may also choose to prohibit the perpetrator from supervising children in any professional capacity since it has reason to believe that the authority in this position may increase the likelihood of the authority being abused again.

At least 4 years of prohibition should be imposed for sexual offenses, offenses involving vulnerable victims, and offenses involving serious injuries. If the authority was essential to the commission of the crime, the prohibition period should be at least 3 years. Generally, the period of prohibition should be proportionate to the seriousness of the offense.

9.1.5 Prohibition on driving a motor vehicle[93]

Par.2.5 is primarily focuses on those offenses involving motor vehicles in situations that jeopardizes public safety. However, it is not limited only to offenses where the offense itself was committed with a vehicle. It only need be related to the commission of the crime in that there was some driving that threatened public safety. As with most provisions, this should be in direct proportion to the threat and the seriousness of the crime. An important factor will also be the prominence or necessity of the vehicle in committing the crime. The greater it serves a central role in the crime, the longer the period of the prohibition.

9.1.6 Confiscation of a driver license[94]

Confiscation per Article 68 is similar in nature to 2.5 however it allows for confiscation or prohibition on any vehicle (as opposed to a specific make/model). The threat is the same as 2.5 in that there is jeopardy to the pubic traffic. However, the court is limited to

[93] Article 62 of Criminal Code, par.2.5
[94] Article 62 of Criminal Code, par.2.6

crimes involving death or grievous bodily injury or if the court determines that there is an ongoing danger to public safety because of an inability of the driver to drive a motor vehicle safely. As with 2.5, the prohibition will be proportional to the seriousness of the offense. If the offenses involves death or grievous bodily injury and is directly related to operation of a motor vehicle, the period of confiscation should be 5 years.

9.1.7 Confiscation[95]

Confiscation of property is mandatory in all cases for property used in commission of a criminal offense and derived from the commission of a criminal offense. Although mandatory, the appropriate procedures must have been followed in the confiscation process as determined by the CPC. Property not owned by the perpetrator may be confiscated as long as it does not adversely affect the rights of third parties to obtain compensation from the perpetrator.

Although the provisions of 2.7 are mandatory in nature, they cannot be imposed without proper procedure being followed. If the property has been subjected to seizure or sequestration the court will need to refer to the provisions of the CPC in determining whether the property can be legitimately confiscated. If procedures have been appropriately followed, all confiscation should be immediately ordered in conjunction with any sentence.

While property belonging to third parties can be confiscated under this provision provided there is no adverse impact on rights to recover, it is generally not advisable to do so. Particularly if there has been no procedure or opportunity for third parties to be heard or they have not been properly noticed. Moreover, access to a right to recover is not enough to assure the third party of a genuine opportunity to recover, especially if a large portion of the perpetrator' s property is being confiscated and they are being incarcerated. If the court has reason to believe there are attempts to protect or conceal the party, outside of the limitations provided in the CPC, this provision may be appropriate.

[95] Article 62 of Criminal Code, par.2.7

However, if there are indications the third party is an innocent owner or has only an incidental connection to the crime, the court should avoid confiscation unless justified.

9.1.8 Order to publish a judgment[96]

Par. 2.8 allows for publication of judgments and is further described in detail under Article 70. This provision should be applied when it is in the public interest to have the judgment published in a more open and accessible way than more traditional access to public records. This provision should be limited in use especially when concerns of privacy are involved or publication may identify individuals unrelated to perpetration of the crime. The provision may be particularly useful when public figures are involved or there are larger implications for public stability.

9.1.9 Expulsion of a foreigner from the territory of the Republic of Kosovo[97]

The provisions of 2.9 are self-explanatory and allow for the expulsion of foreigners for a period of 1-10 years. The court is required to consider the seriousness of the offense, motives and the perpetrator's connection in determining whether and how long of a period to impose.

9.2 Measures of Mandatory Treatment

Chapter V of the CC provides Measures of Mandatory Treatment. These provisions are limited to perpetrators who have no criminal liability because of mental condition, substantially diminished mental capacity or are drug or alcohol addicted. As such they are beyond the scope of the sentencing guidelines. The majority of the determination in these cases will be factual findings that the perpetrator is not criminally liable or suffered from such a diminished mental capacity that treatment for the condition is of paramount concern. Finally, in cases where criminal punishment may apply per the guidelines the

[96] Article 62 of Criminal Code, par.2.8
[97] Article 62 of Criminal Code, par.2.9

court may substitute some provision of the penalty with a period of mandatory treatment, provided the crime was committed under the influence or primarily influenced by alcohol or drug use.

