FEDERAL UNIVERSITY OF MINAS GERAIS
FACULTY OF LAW

PLEA-BARGAINING AND SENTENCING AT INTERNATIONAL CRIMINAL COURTS

BRUNO DE OLIVEIRA BIAZATTI

BELO HORIZONTE
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Master's thesis presented by Bruno de Oliveira Biazatti to the Graduate Program of the Faculty of Law of the Federal University of Minas Gerais, under the guidance of Professor Aziz Tuffi Saliba. The thesis was written under the scope of Research Line 1, entitled "Power, Citizenship, and Development under the Rule of Law".

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BRUNO DE OLIVEIRA BIAZATTI

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Master's thesis presented by Bruno de Oliveira Biazatti and approved by the Graduate Program of the Faculty of Law of the Federal University of Minas Gerais, as a criterion for obtaining the Master's Degree in Law.

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"It is this mass we are made of, half indifference and half evil"

José Saramago, *Blindness* (*Ensaio sobre a cegueira*)[1]

[1] SARAMAGO, José. *Ensaio sobre a cegueira*, Rio de Janeiro: Companhia das Letras, 2002, p.40. Translation by the author from the original in Portuguese, which follows: "É desta massa que nós somos feitos, metade de indiferença e metade de ruindade".

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ABSTRACT

Plea-bargaining, although initially rejected, is now an integral part of the activities conducted by international criminal judges, lawyers and prosecutors. The thesis aims to evaluate the introduction of this practice in the case-law of three courts: the International Criminal Tribunal for the former-Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court. After assessing the main decisions on the subject of these institutions, one can see that plea-bargaining had been transplanted from the domestic realm to the international fora with caution and certain adaptations. Two main trends were identified. Firstly, international criminal judges exercise significant control over sentencing, even in cases of plea-bargaining. Therefore, they are not formally bound by the plea agreements nor willing to accept blindly sentence recommendations by the prosecution. Secondly, judges insistently pursue the international criminal tribunals' goal to identity and record the truth. As such, they will only accept a plea if there is enough evidence to corroborate its content. In conclusion, international criminal tribunals implement plea-bargaining taking into account their particular structural and ideological features, and not just as an automatic transposition from domestic law.

Keywords: Plea-bargaining; guilty pleas; plea agreements; international sentencing; International Criminal Tribunal for the former-Yugoslavia; International Criminal Tribunal for Rwanda; International Criminal Court.

RESUMO

As delações premiadas, cujo uso foi inicialmente rejeitado pelos tribunais criminais internacionais, são agora parte integrante das atividades dos juízes, advogados e procuradores internacionais. Esta Dissertação visa avaliar a introdução desta prática em três tribunais: o Tribunal Penal Internacional para a ex-Iugoslávia, o Tribunal Penal Internacional para Ruanda e o Tribunal Penal Internacional. Depois de avaliar os principais julgamentos destas instituições sobre o tema, verificou-se que a prática de delação premiada foi transposta do âmbito doméstico para a jurisdição internacional com cautela e certas adaptações. Duas tendências principais foram identificadas. Em primeiro lugar, os juízes criminais internacionais exercem controle significativo sobre o processo de determinação da sentença, mesmo em casos com admissão de culpa pelos réus. Portanto, as câmaras de julgamento dos tribunais internacionais não são formalmente vinculadas aos acordos de delação premiada nem estão dispostas a implementar, de forma automática, as recomendações de sentença feitas pela Procuradoria. Em segundo lugar, os juízes internacionais insistentemente atuam com vistas a identificar e registrar a verdade histórica. Eles aceitarão certa admissão de culpa apenas se o seu conteúdo for suficientemente corroborado por provas. Portanto, os tribunais penais internacionais aceitam e implementam as transações entre o réu e a Procuradoria na medida em que esta prática se adequa às características estruturais e ideológicas particulares daquelas cortes. Uma simples transposição automática do direito interno à jurisdição internacional não deve ocorrer e, de fato, não ocorreu até o momento.

Palavras-chave: Negociações entre procuradores e réus; acordos de delação premiada; admissões de culpa; dosimetria da pena em tribunais criminais internacionais; Tribunal Penal Internacional para a ex-Iugoslávia; Tribunal Penal Internacional para Ruanda; Tribunal Penal Internacional.

LIST OF ABBREVIATIONS

AQIM	Al-Qaeda in the Islamic Maghreb
Cf.	*Confer*
DPKO	Department of Peacekeeping Operations
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
ed.	Edition/Editor
et al.	and others (*et alia*)
EU	European Union
Hon.	Honorable
HVO	Croatian Defense Council (*Hrvatsko Vijeće Obrane*)
IACtHR	Inter-American Court of Human Rights
Ibid.	*Ibidem*
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Report
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (simply known as the "International Criminal Tribunal for Rwanda")
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (simply known as the "International Criminal Tribunal for the former-Yugoslavia")
ILC	United Nations International Law Commission
JNA	Yugoslav People's Army (*Jugoslovenska Narodna Armija*)
N/A	Not applicable

NAKI	Nairobi – Kigali
NATO	North Atlantic Treaty Organization
no./n.	Number
p.	Page
para.	Paragraph
PCIJ	Permanent Court of International Justice
RPF	Rwandan Patriotic Front
RTLMC	Thousand Hills Free Radio and Television (*Radio Télévision Libre des Mille Collines*)
Ser.	Series
SFOR	Stabilisation Force in Bosnia and Herzegovina
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNDoc.	United Nations Document
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTS	United Nations Treaty Series
US	United States of America
vol.	Volume

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INTRODUCTION

The steady growing number of international courts and tribunals worldwide constitutes one of the most puzzling forms of cooperation in the international legal-political landscape[2]. In establishing these institutions, States relinquish the competence and authority they so vigorously protect, in order to empower third parties to have the final word on questions of paramount importance to them, such as treatment of terrorists[3], migration and rights of foreigners[4], use and contamination of international watercourses[5], sustainable management of living resources[6], new technologies[7] and determination of maritime and land boundaries[8]. The prosecution and punishment of criminals is another

[2] KATZENSTEIN, Suzanne. "In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century", *Harvard International Law Journal,* vol.55, p.151-209, 2014, p.151.

[3] *Ireland v. United Kingdom,* Application no. 5310/71, ECtHR, Judgment, 18 January 1978; *Aksoy v. Turkey,* Application no. 21987/93, ECtHR, Judgment, 18 December 1996; *Martinez Sala and others v. Spain,* Application no. 58438/00, ECtHR, Judgment, 2 November 2004.

[4] *Jadhav Case (India v. Pakistan),* Order of 18 May 2017, Request for the Indication of Provisional Measures, [2017] ICJ Rep.1; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* [2010] ICJ Rep.639; *Avena and Other Mexican Nationals (Mexico v. United States of America),* [2004] ICJ Rep.12; *LaGrand (Germany v. United States of America),* [2001] ICJ Rep.466; *Nottebohm Case (Liechtenstein v. Guatemala),* [1955] ICJ Rep.4; *Rights of Nationals of the United States of America in Morocco (France v. United States of America),* [1952] ICJ Rep.176; *Colombian-Peruvian Asylum Case (Colombia v. Peru),* [1950] ICJ Rep.266; *Haya de la Torre (Colombia v. Peru),* [1951] ICJ Rep.71; *A.M. v. France,* Application no. 56324/13, ECtHR, Judgment, 12 July 2016; *Khlaifia and others v. Italy,* Application no. 16483/12, ECtHR, Judgment, 15 December 2016; *Georgia v. Russia (I),* Application no. 13255/07, ECtHR, Judgment, 3 July 2014; *M.A. v. Cyprus,* Application no. 41872/10, ECtHR, Judgment, 23 July 2013; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* Application no. 13178/03, ECtHR, Judgment, 12 October 2006.

[5] *Diversion of Water from the Meuse (Netherlands v. Belgium),* [1937] PCIJ (Ser.A/B) no.70; *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v. Poland),* [1929] PCIJ (Ser.A) no.23; *Dispute over the Status and Use of the Waters of the Silala, Order of 1 July 2016 (Chile v. Bolivia),* [2016] ICJ Rep.243; *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), [2010] ICJ Rep.14; *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia),* [1997] ICJ Rep.7; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep.213.

[6] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),* [2014] ICJ Rep.226; *European Commission v. Hellenic Republic (Greece),* Case C 504/14, European Court of Justice, Fourth Chamber, 10 November 2016; *Commission of the European Communities v French Republic,* Case C-182/89, European Court of Justice, 29 November 1990.

[7] *S. and Marper v. the United Kingdom,* Applications nos. 30562/04 and 30566/04, ECtHR, Judgment, 4 December 2008; *Nagla v. Latvia,* Application no. 73469/10, ECtHR, Judgment, 16 July 2013; *Copland v. United Kingdom,* Application no. 62617/00, ECtHR, Judgment, 3 April 2007; *Ben Faiza v. France,* Application no. 31446/12, ECtHR, Judgment, 8 February 2018; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* Application no. 22947/13, ECtHR, Judgment, 2 February 2016; *Bărbulescu v. Romania,* Application no. 61496/08, ECtHR, Judgment, 5 September 2017; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica,* IACtHR, Judgment, 28 November 2012, Series C No. 257.

[8] *Legal Status of Eastern Greenland (Denmark v. Norway),* [1933] PCIJ (Ser.A/B) no.53; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),* [2007] ICJ Rep.659; *Maritime Dispute (Peru v. Chile),* [2014] ICJ Rep.3; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* [2002] ICJ Rep.303; *Kasikili/Sedudu Island (Botswana v. Namibia),* [1999] ICJ Rep.1045; *Maritime Delimitation in the Black Sea (Romania v. Ukraine),* [2009] ICJ Rep.61; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore),* [2008] ICJ Rep.12; *Aegean Sea Continental Shelf*

competence that States have decided to transfer, at least in part, to international courts. Accordingly, international criminal courts have been mandated to try not every offense, but "the most serious crimes of concern to the international community as a whole"[9].

If you look to the institutional criminal landscape in the international level for the past three decades at once, you would be able to find a significant number of courts: five international criminal tribunals[10] and seven hybrid criminal courts[11]. However, international criminal jurisdiction is something new in our history[12]. It is a product of the twentieth century[13] and had to overcome several setbacks before it could consolidate itself as a permanent element of International Law[14].

An even newer element at the international fora is plea-bargaining[15]. For terminology purposes, plea-bargaining is a bilateral negotiation between a prosecutor on one side, and a defendant and his or her lawyers on the other[16]. These interactions involve an express promise by the accused to plead guilty to one or more charges of the indictment in return for either the dismissal of other charges, a favorable sentence recommendation by the Prosecution or both[17]. Accordingly, plea-bargaining occurs in three forms: (i) *sentence bargaining*, in which the prosecutors agree to recommend a lesser sentence in exchange for a guilty plea by the defendant; (ii) *charge bargaining*, with the Prosecution agreeing to procure the dismissal of one or more charges in exchange for the guilty plea; and (iii) the combination of these two forms[18]. The parties agree upon the outcomes of

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(Greece v. Turkey),[1978] ICJ Rep.3; *Continental Shelf (Libyan Arab Jamahiriya v. Malta),* [1985] ICJ Rep.13; *Frontier Dispute (Burkina Faso v. Republic of Mali),* [1986] ICJ Rep.554; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* [1994] ICJ, Rep.6.

[9] *Rome Statute of the International Criminal Court,* UNDoc.A/CONF.183/9, 17 July 1998, 4th preambulatory clause [*ICC Rome Statute*].

[10] These five international criminal courts are the International Criminal Tribunal for the former-Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Mechanism for International Criminal Tribunals and the International Criminal Court.

[11] These seven hybrid criminal courts are the Regulation 64 Panels in the Courts of Kosovo, the Special Panels of the Dili District Court in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Court of Bosnia and Herzegovina, the Extraordinary African Chambers and the Kosovo Specialist Chambers.

[12] CASSESE, Antonio *et al. Cassese's International Criminal Law*, 3rd ed., Oxford: Oxford University Press, 2013, p.4 [CASSESE *et al.*].

[13] *Ibid*., p.4.

[14] *Ibid*., p.258-259.

[15] TURNER, Jenia Iontcheva. "Plea Bargaining and International Criminal Justice", *University of the Pacific Law Review,* vol.48, p.219-246, 2017, p.219 [TURNER (2017)].

[16] O'HEAR, Michael. "Plea Bargaining and Procedural Justice", *Georgia Law Review,* vol.42, p.407-469, 2008, p.414.

[17] *Ibid*.; FISHERT, George. "Plea Bargaining's Triumph", *Yale Law Journal,* vol.109, p.857-1086, 2000, p.864 [FISHERT].

[18] BOAS, Gideon *et al. International Criminal Procedure,* vol.III, Cambridge: Cambridge University Press, 2011, p.221 [BOAS *et al.*].

these negotiations in writing via plea agreements, which are eventually presented to the trial judges.

Plea-bargaining had its origins in common law jurisdictions in the nineteenth century[19]. Prior to 1830s, plea-bargaining existed in US and United Kingdom, but it was rare[20]. At that time, no more than 10 to 15% of all lower court convictions came from guilty pleas in the US[21]. In fact, the US Supreme Court, although not directly addressing plea-bargaining, indicated in some cases back then its reluctance to permit bargained waivers of procedural rights[22]. For instance, in the 1874 case *Insurance Co. v. Morse*, the Court stated that "every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights"[23].

Despite this initial judicial resistance and strenuous objections by commentators[24], plea-bargaining became a dominant method of resolving criminal cases at the end of the nineteenth century and beginning of the twentieth century in common law States, especially the US[25]. In fact, by 1880, around 90% of the cases in that State were resolved by plea deals[26]; in 2009, 97% of federal convictions and 94% of state convictions in US were obtained through plea agreements[27]. This shift in paradigm – from rejection of negotiated justice to widespread plea-bargaining – is due to the highly formal, expensive and time-consuming methods of proof in the Anglo-American justice system[28]. The combination of this particular feature with the intense process of urbanization, increased

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[19] ALSCHULER, Albert. "Plea Bargaining and Its History", *Columbia Law Review,* vol.79, n.1, p.1-43, 1979, p.7-12 [ALSCHULER].
[20] *Ibid*., p.10; FISHERT, *supra* note 17, p.864; VOGEL, Mary. "The Social Origins of Plea Bargaining: An Approach to the Empirical Study of Discretionary Leniency?", *Journal of Law and Society*, vol.35, p.201-232, 2008, p.209-210 [VOGEL].
[21] VOGEL, *ibid*.
[22] *Whiskey Cases,* US Supreme Court, 99 U.S. 594, 1878; *Insurance Company v. Morse,* US Supreme Court, 87 U.S. 445, 1874; *Hallinger v. Davis,* US Supreme Court, 146 U.S. 314, 1893.
[23] *Insurance Company v. Morse,* US Supreme Court, 87 U.S. 445, 1874, p.451.
[24] LANGBEIN, John. "Torture and Plea Bargaining", *University of Chicago Law Review,* vol.46, p.3-22, 1978, p.12-13; ALSCHULER, Albert. "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System", *University of Chicago Law Review,* vol.50, no.3, p.931-1050, 1983, p.932; BIBAS, Stephanos. "Plea Bargaining outside the Shadow of Trial", *Harvard Law Review*, vol.117, p.2464-2547, 2004; SCHULHOFER, Stephen. "Plea Bargaining as Disaster", *Yale Law Journal*, vol.101, no.8, p.1979-2009, 1979, p.1992; SCHULHOFER, Stephen. "A Wake-Up Call from the Plea-Bargaining Trenches", *Law & Social Inquiry,* vol.19, no.1, p.135-144, 1994; SCHULHOFER, Stephen. "Is Plea Bargaining Inevitable?", *Harvard Law Review,* vol.97, no.5, p.1037-1107, 1984.
[25] ALSCHULER, *supra* note 19, p.6.
[26] VOGEL, *supra* note 20, p.209.
[27] *Missouri v. Frye,* US Supreme Court, 132 S. Ct. 1399 (2012), 21 March 2012, p.1407.
[28] ALSCHULER, *supra* note 19, p.42; FEELEY, Malcolm. "Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining", *Israel Law Review,* vol.31, p.183-222, 1997, p.187-192.

crime rates, expansion of the substantive criminal law, and the professionalization and increasing bureaucratization of the police, prosecution and law firms threatened to implode the criminal system if most of the defendants were to be prosecuted in full trials[29].

Indeed, the view against negotiated waivers of procedural guarantees advanced by the US Supreme Court almost one hundred and fifty years ago in the case *Insurance Co. v. Morse* is disparaged by the US Supreme Court of today[30]. The latter has sanctioned plea-bargaining in several cases[31], especially *Brady v. United States*[32]. Accordingly, as said by Robert E. Scott and William J. Stuntz, in US, plea-bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system"[33] [emphasis in the original]. In *Lafler v. Cooper*, the US Supreme Court concluded that the American criminal system "is for the most part a system of pleas, not a system of trials"[34]. Although the US is undoubtedly the most extreme State in its reliance on plea-bargaining, the former is not alone in substantial use of such practice to dispose of cases. For example, in England and Wales, in 2017, 67% of all criminal convictions were obtained through guilty pleas[35].

While negotiated justice dominated the criminal judicial system in common law States, in civil law jurisdictions plea-bargaining was an unknown concept until the 1980s[36]. This practice was generally regarded as irreconcilable to the inquisitorial

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[29] ALSCHULER, *ibid*.; FEELEY, Malcolm. "Perspectives on Plea Bargaining", *Law & Society Review*, vol.13, p.199-209, 1979, p.201.

[30] ALSCHULER, *ibid*.

[31] *Class v. United States*, US Supreme Court, 583 US _ (2018), Case no. 16-424, 21 February 2018; *Lee v. United States*, US Supreme Court, 582 US _ (2017), Case no. 16-327, 23 June 2017; *Lafler v. Cooper*, US Supreme Court, 566 U.S. 156 (2012), Case no. 10-209, 21 March 2012; *Tollett v. Henderson*, US Supreme Court, 411 U.S. 258 (1973), Case no. 72-95, 17 April 1973; *Bordenkircher v. Hayes*, US Supreme Court, 434 U.S. 357 (1978), Case no. 76-1334, 18 January 1978; *Blackledge v. Allison*, US Supreme Court, 431 U.S. 63 (1977), Case no. 75-1693, 2 May 1977; *Santobello v. New York*, US Supreme Court, 404 U.S. 257 (1971), Case no. 70-98, 20 December 1971; *Parker v. North Carolina*, US Supreme Court, 397 U.S. 790 (1970), Case no. 268, 4 May 1970; *McMann v. Richardson*, US Supreme Court, 397 U.S. 759 (1970), Case no. 153, 4 May 1970.

[32] *Brady v. United States*, US Supreme Court, 397 U.S. 742 (1970), Case no. 270, 4 May 1970, p.751-752.

[33] SCOTT, Robert and STUNTZ, William. "Plea Bargaining as Contract", *Yale Law Journal*, vol.101, p.1909-1968, 1992, p.1912.

[34] *Lafler v. Cooper*, US Supreme Court, 566 U.S. 156 (2012), Case no. 10-209, 21 March 2012, p.170.

[35] "Criminal Court Statistics Quarterly, England and Wales, January to March 2018 (annual 2017)", Ministry of Justice, 28 June 2018, p.11. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720026/ccsq-bulletin-jan-mar-2018.pdf>. Access on: November 31, 2018.

[36] LANGER, Máximo. "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", *Harvard International Law Journal*, vol.45. no.1, p.1-64, 2004, p.21-22 [LANGER].

traditions of the civil law system[37], especially the well-established principle of mandatory prosecution and the obligation of trial judges to scrutinize the facts of the case independently from the parties[38]. Moreover, the simpler and more straightforward trial procedure in civil law jurisdictions, in comparison to the common law system, also made plea-bargaining less necessary[39].

However, World War II and the growth of dictatorial communist regimes during Cold War triggered a reaction in States with an inquisitorial criminal system[40]. The widespread abuses and persecutions by totalitarian regimes in that period faded the traditional strong reliance on state-heavy institutions in civil law jurisdictions, resulting in the weakening of the deference to public authority[41]. At the same time, concerns with fairness and human rights protection motivated democratic governments to reinforce and expand procedural safeguards, which have the potential to create more complicated, lengthier and costlier criminal trials[42].

As a result, over the past four decades, there has been a growing interest in trial waiver systems in civil law jurisdictions, in response to the rising number of complex criminal cases, heavier caseloads and the need to save resources[43]. Accordingly, States with the inquisitorial tradition have introduced modified forms of plea-bargaining into

[37] TURNER (2017), *supra* note 15, p.224.
[38] TURNER, Jenia Iontcheva. "Plea Bargaining", p.34-65, p.35. In POCAR, Fausto and CARTER, Linda (eds.). *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham: Edward Elgar Publishing, 2013 [TURNER (2013)].
[39] TURNER (2017), *supra* note 15, p.224; ALSCHULER, *supra* note 19, p.42.
[40] DAMAŠKA, Mirjan. "Negotiated Justice in International Criminal Courts", *Journal of International Criminal Justice*, vol.2, n.4, p.1018-1039, 2004, p.1023 [DAMAŠKA].
[41] *Ibid*.
[42] *Ibid*.
[43] TURNER (2013), *supra* note 38, p.35; LANGER, *supra* note 36, p.28; SCHARF, Michael. "Trading Justice for Efficiency: Plea Bargaining and International Tribunals", *Journal of International Criminal Justice*, vol.2, p.1070-1081, 2004, p.1071 [SCHARF]; MA, Yue. "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, Italy: A Comparative Perspective", *International Criminal Justice Review*, vol.12, p.22-52, 2002, p.24 [MA].

their criminal systems[44], such as Brazil[45], Italy[46], Germany[47], Japan[48], France[49], Israel[50], Russia[51], the Netherlands[52] and China[53]. In addition, the Council of Europe adopted in 1987, the Recommendation no. R (87) 18 concerning the Simplification of Criminal Justice, which asks the member States to introduce out-of-court settlements and simplified procedures to dispose of minor offenses[54].

The report entitled "The Disappearing Trial", published in 2017 by the non-governmental organization "Fair Trials", points out to a worldwide dramatic increase in the formal recognition and regulation of plea-bargaining[55]. The report indicates that since

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[44] TURNER (2013), *supra* note 38, p.35; GAROUPA, Nuno and STEPHEN, Frank H. "Why Plea-Bargaining Fails to Achieve Results in So Many Criminal Justice Systems: A New Framework for Assessment", *Maastricht Journal of European and Comparative Law,* vol.15, p.323-538, 2008, p.324.

[45] *Law n. 8,072 ("Law of the Henious Crimes"),* of July 25, 1990, art.8; *Law n. 9,807,* of July 13, 1999, arts.13-14; *Law n. 12,850,* of August 2, 2013, arts.4-7; CARVALHO, Natália Oliveira de. *A Delação Premiada no Brasil*, Rio de Janeiro: Lumen Juris, 2009; RODRÍGUEZ, Víctor Gabriel. *Delação Premiada: Limites Éticos ao Estado,* Rio de Janeiro: Forense, 2018; DIPP, Gilson. *A "Delação" ou Colaboração Premiada: uma Análise do Instituto pela Interpretação da Lei*, Brasília: Instituto Brasiliense de Direito Público – IDP, 2015; MEIRA, José Boanerges *et al.* "A Colaboração Premiada e Processo Penal Brasileiro: Uma Análise Crítica", *VirtuaJus,* vol.2, n.3, p.176-211, 2017.

[46] MA, *supra* note 43, p.39-43; MCCLEERY, Kyle. "Guilty Pleas and Plea Bargaining at the *Ad Hoc* Tribunals: Lessons from Civil Law Systems", *Journal of International Criminal Justice,* vol.14, p.1099-1120, 2016, p.1115-1116 [MCCLEERY]; MAFFEI, Stefano. "Negotiations on Evidence and Negotiations on Sentence: Adversarial Experiments in Italian Criminal Procedure", *Journal of International Criminal Justice*, vol.2, no.4, p.1050-1069, 2004; PIZZI, William and MARAFIOTI, Luca. "The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation", *Yale Journal of International Law,* vol.17, no.1, p.1-40, 1992, p.21-26.

[47] MCCLEERY, *ibid*., p.1112-1114; LEVENSON, Laurie. "Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper", *Loyola of Los Angeles Law Review*, vol.46, p.457-490, 2013, p.472-473 [LEVENSON]; RAUXLOH, Regina. "Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?", *Fordham International Law Journal,* vol.34, no.2, p.296-331, 2011; TURNER, Jenia Iontcheva. "Judicial Participation in Plea Negotiations: A Comparative View", *American Journal of Comparative Law,* vol.54, no.1, p.199-267, 2006, p.214-237; TURNER, Jenia Iontcheva. "Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons", *William & Mary Law Review,* vol.57, no.4, p.1549-1596, 2016; SWENSON, Thomas. "The German 'Plea Bargaining' Debate", *Pace International Law Review,* vol.7, no.2, p.373-429, 1995. For an evaluation of the German legal system before the introduction of plea-bargaining, cf.: LANGBEIN, John. "Land Without Plea Bargaining: How the Germans Do It", *Michigan Law Review,* vol.78, p.204-225, 1979.

[48] LEVENSON, *ibid*., p.473-475; MA, *supra* note 43, p.31-35.

[49] MCCLEERY, *supra* note 46, p.1114; FRASE, Richard. "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?", *California Law Review,* vol.78, no.3, p.539-683, 1990, p.628-647.

[50] HARNON, Eliahu. "Plea-Bargaining in Israel - The Proper Functions of the Prosecution and the Court and the Role of the Victim", *Israel Law Review,* vol.31, p.245-285, 1997.

[51] LEVENSON, *supra* note 47, p.473.

[52] MCCLEERY, *supra* note 46, p.1116; SWART, Bert. "Settling Criminal Cases Without a Trial", *Israel Law Review,* vol.31, p.223-244, 1997, p.225-238.

[53] LEVENSON, *supra* note 47, p.475-476.

[54] *Recommendation no. R (87) 18 of the Committee of Ministers to Member States concerning the Simplification of Criminal Justice,* adopted by the Committee of Ministers at the 410th Meeting of the Ministers' Deputies, Council of Europe, 17 September 1987, p.3-4.

[55] *The Disappearing Trial: Towards a Rights-Based Approach to Trial Waiver Systems*, Fair Trials, 2017, p.23. Available at: <https://www.fairtrials.org/wp-content/uploads/2017/12/Report-The-Disappearing-Trial.pdf>. Access on: November 31, 2018.

1990, the existence of trial waiver systems worldwide has increased nearly 300%[56]. In several States, the use of plea-bargaining skyrocketed in just a few years[57]. In Georgia, for example, 12.7% of criminal cases were resolved via plea deals in 2005, which ballooned to 87.8% in 2012[58]. In Russia, the use of plea-bargaining increased from 37% in 2008 to 64% six years later[59]. In Colombia, approximately 12% of all criminal cases were disposed through plea-bargaining in 2008, which increased to 35% in 2014[60]. The report also indicates that nowadays, the percentage of cases resolved via trial waiver procedures in Australia is 61.1%; in Bosnia and Herzegovina is 41%; in Estonia is 64%; in Poland is 43%; and in Spain is 45.7%[61].

However, the report discloses that in some States where plea-bargaining has been officially introduced, this practice failed to dominate the criminal system[62]. For instance, the percentage of cases disposed via trial waiver mechanisms in Croatia is 4.6%; in Serbia is 4%; in Czech Republic is 0.07%; in Hungary is 0.23%; in India is 5.3%; in Italy is 4%; and in Ukraine is 0.01%[63].

Even though plea negotiations are now a global legal phenomenon[64], a model of plea-bargaining as aggressive as the US's was not transferred to civil law States[65]. The type of bargained justice introduced in inquisitorial jurisdictions has been more restrained because such practice can clash with still standing – albeit significantly weakened – bedrock assumptions of civil law criminal procedure[66]. For instance, in order to preserve the control of the bench over the criminal trial, judges normally have access to the entire investigative file of the case and can ask for additional evidence if they have doubts about the agreed-upon facts in the plea deal[67].

Moreover, in inquisitorial jurisdictions, judges retain greater authority to oversee plea agreements, as they are often involved in the negotiations between the parties and

[56] *Ibid.*
[57] *Ibid.*, p.32.
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*, p.34.
[61] *Ibid.*
[62] *Ibid.*, p.32.
[63] *Ibid.*, p.34.
[64] TURNER, Jenia Iontcheva and WEIGEND, Thomas. "Negotiated Justice", p.1375-1413, p.1376. In SLUITER, Göran *et al.* (eds.). *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press, 2013 [TURNER and WEIGEND].
[65] TURNER (2017), *supra* note 15, p.224.
[66] DAMAŠKA, *supra* note 40, p.1024.
[67] TURNER (2013), *supra* note 38, p.39.

can evaluate and edit the terms of the deals before they become final[68]. Among other differences[69], legislators in civil law jurisdictions are not willing to permit plea-bargaining over the most serious offenses[70]. Therefore, States with an inquisitorial legal tradition continue to treat plea-bargaining with greater skepticism than their common law counterparts do[71].

The expansion of plea negotiations worldwide indicates that the historical clear frontier between civil law and common law criminal procedures has become blurred in the past few decades[72]. As international criminal procedure is the merger of the civil law and common law models[73], it is not surprising that plea-bargaining also reached international criminal courts in the end of the twentieth century[74]. In a historical perspective, the charters of the International Military Tribunals of Nuremberg[75] and Tokyo[76], both created right after the end of World War II, had no reference to plea agreements[77], but both charters provided the defendants with the opportunity to plead guilty or not guilty at the commencement of the trial[78]. However, none of the twenty-four defendants in Nuremberg nor any of the twenty-eight accused in Tokyo pleaded guilty,

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[68] TURNER (2017), *supra* note 15, p.224-225; LEVENSON, *supra* note 47, p.472.
[69] TURNER (2017), *ibid*.; LEVENSON, *ibid*., p.472-476; DAMAŠKA, *supra* note 40, p.1024-1027.
[70] DAMAŠKA, *ibid*., p.1025; TURNER and WEIGEND, *supra* note 64, p.1376.
[71] TURNER (2013), *supra* note 38, p.40; TURNER (2017), *supra* note 15, p.225-226.
[72] DAMAŠKA, *supra* note 40, p.1019.
[73] CASSESE *et al.*, *supra* note 12, p.6-7; DELMAS-MARTY, Mireille. "A Influência do Direito Comparado sobre a Atividade dos Tribunais Penais Internacionais", p.151-150, p.109-110. In CASSESE, Antonio and DELMAS-MARTY, Mireille (eds.). *Crimes Internacionais e Jurisdições Internacionais*, Barueri: Manole, 2004.
[74] TURNER and WEIGEND, *supra* note 64, p.1376; TURNER (2017), *supra* note 15, p.226.
[75] For more information on the Nuremberg Trials, cf.: GROSS, Leo. "The Punishment of War Criminals: The Nuremberg Trial (First Part)", *Netherlands International Law Review*, vol.2, no.4, p.356-374, 1955; GROSS, Leo. "The Punishment of War Criminals: The Nuremberg Trial (Second part)", *Netherlands International Law Review*, vol.3, no.1, p.10-24, 1956; *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*, US Department of State, Publication no. 3080, International Organization and Conference Series II, 1949; KRAUS, Herbert. "The Nuremberg Trial of the Major War Criminals: Reflections after Seventeen Years", *DePaul Law Review*, vol.13, no.2, p.233-147, 1964; GONÇALVES, Joanisval Brito. *Tribunal de Nuremberg 1945-1946: a Gênese de uma Nova Ordem no Direito Internacional*, Rio de Janeiro: Renovar, 2001; TOMUSCHAT, Christian. "The Legacy of Nuremberg", *Journal of International Criminal Justice*, vol.4, p.830-844, 2006 [TOMUSCHAT].
[76] For more information on the Tokyo Trials, cf.: BOISTER, Neil and CRYER, Robert. *The Tokyo International Military Tribunal: A Reappraisal*, Oxford: Oxford University Press, 2008; TANAKA, Yuki; McCORMACK, Tim and SIMPSON, Gerry (eds.). *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Leiden: Martinus Nijhoff Publishers, 2010; WANHONG, Zhang. "From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (on the Sixtieth Anniversary of the Nuremberg Trials)", *Cardozo Law Review*, vol.27, no.4, p.1673-1692, 2006; SELLARS, Kirsten. "Imperfect Justice at Nuremberg and Tokyo", *European Journal of International Law*, vol.21, no.4, p.1085-1102, 2010.
[77] TURNER and WEIGEND, *supra* note 64, p.1377.
[78] *Charter of the International Military Tribunal*, London Conference, 8 August 1945, art.24(b) [*Charter of the Nuremberg Tribunal*]; *Charter of the International Military Tribunal for the Far East*, Supreme Commander for the Allied Powers General Douglas MacArthur, Tokyo, 26 April 1946, art.15(b).

and there is no record of attempts of sentence or charge bargaining by the prosecutors[79]. In fact, Albert Speer entered a plea of not guilty before the Nuremberg Tribunal, but eventually admitted his involvement in the Nazi system of slave labor[80]. There is no indication that this particular admission was the result of plea negotiations and his lenient sentence of 20 years' imprisonment was based on other mitigating factors[81].

Although the Nuremberg and Tokyo Tribunals had no guilty plea nor plea agreements, in the end of the last century and throughout the current one, the gravest crimes, such as genocide, crimes against humanity and war crimes, have been disposed via plea-bargaining in international and hybrid criminal tribunals[82]. This fact gave rise to serious debate in the academic literature[83]. Despite strong controversy, all international and hybrid criminal courts, with the exception of the Extraordinary Chambers in the Courts of Cambodia[84] and the Extraordinary African Chambers[85], provide for the possibility of plea negotiations[86]. However, the Regulation 64 Panels in the Courts of Kosovo and the Special Court for Sierra Leone finished their activities in 2008 and 2013

[79] TURNER and WEIGEND, *supra* note 64, p.1377.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*., p.1376.
[83] *Ibid*.; TURNER (2013), *supra* note 38, p.41.
[84] *The Prosecutor v. Kaing Guek Eav alias Duch*, Judgment, ECCC, Trial Chamber, Case no. 001/18-07-2007/ECCC/TC, 26 July 2010, paras.48-49; *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, ECCC, NS/RKM/1004/006, 27 October 2004; *Internal Rules (Rev. 9) as revised on 16 January 2015*, ECCC, 12 June 2007.
[85] *The Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers*, 22 August 2012. Reprinted in *International Legal Materials*, vol.52, no.4, p.1020-1036, 2013.
[86] *ICC Rome Statute*, *supra* note 9, art.65(5); *Rules of Procedure and Evidence of the International Criminal Court*, Official Records of the Assembly of States Parties to the Rome Statute, First Session, New York, 3-10 September 2002, ICC-ASP/1/3 and Corr.1, part II.A., rule 139; *Rules of Procedure and Evidence as amended on 10 July 2015*, International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.50, 11 February 1994, rules 62*bis* and 62*ter* [*Rules of Procedure and Evidence of the ICTY*]; *Rules of Procedure and Evidence as amended on 13 May 2015*, International Criminal Tribunal for Rwanda, UNDoc.ITR/3/REV.1, 29 June 1995, rules 62(B) and 62*bis* [*Rules of Procedure and Evidence of the ICTR*]; *Rules of Procedure and Evidence as corrected on 3 April 2014*, Special Tribunal for Lebanon, STL-BD-2009-01-Rev.6-Corr.1, 20 March 2009, rules 99 and 100; *Rules of Procedure and Evidence as amended on 18 April 2016*, Mechanism for International Criminal Tribunals, MICT/1/Rev., 8 June 2012, rules 64(C) and 65; *Rules of Procedure and Evidence as amended on 28 May 2010*, Special Court for Sierra Leone, 16 January 2002, rule 62; *United Nations Transitional Administration in East Timor (UNTAET) Regulation no. 2000/30 on Transitional Rules of Criminal Procedure*, UNDoc.UNTAET/REG/2000/30, 25 September 2000, rule 29(A); *Criminal Procedure Code of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina no. 65/18, art.231. Available at: <http://www.sudbih.gov.ba/app_dev.php/stranica/82/pregled>. Access on: December 1, 2018; *Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court as revised on 29 May 2017*, KSC-BD-03/Rev1/2017/1 of 127, 17 March 2017, rules 93 and 94; *Law on Criminal Proceedings of Serbia*, Official Gazette no. 26/1986, art.323.

respectively, with no guilty-plea case. In addition, the Special Tribunal for Lebanon, the International Residual Mechanism for Criminal Tribunals and the Kosovo Specialist Chambers, created in 2009, 2010 and 2015 respectively, have yet to resolve a case through plea-bargaining. Although the Special Panels in East Timor[87] and the Court of Bosnia and Herzegovina[88], both hybrid courts, disposed of several cases through plea-bargaining, the two international criminal tribunals that had applied this practice extensively – the ICTY and the ICTR – received no admission of guilt nor plea agreements in their last ten and six years of existence respectfully (cf. Annex I). Finally, the ICC had only one guilty-plea case since its establishment in 2002[89].

[87] The Special Panels in East Timor had the following guilty-plea cases, *inter alia: The Prosecutor v. Agustinho Atolan alias Quelo Mauno,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 312003, 9 June 2003; *The Prosecutor v. João Fernandez,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 01/00.C.G.2000, 25 January 2000; *The Prosecutor v. Sabino Gouveia Leite,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 04b/2001, 7 December 2002; *The Prosecutor v. Anastacio Martins and Domingos Goncalves,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 11/2001, 13 November 2003; *The Prosecutor v. Lino Beno,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 4b/2003, 16 November 2004; *The Prosecutor v. Jose Cardoso alias Mouzinho,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 04c/2001, 5 April 2003; *The Prosecutor v. Agostinho Cloe, Aghostinho Cab, Lazarus Fuli and Antonio Lelan,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 4/2003, 16 November 2004; *The Prosecutor v. Abilio Mendes Correia,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 19/2001, 9 March 2004; *The Prosecutor v. João Franca da Silva alias Johni Franca,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 04a/2001, 5 December 2002; *The Prosecutor v. Lino de Carvalho,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 10/2001, 18 March 2004; *The Prosecutor v. Marcurious José de Deus alias Marcurious Malik/Marley,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 13/2001, 18 April 2002; *The Prosecutor v. Joanico Gusmão,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 07/C.G./2003, 14 April 2004; *The Prosecutor v. Miguel da Silva alias Miguel Mau,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 08/2003, 23 February 2004; *The Prosecutor v. Domingos Metan,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 4c/2003, 16 November 2004; *The Prosecutor v. Inacio Olivera, Gilberto Fernandes and Jose da Costa,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 12/2002, 23 February 2004; *The Prosecutor v. Francisco Pedro alias Geger*, Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 1/2001, 14 April 2005; *The Prosecutor v. Benjamin Sarmento & Romeiro Tilman,* Judgment, Special Panels of the Dili District Court in East Timor, Trial Chamber, Case no. 18/2001, 16 July 2003.

[88] The Court of Bosnia and Herzegovina had the following guilty-plea cases, *inter alia*: *The Prosecutor v. Anić Miroslav,* Judgment, Court of Bosnia and Herzegovina, Section I, Case no. S1-1-K-005596-11-KrI, 31 May 2011; *The Prosecutor v. Damir Ivanković, a.k.a. "Dado",* Judgment, Court of Bosnia and Herzegovina, Section I, Case no. X-KR-08/549-1, 2 July 2009; *The Prosecutor v. Paško Ljubičić,* Judgment, Court of Bosnia and Herzegovina, Section I, Case no. X-KR-06/241, 29 April 2008; *The Prosecutor v. Zečević Saša,* Judgment, Court of Bosnia and Herzegovina, Section I, Case no. S1-1-K-013227-13-Krž, 28 June 2012; *The Prosecutor v. Đurić Gordan,* Judgment, Court of Bosnia and Herzegovina, Section I, Case no. X-KR-08/549-2, 10 September 2009; *The Prosecutor v. Četić Ljubiša,* Judgment, Court of Bosnia and Herzegovina, Section I, Case no. S1-1-K-009135-12-Krž, 9 April 2012.

[89] *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Judgment, ICC, Trial Chamber VIII, Case no. ICC-01/12-01/15, 27 September 2016 [*The Prosecutor v. Ahmad Al Faqi Al Mahdi*].

The thesis examines the experience of plea-bargaining in the three international criminal courts with guilty-plea cases: the ICTY, ICTR and ICC. By looking back at the practice of these three courts, this research aims to identify trends in those particular cases in order to ensure a minimal level of legal certainty to defendants, defense lawyers and prosecutors in the context of future plea negotiations and sentence determination in guilty-plea cases at the ICC. Accordingly, the thesis will evaluate the level of deference the trial and appeals chambers of those three tribunals have showed so far to the outcomes of plea negotiations and if the guilty pleas and cooperation with the Prosecution by the accused resulted in significant sentence leniency.

The hypothesis of this thesis is that the worldwide progressive move towards negotiated justice has reached international criminal tribunals. In addition, plea-bargaining generally does not contradict the main features of International Criminal Law. In fact, it is not only a desirable practice, but also a necessary one at these courts in order to foster judicial efficiency, save resources and facilitate investigations, as a means to tackle with the severe budgetary restrictions of these courts and their highly complex cases. However, a disruptive system of plea-bargaining – similar to the US's – is not desirable and, in fact, has not been introduced at the international fora due to the resistance by civil law States. Hence, aggressive bargains, with wide ranging factual modifications in the charges and extreme lenience in sentence recommendations, would not be accepted by the trial chambers. Finally, a basic premise of the thesis is that the invariable vulnerable position of the defendants in relation to the prosecutors, during plea negotiations, demand special attention by the trial judges to avoid arbitrariness and fair trial breaches.

In order to achieve the research goals and to test the hypothesis, the thesis adopts the normative and comparative approaches[90]. The normative methodology provided the basis from which the comparative approach was applied. Accordingly, in a normative perspective, the thesis investigated how the trial and appeals chambers of the ICTY, ICTR and ICC reacted to the two main outcomes of plea negotiations – namely, guilty pleas and cooperation with the Prosecution by the defendants – as factors for sentence mitigation.

The comparative research approach was used to draw parallels and contrasts between cases in order to evaluate whether the guilty plea and cooperation with the Prosecution effectively resulted in significant sentence leniency to the accused. The thesis compares the sentence imposed in guilty-plea cases with the verdicts in non-guilty-plea

[90] GUSTIN, Miracy Barbosa de Souza and DIAS, Maria Tereza Fonseca. *(Re)Pensando a Pesquisa Jurídica: Teoria e Prática*, 3rd ed., Belo Horizonte: Del Rey, 2010, p.21 and 28.

cases. It points out to certain similarities between the cases, such as the same rank and responsibilities of the defendants, similar charges, and the perpetration of crimes in the same territorial area or circumstances. These elements of connection make the comparison between guilty-plea and non-guilty-plea cases possible and, most importantly, reliable. An examination of plea-bargaining at the ICTY, ICTR and ICC from a comparative perspective shed a helpful and new light upon this topic. By analyzing the sentence determination in the cases concerned, it is possible to glean a picture of how the judges received plea-bargains between the Prosecution and the defendants.

The research was conducted by predominantly considering primary sources, especially the statutes, rules of procedure and evidence, judicial decisions and transcripts of sessions and hearings of the ICTY, ICTR and ICC. Secondary sources, on the other hand, were drawn from a wide pool. Specifically regarding academic literature, as scholars from the US have written about the issue of plea-bargaining more extensively, American jurists authored a sizeable amount of papers and books applied in the thesis.

The thesis is made up of four sections. Each of them assesses key matters central to understanding how plea-bargaining had affected sentence determination at the ICTY, ICTR and ICC and how it can affect future sentencing at the latter. As these three tribunals have the obligation to ensure fair trial guarantees to the defendants[91], Section 1 of the thesis focuses on plea-bargaining through the lens of human rights. First, it summarizes the cases of the UNHRC and the ECtHR on plea negotiations. Second, it evaluates the four conditions for the validity of guilty pleas, namely voluntariness; knowledge by the defendant of all factual and legal circumstances of the case; lack of equivocation in the plea; and factual basis to corroborate the conviction.

Section 2 analyzes the practice of sentence bargaining and charge bargaining at the ICTY. It identifies the reasons for the introduction of plea negotiations in that Tribunal and reviews its multiple guilty-plea cases in order to identify trends and trend shifts on how the trial chambers reacted to the plea agreements. Finally, the second section addresses the motives for the lack of guilty-plea cases at the ICTY in its final ten years. Section 3, on the other hand, assesses plea-bargaining at the ICTR. It evaluates all nine guilty-plea cases at the ICTR with the goal of identifying trends in the judgments. The

[91] *ICC Rome Statute*, *supra* note 9, art.67; *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, Resolution 827, 23 May 1993, art.21 [*ICTY Statute*]; *Statute of the International Tribunal for Rwanda*, UNDoc.S/RES/955, 8 November 1994, art.20 [*ICTR Statute*].

third section also analyzes why the ICTR had significantly less guilty-plea cases than its sibling at The Hague – the ICTY.