CHAPTER X
PROVIDING A JUSTIFICATION

Providing proper justification for the final sentence is of paramount importance. Clear reasoning and analysis are basic requirements in judicial decisions and an important aspect of the right to fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be neglected in the interests of speed. [98]

Clear reasoning also provides the perpetrator with appropriate notice of how the sentence was justified and allows for victims and prosecutors to know that their concerns and arguments were addressed. Moreover, proper justification provides reviewing courts assurances that all of the provisions of the law were considered appropriately and will inevitably cut down on the number of successful appeals based on a lack of justification or an inability of by a reviewing court to determine the basis for the sentence. A judge ensures that his judgments are intelligible. He gives reasons for his decision so that everyone involved can understand the logic on which the judge based his decision.[99] The statement of the reasons not only makes the decision easier for the litigants to understand and be accepted, but is above all a safeguard against arbitrariness. Firstly, it obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful; secondly, it enables society to understand the functioning of the judicial system.[100]

Following the principles and approach outlined in the guidelines itself will eliminate the vast majority of appeals. However, sentencing based on the guidelines is not a substitute for proper justification and consideration. Nowhere is this more controversial and problematic than in the consideration of aggravating/mitigating circumstances. To streamline the consideration process, Appendix 2 provides a standard form for the court to use in calculation and justification of the sentence.

---

[98] Consultative Council of European Judges (CCJE), Opinion No.11 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on Quality of Judicial Decisions, Strasbourg (2008) no.3.

[99] European Network of Councils for the Judiciary (ECNJ), Judicial Ethics Report 2009-2010, Listening and Communication, pg.14.

[100] Consultative Council of European Judges (CCJE), Opinion No.11 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on Quality of Judicial Decisions, Strasbourg (2008) no.35.

The form provides a series of lines for each possible aggravating and mitigating factor. The court then need simply provide factual justifications for each factor as appropriate. This will provide the court with a quick reference to the facts supporting the particular factor. This will make writing the detailed judgment much quicker.

Identifying the final sentencing range is simply a matter of determining the overall total aggravating in comparison to mitigating and whether some other sentencing adjustment, such as mitigation, has taken place. Once final the court determines the appropriate range and provides a final sentence somewhere within that range. It can then make any final adjustments such as suspension of the sentence or assignment of alternative punishments. Last, the court will determine whether any accessory punishments apply and/or conditions for suspended sentences.

In addition to determining a final sentence based on aggravating/mitigating circumstances and other applicable provisions, Appendix 2 provides a list of conditions for suspended sentences as well as the accessory punishments available for all sentences. This should remind the court of all factors available and encourage their use in providing meaningful sentences likely to succeed.

In drafting the final written decision the court should apply the following suggestions:

- Each factor that the court determines exists must be clearly stated in the judgment – both aggravating and mitigating.
- The court must provide a relatively detailed statement of the facts the court believes support and justify the finding of a factor.
- The court should state the overall value assigned to each of the factors after stating the facts in support of the factor.
- The court must refer to the number of all factors that do not exist and state there are no facts supporting the factor.

- If there is evidence submitted in support of a mitigating/aggravating factor that the court does not find credible, it should specifically state so and provide a brief justification.
- The court must clearly state whether the factors are equal, do not exist, outweigh or significantly outweigh.
- The final range must be stated in the judgment along with the final sentence.
- Suspended sentences must include a specific justification why the court believes the threat of punishment is sufficient to prevent the perpetrator from committing another crime.
- Article 75 mitigation must specifically include which provisions of the code the court is relying on to mitigate.

To be of high quality, a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable. Only then will the parties be convinced that their case has been properly considered and dealt with and will society perceive the decision as a factor for restoring social harmony. To achieve these aims, a number of requirements must be met.[101]

CHAPTER XI
ALTERNATIVE PRACTICES

[101] Consultative Council of European Judges (CCJE), Opinion No.11 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on Quality of Judicial Decisions, Strasbourg (2008) no.35.