Section 4 focuses on the practice of plea-bargaining at the ICC. First, it describes the process of creation of this Tribunal. Second, it summarizes the *travaux préparatoires* of Article 65 of the Rome Statute, which regulates the procedure for guilty-plea cases at the ICC. Third, it evaluates the prosecution of Ahmad Al Faqi Al Mahdi, who is the first and so far only ICC defendant who pleaded guilty. The appraisal of the *Al Mahdi* case aims at confirming if the accused's admission of guilt and cooperation with the Prosecution resulted in significant sentence leniency in his favor. Section 4 also analyzes if the *Al Mahdi* case provides sufficient elements to anticipate the future of plea-bargaining at the ICC.

Finally, Annex I describes the main information of all guilty-plea cases at the ICTY, ICTR and ICC. It contains a table created by the author of the thesis with data collected from the decisions and official websites of these three tribunals.

1 PLEA-BARGAINING AND THE PROTECTION OF THE DEFENDANT'S RIGHTS

On November 21, 1945, the Chief American Prosecutor at the Nuremberg Tribunal Robert H. Jackson said in his opening statement of the trial of German war criminals: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well"[92]. This notorious quotation indicates that people accused of international crimes should not be treated as enemies or dangerous threats who must be destroyed or rendered impotent, but as fellow members of the world's normative community[93]. Accordingly, the trial of such criminals poses a herculean challenge to us as mankind: our ability to recognize that even those who have committed the most terrible crimes are bearers of undeniable human rights[94].

International criminal justice will achieve its purposes only if both victims and defendants have their rights equally secured in the course of proceedings[95]. In this sense, International Criminal Law and International Human Rights Law should be applied in a complementary manner, one reinforcing the other[96]. To this end, the normative procedure of international criminal courts expressly lists procedural guarantees applicable to the defendants[97].

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[92] *Opening Statement before the International Military Tribunal*, Trial of the Major War Criminals before the International Military Tribunal, vol.II, Proceedings: 11/14/1945-11/30/1945, 21 November 1945. Available at: <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>. Access on: December 8, 2018.

[93] RAMOS, André de Carvalho and MAHLKE, Helisane. "Artigos 66 e 67: Os Direitos do Acusado no Tribunal Penal Internacional", p.931-955, p.940-941. In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (eds.). *O Tribunal Penal Internacional: Comentários ao Estatuto de Roma*, Belo Horizonte: Del Rey, 2016.

[94] DUFF, Antony. "Authority and Responsibility in International Criminal Law", p.589-604, p.603. *In* BESSON, Samantha and TASIOULAS, John (eds.). *The Philosophy of International Law,* Oxford: Oxford University Press, 2010.

[95] *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Judgment, ICTY, Appeals Chamber, Case no. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para.9 [*Individual Opinion of Judge Cassese in the Erdemović case*]

[96] CANÇADO TRINDADE, Antônio Augusto. *El Ejercicio de la Función Judicial Internacional: Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte: Del Rey, 2013, p.195; CASSESE, Antonio. "A Influência da CEDH sobre a Atividade dos Tribunais Penais Internacionais", p.172-224. In CASSESE, Antonio and DELMAS-MARTY, Mireille (eds.). *Crimes Internacionais e Jurisdições Internacionais,* Barueri: Manole, 2004.

[97] *ICC Rome Statute, supra* note 9, art.67; *ICTY Statute*, *supra* note 91, art.21; *ICTR Statute*, *supra* note 91, art.20; *Statute of the Special Tribunal for Lebanon*, UNDoc.S/RES/1757, 23 January 2007, art.15; *Statute of the Special Court for Sierra Leone*, annexed to the Agreement between the United Nations and the Government of Sierra Leone, 16 January 2002, art.17; *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea ("ECCC Agreement")*, 6 June 2003, art.13.

This coordination and co-dependence between International Criminal Law and International Human Rights Law is provided for in article 21(3) of the Rome Statute[98]. When interpreting the meaning of this provision in the *Lubanga* case, the ICC Court of Appeals concluded that "human rights underpin the [Rome] Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights"[99]. In light of article 21(3), the ICC has applied international human rights instruments in order to substantiate several of its obligations towards the accused and the victims[100], such as the right to due process of law[101], access to effective remedy[102], reparations to victims[103] and presumption of innocent[104]. Other evidence of the coordination between International Criminal Law and International Human Rights Law is the existence of cases before the ECtHR in which defendants and witnesses of the ICTY

[98] Article 21(3) of the Rome Statute reads as follows: "The application and interpretation of law [by the ICC] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status". For an evaluation of this provision, cf.: SCHABAS, William. *The International Criminal Court: A Commentary on the Rome Statute*, Oxford: Oxford University Press, 2010, p.397-400 [SCHABAS (2010)]; DEGUZMAN, Margaret M. "Article 21: Applicable Law", p.932-948, p.947-948. In TRIFFTERER, Otto and AMBOS, Kai (eds.). *Rome Statute of the International Criminal Court: A Commentary*, Portland: Beck/Hart, 2016 [DEGUZMAN]; PELLET, Alain. "Applicable Law", p.1051-1084, p.1079-1082. In CASSESE, Antonio; GAETA, Paola; and JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court – A Commentary*, vol.II, Oxford: Oxford University Press, 2002; BAILEY, Stephen. "Article 21(3) of the Rome Statute: A Plea for Clarity", *International Criminal Law Review*, vol.14, p. 513-550, 2014; SHEPPARD, Daniel. "The International Criminal Court and 'Internationally Recognized Human Rights': Understanding Article 21(3) of the Rome Statute", *International Criminal Law Review*, vol.10, p.43-71, 2010.

[99] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC, Appeals Chamber, Case n. ICC-01/04-01/06-772, 14 December 2006, para.37.

[100] DEGUZMAN, *supra* note 98, p.947-948.

[101] *The Prosecutor v. Laurent Gbagbo*, Decision on the Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129), ICC, Pre-Trial Chamber I, Case n. ICC-02/11-01/11-212, 15 August 2012, paras.89-92.

[102] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on an Amicus Curiae application and on the '*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile'* (articles 68 and 93(7) of the Statute), ICC, Trial Chamber II, Case n. ICC-01/04-01/07-3003-tENG, 15 June 2011, para.70.

[103] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC, Trial Chamber II, Case n. ICC-01/04-01/06-1119, 18 January 2008, paras.34-37.

[104] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Request for Disqualification of the Prosecutor, ICC, Appeals Chamber, Case n. ICC-01/11-01/11-175, 12 June 2012, paras.24-28.

and ICC, through lawsuits against States, have tried to challenge some actions of these courts in light of human rights arguments[105].

Protection of the rights of the accused is an obligation also applicable during plea negotiations[106]. Hence, the procedural "short-cut" that a plea agreement entails – by avoiding a lengthy trial – cannot "curtail the rights of the accused or, more generally, prove detrimental to the general principle of fair trial"[107]. Accordingly, the thesis will address the decisions of international human rights bodies dealing with plea-bargaining and, subsequently, the criteria for valid guilty pleas.

1.1 Plea-bargaining in the case-law of international human rights institutions

The connection between plea-bargaining and human rights becomes clear after considering the existence of decisions by international human rights institutions on plea negotiations. As there is no case before the IACtHR and the African Court on Human and Peoples' Rights on plea-bargaining, the thesis will focus exclusively on the UNHRC and the ECtHR.

Before the UNHRC, one should consider the case *Cox v. Canada*, decided in 1994[108]. The applicant, Keith Cox, was a citizen of US arrested in Laval, Canada, for theft[109]. While in custody, Canadian authorities received a request for his extradition from the US[110]. Kox was wanted in Pennsylvania on two charges of murder[111]. If convicted, he could face the death penalty, although the two other accomplices in the case were tried and sentenced to life imprisonment after pleading guilty[112]. Canada argued, *inter alia*, that the extradition was lawful because Cox could easily evade the death penalty by pleading guilty in Pennsylvania[113]. In response, Cox sustained "that the use of plea

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[105] *Slobodan Milošević v. the Netherlands,* Application n. 77631/01, ECtHR, Decision as to the Admissibility of the Application, 19 March 2002; *Naletilić v. Croatia,* Application n. 51891/99, ECtHR, Decision as to the Admissibility of the Application, 4 May 2000; *Galić v. the Netherlands,* Application n. 22617/07, ECtHR, Decision as to the Admissibility of the Application, 9 June 2009; *Blagojević v. the Netherlands,* Application n. 49032/07, ECtHR, Decision as to the Admissibility of the Application, 9 June 2009; *Djokaba Lambi Longa v. the Netherlands,* Application n. 33917/12, ECtHR, Decision as to the Admissibility of the Application, 9 October 2012. The ECtHR found all these petitions inadmissible.
[106] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.9.
[107] *Ibid.*
[108] *Cox v. Canada,* Communication no. 539/1993, UNDoc.CCPR/C/52/D/539/19930, 9 December 1994.
[109] *Ibid*., para.1.
[110] *Ibid*., para.2(1).
[111] *Ibid*.
[112] *Ibid*.
[113] *Ibid*., para.12(4).

bargaining in a death penalty case meets the definition of torture"[114]. He stated that the only way to avoid the physical suffering related to capital punishment in the case was to plead guilty[115].

The UNHRC, without a clear reasoning for its conclusion, decided that plea-bargaining in itself does not violate the procedural rights of the accused, even in the context of death penalty[116]. Accordingly, it determined that Cox's extradition to the US did not contradict the International Covenant on Civil and Political Rights[117].

The second case dealing with plea-bargaining before the UNHRC is *Hicks v. Australia*, decided on February 19, 2016[118]. The applicant, David Hicks, was an Australian national arrested in Afghanistan in November 2001, by the US[119]. Three months later, he was transferred to the American Naval Base at Guantanamo Bay, Cuba, where he was detained until 2007[120]. Hicks claimed that he was tortured and detained without judicial review for years[121].

Following a plea agreement in whose negotiation Australia participated directly, Hicks pleaded guilty to providing material support for terrorism and was sentenced by an American military commission on March 31, 2007, to seven years' imprisonment[122]. Pursuant to a prisoner transfer agreement, he was transferred from Guantanamo to Australia on May 20, 2007, where he served the remaining seven months of his sentence[123]. Hicks was released from prison on December 29, 2007 and was made subject to a control order for a year following his release[124].

The UNHRC found Australia liable for its part in the negotiation of the plea agreement[125]. It noted that the only option Hicks had to escape the human rights violations to which he was subjected at Guantanamo Bay was to accept the plea deal that was offered

[114] *Ibid*., para.14(2).
[115] *Ibid*.
[116] *Ibid*., para.16(6). The decision stated the following: "The Committee notes that the author claims that the plea bargaining procedures, by which capital punishment could be avoided if he were to plead guilty, further violates his rights under the Covenant. The Committee finds this not to be so in the context of the criminal justice system in Pennsylvania".
[117] *Ibid*., para.18.
[118] *Hicks v. Australia*, Communication no. 2005/2010, UNDoc.CCPR/C/115/D/2005/2010, 19 February 2016.
[119] *Ibid*., paras.1(1) and 1(2).
[120] *Ibid*., para.1(2).
[121] *Ibid*., paras.2(7) - 2(9).
[122] *Ibid*., para.1(2).
[123] *Ibid*.
[124] *Ibid*.
[125] *Ibid*., para.4(10).

to him[126]. In light of this scenario, the Committee determined that was incumbent on Australia to prove that it had done everything possible to ensure that the terms of the arrangement reached with the US did not cause it to violate the International Covenant on Civil and Political Rights[127]. As Australia failed to provide such evidence, the UNHRC concluded that it breached Hicks's right to liberty by enforcing the remainder of the sentence imposed under the plea agreement[128].

Although the case *Luiz Inácio Lula da Silva ("Lula") v. Brazil* is still pending before the UNHRC, the communication initiating the proceedings raises some relevant questions regarding plea-bargaining[129]. The main issue is the use of pre-trial detention in order to obtain confessions from suspects through plea deals[130]. Lula argues that Brazilian law allows a judge in the investigative phase to order the pre-trial arrest of a suspect for an indefinite time until he accepts to confess and negotiate a plea agreement with the prosecutors[131]. Under these circunstances, the suspect is induced to engage in plea negotiations in exchange for his release from prison and lighter sentences[132]. Moreover, the same judge who approves the plea deal will then turn around to become the trial judge, convicting the defendant and deciding on the sentence[133]. According to Lula, these

[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*.
[129] *Luiz Inácio Lula da Silva ("Lula") v. Brazil,* UN Human Rights Committee, Communication under the Optional Protocol to the International Covenant on Civil and Political Rights, 28 July 2016, para.6 [*Luiz Inácio Lula da Silva ("Lula") v. Brazil*].
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.

Brazilian plea-bargaining practices are contrary to articles 9[134] and 14(1)[135] of the International Covenant on Civil and Political Rights[136].

The cases of *Cox* and *Hicks* reveal that the UNHRC has not directly considered a challenge to plea-barganning per se. The only international human rights body that have done so is the ECtHR, in the case *Natsvlishvili and Togonidze v. Georgia*[137]. The applicants were two Georgian nationals – Amiran Natsvlishvili and Rusudan Togonidze – who came before the Court arguing that their prosecutors in Georgia abused of the process in their plea-negotiations by unlawfully depriving them of the right to petition before a competent judicial authority[138]. Dismissing the applicants' pleadings, the ECtHR concluded that "there cannot be anything improper in the process of charge or sentence bargaining in itself"[139]. It also praised the benefits of this practice, such as the speedy adjudication of criminal cases; reduction of the workload of courts, prosecutors and lawyers; strengthening the fight against corruption and organized crime; and reduction of the number of sentences imposed and, as a result, the number of prisoners[140].

[134] Article 9 of the International Covenant on Civil and Political Rights reads as follow: "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". Cf.: *International Covenant on Civil and Political Rights*, New York, 999 UNTS 171, 16 December 1966, art.9.

[135] Article 14(1) of the International Covenant on Civil and Political Rights reads as follow: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children". Cf.: *Ibid*., art.14(1).

[136] *Luiz Inácio Lula da Silva ("Lula") v. Brazil*, *supra* note 129, paras.45-58.

[137] *Natsvlishvili and Togonidze v. Georgia*, Application n. 9043/05, ECtHR, Judgment, 29 April 2014.

[138] *Ibid*., para.73.

[139] *Ibid*., para.87.

[140] *Ibid*.

After acknowledging that plea-bargaining entails the waiver of a number of procedural rights by the accused[141], the ECtHR concluded that this is not a problem in itself since people are allowed to waive these safeguards as an exercise of their own free will[142]. However, the Court emphasized that "it is also a cornerstone principle that any waiver of procedural rights must always be established […] in an unequivocal manner and be attended by minimum safeguards commensurate with its importance"[143]. The ECtHR added that such waiver "must not run counter to any important public interest"[144]. There are numerous decisions in which the Court reiterated the legality of waivers of procedural rights by the defendants[145].

In order to ensure that the demands for expeditiousness and efficiency at international criminal courts do not hamper the procedural guarantees of the accused, there are very stringent conditions that any trial chamber has to check before accepting a guilty plea[146]. The next part of the thesis will address these requirements.

1.2 Conditions for the validity of guilty pleas

A trial chamber shall accept a plea of guilty only if the following four criteria are fulfilled: (**1.2.1**) the plea must be voluntary; (**1.2.2**) informed; (**1.2.3**) unequivocal; and (**1.2.4**) based on sufficient facts.

1.2.1 The guilty plea must be voluntary

[141] *Ibid*., para.88. Plea agreements can entail the waiver of the right to appeal, right to a full trial, right to present a legal defense, right to offer the testimony of witnesses, right to introduce evidence, right not to testify or to confess guilt, right to remain silent, etc.
[142] *Ibid*.
[143] The ECtHR ruled "that the [...] decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review". Cf.: *Ibid*., paras.88 and 92.
[144] *Ibid*., para.88.
[145] *Scoppola v. Italy (no. 2),* Application n. 10249/03, ECtHR, Judgment, 17 September 2009, para.135; *Poitrimol v. France* Application n. 14032/88, ECtHR, Judgment, 23 November 1993, para.31; *Håkansson and Sturesson v. Sweeden*, Application n. 11855/85, ECtHR, Judgment, 21 February 1990, para.66; *Sejdovic v. Italy*, Application n. 56581/00, ECtHR, Judgment, 1 March 2006, para.86; *Le Compte, Van Leuven e De Meyere v. Belgium*, Application n. 6878/75 e 7238/75, ECtHR, Judgment, 23 June 1981, para.59; *H. v. Belgium*, Application n. 8950/80, ECtHR, Judgment, 30 November 1987, para.54; *Hermi v. Italy*, Application n. 18114/02, ECtHR, Judgment, 18 October 2006, para.73.
[146] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.9.

A guilty plea must be voluntary in order to be accepted[147]. A voluntary admission of guilt is the one that is not coerced, rather arrived at by the free will of the defendant[148]. This criterion prohibits any plea reached after "improper threats, bullying or any improper inducement to plead guilty"[149]. The voluntariness requirement implies two sub-criteria: (i) the accused must be mentally competent to understand the consequences of his actions when pleading guilty[150]; and (ii) the admission of guilt must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence[151]. Therefore, a plea of guilty must be "a conscious volitional decision of the accused"[152]. In order to verify the voluntariness of an admission of guilt, the trial chamber shall inquire into the reasons for the change of plea and, if there is a plea agreement, the conditions under which this deal was negotiated and reached[153].

Trial judges shall strike a plea of guilty for being non-voluntary if there was a serious question as to the accused's mental state at the time of entering the plea[154]. For instance, the High Court of Hong Kong, in *HKSAR v Meijne Camilo Arturo,* vacated an admission of guilt to indecent assault because the defendant pleaded guilty while under medication for the manic phase of Bipolar Disorder[155]. In *R. v. Abotossaway*, the Court of Appeal for Ontario struck a plea of guilty because the applicant was depressed at the relevant time, having spent a considerable time in jail[156]. In *R. v. Hansen*, the Manitoba Court of Appeal allowed the withdrawal of a guilty plea and a new trial was ordered because the accused was in a disturbed state of mind at the time of pleading and was under the false impression that if he did not plead guilty, the Prosecution would proceed on a harsher charge[157]. In *R. v. Lewis*, the Court of Appeal for Saskatchewan revoked the guilty

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[147] *ICC Rome Statute*, *supra* note 9, art.65(1)(b); *Rules of Procedure and Evidence of the ICTY*, *supra* note 86, rule 62*bis*(i); *Rules of Procedure and Evidence of the ICTR*, *supra* note 86, rule 62(B)(i).
[148] *R. v. Symonds,* Nova Scotia Court of Appeal, Canada, 2018 NSCA 34, Case no. CAC 464147, 24 April 2018, para.20 [*R. v. Symonds*].
[149] *Ibid.*; BOAS *et al*., *supra* note 18, p.216.
[150] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.5.
[151] *Ibid.*
[152] *R. v. Acorn,* Court of Appeal for Ontario, Canada, 1996 CanLII 536, Case no. c10797, 3 October 1996, para.3.
[153] *The Prosecutor v. Momir Nikolić ("Srebrenica"),* Judgment, ICTY, Trial Chamber I, Case no. IT-02-60/1-S, 2 December 2003, para.52 [*The Prosecutor v. Momir Nikolić*].
[154] *R. v. Murphy,* Nova Scotia Court of Appeal, Canada, N.S.J. No.41, Case no. 107138, 2 February 1995, para.10.
[155] *HKSAR v. Meijne Camilo Arturo,* High Court of the Hong Kong Special Administrative Region, Court of First Instance, Magistracy Appeal no. 274 of 2012, 30 January 2015, para.20.
[156] *R. v. Abotossaway*, Court of Appeal for Ontario, Canada, 189 OAC 322, Case no. C40660, 23 August 2004, para.3.
[157] *Regina v. Hansen,* Manitoba Court of Appeal, Canada, 37 CCC (2d) 371, 7 September 1977, p.371.

plea because it was entered in a context of significant confusion in the court record and the accused had recently been remanded for mental health issues[158].

As for the relation between voluntariness and plea-bargaining, Antonio Cassese believed that any negotiation between the accused and the Prosecution and any plea agreement coming from such consultations render the subsequent guilty plea null and void for not being voluntary[159]. The Italian jurist argued that the entering of a guilty plea in exchange for a favorable sentence recommendation or the dropping of certain charges by the prosecutors does not reflect the defendant's free will[160]. However, the view of the thesis's author, as corroborated by the widespread international judicial practice[161], is that the existence of plea-bargaining does not automatically render a plea inacceptable[162]. In a lawful plea negotiation, the defendant is not coerced to participate in discussions with the Prosecution; he willingly engages in such talks and both parties agree, in writing, with the outcomes of these talks[163]. A mere exchange of pledges during plea negotiations is not coercive or oppressive conduct that unfairly deprives the accused of his free will in the decision to waive the right to a full trial[164]. Moreover, the defendant's subsequent unfulfilled hope for a lighter sentence in exchange of his plea of guilty does not qualify as improper inducement[165].

Furthermore, a guilty plea may be found to be involuntary when a defendant was induced or motivated to plead guilty on the basis of inaccurate legal advice[166]. In the case of *R. v. Venne*, the defendant pleaded guilty after her lawyer assured her that she would not receive a jail sentence if she admitted the crime[167]. Consequently, she would be able

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[158] *R. v Lewis,* Court of Appeal for Saskatchewan, Canada, 399 Sask R 180, Case no. CACR2144, paras.20 and 27.
[159] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.10.
[160] On this regard, Cassese stated the following: "both the [ICTY's] Statute and the Rules deliberately do not make provision for plea bargaining - or, at least, of any endorsement or acknowledgement by the Chambers of out-of-court plea bargaining. This means, among other things, that the framers of the Statute and the Rules aimed at averting those distortions of the free will of the accused which may be linked to plea". Cf. *Ibid*.
[161] Cf. sections 2.2, 3.2 and 4.3 of the present thesis.
[162] *R. v. Symonds*, *supra* note 148, para.51.
[163] *R. v. Barwick,* Superior Court of Justice of Ontario, Canada, 2005 CanLII 46741 (ON SC), 14 December 2005, para.35 [*R. v. Barwick*]; *R. v. Moser*, Ontario Supreme Court, Canada, 163 CCC (3d) 286, Case no. CRIMJ(P) 5127/00, 1 February 2002, para.33; *Regina v. Hector,* Court of Appeal for Ontario, Canada, 146 CCC (3d) 81, Case no. C30124, 11 May 2000, p.88-89.
[164] *R. v. Barwick, ibid*.
[165] *The Prosecutor v. Jean Kambanda*, Judgment, ICTR, Appeals Chamber, Case no. ICTR 97-23-A, 19 October 2000, para.63 [*The Prosecutor v. Jean Kambanda – Appeal*].
[166] *R. v. Symonds, supra* note 148, para.52.
[167] *R. v Venne,* Queen's Bench for Saskatchewan, Canada, 2015 SKQB 252 (CanLII), Case no. NJ 18 of 2014, 24 August 2015, para.8.

to continue to support her children and her mother[168]. The judges eventually quashed the admission of guilt because the lawyer's assurances that the accused would receive a non-custodial sentence was incorrect[169]. Likewise, in *R. v. Al-Diasty*, the Court of Appeal for Ontario allowed the defendant to withdraw his guilty plea and ordered a re-trial because the accused pleaded guilty to six counts of fraud based on an incorrect assurance from his counsel that he would receive no prison time[170].

As for the element of threat or inducement, one should note that almost invariably, criminal trials are stressful, creating feelings of pressure and emotional anxiety in the accused[171]. The mere presence of such emotions does not render a guilty plea null and void[172]. This anguish will invalidate the plea only if it had impaired the defendant's free will and mental stability[173]. For instance, in *R. v. Barwick*, the Superior Court of Justice of Ontario quashed an admission of guilt due to improper pressure from the defense counsel[174]. On the day of the trial, the most important witness for the defense failed to appear[175]. The lawyer told Barwick, the accused, that without the testimony, the judge would certainly convict and sentence him to a lengthy term of imprisonment[176]. After being informed by his counsel that an adjournment in order to locate the witness would not be granted, Barwick felt he had no other choice but to plead guilty in order to receive a lesser sentence[177]. The Court ruled that these circumstances amounted to extraordinary pressure and, thus, Barwick's guilty plea was involuntary[178].

A guilty plea could be render involuntary due to pressure from the bench as well[179]. An illustrative case is *R. v. Djekic*, before the Court of Appeal for Ontario[180]. The appellant, Chana Djekic, pleaded guilty on November 24, 1998 to welfare fraud and was convicted[181]. She appealed asking for the withdrawal of such a plea because it did not

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[168] *Ibid*.
[169] *Ibid*., paras.21-23.
[170] *R. v. Al-Diasty*, Court of Appeal for Ontario, Canada, 174 CCC (3d) 574, Case no. C36144, 28 April 2003, paras.6-8.
[171] *R. v. Symonds*, *supra* note 148, para.50.
[172] *Ibid*.
[173] *Ibid*.
[174] *R. v. Barwick*, *supra* note 163, para.41.
[175] *Ibid*.
[176] *Ibid*.
[177] *Ibid*.
[178] *Ibid*.
[179] *R. v. Rajaeefard*, Court of Appeal for Ontario, Canada, 46 CR (4th) 111, Case no. c21934, 17 January 1996, p.131-134.
[180] *R. v. Djekic*, Court of Appeal for Ontario, Canada, 147 CCC (3d) 572, Case no. C32266, 22 August 2000, paras.8-9.
[181] *Ibid*., para.1.

fulfill the voluntariness requirement[182]. According to Djekic, she appeared before the trial judge for her preliminary hearing with her child and, a few moments before the beginning of the proceedings, the prosecutor told her that he intended to arrest her that day and indict her with a new charge (obstruction of justice)[183]. The prosecutor called child service to take Djekic's child away[184].

While she was still in a state of shock with this new information, the judge called her and initiated the hearing[185]. The judge, an authority figure, used strong language to pressure her to make a decision about her case right away[186]. Intimidated by the bench, she pleaded guilty while still considering what to do regarding the immediate needs of her child and the new count she would be facing as well as the existing charge[187]. The Court of Appeal for Ontario concluded that "it was unfortunate and inappropriate for the presiding judge to speak to [Djekic] about those issues in the circumstances. It was the role of her counsel to do that and to advise her with respect to her choices and the timing of those choices"[188]. Accordingly, the Court vacated her plea of guilty[189].

The case *Kent v. United States* is another important decision on voluntariness[190]. It deals with the following question: is a threat by the Prosecution to indict people close to the defendant, including family members, if he refuses to plead guilty, a wrongful pressure?[191] In the case, the accused pleaded guilty to a charge of bank robbery so that his fiancé, who had also confessed, would not be prosecuted as an accessory[192]. Later, he appealed hoping to quash the plea as involuntary. The US Court of Appeals for the First Circuit denied the motion as follows: "We are not prepared to say that it can be coercion to inform a defendant that someone close to him who is guilty of a crime will be brought to book if he does not plead"[193]. The Court also explained that "if a defendant elects to sacrifice himself for such motives, that is his choice, and he cannot reverse it after he is dissatisfied with his sentence, or with other subsequent developments"[194].

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[182] *Ibid*.
[183] *Ibid*., para.3.
[184] *Ibid*.
[185] *Ibid*., para.4.
[186] *Ibid*.
[187] *Ibid*., para.8.
[188] *Ibid*.
[189] *Ibid*., para.10.
[190] *Thomas A. Kent v. United States*, Court of Appeals for the First Circuit, US, 272 F.2d 795 (1st Cir. 1959), Case no. 5512, 28 December 1959.
[191] *Ibid*., para.3.
[192] *Ibid*.
[193] *Ibid*., para.8.
[194] *Ibid*.

In the *Kambanda* case[195], the ICTR Appeals Chamber had to evaluate if a guilty plea was voluntary[196]. The defendant, Jean Kambanda, was the Rwandan Prime Minister during the 1994 genocide of the Tutsis by the Hutus[197]. He pleaded guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity (murder and extermination)[198]. As the Trial Chamber sentenced Kambanda to life imprisonment[199], he appealed in order to quash his admission of guilt[200].

As for voluntariness, Kambanda argued that he was forced to enter his plea of guilty[201]. Kambanda told that ICTR officials detained and questioned him in an unofficial building[202]. During this confinement and while being deprived of a counsel of his choice, he signed the plea agreement with the Prosecution[203]. Kambanda claimed that "his place of detention contributed to an oppressive atmosphere that compelled him to sign the plea agreement"[204].

The *Kambanda* Appeals Chamber rejected the pleadings of the defense[205]. It focused on the question whether the defendant's depression over being isolated while in detention was serious enough to inhibit his free will[206]. The Chamber pointed out that Kambanda worked as Prime Minister of Rwanda, which meant he was used to stressful situations during which important decisions had to be made by him[207]. Thus, it concluded that his depression from being detained was "completely inadequate to support a claim that [Kambanda] was mentally incompetent and failed to understand the consequences of his actions in pleading guilty"[208]. During the appeal, the defense did not argue that Kambanda was in any way threatened or induced by the prosecutors to plead guilty[209].

1.2.2 The guilty plea must be informed

[195] For more information on the *Kambanda* case, cf.: section 3.2.1 of the present thesis.
[196] *The Prosecutor v. Jean Kambanda – Appeal*, *supra* note 165, paras.56-64.
[197] *The Prosecutor v. Jean Kambanda*, Judgment, ICTR, Trial Chamber, Case no. ICTR 97-23-S, 4 September 1998, para.39 [*The Prosecutor v. Jean Kambanda – Trial*]. For more information on the 1994 genocide in Rwanda, cf.: section 3.1 of the present thesis.
[198] *Ibid*., para.3.
[199] *Ibid*., verdict.
[200] *The Prosecutor v. Jean Kambanda – Appeal*, *supra* note 165, para.49.
[201] *Ibid*., para.57.
[202] *Ibid*.
[203] *Ibid*.
[204] *Ibid*., para.58.
[205] *Ibid*., para.62.
[206] *Ibid*.
[207] *Ibid*.
[208] *Ibid*.; BOAS *et al*, *supra* note 18, p.218.
[209] *The Prosecutor v. Jean Kambanda – Appeal*, *ibid*., para.63.

A guilty plea will be accepted only if informed[210]. Accordingly, "the accused must understand the nature of a guilty plea and the consequences of pleading guilty in general, the nature of the charges against him, and the distinction between any alternative charges and the consequences of pleading guilty to one rather than the other"[211]. In order to check the informed criterion, the trial chamber has to read the indictment; explain the elements of the charges to the defendant; and inquire into the accused's understanding of these elements, to ensure that his comprehension of the requirements of the crime reflects his actual conduct and participation[212]. In other words, in determining if a guilty plea is informed, the judges have to evaluate if the accused truly understands his situation, his rights and the consequences of his admission of guilt[213].

The informed criterion is found in the Rome Statute[214] and in the case-law of ICTY[215], ICTR[216] and ICC[217]. It is part of the domestic judicial practice as well. In *Kercheval v. United States*, the US Supreme Court ruled that "a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences"[218]. In *Commonwealth ex rel. West v. Rundle*, the Supreme Court of Pennsylvania ruled that the court must "satisfy itself that the defendant understands the

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[210] *ICC Rome Statute*, *supra* note 9, art.65(1)(a); *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 62*bis*(ii); *Rules of Procedure and Evidence of the ICTR, supra* note 86, rule 62(B)(ii); *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Judgment, ICTY, Appeals Chamber, Case no. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para.8 [*Joint Opinion of Judges McDonald and Vohrah in the Erdemović case*].

[211] *The Prosecutor v. Jean Kambanda – Appeal*, *supra* note 165, para.75.

[212] *The Prosecutor v. Momir Nikolić*, *supra* note 153, para.52.

[213] *Cortez v. United States,* Court of Appeals for the Ninth Circuit, US, 337 F.2d 699 (9th Cir. 1964), 22 October 1964.

[214] *ICC Rome Statute*, *supra* note 9, art.65(1)(a). This provision states the following: "Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether: (a) The accused understands the nature and consequences of the admission of guilt".

[215] *The Prosecutor v. Momir Nikolić*, *supra* note 153, para.52; *The Prosecutor v. Predrag Banović ("Omarska and Keraterm Camps"),* Judgment, ICTY, Trial Chamber, Case no. IT-02-65/1-S, 28 October 2003, para.17 [*The Prosecutor v. Predrag Banović*]; *The Prosecutor v. Ranko Češić ("Brčko"),* Judgment, ICTY, Trial Chamber I, Case no. IT-95-10/1-S, 11 March 2004, para.4 [*The Prosecutor v. Ranko Češić*]; *The Prosecutor v. Biljana Plavšić ("Bosnia and Herzegovina"),* Judgment, ICTY, Trial Chamber, Case no. IT-00-39&40/1-S, 27 February 2003, para.5 [*The Prosecutor v. Biljana Plavšić*].

[216] *The Prosecutor v. Jean Kambanda – Appeal*, *supra* note 165, para.75; *The Prosecutor v. Paul Bisengimana*, Judgment, ICTR, Trial Chamber II, Case no. ICTR-00-60-T, 13 April 2006, para.22 [*The Prosecutor v. Paul Bisengimana*]; *The Prosecutor v. Joseph Serugendo,* Judgment, ICTR, Trial Chamber I, Case no. ICTR-2005-84-I, 12 June 2006, para.11 [*The Prosecutor v. Joseph Serugendo*]; *The Prosecutor v. Michel Bagaragaza,* Judgment, ICTR, Trial Chamber III, Case no. ICTR-05-86-S, 17 November 2009, para.15 [*The Prosecutor v. Michel Bagaragaza*]; *The Prosecutor v. Juvénal Rugambarara,* Judgment, ICTR, Trial Chamber II, Case no. ICTR-00-59-T, 16 November 2007, para.8 [*The Prosecutor v. Juvénal Rugambarara*]; *The Prosecutor v. Joseph Nzabirinda,* Judgment, ICTR, Trial Chamber II, Case no. ICTR-2001-77-T, 23 February 2007, para.12 [*The Prosecutor v. Joseph Nzabirinda*].

[217] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 89, para.30.

[218] *Kercheval v. United States,* US Supreme Court, 274 U.S. 220 (1927), Case no. 705, 2 May 1927, p.224.

nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences"[219].

In Canada, the Court of Appeal for British Columbia, in *Rex v. Milina*, concluded that "upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence [*sic*] with which he is charged"[220]. The Ontario Court of Appeals took the same approach in *R. v. T.R.*: "The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea"[221].

In the *Erdemović* case[222], the ICTY Appeals Chamber vacated the very first guilty plea before an international tribunal for not being informed[223]. Dražen Erdemović, the defendant, was a private serving at the Army of the Serb Republic[224]. He participated in the killing of several Muslim men in the area of Srebrenica, in Bosnia and Herzegovina[225]. After being charged with a crime against humanity and, alternatively, a war crime[226], he pleaded guilty to the former[227]. The Trial Chamber convicted and sentenced him to 10 years' imprisonment[228]. Erdemović appealed arguing that such amount of prison time was manifestly excessive[229].

Although Erdemović did not ask for the quashing of his guilty plea, this was exactly what the Appeals Chamber did[230]. The appeal judgment noted that, in identical circumstances, "a punishable offence [*sic*], if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime"[231]. After noting that Erdemović had

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[219] *Commonwealth ex rel. West v. Rundle*, Supreme Court of Pennsylvania, US, 428 Pa. 102 (1968), 3 January 1968, p.106.
[220] *Rex v. Milina*, British Columbia Court of Appeal, Canada, [1947] 1 DLR 124, 18 June 1946, p.131.
[221] *R. v. R.T.*, Court of Appeal for Ontario, Canada, 10 OR (3d) 514, Case no. 668/90, 15 September 1992, para.14.
[222] For more information on the *Erdemović* case, cf.: section 2.2.1 of the present thesis.
[223] *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Judgment, ICTY, Appeals Chamber, Case no. IT-96-22-A, 7 October 1997, para.26 [*The Prosecutor v. Dražen Erdemović – Appeal*].
[224] *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Judgment, ICTY, Trial Chamber, Case no. IT-96-22-T, 29 November 1996, para.2 [*The Prosecutor v. Dražen Erdemović – Trial/1996*]; *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Judgment, ICTY, Trial Chamber, Case no. IT-96-22-T*bis*, 5 March 1998, para.4 [*The Prosecutor v. Dražen Erdemović – Trial/1998*].
[225] *The Prosecutor v. Dražen Erdemović – Trial/1996, ibid.,* para.78.
[226] *Ibid*., para.2.
[227] *Ibid*., para.3.
[228] *Ibid*., para.3 and disposition.
[229] *The Prosecutor v. Dražen Erdemović – Appeal*, *supra* note 223, paras.11-12.
[230] *Ibid*., para.26.
[231] *Ibid.*, para.20.

not been informed that a crime against humanity is more serious than a war crime and that if he had pleaded guilty to the war crime charge he could reasonably expect a lighter sentence[232], the Appeals Chamber ruled that his guilty plea "was not the result of an informed choice"[233]. The appellate judges even said: "had [Erdemović] been properly apprised of the less serious charge and his entitlement to plead to it, we have grave doubts that he would have continued to plead guilty to the more serious charge"[234]. The Appeals Chamber then remitted the case to another trial chamber, so Erdemović would have a new opportunity to plead in full knowledge of the relevant implications of his plea[235]. In his second trial, Erdemović pleaded guilty to the war crime charge[236] and was sentenced to 5 years' imprisonment[237].

The ICTR also had to determine if a guilty plea was informed[238]. In the appeal against his life imprisonment sentence, Jean Kambanda claimed he was unable to fully understand the nature of his charges and the consequences of his plea of guilty due to ineffective assistance of counsel[239]. He argued that the lawyer assigned to him by the ICTR Registrar did not take affirmative action on his behalf[240]. In the space of two years, they had only one hour of consultation and the counselor did not study the case properly nor did he implement investigations in order to inform Kambanda aptly[241]. Therefore, the accused concluded that his plea of guilty was not informed because "he himself did not know the ins and outs of the charges brought against him, nor did he know the ins and outs of the guilty plea"[242].

Kambanda claimed that his Trial Chamber was negligent as well[243]. According to the defendant, the trial judges did not explain to him the consequences, in terms of imprisonment, of the guilty plea[244]. He demanded being informed by the Chamber that even by pleading guilty, the only possible sentence would be life imprisonment and that his admission of guilt would have no mitigating effect whatsoever in the penalty[245].

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[232] *Ibid.*, para.26.
[233] *Ibid.*, para.27.
[234] *Ibid.*, para.26.
[235] *Ibid.*, para.20.
[236] *The Prosecutor v. Dražen Erdemović – Trial/1998*, *supra* note 224, para.18.
[237] *Ibid.*, para.23.
[238] *The Prosecutor v. Jean Kambanda – Appeal*, *supra* note 165, paras.65-78.
[239] *Ibid.*, para.67.
[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*, para.68-69.
[244] *Ibid.*, para.68.
[245] *Ibid.*

Moreover, Kambanda argued that the trial judges should have taken a more active role in investigating the adequacy of the legal assistance provided to him by his lawyer[246].

The *Kambanda* Appeals Chamber rejected all those arguments[247]. Firstly, the accused failed to bring any evidence that his counsel was uninformed about the case and about the consequences of the plea[248]. Likewise, there was no proof that the counsel did not inform Kambanda properly[249]. In fact, from the answers the defendant provided in court in response to the Chamber's questions, one could reasonably infer that he was fully aware of the nature of the charges against him and the consequences of pleading guilty[250]. Secondly, "the duty of a Trial Chamber to inform an accused person of the possible sentence [was] not to be mechanically discharged"[251]. Thus, there was no obligation on the trial chambers to inform, in every single case, the possible sentence that was going to be imposed[252]. Moreover, the transcripts of Kambanda's trial indicated that both parties knew and, in fact, accepted that life imprisonment was a possibility[253]. The Appeals Chamber concluded that when Kambanda said in court, during his trial: "I fully know the consequences of my guilty plea", he was acknowledging the possibility of a sentence of life in prison[254]. Accordingly, the Chamber dismissed his claim that the guilty plea was uninformed[255].

1.2.3 The guilty plea must be unequivocal

The guilty plea must not be equivocal[256], i.e., the content of the admission of guilt must not amount to a defense contradicting the plea itself[257]. The trial chamber has to check and confirm whether the accused's acknowledgment and explanation of the facts and his involvement in them do not constitute a legal defense[258]. If that is the case, the plea shall be rejected, and the defense argued in the plea will be tested at a full-scale

[246] *Ibid*., para.69.
[247] *Ibid*., paras.76-77.
[248] *Ibid*., para.77.
[249] *Ibid.*
[250] *Ibid.*
[251] *Ibid*., para.76.
[252] *Ibid.*
[253] *Ibid.*
[254] *Ibid.*
[255] *Ibid*., para.78.
[256] *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 62*bis*(iii); *Rules of Procedure and Evidence of the ICTR, supra* note 86, rule 62(B)(iii); *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case, supra* note 210, para.8.
[257] *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case*, *ibid*.
[258] *Ibid*., para.29.

trial[259]. This requirement aims to prevent violations of the principle of presumption of innocence[260] and "to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defense which he may not realize"[261].

Although the unequivocal criterion exists in most common law jurisdictions[262] – for example, Australia[263], United Kingdom[264], Canada[265], Grenada[266], Kenya[267], Malaysia[268], Jamaica[269] and Hong Hong[270] –, the US is not one of them[271]. In 1970, in *North Carolina v. Alford*, the US Supreme Court upheld the entering of guilty pleas in which the defendant asserts his innocence, but at the same time, admits that there is sufficient evidence to convict him of the charged offenses[272]. This practice is now known as "Alford pleas", in reference to that case[273]. The landmark decision refers to the trial of Henry C. Alford, an African American man[274]. In 1963, North Carolina indicted him of murder, a charge that carried a possible sentence of life imprisonment or the death

[259] *Ibid*.
[260] *Ibid*.
[261] *Ibid*.
[262] *Ibid*.
[263] *Brian William Maxwell v. The Queen*, High Court of Australia, (1996) 184 CLR 501, Case no. F.C. 96/006, 15 March 1996, para.20; *Marlow v The Queen*, Court of Criminal Appeal of Tasmania, Australia, [1990] Tas R 1, 18 January 1990, p.13; *Director of Public Prosecutions v. Jason Marcus King*, Supreme Court of Vitoria, Australia, [2008] VSCA 151, 21 August 2008, para.23.
[264] *Regina v. Maso*, Court of Appeal of England and Wales, United Kingdom, [2004] EWCA Crim 2848, 18 November 2004; *R. v. Sheikh & Ors*, Court of Appeal of England and Wales, United Kingdom, [2004] EWCA Crim 492, 8 March 2004, para.16; *Borg and Barnes v. Director of Public Prosecutions*, High Court of England and Wales, United Kingdom, [2006] EWHC 2266, 14 September 2006.
[265] *R. v. Symonds, supra* note 148, para.20; *Adgey v. R.*, Supreme Court of Canada, [1975] 2 S.C.R. 426, 2 October 1973, p.440.
[266] *The Queen v. Ricardo Alexander*, High Court of Justice, Grenada, Case no. GDAHCV 201210043, 21 March 2013, paras.21-22.
[267] *Simon Gitau Kinene v. Republic*, High Court of Kenya at Kiambu, Criminal Appeal no. 9/2016, 25 October 2016; *Jane Wairimu Ngigi v. Republic*, High Court of Kenya at Nairobi, Criminal Appeal no. 1072/1986, 6 March 1987; *Ndabi v. Republic*, High Court of Kenya at Nairobi, Criminal Appeal no. 875/1986, 25 November 1987.
[268] *Lee Weng Tuck & Anor v. PP*, Supreme Court of Malaysia, 2 M.L.J. 143, 1989.
[269] *Shadrach Momah v. R.*, Court of Appeal of Jamaica, [2011] JMCA Crim 54, Resident Magistrates Criminal Appeal no. 29/2010, 28 October 2011, para.13.
[270] *HKSAR v. Wang Jing-yun*, High Court of the Hong Kong Special Administrative Region, Court of Appeal, Criminal Appeal no. 326 OF 2005, 30 May 2006; *HKSAR v. Chan Yau Hei*, Court of Final Appeal of the Hong Kong Special Administrative Region, Final Appeal No. 3 Of 2013 (Criminal), 7 March 2014.
[271] *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case*, *supra* note 210, para.29.
[272] *North Carolina v. Alford*, US Supreme Court, 400 U.S. 25 (1970), Case no. 14, 23 November 1970, holding [*North Carolina v. Alford*].
[273] WARD, Bryan. "A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea", *Missouri Law Review*, vol.68, n.4, p.913-943, 2003, p.913 [WARD].
[274] REDLICH, Allison and ÖZDOĞRU, Asil Ali. "Alford pleas in the age of innocence", *Behavioral Sciences and the Law*, vol.27, n.3, p.467-488, 2009, p.468 [REDLICH and ÖZDOĞRU].

penalty[275]. On the day in question, Alford went to a pub and, allegedly, got into a fight with Nathaniel Young[276]. Later that day, Young was shot to death[277].

Despite Alford's claims of innocence, there was a bulk of evidence pointing to his guilt[278]. Although there was no eyewitness to the crime, there were witnesses who testified that shortly before the murder, Alford returned home to get his gun stating he was going to kill the victim[279]. Witnesses affirmed that upon going back to his home, Alford told that he carried out the murder[280]. He also had an extensive criminal record, including a prior conviction for murder[281].

Following a bargain with the Prosecution, Alford agreed to plead guilty[282]. However, at the hearing before the trial judge, he insisted that he did not kill Young and said he was pleading guilty only to avoid the death penalty[283]. Despite his claims of innocence, the judge allowed Alford to enter a guilty plea and sentenced him to 30 years' imprisonment[284]. Later, Alford tried to quash his plea by means of *habeas corpus*[285]. While the US Court of Appeals for the Fourth Circuit granted the relief, holding that the guilty plea was involuntary because its primary motivation was the fear of death, the Supreme Court re-affirmed the conviction[286]. In this case, the Court had to decide whether the validity of guilty pleas remained intact when the defendant maintains his innocence and testifies that the plea is only to avoid a harsher sentence[287].

In a 6-3 decision[288], the US Supreme Court ruled that there is no due process violation when the defendant concludes, after receiving due advice from counsel, that it is in his best interest to plead guilty, even though he publicly proclaims his own innocence[289]. In other words, the majority saw no difference between an accused who

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[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*
[278] *Ibid.*
[279] *Ibid.*
[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid*., p.469.
[283] *Ibid*. Alford's exact words follow: "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all". Cf.: *North Carolina v. Alford*, *supra* note 272, footnote 2.
[284] REDLICH and ÖZDOĞRU, *ibid*., p.469.
[285] *Ibid.*
[286] WARD, *supra* note 273, p.915-916.
[287] *Ibid*., p.916.
[288] While Justices Black, Stewart, White, Burger, Blackmun and Harlan voted with the majority, Justices Douglas, Marshall and Brennan dissented.
[289] *North Carolina v. Alford*, *supra* note 272, p.37-39.

maintains his innocence with a guilty plea and one who admits to the crime[290]. The judgment reads as follows: "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime"[291].

Moreover, in the *Erdemović* case, the ICTY Appeals Chamber had to determine if the accused's guilty plea was equivocal due to his claim on duress[292]. Even though Erdemović admitted his participation in the killing of Muslims in Srebrenica, he emphasized that he had no other choice[293]. In his initial appearance, he told the Trial Chamber: "If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too'"[294]. Therefore, the judges had to establish if duress afforded a complete defense in International Law to a charge of crime against humanity or war crime referring to the murder of unarmed civilians[295]. If the answer was affirmative, Erdemović's guilty plea would be deemed equivocal and thus, invalid[296].

The majority of the *Erdemović* Appeals Chamber (judges Antonio Cassese[297] and Ninian Stephen[298] dissenting) ruled that duress is not a complete defense[299], having relevance only as a mitigating factor during sentencing[300]. Hence, the majority found that the guilty plea of Erdemović was not equivocal[301].

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[290] The judgment reads as follows: "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. Here, the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, its validity cannot be seriously questioned". Cf.: *Ibid.*

[291] *Ibid*., p.38.

[292] *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Transcript of Session held on May 31, 1996, ICTY, Trial Chamber, Case no. IT-96-22-T, p.32 [*Transcript of Session held on May 31, 1996 in the Erdemović case*]; BOAS *et al*., *supra* note 18, p.215.

[293] *Transcript of Session held on May 31, 1996 in the Erdemović case*, *ibid*., p.32.

[294] *Ibid*.

[295] *The Prosecutor v. Dražen Erdemović – Appeal*, *supra* note 223, para.16.

[296] *Ibid*.

[297] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.49.

[298] *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Judgment, ICTY, Appeals Chamber, Case no. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, paras.66-69.

[299] *The Prosecutor v. Dražen Erdemović – Appeal*, *supra* note 223, para.19.

[300] *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case*, *supra* note 210, para.90.

[301] *The Prosecutor v. Dražen Erdemović – Appeal*, *supra* note 223, para.19; BOAS *et al*., *supra* note 18, p.215.

At the ICTR, Jean Kambanda claimed before the Appeals Chamber that his guilty plea was equivocal[302]. He argued that the President of his Trial Chamber erred when explaining the meaning of "equivocal" to him[303]. While inquiring about this element, the President gave the following explanation: "is this guilty plea -- is it not equivocal? And what I mean by that is, are you aware of the fact that you can no longer raise any means of defence [*sic*] that would go against your guilty plea? Are you aware of that fact?"[304]. The defendant replied: "My guilty plea, Mr. President, is not equivocal. I'm aware of that"[305]. According to Kambanda, instead of asking if he had any defense against the six charges of the indictment, the President asked if he would have raised any means of defense that would have meant that the guilty plea would be equivocal[306]. Kambanda sustained that this confusion by the President of the Trial Chamber rendered his admission of guilt invalid[307].

Once again, the *Kambanda* Appeals Chamber dismissed the defense's arguments[308]. The Chamber highlighted that, in any moment during the trial, Kambanda raised a defense or explanation of his actions[309]. It pointed out that "the Trial Chamber had several opportunities to question and observe [Kambanda], and note[d] that it was satisfied that [his] guilty plea was voluntary, informed, and unequivocal"[310]. Therefore, there was no reason to find Kambanda's plea invalid[311].

1.2.4 A factual basis must exist for a valid guilty plea

A valid guilty plea is the one whose content is substantiated by facts[312]. An admission of guilt is not in itself a sufficient basis for the conviction of an accused[313]; the judges have to check if there is enough evidence to base the conviction both in law and

[302] *The Prosecutor v. Jean Kambanda – Appeal, supra* note 165, paras.79-80.
[303] *Ibid*., para.80.
[304] *The Prosecutor v. Jean Kambanda*, Transcript of Session held on May 1, 1998, ICTR, Trial Chamber, Case no. ICTR 97-23-S, p.27.
[305] *Ibid*.
[306] *The Prosecutor v. Jean Kambanda – Appeal, supra* note 165, para.80.
[307] *Ibid*.
[308] *Ibid*., paras.84-87.
[309] *Ibid*., para.85.
[310] *Ibid*., para.87.
[311] *Ibid*.
[312] *ICC Rome Statute, supra* note 9, art.65(1)(c); *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 62*bis*(iv); *Rules of Procedure and Evidence of the ICTR, supra* note 86, rule 62(B)(iv).
[313] *The Prosecutor v. Goran Jelisić ("Brčko"),* Judgment, ICTY, Trial Chamber, Case no. IT-95-10-T, 14 December 1999, para.25 [*The Prosecutor v. Goran Jelisić*].

in fact[314]. Hence, "the admission may not be proof of guilt. Far from being proof, it must itself be proven"[315]. If the judges consider the submitted evidence as insufficient to support a conviction, the trial chamber, pursuing "the interests of justice, in particular the interests of the victims"[316], may request the prosecutors to present additional evidence[317] or order the continuation of the case in a regular full-scale trial[318].

Specifically regarding the substantiated by facts criterion, International Criminal Law departed significantly from common law jurisdictions[319]. For instance, in *Kercheval v. United States*, the US Supreme Court stated that "a plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. […] More is not required; the court has nothing to do but give judgment and sentence"[320]. The same rationale was later upheld in *Boykin v. Alabama*[321]. Likewise, the Supreme Court of Canada, in *Adgey v. The Queen*[322] and *Brosseau v. The Queen*[323], decided that a trial court has no duty to hold further inquiry into the factual circumstances of the case following a guilty plea.

2 PLEA-BARGAINING AT THE ICTY

The thesis will now address the experience of plea-bargaining at the ICTY. Firstly, it will describe the context of the Tribunal's creation; afterwards, it will assess its leading guilty-plea cases.

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[314] *Ibid.*; GUARIGLIA, Fabricio. "Article 65 (Proceedings on an Admission of Guilt)", p.1621-1634, p.1630. In TRIFFTERER, Otto and AMBOS, Kai (eds.). *Rome Statute of the International Criminal Court: A Commentary*, Portland: Beck/Hart, 2016 [GUARIGLIA].
[315] TERRIER, Frank. "Procedure before the Trial Chamber", p.1277-1318, p.1288. In CASSESE, Antonio; GAETA, Paola; and JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court – A Commentary*, vol.II, Oxford: Oxford University Press, 2002 [TERRIER].
[316] *ICC Rome Statute*, *supra* note 9, art.65(4).
[317] *Ibid*., art.65(4)(a).
[318] *Ibid*., art.65(4)(b); BOAS *et al*., *supra* note 18, p.226; GUARIGLIA, *supra* note 314, p.1631; OLUPONA, Bolanle. "Artigo 65: Procedimento nos Casos de Admissão de Culpa", p.923-929, p.928. In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (eds.). *O Tribunal Penal Internacional: Comentários ao Estatuto de Roma*, Belo Horizonte: Del Rey, 2016 [OLUPONA]; FRIMAN, Håkan. "International criminal procedures: trial and appeal procedures", p.271-288, p.277. In SCHABAS, William and BERNAZ, Nadia (eds.). *Routledge Handbook of International Criminal Law*, New York: Routledge, 2011;
[319] TERRIER, *supra* note 315, p.1288.
[320] *Kercheval v. United States*, US Supreme Court, 274 U.S. 220 (1927), Case no. 705, 2 May 1927, p.223.
[321] *Boykin v. Alabama*, US Supreme Court, 395 U.S. 238 (1969), Case no. 642, 2 June 1969, p.242.
[322] *Adgey v. R.*, Supreme Court of Canada, [1975] 2 SCR 426, 2 October 1973, p.429-430.
[323] *Brosseau v. The Queen*, Supreme Court of Canada, [1969] SCR 181, 28 November 1968, p.189-190.

2.1 Background: The Violent Fragmentation of the former-Yugoslavia and the Creation of the ICTY

The Balkan Peninsula has a deep ethnic, religious and cultural diversity[324]. Numerous ethnic groups inhabit the region, such as Albanians, Bosnians, Croats, Macedonians, Serbs, Slovenes and others[325]. As for religious diversity, Croats and Slovenes are mostly Catholics due to their historical domination by the Austro-Hungarian Empire[326]. Although the Serbs are traditionally Orthodox Christians, they were governed by the Ottoman Empire between 1389 and 1878, which resulted in the conversion of part of the local population to Islam, especially among the Bosnians[327].

After the end of World War I, a significant part of these Balkan peoples was entangled into a new unified State: the Kingdom of Yugoslavia, a constitutional monarchy created on December 1, 1918. The Soviet Union's influence in the end and after World War II in the region led to the extinction of the monarchy and the creation of the People's Republic of Yugoslavia, in 1945. It was composed of six republics (Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia and Montenegro) and two autonomous regions in Serbia (Kosovo and Voyvodina)[328].

In 1953, Marshal Josip Broz Tito took control over Yugoslavia where he assembled a repressive communist regime[329]. Under Tito's rule, the Yugoslav republics were tightly controlled, and any dissident movement was repressed[330]. Following the death of Tito on May 4, 1980, Yugoslavia entered a severe economic crisis and tensions between its ethnic and national groups began to grow[331]. After the Soviet Union's collapse in 1991, the centrifugal forces within Yugoslavia, which had been violently restrained for decades, were liberated, provoking its inevitable disintegration in the early 1990s[332].

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[324] MORRIS, Virginia and SCHARF, Michael. *An Insider's Guide to the International Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, vol.1, Irvington-on-Hudson: Transnational Publishers, 1995, p.18 [MORRIS and SCHARF (1995)]

[325] JAPIASSÚ, Carlos Eduardo Adriano. *O Direito Penal Internacional*, Belo Horizonte: Del Rey, 2009, p.91 [JAPIASSÚ].

[326] MORRIS and SCHARF (1995), *supra* note 324, p.18.

[327] *The Prosecutor v. Duško Tadić ("Prijedor"),* ICTY, Trial Chamber, Case no. IT-94-1-T, 7 May 1997, para.56 [*The Prosecutor v. Duško Tadić*].

[328] *Ibid*., para.65.

[329] *Ibid*.

[330] *The Prosecutor v. Kvočka et al. ("Omarska, Keraterm & Trnopolje Camps"),* ICTY, Trial Chamber, Case no. IT-98-30/1-T, 2 November 2001, para.9 [*The Prosecutor v. Kvočka et al.*].

[331] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015] ICJ Rep.3, para.54; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep.43, para.232 [*2007 Genocide Case at the ICJ*].

[332] JAPIASSÚ, *supra* note 325, p.92; MORRIS and SCHARF (1995), *supra* note 324, p.18.

A key actor during the crisis in the former-Yugoslavia was Slobodan Milošević. In 1986, he became the 11th President of the League of Communists of Serbia, the most influential Serbian political office at the time[333]. He implemented very aggressive policies to centralize Yugoslavia under the rule of Serbia[334]. Milošević's centralism faced strong resistance, especially from Slovenia and Croatia[335].

Internal negotiations between the Yugoslav republics aimed at preventing Milošević's policies towards political centralization, but such dialogs proved unsuccessful[336]. This failure in the diplomatic talks resulted in Slovenia and Croatia declaring their independence from Yugoslavia on June 25, 1991[337]. Soon, Bosnia and Herzegovina, Macedonia and Kosovo developed secessionist claims of their own. Milošević quickly responded with an intense military campaign to preserve the integrity of Yugoslavia and to enforce Serbia's dominance. The result was the most devastating humanitarian crisis in Europe since World War II.

Although the hostilities in Slovenia were short-lived (only ten days)[338] and Macedonia departed from Yugoslavia with virtually no resistance from the Serbs[339], Croatia, Kosovo and Bosnia and Herzegovina had much bloodier conflicts. As most of ICTY's guilty-plea cases refer to the crimes committed against ethnic groups in Bosnia and Herzegovina (cf. Annex I), the thesis will describe only the conflict in this State.

In 1992 (after the conflict in Slovenia had ended and while hostilities were taking place in Croatia), Bosnia and Herzegovina held referendums to decide whether to remain under Milošević's authoritarian rule or declare its independence and face the ruthless military response of the JNA[340]. At that time, Bosnia and Herzegovina had three main groups: Muslims or Bosniaks (43.7%), Croats (17.3%) and Serbs (31.4%)[341]. On February 29 and March 1, 1992, 63.4% of the population voted in a referendum to decide the future of Bosnia and Herzegovina[342]. Reports showed 99.4% of the votes favored secession[343].

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[333] MORRIS and SCHARF (1995), *ibid*., p.19.
[334] *Ibid.*
[335] *Ibid.*
[336] *The Prosecutor v. Duško Tadić, supra* note 327, para.77.
[337] *Ibid.*
[338] JAPIASSÚ, *supra* note 325, p.92; RADAN, Peter. *The Break-up of Yugoslavia and International Law*, London: Routledge, 2002, p.173-174 [RADAN].
[339] CRAVEN, Matthew. "What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood", *Australian Year Book of International Law*, vol.16, p.199-237, 1995, p.203-204.
[340] MORRIS and SCHARF (1995), *supra* note 324, p.19.
[341] *The Prosecutor v. Duško Tadić, supra* note 327, para.57; *2007 Genocide Case at the ICJ*, *supra* note 331, para.232.
[342] RADAN, *supra* note 338, p.187.
[343] *Ibid*.

While the Bosniaks and Croats voted for independence, most Serbs boycotted the referendum[344]. Bosnia and Herzegovina formally declared its independence on March 3, 1991[345]. Despite the fact that only Muslims and Croats voted in support of secession, the EU granted recognition on April 6, 1992[346]. On May 20, the UNSC endorsed the admission of Bosnia and Herzegovina to the UN[347]. The UNGA formally admitted this State as a UN member two days later[348].

In response to the secession, the four Serbian autonomous districts in Bosnia and Herzegovina (Romanija, Herzegovina, Bosnian Krajina and North-Eastern Bosnia) combined themselves into the Serb Republic (*Republika Srpska*)[349], and declared their independence as a sovereign State on April 7, 1992[350]. Radovan Karadžić – a future defendant in the ICTY[351] – served as its first President[352]. Several Serbian paramilitary groups were created in or moved into the new Serb Republic, initiating a process of ethnic cleansing[353]. Moreover, the JNA provided some 50,000 to 80,000 troops and heavy weaponry to the Army of the Serb Republic, whose commander was General Ratko Mladić[354] – another defendant in the ICTY[355].

The Serbs quickly took control over 70% of Bosnia and Herzegovina's territory[356]. Serbian and Bosnian Serb soldiers did numerous sieges and bombardments against the main areas inhabited by Bosnian Muslims, such as Sarajevo, Mostar, Srebrenica, Bihać, Tuzla and Goražde[357]. The ICTY concluded that several crimes against humanity, war crimes and acts of genocide were committed by the Serbs against the Bosniaks and

[344] *The Prosecutor v. Duško Tadić, supra* note 327, para.78.
[345] RADAN, *supra* note 338, p.187.
[346] *Ibid*.; *2007 Genocide Case at the ICJ*, *supra* note 331, para.234.
[347] *Resolution of the UNSC no. 755 (1992)*, UNDoc.S/RES/755, 20 May 1992.
[348] *Resolution of the UNGA no. 46/237*, UNDoc.S/RES/46/237, 22 May 1992.
[349] RADAN, *supra* note 338, p.188-189.
[350] *The Prosecutor v. Duško Tadić, supra* note 327, para.78; *The Prosecutor v. Kvočka et al.*, *supra* note 330, para.10; KONESKA, Cvete. *After Ethnic Conflict: Policy-making in Post-conflict Bosnia and Herzegovina and Macedonia*, Surrey: Ashgate Publishing Limited, 2014, p.46-47 [KONESKA].
[351] *The Prosecutor v. Radovan Karadžić,* ICTY, Trial Chamber, Case no. IT-95-5/18-T, 24 March 2016.
[352] MORRIS and SCHARF (1995), *supra* note 324, p.20.
[353] BENSON, Leslie. *Yugoslavia: A Concise History*, New York: Palgrave Publishers, 2001, p.165 [BENSON].
[354] *Ibid.*
[355] *Prosecutor v. Ratko Mladić,* ICTY, Trial Chamber, Case no. IT-09-92-T, 22 November 2017.
[356] BENSON, *supra* note 353, p.191.
[357] MORRIS and SCHARF (1995), *supra* note 324, p.20.

Croats[358]. In the same line, the ICJ ruled that the Army of the Serb Republic perpetrated a genocide against the Muslims in Srebrenica, in July 1995[359].

In addition to fighting against the Serbs, Bosnia and Herzegovina had to fight in a second front against the Bosnian Croats. Before Bosnia and Herzegovina's secession, the Croats sided with the Bosniaks, but they always feared the creation of a unitary State dominated by Muslims[360]. With the support of Zagreb, the Croatian communes in Western Bosnia and Herzegovina merged and established themselves on November 18, 1991 as the Croatian Republic of Herzeg-Bosnia, an unrecognized self-proclaimed State[361]. On April 8, 1992, Herzeg-Bosnia established its own military branch – the HVO[362].

Fighting broke out between the HVO and Bosnia and Herzegovina on June 19, 1992[363]. Initially, Herzeg-Bosnia had control over 20% of Bosnia-Herzegovina[364], and implemented numerous atrocities against the Muslim population in the areas under its authority. The ICTY prosecuted several Herzeg-Bosnia's military and government officials for war crimes and crimes against humanity[365]. The hostilities between Bosnia-

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[358] In all following cases, the ICTY convicted Serbians and Bosnian Serbs for crimes against humanity, war crimes and/or genocide: *The Prosecutor v. Radislav Krstić ("Srebrenica-Drina Corps"),* ICTY, Trial Chamber, Case no. IT-98-33-T, 02 August 2001 [*The Prosecutor v. Radislav Krstić – Trial*]; *The Prosecutor v. Radislav Krstić ("Srebrenica-Drina Corps"),* ICTY, Appeals Chamber, Case no. IT-98-33-A, 19 April 2004 [*The Prosecutor v. Radislav Krstić – Appeal*]; *The Prosecutor v. Miroslav Deronjić ("Glogova"),* ICTY, Appeals Chamber, Case no. IT-02-61-A, 20 July 2005; *The Prosecutor v. Kvočka et al. ("Omarska, Keraterm & Trnopolje Camps"),* ICTY, Appeals Chamber, Case no. IT-98-30/1-A, 28 February 2005; *The Prosecutor v. Popović et al.*, ICTY, Appeals Chamber, Case no. IT-05-88-A, 30 January 2015; *The Prosecutor v. Popović et al.*, ICTY, Trial Chamber II, Case no. IT-05-88-T, 10 June 2010; *The Prosecutor v. Blagojević & Jokić,* ICTY, Trial Chamber I, Case no. IT-02-60-T, 17 January 2005; *The Prosecutor v. Blagojević & Jokić,* ICTY, Appeals Chamber, Case no. IT-02-60-A, 9 May 2007; *The Prosecutor v. Popović et al. ("Srebrenica"),* ICTY, Trial Chamber II, Case no. IT-05-88-T, 10 June 2010; *The Prosecutor v. Ranko Češić ("Brčko"),* ICTY, Appeals Chamber, Case no. IT-95-10/1-S, 11 March 2004; *The Prosecutor v. Momčilo Perišić,* ICTY, Appeals Chamber, Case no. IT-04-81-A, 28 February 2013; *The Prosecutor v. Momčilo Perišić,* ICTY, Trial Chamber I, Case no. IT-04-81-T, 6 September 2011; *The Prosecutor v. Radoslav Brđanin ("Krajina"),* ICTY, Trial Chamber II, Case no. IT-99-36-T, 1 September 2004; *The Prosecutor v. Radoslav Brđanin ("Krajina"),* ICTY, Appeals Chamber, Case no. IT-99-36-A, 3 April 2007.

[359] *2007 Genocide Case at the ICJ*, *supra* note 331, paras.278-297.

[360] RADAN, *supra* note 338, p.190.

[361] *Ibid.*

[362] *The Prosecutor v. Kordić & Čerkez ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-14/2-T, 26 February 2001, p.311.

[363] *Ibid.*

[364] RADAN, *supra* note 338, p.190.

[365] In all following cases, the ICTY convicted Herzeg-Bosnia's military and government officials: *The Prosecutor v. Ivica Rajić ("Stupni Do"),* ICTY, Trial Chamber I, Case no. IT-95-12-S, 8 May 2006 [*The Prosecutor v. Ivica Rajić*]; *The Prosecutor v. Miroslav Bralo ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-17-S, 7 December 2005 [*The Prosecutor v. Miroslav Bralo*]; *The Prosecutor v. Miroslav Bralo ("Lašva Valley"),* ICTY, Appeals Chamber, Case no. IT-95-17-A, 2 April 2007; *The Prosecutor v. Prlić et al.*, ICTY, Appeals Chamber, Case no. IT-04-74-A, 29 November 2017; *The Prosecutor v. Prlić et al.*, ICTY, Trial Chamber III, Case no. IT-04-74-T, 29 May 2013; *The Prosecutor v. Zlatko Aleksovski, "Lašva*

Herzegovina and the HVO officially ended with the Washington Agreements, signed on March 18, 1994[366].

The armed conflicts between Bosnia and Herzegovina and the Serbians finished after a major bombing campaign by NATO against strategic Serb positions throughout the Bosnian territory. NATO's forces had already conducted isolated strikes in the region[367], but the massacres in the Bosniak enclaves of Goražde, Srebrenica and Žepa motived a full air campaign, named "Operation Deliberate Force"[368]. Between August 30 and September 20, 1995, aircraft of fifteen NATO member States dropped bombs over military objectives of the Army of the Serb Republic, dramatically reducing its fighting capability. By October 1995, the hostilities in Bosnia and Herzegovina had already ceased[369].

NATO's bombardment forced Milošević to the negotiation table. Leaders of Serbia, Croatia and Bosnia and Herzegovina met at the Wright-Patterson Air Force Base near Dayton, Ohio, in November 1995, to discuss the terms of a peace agreement[370]. The US, EU and Russia led the negotiations. After twenty days of talks, the final text was agreed in Dayton, on November 21, 1995. The formal agreement – named General Framework Agreement for Peace in Bosnia and Herzegovina[371] – was signed in Paris, on December 14, 1995[372]. This treaty is known as the Dayton Accords.

Valley", ICTY, Appeals Chamber, Case no. IT-95-14/1-A, 24 March 2000; *The Prosecutor v. Zlatko Aleksovski ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-14/1-T, 25 June 1999; *The Prosecutor v. Anto Furundžija ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-17/1-T, 10 December 1998; *The Prosecutor v. Anto Furundžija ("Lašva Valley"),* ICTY, Appeals Chamber, Case no. IT-95-17/1-A, 21 July 2000; *The Prosecutor v. Kupreškić et al. ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-16-T, 14 January 2000; *The Prosecutor v. Kupreškić et al. ("Lašva Valley"),* ICTY, Appeals Chamber, Case no. IT-95-16-A, 23 October 2001; *The Prosecutor v. Tihomir Blaškić ("Lašva Valley"),* ICTY, Appeals Chamber, Case no. IT-95-14-A, 29 July 2004; *The Prosecutor v. Tihomir Blaškić ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-14-T, 3 March 2000; *The Prosecutor v. Kordić & Čerkez ("Lašva Valley"),* ICTY, Appeals Chamber, Case no. IT-95-14/2-A, 17 December 2004; *The Prosecutor v. Kordić & Čerkez ("Lašva Valley"),* ICTY, Trial Chamber, Case no. IT-95-14/2-T, 26 February 2001; *The Prosecutor v. Naletilić & Martinović ("Tuta and Štela"),* ICTY, Trial Chamber, Case no. IT-98-34-T, 31 March 2003; *The Prosecutor v. Naletilić & Martinović ("Tuta and Štela"),* ICTY, Appeals Chamber, Case no. IT-98-34-A, 3 May 2006; *The Prosecutor v. Hadžihasanović & Kubura ("Central Bosnia"),* ICTY, Appeals Chamber, Case no. IT-01-47-A, 22 April 2008; *The Prosecutor v. Hadžihasanović & Kubura ("Central Bosnia"),* ICTY, Trial Chamber, Case no. IT-01-47-T, 15 March 2006.

366 RADAN, *supra* note 338, p.190.

367 GAZZINI, Tarcisio. "NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)", *European Journal of International Law,* vol.12, no.3, p.391-435, 2001, p.392-401.

368 *Ibid*., p.401-404.

369 RADAN, *supra* note 338, p.191-192.

370 KONESKA, *supra* note 350, p.50-51.

371 *The General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14 December 1995. Available here: <https://www.osce.org/bih/126173?download=true>. Access on: May 24, 2018.

372 KONESKA, *supra* note 350, p.51.

Naturally, the conflicts in the former-Yugoslavia caught the attention of the UNSC[373]. Several resolutions under Chapter VII of the UN Charter were adopted concerning the region[374]. One of them requested the UNSG to create, "as a matter of urgency"[375], an impartial Commission of Experts to examine and analyze information about the crimes committed in the former-Yugoslavia[376].

The UNSG at the time, Boutros Boutros-Ghali, decided that the Commission of Experts would be composed of five members[377]: Frits Kalshoven (the Netherlands/Chairman), M. Cherif Bassiouni (Egypt), William J. Fenrick (Canada), Kéba M'baye (Senegal) and Torkel Opsahl (Norway)[378]. After the resignation of Kalshoven for medical reasons and the death of Opsahl, the Commission was reorganized on October 19, 1993: Bassiouni was named Chairman; and Christine Cleiren (the Netherlands) and Hanne Sophie Greve (Norway) were appointed new members[379].

The Commission of Experts delivered its first interim report on January 26, 1993, indicating that grave breaches and other violations of International Humanitarian Law have been committed in the former-Yugoslavia[380]. The Commission stated that "those practices constitute[d] crimes against humanity and [could] be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention"[381]. In its concluding remarks, the Commission argued for the creation of an *ad hoc* international criminal court specifically for the former-Yugoslavia[382].

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[373] MORRIS and SCHARF (1995), *supra* note 324, p.22.
[374] *Resolution of the UNSC no. 713 (1991),* UNDoc.S/RES/713, 25 September 1991; *Resolution of the UNSC no. 721 (1991),* UNDoc.S/RES/721, 27 November 1991; *Resolution of the UNSC no. 724 (1991),* UNDoc.S/RES/724, 14 December 1991; *Resolution of the UNSC no. 727 (1992),* UNDoc.S/RES/727, 8 January 1992; *Resolution of the UNSC no. 740 (1992),* UNDoc.S/RES/740, 7 February 1992; *Resolution of the UNSC no. 743 (1992),* UNDoc.S/RES/743, 21 February 1992; *Resolution of the UNSC no. 749 (1992),* UNDoc.S/RES/749, 7 April 1992; *Resolution of the UNSC no. 752 (1992),* UNDoc.S/RES/752, 15 May 1992; *Resolution of the UNSC no. 757 (1992),* UNDoc.S/RES/757, 30 May 1992; *Resolution of the UNSC no. 758 (1992),* UNDoc.S/RES/758, 8 June 1992; *Resolution of the UNSC no. 760 (1992),* UNDoc.S/RES/760, 18 June 1992; *Resolution of the UNSC no. 761 (1992),* UNDoc.S/RES/761, 29 June 1992; *Resolution of the UNSC no. 762 (1992),* UNDoc.S/RES/761, 30 June 1992.
[375] *Resolution of the UNSC no. 780 (1992),* UNDoc.S/RES/780, 6 October 1992, para.2.
[376] *Ibid.*
[377] *Report of the Secretary-General on the establishment of the Commission on Experts pursuant to paragraph 2 of Security Council resolution 780 (1992),* UNDoc.S/24657, 14 October 1992, para.8.
[378] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992),* UNDoc.S/1994/674, 27 May 1994, para.6.
[379] *Ibid*., para.7.
[380] *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992),* UNDoc.S/25274, 26 January 1993, para.56.
[381] *Ibid*.
[382] The report stated the following: "The Commission was led to discuss the idea of the establishment of an *ad hoc* international tribunal. In its opinion, it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal in relation to the events in the territory of the former

In response to the Commission of Experts' suggestion, France[383], Italy[384] and the Commission on Security and Cooperation in Europe[385] circulated their own draft statutes for such new tribunal. These proposals gave rise to intense negotiations within the UNSC[386]. Accordingly, by Resolution 808, the UNSC "decide[d] that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[387]. It also requested the UNSG to prepare "a report on all aspects of this matter, including specific proposals and appropriate options for the effective and expeditious implementation of the decision [to create the tribunal]"[388].

Boutros-Ghali submitted his report on May 3, 1993, with a draft statute attached[389]. He was very careful in drafting the statute according to existing International Humanitarian Law and International Criminal Law and taking into account the commentaries and suggestions submitted by States and other interested actors[390]. Three weeks after receiving Boutros-Ghali's draft, the UNSC, acting under the Chapter VII of the UN Charter[391], unanimously[392] adopted Resolution 827, on May 25, 1993, creating the International Criminal Tribunal for the former-Yugoslavia – ICTY[393]. The latter had jurisdiction to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January

Yugoslavia. The Commission obverses that such a decision would be consistent with the direction of its work". Cf.: *Ibid*., para.74.

[383] *Letter from the Permanent Representative of France to the United Nations addressed to the Secretary-General,* UNDoc.S/25266, 10 February 1993. Available at: <http://repository.un.org/bitstream/handle/11176/50551/S_25266-EN.pdf?sequence=3&isAllowed=y>. Access on: May 24, 2018.

[384] *Letter from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General,* UNDoc.S/25300, 17 February 1993. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/091/53/img/N9309153.pdf?OpenElement>. Access on: April 25, 2018.

[385] *Letter from the Permanent Representative of Sweden to the United Nations Addressed to the Secretary-General*, UNDoc.S/25307, 19 February 1993. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/094/09/img/N9309409.pdf?OpenElement>. Access on: April 25, 2018.

[386] MORRIS and SCHARF (1995), *supra* note 324, p.31.

[387] *Resolution of the UNSC no. 808 (1993),* UNDoc.S/RES/808, 22 February 1993, para.1.

[388] *Ibid*., para.2.

[389] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UNDoc.S/25704, 3 May 1993. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/248/35/img/N9324835.pdf?OpenElement>. Access on: April 25, 2018.

[390] MORRIS and SCHARF (1995), *supra* note 324, p.32-33.

[391] *Resolution of the UNSC no. 827 (1993),* UNDoc.S/RES/827, 25 May 1993, 11th preambulatory clause [*Resolution of the UNSC no. 827 (1993)*].

[392] The members of the UNSC in 1993 were Brazil, China, Cape Verde, Djibouti, Spain, France, United Kingdom, Hungary, Japan, Morocco, New Zealand, Pakistan, Russia, US and Venezuela.

[393] *Resolution of the UNSC no. 827 (1993), supra* note 391, para.2.

1991 and a date to be determined by the Security Council upon the restoration of peace"[394].

The UNSC adopted Boutros-Ghali's proposed statute without any change[395]. Although its members had reservations to some points of the draft, they all agreed not to open the text for negotiations[396]. They feared that new talks would be excessively long and would result in political compromises detrimental to the Tribunal[397].

The creation of the ICTY was a historical episode for International Law, since it marked the renaissance and consolidation of international criminal justice[398]. The ICTY was the first international court with penal jurisdiction since the Nuremberg and Tokyo Tribunals and the first international court ever to indict a sitting head of State – Slobodan Milošević[399]. After 24 years of existence, the ICTY concluded its activities on December 31, 2017. The Tribunal indicted 161 individuals in total. Ninety of them were found guilty and sentenced. As of November 2017, fifty-six convicted defendants have served their sentences[400]; nine died after trial or while serving their sentences[401]; two appealed to the Mechanism for International Criminal Tribunals[402]; and the twenty-three remaining

[394] *Ibid.*
[395] MORRIS and SCHARF (1995), *supra* note 324, p.33.
[396] *Ibid.*
[397] *Ibid.*
[398] WERLE, Gerhard. *Principles of International Criminal Law*, 2nd ed., The Hague: Asser Press, 2009, p.15 [WERLE].
[399] *The Prosecutor v. Slobodan Milošević et al.,* Initial Indictment "Kosovo", ICTY, Trial Chamber, Case no. IT-99-37, 22 May 1999; *The Prosecutor v. Slobodan Milošević*, Initial Indictment "Croatia", ICTY, Trial Chamber, Case no. IT-01-51-I, 27 September 2001; *The Prosecutor v. Slobodan Milošević,* Initial Indictment "Bosnia and Herzegovina", ICTY, Trial Chamber, Case no. IT-01-51-I, 22 November 2001.
[400] The defendants who have served their sentence follow: Zlatko Aleksovski, Haradin Bala, Predrag Banović, Vidoje Blagojević, Tihomir Blaškić, Ljubomir Borovčanin, Lahi Brahimaj, Mario Čerkez, Ranko Češić, Hazim Delić, Damir Došen, Dražen Erdemović, Anto Furundžija, Enver Hadžihasanović, Dragan Jokić, Miodrag Jokić, Drago Josipović, Dragan Kolundžija, Dario Kordić, Milojica Kos, Radomir Kovač, Momčilo Krajišnik, Milorad Krnojelac, Amir Kubura, Miroslav Kvočka, Esad Landžo, Vladimir Lazarević, Vinko Martinović, Darko Mrđa, Zdravko Mucić, Mladen Naletilić, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Dragoljub Ojdanić, Vinko Pandurević, Biljana Plavšić, Dragoljub Prcać, Mlađo Radić, Ivica Rajić, Vladimir Šantić, Duško Sikirica, Blagoje Simić, Milan Simić, Nikola Šainović, Veselin Šljivančanin, Pavle Strugar, Duško Tadić, Miroslav Tadić, Johan Tarčulovski, Stevan Todorović, Mitar Vasiljević, Zoran Vuković, Simo Zarić, Dragan Zelenović and Zoran Žigić.
[401] The defendants who died after trial or while serving their sentence follow: Milan Babić, Ljubiša Beara, Rasim Delić, Miroslav Deronjić, Milan Gvero, Mile Mrkšić, Drago Nikolić, Slobodan Praljak and Zdravko Tolimir.
[402] The two defendants who appealed to the Mechanism for International Criminal Tribunals are Radovan Karadžić and Ratko Mladić.

convicted were in prison[403]. The ICTY acquitted nineteen defendants[404] and referred thirteen for trial in national jurisdictions[405]. Twenty indictments were withdrawn by the Prosecutor[406] and seventeen accused died during trial or before their transfer to the Tribunal[407] [408].

2.2 ICTY's Case-Law on Plea-Bargaining

In the span of approximately one decade (1993 – 2005), the ICTY's stand on plea-bargaining changed drastically[409]. In its early years, this Tribunal firmly rejected such practice[410]. Less than a year after the ICTY's creation, its first President Antonio Cassese announced on February 11, 1994, that the Tribunal would not engage in plea-bargaining because such practice does not conform to its unique goals of peace and justice[411]. The

[403] The convicted defendants in prison follow: Valentin Ćorić, Milivoj Petković, Jadranko Prlić, Berislav Pušić, Mićo Stanišić, Bruno Strojić, Stojan Župljanin, Miroslav Bralo, Radoslav Brđanin, Vlastimir Đorđević, Stanislav Galić, Goran Jelisić, Radislav Krstić, Dragoljub Kunarac, Milan Lukić, Sredoje Lukić, Sreten Lukić, Milan Martić, Radivoje Miletić, Dragomir Milošević, Nebojša Pavković, Vujadin Popović and Milomir Stakić.

[404] The acquitted defendants follow: Idriz Balaj, Ljube Boškoski, Ivan Čermak, Zejnil Delalić, Ante Gotovina, Sefer Halilović, Ramush Haradinaj, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Fatmir Limaj, Mladen Markač, Milan Milutinović, Isak Musliu, Naser Orić, Dragan Papić, Momčilo Perišić and Miroslav Radić.

[405] The defendants referred to a national jurisdiction follow: Rahim Ademi, Dušan Fuštar, Momčilo Gruban, Gojko Janković, Vladimir Kovačević, Duško Knežević, Paško Ljubičić, Željko Mejakić, Mirko Norac, Mitar Rašević, Radovan Stanković, Savo Todović and Milorad Trbić.

[406] The Prosecutor withdrew the indictments of the following defendants: Mirko Babić, Nenad Banović, Zdravko Govedarica, Gruban, Marinko Katava, Dragan Kondić, Predrag Kostić, Goran Lajić, Zoran Marinić, Agim Murtezi, Nedeljko Paspalj, Milan Pavlić, Milutin Popović, Draženko Predojević, Ivan Šantić, Dragomir Šaponja, Željko Savić, Pero Skopljak, Nedjeljko Timarac and Milan Zec.

[407] The accused who died during trial or before their transfer to the Tribunal follow: Stipo Alilović, Janko Bobetko, Goran Borovnica, Simo Drljača, Dragan Gagović, Janko Janjić, Nikica Janjić, Slobodan Miljković, Željko Ražnatović, Vlajko Stojiljković, Mehmed Alagić, Đorđe Đukić, Slavko Dokmanović, Goran Hadžić, Milan Kovačević, Slobodan Milošević and Momir Talić.

[408] All these figures are available in the ICTY's official website: <http://www.icty.org/en/cases/key-figures-cases>. Access on: May 19, 2018.

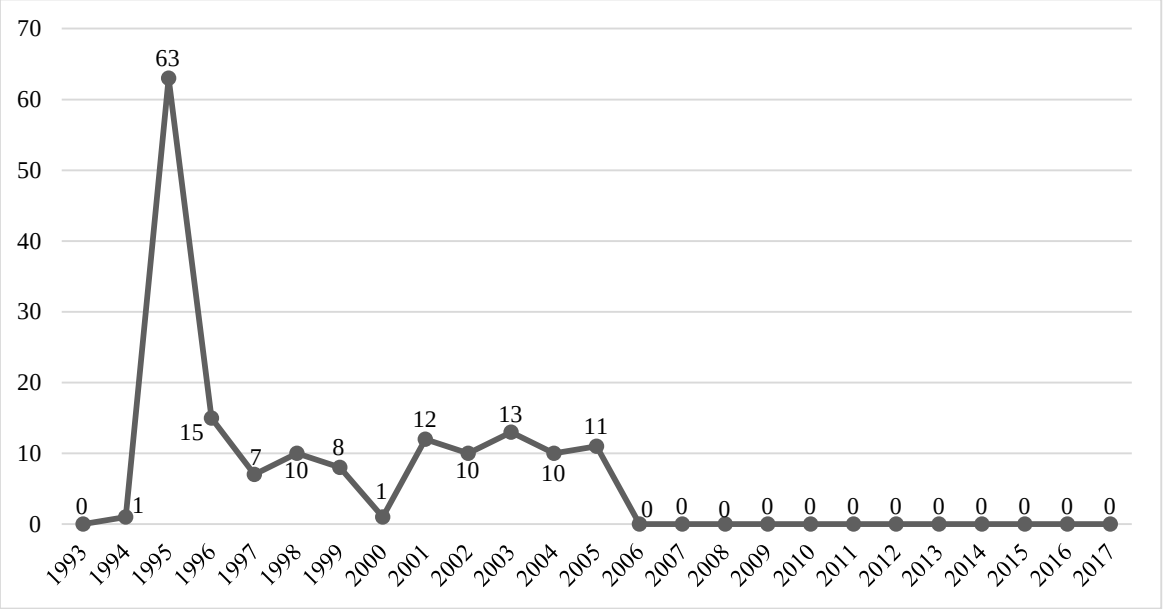
[409] COMBS, Nancy Amoury. "Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentencing Discounts", *Vanderbilt Law Review,* vol.59, p.69-151, 2006, p.84-87 [COMBS (2006)].

[410] SCHARF, *supra* note 43, p.1073.

[411] President Antonio Cassese's declaration follows: "The question of the grant of immunity from prosecution to a potential witness has also generated considerable debate. Those in favour contend that it will be difficult enough for us to obtain evidence against a suspect and so we should do everything possible to encourage direct testimony. They argue that this is especially true if the testimony serves to establish criminal responsibility of those higher up the chain of command. Consequently, arrangements such as plea-bargaining could also be considered in an attempt to secure other convictions. However, we always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be". Cf.: *Statement by the President Made at a Briefing to Members of Diplomatic Missions*, IT/29, 11 February 1994, reprinted in: MORRIS, Virginia and SCHARF, Michael. *An Insider's Guide to the International Tribunal for the Former Yugoslavia: A Documentary History and Analysis,* vol.2, Irvington-on-Hudson: Transnational Publishers, 1995, p.652.

judges discussed and rejected the possibility of including plea-bargaining into the ICTY's Rules of Procedure and Evidence following a suggestion by the US[412].

However, in just a few years, the number of defendants had grown exponentially at the ICTY, due to the prompt issuing of several new indictments by the Office of the Prosecutor and the rising engagement of States and NATO in arresting and transferring indictees to the Tribunal[413]. Graph 1, below, illustrates this significant growth in the numbers of those accused:



Graph 1: Number of new indictees at the ICTY per year[414].

Graph 1 indicates that, out of the 161 people indicted by the ICTY, 79 were charged in the first four years. This number amounts to 49% of all ICTY's indictees. The quick and massive expansion of ICTY's caseload disclosed its inability to provide complete trials for all its defendants[415]. In addition, the UNSC started to pressure the

[412] In its suggestion, the US argued the following: "Under many common law systems, the prosecutor enjoys broad powers to offer immunity to, and enter into plea-bargain agreements with, accused who provide meaningful and substantial cooperation in the investigation or prosecution of other cases. Without such mechanisms, the International Tribunal may be unable to successfully prosecute a significant number of high-level figures". Cf. *Suggestions Made by the Government of the United States of America to the Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia*, IT/14, 17 November 1993, reprinted in: *ibid*., p.539.

[413] MCCLEERY, *supra* note 46, p.1101; KOVAROVIC, Kate. "Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Resolution at the International Criminal Court", *Journal of Dispute Resolution*, vol.2011, p.283-308, 2011, p.286 [KOVAROVIC].