Although alternative practices for the disposition of cases are relatively new, they have gained increasing popularity worldwide as methods to conserve and prioritize resources. The following are offered as general guidelines that should govern the way in which courts approach these practices.

11.1 Plea Bargaining

Although the court has limited ability to be involved in the actual negotiation between the perpetrator and the prosecutor, it nonetheless has the ultimate say in whether the plea bargain will be accepted. The provisions of the plea agreement are generally controlled by Article 233 of the Criminal Procedure Code and the sentencing provisions of the Criminal Code. There are several important considerations the court should adhere to.

Generally, the prosecutor has the ability to make an offer that is within the limitations provided for in the code. Any legally available possible sentence can be offered by the prosecutor and accepted by the perpetrator. This does not mean that the prosecutor must make the minimum offer whenever it is available. Determination of an appropriate plea agreement is a decision within the prosecutor's judgement that must take into consideration a variety of factors. That said, the fact that the prosecutor makes a particular offer DOES NOT mean that the court MUST accept and implement it. The court is the ultimate determiner of whether the plea agreement is acceptable, but it should give some deference to the prosecutor in their decision.

For example, if the offense carries a base level sentence range of 3-5 years, it can be mitigated down (via the plea agreement provisions of Article 75, paragraph 1.3) to a new minimum sentence of 12 months per Article 76. Article 233, of the CPC Paragraph 7 provides the prosecutor its maximum ability to mitigate. If the agreement is entered into prior to the main trial, the possible sentence is actually 80% of the 12 months (90% of 12 months if the trial has started – However as discussed previously, there should be a strong inclination NOT to offer a significant benefit for pleas or agreements consummated

during the main trial.). Further reduction is possible when the perpetrator begins proactively cooperating with the prosecution such as testifying as a cooperative witness (60% of minimum) and taking part in a covert operation as well as being a cooperative witness (40% of minimum). At a minimum, the prosecutor must include in the plea agreement:

(i) The charges to which the defendant will plead guilty;
(ii) Whether the defendant agrees to cooperate;
(iii) The rights that are waived;
(iv) The defendant's restitution to the injured party and the assets to be confiscated.

Although the prosecutor has the ability to make plea agreements down to the level as provided for in the CPC it does not mean that the court is obliged to accept them. Article 233 explains that in order to accept the plea agreement, the court must positively evaluate several factors. These include the following:

18.1. The defendant understands the nature and the consequences of the guilty plea;

18.2. The guilty plea is voluntarily made by the defendant after sufficient consultation with defense counsel, if defendant has a defense counsel, and the defendant has not been forced to plead guilty or coerced in any way;

18.3. The guilty plea is supported by the facts and material proofs of the case that are contained in the indictment, by the materials presented by the prosecutor to supplement the indictment and accepted by the defendant, and any other evidence, such as the testimony of witnesses, presented by the prosecutor or defendant; and

18.4. None of the circumstances under Article 253, paragraphs 1 and 2 of this Code exists.

Inevitably, the primary concern for the court will be the offer/recommended sentence made by the prosecutor and whether the court agrees that it is acceptable. Procedurally, the code allows the court to accept the guilty plea of the defendant and ultimately determine a sentence that is higher than the offer made by the prosecutor. This is based primarily on the concern that after the court accepts the plea, it may determine that there are insufficient factors to ultimately arrive at a sentence offered by the prosecutor or there may be facts that change the court's position substantially. While this permits maximum flexibility for the court to determine a sentence that is justified by the facts, imposing a higher sentence than expected will destroy the motivation for plea agreements in the first place. Primarily that the defendant foregoes the uncertainty of trial for a known sentence.

To correct this potential problem, the court must reject a plea at the original acceptance hearing if there is any concern it will not be able to sufficiently justify the agreed to sentence. The court is permitted to do this under paragraph 18.1 (above) based on the argument that the perpetrator does not understand the nature and consequences of the plea agreement, i.e. that they are going to receive a sentence that is higher than what was actually negotiated. If the court has already accepted the initial agreement and learns of facts that will not permit imposition of the agreed to recommended sentence it may inform the defendant and reject the plea on the basis that the defendant no longer understands the consequences of the plea.

There are no specific requirements as to whether the defendant is to be offered a sentencing range or a specific sentence in exchange for a plea. Each has its own merits. Likewise, there is no requirement that the defendant plead guilty to every offense listed in the indictment if they intend to plead guilty. The court must evaluate the recommended sentence and charges in their entirety and determine whether there are sufficient facts to impose the requested sentence. The court should always request the prosecution and defense to provide justification to support the requested sentence.

Ultimately courts are strongly encouraged, in order to facilitate plea bargaining and expedite case processing, to reject plea agreements that are untenable and allow

renegotiation rather than sentence outside the plea agreement and force resolution at the appellate level.

11.2 Punitive Order

Chapter 30 of the Procedure Code introduces the option of a Punitive Order. This allows the prosecutor to request a direct indictment of the perpetrator for offenses that carry a potential maximum sentence of 3 years or less. The punishments are limited substantially to non-incarceration conditions, admonishment and limited confiscation. What is important for the court in this respect is that agreement to the punitive order is not obligated. The court may reject the request if, similar to plea agreements, the court does not believe the recommended measures are appropriate and/or a different punishment might be expected in light of the factual information submitted in the indictment.

As with all possible outcomes, the victim should have the opportunity to address the court as to resolution of the matter and the impact the order may have on prospects for restitution etc. Therefore, before accepting a punitive order, the court should require proof from the prosecutor that the victim was contacted and made aware of the punitive order, including the opportunity to provide evidence to the court, or that the prosecutor was unable to contact the victim and what efforts were made.

CHAPTER XII
APPELLATE REVIEW

12.1 Discretion of Appellate Court Review of Sentencing

As has been discussed throughout this manual, one of the most important goals of sentencing guidelines is to reduce the disparity in sentences without destroying the discretion of judges to adapt to particular situations. If the guidelines are followed appropriately, the need for Appellate review reduces substantially as does the grounds upon which the court should properly review the lower court's decision.

12.2 Elimination of Disparity

A universal criticism of sentencing procedures which do not provide for appellate review is the resulting disparity of sentences in cases which do not appear to be substantially different from one another. In the mind of the public, unequal sentences imposed upon defendants convicted of the same offense, without some visible justification, amount to judicial caprice and could cause loss of respect for the judicial system. Unjustified sentence disparity also tends to inhibit prisoner rehabilitation. Such adverse effects of sentence disparity tend to frustrate the deterrent and rehabilitative purposes of the sentence.[102] Thus, at its very core, the Appellate court serves the important task of eliminating any potential disparity between sentences, ensuring proper justification and reducing the appearance of arbitrariness.

In common law countries, decisions of higher courts that settle a legal issue serve as binding precedents in identical disputes thereafter. In civil law countries, decisions do not

[102] ***Dupree Julian Glenn,*** Louisiana Law Review, Volume 33/No.4, ABA Minimum Standards for Criminal Justice-A, Appellate Review of Sentencing, pg.561

have this effect but can nevertheless provide valuable guidelines to other judges dealing with a similar case or issue, in cases that raise a broad social or major legal issue. Therefore the statement of the reasons, deriving from a detailed study of the legal issues addressed, needs to be drawn up with special care in such cases in order to meet the parties' and society's expectations.[103]

Disparity damages the certainty and clarity of the applicability of the legal social control and it damages the social order. When uniform punishments are determined any deviation from the determined punishment would be clear and overt and may be fixed out within the legal process. In modern legal systems a procedural solution is used to address such disparity and restoring uniformity is the function of the court of appeals. Thus, when two identical cases are brought before the court of appeals and they were punished differently by the lower courts, the appeal court may settle the disparity after deciding which disparate court opinions was appropriate or by imposing new identical punishments on the offenders. Nevertheless, completely identical cases with identical personal and impersonal characteristics are very rare. When the disparity between the punishments stems from the factual disparity between the cases, it may be justified socially because different cases require different social treatment. But when the disparity in punishments results from different judicial experiences, different views of the courts etc. it is understood as being incorrect and requiring correction.[104]