[414] Graph created by the author based on information from the official ICTY website. Cf.: <http://www.icty.org/en/documents/annual-reports>. Access on: October 25, 2018.

[415] KOVAROVIC, *supra* note 413, p.286.

Tribunal to reduce costs and finish all its activities as late as 2010[416]. Accordingly, just seven years after Cassese's statement rejecting plea negotiations, the ICTY changed its policy and began to accept plea-bargaining as a means to dispose of its unsustainable caseload[417]. In fact, twenty defendants at the ICTY pleaded guilty[418] (12% of all accused).

This change in paradigm affected the ICTY's Rules of Procedure and Evidence as well. The initial version of the Rules, adopted by the judges of the Tribunal on February 11, 1994, merely provided the accused the opportunity to enter a plea of guilty or not guilty at his initial appearance before a Trial Chamber[419]. There was no reference to plea agreements nor any form of plea negotiations. The judges amended the Rules on November 12, 1997 in order to include Rule 62*bis*[420], which introduced two elements: (i) the possibility of a defendant who pleaded not guilty at his initial appearance to change his plea to guilty at a later stage; and (ii) the inclusion of the four criteria for valid guilty pleas[421]. Four years later, on December 13, 2001, the judges added Rule 62*ter*, which formally brought the plea agreement procedure to the ICTY[422]. This provision expressly allowed sentence and charge bargaining[423], but stated that "the Trial Chamber shall not be bound by any agreement [between the Prosecution and the defense]"[424].

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[416] *Resolution of the UNSC no. 1503 (2003),* UNDoc.S/RES/1503, 28 August 2003, para.7 [*Resolution of the UNSC no. 1503 (2003)*]; *Resolution of the UNSC no. 1534 (2004),* UNDoc.S/RES/1534, 26 March 2004, para.3 [*Resolution of the UNSC no. 1534 (2004)*].

[417] SCHARF, *supra* note 43, p.1073; KOVAROVIC, *supra* note 413, p.286.

[418] The ICTY defendants who pleaded guilty follow: Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Dražen Erdemovič, Miodrag Jokić, Goran Jelisić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajić, Duško Sikirica, Milan Simić, Stevan Todorović and Dragan Zelenović. Cf.: <http://www.icty.org/en/cases/guilty-pleas>. Access on: November 19, 2018.

[419] *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 62(iii).

[420] *Ibid*., rule 62*bis*. This provision states the following: "If an accused pleads guilty in accordance with Rule 62(vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that: (i) the guilty plea has been made voluntarily; (ii) the guilty plea is informed; (iii) the guilty plea is not equivocal; and (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case; the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing".

[421] *Ibid*. For an evaluation of those four criteria, cf. section 1.2 of the present thesis.

[422] *Ibid*., rule 62*ter*. This provision states the following: "(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber: (i) apply to amend the indictment accordingly; (ii) submit that a specific sentence or sentencing range is appropriate; (iii) not oppose a request by the accused for a particular sentence or sentencing range; (B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A); (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty".

[423] *Ibid*., rule 62*ter*(A).

[424] *Ibid*., rule 62*ter*(B).

Although all twenty ICTY's guilty-plea cases had been studied and will be mentioned in the thesis, a thorough and separate discussion of each of them falls outside the scope of this work. The main information on all these cases are provided for in Annex I. Moreover, as the goal of this thesis is to offer an overall understanding of ICTY's main trends on plea agreements, the author had chosen four leading cases, critical for comprehending the evolution of plea-bargaining at the ICTY and the main lessons one can extracted from its case-law. The first one is the *Erdemović* case[425], whose defendant was the first person ever to plead guilty before an international tribunal. The case is useful because it indicates ICTY's early reaction to a guilty plea and its changing position towards accepting plea-bargaining, in opposition to the above-mentioned Cassese's 1994 statement.

Secondly, the thesis will analyze the *Jelisić* case[426], whose defendant was the second person to enter a guilty plea before the ICTY. It is a relevant judgment for comparative reasons. The accused in the *Erdemović* case held a low-ranking position, expressed remorse and significantly cooperated with the Tribunal. Jelisić, on the other hand, acted in a position of authority, demonstrated no remorse and committed his crimes in a brutal manner, enjoying inflicting pain on others. The *Jelisić* case points out to the relative weight a plea agreement can have in the sentence determination by the trial chambers.

The two final leading cases are the *Todorović*[427] and *Simić*[428] cases. While the former marks the introduction of sentence bargaining at the ICTY, the latter is the first case with charge bargaining. In addition to discussing the details of each judgment, this thesis will indicate the evolution of plea agreements with sentence bargaining (following the *Todorović* case) and with charge bargaining (following the *Simić* case). The goal is to identify trends as well as shifts in these trends.

2.2.1 The Prosecutor v. Dražen Erdemović

[425] *The Prosecutor v. Dražen Erdemović – Trial/1996, supra* note 224.
[426] *The Prosecutor v. Goran Jelisić, supra* note 313.
[427] *The Prosecutor v. Stevan Todorović ("Bosanski Šamac"),* Judgment, ICTY, Trial Chamber, Case no. IT-95-9/1-S, 31 July 2001 [*The Prosecutor v. Stevan Todorović*].
[428] *The Prosecutor v. Milan Simić ("Bosanski Šamac"),* Judgment, ICTY, Trial Chamber II, Case no. IT-95-9/2-S, 17 October 2002 [*The Prosecutor v. Milan Simić*].

The first guilty plea ever before an international court occurred at the chambers of the ICTY. The first defendant to enter such a plea was Dražen Erdemović[429]. He did so without bargaining with the Prosecution[430]. Erdemović was a Bosnian Croat who fought in Bosnia and Herzegovina as a foot soldier of the Army of the Serb Republic[431]. Right after the fall of the UN "safe area"[432] in Srebrenica at the hands of the Serbs, Erdemović and the other members of his unit were detached to a collective farm near the city of Pilica[433].

On the same day, several buses arrived carrying civilian Muslim men from 17 to 60 years of age who had been separated from their families after surrendering themselves to the Serbs[434]. Police officers took the civilians off the buses in groups of ten and lined them up with their backs to a firing squad[435]. Erdemović and the other members of his unit systematically shot all of them to death[436]. Approximately 1,200 civilians were executed in five hours[437]. The defendant alone killed seventy of them[438]. In total, the Serbs

[429] Erdemović's guilty plea statement follows: "First of all, honourable Judges, I wish to say that I feel sorry for all the victims, not only for the ones who were killed then at that farm, I feel sorry for all the victims in the former Bosnia and Herzegovina regardless of their nationality. I have lost many very good friends of all nationalities only because of that war, and I am convinced that all of them, all of my friends, were not in favour of a war. I am convinced of that. But simply they had no other choice. This war came and there was no way out. The same happened to me. Because of my case, because of everything that happened, I of my own will, without being either arrested and interrogated or put under pressure, admitted even before I was arrested in the Federal Republic of Yugoslavia, I admitted to what I did to this journalist and I told her at that time that I wanted to go to the International Tribunal, that I wanted to help the International Tribunal understand what happened to ordinary people like myself in Yugoslavia. As Mr. Babić has said, in the Federal Republic of Yugoslavia I admitted to what I did before the authorities, judicial authorities, and the authorities of the Ministry of the Interior, like I did here. Mr. Babić when he first arrived here, he told me, "Dražen, can you change your mind, your decision? I do not know what can happen. I do not know what will happen." I told him because of those victims, because of my consciousness, because of my life, because of my child and my wife, I cannot change what I said to this journalist and what I said in Novi Sad, because of the peace of my mind, my soul, my honesty, because of the victims and war and because of everything. Although I knew that my family, my parents, my brother, my sister, would have problems because of that, I did not want to change it. Because of everything that happened I feel terribly sorry, but I could not do anything. When I could do something, I did it. Thank you. I have nothing else to say". Cf.: *The Prosecutor v. Dražen Erdemović ("Pilica Farm"),* Guilty Plea Statement, ICTY, Trial Chamber, Case no. IT-96-22, 20 November 1996. Available at: <http://www.icty.org/en/content/dra%C5%BEen-erdemovi%C4%87>. Access on: November 19, 2018.

[430] COMBS (2006), *supra* note 409, p.87.

[431] *The Prosecutor v. Dražen Erdemović – Trial/1998, supra* note 224, para.4; *The Prosecutor v. Dražen Erdemović – Trial/1996, supra* note 224, para.2.

[432] *Resolution of the UNSC no. 819 (1993),* UNDoc.S/RES/819, 16 April 1993.

[433] *The Prosecutor v. Dražen Erdemović – Trial/1996, supra* note 224, para.2.

[434] *Ibid.*

[435] *Ibid.*

[436] *Ibid.*

[437] *Ibid.*, para.85.

[438] *Ibid.*, para.78.

summarily executed more than seven thousand men and boys in Srebrenica in just a few days, a clear genocide against the local Muslim community[439].

Despite the systematic and brutal character of all these murders, the ICTY only became aware of the Pilica farm massacre when Erdemović brought himself to the Tribunal's attention[440]. After the killings, he tried to contact the ICTY by telling his story and describing the massacre to several journalists, what eventually led to his arrest by Yugoslav authorities[441]. On March 28, 1996, the Tribunal ordered his transfer to The Hague[442], and on May 29 indicted him for having committed a crime against humanity and, alternatively, a war crime for his involvement in the Pilica farm slaughters[443]. On May 31, Erdemović appeared before the Trial Chamber and pleaded guilty to the crime against humanity accusation[444]. He was convicted of this charge[445] and the war crime count was dismissed[446].

Even though the Trial Chamber's judgment had very interesting arguments on duress as a defense[447], the thesis will focus exclusively on Erdemović's guilty plea and cooperation with the Prosecution. On the latter, the Chamber noted that, throughout the proceedings, the prosecutors repeatedly informed the Tribunal that the accused's cooperation was "substantial"[448], "full and comprehensive"[449] and "voluntary and unconditional"[450]. The Prosecution also admitted to being unaware of several massacres

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[439] *2007 Genocide Case at the ICJ*, *supra* note 331, paras.278 and 297.
[440] COMBS, Nancy Amoury. "Copping a plea to genocide: the plea bargaining of international crimes", *University of Pennsylvania Law Review*, vol.151, p.1-157, 2002, p.109-110 [COMBS (2002)].
[441] *Ibid.*
[442] *The Prosecutor v. Dražen Erdemović – Trial/1996*, *supra* note 224, para.1.
[443] *Ibid*., para.2.
[444] *Ibid*., para.3.
[445] *Ibid*., disposition.
[446] *Ibid*.
[447] *Ibid*., para.16-20. For more information on duress as a defense in International Criminal Law, cf.: HEIM, Sarah. "The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians", *Cornell International Law Journal,* vol.46, p.165-190, 2013; RISACHER, Benjamin. "No Excuse: The Failure of the ICC's Article 31 Duress' Definition", *Notre Dame Law Review,* vol.89, no.3, p.1403-1426, 2014; AMBOS, Kai. "Defences in International Criminal Law", p.299-329, p.310-317. In BROWN, Bartram (ed.). *Research Handbook on International Criminal Law*, Cheltenham: Edward Elgar Publishing, 2011; JOYCE, Marcus. "Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse", *Leiden Journal of International Law*, vol.28, no.3, p.623-642, 2015; MORAN, Clare Frances. "A Perspective on the Rome Statute's Defence of Duress: The Role of Imminence", *International Criminal Law Review,* vol.18, p.154-177, 2018; WIENER, Noam. "Excuses, Justifications, and Duress at the International Criminal Tribunals", *Pace International Law Review,* vol.26, no.2, p.88-131, 2014; WESTEN, Peter and MANGIAFICO, James. "The Criminal Defense of Duress: A Justification, Not an Excuse - And Why It Matters", *Buffalo Criminal Law Review,* vol.6, no.2, p.833-950, 2003.
[448] *The Prosecutor v. Dražen Erdemović – Trial/1996*, *supra* note 224, para.99.
[449] *Ibid*.
[450] *Ibid*.

in and around Srebrenica before the testimonies of the defendant[451]. The information provided by Erdemović had a positive and significant impact in the development of on-site investigations, saving time and resources[452]. The Prosecution also disclosed that his cooperation was key to demonstrate, in other ICTY cases, that the killings of Muslims in Srebrenica were carefully planned and systematic in nature[453]. Although the then ICTY Chief Prosecutor Richard J. Goldstone praised the defendant's collaboration, he stated that no promise had been given to Erdemović in exchange for his cooperation[454].

The Trial Chamber also took into account the "quality of the information provided"[455]. It noted that Erdemović delivered details about the massacres, the names of those involved and relevant information on the internal structure of the Serb Republic's Army[456]. The accused also played a key role in providing testimony at the pre-trial hearings of Radovan Karadžić (the first President of the Serb Republic) and Ratko Mladić (commander of the Serb Republic's Army)[457]. Those hearings resulted in the issuance of arrest warrants against both[458].

Taking into account all this evidence, the *Erdemović* Trial Chamber decided to consider the cooperation as a mitigating circumstance of the sentence[459]. It also applied the following mitigating factors: (i) the defendant's young age (23 years old at the time of the crimes)[460]; (ii) his low position in the military hierarchy[461]; (iii) his extreme remorse[462]; (iv) his efforts to surrender himself to the Tribunal[463]; (v) the guilty plea[464]; (vi) the fact that he did not constitute a danger any longer[465]; (vi) the corrigible nature of

[451] *Ibid*.
[452] *Ibid*.
[453] *Ibid*.
[454] *Ibid*.
[455] *Ibid*., para.100.
[456] *Ibid*.
[457] *Ibid*.
[458] *Ibid*.; *The Prosecutor v. Radovan Karadžić and Ratko Mladić,* Initial Indictment, ICTY, Trial Chamber, Case no. IT-95-5-I, 24 Jul 1995; *The Prosecutor v. Radovan Karadžić and Ratko Mladić,* Initial Indictment, ICTY, Trial Chamber, Case no. IT-95-18-I, 14 November 1995; "Trial Chamber issues international arrest warrants against Karadžić and Mladić and rebukes Federal Republic of Yugoslavia and Republika Srpska for failing to arrest them", *ICTY Press Release*, 11 July 1996. Available at: <http://www.icty.org/en/sid/732>. Access on: November 27, 2018.
[459] *The Prosecutor v. Dražen Erdemović – Trial/1996, ibid*., paras.99-101.
[460] *Ibid*., paras.109 and 111.
[461] *Ibid*., paras.92-95.
[462] *Ibid*., paras.96-98.
[463] *Ibid*., para.97.
[464] *Ibid*., para.111.
[465] *Ibid*.

his character[466]; and (vii) the fact that he would not serve his sentence in Bosnia and Herzegovina[467].

Following the Prosecution's recommendation to hand down a prison sentence no longer than 10 years[468], the Chamber sentenced Erdemović to 10 years in prison, on November 29, 1996[469]. The defense lawyers sought an appeal as they requested the sentence not to exceed one year[470]. They argued the applicability of the duress defense as well as the manifestly excessive nature of the 10-year sentence[471].

As explained above[472], the *Erdemović* Appeals Chamber concluded that the accused's guilty plea was uninformed[473]. It forwarded the case to a new trial chamber, so Erdemović could plea one more time fully cognizant[474]. Naturally, the first guilty plea ever before an international court motivated strong individual opinions by the appellate judges Gabrielle Kirk McDonald[475] (from the US), Lal Chand Vohrah[476] (from Malaysia) and Antonio Cassese[477] (from Italy). Judges Mcdonald and Vohrah delivered a joint separate opinion favorable to the introduction and consolidation of guilty pleas and plea-bargaining at international tribunals[478]. They highlighted the advantages of such practice, including the saving of resources and time, and sparing witnesses and victims of the duty to testify in court[479].

Judge Cassese concurred with judges McDonald and Vohrah regarding the advantages of guilty pleas to the public interest as well as to the accused[480]. Cassese agreed that in addition to avoiding the psychological stress and demoralization of a public trial, those defendants who plead guilty could even receive sentence mitigation in

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[466] *Ibid*.
[467] *Ibid*.
[468] *Ibid*.
[469] *Ibid*., disposition.
[470] *Ibid*., para.111.
[471] *The Prosecutor v. Dražen Erdemović – Appeal, supra* note 223, paras.11-12.
[472] Cf.: section 1.2.2 of the present thesis.
[473] *The Prosecutor v. Dražen Erdemović – Appeal, supra* note 223, para.26.
[474] *Ibid*., para.20.
[475] *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case, supra* note 210.
[476] *Ibid*.
[477] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95.
[478] *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case, supra* note 210, para.2.
[479] *Ibid*. Judges Mcdonald and Vohrah recommended that "guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States".
[480] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.8.

response to their cooperative conduct[481]. However, as mentioned above[482], Cassesse opposed the practice of plea-bargaining because it allegedly results in non-voluntary guilty pleas[483].

The *Erdemović* appeals judgment set the stage for a departure from Cassese's 1994 statement rejecting plea-bargaining entirely (a position reaffirmed in his individual opinion in the present case[484]). The majority of the *Erdemović* Appeals Chamber agreed with judges McDonald and Vohrah[485], who favored the replication at the ICTY of common law practices and principles on plea-bargaining[486]. In fact, the appeals judgment itself curiously did not have any significant support for this reasoning; it merely referred to McDonald's and Vohrah's joint opinion[487]. For instance, the judgment's paragraph 18 stated the following: "The Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, unanimously finds that the Appellant's plea was voluntary"[488]. Likewise, its paragraph 20 indicated that: "the Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, finds that the guilty plea of the Appellant was not informed"[489].

Although there was no mention to plea deals in the ICTY's Rules of Procedure and Evidence back then, the Appeals Chamber's inclination to favor plea-bargaining motivated Erdemović and the Prosecution to reach a plea agreement[490]. Pursuant to this deal, Erdemović entered a plea of guilty referring to the war crime count, and the Prosecution agreed to withdraw the crime against humanity charge and to accept the

[481] Regarding the benefits of guilty pleas to the own defendants, Cassese states the following: "the accused may find his pleading guilty beneficial to his own condition. Firstly, it may help him to salve his conscience and atone for his wrongdoing. Secondly, he will avoid the indignity and the possible demoralisation of undergoing a trial, as well as the psychological ordeal he would have to go through during examination and cross-examination of witnesses (and possibly also of himself as a witness); he will also eschew the public exposure that may ensue from trial , and the adverse consequences for his social position and the life of his family and relatives. Thirdly, the accused may expect that the court will recognise his cooperative attitude by reducing the sentence it would have imposed had there not been a plea of guilty: in other words, the accused may hope that the court will be more lenient in recognition of his admission of guilt". Cf. *Ibid*., para.8.
[482] Cf.: section 1.2.1 of the present thesis.
[483] *Individual Opinion of Judge Cassese in the Erdemović case*, *supra* note 95, para.10.
[484] *Ibid.*
[485] *The Prosecutor v. Dražen Erdemović – Appeal, supra* note 223, paras.17-21.
[486] *Joint Opinion of Judges McDonald and Vohrah in the Erdemović case, supra* note 210, paras.2, 6, 9, 10, 14, 29 and 30.
[487] *The Prosecutor v. Dražen Erdemović – Appeal, supra* note 223, paras.18-20.
[488] *Ibid*., para.18.
[489] *Ibid*., para.20.
[490] *The Prosecutor v. Dražen Erdemović – Trial/1998, supra* note 224, para.18.

accused's claim on duress[491]. Moreover, they jointly recommended a sentence of seven years' imprisonment[492].

The second *Erdemović* Trial Chamber acknowledged that "there [was] no provision for [plea] agreements in the Statute and Rules of Procedure and Evidence of the [ICTY]"[493]. It also indicated that "this [was] the first time that such a document ha[d] been presented to the International Tribunal"[494]. Even though the Chamber clearly stated that it was not bound by the plea agreement's terms[495], it admitted to had taken them "into careful consideration" in determining Erdemović's sentence[496]. Thus, the Chamber accepted the duress as a mitigating factor[497] and sentenced the accused to 5 years' imprisonment[498].

The goodwill of the second *Erdemović* Trial Chamber in favor of the defendant is notable. It imposed a sentence that is half the amount chosen by the first Trial Chamber and, even more curious, that it is two years lighter than the plea agreement's recommendation[499]. According to Nancy Combs, Erdemović's apparent true remorse, persistent desire to state the truth and meaningful cooperation with the Prosecution charmed the judges[500].

2.2.2 The Prosecutor v. Goran Jelisić

When the remarkably lenient second sentence in the *Erdemović* case became public on March 5, 1998, Goran Jelisić was already under the ICTY's custody at The Hague[501]. He saw this precedent as a golden opportunity to receive a low sentence as well. However, while Erdemović's character played in his favor, Jelisić's character had the exact opposed effect on the judges[502]. In the end, his plans to bargain for a lighter sentence were entirely frustrated: he received a sentence 700% longer than Erdemović's.

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[491] *Ibid*.
[492] *Ibid*.
[493] *Ibid*., para.19.
[494] *Ibid*.
[495] *Ibid*.
[496] *Ibid*.
[497] *Ibid*., para.17.
[498] *Ibid*., para.23.
[499] *Ibid*., para.18.
[500] COMBS (2002), *supra* note 440, p.114.
[501] *The Prosecutor v. Goran Jelisić, supra* note 313, para.5.
[502] COMBS (2002), *supra* note 440, p.115 and 117.

Jelisić was a Bosnian Serb and the *de facto* commander of the Luka concentration camp, a former port facility located in the city of Brčko, in Bosnia and Herzegovina[503]. On May 1992, Serbian official forces and paramilitary groups invaded that city and immediately separated the Serbian people from Croats and Muslims[504]. The soldiers transported the non-Serbians by buses to the Luka camp, where they had been subjected to brutal mistreatment and murders[505].

Jelisić was initially accused of genocide, war crimes and crimes against humanity[506]. He was arrested on January 22, 1998, and his first appearance before the ICTY occurred four days later, when he pleaded not guilty to all counts[507]. Subsequent negotiations between defense lawyers and the prosecutors ended up in the "Agreed Factual Basis for Guilty Pleas to be Entered by Goran Jelisić", which was signed by both parties on September 9, 1998[508]. The Prosecution issued a new indictment taking into account the agreed facts[509].

On October 29, 1998, Jelisić officially pleaded guilty to the war crimes and crimes against humanity accusations, as described in the Agreed Factual Basis[510]. He admitted to having committed brutal acts, including the murder of thirteen detainees after beating them severely with truncheons and clubs[511]. He also confessed to inflicting bodily harm on four people[512] and ordering his subordinates to cut off one detainee's ear[513]. Some prisoners were beaten so severely to the point of fainting or becoming unrecognizable[514]. He also stole money and other valuables from the detainees by threatening them with death[515].

In order to terrorize the prisoners, Jelisić declared that he had to execute twenty to thirty people before being able to have breakfast each morning[516]. He once told the detainees that 70% of them were to be killed and 30% beaten[517]. He constantly informed

[503] *The Prosecutor v. Goran Jelisić, supra* note 313, para.23.
[504] *Ibid.*, paras.18-22.
[505] *Ibid.*
[506] *Ibid.*, para.4.
[507] *Ibid.*, para.6.
[508] *Ibid.*, para.10.
[509] *Ibid.*
[510] *Ibid.*, para.11.
[511] *Ibid.*, para.23.
[512] *Ibid.*
[513] *Ibid.*, paras.23 and 40.
[514] *Ibid.*, para.44.
[515] *Ibid.*, paras.16 and 49.
[516] *Ibid.*, para.103.
[517] *Ibid.*, para.102.

the prisoners about the running count of Muslims that he had murdered[518]. On May 11, 1992, he claimed to have killed 150 people[519]. Moreover, Jelisić presented himself as the "Serbian Adolf" to his Muslin detainees and even to the ICTY's judges at his first appearance[520].

Although Jelisić refused to plead guilty to genocide[521], the Trial Chamber, after hearing the arguments of the Prosecution, found that there was not enough evidence to convict him of genocide[522]. In addition, it is relevant to note the approach of the Trial Chamber in dealing with Jelisić's guilty plea. The judges did not blindly accept the agreed facts[523]. On the contrary, they insisted in finding enough evidence to support the Agreed Factual Basis[524]. Moreover, the judges did their own factual and legal evaluation of the case, in order to identify if the facts really fell within the charges[525].

While the prosecutors were lenient in their sentence recommendation in the *Erdemović* case, they could not have been harsher in the case of Jelisić. They argued that no mitigating circumstance should apply and they asked for the most severe penalty of the ICTY Statute – life imprisonment[526]. In particular, the Prosecution argued that the defendant should receive no credit for his cooperation because it had "not been substantial and ongoing"[527]. It also emphasized that "there was no plea agreement between the

[518] *Ibid.*, para.103.
[519] *Ibid.*
[520] *Ibid.*, para.102.
[521] *Ibid.*, para.11.
[522] *Ibid.*, paras.15 and 59-108.
[523] *Ibid.*, para.28.
[524] *Ibid.*
[525] *Ibid.*, paras.32-58. According to the *Jelisić* Trial Chamber: "A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime". Cf.: *Ibid.*, para.25.
[526] *Ibid.*, para.119.
[527] At the hearing of November 25, 1999, the leading prosecutor Geoffrey Nice stated the following: "I turn to cooperation. The defendant's cooperation with the Prosecution has not been substantial and ongoing. (…) If it has not been substantial and ongoing, maybe it should not be considered as a mitigating factor in the sentencing. To be considered substantial, the cooperation extended to the Prosecutor must be significant and must contribute in a meaningful way to the administration of justice, but I observe that this is supported by a presentencing brief, not by a judgement, in the Kambanda case, although it doesn't appear that it was disagreed with. Several factors show that the defendant's cooperation was not significant and did not contribute in a meaningful way. It did not contribute to the effective arrest of other defendants or to the effective pursuit of other suspects or targets, and it did not lead to significant investigations. The defendant did not surrender himself voluntarily. The information provided was not considered by the Prosecution as useful, taking into consideration the fact that it was mainly public information or information of common knowledge, except with respect to his own acts. The Prosecution considers part of the information to be unreliable or incorrect because of inconsistencies and because of the sanitised version of events given. It is right to note, as I do at the end of subparagraph (c), he did make, as the Chamber will recall, specific allegations -- and I believe the name was in private session and, therefore, it doesn't appear here -- but he made specific allegations about a member of a body, which I have identified in the text, and indeed blamed

Prosecution and the defendant confirming significant cooperation in this case"[528]. In fact, during the negotiations of the Agreed Factual Basis, the prosecutors warned Jelisić that they would offer him nothing in exchange for his guilty plea, a promise they firmly kept[529]. Defense lawyers also advised him that a guilty plea would be of little help, but Jelisić did not listen[530]. He continued insisting that his confession would be considered substantial cooperation by the judges[531]. His lawyers, aware of the difficulties of the case, did not ask for a specific penalty at the sentencing hearing; they just opposed the life imprisonment[532].

Like the Prosecution, the *Jelisić* Trial Chamber granted no significant credit for the guilty plea[533]. In fact, the particularly strong language in the judgment indicated that the defendant's sadism stunned the judges. They even said that "[Jelisić's] words and attitude […] essentially reveal[ed] a disturbed personality"[534]. They also pointed out to "the repugnant, bestial and sadistic nature of Goran Jelisić's behaviour. His cold-blooded commission of murders and mistreatment of people attest[ed] to a profound contempt for mankind and the right to life"[535].

Accordingly, the *Jelisić* Trial Chamber gave him next to nothing to mitigate the sentence[536]. Although the judgment acknowledged "the accused's guilty plea out of principle"[537], the Chamber only accorded "relative weight"[538] to it because Jelisić, unlike Erdemović, "demonstrated no remorse […] for the crimes he committed"[539]. The judges also mentioned some photographs taken with the consent of the defendant, showing him committing the crimes[540].

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that person fully for what he says he was ordered to do. Further, cooperation was limited because the defendant, as indeed the psychiatrist reminded us yesterday, was very definite about that which he was and that which he was not prepared to discuss. There was no plea agreement between the Prosecution and the defendant confirming significant cooperation in this case, and in the upshot, the Prosecution did not and does not invite the Trial Chamber to consider the cooperation as a significant mitigating factor". Cf. *The Prosecutor v. Goran Jelisić ("Brčko"*), Transcript of Session held on November 25, 1999, ICTY, Trial Chamber, Case no. IT-95-10-T, p.77.

[528] *Ibid*., p.79.

[529] COMBS, Nancy Amoury. *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach,* Stanford: Stanford University Press, 2007, p.62 [COMBS (2007)].

[530] *Ibid*.

[531] *Ibid*.

[532] *The Prosecutor v. Goran Jelisić, supra* note 313, para.120.

[533] *Ibid*., para.127.

[534] *Ibid*., para.105.

[535] *Ibid*., para.130.

[536] *Ibid*., para.134.

[537] *Ibid*., para.127.

[538] *Ibid*.

[539] *Ibid*.

[540] *Ibid*.

While in the *Erdemović* case the Trial Chamber celebrated Erdemović's collaboration with the Prosecution[541], the present judgment limited itself to say: "[Jelisić's] cooperation with the Office of the Prosecutor in this case [did] not seem to constitute a mitigating circumstance"[542]. In sum, the Chamber determined that "the aggravating circumstances far outweigh the mitigating ones"[543]. He was sentenced to 40 years' imprisonment[544].

The defendant challenged this ruling before the Appeals Chamber, but failed to change the sentence[545]. He argued, *inter alia,* that no credit was given for his guilty plea and cooperation with the Tribunal[546]. The *Jelisić* Appeals Chamber reaffirmed the trial judges' discretion while weighing possible mitigating circumstances, including guilty pleas and cooperation by defendants[547]. It also recalled that relied with the appellants the burden "to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion resulting in a sentence outside the discretionary framework provided in the Statute and the Rules"[548]. As Jelisić failed to fulfill this burden[549], the Appeals Chamber upheld the 40 years' imprisonment sentence[550].

At first sight, the trial of Jelisić appeared to be a plea-bargaining case, especially because of three factors: (i) some of the initial charges were withdrawn by the Prosecution; (ii) Jelisić entered a guilty plea; and (iii) both parties reached a joint statement with agreed facts. However, there was no plea bargain in the case[551]. Firstly, the defendant received no benefit from his plea[552]. Secondly, although the Prosecution indeed withdrew eight counts of war crimes and crimes against humanity, it did so due to the lack of sufficient evidence, and not as a concession to the accused[553]. In addition, the dropped counts most likely did not have a significant impact in Jelisić's sentence[554]. Out of the eight withdrawal charges, four of them referred to the killing of two people; two

[541] *The Prosecutor v. Dražen Erdemović – Trial/1998*, *supra* note 224, para.16.
[542] *The Prosecutor v. Goran Jelisić, supra* note 313, para.127.
[543] *Ibid*., para.134.
[544] *Ibid*., para.139.
[545] *The Prosecutor v. Goran Jelisić ("Brčko"),* Judgment, ICTY, Appeals Chamber, Case no. IT-95-10-A, 5 July 2001, disposition.
[546] *Ibid*., paras.119 and 124.
[547] *Ibid*., paras.121 and 124.
[548] *Ibid*., para.122.
[549] *Ibid*., paras.123 and 127.
[550] *Ibid*., disposition.
[551] COMBS (2002), *supra* note 440, p.117.
[552] *Ibid*.
[553] COMBS (2007), *supra* note 529, p.62.
[554] COMBS (2002), *supra* note 440, p.117.

charges related to the general conditions at the Luka camp; and the other two referred to the torture of a victim Jelisić admitted to having murdered[555]. No one can deny that these dropped charges were serious, but they did not substantially add anything new in relation to war crimes and crimes against humanity Jelisić had pleaded guilty to committing[556].

2.2.3 The Prosecutor v. Stevan Todorović

The *Todorović* case inaugurated a new practice at the ICTY: sentence bargaining, in which the defendant pleaded guilty to certain charges in exchange of lenient sentence recommendations by the Prosecution[557]. The accused in this landmark case was Stevan Todorović, a former-executive in a bamboo furniture factory[558]. On April 17, 1992, he was appointed Chief of Police in the Municipality of Bosanski Šamac, in Bosnia and Herzegovina, right after Serb forces gained control over the area[559]. In the following months, the Serbians launched a series of attacks in order to remove the Bosnian Croat and Bosnian Muslim populations from the Municipalities of Bosanski Šamac and Odzak[560]. The non-Serbians were murdered, beaten, sexually assaulted, deported, unlawfully confined and subjected to forced labor[561]. The local Serb authorities implemented large-scale appropriations of non-Serbians' personal and commercial property and enforced several discriminatory orders, including forcing the Croats and Muslims to wear white armbands to identify themselves as non-Serbs[562].

Todorović was one of the five defendants indicted for ethnic cleansing in the Municipalities of Bosanski Šamac and Odzak[563]. For his role as the local Chief of Police, he was charged with: (i) crimes against humanity (persecutions on political, racial and religious grounds; deportation; murder; inhumane acts; rape; and torture); (ii) grave breaches of the 1949 Geneva Conventions (unlawful deportation; murder; wilfully

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[555] *Ibid*.
[556] *Ibid*.
[557] BOAS *et al*., *supra* note 18, p.221; MCCLEERY, *supra* note 46, p.1103.
[558] *The Prosecutor v. Stevan Todorović ("Bosanski Šamac"),* Initial Indictment, ICTY, Trial Chamber, Case no. IT-95-9/1-S, 29 June 1995, para.10.
[559] *Ibid*.
[560] *Ibid*., paras.4-5.
[561] *Ibid*.
[562] *Ibid*.
[563] The other four defendants were: (i) Blagoje Simić (the President of the Municipal Board of the Serbian Democratic Party and President of the Serb Crisis Staff in the municipality of Bosanski Šamac); (ii) Milan Simić (member of the Bosnian Serb Crisis Staff and President of the Municipal Assembly of Bosanski Šamac); (iii) Miroslav Tadić (President of the Commission for Population Exchange in Bosanski Šamac and a member of the Bosnian Serb Crisis Staff); and (iv) Simo Zarić (Chief of National Security in Bosanski Šamac and Deputy to the President of the Civilian Council in Odzak).

causing great suffering; torture; and inhuman treatment); and (iii) violations of the laws or customs of war (murder; cruel treatment; and torture)[564]. Todorović's crimes were particularly cruel. For example, on two different occasions, he forced four male prisoners to perform fellatio on each other at the police station of Bosanski Šamac[565]. He laughed while watching the men perform oral sex[566]. His notorious reputation for cruelty earned him the alias "Monstrum"[567].

NATO apprehended Todorović and transferred him to The Hague in September 1998[568]. In his initial appearance on September 30 of that year, he pleaded not guilty to all charges[569]. However, he had a bargaining chip that dramatically changed the course of his trial: the ability to embarrass NATO[570]. To date, the circumstances surrounding Todorović's arrest remain unclear[571]. Nevertheless, according to the defendant's own account and several media reports, on the night of September 27, 1998, four armed and masked men burst into his house in Western Serbia, gagged, blindfolded, and beat him with a baseball bat[572]. He was immediately smuggled to Bosnia-Herzegovina. Just a few minutes after crossing the international border, a helicopter arrived and took him to SFOR's Air Base at Tuzla, in Bosnia[573]. Some newspapers speculated that the four men were bounty hunters paid for by American and British intelligence[574]. Although what really happened that night is still unknown – mostly due to NATO's and the ICTY Office of the Prosecutor's efforts to maintain the facts a secret[575] – defense lawyers cleverly used the circumstances in their favor[576].

Aware of the politically sensitive nature of the issue and the overwhelming desire for secrecy, Todorović publicly challenged the legality of his arrest and tried to implicate NATO and the ICTY Prosecutor in the capture[577]. To put pressure on the Prosecution,

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[564] *The Prosecutor v. Stevan Todorović*, *supra* note 427, para.3.
[565] *Ibid*., paras.39-40.
[566] *Ibid*., para.40.
[567] SIMONS, Marlise. "War Crimes Court Takes It Easy on a Cooperative Bosnian Serb", *The New York Times*, 1 August 2001. Available at: <https://www.nytimes.com/2001/08/01/world/war-crimes-court-takes-it-easy-on-a-cooperative-bosnian-serb.html>. Access on: November 27, 2018.
[568] *The Prosecutor v. Stevan Todorović*, *supra* note 427, para.2.
[569] *Ibid*.
[570] COMBS (2002), *supra* note 440, p.118.
[571] SLOAN, James. "Prosecutor v. *Todorović*: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction", *Leiden Journal of International Law*, vol.16, p.85-113, 2003, p.86 [SLOAN].
[572] *Ibid.*
[573] *Ibid*.; *The Prosecutor v. Stevan Todorović*, *supra* note 427, para.2.
[574] SLOAN, *ibid*.
[575] *Ibid.*
[576] *Ibid.*
[577] *Ibid.*

Todorović's lawyers requested the Trial Chamber to order NATO to deliver all documents and witnesses in connection with his arrest[578]. As NATO refused to cooperate voluntarily[579], the Trial Chamber issued its decision on October 18, 2000, granting the defense's request[580]. Naturally, NATO and some of its member States (US, Canada, United Kingdom, Germany, The Netherlands, Norway, Italy, Denmark and France) appealed on November 2, 2000[581]. The Appeals Chamber suspended the challenged decision until its final judgment on the matter[582].

The defense's strategy worked, and while the case was pending before the Appeals Chamber, Todorović and the Prosecution reached a plea agreement[583]. Following the deal, Todorović entered a plea of guilty on December 13, 2000, to the count of persecution as a crime against humanity[584]. The Prosecution dropped all other counts on January 23, 2001[585]. In response, the defendant withdrew the motions questioning the legality of his arrest on the following day[586]. The trial of Todorović was then formally severed from the one against the other four defendants[587].

During the sentencing proceedings, the *Todorović* Trial Chamber reaffirmed that it is not bound by any plea agreement[588] as well as the need for its own evaluation of the facts, independently from the agreed terms[589]. The decision noted that "a guilty plea

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[578] "Decision on Todorović's Motion for judicial Assistance", *ICTY Press Release,* 20 October 2000. Available at: <http://www.icty.org/en/sid/7811>. Access on: November 27, 2018.
[579] COGAN, Jacob Katz. "International Criminal Courts and Fair Trials: Difficulties and Prospects", *Yale Journal of International Law,* vol.27, p.111-140, 2002, p.125.
[580] The decision stated that the Stabilisation Force in Bosnia and Herzegovina (SFOR), the North Atlantic Council and all States participating in SFOR should disclose to the defense lawyers the following documents and information: "a) copies of all correspondence and all reports by SFOR relating to the apprehension of the accused, Stevan Todorovic; b) the original or a copy of all audio and video tapes made by SFOR on 27 September 1998 of the initial detention and arrest of the accused, Stevan Todorovic; c) copies of all SFOR pre- and post-arrest operations reports relating to the arrest and detention of the accused, Stevan Todorovic; d) the identity, if known, of the individual or individuals who transported the accused, Stevan Todorovic, by helicopter to the Tuzla Air Force base, Bosnia and Herzegovina, on or about 26 and 27 September 1998; and e) the identity, if known, of the individual or individuals who placed the accused, Stevan Todorovic, under arrest and who served the arrest warrant issued by the International Tribunal on the accused, Stevan Todorovic, on or about 28 September 1998". Cf. "Decision on Todorović's Motion for judicial Assistance", *ICTY Press Release,* 20 October 2000. Available at: <http://www.icty.org/en/sid/7811>. Access on: November 27, 2018.
[581] "Appeals Chamber suspends Trial Chamber's decision on Todorovic's motion for judicial assistance", *ICTY Press Release,* 10 November 2000. Available at: <http://www.icty.org/en/sid/7808>. Access on: November 27, 2018.
[582] *Ibid.*
[583] SLOAN, *supra* note 571, p.86.
[584] *The Prosecutor v. Stevan Todorović*, *supra* note 427, paras.5-6.
[585] *Ibid*., para.6.
[586] *Ibid*., paras.5-6.
[587] *Ibid*., para.6.
[588] *Ibid*., para.79.
[589] *Ibid*., para.25

cannot form the sole basis for the conviction of an accused; the Trial Chamber must also be satisfied that 'there is a sufficient factual basis for the crime and the accused's participation in it'"[590].

Regarding the guilty plea as a mitigating circumstance, the Chamber concurred that such a plea should, in itself, amount to a sentence reduction[591]. Firstly, it indicated that a "guilty plea is always important for the purpose of establishing the truth in relation to a crime"[592]. Moreover, mentioning the individual opinion of Judge Cassese from the *Erdemović* case, the *Todorović* Trial Chamber endorsed the practical benefits of such pleas to the work of the Tribunal, such as avoiding the difficulties of lengthy trials, relieving victims and witnesses from giving stressful testimonies before the trial chambers and reducing costs of international criminal trials[593]. As guilty pleas simplify the proceedings, they reduce expenses related to simultaneous interpretation and provision of written transcripts into various languages; transportation and provisions to numerous victims and witnesses from far-away areas; etc[594].

The *Todorović* Trial Chamber introduced an important new element: the time of the guilty plea[595]. According to the judgment, in order to receive credit, a defendant should have had entered his plea of guilty before the commencement of the trial[596]. The Chamber pointed out that "if pleaded at a later stage of the proceedings, or even after the conclusion of the trial, a voluntary admission of guilt [did] not save the [Tribunal] the time and effort of a lengthy investigation and trial"[597]. Regarding the present case, the judges stated that even though Todorović pleaded guilty 26 months after his initial appearance, his trial had not yet begun[598]. In conclusion, the Chamber decided to consider Todorović's guilty plea as a mitigating circumstance, due to its "considerable contribution […] to the efficiency of the work of the [ICTY] and to its search for the truth"[599].

As for the defendant's cooperation, the *Todorović* Trial Chamber made extensive reference to the *Blaškić* case[600]. Although the defendant in that case – Tihomir Blaškić, a General in the HVO – did not cooperate with the Tribunal nor pleaded guilty, the *Blaškić*

[590] *Ibid*.
[591] *Ibid*., para.80.
[592] *Ibid*., para.81.
[593] *Ibid*., para.80.
[594] *Ibid*.
[595] *Ibid*., para.81.
[596] *Ibid*.
[597] *Ibid*.
[598] *Ibid*., para.82.
[599] *Ibid*.
[600] *Ibid*., para.85.

Trial Chamber provided significant clarification on cooperation as a mitigating circumstance[601]. It explained that since collaboration by the defendant was the only cause for sentence reduction explicitly provided for in the ICTY's Rules of Procedure and Evidence[602], it had "a special importance"[603]. It clarified that not every collaboration with the Prosecution could entail leniency[604]. Two requirements had to be met: (i) "both the quality and the quantity of the information provided by the accused [were] substantial"[605]; and (ii) "the cooperation [was] given without hope of reward"[606], i.e., the accused collaborated with "spontaneity and selflessness"[607] and without asking for something in return[608].

Adopting the *Blaškić* approach, the Prosecutor argued that since Todorović received substantial benefits from the plea agreement, his cooperation could not be considered spontaneous and selfless[609]. Thus, he should not receive any credit for it[610]. The *Todorović* Trial Chamber concurred with the *Blaškić* judgment's proposition to mitigate the sentence exclusively when the quality and quantity of the information provided by the defendant were substantial[611]. However, it disagreed that concessions in favor of the defendant in exchange for his collaboration could render this cooperation unfit for sentence mitigation purposes[612]. The judgment unequivocally stated the following: "the fact that an accused has gained or may gain something pursuant to an agreement with the Prosecution does not preclude the Trial Chamber from considering his substantial cooperation as a mitigating circumstance in sentencing"[613].

The Trial Chamber noted that Todorović's cooperation had been provided "in an open and forthright manner" [614] and that he delivered information in accordance with the

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[601] *The Prosecutor v. Tihomir Blaškić ("Lašva Valley"),* Judgment, ICTY, Trial Chamber, Case no. IT-95-14-T, 3 March 2000, para.774 [*The Prosecutor v. Tihomir Blaškić*].
[602] *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 101(B)(ii). This provision stated the following: "In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: […] any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction".
[603] *The Prosecutor v. Tihomir Blaškić, supra* note 601, para.774.
[604] *Ibid.*
[605] *Ibid.*
[606] *Ibid.*
[607] *Ibid.*
[608] *Ibid.*
[609] *The Prosecutor v. Stevan Todorović*, *supra* note 427, para.85.
[610] *Ibid.*
[611] *Ibid*., para.86.
[612] *Ibid.*
[613] *Ibid*., para.87.
[614] *Ibid.*

quantity and quality criteria, including some data that might not otherwise had been obtained by the Prosecution[615]. Accordingly, it concluded that his collaboration was substantial and, thus, could be considered a mitigating circumstance[616].

In the end, Todorović was sentenced to ten years' imprisonment[617]. As the penalty remained within the range of the plea agreement (5 to 12 years), there was no appeal by either party[618]. The sentence bargaining in the present case favored the defendant significantly[619]. For instance, Duško Tadić had been charged with similar crimes as Todorović[620], and did not have a superior position, as the latter did[621]. Despite that, Tadić received a twenty-year sentence[622] (twice the amount of Todorović). Arguably, the Prosecution was particularly lenient in the *Todorović* case due to its desire to bury the defendant's embarrassing motions challenging the validity of his detention[623].

The huge leniency of the Prosecution while bargaining the sentence in the *Todorović* case was rather an exception than the rule[624]. In the subsequent guilty-plea cases with sentence bargaining, the Prosecution requested the imposition of harsh sentences by the trial chambers[625]. In fact, the prosecutors' recommended sentences were similar to those that most likely would have been imposed to the defendants after a regular trial[626].

This rationale applies particularly to the *Sikirica et al*. case, which will be discussed in more detail further below in this section of the thesis. For now, it is enough to say that Sikirica, one of the defendants, was the Commander of Security at the Logor

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[615] *Ibid.*
[616] *Ibid*., para.88.
[617] *Ibid*., para.115.
[618] *Ibid*., para.11.
[619] COMBS (2007), *supra* note 529, p.71.
[620] Todorović was charged with crimes against humanity (persecutions on political, racial and religious grounds; deportation; murder; inhumane acts; rape; and torture), grave breaches of the 1949 Geneva Conventions (unlawful deportation; murder; wilfully causing great suffering; and torture or inhuman treatment) and violations of the laws or customs of war (murder; cruel treatment and torture). Tadić was indicted with crimes against humanity (persecutions on political, racial or religious grounds; rape; murder; and inhumane acts), grave breaches of the 1949 Geneva Conventions (wilful killing; torture or inhuman treatment; and wilfully causing great suffering or serious injury to body or health) and violations of the laws or customs of war (cruel treatment; and murder). Cf.: *The Prosecutor v. Stevan Todorović*, *supra* note 427, para.3; *The Prosecutor v. Duško Tadić, supra* note 327, para.9.
[621] While Todorović was the chief of police and a member of the Serb crisis staff in Bosanski Šamac, Tadić was the President of the Local Board of the Serb Democratic Party in Kozarac, Bosnia and Herzegovina. Cf. *The Prosecutor v. Stevan Todorović*, *ibid.*, para.10; *The Prosecutor v. Duško Tadić, ibid.*, paras.180-192.
[622] *The Prosecutor v. Duško Tadić, ibid*., para.76.
[623] COMBS (2007), *supra* note 529, p.71.
[624] *Ibid.*
[625] *Ibid.*
[626] *Ibid.*

Keraterm concentration camp[627]. Following a plea agreement, the Prosecution recommended the highest sentence possible in the terms of that deal – 17 years' imprisonment[628]. The Trial Chamber imposed on Sikirica, a 15-year sentence[629]. Interestingly, the trial of other commandants of concentration camps in the former-Yugoslavia, in which the defendants did not enter a guilty plea, resulted in very similar or even smaller sentences than the one imposed on Sikirica, who pleaded guilty[630]. For instance, Zlatko Aleksovski, Commander of the Kaonik prison, was convicted by the Trial Chamber, after a full trial, to two and a half years' imprisonment[631] and by the Appeals Chamber to seven years[632]. Hazim Delić, Deputy Commander of the Čelebići camp, was particularly vicious: he beaten some detainees to death, raped others repeatedly and often tortured the prisoners, including by using an electric shock device[633]. After a regular trial, he was sentenced to 18 years' imprisonment[634], a sentence only slightly higher than Sikirica's.

A dramatic shift occurred in the Prosecution's strict approach to sentence bargaining with the *Plavšić* case[635]. The accused was Biljana Plavšić, a Bosnian Serb college professor and politician who served as the second President of the Serb Republic[636]. Her indictment contained very serious accusations: genocide, complicity in genocide and crimes against humanity (persecutions, extermination and killing, deportation and inhumane acts)[637]. She was responsible for ordering widespread persecutions of Bosnian Muslim, Bosnian Croat and other non-Serb populations throughout the Serb Republic [638]. She implemented a campaign of ethnic separation, which resulted in the death and expulsion of thousands of civilians in circumstances of vicious cruelty[639]. Plavšić also invited paramilitary groups from Serbia to assist Bosnian

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[627] *The Prosecutor v. Duško Sikirica et al. ("Keraterm Camp"),* Judgment, ICTY, Trial Chamber, Case no. IT-95-8-S, 13 November 2001, para.1 [*The Prosecutor v. Duško Sikirica et al.*].
[628] *Ibid*., para.25.
[629] *Ibid*., para.245.
[630] COMBS (2007), *supra* note 529, p.72-73.
[631] *The Prosecutor v. Zlatko Aleksovski ("Lašva Valley"),* Judgment, ICTY, Trial Chamber, Case no. IT-95-14/1-T, 25 June 1999, para.244.
[632] *The Prosecutor v. Zlatko Aleksovski ("Lašva Valley"),* Judgment, ICTY, Appeals Chamber, Case no. IT-95-14/1-A, 24 March 2000, para.192.
[633] *The Prosecutor v. Zdravko Mucić et al. ("Čelebići Camp"),* Judgment, ICTY, Trial Chamber, Case no. IT-96-21-T*bis*-R117, 9 October 2001, para.29.
[634] *Ibid*., para.44; *The Prosecutor v. Zdravko Mucić et al. ("Čelebići Camp"),* Judgment, ICTY, Appeals Chamber, Case no. IT-96-21-A*bis*, 8 April 2003, para.61.
[635] COMBS (2007), *supra* note 529, p.73.
[636] *The Prosecutor v. Biljana Plavšić, supra* note 215, para.10.
[637] *Ibid*., para.2.
[638] *Ibid*., paras.10-19.
[639] *Ibid*.

Serb forces in effecting the ethnic extermination of Muslims, Croats and other minorities in Bosnia, including detaining and killing them in concentration camps[640].

As part of Plavšić's ethnic cleansing campaign, the Serbs turned around 850 Muslim- and Croat-inhabited villages to ashes; these villages no longer physically exist[641]. They also destroyed over 100 Islamic mosques and 7 Catholic churches in 29 different municipalities of Bosnia and Herzegovina[642]. In several areas, virtually all non-Serbs were exterminated or expelled[643]. For instance, approximately 15,000 Muslims and Croats lived in the Foca municipality, in 1991; only 434 remained in 1997[644]. While about 53,000 non-Serbs resided in the Prijedor municipality before the conflict, only 4,000 of them could be found there in 1997[645]. The situation was similar in other Bosnian municipalities: in Zvornik, the non-Serb community of 31,000 persons in 1991 was reduced to fewer than 1,000 in 1997[646]. In Bratunac, there were 16,000 Muslims and Croats in 1991 and only hundreds in 1997[647]. In addition to her involvement in all those acts, Plavšić also aided in the cover-up of the crimes[648].

Even though Plavšić pleaded not guilty to all counts at her initial appearance[649], she and the Prosecution reached a plea agreement on September 30, 2002[650]. Pursuant to the plea deal, the defendant pleaded guilty only to the charge of persecution as a crime against humanity, and the Prosecution dropped all remaining charges, including the ones on genocide[651]. However, the dropping of those counts was the only concession in the plea agreement. One of its provisions clearly stated that no sentence bargaining had been reached: "In respect to the lengthy of sentence to be imposed, the Prosecutor has made no promises to Biljana Plavšić in order to induce her to change her plea […] from not guilty to guilty"[652].

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[640] *Ibid*.
[641] *Ibid*., para.32.
[642] *Ibid*., para.44
[643] *Ibid*., paras.38-39.
[644] *Ibid*., para.38.
[645] *Ibid*., para.39.
[646] *Ibid*., para.38.
[647] *Ibid*.
[648] *Ibid*., paras.10-19.
[649] *Ibid*., para.3
[650] *Ibid*., para.5.
[651] *Ibid*.
[652] *The Prosecutor v. Biljana Plavšić ("Bosnia and Herzegovina"),* Plea Agreement, ICTY, Trial Chamber, Case no. IT-00-39&40-PT, 30 September 2002, para.7.

Arguably, the lack of sentence bargaining could be a reaction to Plavšić's refusal to cooperate by providing information or testifying in other cases[653]. In fact, her guilty plea statement reads as follows: "I have accepted responsibility for my part in this. This responsibility is mine and mine alone. It does not extend to other leaders who have a right to defend themselves"[654]. The ICTY Prosecutor Carla Del Ponte later wrote in her memoir that she had made a "fundamental error" by "not obliging [Plavšić] to agree on paper to testify against the other accused"[655]. She even admitted the following: "I accepted verbal assurances and was deceived"[656].

More surprisingly, despite no promise of a lenient sentence recommendation in the plea agreement, the Prosecution sought a sentence of between 15 and 25 years in prison[657]. Although this range could have become a life sentence due to Plavšić's age at the time of sentencing (72 years old)[658], her top political rank in the government of the Serb Republic and the brutal and widespread nature of the crimes could easily have justifed a more aggressive sentence recommendation by the Prosecution in her case.

The *Plavšić* Trial Chamber was even more lenient than the Prosecution. It gave particular emphasis to the mitigating factors[659], especially Plavšić's guilty plea and remorse[660], her old age[661] and her post-conflict efforts to achieve national conciliation and the implementation of the Dayton Accords in the Serb Republic[662]. Accordingly, she was sentenced to mere 11 years' imprisonment on February 27, 2003[663]. Her light sentence and the fact that she served it in an apparently luxurious Swedish minimum-security prison, with access to sauna, solarium, massage room and horse-riding paddock, enraged the Bosnian Muslim community[664]. They also vehemently criticized her early release

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653 SUBOTIC, Jelena. "The Cruelty of False Remorse: Biljana Plavšic at The Hague", *Southeastern Europe*, vol.36, p.39-59, 2012, p.47 [SUBOTIC].
654 *The Prosecutor v. Biljana Plavšić ("Bosnia and Herzegovina"),* Guilty Plea Statement, ICTY, Trial Chamber, Case no. IT-00-39&40-1, 17 December 2002. Available at: <http://www.icty.org/en/content/statement-guilt-biljana-plav%C5%A1i%C4%87>. Access on: November 27, 2018.
655 PONTE, Carla Del. *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, New York: Other Press, 2009, p.161.
656 *Ibid.*
657 *The Prosecutor v. Biljana Plavšić, supra* note 215, para.128; COMBS (2007), *supra* note 529, p.74.
658 COMBS (2007), *ibid.*
659 SUBOTIC, *supra* note 653, p.44.
660 *The Prosecutor v. Biljana Plavšić, supra* note 215, paras.66-81.
661 *Ibid*., paras.95-106
662 *Ibid*., paras.85-94
663 *Ibid*., para.134.
664 COMBS (2007), *supra* note 529, p.74; ORENTLICHER, Diane. *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, Oxford: Oxford University Press, 2018, p.147-148.

from prison in October 2009, after serving only 6 years[665]. Her official welcome back in Bosnia and Herzegovina by the top Bosnian Serb leadership, including the Serb Republic's Prime Minister Milorad Dodik, its President Rajko Kuzmanović and the Serb member of Bosnia's central presidency Nebojša Radmanović, also caused rage among the Bosniaks[666].

The *Plavšić* case marked the beginning of Prosecutor Carla Del Ponte's policy of enormous leniency in sentence recommendations[667]. This dramatic change in the prosecutorial strategy was due mostly to the UNSC's pressure to close the ICTY[668]. The Prosecutor's new approach became evident by comparing the sentence of defendants who pleaded guilty *before* and *after* the *Plavšić* case (decided on February 27, 2003). The thesis will discuss first Goran Jelisić (who pleaded guilty on October 28, 1998[669]) and Ranko Češić (who pleaded guilty on October 8, 2003[670]). Češić is a Bosnian Serb, who, like Jelisić, participated in the ethnic cleansing in the Municipality of Brčko[671]. He was a member of the local police and, on this capacity, arrested numerous non-Serbians and brought them to the Brčko police station or to the Luka concentration camp, where he beat, humiliated and killed detainees[672]. In total, Češić confessed murdering ten prisoners, two of whom died because of severe beating and eight others were shot dead[673]. He also admitted to having forced two Muslim brothers to perform sexual acts on each other in public[674].

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[665] TRAYNOR, Ian. "Leading Bosnian Serb war criminal released from Swedish prison", *The Guardian*, 27 October 2009. Available at: <https://www.theguardian.com/world/2009/oct/27/bosnian-serb-war-criminal-freed>. Access on: November 27, 2018; "Bosnian war's 'Iron Lady' freed from prison", *CNN*, 27 October 2009. Available at: <http://edition.cnn.com/2009/WORLD/europe/10/27/plasvic.release/index.html>. Access on: November 27, 2018; "Former Bosnian Serb President Plavsic to be Released From Prison", *Fox News*, 15 September 2009. Available at: <https://www.foxnews.com/story/former-bosnian-serb-president-plavsic-to-be-released-from-prison>. Access on: November 27, 2018; PENFOLD, Chuck. "Former Bosnian Serb leader Plavsic released from prison", *DW*, 27 October 2009. Available at: <https://www.dw.com/en/former-bosnian-serb-leader-plavsic-released-from-prison/a-4830074>. Access on: November 27, 2018.

[666] NEDELJKOVIC, Ivan. "Bosnian Serb war criminal Plavsic back in Serbia", *Reuters*, 27 October 2009. Available at: <https://uk.reuters.com/article/uk-sweden-plavsic/bosnian-serb-war-criminal-plavsic-back-in-serbia-idUKTRE59Q1Y520091027>. Access on: November 27, 2018; "Plavsic's Welcome Provokes Outrage", *Balkan Insight*, 13 November 2009. Available at: <http://www.balkaninsight.com/en/article/plavsic-s-welcome-provokes-outrage>. Access on: November 27, 2018.

[667] COMBS (2007), *supra* note 529, p.75.

[668] *Ibid*.

[669] *The Prosecutor v. Goran Jelisić, supra* note 313, para.11. For more information on the *Jelisić* case, cf.: section 2.2.2 of the present thesis.

[670] *The Prosecutor v. Ranko Češić*, *supra* note 215, para.4.

[671] *Ibid*., para.7.

[672] *Ibid*., paras.7-17.

[673] *Ibid*., paras.9-11 and 15-17.

[674] *Ibid*., para.13.

Although Češić did not hold Jelisić's position of authority[675], he admitted to crimes roughly comparable to those committed by the latter (killing of thirteen people, infliction of bodily harm on four prisoners and stealing valuables from detainees)[676]. Jelisić's plea of guilty earned him no credit with the Prosecution – which sought a life sentence[677] – and no significant sentence mitigation from the Trial Chamber, which sentenced him to virtually a life sentence (40 years in prison)[678]. Češić, however, had a much more favorable fate. Following the plea agreement, the Prosecution recommended a sentence in the range of 13 to 18 years[679]. The Trial Chamber complied with the plea deal and sentenced Češić to 18 years of imprisonment[680].

Likewise, great discrepancy in sentencing can be found in two cases concerning the Logor Keraterm concentration camp: the *Sikirica et al*. and the *Banović* cases[681]. That camp had been installed in a former ceramic tile factory, near the town of Prijedor, after the Serbian military attack on the Kozarac area, in Northwestern Bosnia and Herzegovina[682]. Numerous civilians with non-Serbian origins were captured and imprisoned there[683]. Although the exact number of detainees varied over time, the average was between 1,000 and 1,050 people[684]. The prisoners were subjected to constant summary executions, inhumane living conditions, beatings, torture and other mistreatments[685]. A UN report stated that "there was almost no day with less than two or three prisoners killed in Logor Keraterm"[686].

In the *Sikirica et al.* case there were three defendants: Duško Sikirica, Damir Došen and Dragan Kolundžija, all Bosnian Serbs[687]. While the first was Logor Keraterm's Commander of Security, the other two accused were both Shift Commanders of the

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675 While Češić was a local police officer, Jelisić was the commander of the Luka concentration camp.
676 *The Prosecutor v. Goran Jelisić, supra* note 313, para.23.
677 *Ibid*., para.119.
678 *Ibid*., para.139.
679 *The Prosecutor v. Ranko Češić*, *supra* note 215, para.108.
680 *Ibid*., para.111.
681 *The Prosecutor v. Duško Sikirica et al*., *supra* note 627; *The Prosecutor v. Predrag Banović, supra* note 215.
682 *Final report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992) (Annex V: The Prijedor Report),* UNDoc.S/1994/674/Add.2 (Vol. I), 28 December 1994. Available at: <https://web.archive.org/web/20081206012327/http://www.ess.uwe.ac.uk/comexpert/ANX/V.htm#II-VIII.B>. Access on: November 27, 2018.
683 *Ibid.*
684 *Ibid.*
685 *Ibid.*
686 *Ibid.*
687 *The Prosecutor v. Duško Sikirica et al*., *supra* note 627, para.1.

camp's guards[688]. The ICTY issued their arrest warrants on July 21, 1995, but the three accused were surrendered to the Tribunal over a period of more than one year, from June 1999 to July 2000[689]. As for the accusations, Kolundžija was indicted with five charges of violations of the laws or customs of war and crimes against humanity[690]. Došen was indicted with seven charges of violations of the laws or customs of war and crimes against humanity[691]. Finally, Sikirica was indicted with nine charges of violations of the laws or customs of war, genocide and crimes against humanity[692]. All three pleaded not guilty at their first appearance[693].

The trial initiated on March 19, 2001, but all three defendants eventually entered plea agreements with the Prosecution[694]. They pleaded guilty to persecution as crime against humanity in September 2001, and the Prosecution withdrew the remaining charges[695]. The *Sikirica* Trial Chamber emphasized that it was not bound by the guilty plea and it had to evaluate the factual basis of the case in order to deliver a conviction[696]. The judgment also indicated that once the Chamber identified sufficient facts to corroborate the content of the guilty plea, "it should, unless there [were] cogent reasons indicating otherwise, impose a sentence that [was] based on the agreed facts"[697]. The judgment did not provide any particular guidance to indicate what those "cogent reasons" could be.

After its own legal and factual evaluation, the Trial Chamber found Sikirica guilty of personally shooting a detainee in the head and of failing to discharge his duty, as the camp's commander of security, to prevent the killings, rapes and mistreatment of prisoners in Logor Keraterm[698]. Došen was found criminally liable for permitting these serious offenses against the detainees[699]. Lastly, Kolundžija was found guilty of abusing

[688] *Ibid.*
[689] *Ibid.*
[690] *Ibid*., paras.2 and 5.
[691] *Ibid*., paras.3 and 7.
[692] *Ibid*., paras.4 and 6.
[693] *Ibid*., paras.2-4.
[694] *Ibid*., paras.12-14.
[695] *Ibid*., paras.13 and 15.
[696] *Ibid*., para.46. The judgment reads as follows: "In arriving at a decision as to whether it is so satisfied, the Chamber is not confined to a consideration of the facts as agreed between the Prosecution and the Defence, because its fundamental obligation is to ensure that there is a sufficient factual basis for the crime and the accused's participation in it. Thus, if the Chamber is dissatisfied or is for any reason uncertain about any of the facts as agreed between the parties, the Chamber may conduct a trial on that particular issue for the purpose of determining those facts". Cf. *Ibid*., para.48.
[697] *Ibid*., para.49.
[698] *Ibid*., paras.118-127.
[699] *Ibid*., paras.153-161.

his position of trust by continuing to work as a shift leader at the camp, although aware of the inhuman conditions[700].

In the determination of the applicable mitigating circumstances, the Chamber began with the Sikirica's guilty plea[701]. A central question was timing because the defendant entered such plea about five months after the beginning his trial[702]. As decided in the *Todorović* case, a guilty plea can be useful for mitigating purposes only if made before the commencement of the prosecution[703]. Hence, the *Sikirica* Trial Chamber had to decide if it should apply the *Todorović* precedent or not. In other words, it had to choose whether to give no credit to the accused for his late plea or consider the appropriateness of departing from the *Todorović* case and accept the guilty plea as a mitigating factor of the defendants' sentence.

Defense lawyers expressly challenged the *Todorović* precedent[704]. They argued that Sikirica's guilty plea was relevant for facilitating the truth-finding process, i.e., even late guilty pleas could help the Tribunal and the victims, by providing a clearer picture of the events[705]. They sustained that since this version of the facts was coming from the accused himself, it had more probative value and more significance to the victims than the evidence gathered by the Prosecution[706]. In pragmatic terms, the defense submitted that if Sikirica had pleaded guilty to the crime of persecution at the outset of his trial, "it [was] doubtful whether the Prosecution would have accepted the factual basis that it has now accepted as accurately describing Sikirica's culpability"[707]. His lawyers believed that the absence of a trial could have prevented the proper determination of the accused's responsibility[708].

The Trial Chamber concurred with Sikirica's defense[709]. It ruled that a guilty plea had two roles to play in facilitating the ICTY's work[710]. The first one referred to those guilty pleas entered before the commencement of the trial proceedings: they saved time and efforts by avoiding a lengthy investigation and trial[711]. The second role referred to

[700] *Ibid*., paras.200-203
[701] *Ibid*., para.48.
[702] *Ibid*., paras.14-15.
[703] *The Prosecutor v. Stevan Todorović, supra* note 427, para.81.
[704] *The Prosecutor v. Duško Sikirica et al*., *supra* note 627, paras.142-144.
[705] *Ibid*., paras.142-143.
[706] *Ibid*.
[707] *Ibid*., para.144.
[708] *Ibid*.
[709] *Ibid*., para.149.
[710] *Ibid*.
[711] *Ibid*.

any guilty plea, notwithstanding their timing: they directly aided the ICTY in its fundamental objective of finding the truth[712]. Accordingly, the *Sikirica* Trial Chamber ruled that guilty pleas should receive different mitigating weight depending on the time of their entering[713]. The accused who pleaded guilty prior to the beginning of his trial would receive full credit for that plea[714]. On the other hand, the defendant who entered a plea of guilty any time thereafter would still receive some credit, but it would not be in the same amount as if he pleaded guilty before the commencement of his trial[715].

The Chamber concluded that Sikirica should receive at least some credit for his late guilty plea[716]. The same conclusion had been applied to Došen[717]. Kolundžija, however, entered his plea of guilty before the commencement of his defense, but after the conclusion of the Prosecution's case[718]. Due to his timelier plea, Kolundžija received close to full credit[719].

As for the cooperation of the defendants with the Prosecution, the *Sikirica* Trial Chamber rejected any possible mitigation[720]. After acknowledging that this mitigating cause relied on the extent and quality of the information provided[721], the judgment simply added: "The Trial Chamber has heard and considered submissions on cooperation in this case. However, the Chamber concluded that they were not of sufficient substance as to affect its decision"[722]. There was no other relevant mention to cooperation in the judgment.

In the end, the Prosecution delivered the following sentence recommendations: 17 years' imprisonment to Sikirica[723]; 7 years to Došen[724]; and 5 years to Kolundžija[725]. The Trial Chamber, however, imposed lighter punishments, notwithstanding the absence of cooperation[726]. Its judgment, issued on November 13, 2001, sentenced Sikirica to 15 years' imprisonment; Došen to 5 years; and Kolundžija to 3 years[727]. Although Sikirica

[712] *Ibid*.
[713] *Ibid*., para.150.
[714] *Ibid*.
[715] *Ibid*.
[716] *Ibid*., para.151.
[717] *Ibid*., para.193.
[718] *Ibid*., para.228.
[719] *Ibid*.
[720] *Ibid*., para.111.
[721] *Ibid*.
[722] *Ibid*.
[723] *Ibid*., para.25.
[724] *Ibid*., para.31.
[725] *Ibid*., para.37.
[726] *Ibid*., para.245.
[727] *Ibid*.

received a much harsher penalty than Kolundžija and Došen, his guilty plea had been particularly relevant[728]. The sentencing Chamber admitted that even though his plea was very late, "had he not pleaded guilty in the circumstances of this case, […] he would have received a much longer sentence"[729].

The other judgment referring to the Logor Keraterm camp – but now subsequent to the 2003 *Plavšić* case – was the *Banović* case[730]. Predrag Banović, the defendant, was a Bosnian Serb, who acted as one of the guards at the Logor Keraterm camp[731]. Following a plea agreement, he pleaded guilty to persecution as a crime against humanity[732], and the Prosecution withdrew the remaining counts (murder and inhumane acts as crimes against humanity, and murder and cruel treatment as violations of the laws or customs of war)[733]. Banović confessed his knowledge of the terrible conditions of detainees in the camp as well as his personal participation in their mistreatment and killing[734]. He admitted to beating five prisoners to death[735] and beating twenty-seven detainees using various harmful weapons, including truncheons, cables, baseball bats and iron balls[736]. Banović also shot two of the beaten prisoners[737].

Even though Banović held a lower rank and subordinated position in comparison to Sikirica, Kolundžija and Došen, all four of them were low-level criminals[738]. Additionally, as Banović's offenses were significantly more numerous and vicious, one could expect the Prosecution to seek a term of imprisonment longer than Kolundžija's and Došen's and nearly similar to Sikirica's[739]. However, he was sentenced to a mere 8 years in prison[740], the exact amount recommended by the Prosecution[741].

The sentence leniency in the *Banović* case became clear after comparing it with the *Vasiljević* case[742]. In the latter, the defendant – Mitar Vasiljević, a member of the

[728] COMBS (2002), *supra* note 440, p.126.
[729] *The Prosecutor v. Duško Sikirica et al*., *supra* note 627, para.234.
[730] *The Prosecutor v. Predrag Banović, supra* note 215.
[731] *Ibid*., para.6.
[732] *Ibid*., para.13.
[733] *Ibid*., para.14.
[734] *Ibid*., para.28.
[735] *Ibid*., para.29.
[736] *Ibid*., para.30
[737] *Ibid*.
[738] COMBS (2007), *supra* note 529, p.75.
[739] *Ibid*.
[740] *The Prosecutor v. Predrag Banović, supra* note 215, para.96.
[741] *Ibid*., para.94.
[742] *The Prosecutor v. Mitar Vasiljević ("Višegrad"),* Judgment, ICTY, Trial Chamber II, Case no. IT-98-32-T, 29 November 2002 [*The Prosecutor v. Mitar Vasiljević – Trial*].

paramilitary group known as the "White Eagles"[743] –, was convicted, after a full trial, for aiding and abetting in persecution as a crime against humanity and in murder as a violation of the laws or customs of war[744]. Vasiljević participated in the so-called "Drina River Incident", which resulted in the murder of five Muslims[745]. After holding seven Muslim men in a hotel, he led them to the bank of the Drina River and ordered them to line up facing the water[746]. A firing squad composed of four soldiers, including Vasiljević, shot at the seven Muslim men[747]; five of them died[748]. While the trial judgment sentenced Vasiljević to 20 years' imprisonment on November 29, 2002[749], the Appeals Chamber reduced such amount to 15 years in 2004[750]. Hence, Banović and Vasiljević were both found guilty of killing five people[751]. Even though Banović should receive credit for his guilty plea, the difference of seven years between their sentences was particularly significant[752].

The Office of the Prosecutor's leniency in sentence bargaining became so excessive in 2003 as to threaten the ICTY's legitimacy and credibility, forcing its trial chambers to react[753]. Accordingly, the judges began to show resistance in accepting prosecutorial sentence recommendations coming from plea negotiations[754]. In fact, they had to change a long-lasting trend in the Tribunal's case-law: in all seven guilty-plea cases until that moment – *Erdemović*[755], *Jelisić*[756], *Todorović*[757], *Sikirica et al.*[758],

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[743] *Ibid*., para.2.
[744] *The Prosecutor v. Mitar Vasiljević ("Višegrad"),* Judgment, ICTY, Appeals Chamber, Case no. IT-98-32-A, 25 February 2004, disposition [*The Prosecutor v. Mitar Vasiljević – Appeal*].
[745] *The Prosecutor v. Mitar Vasiljević – Trial, supra* note 742, paras.96-115.
[746] *Ibid*., paras.96-109.
[747] *Ibid*., paras.110-111.
[748] *Ibid*., para.49.
[749] *Ibid*., para.309.
[750] *The Prosecutor v. Mitar Vasiljević – Appeal, supra* note 744, para.182.
[751] *The Prosecutor v. Mitar Vasiljević – Trial, supra* note 742, para.307; *The Prosecutor v. Predrag Banović, supra* note 215, para.29.
[752] COMBS (2007), *supra* note 529, p.76.
[753] *Ibid*.
[754] MCCLEERY, *supra* note 46, p.1101-1102; RAUXLOH, Regina. "Negotiated History: The Historical Record in International Criminal Law and Plea-Bargaining", *Journal of International Criminal Justice*, vol.10, p.739-770, 2010, p.748 [RAUXLOH].
[755] In the second trial in the *Erdemović* case, although the parties agreed on a sentence of 7 years' imprisonment, the Trial Chamber sentenced the defendant to 5 years in prison. Cf.: *The Prosecutor v. Dražen Erdemović – Trial/1998, supra* note 224, paras.18 and 23.
[756] In the *Jelisić* case, the Prosecution sought a sentence of life imprisonment. Although, the Trial Chamber sentenced Jelisić to forty years' imprisonment, it could mean, in practical terms, a life sentence due to his age at the time (31 years old). Cf.: *The Prosecutor v. Goran Jelisić, supra* note 313, paras.119 and 139.
[757] In the *Todorović* case, the Prosecution, following a plea agreement, recommended a sentence of twelve years' imprisonment. The Trial Chamber sentenced Todorović to ten years. Cf.: *The Prosecutor v. Stevan Todorović*, *supra* note 427, paras.11 and 115.
[758] In the *Sikirica et al.* case, the plea deals prevented the Prosecution from seeking sentences exceeding seventeen, seven, and five years' imprisonment for Duško Sikirica, Damir Došen and Dragan Kolundžija,

Plavšić[759], *Banović*[760] and *Simić*[761] – the assigned trial chamber always sentenced within the Prosecution's suggested range, i.e., a sentence harsher than the one recommended by the prosecutors was never imposed (cf.: Annex I).

The *Simić* case was an early indication of a change in paradigm. Even though the *Simić* Trial Chamber sentenced the accused to 5 years' imprisonment[762] (a term within the range of the Prosecution's recommendation of 3 to 5 years[763]), the judgment clarified that this small amount was due to the "particular circumstances of the case"[764]. At first, the Trial Chamber highlighted the "importance of consistency in the sentences imposed by the Tribunal in cases where the circumstances [were] substantially similar"[765], but it concluded that the *Simić* case was exceptional, with circumstances similar to no other so far[766].

The defendant, Milan Simić, was a senior public official in the Municipality of Bosanski Šamac, in Bosnia and Herzegovina[767]. The Trial Chamber ruled that he was "responsible for particularly serious offences [*sic*] against vulnerable persons"[768], committed in a local primary school used as detention camp during the armed conflict[769]. His actions inflicted severe pain and suffering on detainees through violent beatings and other barbaric acts[770]. Accordingly, the *Simić* Trial Chamber concluded that he deserved to be "condemned in the highest degree"[771]. The Chamber also highlighted that "under ordinary circumstances a long custodial sentence, even up to the remainder of his life, would have been appropriate"[772].

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respectively. Even though the prosecutors sought the maximum amount for each accused, the Trial Chamber sentenced Sikirica, Došen and Kolundžija to fifteen, five and three years' imprisonment, respectively. Cf.: *The Prosecutor v. Duško Sikirica et al*., *supra* note 627, paras.25, 31, 37, 42 and 245.

[759] In the *Plavšić* case, the Prosecution recommended a sentence of at least fifteen and at most twenty-five years' imprisonment. The Trial Chamber sentenced Plavšić to eleven years in prison. Cf.: *The Prosecutor v. Biljana Plavšić, supra* note 215, paras.128 and 134.

[760] In the *Banović* case, the parties recommended a sentence of eight years, which was the precise amount imposed by the Trial Chamber. Cf.: *The Prosecutor v. Predrag Banović, supra* note 215, paras.11 and 96.

[761] In the *Simić* case, the Prosecution recommended a five-year sentence, which was the exact term imposed by the Trial Chamber. Cf.: *The Prosecutor v. Milan Simić, supra* note 428, paras.30 and 122.

[762] *Ibid*., para.122.

[763] *Ibid*., para.117.

[764] *Ibid*., para.113.

[765] *Ibid*., para.114.

[766] *Ibid*.

[767] *Ibid*., para.115.

[768] *Ibid*.

[769] *Ibid*., para.4.

[770] *Ibid*., para.115.

[771] *Ibid*.

[772] *Ibid*.

However, the judges paid due attention to Simić's particular medical condition: he was a wheelchair-bound paraplegic, who required full time assistance to perform the most basic daily activities vital to his survival[773]. They noted "that in the history of the Tribunal there has not been an accused in similar medical circumstances"[774]. His unique needs constituted "an exceptional circumstance that oblige[d] [the] Trial Chamber, for reasons of humanity, to accept that Milan Simić's medical condition ought to be a consideration in sentencing, as a special circumstance"[775]. Therefore, the judgment indicated that in the absence of Simić's extreme medical condition, he would had received a sentence outside the range the Prosecution recommended, probably life imprisonment[776]. The thesis will discuss the *Simić* case in further detail in Section 2.2.4, which address charge bargaining at the ICTY.

The first case ever in which an ICTY trial chamber refused to uphold a sentence recommendation of the Prosecution was the *Momir Nikolić* case[777]. Momir Nikolić was the Assistant Commander and Chief of Security and Intelligence of the Bratunac Brigade of the Serb Republic's Army, during the massacres of Bosnian Muslims in and around Srebrenica[778]. Following a plea agreement, he pleaded guilty on May 7, 2003 to the count of persecution as a crime against humanity[779]. The Prosecution dismissed all remaining accusations, namely genocide, crimes against humanity (extermination, murder and inhumane acts) and a violation of the laws or customs of war (murder)[780].

Nikolić admitted his involvement in the following offenses: (i) murder of thousands of Bosnian Muslim civilians in the Municipality of Srebrenica, most of them men; (ii) cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at the village of Potočari and in detention facilities in Bratunac and Zvornik; (iii) creation of an environment of terror against the Muslims of Srebrenica and Potočari; (iv) destruction of civilian property belonging to Bosnian Muslims; (v) forced deportation of Bosnian Muslims from the Srebrenica area; and (vi) coordination of the mass exhumation and re-burial of Muslim bodies in order to conceal the widespread killings[781].

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[773] *Ibid*., para.116.
[774] *Ibid*.
[775] *Ibid*.
[776] COMBS (2007), *supra* note 529, p.76.
[777] *Ibid*.
[778] *The Prosecutor v. Momir Nikolić, supra* note 153, para.2.
[779] *Ibid*., para.12.
[780] *Ibid*., para.13.
[781] *Ibid*., paras.31, 88 and 123.

For all those grave violations, the Prosecution sought a sentence of between 15 and 20 years[782]. The massive criminal enterprise attributable to Nikolić and the excessive lenience of the Prosecution motivated the Trial Chamber[783] to reevaluate the appropriateness of continuing with plea-bargaining at the ICTY[784]. Although the Chamber did not deny that plea agreements were already permissible under the ICTY's Rules of Procedure and Evidence at that moment[785], the Chamber admitted to having some concerns about the recent increased use of such agreements, especially because they could hamper the Tribunal's ability to fulfil its mandate[786].

The *Momir Nikolić* Trial Chamber recalled that the UNSC created the ICTY not just to convict and punish those individuals responsible for serious crimes committed in the territory of the former-Yugoslavia, but also to stop ongoing offenses and to prevent the commission of new ones[787]. It was hoped that the ICTY would contribute to the restoration and maintenance of peace in the region and, ultimately, would promote the rule of law at a global level[788]. Finally, the public criminal proceedings at the ICTY and the substantial amount of evidence gathered during the trials would establish an accurate and accessible historical record of the events, preventing a cycle of revenge killings and future crimes[789].

The Chamber recognized that some of these objectives were not completely realized when convictions resulted from plea agreements[790]. For instance, the absence of a full public trial impeded the creation of a more complete and detailed historical record[791] as well as prevented the participation of victims or survivors of victims in the proceedings[792]. The Chamber also criticized charge bargaining because it could create "holes" in the public record due to the withdrawals of some charges and factual allegations[793]. As the last shortcoming, the *Momir Nikolić* Trial Chamber highlighted that plea-bargaining could result in complications in light of the principle of equality before

[782] *Ibid*., paras.172.
[783] The *Nikolić* Trial Chamber was composed of judges with a civil law background: Liu Daqun (President/China), Volodymyr Vassylenko (Ukraine) and Carmen Maria Argibay (Argentine).
[784] *The Prosecutor v. Momir Nikolić, supra* note 153, paras.57-73.
[785] *Ibid*., para.57.
[786] *Ibid*.
[787] *Ibid*., para.59.
[788] *Ibid*., paras.59 - 60.
[789] *Ibid*., para.60.
[790] *Ibid*., para.61.
[791] *Ibid*.
[792] *Ibid*., para.62.
[793] *Ibid*., para.63.

the law because not all accused could obtain favorable concessions through plea agreements[794]. Generally, only defendants in possession of useful information to the Prosecution could benefit from this option[795].

The judges also listed the benefits of plea-bargaining. Firstly, guilty-plea cases resulted in fast and certain convictions[796]. Secondly, these convictions derived from the accused's own acceptance of responsibility and acknowledgement of the crimes he committed, preventing any future denial of the commission of the offenses and allegations that the ICTY was biased or that its verdicts were based on insufficient or fabricated evidence[797]. Thirdly, guilty pleas were often accompanied by a statement of agreed facts, which helped to create a historical record of the truth[798]. Fourthly, cooperation with the Prosecution following plea agreements significantly assisted in investigations and presentation of evidence at the trials of other accused[799]. Finally, guilty pleas contributed to the ICTY's goal of restoring peace and bringing reconciliation in the former-Yugoslavia, especially because such pleas could be more meaningful and significant to the victims and survivors than a regular verdict of guilty by a trial chamber[800]. Likewise, the admission of guilt and a sincere demonstration of remorse by the defendant could facilitate dialogues aiming at national conciliation[801].

The *Momir Nikolić* Trial Chamber, however, was not convinced that the saving of time and resources was a good reason to promote plea agreements[802]. It recalled that the international community entrusted the ICTY with a great responsibility: to bring justice to the victims of the most serious crimes committed in the former-Yugoslavia, through criminal proceedings that are fair and that pay due regard to the interests of victims[803]. In light of the significance of this task, "the saving of resources [could not] be given undue consideration or importance"[804]. According to the judgment, the quality of the justice delivered by the Tribunal and the fulfilment of its mandate were the absolute priorities and could not be compromised[805]. In conclusion, the *Momir Nikolić* Trial Chamber

[794] *Ibid*., para.66.
[795] *Ibid*.
[796] *Ibid*., para.69.
[797] *Ibid*., para.70.
[798] *Ibid*.
[799] *Ibid*., para.71.
[800] *Ibid*., para.72.
[801] *Ibid*.
[802] *Ibid*., para.67.
[803] *Ibid*.
[804] *Ibid*.
[805] *Ibid*.

enshrined that "while savings of time and resources may be a *result* of guilty pleas, this consideration should not be the main *reason* for promoting guilty pleas through plea agreements"[806] [emphasis in the original].

After taking the pros and cons into consideration, the *Momir Nikolić* Trial Chamber found "that, on balance, guilty pleas pursuant to plea agreements, [could] further the work – and the mandate – of the Tribunal"[807]. However, it emphasized the need for caution[808] and that "[plea agreements] should be used only when doing so would satisfy the interests of justice"[809].

In the sentencing stage of the *Momir Nikolić* case, the Prosecution recommended a sentence of between 15 and 20 years[810], which was eventually rejected by the trial judges[811]. They argued that such amount did not "adequately [reflect] the totality of the criminal conduct for which Momir Nikolić ha[d] been convicted"[812]. They insisted in highlighting the vicious nature of the crimes that the accused admitted his involvement in[813].

In the end, the Trial Chamber sentenced Nikolić to 27 years in prison[814], 35% more than the amount suggested by the Prosecution. The accused appealed and successfully reduced his sentence to 20 years[815]. Following the *Momir Nikolić* case, the attitude of the trial chambers towards the Prosecution's sentence recommendations

[806] *Ibid*.
[807] *Ibid*., para.73.
[808] *Ibid*.
[809] *Ibid*.
[810] *Ibid*., para.172.
[811] *Ibid*., para.180.
[812] *Ibid*.
[813] The judgment reads as follows: "The count of persecutions for which Momir Nikolić has pled guilty is based on some of the most horrific events to befall the former Yugoslavia during its long war, in which hundreds of thousands of people lost their lives and even more were displaced. Murder and forced displacement based on religion and ethnicity are the underlying acts in the case of Momir Nikolic. Following the fall of Srebrenica, Mr. Nikolić took part in a joint criminal enterprise that had as its goal the murder of thousands of men and the forcible displacement of tens of thousands of Muslims, so that this part of eastern Bosnian could be "cleansed" of non-Serbs. Civilians who were forced to flee the Srebrenica safe area were subjected to acts of humiliation, terror and cruelty at all stages of this operation". Cf.: *Ibid*., para.174.
[814] *Ibid*., para.183.
[815] *Ibid*., para.135.

varied[816]. They adhered to its suggestions in the *Obrenović*[817], *Češić*[818], *Mrđa*[819], *Jokić*[820], *Deronjić*[821], *Bralo*[822], *Rajić*[823] and *Zelenović*[824] cases, but imposed longer-than-agreed sentences in the *Dragan Nikolić*[825] and *Babić*[826] cases (cf. Annex I).

In fact, the trial judges' contempt for the recommendations of the Office of the Prosecutor in some cases resulted in more caution by the defendants, breaking the ongoing trend of numerous successive guilty pleas in 2003[827]. Accordingly, after the *Babić* case, in which the Trial Chamber refused to uphold the plea agreement[828], eighteen months elapsed until another ICTY accused decided to plead guilty: Miroslav Bralo pleaded guilty on July 19, 2005[829] and Ivica Rajić did the same on October 26, 2005[830]. In both cases, the trial chambers complied with the plea deals (cf. Annex I). Most likely, Bralo and Rajić decided to take their chances with a plea agreement because on February 11, 2005, the ICTY's Rules of Procedure and Evidence had been amended to allow the Office of the Prosecutor to request the referral of cases to the national courts of any State[831]. Thus, after this amendment, the prosecutors could use the threat to refer the case to Bosnia and Herzegovina, the place where most of the crimes were committed, as bargaining chip[832].

2.2.4 The Prosecutor v. Milan Simić

[816] COMBS (2007), *supra* note 529, p.78-86.
[817] *The Prosecutor v. Dragan Obrenović ("Srebrenica"),* Judgment, ICTY, Trial Chamber I, Case no. IT-02-60/2-S, 10 December 2003, paras.147 and 156 [*The Prosecutor v. Dragan Obrenović*].
[818] *The Prosecutor v. Ranko Češić, supra* note 215, paras.105 and 111.
[819] *The Prosecutor v. Darko Mrđa ("Vlašić Mountain"),* Judgment, ICTY, Trial Chamber I, Case no. IT-02-59-S, 31 March 2004, paras.116 and 129.
[820] *The Prosecutor v. Miodrag Jokić ("Dubrovnik"),* Judgment, ICTY, Trial Chamber I, Case no. IT-01-42/1-S, 18 March 2004, paras.69 and 116 [*The Prosecutor v. Miodrag Jokić*].
[821] *The Prosecutor v. Miroslav Deronjić ("Glogova"),* Judgment, ICTY, Trial Chamber II, Case no. IT-02-61-S, 30 March 2004, para.277 and disposition [*The Prosecutor v. Miroslav Deronjić*].
[822] *The Prosecutor v. Miroslav Bralo, supra* note 365, paras.90 and 97.
[823] *The Prosecutor v. Ivica Rajić, supra* note 365, paras.18 and 184.
[824] *The Prosecutor v. Dragan Zelenović ("Foča"),* Judgment, ICTY, Trial Chamber I, Case no. IT-96-23/2-S, 4 April 2007, paras.14 and 71.
[825] *The Prosecutor v. Dragan Nikolić ("Sušica Camp"),* Judgment, ICTY, Trial Chamber II, Case no. IT-94-2-S, 18 December 2003, para.275 and disposition [*The Prosecutor v. Dragan Nikolić*].
[826] *The Prosecutor v. Milan Babić ("RSK"),* Judgment, ICTY, Trial Chamber I, Case no. IT-03-72-S, 29 June 2004, paras.42 and 102 [*The Prosecutor v. Milan Babić*].
[827] COMBS (2007), *supra* note 529, p.83.
[828] *The Prosecutor v. Milan Babić, supra* note 826, paras.42 and 102.
[829] *The Prosecutor v. Miroslav Bralo, supra* note 365, para.3.
[830] *The Prosecutor v. Ivica Rajić, supra* note 365, para.9.
[831] *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 11*bis*(B).
[832] COMBS (2007), *supra* note 529, p.83.