A judicial decision must meet a number of requirements in relation to which some common principles can be identified, irrespective of the specific features of each judicial system and the practices of courts in different countries. The starting point is that the purpose of a judicial decision is not only to resolve a given dispute providing the parties with legal certainty, but often also to establish case law which may prevent the emergence of other disputes and ensure social harmony. Judges should in general apply the law consistently. However when a court decides to depart from previous case law,

[103] Consultative Council of European Judges (CCJE), Opinion No.11 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on Quality of Judicial Decisions, Strasbourg (2008).
[104] Hallevy, Gabriel. The right to be punished: modern doctrinal sentencing. Springer Science & Business Media, 2012.

this should be clearly mentioned in its decision. In exceptional circumstances, it may be appropriate for the court to specify that this new interpretation is only applicable as from the date of the decision in issue or from a date stipulated in such decision.[105]

12.3 Standard of 'Discernible Error'

According to the ICTY Appellate Chamber, "*an appeal against sentencing is an appeal stricto sensu; it is corrective in nature and not a trial de novo. Trial chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime. As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by a trial chamber unless the appealing party demonstrates that the trial chamber committed a "discernible error" in exercising its discretion or has failed to follow the applicable law*. It is for the party challenging the sentence to demonstrate how the trial chamber ventured outside its discretionary framework in imposing the sentence… *In doing so, an appellant must demonstrate that the trial chamber: (i) gave weight to extraneous or irrelevant considerations; (ii) failed to give weight or sufficient weight to relevant considerations; (iii) made a clear error as to the facts upon which it exercised its discretion; or (iv) made a decision that was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber failed to properly exercise its discretion*.[106]

The same principle was used also in Aleksovski and Tadic case : "*In civil legal systems such as Germany and Italy the relevant Criminal Codes set out what factors a judge must take into consideration in imposing a sentence.* ***The appellate courts may interfere with the discretion of the lower court if its considerations went outside these factors or if it breached a prescribed minimum or maximum limit on sentence.*** *The Appeals Chamber*

[105] Consultative Council of European Judges (CCJE), Opinion No.11 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on Quality of Judicial Decisions, Strasbourg (2008).
[106] Case no.IT-08-91-A, Appeals Chamber Judgment in Prosecutor v. Mico Stanisic & Stojan Zupljanin, International Criminal Tribunal for Former Yugoslavia, (30 Jun3 2016), Par.1100

has followed this general practice. Thus in Prosecutor v. Tadic, the Appeals Chamber held that ***it should not intervene in the exercise of the Trial Chamber's discretion with regard to sentence unless there is a "discernible error"…****That error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute.*"[107]

As such, the court should attempt to confine its consideration of the "appropriateness" of a sentence to situations in which there is a need to definitively settle an issue and/or there is a misapplication of the provisions of the law.

[107] Case No.IT-95-14/1-A, Judgment , Prosecutor v Zlatko Aleksovski, International Criminal Tribunal for the Former Yugoslavia, (24 March 2000), Par.186-187, citing Prosecutor v. Tadic, Case No.: IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals.

APPENDIX I

SENTENCING TABLE

I.	1	2	3	4	5	6	7	8	9
	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	fine only	X			x	x	x	x	x
b.	[1,2] up to 3 months	Yes			min.1 month	min. 40days	45 days	max. 2months	max. 3months
c.	[1,2] up to 6 months	Yes			min.1 month	min. 2 months	3 months	max. 5 months	max. 6months
d.	[1,2] up to 1year	yes			min.1month	min. 4 months	6 months	max. 10 months	max. 1year
e.	[1] up to 2years	Yes			min.1 month	min. 6months	1year	max. 1year & 6months	max. 2 years
f.	[1] up to 3years	Yes			min.1month	min. 8 months	1year	max. 2years	max. 3 years
g.	[1] up to 5years	Yes			min.1month	min. 1year	2 years	max. 4 years	max. 5 years
h.	[1] up to 7years	If Mitigated			min.1year	min. 2 years	3 years	max. 5years	max. 7 years
i.	[1] up to 8years	If Mitigated			min.1year	min. 3years	4 years	max. 6years	max. 8 years
j.	[1] up to 10years	If Mitigated			min.1year	min. 4years	5 years	max. 8 years	max. 10 years
k.	[1] up to 15years	No			min.1year	min. 5years	7 years	max. 12 years	maximim 15 years
l.	[1] up to 20years	No			min.1year	min. 6years	10years	max. 16 years	max. 20 years
m.	[1] up to 25years	No			min.1year	min. 7years	12 years	max. 20 years	max. 25 years