The case of Milan Simić referred to the same circumstances of the above-discussed *Todorović* case, namely the ethnic cleansing in the Municipality of Bosanski Šamac, in Northwestern Bosnia and Herzegovina[833]. Simić was a member of the Bosnian Serb Crisis Staff and President of the Municipal Assembly of Bosanski Šamac[834]. The ICTY indicted Simić and other five people[835] on July 21, 1995, for the crimes in the region[836]. Thirty-one months later, Simić surrendered himself voluntarily to the Tribunal[837]. On February 17, 1998, at his initial appearance, he pleaded not guilty to all charges[838].

The final version of his indictment, issued on January 9, 2002, charged Simić with: (i) crimes against humanity (persecution, torture and inhumane acts); and (ii) a violation of the laws or customs of war (cruel treatment)[839]. These crimes occurred against several Bosnian Muslims detained in the Bosanski Šamac primary school[840]. For instance, in one night, he personally beat and kicked four detainees, including a man who was known to have a heart condition[841]. He kicked the men in their genitals and, during the beatings, fired gunshots over their heads[842]. Together with other Serb men, he beat a prisoner named Safet Hadžialijagić and repeatedly pulled down his pants, threatening to cut off his penis[843].

The trial of Simić and his co-defendants commenced on September 10, 2001[844]. During the proceedings, his poor health posed a significant challenge to the ICTY[845]. Simić became paraplegic about a year following the crimes in the Bosanski Šamac primary school, after he was shot in an assassination attempt[846]. He lost the use of both legs and one arm and suffered from continuous infections due to the loss of a kidney[847]. As he could not move his body by himself in bed, he constantly had bedsores[848]. To cope

[833] *The Prosecutor v. Milan Simić, supra* note 428, para.1.
[834] *Ibid*., para.53.
[835] The other five defendants were Blagoje Simić, Simo Zarić, Miroslav Tadić, Stevan Todorović and Slobodan Miljković.
[836] *The Prosecutor v. Milan Simić, supra* note 428, para.1.
[837] *Ibid*., para.2.
[838] *Ibid*.
[839] *Ibid*., para.3.
[840] *Ibid*., para.4.
[841] *Ibid*.
[842] *Ibid*.
[843] *Ibid*.
[844] *Ibid*., para.6.
[845] COMBS (2007), *supra* note 529, p.64.
[846] *Ibid*.
[847] *Ibid*.
[848] *Ibid*.

with Simić's medical needs, the Chamber held sessions only in the morning and provided him with a nurse and a bed for rest during breaks[849]. Moreover, a video-link system and a two-way telephone line were installed between the courtroom and the ICTY's detention unit, allowing Simić to watch the sessions and to communicate with his lawyers while resting[850].

Eight months into the trial, on May 13, 2002, the Prosecution submitted Simić's plea agreement to the Chamber[851]. It contained details about the crimes for which the defendant had been accused and his participation in them[852]. The plea deal also had a clause prohibiting the Prosecution to use such information in other cases[853]. Simić refused to testify in other trials as well[854].

In exchange for his guilty plea[855] to two counts of torture as crimes against humanity, the Prosecution dropped all remaining charges[856]. In addition, both parties agreed to pursue a sentence of not less than three years and not more than five[857]. If the Trial Chamber's sentence did not exceed this agreed range, both parties would not appeal[858].

After checking and confirming the validity of Simić's guilty plea[859], the Chamber, as in the *Todorović* case, severed Simić's trial from the original case[860]. Subsequently, it

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[849] *The Prosecutor v. Milan Simić, supra* note 428, para.8.
[850] *Ibid*.
[851] *Ibid*., para.9.
[852] *Ibid*.
[853] COMBS (2007), *supra* note 529, p.64.
[854] *Ibid*.
[855] Milan Simić's guilty plea statement follows: "Your Good morning, Your Honours. Thank you for extending this opportunity for me to address you. First of all, I would like to express my sincere regret and remorse for what I have done to my fellow citizens and friends at the elementary school. I'm aware of the fact that the fact that my best friend was killed and the fact that I was drunk can in no way serve as a justification for what I have done there. I am convinced that even my late friend, Dušan Mijanić, with whom I have spent unforgettable days as a student, would not find words to justify my conduct. Unfortunately, I became aware of all this only afterwards, and although it was immediately clear to me that it was impossible to make up for what I have done, my conscience led me to at least extend my apologies to the people whom I had hurt. I have done that, but in addition to my sincere regret and remorse and personal apology that I extended to them, I was still haunted by guilt and it continues so until this day. As regards the interview I gave to the Prosecutor, one should bear in mind that I gave that interview immediately after being the first to come voluntarily to The Hague at the time when The Hague Tribunal was a taboo topic in Bosnia and Herzegovina and that for me, the mere fact of voluntary surrender was too great a burden so that I did not have enough strength or courage to do an additional step and immediately admit my guilt. This is why I value even more the fact that you allowed me to once again publicly extend apology to all of them. Thank you". Cf.: *The Prosecutor v. Milan Simić ("Bosanski Šamac"),* Guilty Plea Statement, ICTY, Trial Chamber II, Case no. IT-95-9/2, 22 July 2002. Available at: <http://www.icty.org/en/content/milan-simi%C4%87#>. Access on: November 27, 2018.
[856] *The Prosecutor v. Milan Simić, supra* note 428, paras.19-23.
[857] *Ibid*., para.13.
[858] *Ibid*., footnote 28.
[859] *Ibid*., paras.19-21.
[860] *Ibid*., para.23.

initiated the sentencing proceeding. The Trial Chamber first began with the mitigating effect of the guilty plea[861]. It recognized that admissions of guilt, in principle, give rise to sentence reduction[862]. The Chamber also admitted that guilty pleas were relevant for avoiding costly and time-consuming trials and for relieving victims and witnesses of the stress of giving testimony[863].

The *Simić* Trial Chamber also mentioned the *Todorović* approach on the time of the guilty plea[864]. It stated that "generally, a plea of guilty will only contribute to public advantage if it is pleaded before the commencement of the trial"[865]. However, the Chamber decided to apply the *Sikirica* approach, i.e., to reduce the mitigating weight of a guilty plea in accordance with the time it was entered by the accused[866]. Accordingly, as Simić pleaded guilty more than four years after his initial appearance and after his trial had already initiated, the judgment stated that "Milan Simić's plea of guilty [was] bound to weigh less in the sentencing process than if it had been made earlier or before the commencement of the trial"[867]. Referring to the specific circumstances of the case, the Chamber noted that Simić's guilty plea made all the expensive facilities built to accommodate his special medical needs no longer necessary, which had a positive impact in the Tribunal's budget[868]. In conclusion, despite the lateness of Simić's plea, he received "some credit" for it[869].

Regarding cooperation with the Tribunal, the Prosecution denied the existence of any collaboration by the accused in the case at hand[870]. It highlighted that Simić insisted and, in fact, obtained a guarantee from the Prosecution that any information in his plea agreement would not be introduced as evidence against Simić's former co-defendants[871]. In addition, the prosecutors requested this demand by Simić to be considered an aggravating circumstance of his sentence[872].

After ratifying that there was no cooperation by the defendant, the Trial Chamber rejected the Prosecution's claim to apply as an aggravating factor, the fact that Simić did

[861] *Ibid*., paras.42-43.
[862] *Ibid*., para.84.
[863] *Ibid*.
[864] *Ibid*.
[865] *Ibid*.
[866] *Ibid*., para.85.
[867] *Ibid*.
[868] *Ibid*., para.86.
[869] *Ibid*., para.87.
[870] *Ibid*., para.88.
[871] *Ibid*.
[872] *Ibid*., para.89.

not permit the plea agreement to be used against his former co-accused[873]. The Chamber noted that the Prosecution voluntarily accepted that condition imposed by the defendant during the negotiations of the plea deal[874]. Thus, the Prosecution could not argue that condition against Simić at the sentencing stage of the trial[875]. The Chamber concluded that no mitigation nor aggravation should apply to Simić concerning the issue of cooperation[876]. He was sentenced to 5 years' imprisonment[877], which resulted in no appeal from either party in the terms of the plea agreement.

The *Simić* case was paradigmatic because it was the first one before the ICTY to deal with charge bargaining[878]. Until that moment, the prosecutors were willing to negotiate only sentencing recommendations, not charges[879]. In the practice of charge bargaining, on the other hand, the Prosecution agreed not to charge the accused with certain crimes or to dismiss one or more charges already brought against the accused in exchange of his guilty plea[880]. Although in some ICTY cases prior to *Simić*, the Prosecution in fact withdrew some of the charges, it did so not as result of charge bargaining[881]. In those cases, the prosecutors dropped the charges due to the lack of sufficient evidence, as occurred for instance in the *Jelisić* case[882]. The Prosecution also dropped some charges when their withdrawal would not affect the imposed sentence or the factual basis of the case as a whole[883]. For example, in the *Todorović* and *Sikirica et al.* cases, all four defendants pleaded guilty to the most serious and comprehensive of the charges – persecution as a crime against humanity –, which contained the factual allegations appearing in all withdrawn counts[884].

The *Simić* case was the first one in which the Prosecution made a substantial concession by dropping some of the charges[885]. Firstly, the dismissal of the counts of inhumane acts and cruel treatment did not represent a significant concession by the

[873] *Ibid*.
[874] *Ibid*.
[875] *Ibid*.
[876] *Ibid*., paras.89 and 113.
[877] *Ibid*., para.122.
[878] COMBS (2007), *supra* note 529, p.63.
[879] *Ibid*.
[880] BOAS *et al.*, *supra* note 18, p.221; MCCLEERY, *supra* note 46, p.1104.
[881] COMBS (2007), *supra* note 529, p.63.
[882] *Ibid*., p.62.
[883] *Ibid*., p.63.
[884] *The Prosecutor v. Stevan Todorović, supra* note 427, para.5; *The Prosecutor v. Duško Sikirica et al.*, *supra* note 627, paras.13 and 15.
[885] COMBS (2007), *supra* note 529, p.64.

prosecutors, especially because Simić pleaded guilty to torture, a much graver crime[886]. Moreover, by acknowledging his guilt to torture, he admitted to facts that could in fact constitute inhumane acts and cruel treatment[887]. Hence, there was no significant loss to the victims or to the credibility of the ICTY regarding the dismissal of the charges on inhumane acts and cruel treatment.

The main issue was the withdrawal of the charge of persecution as a crime against humanity[888]. This dropped count encompassed conduct far more serious and comprehensive than the facts the defendant admitted the existence[889]. In the persecution charge, the prosecutors sought to convict Simić for his participation in the widespread campaign of illegal arrests and detentions and for the inhumane treatment imposed on hundreds of civilians living in the Municipality of Bosanski Šamac[890]. However, pursuant to the plea agreement with the Prosecution, he pleaded guilty in relation to the crimes committed against only a handful of victims, while the prosecutors withdrew charges involving hundreds of them[891]. A reasonable explanation for this blatant charge bargaining was the need to speed up the trial, since Simić's medical needs had significantly slowed down the proceedings[892].

The *Simić* case prompted a wave of dangerously lenient charge bargains at the ICTY[893]. In the three cases with guilty pleas immediately after *Simić – Plavšić*, *Momir Nikolić* and *Obrenović* –, the Prosecution even agreed to withdraw charges of genocide, the gravest crime under the ICTY's jurisdiction[894]. As the *Plavšić* and *Momir Nikolić* cases were discussed in detail above[895], the thesis will focus now in the *Obrenović* case.

Dragan Obrenović was a military commander of the Army of the Serb Republic in Srebrenica, during the systematic killings of Bosnian Muslims[896]. He was charged with genocide, crimes against humanity and war crimes[897]. Similar to the *Plavšić* and *Momir Nikolić* cases, the Prosecution, following a plea agreement, dropped all charges against

[886] *The Prosecutor v. Milan Simić, supra* note 428, paras.3, 10 and 21.
[887] COMBS (2007), *supra* note 529, p.64.
[888] *The Prosecutor v. Milan Simić, supra* note 428, paras.3, 10 and 22.
[889] COMBS (2007), *supra* note 529, p.64.
[890] *Ibid*.
[891] *Ibid*.
[892] *Ibid*., p.65.
[893] *Ibid*., p.65-66.
[894] *The Prosecutor v. Biljana Plavšić, supra* note 215, paras.2 and 5; *The Prosecutor v. Momir Nikolić, supra* note 153, paras.4 and 13; *The Prosecutor v. Dragan Obrenović, supra* note 817, paras.3 and 11.
[895] Cf. section 2.2.3 of the present thesis.
[896] *The Prosecutor v. Dragan Obrenović, supra* note 817, para.2.
[897] *Ibid*., para.3.

Obrenović, but the one on persecution as a crime against humanity[898]. He pleaded guilty only to this count[899] and was sentenced to 17 years' imprisonment[900].

The plea deal had been particularly helpful to Obrenović because the ICTY had already ruled in the previous *Krstić* case, that the massacres of the Muslim population in Srebrenica constituted genocide[901]. It is reasonable to conclude that the *Obrenović* Trial Chamber would have replicated this conclusion because the facts of the *Obrenović* case were similar to those of the *Krstić* case. Moreover, the ICTY and ICTR had applied severe penalties to defendants found guilty of genocide. The only person convicted of genocide by the ICTY at the time – Radislav Krstić – was initially sentenced to 46 years' imprisonment[902] and later to 35 years by the Appeals Chamber[903]. Virtually all of ICTR's defendants found guilty of genocide were sentenced to life imprisonment[904]. Therefore, one can infer that if Obrenović had being prosecuted and convicted of genocide, he would have received a sentence much longer than 17 years.

The aggressive policy of the Prosecution in pursuing charge bargaining after the *Simić* case triggered a backlash by the trial judges[905]. They demanded more caution by the prosecutors while doing this practice, and the *Momir Nikolić* case was particularly illustrative of this approach[906]. Firstly, the *Momir Nikolić* judgment advised that the crimes under the ICTY's jurisdiction were "fundamentally different" from those

[898] *Ibid*., paras.10-11.
[899] *Ibid*., para.10.
[900] *Ibid*., para.156.
[901] *The Prosecutor v. Radislav Krstić – Trial*, *supra* note 358, para.598; *The Prosecutor v. Radislav Krstić – Appeal*, *supra* note 358, paras.5-38.
[902] *The Prosecutor v. Radislav Krstić – Trial*, *ibid.*, para.726.
[903] *Ibid*., para.275.
[904] The ICTR defendants in following cases were convicted of genocide and sentenced to life imprisonment: *The Prosecutor v. Jean Kambanda – Trial*, *supra* note 197, verdict; *The Prosecutor v. Jean Kambanda – Appeal*, *supra* note 165, para.126; *The Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-96-4-A, 1 June 2001, verdict [*The Prosecutor v. Jean-Paul Akayesu – Appeal*]; *The Prosecutor v. Georges Rutaganda*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-96-3-A, 26 May 2003, disposition; *The Prosecutor v. Jean de Dieu Kamuhanda*, Judgment, ICTR, Trial Chamber II, Case no. ICTR-95-54A-T, 22 January 2004, para.770; *The Prosecutor v. Jean de Dieu Kamuhanda*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-95-54A-A, 19 September 2005, para.365; *The Prosecutor v. Athanase Seromba*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-2001-66-A, 12 March 2008, para.240; *The Prosecutor v. Mikaeli Muhimana*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-95-1B-A, 21 May 2007, disposition; *The Prosecutor v. Alfred Musema*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-96-13-A, 16 November 2001, disposition; *The Prosecutor v. Eliézer Niyitegeka*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-96-14-A, 9 July 2004, disposition; *The Prosecutor v. Callixte Nzabonimana*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-98-44D-A, 29 September 2014, disposition; *The Prosecutor v. Karemera et al.*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-98-44-A, 29 September 2014, disposition; *The Prosecutor v. Emmanuel Ndindabahizi*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-01-71-A, 16 January 2007, disposition.
[905] COMBS (2007), *supra* note 529, p.66.
[906] For more information on the *Momir Nikolić* case, cf.: section 2.2.3 of the present thesis.

prosecuted by national courts[907]. Accordingly, the judgment stated that "any 'negotiations' on a charge of genocide or crimes against humanity must be carefully considered and be entered into for good cause"[908]. The *Momir Nikolić* Trial Chamber also emphasized the need to avoid distortions of historical events[909]. It noted that the withdrawal of factual allegations could cast doubt on the public record, "as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a 'bargaining chip' in the negotiation process"[910].

Eventually the Prosecution abandoned its policy of factually distortive charge bargaining as occurred in the *Simić* case[911]. Indeed, there was virtually no blatant charge bargain in future plea agreement cases, as one can see in the *Jokić*[912], *Deronjić*[913] and *Dragan Nikolić*[914] cases.

2.3 The Evolution of Plea-Bargaining at the ICTY: Some Remarks

The evolution of plea-bargaining at the ICTY is particularly illustrative of the dichotomy within International Criminal Law: in one hand, we have the *ideological* goal of fighting impunity everywhere, by prosecuting those responsible for the most serious crimes imaginable; on the other hand, we have the *practical* limitations of such endeavor, such as lack of funds, institutional limitations, denial of cooperation by States and political influence over the proceedings[915]. The preservation of this delicate balance is a

[907] *The Prosecutor v. Momir Nikolić, supra* note 153, para.65.
[908] *Ibid.*
[909] The *Momir Nikolić* Trial Chamber stated the following: "The Prosecutor must carefully consider the factual basis and existing evidence when deciding what charge most adequately reflects the underlying criminal conduct of an accused. Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor make a plea agreement such that the totality of an individual's criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences [*sic*] committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record. Convictions entered by a trial chamber must accurately reflect the actual conduct and crime committed and must not simply reflect the agreement of the parties as to what would be a suitable settlement of the matter". Cf.: *Ibid.*
[910] *Ibid.*
[911] COMBS (2007), *supra* note 529, p.66.
[912] *The Prosecutor v. Miodrag Jokić, supra* note 820.
[913] *Prosecutor v. Miroslav Deronjić, supra* note 821.
[914] *The Prosecutor v. Dragan Nikolić, supra* note 825.
[915] DANA, Shahram. "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?", *Penn State Journal of Law & International Affairs,* vol.3, n.1, p.30-112, 2014; TALLGREN, Immi. "The Sensibility and Sense of International Criminal Law", *European Journal of International Law,* vol.13, n.3, p.561-595, 2002; KAUL, Hans-Peter. "The International Criminal Court – Current Challenges and Perspectives", Salzburg Law School on International Criminal

herculean task ongoing since the formation of International Criminal Law. Thus, this struggle is what leaves the courts to toil with the ideological and practical function of plea-bargaining.

At its creation, the ICTY categorically rejected plea-bargaining under ideological reasons, i.e., the crimes prosecuted at international criminal tribunals are too reprehensible and heinous to be bargained over[916]. However, the growing caseload in the following years revealed ICTY's inability to prosecute all defendants by means of full-scale trials[917]. Likewise, the pressure from financial endorsers to reduce spending could not be ignored[918]. In light of these factors, the ICTY was forced into a corner; as its way out, it endorsed plea-bargaining[919]. Looking back at this development, one can clearly see that such practice became a reality at ICTY due to practical necessity[920]. Nina Jørgensen even labeled the introduction of plea-bargaining "a triumph for pragmatism"[921].

This "triumph for pragmatism" raises a disturbing question: how truly independent was the ICTY? As noted by Julian Cook, "forced to confront pressures from both the United Nations and the United States that threaten its continued existence, the ICTY has little choice but to adopt a plea bargaining strategy"[922]. As the change in the ICTY's judicial and prosecutorial policy in relation to plea-bargaining was the result of pressure from external political actors[923], one has to ask himself about the ability of the ICTY to resist outside influences and act with independence. The introduction of plea-bargaining under those circumstances raises doubt about other modifications and decisions taken at the ICTY that could have been the result of political compromises between the Tribunal and external actors. One may think, especially, in Prosecutor Carla Del Ponte's decision not to indict the nationals of NATO member States for alleged war

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Law, 8 August 2011. Available at: <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>. Access on: December 2, 2018.

916 KOVAROVIC, *supra* note 413, p.285; SCHARF, *supra* note 43, p.1073.

917 KOVAROVIC, *ibid*., p.286.

918 DAMAŠKA, *supra* note 40, p.1035-1036.

919 COOK, Julian. "Plea Bargaining at The Hague", *Yale Journal of International Law,* vol.30, n.2, p.473-506, 2005, p.476-477 [COOK]; DEMIRDJIAN, Alexis and DIXON, Rodney. "Advising Defendants about Guilty Pleas before International Courts", *Journal of International Criminal Justice,* vol.3, n.3, p.680-694, 2005, p.694.

920 DAMAŠKA, *supra* note 40, p.1036; COMBS (2002), *supra* note 440, p.145.

921 JØRGENSEN, Nina. "The Genocide Acquittal in the *Sikirica* Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea", *Leiden Journal of International Law,* vol.15, n.2, p.389-407, 2002, p.407.

922 COOK, *supra* note 919, p.476-477.

923 CLARK, Janine Natalya. "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation", *European Journal of International Law*, vol.20, no.2, p.415-436, 2009, p.433 [CLARK].

crimes committed during the bombardments in the former-Yugoslavia[924]. This puts the ICTY in an awkward position; one with the dangerous potential to threaten the legitimacy of the Tribunal's work.

Even though the inclusion of article 65 (regulating the proceedings on an admission of guilt) at the ICC Rome Statute[925] indicates that plea-bargaining is now an established element of the international criminal justice system[926], the introduction of such practice at the international fora by the ICTY was completely avoidable in the first place[927]. In fact, the ICTY President Theodor Meron's characterization of plea-bargaining in that Tribunal as a natural development[928] or "part of the court's coming of age"[929] seems inappropriate[930]. The need for plea-bargaining at the ICTY could have been avoided if the Office of the Prosecutor had been more selective in its indictments[931]. In the ICTY's early years, the Prosecutor filed indictments randomly, without a clear and objective prosecutorial strategy[932]. Accordingly, the pool of defendants contained numerous low-level offenders, including foot soldiers and prison guards[933].

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924 "Prosecutor's Report on the Nato Bombing Campaign", *ICTY Press Release,* 13 June 2000. Available at: <http://www.icty.org/en/press/prosecutors-report-nato-bombing-campaign>. Access on: November 30, 2018.

925 Cf. section 4.2 of the present thesis.

926 TIEGER, Alan and SHIN, Milbert. "Plea Agreements in the ICTY: Purpose, Effects and Propriety", *Journal of International Criminal Justice*, vol.3, n.3, p.666-679, 2005, p.667 [TIEGER and SHIN].

927 SCHARF, *supra* note 43, p.1080.

928 SIMONS, Marlise. "Plea Deals Being Used to Clear Balkan War Tribunal's Docket", *The New York Times,* 18 November 2003. Available at: <https://www.nytimes.com/2003/11/18/world/plea-deals-being-used-to-clear-balkan-war-tribunal-s-docket.html>. Access on: November 30, 2018.

929 *Ibid.*

930 SCHARF, *supra* note 43, p.1080.

931 *Ibid.*

932 COMBS (2007), *supra* note 529, p.57.

933 For example: (i) Predrag Banović was a guard at the Keraterm camp. He was indicted on July 21, 1995 and later convicted of persecutions on political, racial or religious grounds as crimes against humanity. Cf.: *The Prosecutor v. Predrag Banović, supra* note 215; (ii) Esad Landžo was a guard at the Čelebići camp from May 1992 to December 1992. He was indicted on March 21, 1996 and later found guilty of the war crimes of wilful killing, torture and wilfully causing great suffering or serious injury. Cf.: *The Prosecutor v. Mucić et al. ("Čelebići Camp"),* ICTY, Trial Chamber II, Case no. IT-96-21-Tbis-R117, 9 October 2001; (ii) Drago Josipović, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić and Dragan Papić were all soldiers of the HVO in central Bosnia and Herzegovina. They were indicted on November 10, 1995, but were all acquitted with the exception of Drago Josipović, who was convicted of persecutions on political, racial or religious grounds; murder; and inhumane acts as crimes against humanity. Cf.: *The Prosecutor v. Kupreškić et al. ("Lašva Valley"),* Judgment, ICTY, Appeals Chamber, Case no. IT-95-16-A, 23 October 2001; (iii) Haradin Bala was a guard at the Lapušnik/Llapushnik prison camp, near the city of Glogovac in central Kosovo. He was indicted on January 27, 2003 and later convicted of torture, cruel treatment and murder as violations of the laws or customs of war. Cf.: *The Prosecutor v. Limaj et al.*, Judgment, ICTY, Trial Chamber II, Case no. IT-03-66-T, 30 November 2005; (iv) Lukić Sredoje was a police officer and member of a local Bosnian Serb paramilitary group known as the "White Eagles", in Višegrad, in Eastern Bosnia and Herzegovina. He was indicted on October 26, 1998 and later convicted of crimes against humanity (inhumane acts; persecutions on political, racial and religious grounds; and murder) and violations of laws or customs of war (cruel treatment and murder). Cf.: *The Prosecutor v. Lukić Milan & Lukić Sredoje ("Višegrad"),* Judgment, ICTY, Trial Chamber III, Case no. IT-98-32/1-T, 20 July 2009;

Moreover, plea-bargaining could have been avoided if the UNSC had not been so anxious to close prematurely the Tribunal, under the guise of the arguably unbearable costs of the ICTY[934]. Actually, as noted by David Wippman, the notion that international criminal trials are expensive and slow is accurate, but deceptive[935]. On average, trials at the ICTY cost much more than an average criminal trial in the US, for example[936]. However, this was not due to the ICTY's overspending or mismanagement of funds, but derived from the inherent complexity of the cases being prosecuted[937]. In fact, as the ICTY was the judicial body that prosecuted the highest number of complex criminal cases ever, it is not surprising that such a court was expensive[938]. Moreover, Stuart Ford's empirical study on complexity and efficiency at international criminal courts revealed that the ICTY was much more efficient than domestic courts in the US and Europe in the prosecution of comparable mass atrocity cases[939]. Therefore, particularly regarding complex criminal cases as those adjudicated before the ICTY, the mainstream affirmation that such a court was excessively slow and costly turns out not to be true[940].

Finally, the ICTY's guilty-plea cases disclosed that plea-bargaining had been transplanted from the domestic jurisdiction of States to the international fora with restraint and modifications[941]. Prosecutors began practicing plea-bargaining and judges began accepting plea agreements[942], but they had done so taking into account the ICTY's particular structural and ideological features[943]. In fact, the judges tried to justify, in their legal analyses, that plea-bargaining was not a practice irreconcilable with the purposes

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and (v) Zoran Žigić was a taxi-driver who reserved as police officer during the conflict in Bosnia and Herzegovina. He also worked for a brief period as a guard at Keraterm camp and visited the Omarska and Trnopolje concentration camps to abuse, beat, torture and kill prisoners. He was indicted on November 9, 1998 and later convicted of persecutions on political, racial or religious grounds as crimes against humanity, and torture and cruel treatment as violations of the laws or customs of war. Cf.: *The Prosecutor v. Kvočka et al., supra* note 330.

934 SCHARF, *supra* note 43, p.1080.

935 WIPPMAN, David. "The Costs of International Justice", *American Journal of International Law*, vol.100, n.4, p.861-881, 2006, p.880 [WIPPMAN]; TIEGER and SHIN, *supra* note 926, p.668.

936 WIPPMAN, *ibid*.; TIEGER and SHIN, *ibid*., p.668-669.

937 WIPPMAN, *ibid*.; TIEGER and SHIN, *ibid*.

938 FORD, Stuart. "Complexity and Efficiency at International Criminal", *Emory International Law Review*, vol.29, p.1-69, 2014, p.62.

939 *Ibid*., p.63.

940 *Ibid*.

941 COMBS (2002), *supra* note 440, p.145.

942 SCHABAS, William. "Sentencing by International Tribunals: A Human Rights Approach", *Duke Journal of Comparative & International Law*, vol.7, p.461-517, 1997, p.496-497.

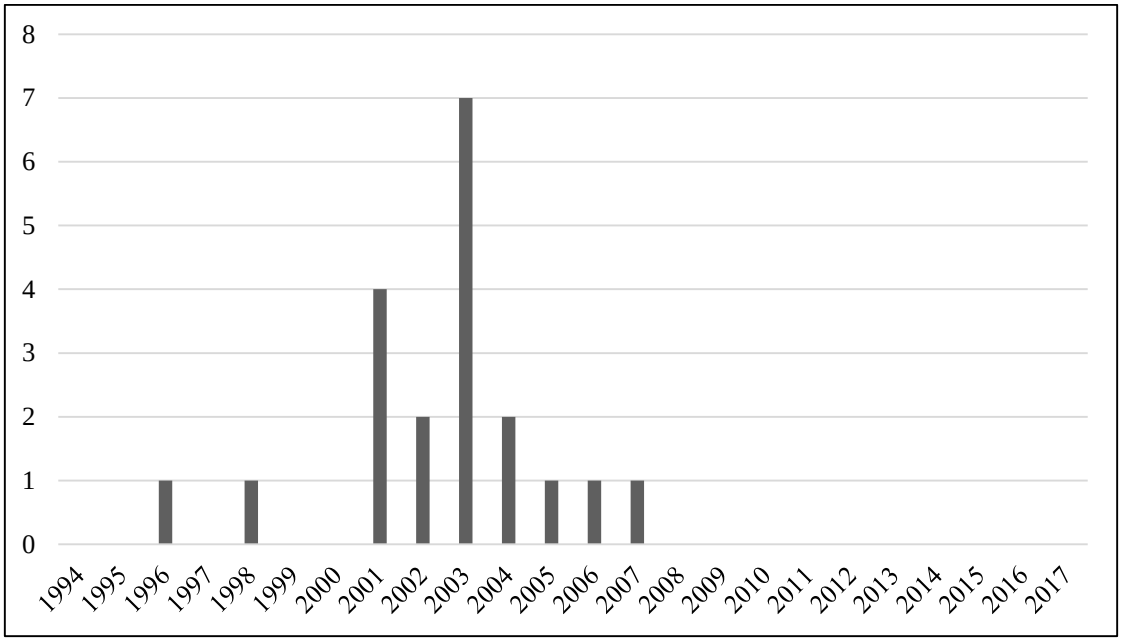
943 COMBS (2002), *supra* note 440, p.148.

and nature of the ICTY. Accordingly, they listed the ideological advantages of such a practice, alongside the practical ones[944].

The solution found by the ICTY was the establishment of "an uneasy compromise in which Trial Chambers began to accept plea-bargaining, including charge bargaining, to a degree, but carefully guarded their discretion over sentencing, remaining prepared to reject agreements viewed as inappropriate"[945]. Therefore, ICTY judges exercised significant control over sentencing, even in cases of plea-bargaining[946]. They were not formally bound by the plea agreements nor willing to enforce automatically the Prosecution's sentence recommendations[947]. As the judges insistently had pursued the ICTY's goal to identity and record the truth[948], they only accepted admissions of guilt that were sufficiently substantiated by facts[949].

One can identify a final trend in the guilty-plea cases at the ICTY: while 2003 was the year with the most admissions of guilt (seven in total), in the subsequent years, the number of defendants willing to plead guilty decreased significantly and no accused entered such plea in the final ten years of the ICTY[950]. Graph 2, below, illustrates this trend:

[944] Those ideological benefits include: bringing closure to victims, fostering national reconciliation and international peace, deterrence of new crimes and helping identify and record the truth. Cf.: *The Prosecutor v. Momir Nikolić, supra* note 153, para.72; *The Prosecutor v. Stevan Todorović, supra* note 427, para.81; *The Prosecutor v. Miroslav Deronjić, supra* note 821, para.236; *The Prosecutor v. Dragan Nikolić, supra* note 825, para.231; *The Prosecutor v. Dragan Obrenović, supra* note 817, para.111.
[945] MCCLEERY, *supra* note 46, p.1102.
[946] COMBS (2002), *supra* note 440, p.145.
[947] *Ibid*., p.148.
[948] *The Prosecutor v. Momir Nikolić, supra* note 153, para.65; TIEGER and SHIN, *supra* note 926, p.676-677; CLARK, *supra* note 923, p.424-428.
[949] TIEGER and SHIN, *ibid.*, p.670; DAMAŠKA, *supra* note 40, p.1038.
[950] RAUXLOH, *supra* note 754, p.749. The list of ICTY defendants who pleaded guilty per year follows: one in 1996 (Dražen Erdemović), one in 1998 (Goran Jelisić), four in 2001 (Damir Došen, Dragan Kolundžija, Duško Sikirica and Stevan Todorović), two in 2002 (Biljana Plavšić and Milan Simić), seven in 2003 (Predrag Banović, Ranko Češić, Miodrag Jokić, Darko Mrđa, Dragan Nikolić, Momir Nikolić and Dragan Obrenović), two in 2004 (Milan Babić and Miroslav Deronjić), one in 2005 (Miroslav Bralo), one in 2006 (Ivica Rajić) and the last one in 2007 (Dragan Zelenović). Cf.: <http://www.icty.org/en/features/statements-guilt>. Access on: December 2, 2018.



Graph 2: Number of defendants who pleaded guilty per year at the ICTY[951].

Graph 2 indicates a clear peak in 2003. Plea-bargaining was so successful that year that five out of the twelve convictions at the ICTY in 2003 derived from plea deals[952]. More impressively, five out of the six defendants convicted in 2004 pleaded guilty[953]. However, the peak in 2003 was followed by an abrupt reduction and, after 2007, the inexistence of guilty pleas. Three reasons justified the fading of such pleas at the ICTY. The first was the strong criticism from the victims of the crimes and scholars of the excessively lenient sentences and the lack of complete trials[954]. Second, Michael Johnson, the ICTY Chief of Prosecution, left the Tribunal in 2003; he was a strong supporter of plea-bargaining and one the main plea negotiators at the ICTY[955]. The third and most important cause for the reduction of plea agreements was the defendants' lack of confidence that the trial chambers would enforce the bargains[956], after the judges had

[951] Graph created by the author based on information from the official ICTY website. Cf.: <http://www.icty.org/en/features/statements-guilt>. Access on: December 2, 2018.
[952] In 2003, Stanislav Galić, Blagoje Simić, Miroslav Tadić, Simo Zarić, Milomir Stakić, Mladen Naletilić Vinko Martinović were found guilty after full trials. On the other hand, Dragan Nikolić, Dragan Obrenović, Momir Nikolić, Predrag Banović and Biljana Plavšić were convicted that year after pleading guilty. Cf.: <http://www.icty.org/en/cases/judgement-list#2003>. Access on: December 4, 2018.
[953] In 2004, the only defendant convicted after a full trial was Radoslav Brđanin. Milan Babić, Darko Mrđa, Miroslav Deronjić, Miodrag Jokić and Ranko Češić were convicted that year after pleading guilty. Cf.: <http://www.icty.org/en/cases/judgement-list#2004>. Access on: December 4, 2018.
[954] COMBS (2006), *supra* note 409, p.99.
[955] *Ibid.*
[956] *Ibid.*, p.99-100; BOAS *et al.*, *supra* note 18, p.224.

rejected the agreed-upon sentences in the *Momir Nikolić*[957], *Dragan Nikolić*[958] and *Babić*[959] cases (cf. Annex I).

3 PLEA-BARGAINING AT THE ICTR

The thesis will now turn to the practice of plea-bargaining in the second *ad hoc* international criminal tribunal – the ICTR. Firstly, it will provide the factual context of the establishment of such a court and subsequently, will describe and evaluate the main guilty-plea cases at the ICTR.

3.1 Background: The 1994 Genocide of the Tutsis by the Hutus and the Creation of the ICTR

In 1994, the world witnessed the second most efficient human extermination in history, only losing to the 1945 atomic bombings of Hiroshima and Nagasaki: the genocide of the Tutsis by the Hutus, in Rwanda[960]. In approximately three months, some 800,000 Rwandans were killed, most of them hacked to death with machetes[961]. Once the genocide was over, one-tenth of Rwanda's population had been murdered[962].

Rwanda is a small State located in central Africa, in the region known as the African Great Lakes. Its population is mainly composed of three groups: Hutus (85%), Tutsis (14%) and Twas (1%)[963]. Hutus and Tutsis have lived peacefully in the territory of present Rwanda for centuries, sharing the same language – Kinyarwanda – and the same Catholic faith, and having intergroup marriages[964]. Despite some alleged and biased

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957 *The Prosecutor v. Momir Nikolić, supra* note 153, para.180.
958 *The Prosecutor v. Dragan Nikolić, supra* note 825, para.275 and disposition.
959 *The Prosecutor v. Milan Babić, supra* note 826, paras.42 and 102.
960 GOUREVITCH, Philip. *Gostaríamos de Informá-lo de que Amanhã Seremos Mortos com Nossas Famílias*, São Paulo: Companhia das Letras, 2006, p.6 [GOUREVITCH].
961 *Report of the Independent Inquiry into the actions of the United Nations during the 1994 Genocide in Rwanda*, UNDoc.S/1999/1257, 15 December 1999, p.3. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20S19991257.pdf>. Access on: March 24, 2018 [*Report of the Independent Inquiry into the actions of the UN during the Genocide in Rwanda*].
962 JUNIOR, Arno Dal Ri and ZEN, Cássio Eduardo. "Entre Versailles e Roma - A instituição de uma jurisdição penal internacional permanente como virada paradigmática na história do Direito Internacional", p.1-27, p.15. In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (eds.). *O Tribunal Penal Internacional: Comentários ao Estatuto de Roma*, Belo Horizonte: Del Rey, 2016.
963 MOGHALU, Kingsley Chiedu. *Rwanda's Genocide: The Politics of Global Justice,* New York: Palgrave Macmillan, 2005, p.9.
964 TATUM, Dale. *Genocide at the Dawn of the Twenty-First Century: Rwanda, Bosnia, Kosovo, and Darfur,* New York: Palgrave Macmillan, 2010, p.40.

physiological distinctions[965], the main difference between Hutus and Tutsis was the economic activity of each group: while the Hutus lived on agriculture, the Tutsis were cattle ranchers[966]. The latter became the political and economic elite of Rwanda because ranching was more profitable[967].

The first imperialist European State to dominate Rwanda was Germany, in late 19th century[968]. In 1897, the Germans established a system of indirect domination, through which they chose influential Tutsis to act as feudal leaders to the detriment of the Hutu population[969]. After the defeat of Germany in World War I, Belgium assumed the colonial rule of Rwanda[970]. In 1933, the Belgians carried out a census in Rwanda, formally dividing the population into three official ethnic groups: Tutsis, Hutus and Twas[971]. The colonial power required each Rwandan subject to carry a mandatory personal identification card to indicate which group he or she belonged to[972]. As a result, Belgium installed an apartheid system based on the alleged Tutsi racial superiority[973]. Belgian authorities created profound antagonisms between Tutsis and Hutus through a strict and artificial tribal division of the Rwandan population [974]. Hence, "the root of Rwanda's

[965] In comparison to Hutus, Tutsis seemed to be taller, thinner and have narrow faces and aquiline noses. Colonialists judged them closer to Europeans in their physical appearance. Belgians colonizers even spread myths of the Tutsi racial superiority through imperialist "science": "In addition to military and administrative chiefs, and a veritable army of churchmen, the Belgians dispatched scientists to Rwanda. The scientists brought scales and measuring tapes and calipers and they went about weighing Rwandans, measuring Rwandans cranial capacities, and conducting comparative analysis of the relative protuberances of Rwandan noses. Sure enough, the scientists found what they believed all along. Tutsis had "nobler," more "naturally" aristocratic dimensions than the "coarse" and "bestial" Hutus. On the "nasal index," for instance, the median Tutsi nose was found to be about two and a half millimetres longer and nearly five millimetres narrower than the median Hutu nose". Cf.: CHUA, Amy. *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability,* New York: Knopf Doubleday Publishing Group, 2004, p.166; GOUREVITCH, *supra* note 960, p.53-54.
[966] GOUREVITCH, *ibid*., p.45-46.
[967] *Ibid.*
[968] OPPONG, Joseph. *Rwanda*, Modern World Nations Series, New York: Chelsea House Publishers, 2008, p.50.
[969] *Ibid*.; GOUREVITCH, *supra* note 960, p.52-53.
[970] The official transfer of Germany's colonial territories after the World War I occurred trough the Peace Treaty of Versailles. Its article 118 states the following: "In territory outside her European frontiers as fixed by the present Treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers. Germany hereby undertakes to recognise and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect". In the same line, article 119 determines: "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions". Cf. *Treaty of Peace between the Allied and Associated Powers and Germany ("Treaty of Versailles"),* Versailles, 28 June 1919, arts.118-119.
[971] GOUREVITCH, *supra* note 960, p.55.
[972] *Ibid.*
[973] *Ibid.*
[974] *Ibid*.; p.55-56.

problems lay less with ancient ethnic grievances and more with the colonial interventions of European actors"[975].

Decolonization of Africa brought change in the political life of Rwanda: the former subjugated Hutus took over the government in 1959[976] and frequent massacres of Tutsis occurred since then, notably in 1959, 1963, 1966, 1973, 1990, 1991, 1992 and 1993[977]. About 100,000 Tutsis left Rwanda and took refuge in neighboring States before 1994[978].

In the 1970s and 1980s, Rwanda was ruled by the totalitarian President Juvénal Habyarimana (of Hutu origin)[979]. In his regime, the system of racial division created by Belgium had been preserved[980]. Thus, each Rwandan citizen still carried an identification card specifying his or her respective "racial group" (Tutsi, Hutu or Twa)[981]. In addition, President Habyarimana implemented a policy of social exclusion of Tutsis and took no measure to prevent the persecution and killings of this group[982].

The Tutsis in Uganda created the armed group "Rwandese Patriotic Front" (RPF)[983]. On October 1, 1990, they invaded Rwanda to overthrow President Habyarimana and to abolish the Tutsi exclusion system[984]. Despite receiving military support from France, the Rwandan Army (loyal to Habyarimana) failed to expel the RPF and the latter took control of the Northern part of the Rwandan territory[985]. Hostilities lasted until August 4, 1993, when the Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front (known as "Arusha Accords") was signed in Arusha, Tanzania[986]. The main objectives of the agreement were: (i) the

[975] CARNEY, J. J. *Rwanda Before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era,* Oxford: Oxford University Press, 2014, p.2.
[976] MORRIS, Virginia and SCHARF, Michael. *The International Criminal Tribunal for Rwanda,* vol.1, Irvington-on-Hudson: Transnational Publishers, 1998, p.50 [MORRIS and SCHARF (1998)].
[977] *Report on the Situation of Human Rights in Rwanda prepared by the Special Rapporteur of the Commission on Human Rights,* UNDoc.A/49/508, S/1994/1157, 13 October 1994, para.20. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/398/84/IMG/N9439884.pdf?OpenElement>. Access on: May 25, 2018 [*Report on the Situation of Human Rights in Rwanda*].
[978] GOUREVITCH, *supra* note 960, p.59.
[979] MORRIS and SCHARF (1998), *supra* note 976, p.50.
[980] *Ibid.*
[981] *Ibid.*
[982] *Ibid.*
[983] *Ibid.*
[984] *Ibid.*
[985] *Ibid.*
[986] *Ibid*., p.50-51.

immediate cessation of the armed conflict[987]; (ii) military demobilization[988]; (iii) establishment of the Broad-Based Transitional Government, headed by a prime minister chosen by both parties – Faustin Twagiramungu[989]; (iii) the holding of new general elections[990]; and (iv) the repatriation of all Tutsi refugees[991].

The UN welcomed the Arusha Accords and on October 5, 1993, the UNSC unanimously adopted Resolution 872, which created the peacekeeping operation named UNAMIR[992]. The UNSC mandated it to monitor the compliance with the Arusha Accords, especially regarding the installation of the Broad-Based Transitional Government, the implementation of new elections and the process of repatriation and resettlement of Rwandan refugees[993]. UNAMIR's head was the Cameroonian Jacques-Roger Booh-Booh and the Force Commander was the Canadian Major-General Roméo Dallaire (they both held these positions during the upcoming genocide)[994].

The Arusha Accords allowed President Habyarimana to remain in power until the transitional government of Prime Minister Twagiramungu would be established[995]. However, the treaty prohibited Habyarimana to "encroach on the mandate of the Broad-

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[987] *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, Arusha, 4 August 1993, art.1 [*Peace Agreement between the Government of Rwanda and the RPF*]. This provision reads as follows: "The war between the Government of the Republic of Rwanda and the Rwandese Patriotic Front is hereby brought to an end".

[988] *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Integration of the Armed Forces of the Two Parties*, Arusha, 3 August, 1993, arts.147 - 163. Article 147 reads as follows: "Elements of the two Forces, namely the Rwandese Armed Forces and the RPF Forces which shall not have been retained among the nineteen thousand (19,000) servicemen and gendarmes shall be demobilized".

[989] *Peace Agreement between the Government of Rwanda and the RPF*, *supra* note 987, art.6. This provision reads as follows: "The two parties agree on the appointment of Mr. TWAGIRAMUNGU Faustin as Prime Minister of the Broad-Based Transitional Government, in accordance with Articles 6 and 51 of the Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Power-Sharing within the framework of a Broad-Based Transitional Government".

[990] *Protocol of Agreement on Power-Sharing within the Framework of a Broad-Based Transitional Government between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, Arusha, 30 October, 1992. Article 23 reads as follows: "The Broad-based Transitional Government shall implement the programme comprising the following: […] Prepare and organise general elections to be held at the end of the Transition Period".

[991] *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons,* Arusha, 9 June 1993, art.1. This provision reads as follows: "The return of Rwandese refugees to their country is an inalienable right and constitutes a factor of peace, national unity, and reconciliation". In a more compelling language, article 2 reads as follow: "The return is an act of free will on the part of each refugee. Any Rwandese refugee who wants to go back to his country will do so without any precondition whatsoever".

[992] *Resolution of the UNSC no. 827 (1993), supra* note 391, para.2.

[993] *Ibid*., para.3.

[994] SASSÒLI, Marco; BOUVIER, Antoine; and QUINTIN, Anne. *How Does Law Protect in War?,* vol.III, 3rd ed., Geneva: ICRC, 2011, p.11.

[995] *Peace Agreement between the Government of Rwanda and the RPF*, *supra* note 987, art.8.

Based Transitional Government"[996], and he "in no case, [could] take decisions which may be detrimental to the implementation of the Broad-Based Transitional programme"[997].

Contravening the Arusha Accords, President Habyarimana refused to step down and transfer power to Prime Minister Twagiramungu[998]. Several Hutu extremists at the President's cabinet strongly opposed the Arusha Accords and rejected any form of reduction of their political power[999]. Parallel to this scenario, moderate Hutu leaders gained increasing support and influence among the population, jeopardizing the supremacy of President Habyarimana's radical regime[1000]. Accordingly, the main threat to the government was the rise of moderate Hutu politicians, who could defeat President Habyarimana in the general election provided for in the Arusha Accords[1001].

In response, President Habyarimana launched a strong campaign to strengthen the national hatred against the Tutsis and to dispel any moderate rhetoric by the Hutu opposition[1002]. Rwandan authorities took widespread and systematic measures throughout the country in preparation for the future genocide[1003]. From early 1993, the *Radio Télévision Libre des Mille Collines* (RTLMC), of property of Hutu hard-liners close to the President and his family, began broadcasting speeches inciting racial hatred and violence against Tutsis and moderate Hutus[1004]. A training center was set up in the Mutura region, Northwestern Rwanda, where Hutu radicals learned methods of extermination and indoctrination of racial hatred[1005]. Individuals trained at this center became members of militias, especially the *Interahamwe*[1006], one of the main actors in the genocide[1007]. Between 1992 and 1994, Rwandan authorities distributed thousands of firearms across the country to civilians, the Presidential Guard and militias[1008]. Machetes were imported in bulk from China and stocked in secret locations in several parts of the

[996] *Ibid.*
[997] *Ibid.*
[998] MORRIS and SCHARF (1998), *supra* note 976, p.51.
[999] *Ibid.*
[1000] *Ibid.*
[1001] *Ibid.*
[1002] *Ibid.*, p.51-52.
[1003] *Report on the Situation of Human Rights in Rwanda*, *supra* note 977, para.26.
[1004] *Ibid.*; MORRIS and SCHARF (1998), *supra* note 976, p.51-52.
[1005] MORRIS and SCHARF (1998), *ibid*., p.52.
[1006] *Interahamwe* means "those who attack together". Cf. *Third report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights*, UNDoc.A/49/508/Add.1, S/1994/1157/Add.1, 14 November 1994, para.9. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/450/83/PDF/N9445083.pdf?OpenElement>. Access on: May 25, 2018.
[1007] MORRIS and SCHARF (1998), *supra* note 976, p.52.
[1008] *Ibid.*; *Report on the Situation of Human Rights in Rwanda*, *supra* note 977, para.26.

territory[1009]. Moreover, Hutu radicals had compiled and circulated lists with names of Tutsis and moderate Hutus for months[1010].

On January 11, 1994, Roméo Dallaire sent a cable to the DPKO with the details of all the preparation and planning for the imminent racial violence[1011]. He received this information from an informant who was a top-level trainer of the *Interahamwe* militia[1012]. Dallaire requested authorization to take action and seize the weapons, preventing the massacres[1013]. Under-Secretary-General Kofi Annan denied the request, emphasizing "the need to avoid entering into a course of action that might lead to the use of force and unanticipated repercussions"[1014]. On the following months, Dallaire repeatedly informed the DPKO of the increasing deterioration of the situation and the abundance of evidence pointing to the forthcoming ethnic violence in Rwanda[1015]. He insistently requested reinforcements and authorization to take a more active role[1016]. DPKO's officials ignored or formally denied his appeals[1017].

The genocide began on April 6, 1994, when the plane carrying President Habyarimana and the President of Burundi Cyprien Ntaryamira was shot down, at approximately 8:30pm, by a ground-to-air missile, while landing at the airport of Kigali, Rwanda's capital[1018]. All aboard died[1019]. Rwandan authorities immediately accused the RPF for the attack[1020], despite indications pointing to Hutu extremists[1021]. In less than an hour, the armed forces, the Presidential Guard, the gendarmerie and the *Interahamwe*

[1009] *Ibid.*
[1010] *Ibid*., p.53.
[1011] *Report of the Independent Inquiry into the actions of the UN during the Genocide in Rwanda*, *supra* note 961, p.10.
[1012] *Ibid.*
[1013] *Ibid.*
[1014] *Ibid*., p.11.
[1015] *Ibid*., p.14-15.
[1016] *Ibid*.
[1017] *Ibid*.
[1018] MORRIS and SCHARF (1998), *supra* note 976, p.53; SALIBA, Aziz Tuffi and LIMA, Humberto Alves de Vasconcelos. "Aspectos Políticos da Criação do Tribunal Penal Internacional para Ruanda", p.1-29, p.5. In SALIBA, Aziz Tuffi; CANÊDO, Carlos Augusto and NASSER, Salem Hikmat. *Tribunais Penais Internacionais* (forthcoming/on file with author).
[1019] *Report of the Independent Inquiry into the actions of the UN during the Genocide in Rwanda*, *supra* note 961, p.15.
[1020] Mr. Bicamumpaka, the representative of Rwanda at the UNSC in 1994, expressly lied before the Council on 16 May 1994, the first meeting dealing with the Rwandan genocide. He said: "The RPF, strongly supported by Uganda, has taken responsibility for killing the Head of State of Rwanda - high treason in any civilized country - and has resumed the war, a war more savage than the one that began on 1 October 1990. It has carried out systematic, selective massacres of civilians". Cf.: *Official Records of the 3377th Meeting of the UN Security Council*, UNDoc.S/PV.3377, 16 May 1994, p.4 [*Official Records of the 3377th Meeting of the UNSC*].
[1021] MORRIS and SCHARF (1998), *supra* note 976, p.53.

militia initiated the extermination of Tutsis, Twas and moderate Hutus[1022]. An interim government with Hutu radical members was created: Théodore Sindikubwabo became the President and Jean Kambanda was appointed Prime Minister[1023].

Within hours after the plane crash, the streets of Kigali were filled with corpses[1024]. Tutsis, Twas and moderate Hutus were hunted down and killed[1025]. People on the streets were stopped and those carrying the Tutsi identification card were slaughtered[1026]. The Hutus started searching each house to find Tutsis and kill them[1027]. Tutsis hiding in hospitals, churches, schools and even Red Cross facilities were killed collectively[1028]. Mass killings were encouraged by the RTLMC, which propagated racially charged hate speech as well as publicized the location of Tutsis and moderate Hutus[1029]. Due to extensive preparations earlier, the killing quickly spread throughout the country[1030]. Hundreds of thousands of Tutsis were killed and their bodies dumped into rivers or mass graves[1031]. Several local authorities gathered the Tutsis to facilitate the murders by troops and militiamen. Thousands of Tutsi women were brutally raped, either individually or in groups[1032].

The genocide motivated the RPF to re-initiate hostilities against Rwanda's armed forces and the militias[1033]. Despite its numerical and military inferiority, the RPF rapidly gained control over Kigali on July 18, 1994, ending the genocide[1034]. As the interim

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[1022] *Ibid.*
[1023] *Ibid*., p.55.
[1024] *Ibid*., p.54.
[1025] *Ibid*.
[1026] *Ibid*.
[1027] *Ibid*.
[1028] *Ibid*.; *Report on the Situation of Human Rights in Rwanda*, *supra* note 977, para.27.
[1029] MORRIS and SCHARF (1998), *ibid*., p.54-55.
[1030] *Report on the Situation of Human Rights in Rwanda*, *supra* note 977, para.26.
[1031] MORRIS and SCHARF (1998), *supra* note 976, p.55.
[1032] *Ibid*. The UN Special Rapporteur on Rwanda, René Degni-Ségui, described the massacres as follow: "The killings are carried out under atrocious, appallingly cruel, conditions. They are preceded by acts of torture or other cruel, inhuman and degrading treatment. Generally, the victims are attacked with machetes, axes, cudgels, clubs, sticks or iron bars. The killers sometimes go so far as to cut off their fingers, hands, arms and legs one after another before cutting off their heads or splitting their skulls. Witnesses report that it is not uncommon for the victims to plead with their executioners or offer them money to let them be shot rather than hacked to death. It has also been reported that, when the Tutsi have shut themselves in a room or a church which the militiamen cannot get into, the military come to their aid, breaking down doors, throwing in grenades and leaving it to the militia to finish things off. This barbarism does not spare either children in orphanages or patients in hospital, who are taken away and killed or finished off. Mothers have been forced to beat their children, while Hutu staff working for *Médecins sans frontières* […] were obliged to kill their Tutsi colleagues. Those who had the courage to refuse were killed. It has even been reported that the killers, after executing their victims in the open street, in front of everyone, cut them up into pieces, and some do not hesitate to sit on the bodies and drink beer while waiting for prisoners to come and take the bodies away". Cf. *Report on the Situation of Human Rights in Rwanda*, *supra* note 977, para.19.
[1033] *Report on the Situation of Human Rights in Rwanda*, *ibid*., para.20.
[1034] MORRIS and SCHARF (1998), *supra* note 976, p.58.

government of Théodore Sindikubwabo and Jean Kambanda had been expelled into exile, the RPF formed a new government of national unity, composed of President Pasteur Bizimungu (moderate Hutu), Prime Minister Faustin Twagiramungu (moderate Hutu) and Vice-President/Defense Minister Paul Kagame (Tutsi)[1035].

The numbers of the Rwandan genocide are astonishing: in approximately 100 days (between April and July of 1994), about 800,000 people were killed[1036]. Accordingly, 333 murders occurred each hour, or 5.5 each minute[1037]. Although the killings were conducted with menial low-tech weapons (machetes were the most common of them), the deaths in Rwanda surmounted the number of Jews slaughtered in the Holocaust at a rate three times greater[1038]. Nearly 2 million Rwandans (mostly Hutus) had to leave their homes in search of secure locations[1039]; most of them took refuge in Tanzania[1040]. Only between 28 and 29 April 1994, some 250,000 people crossed the Rwandan frontier into that State[1041]. Approximately 330,000 people were sheltered in the Benaco refugee camp, in Tanzania, which was the largest refugee camp in the world at the time[1042].

As fate would have it, during the entire genocide and the subsequent creation of the ICTR, Rwanda was a non-permanent member of the UNSC[1043]. Shortly after the explosion of the plane on April 6, 1994, the Rwandan delegate reported to the UNSC that the crisis in his State was due to a *coup d'etat* attempt by the RPF, with the support of Uganda[1044]. He also said that the mass murders have been perpetrated by the RPF against the Hutu population[1045].

[1035] *Ibid.*
[1036] *Report of the Independent Inquiry into the actions of the UN during the Genocide in Rwanda*, *supra* note 961, p.3.
[1037] GOUREVITCH, *supra* note 960, p.130.
[1038] *Ibid.*
[1039] *Report on the Situation of Human Rights in Rwanda*, *supra* note 977, para.35.
[1040] *Ibid*., para.36.
[1041] *Ibid*., para.38.
[1042] *Ibid*., para.36.
[1043] Cf.: <http://www.un.org/en/sc/inc/searchres_sc_year_english.asp?year=1994>. Access on: May 25, 2018.
[1044] Mr. Bicamumpaka, the representative of Rwanda at the UNSC in 1994, said: "The assassination of the Head of State of Rwanda on 6 April 1994 and the simultaneous resumption of war were not mere coincidence. These events were part of a carefully prepared plan to seize power in Kigali. That plan was coordinated with the Ugandan authorities, who themselves had carried out a concealed demobilization to make soldiers available to send to the front in Rwanda. The resumption of hostilities by the RPF, along with large-scale massacres of Hutu civilians, was the straw that broke the camel's back, unleashing repressed hatreds and a festering desire for revenge". Cf.: *Official Records of the 3377th Meeting of the UNSC*, *supra* note 1020, p.4.
[1045] Mr. Bicamumpaka said: "More recently, after the assassination of President Habyarimana, the RPF ruthlessly massacred Hutu peasants in the north of the country and in the district of Kibungo. Thousands of people perished, and several areas of the capital were plunged into mourning by the RPF, which pitilessly

Instead of sending more troops to Rwanda, the first response by the UN was to reduce its presence there[1046]. The crisis and the killing of ten Belgian soldiers right after the plane crash motivated Belgium to withdraw its troops from Rwanda[1047]. Thus, the UNSC unanimously adopted on April 21, 1994, the Resolution 912[1048], reducing UNAMIR's troops from 1,515 men to mere 270[1049]. Furthermore, UNSC deliberately avoided the word "genocide" in its resolutions for the first two months after the beginning of the killings, due to concerns about the legal implications of attesting the existence of a genocide[1050].

In light of the UNSC's lethargy, the UN human rights institutions were the first to act[1051]. As it became obvious that the UN was not willing to stop the humanitarian catastrophe, human rights bodies decided to take measures to gather evidence and record the offenses being committed[1052]. The former-UN Commission on Human Rights, in its Resolution S-3/1 of May 25, 1994, appointed René Degni-Ségui (from Côte d'Ivoire) as Special Rapporteur on Rwanda[1053]. His mandate was to investigate and to compile "information on possible violations of human rights and acts which may constitute breaches of international humanitarian law and crimes against humanity, including acts of genocide, in Rwanda"[1054]. In addition, the newly appointed UN High Commissioner for Human Rights José Ayala Lasso (from Ecuador) visited Rwanda from 11 to 12 May 1994 and published a follow-up report[1055]. He concluded that "the situation in Rwanda can be characterized as a human rights tragedy"[1056] and stressed that "the authors of the atrocities must be made aware that they cannot escape personal responsibility for criminal acts they have carried out, ordered or condoned"[1057].

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killed men, women, children and old people simply because they were Hutu and against its hegemonic designs". Cf.: *ibid*., p.5.

[1046] MORRIS and SCHARF (1998), *supra* note 976, p.59-60.

[1047] *Report of the Independent Inquiry into the actions of the UN during the Genocide in Rwanda*, *supra* note 961, p.19-20.

[1048] *Resolution of the UNSC no. 912 (1994),* UNDoc.S/RES/912, 21 April 1994.

[1049] GOUREVITCH, *supra* note 960, p.146.

[1050] MORRIS and SCHARF (1998), *supra* note 976, p.62.

[1051] *Ibid*., p.61.

[1052] *Ibid*.

[1053] *Report of the Commission on Human Rights on its Third Special Session,* UNDoc.E/CN.4/S-3/4, 30 May 1994, p.13. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/128/01/PDF/G9412801.pdf?OpenElement>. Access on: May 25, 2018.

[1054] *Ibid*., p.8.

[1055] *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994*, UNDoc.E/CN.4/S-3/3, 19 May 1994, para.16. Available at: <http://www.un.org/ga/search/view_doc.asp?symbol=E%2FCN.4%2FS-3%2F3&Submit=Search&Lang=E>. Access on: May 25, 2018.

[1056] *Ibid*., para.28.

[1057] *Ibid*., para.32.

However, the Commission on Human Rights soon changed its policy, deciding to leave the criminal prosecution to the domestic courts of Rwanda[1058]. Prime Minister Faustin Twagiramungu strongly protested this change of position[1059]. Reasonably accusing the UN of eurocentrism and bias, he affirmed in an interview: "Is it because we're Africans that a court has not been set up?"[1060]. The RPF also supported the creation of an ICTY-like tribunal for Rwanda[1061].

On May 31, 1994, Boutros Boutros-Ghali submitted a 14-page report to the UNSC, stating that "there can be little doubt that [the situation in Rwanda] constitute[d] genocide, since there have been large-scale killings of communities and families belonging to a particular ethnic group [the Tutsis]"[1062]. In response, the UNSC adopted Resolution 925 on June 8, 1994, acknowledging for the first time the genocide in Rwanda (two months after its beginning)[1063].

On June 28, 1994, the Special Rapporteur on Rwanda submitted his first report[1064]. After a legal evaluation of the killings of Tutsis under the UN Convention on the Prevention and Punishment of the Crime of Genocide[1065], he concluded that "the term 'genocide' should henceforth be used as regards the Tutsi"[1066]. In light of the overwhelming evidence and under pressure by the RPF and Prime Minister Twagiramungu, the UNSC unanimously decided, in Resolution 935 of July 1, 1994, to create a Commission of Experts (similar to the one established for the former-Yugoslavia[1067]) to investigate grave violations of International Humanitarian Law in Rwanda, including genocide[1068].

[1058] *The Prosecutor v. Jean Bosco Barayagwiza,* Final Report of the Expert-witness, Jiri Toman, on behalf of the Defense, Case n. ICTR-97.19-1, 10 February 2003, p.15.
[1059] MORRIS and SCHARF (1998), *supra* note 976, p.62.
[1060] SCHARF, Michael. "The Politics of Establishing an International Criminal Court", *Duke Journal of Comparative & International Law*, vol. 6, p.167-173, 1997, p.168.
[1061] MORRIS and SCHARF (1998), *supra* note 976, p.62.
[1062] *Report of the Secretary-General on Rwanda,* UNDoc.S/1994/640, 31 May 1994, para.36.
[1063] The 6th preambulatory clause of Resolution 925 (1994) reads as follow: "Noting with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recalling in this context that genocide constitutes a crime punishable under international law". Cf.: *Resolution of the UNSC no. 925 (1994),* UNDoc.S/RES/1925, 8 June 1994.
[1064] *Report on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994,* UNDoc.E/CN.4/1995/7, 28 June 1994. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/131/47/PDF/G9413147.pdf?OpenElement>. Access on: May 25, 2018.
[1065] *Ibid*., paras.43-48.
[1066] *Ibid*., para.48.
[1067] Cf. section 2.1 of the present thesis.
[1068] *Resolution of the UNSC no. 935 (1994),* UNDoc.S/RES/935, 1 July 1994. This resolution's first operative paragraph reads as follows: "The Security Council […] requests the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse information

However, after coming into power in July 1994, the new Rwandan government changed its position towards the *ad hoc* international criminal tribunal[1069]. Despite the disintegration of Rwanda's judicial system during the armed conflict and the fact that most of the suspects have taken refuge in neighboring States[1070], Prime Minister Twagiramungu announced that Rwanda would conduct the trials before its own domestic courts[1071]. Nevertheless, after receiving assurance from the UN and US that the creation of the international tribunal would not take much longer, Twagiramungu agreed to postpone the national trials[1072].

The pressure from Rwanda to accelerate the creation of the international tribunal motivated the US and New Zealand not to wait for the report of the Commission of Experts[1073]. In the third week of September 1994, they jointly circulated a draft UNSC resolution, proposing amendments to the ICTY Statute[1074]. They suggested extending the jurisdiction of the ICTY to cover Rwanda and adding two new trial chambers to that court[1075].

On October 4, 1994, Boutros-Ghali submitted the Commission of Experts' first report to the UNSC[1076]. It indicated that both sides to the armed conflict in Rwanda (the RPF and the Hutus) perpetrated serious breaches of International Humanitarian Law and crimes against humanity[1077]. The Commission also concluded that "acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way"[1078]. Like the US and New Zealand's joint draft resolution, the Commission recommended the UNSC to "amend the [ICTY Statute] to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on April 6, 1994"[1079].

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submitted pursuant to the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur for Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide".

[1069] MORRIS and SCHARF (1998), *supra* note 976, p.66.

[1070] *Ibid*.

[1071] *Ibid*.

[1072] *Ibid*., p.67.

[1073] *Ibid*., p.68.

[1074] *Ibid*.

[1075] *Ibid*.

[1076] *Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UNDoc.S/1994/1125, 4 October 1994. Available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/1125>. Access on: May 25, 2018.

[1077] *Ibid*., paras.146-147.

[1078] *Ibid*., para.148.

[1079] *Ibid*., para.152.

Different from the ICTY Statute – which was drafted by the UNSG[1080] –, the statute of the tribunal for Rwanda underwent a traditional process of negotiation among the members of the UNSC[1081]. Accordingly, Rwanda voiced several concerns regarding the US and New Zealand's joint proposal: (i) the death penalty should apply; (ii) the prison terms should be served in Rwanda, and not in Europe; (iii) the tribunal's competence *ratione temporis* should begin on October 1990, when the persecution of Tutsis started under Habyarimana's Presidency, rather than April 7, 1994, as suggested in the proposal; (iv) the tribunal's competence *ratione temporis* should end on July 15, 1994, when the RPF seized power in Kigali, and not December 31, 1994 as submitted by the US and New Zealand. Rwanda intended to avoid equating the genocide against the Tutsis with the reprisal killings of Hutus by RPF troops, in the second semester of 1994; (v) the trials should not take place at The Hague, but in Rwanda, to reduce costs and allow the Rwandan people to see for themselves justice being done; (vi) Rwanda should have a veto power on the appointment of judges; and (vii) the defendants tried before a national court of Rwanda could not be re-tried at the international tribunal[1082].

Notwithstanding those objections, Rwanda formally requested the UNSC on September 28, 1994, to create the *ad hoc* international criminal tribunal as soon as possible[1083]. On October 6, 1994, President Pasteur Bizimungu, while addressing the UNGA, reinforced that "it [was] absolutely urgent that this international tribunal be established"[1084].

[1080] Cf. section 2.1 of the present thesis.
[1081] MORRIS and SCHARF (1998), *supra* note 976, p.68-72.
[1082] *Ibid*., p.68-69.
[1083] The Ambassador of Rwanda to the UN, Manzi Bakuramutsa, wrote: "We request the international community to reinforce government efforts by: […] Setting up as soon as possible an international tribunal to try the criminals". Cf.: *Letter Dated 28 September from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council*, UNDoc.S/1994/1115, 29 September 1994, p.4.
[1084] President Bizimungu said: "we encourage the United Nations to furnish the international tribunal to be created in Rwanda with the means to function as it should, in order to spare us further disappointments and tragedies. In accordance with Rwanda's request, and following Mr. Degnisegui's report, as well as that of the Commission of Experts established by Security Council resolution 935 (1994), of 1 July 1994, it is absolutely urgent that this international tribunal be established. It will enable us to prosecute in a completely open setting those responsible for the genocide. Since most of the criminals have found refuge in various corners of the world, what we seek is a tool of justice that knows no borders. Moreover, the very nature of the events - considered to be crimes against humanity - warrants the international community's joining forces to prevent their reoccurrence. That is why we continue to urge the adoption of a Security Council resolution that would facilitate the arrest and trial of those responsible for the genocide who are now in refugee camps outside our borders." Cf.: *Official Records of the 21st Meeting of the Forty-ninth Session of the UN General Assembly*, UNDoc.A/49/PV.21, 6 October 1994, p.5.

The US and New Zealand amended the initial draft in numerous aspects to placate Rwanda and to achieve a compromise among the UNSC's members[1085]. Some of these modifications included: (i) the creation of a tribunal separated from the ICTY, to ensure that Rwanda was not second-class in relation to the former-Yugoslavia, a European State. Despite sharing the Appeals Chamber and the Office of the Prosecutor with the ICTY, the ICTR would have its own headquarters, registry, deputy-prosecutor, statute and rules of procedure and evidence; (ii) the possibility of imprisonment on Rwandan soil was expressly included in the statute; (iii) the tribunal's seat would not be in Rwanda, but it would not be at The Hague either; (iv) the tribunal's temporal jurisdiction shall extend from January 1 to December 31, 1994, encompassing crimes prior to the assassination of President Habyarimana, as demanded by Rwanda, but also the persecution of Hutus by Tutsis after the genocide, as suggested by other UNSC's members; and (v) the tribunal's territorial jurisdiction shall extend to the territory of Rwanda as well as to the territory of its neighboring States, allowing the prosecution of Hutus who committed crimes at refugee camps in nearby States[1086].

The UNSC's members, however, refused to compromise on the key issue of death penalty[1087], following the consolidated position of the UN towards the eradication of this particular punishment[1088]. Rwanda, on the other hand, was inflexible in demanding the inclusion of death penalty[1089]. Rwanda's insistent objections and the desire to achieve a unanimous decision in favor of the tribunal compelled the UNSC to delay the vote[1090]. In early November 1994, the Under-Secretary-General for Legal Affairs Hans Corell went to Kigali in a last attempt to reach a compromise[1091]. The negotiation failed and Rwanda decided to vote against the resolution, but it ensured the UNSC that it would cooperate with the tribunal after its establishment[1092].

[1085] MORRIS and SCHARF (1998), *supra* note 976, p.70-71.
[1086] *Ibid.*
[1087] *Ibid*., p.71.
[1088] *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty,* 1642 UNTS 414, New York, 15 December 1989.
[1089] MORRIS and SCHARF (1998), *supra* note 976, p.72.
[1090] *Ibid.*
[1091] *Ibid.*
[1092] *Ibid.*

On November 8, 1994, the UNSC adopted Resolution 955, creating the ICTR[1093]. The voting records were as follow[1094]: thirteen in favor (Argentina, Brazil, Czech Republic, Djibouti, France, New Zealand, Nigeria, Oman, Pakistan, Russia, Spain, the United Kingdom and the US), one against (Rwanda)[1095] and one abstention (China)[1096].

Due to lack of consensus among the UNSC's members, the ICTR Statute did not specify the court's seat. The UNSC deferred this decision to a later moment and mandated the UNSG to find a suitable location[1097]. After considering three cities – Kigali (Rwanda), Nairobi (Kenya) and Arusha (Tanzania)[1098] – Boutros Boutros-Ghali formally

[1093] *Resolution of the UNSC no. 955 (1994)*, UNDoc.S/RES/955, 8 November 1994. This resolution's first operative paragraph reads as follows: "The Security Council [...] [d]ecides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto"

[1094] Cf.: *Official Records of the 3453rd Meeting of the UN Security Council*, UNDoc.S/PV.3453, 8 November 1994, p.3.

[1095] Rwanda raised seven reasons for voting against: (i) the "inadequate" competence *ratione temporis* from January 1, 1994 to December 31, 1994. The Permanent Representative of Rwanda to the UN, Manzi Bakuramutsa, insisted on the period from October 1, 1990, the beginning of the armed conflict, to July 17, 1994, the end of the conflict; (ii) the "inappropriate and ineffective" composition and structure of the tribunal, which will have only two trial chambers, composed by three judges each, and will share the prosecutor and one appeals chamber (with only five judges) with the ICTY. Rwanda desired more trial judges and the tribunal's own appeals chamber and prosecutor. Bakuramutsa stated: "the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular"; (iii) the competence *ratione materiae* of the tribunal was too broad, encompassing crimes under the jurisdiction of Rwandese domestic courts. Rwanda believed that the tribunal should give absolute priority to genocide; (iv) States that took a very active role in the armed conflict in Rwanda (especially France) were entitled to propose candidates for judges and to participate in their election; (v) the people convicted could be imprisoned outside Rwanda and those States will have the authority to issue decisions about the detainees. Rwanda stated that these are questions exclusively for the tribunal or at least for Rwandan authorities to decide; (vi) the ICTR's Statute rules out capital punishment, which is provided for in the Rwandese penal code; and (vii) the seat of the tribunal should be in Rwanda "to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed since 1959 and to promote national reconciliation". Cf.: *Ibid*., p.14-16.

[1096] China raised three reasons for abstaining: (i) the uncertainty whether the UNSC has the power to create international tribunals under Chapter VII of the UN Charter. The Permanent Representative of China to the UN, Li Zhaoxing stated: "[i]n principle, China is not in favour of invoking at will Chapter VII of the Charter to establish an international tribunal through the adoption of a Security Council resolution. That position, which we stated in the Council last year during the deliberations on the establishment of an International Tribunal for the Former Yugoslavia, remains unchanged"; (ii) the pending objections of Rwanda to the tribunal and Rwanda's desire to conduct further consultations on these objections; and (iii) the possibility that Rwandan authorities could refuse to cooperate with the tribunal in the future. Cf.: *Ibid*., p.11.

[1097] In addition to creating the ICTR, the UNSC Resolution 955 also stated: "The Security Council […] [r]equests the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council".

[1098] *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, UNDoc.S/1995/134, 13 February 1995, para.38.

recommended the city of Arusha to the UNSC[1099]. The Council ratified this suggestion through Resolution 977 of February 22, 1995[1100].

The ICTR existed from 1995 to December 31, 2015, when the International Residual Mechanism for Criminal Tribunals assumed all of its residual functions[1101]. In its 20 years of existence, the Tribunal indicted 93 individuals, of which 62 were found guilty and 14 were acquitted[1102]. These convicted defendants included high-ranking military[1103] and government officials[1104]; religious[1105], militia[1106] and media leaders[1107]; business persons[1108]; and even a musician[1109]. The ICTR was the first international tribunal

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[1099] *Ibid.*, para.45.

[1100] *Resolution of the UNSC no. 977 (1995),* UNDoc.S/RES/977, 22 February 1995. This resolution's fifth paragraph reads as follow: "The Security Council […] [d]ecides that, subject to the conclusion of appropriate arrangements between the United Nations and the Government of the United Republic of Tanzania, the International Tribunal for Rwanda shall have its seat at Arusha".

[1101] *Resolution of the UNSC no. 2256 (2015),* UNDoc.S/RES/2256, 22 December 2015.

[1102] Cf.: "Key Figures of ICTR Cases", last update in September 2018, p.1. <http://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf>. Access on: December 3, 2018.

[1103] *The Prosecutor v. Bagosora et al. ("Military I"),* Judgment, ICTR, Trial Chamber I, Case no. ICTR-98-41-T, 18 December 2008; *The Prosecutor v. Ndindilyimana et al. ("Military II"),* Judgment, ICTR, Trial Chamber II, Case no. ICTR-00-56-T, 17 May 2011; *The Prosecutor v. Aloys Simba,* Judgment, ICTR, Trial Chamber I, Case no. ICTR-01-76-T, 13 December 2005; *The Prosecutor v. Ildéphonse Nizeyimana*, Judgment, ICTR, Trial Chamber III, Case no. ICTR-2000-55C-T, 19 June 2012; *The Prosecutor v. Ntagerura et al. ("Cyangugu"),* Judgment, ICTR, Trial Chamber III, Case no. ICTR-99-46-T, 25 February 2004; *The Prosecutor v. Ildephonse Hategekimana,* Judgment, ICTR, Trial Chamber II, Case no. ICTR-00-55B-T, 6 December 2010.

[1104] *The Prosecutor v. Jean Kambanda – Trial, supra* note 197; *The Prosecutor v. Bizimungu et al. ("Government II"),* Judgment, ICTR, Trial Chamber, Case no. ICTR-99-50-T, 30 September 2011; *The Prosecutor v. Jean de Dieu Kamuhanda,* Judgment, ICTR, Trial Chamber II, Case no. ICTR-95-54A-T, 22 January 2004; *The Prosecutor v. Callixte Kalimanzira,* Judgment, ICTR, Trial Chamber III, Case no. ICTR-05-88-T, 22 June 2009; *The Prosecutor v. Nyiramasuhuko et al. ("Butare"),* Judgment, ICTR, Trial Chamber II, Case no. ICTR-98-42-T, 24 June 2011; *The Prosecutor v. Augustin Ngirabatware,* Judgment, ICTR, Trial Chamber II, Case no. ICTR-99-54-T, 20 December 2012; *The Prosecutor v. Callixte Nzabonimana*, Judgment, ICTR, Trial Chamber III, Case no. ICTR-98-44D-T, 31 May 2012.

[1105] *The Prosecutor v. Hormisdas Nsengimana*, Judgment, ICTR, Trial Chamber I, Case no. ICTR-01-69-T, 17 November 2009; *The Prosecutor v. Athanase Seromba,* Judgment, ICTR, Trial Chamber, Case no. ICTR-01-66-T, 13 December 2006; *The Prosecutor v. Emmanuel Rukundo,* Judgment, ICTR, Trial Chamber II, Case no. ICTR-2001-70-T, 27 February 2009; *The Prosecutor v. Ntakirutimana et al.*, Judgment, ICTR, Trial Chamber I, Cases no. ICTR-96-10 & ICTR-96-17-T, 21 February 2003.

[1106] *The Prosecutor v. Joseph Serugendo, supra* note 216; *The Prosecutor v. Omar Serushago*, Judgment, ICTR, Trial Chamber I, Case no. ICTR-98-39-S, 5 February 1999 [*The Prosecutor v. Omar Serushago*]; *The Prosecutor v. Georges Rutaganda*, Judgment, ICTR, Trial Chamber I, Case no. ICTR-96-3-T, 6 December 1999; *The Prosecutor v. Tharcisse Renzaho*, Judgment, ICTR, Trial Chamber I, Case no. ICTR-97-31-T, 14 July 2009; *The Prosecutor v. Ildephonse Hategekimana*, Judgment, ICTR, Trial Chamber II, Case no. ICTR-00-55B-T, 6 December 2010.

[1107] *The Prosecutor v. Nahimana et al. ("Media case"),* Judgment, ICTR, Trial Chamber I, Case no. ICTR-99-51-T, 3 December 2003; *The Prosecutor v. Georges Ruggiu,* Judgment, ICTR, Trial Chamber I, Case no. ICTR-97-32-I, 1 June 2000 [*The Prosecutor v. Georges Ruggiu*].

[1108] *The Prosecutor v. Gaspard Kanyarukiga*, Judgment, ICTR, Trial Chamber II, Case no. ICTR-2002-78-T, 1 November 2010; *The Prosecutor v. Yussuf Munyakazi*, Judgment, ICTR, Trial Chamber I, Case no. ICTR-97-36A-T, 5 July 2010.

[1109] *The Prosecutor v. Simon Bikindi,* Judgment, ICTR, Trial Chamber III, Case no. ICTR-01-72-T, 2 December 2008.

ever to deliver judgments in relation to genocide, and the first to apply the definition of genocide set forth in the UN Convention on the Prevention and Punishment of the Crime of Genocide[1110]. Likewise, it was the first international tribunal to characterize rape as an international crime and to recognize rape as a means of perpetrating genocide[1111]. As acknowledged by the UNSC, the ICTR provided a "substantial contribution […] to the process of national reconciliation and the restoration of peace and security, and to the fight against impunity and the development of international criminal justice, especially in relation to the crime of genocide"[1112].

3.2 ICTR's Case-Law on Plea-Bargaining

The ICTR, like its sibling at The Hague – the ICTY –, also began to be pressured by the UNSC, in the early 2000s, to reduce costs and close its doors no later than 2010[1113]. However, despite the need to dispose of its caseload expeditiously, the ICTR's experience with plea-bargaining was significantly different from that of the ICTY[1114]. Out of the 93 people indicted by the ICTR (68 indictees less than the ICTY), only nine of them pleaded guilty[1115]. This number represented less than half the amount of guilty pleas at the ICTY (20 in total). In terms of comparison, 12% of ICTY's defendants pleaded guilty, and 9% did the same at the ICTR.

The low number of guilty pleas at the ICTR was not the result of a strong and long-lasting ideological stand against plea-bargaining by its judges and prosecutors[1116]. Even though the ICTR was particularly resistant to such a practice in the *Kambanda* case, its first guilty-plea case[1117], subsequently judges and prosecutors desperately tried to establish a culture of guilty pleas in the court[1118]. Although sentence discounts motivated defendants at the ICTY to plead guilty and cooperate with the Prosecution, promises of leniency caused little impact at the ICTR[1119].

[1110] *The Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR, Trial Chamber I, Case no. ICTR-96-4-T, 2 September 1998, para.494 [*The Prosecutor v. Jean-Paul Akayesu – Trial*].
[1111] *Ibid*., paras.417, 468, 507 and 508.
[1112] *Resolution of the UNSC no. 2256 (2015)*, UNDoc.S/RES/2256, 22 December 2015.
[1113] *Resolution of the UNSC no. 1503 (2003), supra* note 416, para.7; *Resolution of the UNSC no. 1534 (2004), supra* note 416, para.3.
[1114] COMBS (2006), *supra* note 409, p.102.
[1115] All nine ICTR defendants who pleaded guilty follow: Jean Kambanda, Omar Serushago, Georges Ruggiu, Vincent Rutaganira, Paul Bisengimana, Joseph Serugendo, Michel Bagaragaza, Juvénal Rugambarara and Joseph Nzabirinda.
[1116] COMBS (2006), *supra* note 409, p.102.
[1117] MCCLEERY, *supra* note 46, p.1105.
[1118] RAUXLOH, *supra* note 754, p.762; COMBS (2006), *supra* note 409, p.102.
[1119] COMBS (2006), *ibid*., p.73.

Following the example of the ICTY, the ICTR also amended its Rules of Procedure and Evidence to introduce plea negotiations formally. As in the ICTY, the initial version of the ICTR's Rules, adopted on June 29, 1995, only mentioned the possibility of defendants to enter a plea of guilty or not guilty on each count of the indictment, at their initial appearance[1120]. There was no reference to plea agreements. On June 8, 1998, the judges amended the Rules of Procedure and Evidence in order to include a new paragraph in Rule 62, which regulated the initial appearance of accused[1121]. The added paragraph contained the four conditions for valid guilty pleas[1122]. On May 27, 2003, at the thirteenth plenary meeting of the ICTR judges, they adopted a new amendment to include Rule 62*bis*[1123], whose content was identical to Rule 62*ter* of the ICTY's Rules of Procedure and Evidence[1124]. The new provision indorsed charge and sentence bargaining[1125], but indicated that plea deals rising out of such negotiations did not bind the judges[1126].

The thesis will assess all nine ICTR's guilty-plea cases. The first three cases – *Kambanda*, *Serushago* and *Ruggiu* – refer to a diverse pool of defendants: the highest-ranking government official in Rwanda during the genocide (Jean Kambanda), a local militia leader who surrendered himself to the ICTR when there was no indictment against him at the time (Omar Serushago) and a naive Belgian journalist who had emigrated to Rwanda just a few months before the genocide (Georges Ruggiu)[1127]. As these three defendants were prosecuted when there was no hurry to close the Tribunal, the prosecutors did little to encourage them to confess[1128].

The next five cases – *Rutaganira*, *Bisengimana*, *Serugendo*, *Nzabirinda* and *Rugambarara* – were adjudicated under a new prosecutorial strategy, i.e., attempting to introduce aggressive charge and sentence bargaining at the ICTR[1129]. Specifically while addressing the *Rutaganira* case, the thesis attempts to explain why the willingness of the Office of the Prosecutor to offer sentence discounts was not enough to convince a significant number of defendants to engage in plea negotiations. Moreover, it will assess

[1120] *Rules of Procedure and Evidence of the ICTR, supra* note 86, rule 62.
[1121] *Ibid*., rule 62(B).
[1122] *Ibid.* For an evaluation of those four criteria, cf. section 1.2 of the present thesis.
[1123] *Ibid*., rule 62*bis.*
[1124] *Rules of Procedure and Evidence of the ICTY, supra* note 86, rule 62*ter.*
[1125] *Rules of Procedure and Evidence of the ICTR, supra* note 86, rule 62*bis*(A).
[1126] *Ibid*., rule 62*bis*(B).
[1127] COMBS (2007), *supra* note 529, p.92.
[1128] *Ibid.*
[1129] *Ibid*., p.97.

how the ICTR trial chambers reacted to the few existing plea agreements. Lastly, through the evaluation of the *Bagaragaza* case, the thesis will address the negotiations led by the Prosecution with the main goal of obtaining incriminating information on high-raking offenders.

3.2.1 The Prosecutor v. Jean Kambanda

Jean Kambanda became the Prime Minister of the Interim Government of Rwanda on April 8, 1994, two days after the attack on President Juvenal Habyarimana's airplane[1130]. He held this position until the end of the genocide[1131]. Kambanda was arrested in Kenya alongside other former-members of the Interim Government and was transferred to Arusha following an ICTR's order of July 16, 1997[1132]. Immediately upon his arrest, he expressed his intention to confess and to cooperate with the Prosecution[1133].

In his initial appearance before the Tribunal on May 1, 1998, Kambanda pleaded guilty to the six counts contained in the indictment: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity (murder and extermination)[1134]. He also managed to reach a plea agreement with the Prosecution[1135].

Probably inspired by the generous leniency that Dražen Erdemović's sympathetic behavior triggered in his second judgment – delivered just two months before Kambanda's initial appearance at the ICTR[1136] – Kambanda unequivocally acknowledged and condemned the genocide[1137]. He also stated that his decision to plead guilty was the result of his "profound desire to tell the truth, as the truth was the only way to restoring national unity and reconciliation in Rwanda"[1138]. The Prosecution agreed that Kambanda's plea of guilty contributed to the restoration of peace in Rwanda[1139]. Additionally, both parties acknowledged that his confession caused judicial economy,

[1130] *The Prosecutor v. Jean Kambanda – Trial*, *supra* note 197, para.39.
[1131] *Ibid*.
[1132] *Ibid*., para.1.
[1133] COMBS (2002), *supra* note 440, p.129.
[1134] *The Prosecutor v. Jean Kambanda – Trial*, *supra* note 197, para.3.
[1135] *Ibid*., para.4.
[1136] Cf. section 2.2.1 of the present thesis.
[1137] *The Prosecutor v. Jean Kambanda – Trial*, *supra* note 197, para.50.
[1138] *Ibid*.
[1139] *Ibid*.

saved victims of the trauma and emotions of a lengthy trial and improved the administration of justice[1140].

Although the *Erdemović* case showed Kambanda how valuable an admission of guilt and cooperation with the Prosecution could be in terms of sentence mitigation[1141], the *Todorović* and *Sikirica et al.* cases, in which the ICTY granted leniency in exchange of statements of remorse, would be both decided three years after Kambanda's trial[1142]. Consequently, he made no such statement at his sentence hearing, a fact highlighted by the judgment[1143]. In addition, the Trial Chamber was not convinced that the guilty plea was in itself an expression of remorse[1144].

At the sentencing hearing, the Prosecution spoke very highly of Kambanda's collaboration, stating that he provided "substantial co-operation and invaluable information"[1145]. In addition to past collaboration, the prosecutors asked for leniency due to "the future co-operation when Jean Kambanda testifies for the prosecution in the trials of other accused"[1146]. Even though the Prosecution recommended Kambanda's collaboration to be taken into consideration as "significant mitigating factor"[1147], it sought a sentence of life imprisonment[1148]. The conflicting stand of the Prosecution – by praising the accused's cooperation and, at the same time, recommending a life sentence – was due mostly to the high media coverage of the case[1149]. After all, Kambanda's position as prime minister during the genocide, his guilty plea – the first one at the ICTR – and the fact that his trial was the first international prosecution of a head of government since Nuremberg brought significant attention to the case[1150]. A low sentence recommendation by the Prosecution could create a backlash against the Tribunal and the Prosecutor in the media[1151].

[1140] *Ibid*., para.54.
[1141] *The Prosecutor v. Dražen Erdemović – Trial/1998, supra* note 224, para.16.
[1142] *The Prosecutor v. Stevan Todorović*, *supra* note 427; *The Prosecutor v. Duško Sikirica et al*., *supra* note 627.
[1143] *The Prosecutor v. Jean Kambanda – Trial, supra* note 197, para.51.The judgment reads as follows: "The Chamber notes however that Jean Kambanda has offered no explanation for his voluntary participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber, during the hearing of 3 September 1998".
[1144] *Ibid*., para.52.
[1145] *Ibid*., para.47.
[1146] *Ibid*.
[1147] *Ibid*.
[1148] *Ibid*., para.60.
[1149] COMBS (2006), *supra* note 409, p.105.
[1150] COMBS (2007), *supra* note 529, p.93; MØSE, Erik. "Main Achievements of the ICTR", *Journal of International Criminal Justice*, vol.3, p.920-943, 2005, p.935.
[1151] COMBS (2006), *supra* note 409, p.106-107.