II.	1	2	3	4	5	6	7	8	9
	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	3 months -1year	Yes		min. 1 month	min. 3 months	min. 6months	7months	max. 10months	max. 1 year
b.	3 months - 3years	Yes		min. 1 month	min. 3 months	min. 10 months	1years &6months	max. 2years	max. 3 years
c.	3 months - 5years	Yes		min. 1 month	min. 3 months	min. 15months	2years&6months	max. 4 years	max. 5 years
d.	6 months-1year	Yes		min. 1 month	min. 6 months	min. 7 months	9months	max. 10months	max. 1 year
e.	6 months-2years	Yes		min. 1 month	min. 6months	min. 10months	1year	max. 1year &6 months	max. 2 years
f.	6 months-3years	Yes		min. 1 month	min. 6 months	min. 1 year	1years&6months	max. 2years	max. 3 years
g.	6months-4years	Yes		min. 1 month	min. 6months	min. 15months	2years	max. 3 years	max. 4 years
h.	6 months-5years	Yes		min. 1 month	min. 6months	min.1year&6 months	2years & 6months	max. 4 years	max. 5 years
i.	6 months-8years	If Mitigated	min. 1 month	min. 3 months	min. 6months	min. 2 years	4 years	max. 6 years	max. 8 years
j.	6months-10years	If Mitigated	min. 1 month	min. 3 months	min. 6months	min.2years & 6months	5years	max. 8 years	max. 10 years

III.	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	1-2years	Yes	min. 3 months	min. 6 months	min. 1 year	min.1year & 3months	1year & 6 months	max. 1 year & 8 months	max. 2 years
b.	1-3years	Yes	min. 3 months	min. 6 months	min. 1 year	min.1year & 6months	2years	max. 2 years & 6 months	max. 3 years
c.	1-4years	Yes	min. 3 months	min. 6 months	min. 1 year	min.1 year & 9months	2years	max. 3 years	max. 4 years
d.	1-5 years	Yes	min. 3 months	min. 6 months	min. 1 year	min. 2 years	3years	max. 4 years	max. 5 years
e.	1-6years	If Mitigated	min. 3 months	min. 6 months	min. 1 year	min.2 years & 3 months	3years	max. 5 years	max. 6 years
f.	1-7years	If Mitigated	min. 3 months	min. 6 months	min. 1 year	min.2 years & 6 months	3years & 6 months	max. 6 years	max. 7
g.	1-8years	If Mitigated	min. 3 months	min. 6 months	min. 1 year	min. 3years	4years	max. 6 years	max. 8 years
h.	1-10years	If Mitigated	min. 3 months	min. 6 months	min. 1 year	min. 3 years	5years	max. 8 years	max. 10 years
i.	1-12years	No	min. 3 months	min. 6 months	min. 1 year	min. 4 years	6years	max. 10 years	max. 12 years
j.	1-15years	No	min. 3 months	min. 6 months	min. 1 year	min. 5 years	8 years	max. 12 years	max. 15 years
	1	3	4	5	6	7	8	9	10

IV.	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	2-5years	Yes	min. 6months	min. 1 year	min. 2 years	min.2 years & 6 months	3years	max.4 years	max. 5 years
b.	2-7years	If Mitigated	min. 6 months	min. 1 year	min. 2 years	min. 3 years	4years	max. 6 years	max. 7 years
c.	2-8years	If Mitigated	min. 6months	min. 1 year	min. 2 years	min.3 years & 6 months	5 years	max. 7 years	max. 8 years
d.	2-10years	If Mitigated	min. 6 months	min. 1 year	min. 2 years	min. 4 years	6 years	max. 8 years	max. 10 years
e.	2-12years	No	min. 6months	min. 1 year	min. 2 years	min. 5 years	7 years	max. 10 years	max. 12 years
f.	at least 2years	No	min. 6 months	min. 1 year	min. 2 years	min. 7 years	12years	max. 20 years	max. 25 years
	1	2	3	4	5	6	7	8	9

V.	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	3years	Yes	min. 1 year	min. 2 years	3 years	3 years	3 years	3 years	max. 3 years
b.	3-5years	Yes	min. 1 year	min. 2 years	min. 3 years	min. 3 years & 6months	4 years	max. 4 years & 6 months	max. 5 years
c.	3-7years	If Mitigated	min. 1 year	min. 2 years	min. 3 years	min. 4 years	5 years	max. 6 years	max. 7 years
d.	3-10years	If Mitigated	min. 1 year	min. 2 years	min. 3 years	min. 4 years & 6 months	6years	max. 8 years	max. 10 years
e.	3-12years	No	min. 1 year	min. 2 years	min. 3 years	min. 5 years	7years	max. 10 years	max. 12 years
f.	3-15years	No	min. 1 year	min. 2 years	min. 3 years	min. 6 years	9 years	max. 13 years	max. 15 years
g.	not less than 3/ at least 3years	No	min. 1 year	min. 2 years	min. 3 years	min. 7 years	13 years	max. 20 years	max. 25 years
h.	at least 4years	No	min. 1 year	min. 2 years	min. 4 years	min. 8 years	14years	max. 21 years	max. 25 years

	1	2	3	4	5	6	7	8	9
VI.	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	5-10years	If Mitigated	min. 3 years	min. 4 years	min. 5 years	min. 6 years	7years	max. 9 years	max. 10 years
b.	5-12years	No	min. 3 years	min. 4 years	min. 5 years	min. 7 years	8years	max. 10 years	max. 12 years
c.	5-15years	No	min. 3 years	min. 4 years	min. 5 years	min. 8 years	10years	max. 13 years	max. 15 years
d.	5-20years	No	min. 3 years	min. 4 years	min. 5 years	min. 8 years	12years	max. 17 years	max. 20 years
e.	not less than 5/ at least 5years	No	min. 3 years	min. 4 years	min. 5 years	min. 9 years	15years	max. 21 years	max. 25 years
	1	2	3	4	5	6	7	8	9
VII.	Applicable sentence	Eligibility for Suspended sentence	Maximum mitigation when Article 75 is applied	Partial mitigation when Article 75 is applied	Factors justifying highest mitigation within the limit	Factors indicating higher mitigation than aggravation	Starting point (Aggr=Mit.)	Factors indicating higher aggravation than mitigation	Factors justifying highest aggravation within the limit
a.	7-12years	No	min. 3 years	min. 5 years	min. 7 years	min. 8 years	9years	max. 11 years	max. 12 years
b.	7-15years	No	min. 3 years	min. 5 years	min. 7 years	min. 9 years	11years	max. 13 years	max. 15 years
c.	7-20years	No	min. 3 years	min. 5 years	min. 7 years	min. 10 years	13years	max. 17 years	max. 20 years
d.	at least 7years	No	min. 3 years	min. 5 years	min. 7 years	min. 11 years	15years	max. 21 years	max. 25 years
e.	at least 8years	No	min. 3 years	min. 5 years	min. 8 years	min. 12 years	16years	max. 23 years	max. 25 years
f.	10years	If Mitigated	min. 5 years	min. 8 years	10 years	10 years	10years	10 years	max. 10 years
g.	10-20years	No	min. 5 years	min. 8 years	min. 10 years	min. 12 years	15years	max. 18 years	max. 20 years
h.	not less than 10/ at least 10years	No	min. 5 years	min. 8 years	min. 10 years	min. 13 years	17years	max. 22 years	max. 25 years
i.	15years	No	min. 5 years	min. 10 years	15 years	15 years	15years	15 years	max. 15 years
j.	not less than 15/ at least 15years	No	min. 5 years	min. 10 years	min. 15 years	min. 17 years	20years	max. 23 years	max. 25 years
k.	at least 20years	No	min.5 years	minimum 13 years	minimum 20 years	minimum 21 years	22years	maximum 24 years	maximum 25 years

[1] A fine can be substituted for the entire sentence.

[2] Judicial admonition available.