In exchange for his guilty plea and significant cooperation with the Tribunal, Kambanda expected substantial leniency and a sentence no longer than two years' imprisonment[1152]. However, the Trial Chamber sentenced him to the most severe punishment possible under the ICTR Statute – life imprisonment[1153]. After weighting the aggravating factors, on the one hand, and the mitigating circumstances, on the other, the Chamber decided that the former far outweighed the latter[1154]. The judgment highlighted that the accused's crimes "carr[ied] an intrinsic gravity, and their widespread, atrocious and systematic character [was] particularly shocking to the human conscience"[1155]. It also noted Kambanda's high governmental rank as prime minister, a role that entailed the obligation and authority to protect the population[1156]. In the end, the Chamber ruled that all these aggravating circumstances "negated" the mitigating ones[1157].

Outraged, Kambanda appealed and immediately interrupted his cooperation with the Prosecution[1158]. At the Appeals Chamber, he asked for the annulment of his guilty plea and a regular trial[1159]. Although he presented a series of grounds of appeal[1160], in this thesis, only two issues will be discussed: (i) the Trial Chamber allegedly erred by accepting Kambanda's plea of guilty without confirming if it was voluntary, informed, unequivocal and based on sufficient facts[1161]; and (ii) the Trial Chamber allegedly gave no credit for the plea of guilty[1162].

The *Kambanda* Appeals Chamber rejected both arguments. Firstly, it pointed out that even though the Trial Chamber did not check the validity of the admission of guilt, this would not be enough to justify changing the judgment[1163]. The Appeals Chamber explained that Kambanda had several opportunities to challenge the legality of his guilty plea, but failed to do so until after receiving a life sentence following that same plea[1164]. Hence, the absence of a satisfactory explanation for his failure to question the validity of his guilty plea in a timely manner before the Trial Chamber could mean that Kambanda

[1152] *The Prosecutor v. Jean Kambanda – Trial, supra* note 197, para.60.
[1153] *Ibid*., verdict.
[1154] *Ibid*., para.62.
[1155] *Ibid*., para.61.
[1156] *Ibid*., paras.61-62.
[1157] *Ibid*., para.62.
[1158] COMBS (2002), *supra* note 440, p.132.
[1159] *The Prosecutor v. Jean Kambanda – Appeal, supra* note 165, para.49.
[1160] *Ibid*., para.10.
[1161] *Ibid*., para.10(3).
[1162] *Ibid*., para.10(4).
[1163] *Ibid*., para.55.
[1164] *Ibid*.

waived his right to do so at a later moment[1165]. Instead of ending its reasoning in this point, the Chamber decided to evaluate the validity of the plea of guilty because a life imprisonment sentence was at stake[1166] and the question of admissions of guilt was "of general importance to the work of the Tribunal"[1167]. As explained above[1168], the Appeals Chamber ruled that Kambanda's plea was voluntary, informed, unequivocal and sufficiently based on facts[1169].

As for the second ground of appeal, concerning the alleged error in sentencing, the *Kambanda* Appeals Chamber reiterated the trial judges' discretion in weighing the mitigating and aggravating factors of each case[1170]. It decided that a change in the trial judgment was mandatory only when "the appellant succeed[ed] in showing that the Trial Chamber abused its discretion, resulting in a sentence outside the discretionary framework provided by the Statute and the Rules"[1171]. The Appeals Chamber ruled that Kambanda failed to present any compelling reason to modify the decision of the Trial Chamber[1172]. Accordingly, his life sentence was upheld[1173].

3.2.2 The Prosecutor v. Omar Serushago

The second defendant to plead guilty before the ICTR was Omar Serushago, who did so just three months after Kambanda's life sentence became public[1174]. He was a leader of the *Interahamwe* militia[1175] and, in this capacity, he led groups of militiamen in the Gisenyi prefecture, exercising control and authority over the slaughtering of thousands of civilians[1176].

Unlike Kambanda, Serushago had been cooperating with the ICTR since before his arrest[1177]. In April 1997, while living in Nairobi, he approached officials of the ICTR and delivered a series of critical information, including the names and locations of some

[1165] *Ibid*.
[1166] *Ibid*.
[1167] *Ibid*.
[1168] Cf. sections 1.2.1 - 1.2.3 of the present thesis.
[1169] *The Prosecutor v. Jean Kambanda – Appeal, supra* note 165, paras.56-95.
[1170] *Ibid*., para.124.
[1171] *Ibid*.
[1172] *Ibid*., para.126.
[1173] *Ibid*.
[1174] *The Prosecutor v. Omar Serushago, supra* note 1106, para.4; *The Prosecutor v. Omar Serushago*, Decision Relating to a Plea of Guilty, ICTR, Trial Chamber I, Case no. ICTR-98-39-T, 14 December 1998 [*The Prosecutor v. Omar Serushago – Decision Relating to a Plea of Guilty*].
[1175] *The Prosecutor v. Omar Serushago*, *ibid*., para.25.
[1176] *Ibid*., para.25.
[1177] COMBS (2007), *supra* note 529, p.94.

people involved in the genocide[1178]. In possession of this material, the Office of the Prosecutor arranged and successfully implemented the Nairobi-Kigali ("NAKI") Operation[1179], which resulted in the arrest of several key perpetrators and instigators of the genocide[1180]. In June 1998, Serushago surrendered himself voluntarily to the authorities of Cote D'Ivoire, before being indicted by the ICTR[1181]. He was eventually transferred to and detained in the Tribunal's premises[1182]. On September 24, 1998, the Prosecutor issued his indictment, which was confirmed five days later[1183].

On December 10, 1998, the parties filed a plea agreement, in which the accused agreed to plead guilty to four of the five counts of his indictment, namely genocide and three crimes against humanity (murder, extermination and torture)[1184]. The Prosecution dismissed the remaining charge (rape as a crime against humanity)[1185] not because of charge bargaining, but due to lack of strong evidence[1186]. In the agreement, Serushago described those offenses in detail, citing the names of other people involved[1187]. He implicated no less than 29 individuals and provided numerous facts that were relevant to future trials of other accused[1188].

At Serushago's initial appearance, the Trial Chamber verified the validity of his guilty plea and confirmed the existence of sufficient facts to substantiate the crimes he confessed[1189]. His plea agreement, like the one in the *Kambanda* case, did not contain any promise of sentence recommendation by the Prosecution[1190]. In fact, the agreement reiterated that "sentencing [was] at the entire discretion of the Trial Chamber"[1191]. However, Serushago's undeniable cooperation and the low media cover of the case motivated the Prosecutor to give relative leniency to him[1192], resulting in a sentence

[1178] *Ibid*.
[1179] *Ibid*.; *The Prosecutor v. Omar Serushago*, *supra* note 1106, para.32.
[1180] Defendants arrested during the NAKI Operation include: Jean Kambanda (Prime Minister of Rwanda), Sylvain Nsabimana (Prefect of Butare), Aloys Ntabakuze (a commander of the Rwandan Armed Forces), George Ruggiu (a broadcaster of the RTLMC) and Hassan Ngeze (founder and editor in chief of the maganize Kangura).
[1181] *The Prosecutor v. Omar Serushago*, *supra* note 1106, para.1.
[1182] *Ibid*.
[1183] *Ibid*., para.2.
[1184] *The Prosecutor v. Omar Serushago – Decision Relating to a Plea of Guilty*, *supra* note 1174.
[1185] *Ibid*.
[1186] COMBS (2007), *supra* note 529, p.94.
[1187] *The Prosecutor v. Omar Serushago*, *supra* note 1106, para.25.
[1188] *Ibid.*; COMBS (2002), *supra* note 440, p.134.
[1189] *The Prosecutor v. Omar Serushago – Decision Relating to a Plea of Guilty*, *supra* note 1174.
[1190] COMBS (2002), *supra* note 440, p.134-135.
[1191] *The Prosecutor v. Omar Serushago,* Plea Agreement between Omar Serushago and the Office of the Prosecutor, ICTR, Case no. ICTR-98-39, 4 December 1998, para.40.
[1192] COMBS (2007), *supra* note 529, p.95.

recommendation of not less than 25 years' imprisonment[1193]. In fact, it was the first recommendation by the Prosecution at that moment not seeking life imprisonment[1194].

At the sentencing stage, the *Serushago* Trial Chamber merely acknowledged the accused's guilty plea as a mitigating factor, providing no significant explanation[1195]. It also noted his public expression of remorse and contrition[1196]. In addition, the Chamber praised Serushago's cooperation with the Prosecution, labeling it "substantial and ongoing"[1197]. Particularly, it noted that he provided information useful in the preparation and execution of the NAKI Operation[1198] and agreed to testify in other pending cases[1199], as he did in the notorious "*Media*" case[1200] and in the "*Military I*" case[1201].

The *Serushago* Trial Chamber maintained its ability to determine the sentence though it still considered the recommendation from the Prosecution. It openly identified the elements in aggravating factors for sentencing: the gravity of the crimes[1202]; the accused's position of authority[1203]; and his voluntary participation in the offenses[1204]. The Trial Chamber decided to sentence him to fifteen years of imprisonment[1205] (ten years less than the minimal amount sought by the Prosecution[1206]).

Accordingly, Serushago was the third person to be convicted by the ICTR and the first to receive less than a life sentence[1207]. Despite the comparative leniency of his sentence, he appealed arguing that the Trial Chamber erred by not giving appropriate

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[1193] *The Prosecutor v. Omar Serushago*, Transcript of Session held on January 29, 1999, Trial Chamber I, Case no. ICTR-98-39, p.14.
[1194] COMBS (2007), *supra* note 529, p.95.
[1195] *The Prosecutor v. Omar Serushago*, *supra* note 1106, para.35. The judgment stated the following: "It is important to recall that the accused pleaded guilty to four counts, namely genocide and three counts of crimes against humanity (murder, extermination, torture). As the Chamber established, his guilty plea was made voluntarily and was unequivocal. Omar Serushago clearly understood the nature of the charges against him and their consequences".
[1196] *Ibid.*, paras.40-41. The judgment stated the following: "During the pre-sentencing hearing, Omar Serushago expressed his remorse at length and openly. He asked for forgiveness from the victims of his crimes and the entire people of Rwanda. In addition to this act of contrition, he appealed for national reconciliation in Rwanda".
[1197] *Ibid.*, para.31.
[1198] *Ibid.*, para.32.
[1199] *Ibid.*, para.33.
[1200] *The Prosecutor v. Nahimana et al. ("Media case"),* Judgment, ICTR, Trial Chamber I, Case no. ICTR-99-51-T, 3 December 2003, paras.264 and 266.
[1201] *The Prosecutor v. Bagosora et al. ("Military I"),* Judgment, ICTR, Trial Chamber I, Case no. ICTR-98-41-T, 18 December 2008, para.1007.
[1202] *The Prosecutor v. Omar Serushago*, *supra* note 1106, para.27.
[1203] *Ibid.*, paras.28-29.
[1204] *Ibid.*, para.30.
[1205] *Ibid.*, verdict.
[1206] *The Prosecutor v. Omar Serushago*, Transcript of Session held on January 29, 1999, Trial Chamber I, Case no. ICTR-98-39, p.14.
[1207] Jean-Paul Akayesu (ICTR's first defendant) and Jean Kambanda (ICTR's second defendant) were both sentenced to life imprisonment.

weight to the mitigating factors and by not taking into account the sentencing practices of Rwanda's domestic courts[1208]. The Appeals Chamber dismissed Serushago's arguments with little discussion, in a mere 14-page decision[1209], and affirmed the Trial Chamber's ruling[1210].

3.2.3 The Prosecutor v. Georges Ruggiu

Georges Ruggiu, the third person to plead guilty before the ICTR, was the only non-Rwandan national to be indicted by this Tribunal[1211]. He was a Belgian social worker who became interested in Rwanda in 1990, after meeting some Rwandan students in his neighborhood in Belgium[1212]. In the following two years, he established contacts with influential Rwandan nationals living in Belgium, including political figures, diplomats and government officials[1213]. After his first visit to Rwanda in 1992, Ruggiu's involvement in Rwandan politics had grown more intensively and he became one of the key players in the Rwandan community in Belgium, participating in major political debates[1214].

In early 1993, he became radically opposed to the RPF and a strong supporter of President Habyarimana, who Ruggiu met numerous times via personal invitation[1215]. In November 1993 (five months prior to the commencement of the genocide), he left Belgium and settled in Rwanda[1216]. He began to work as a journalist and broadcaster for the RTLMC due to his friendship with President Habyarimana[1217]. Ruggiu worked there from January 6 to July 14, 1994[1218].

A year after the genocide, Ruggiu published a book claiming his innocence and asserting that RTLMC's broadcasts were intended only to mobilize Rwandans against the RPF, not to incite violence against Tutsi civilians[1219]. He was arrested in Mombasa,

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[1208] *The Prosecutor v. Omar Serushago*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-98-39-A, 6 April 2000, para.6.
[1209] *Ibid.*, paras.21-31.
[1210] *Ibid.*, para.34.
[1211] COMBS (2007), *supra* note 529, p.95.
[1212] *The Prosecutor v. Georges Ruggiu*, *supra* note 1107, para.38.
[1213] *Ibid.*
[1214] *Ibid*., paras.40-41.
[1215] *Ibid*., para.41.
[1216] *Ibid*., para.42.
[1217] *Ibid*.
[1218] *Ibid*., para.43.
[1219] "'I Lied in My Book to Protect RTLM', Says Convicted Radio Presenter", *Hirondelle News Agency*, 30 November 2001. Available at: <https://www.justiceinfo.net/en/hirondelle-news/17148-en-en-i-lied-in-

Kenya, on July 23, 1997, as part of the NAKI Operation[1220]. The Prosecution indicted Ruggiu with two crimes: direct and public incitement to commit genocide and persecution as a crime against humanity[1221]. Even after his arrest, Ruggiu continued to proclaim his innocence and deny the occurrence of a genocide[1222]. Accordingly, he pleaded not guilty to both counts at his initial appearance on October 24, 1997[1223].

However, after speaking to other ICTR indictees, he realized that in fact he had participated in a carefully planned genocide[1224]. He reported being devastated by this fact, which motivated him to cooperate with the Prosecution[1225]. Approximately three years after his initial appearance, the defendant filed a plea agreement and applied to change his plea to guilty of both charges[1226]. On May 15, 2000, the *Ruggiu* Trial Chamber granted the accused's request and accepted his plea deal with the Prosecution[1227].

In the plea agreement, Ruggiu declared that all facts listed in the indictment were true and he had full responsibility for them[1228]. He admitted that all RTLMC's broadcasts aimed at rallying the population against the Tutsis and moderate Hutus opposed to the Interim Government[1229]. He confessed to wrongfully blaming Belgium for the killing of President Habyarimana and calling for the persecution and expulsion of all Belgians in Rwanda, especially those working at UNAMIR[1230]. He also implicated RTLMC's broadcasters, managers and editorial staff in the genocide[1231].

In exchange for all this valuable information, defense lawyers tried to obtain positive sentence guarantees from the Prosecution, or at least assurances firmer than those the prosecutors had provided Kambanda and Serushago[1232]. Their attempts appear to have failed, since Ruggiu's plea agreement – like the plea deals of Kambanda and Serushago – did not contain any promise regarding the Prosecution's sentence recommendation[1233].

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my-book-to-protect-rtlm-says-convicted-radio-presenter79147914.html>. Access on: November 26, 2018 [*Hirondelle News Agency*].

[1220] *The Prosecutor v. Georges Ruggiu*, *supra* note 1107, para.3.
[1221] *Ibid*., para.4.
[1222] COMBS (2007), *supra* note 529, p.96.
[1223] *The Prosecutor v. Georges Ruggiu*, *supra* note 1107, para.4.
[1224] *Hirondelle News Agency*, *supra* note 1219.
[1225] COMBS (2007), *supra* note 529, p.96.
[1226] *The Prosecutor v. Georges Ruggiu*, *supra* note 1107, paras.7 and 10.
[1227] *Ibid.*, paras.10-12.
[1228] *Ibid.*, para.44.
[1229] *Ibid.*, para.44(i).
[1230] *Ibid.*, para.44(vi).
[1231] *Ibid.*, para.44(xiii).
[1232] COMBS (2007), *supra* note 529, p.96.
[1233] *Ibid.*

Nevertheless, the Prosecutor recommended a sentence of twenty years in prison[1234], which reflected a clear discount in response to the accused's guilty plea and cooperation[1235]. This was the lightest sentence recommendation by the Prosecution until that moment[1236]. In fact, at the hearing of May 15, 2000, the Prosecutor Carla Del Ponte made herself clear: if Ruggiu had pleaded not guilty and a regular trial had taken place, she would have recommended a life sentence[1237].

During the sentencing stage, the *Ruggiu* Trial Chamber acknowledged that the accused's plea of guilty "facilitate[d] the administration of justice by expediting proceedings and saving resources"[1238]. It also spared a lengthy investigation and trial, saving time and efforts[1239]. The judgment noted that the admission of guilt "reflect[ed] [Ruggiu's] genuine awareness of his guilt"[1240] and exposed him to danger in ICTR's detention unit, resulting in his separation from the other detainees[1241].

The *Ruggiu* Trial Chamber admitted that "not all legal systems recognise that a guilty plea constitutes a mitigating factor or may be considered advantageous to the accused"[1242]. However, it highlighted the extraordinary significance of a plea of guilty in a case like this[1243]. Mentioning the *Erdemović* case, the *Ruggiu* Trial Chamber indicated that an acknowledgement of guilt could constitute proof of the honesty of the perpetrator and the beginning of his repentance[1244]. In fact, it considered a good criminal policy the reduction of the sentence of those offenders who have confessed their guilt, since it could inspire other suspects and perpetrators to come forward[1245]. The Chamber even encouraged "all those involved in crimes committed in Rwanda in 1994 to confess and admit their guilt"[1246]. However, while stressing its strict control over sentencing, it

[1234] *The Prosecutor v. Georges Ruggiu, supra* note 1107, para.81.
[1235] COMBS (2007), *supra* note 529, p.96.
[1236] *Ibid.*
[1237] Del Ponte stated the following: "The first list according to the Rwandan law is equivalent to the death penalty. Fortunately, we do not have the death penalty here, but this means that if we were to move to trial, if we had had to provide all the evidence, our request would have been for life imprisonment, because for genocide there has been life imprisonment". Cf.: *The Prosecutor v. Georges Ruggiu*, Transcript of Session held on May 15, 2000, ICTR, Trial Chamber I, Case no. ICTR-97-32-I, p.188.
[1238] *The Prosecutor v. Georges Ruggiu, supra* note 1107, para.53.
[1239] *Ibid.*
[1240] *Ibid*., para.54.
[1241] *Ibid*.
[1242] *Ibid*., para.55.
[1243] *Ibid*.
[1244] *Ibid*.
[1245] *Ibid*.
[1246] *Ibid*.

determined that the weight and importance of guilty pleas as mitigating factors must be considered by the trial chamber in each case[1247].

Although the *Ruggiu* Trial Chamber also took into account the accused's cooperation with the Prosecution, the judges were not enthusiastic with it as they were with the guilty plea[1248]. They just pointed out that his assistance was substantial, indicated a desire to search for the truth and that he probably would remain available for further collaboration after his trial was over[1249].

Despite the Prosecution's recommendation of a sentence of twenty years in prison[1250], the *Ruggiu* Trial Chamber gave particular weight to the mitigating factors, resulting in a sentence of twelve years' imprisonment[1251]. One could reasonably expect that this substantial sentence leniency (especially because a great number of ICTR's sentences were life imprisonments[1252]) and the ongoing fruitful plea negotiations at the ICTY back then would encourage numerous ICTR's defendants to reach plea agreements with the Prosecution. However, they did not pursue this path. In fact, it took almost five years for the next ICTR's accused to plead guilty, namely Vincent Rutaganira. The next section attempts to explain the reasons for this peculiar phenomenon.

3.2.4 The Prosecutor v. Vincent Rutaganira

By June 30, 2005, after approximately ten years in existence, the ICTR delivered 19 judgments involving 25 accused[1253]. Of this amount, 22 defendants have been convicted and three acquitted[1254]. In addition, 25 people were on trial and 16 detainees were awaiting trial[1255]. The ICTY, on the other hand, in its first twelve years of existence, prosecuted 39 accused, in 20 different cases by July 31, 2005[1256]. Of that total, 36 people

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[1247] *Ibid*.
[1248] *Ibid*., paras.57-58.
[1249] *Ibid*.
[1250] *Ibid*., para.81.
[1251] *Ibid*., verdict.
[1252] Cf. footnote 904 of the present thesis.
[1253] *Tenth Annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, UNDoc. A/60/229–S/2005/534, 15 August 2005, p.2 [*Tenth Annual Report of the ICTR*].
[1254] *Ibid*.
[1255] *Ibid*.
[1256] *Twelfth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UNDoc.A/60/267–S/2005/532, 17 August 2005, p.55-56 [*Twelfth Annual Report of the ICTY*].

were convicted and three were acquitted[1257]. The ICTY had 50 accused in custody awaiting trial back then[1258]. More impressively, while the ICTR had adjudicated only four guilty-plea cases by mid-2005[1259], 18 defendants had pleaded guilty at the ICTY around the same time[1260] (an amount more than four times larger).

By mid-2005, both tribunals were already running under UNSC-imposed completion strategies[1261], which meant enormous pressure to speed the trials and finish their activities[1262]. The UNSC determined the following deadlines: completion of investigations by the end of 2004; completion of all trial activities at first instance by the end of 2008; and completion of all work in 2010[1263]. Although both tribunals failed to fulfill these deadlines[1264], their annual reports to the UNSC and the UNGA revealed that at the least they were committed to meeting them[1265]. In light of this scenario, two relevant questions remain: Why the ICTR did not follow the ICTY's strategy of introducing plea-bargaining as a method to reduce its caseload? Since the ICTR and the ICTY had the same Prosecutor until September 2003[1266], why did she pursue an aggressive policy of plea-bargaining at the ICTY and not at the ICTR?

[1257] *Ibid*., p.56.
[1258] *Ibid*., p.52-54.
[1259] The defendants in these four cases were Jean Kambanda, Omar Serushago, Georges Ruggiu and Vincent Rutaganira.
[1260] *Twelfth Annual Report of the ICTY*, *supra* note 1256, p.57.
[1261] *Resolution of the UNSC no. 1503 (2003), supra* note 416, para.7; *Resolution of the UNSC no. 1534 (2004), supra* note 416, para.3.
[1262] MCCLEERY, *supra* note 46, p.1106.
[1263] *Resolution of the UNSC no. 1503 (2003), supra* note 416, para.7; *Resolution of the UNSC no. 1534 (2004), supra* note 416, para.3.
[1264] While the ICTR finished its activities in December 2015, the ICTY did so two years later, in December 2017.
[1265] *Twelfth Annual Report of the ICTY*, *supra* note 1256, paras.7-10; *Thirteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/61/271–S/2006/666, 21 August 2006, paras.7-13; *Fourteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, A/62/172–S/2007/469, 1 August 2007, paras.6-9; *Tenth Annual Report of the ICTR, supra* note 1253, paras.3-5; *Eleventh annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, UNDoc. A/61/265–S/2006/658, 16 August 2006, para.3; *Twelfth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, A/62/284–S/2007/502, 21 August 2007, para.6.
[1266] *ICTR Statute, supra* note 91, art.15(3). This provision stated the following: "The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the

In fact, the sentence leniency in the *Serushago* and *Ruggiu* cases did not seem to have impressed subsequent defendants because the first accused to enter a plea of guilty at the ICTR after the *Ruggiu* case did so only in December 2004, nearly five years after the *Ruggiu* sentencing judgment[1267]. Accordingly, while 2003 was a particularly busy year at the ICTY in plea-bargaining terms, since six defendants pleaded guilty in that year alone (cf. Graph 2, above), no defendant at the ICTR tendered a guilty plea in 2003[1268].

Even though there was no guilty plea at the ICTR between 2000 and 2004, this fact was not due to the lack of attempts by the Office of the Prosecutor[1269]. For years, it insistently offered defendants considerable sentence concessions to convince them to plead guilty, but these efforts ended up unsuccessful[1270]. In addition, as part of its completion strategy, the ICTR could refer its low-level defendants to face trial before domestic courts, including Rwanda's[1271]. The prospect of facing trial in Rwanda terrified some accused, who believed they could suffer unfair trials, physical abuse or even death if prosecuted by Rwandan authorities[1272]. The question was so sensitive to the defendants that 40 out of 55 of them engaged in hunger strikes to protest against the referrals[1273]. Therefore, one could reasonably expect that the Prosecutor's willingness to reach plea agreements and the threat of a referral to Rwanda should bring several defendants to the negotiation table. However, they refused to do so.

Two main reasons justified this arguably odd behavior from ICTR defendants, which was very different from the ICTY accused, who began to negotiate plea agreements as soon as they had the chance. The first and main reason referred to the defendants'

Secretary-General on the recommendation of the Prosecutor". Up until September 14, 2003, the ICTY and the ICTR shared the same Prosecutor. The first four were: (i) Ramon Escovar Salom (1993-1994; from Venezuela); (ii) Richard J. Goldstone (1994 – 1996; fom South Africa); (iii) Louise Arbour (1996 – 1999; from Canada); and (iv) Carla Del Ponte (1999 – 2003; from Switzerland). The UNSC created by Resolution 1503 the new position of Prosecutor at the ICTR, modifying the article 15 of the ICTR Statute. Thus, Del Ponte ramained in office only as the Prosecutor at the ICTY and Hassan Bubacar Jallow (from Gambia) was appointed Prosecutor at the ICTR from September 15, 2003 until the Tribunal's closing in December 2015.

[1267] MCCLEERY, *supra* note 46, p.1105-1106.

[1268] *Ibid.*

[1269] *Ibid*.; COMBS (2006), *supra* note 409, p.114-117.

[1270] COMBS (2006), *ibid.*

[1271] *Rules of Procedure and Evidence of the ICTR, supra* note 86, rule 11*bis*.

[1272] COMBS (2006), *supra* note 409, p.117.

[1273] "Rwanda: Most of the ICTR Prisoners on Hunger Strike to Denounce Transfers to Country", *All Africa*, 8 October 2007. Available at: <https://allafrica.com/stories/200710090398.html>. Access on: November 24, 2018; "Most of the Detainees on Hunger Strike to Denounce Transfers to Rwanda", *Hirondelle News Agency*, 08 October 2007. Available at: <https://www.justiceinfo.net/en/hirondelle-news/19233-en-en-081007-ictrtransfers-most-of-the-detainees-on-hunger-strike-to-denounce-transfers-to-rwanda1000010000.html>. Access on: November 24, 2018.

strong ideological position[1274]. Most of them refused to enter a plea of guilty because they truly did not believe they were guilty of the crimes the Prosecution indicted them, especially genocide[1275]. In fact, they persistently denied that a genocide occurred in Rwanda[1276]. According to their own version, the events in 1994 were the uncontrolled escalation of a long-lasting armed conflict between the Rwandan government and the Uganda-backed rebel group RPF[1277]. Although they admitted that Tutsis were targets of unnecessary violence, they characterized such facts as excesses of a legitimate and spontaneous national resistance effort[1278]. The defendants insisted that their actions were not the implementation of a carefully planned genocidal plot to eradicate the Tutsi people[1279]. They also highlighted that serious crimes were committed by both sides of the conflict, and no member of the RPF had been indicted by the ICTR[1280]. Accordingly, they accused the Tribunal of being a mere political tool of the Tutsi-led government in Rwanda and a manifestation of victors' justice since exclusively Hutus, the losing side of the conflict, were prosecuted[1281].

The second reason for the dearth of plea agreements at the ICTR was the formation of a strong, cohesive and hierarchically-arranged community composed of the defendants imprisoned in the UN Detention Facility in Arusha[1282]. The members of this community were fervidly loyal to each other[1283]. Thus, a plea agreement to provide information against their fellow defendants was out of the question[1284]. This intense group loyalty was evident when one considers the hunger strike of Jean-Paul Akayesu, a defendant at the ICTR. Akayesu began to refuse food in order to pressure the ICTR Registrar to appoint as his defense counsel a lawyer who did not fulfill the Tribunal's criteria[1285]. Twenty-five out of thirty-two detainees embarked on a hunger strike in solidarity with his cause[1286]. In

[1274] COMBS (2006), *supra* note 409, p.118.
[1275] *Ibid.*
[1276] *Ibid*.; MCCLEERY, *supra* note 46, p.1106.
[1277] COMBS (2006), *ibid*.
[1278] *Ibid.*
[1279] *Ibid.*
[1280] *Ibid.*
[1281] *Ibid.*
[1282] *Ibid.*, p.120.
[1283] *Ibid.*
[1284] *Ibid.*
[1285] "Registrar visits ICTR Detention Facilities, meets Tribunal detainees", *ICTR Press Release*, 23 November 1998. Available at: <http://unictr.irmct.org/en/news/registrar-visits-ictr-detention-facilities-meets-tribunal-detainees>. Access on: November 24, 2018.
[1286] "ICTR detainees end hunger strike", *ICTR Press Release*, 28 October 1998. Available at: <http://unictr.irmct.org/en/news/ictr-detainees-end-hunger-strike>. Access on: November 24, 2018.

addition, one of the main features of Rwandan society is the respect for authority[1287]. As the leaders in Rwanda during the genocide gained positions of authority in this detainee community, they suppressed any suggestion that the violence in 1994 was a genocide and prohibited any cooperation with the Prosecution[1288].

Due to the overwhelming bulk of evidence attesting to the genocide in Rwanda, the Prosecution initially did not agree to withdraw genocide charges in order to obtain guilty pleas[1289]. However, the defendants' strong will in denying the occurrence of such a crime put pressure on the Prosecution[1290]. The Office of the Prosecutor had to balance the insistency of the UNSC in reducing the ICTR's caseload and the selection of crimes that were fair to bargain[1291]. Trapped into a corner, the newly appointed Prosecutor at the ICTR Hassan Bubacar Jallow[1292] began to aggressively bargain with all charges on the table, including genocide[1293]. The Prosecution also agreed to revise radically the factual basis of the indictments in order to convince some defendants to negotiate plea agreements[1294].

This new prosecutorial approach, alongside the imminent referral to Rwanda, convinced Vincent Rutaganira to plead guilty and reach a plea agreement with the Prosecution, but not before the dropping of all his genocide-related charges[1295]. The accused was a low-level government official, who served as *conseiller communal* of Mubuga sector, in Western Rwanda, from 1985 to July 1994[1296]. In 1996, he was indicted with the following crimes: conspiracy to commit genocide; genocide; crimes against humanity (murder, extermination and inhumane acts); serious violations of Article 3 Common to the 1949 Geneva Conventions; and serious violations of Additional Protocol II of 1977[1297]. The 1996 indictment depicted Rutaganira as an enthusiastic participant of the genocide, indicating that he directly ordered attacks against Tutsis and had personally participated in some killings[1298].

[1287] COMBS (2006), *supra* note 409, p.120.
[1288] *Ibid.*
[1289] MCCLEERY, *supra* note 46, p.1106; COMBS (2007), *supra* note 529, p.98.
[1290] COMBS (2007), *ibid*.
[1291] *Ibid.*
[1292] Cf. footnote 1266 of the present thesis.
[1293] MCCLEERY, *supra* note 46, p.1106; COMBS (2007), *supra* note 529, p.98.
[1294] *Ibid.*
[1295] *The Prosecutor v. Vincent Rutaganira*, Initial Amended Indictment, ICTR, Office of the Prosecutor, Case no. ICTR-95-1-I, 29 April 1996, para.51.
[1296] *The Prosecutor v. Vincent Rutaganira*, Judgment, ICTR, Trial Chamber III, Case no. ICTR-95-1C-T, 14 March 2005, para.5 [*The Prosecutor v. Vincent Rutaganira*].
[1297] *Ibid*., para.9.
[1298] COMBS (2007), *supra* note 529, p.98.

He surrendered himself voluntarily to the ICTR on March 4, 2002, two weeks after the issuing of his arrest warrant[1299]. In his initial appearance on March 26, 2002, he pleaded not guilty to all counts[1300]. Almost three years later, the defense and the Prosecution informed the *Rutaganira* Trial Chamber that they had reached a plea agreement on December 7, 2004[1301]. It is clear, from the content of the deal, that the defendant had substantial leverage in the negotiations. Pursuant to the plea agreement, Rutaganira had to plead guilty exclusively to the charge of extermination as a crime against humanity and just for aiding and abetting such offense by his omissions, not for committing the crime actively and personally[1302]. Moreover, the Prosecution agreed to seek not only the withdrawal of the remaining counts of genocide, crimes against humanity and war crimes, but rather ask the Trial Chamber to acquit Rutaganira of those counts[1303].

In his guilty plea, Rutaganira admitted knowing that, during the genocide, thousands of Tutsi civilians had taken refuge in the church of the Mubuga sector[1304]. He told the prosecutors that these Tutsi at the church had been attacked in April 1994, by armed Hutu civilians, commune policemen and members of the national gendarmerie[1305]. Consequently, thousands of men, women and children who had assembled at the church died or were wounded[1306]. Rutaganira acknowledged that, prior to the assault, he saw the attackers in the area and failed to warn the Tutsi[1307].

In the determination of sentence in the *Rutaganira* case, the Trial Chamber was in a very important and delicate position. Depending on its reaction to the plea agreement and the guilty plea, which demanded incredible leniency and efforts from the Prosecution, the practice of plea-bargaining could die or thrive at the ICTR. Aware of the urgent need to reduce the caseload, the Chamber praised Rutaganira's plea of guilty[1308]. It highlighted that "when an accused pleads guilty, he is taking an important step towards rehabilitation and reintegration" [1309]. In addition, it argued that a guilty plea "contribute[s] to the search

[1299] *The Prosecutor v. Vincent Rutaganira, supra* note 1296, para.10.
[1300] *Ibid*., para.12.
[1301] *Ibid*., para.14.
[1302] *Ibid*., para.15.
[1303] *Ibid*., paras.16 and 104.
[1304] *Ibid*., para.32.
[1305] *Ibid*.
[1306] *Ibid*.
[1307] *Ibid*.
[1308] *Ibid*., para.114.
[1309] *Ibid*.

for the truth; it shows the resolve of an accused to accept responsibility vis-à-vis the injured party and society as a whole, which may contribute to reconciliation"[1310].

Making explicit reference to ICTY's case-law, the *Rutaganira* Trial Chamber added that as guilty pleas were "always an important factor in establishing the truth about a crime, it should cause a reduction in the sentence that would have been otherwise handed down"[1311]. It also emphasized the time of the guilty plea[1312], as the ICTY did in the *Todorović* case[1313]. Accordingly, the judgment noted "that a guilty plea serves public interest better if it is entered before the commencement or at the initial phase of the trial, thus enabling the Tribunal to save time and resources"[1314]. As Rutaganira entered his plea of guilty prior to the commencement of the trial, the defendant should receive credit for it[1315]. In addition to his confession, the accused expressed remorse and asked for forgiveness, which was praised by the Trial Chamber as well[1316]. The judgment did not address cooperation with the Prosecution because Rutaganira delivered none, as settled in the plea agreement[1317].

The prosecutors, as provided for in the plea deal, asked for a sentence ranging from six to eight years' imprisonment[1318]. Despite emphasizing its "unfettered discretion in determining the appropriate sentence"[1319] and the non-binding nature of the plea agreement[1320], the *Rutaganira* Trial Chamber followed the recommendation and sentenced the accused to six years of imprisonment[1321].

The *Rutaganira* case was the first one in which prosecutors and defense lawyers engaged in sentence bargaining at the ICTR because the Prosecution committed to a specific sentence recommendation in exchange for the defendant's guilty plea[1322]. At first sight, one could deduce that the case also dealt with charge bargaining, since the 1996 indictment portrayed Rutaganira enthusiastically ordering the perpetration of genocidal acts, but after the plea agreement, the Prosecution agreed to accept Rutaganira's role as a

[1310] *Ibid.*
[1311] *Ibid*., para.150.
[1312] *Ibid*., para.151.
[1313] Cf.: section 2.2.3 of the present thesis.
[1314] *The Prosecutor v. Vincent Rutaganira*, *supra* note 1296, para.151.
[1315] *Ibid*., para.152.
[1316] *Ibid*., para.156-158.
[1317] *The Prosecutor v. Vincent Rutaganira*, Transcript of Session held on January 17, 2005, ICTR, Trial Chamber III, Case no. ICTR-95-1C-T, p.29; COMBS (2007), *supra* note 529, p.99.
[1318] *The Prosecutor v. Vincent Rutaganira*, *supra* note 1296, para.167.
[1319] *Ibid.*
[1320] *Ibid.*
[1321] *Ibid*., disposition.
[1322] COMBS (2006), *supra* note 409, p.112; COMBS (2007), *supra* note 529, p.99.

mere spectator of the killings[1323]. However, this significant difference in the factual basis of his initial indictment and of his guilty plea was not the result of charge bargaining; it was due to lack of sufficient evidence, as informed by the prosecutor in the hearing of January 17, 2005[1324]. The first defendant at the ICTR to engage in charge bargaining was Paul Bisengimana, whose case the thesis will discuss now.

3.2.5 The Prosecutor v. Paul Bisengimana

Paul Bisengimana was the *bourgmestre* of Gikoro commune[1325] in the Kigali prefecture, when the genocide took place[1326]. His case is particularly relevant for being the first one in which the guilty plea was procured through charge bargaining[1327]. Initially, the Prosecution indicted Bisengimana on July 1, 2000 for five counts: genocide, complicity in genocide and crimes against humanity (murder, extermination and rape)[1328].

[1323] COMBS (2007), *ibid*.; STEELE, Sarah Louise. "Case Note: The Prosecutor v. Vincent Rutaganira", *Australian International Law Journal*, vol.12, p.129-133, 2005, p.130.

[1324] The prosecutor Charles Ayodeji Adeogun-Phillips stated the following on January 17, 2005: "My second application to Your Honours concerns the remainder of the charges that the Prosecutor requested you on 8th December 2004 to dismiss and return a verdict of not guilty, in effect, acquitting the Accused, Mr. Rutaganira, in relation to these charges. It is suffice to say, Your Honours, in relation to Count number 1, which I believe is the Count -- is the charge of conspiracy to commit genocide, the Prosecutor seeks to discontinue any proceedings in relation to Count 1, simply because of a lack of evidence in support of that Count. So, again, we renew our application to dismiss and acquit Mr. Rutaganira in relation to Count 1. Your Honours, I make a similar application, then, in relation to Count number 14 of the indictment, namely, that of genocide, a violation of Article 2 (3) (a), of the Tribunal statute. And in this regard, were new our application that you dismiss and, in effect, acquit Mr. Rutaganira because the Prosecution does not intend to proceed on this Count due to a lack of evidence to support the said charge at trial. Same application, Your Honour, in relation to count number 15, that of murder as a crime against humanity, in violation of Article 3 (a) of the Statute of the ICTR. Again, for the same reason, our inability to proceed due to a lack of evidence, we ask that you dismiss and return a verdict of not guilty, in effect, acquitting Mr. Rutaganira in relation to Count 15. I make the application in relation to Count 17 of the indictment, namely, a charge of other inhumane acts as crimes against humanity in violation of Article 3 (i) of the Statute of the Tribunal, and we ask that due to a lack of evidence, we are not in a position to proceed with these charges and the allegations therein in support of, and we ask that you dismiss and acquit Mr. Rutaganira in relation to them. That leaves Counts 18 and 19, which are violations of common Article 3, common to the Geneva Conventions, and Additional Protocol II thereof, violations of Article 4 (a), of the Statute of the Tribunal. Again, Your Honours, I renew my application that due to an insufficiency of evidence, the Prosecutor is not in a position to proceed to trial on these Counts and we, therefore, request that you dismiss and acquit Mr. Rutaganira in relation to Count 18 and 19". Cf. *The Prosecutor v. Vincent Rutaganira*, Transcript of Session held on January 17, 2005, ICTR, Trial Chamber III, Case no. ICTR-95-1C-T, p.2-3.

[1325] As *bourgmestre*, Paul Bisengimana was responsible for the maintenance of public order within the Gikoro commune, subject to the authority of the prefect. He had exclusive control over the communal police and any gendarmes placed at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority. Cf. *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.37.

[1326] *Ibid*., para.1.

[1327] COMBS (2007), *supra* note 529, p.101.

[1328] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.7.

He was arrested in Mali seventeen months later and his first appearance at the ICTR occurred on March 18, 2002, when he pleaded not guilty to all accusations[1329].

The indictment described Bisengimana as an active planner and participant of the genocide, stating that he "spearheaded a campaign of the destruction of Tutsi homes and the killing of Tutsi civilians in his home commune of Gikoro in Kigali-Rural prefecture and its environs"[1330]. According to the indictment, between January and April 1994, he supervised the training of *Interahamwe* militiamen and the distribution of weapons in the Gikoro commune[1331]. He personally ordered the *Interahamwe* militia and Hutu armed civilians to attack the Tutsi sheltered at the Musha church[1332]. Moreover, he was present and actively participated in this attack[1333]. During the assault, Bisengimana used a machete to cut off a Tutsi man's arms causing the victim to bleed to death[1334]. He also ordered and participated in the attack against the Tutsis hidden at the Ruhanga Protestant Church and School in the Gikoro commune[1335]. Finally, following Bisengimana's instigation, Hutu civilians and soldiers brutally raped numerous Tutsi women and girls[1336].

On October 19, 2005, the parties notified the *Bisengimana* Trial Chamber of a plea deal between them[1337]. Similar to the *Rutaganira* case, it is reasonable to conclude, from the content of the agreement, that Bisengimana dictated the terms of the negotiations. Firstly, pursuant to the plea deal, the Prosecution had to not only withdraw the counts of genocide, complicity in genocide and rape, but also pursue Bisengimana's acquittal of these charges[1338]. Secondly, the defendant refused to admit any active participation in the violence, but only to his omissions. Accordingly, Bisengimana pleaded guilty of only having aided and abetted the commission of murder and extermination as crimes against humanity[1339]. Thirdly, the Prosecution undertook to support the accused's request to serve his sentence in Europe[1340].

[1329] *Ibid*., para.8.
[1330] *The Prosecutor v. Paul Bisengimana,* Revisited Indictment, ICTR, Trial Chamber II, Case no. ICTR-2001-60-1, 31 October 2005, para.16.
[1331] *Ibid*., para.34.
[1332] *Ibid*., para.20.
[1333] *Ibid*., para.21.
[1334] *Ibid*., para.22.
[1335] *Ibid*., paras.26-28.
[1336] *Ibid*., paras.55-56.
[1337] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.9.
[1338] *Ibid*., para.12.
[1339] *Ibid*.
[1340] COMBS (2007), *supra* note 529, p.102.

The *Bisengimana* Trial Chamber agreed to dismiss the charges of genocide, complicity in genocide and rape, but denied the Prosecution's request for acquittal since the prosecutors had failed to justify their motion on this particular point[1341]. The denial of such request was particularly relevant because Rwanda can prosecute ICTR defendants at its national courts for the charges they were not acquitted by the Tribunal[1342].

Pursuant to the plea deal, Bisengimana admitted having both *de jure* and *de facto* authority over all public servants and other holders of public office in the Gikoro commune[1343]. According to his confession, he had the obligation and necessary means to stop the killings of Tutsi civilians in this commune, but he remained indifferent to the attacks[1344]. He knew that thousands of Tutsi fleeing from the ongoing attacks in the countryside sought refuge for days in the Musha Church in Gikoro[1345].

Bisengimana also admitted that, on or about April 13, 1994, he witnessed Rwandan Army soldiers, *Interahamwe* militiamen, Hutu civilians and communal policemen launch an attack against the Tutsi civilians sheltered at Musha Church, using weapons distributed with the defendant's knowledge[1346]. The attackers set the building on fire during the assault[1347] and more than one thousand Tutsis were killed[1348]. Bisengimana also confessed failing to warn the Tutsis hidden at the Ruhanga Protestant Church and School in the Gikoro commune of the imminent harm that would befall them[1349]. Numerous Tutsi civilians perished in the Ruhanga Complex as well[1350].

For his failure to protect the population and prevent or punish the illegal acts related to the attacks at Musha Church and Ruhanga Complex, the Trial Chamber found Bisengimana liable of aiding and abetting the commission of murder and extermination as crimes against humanity[1351]. However, the Chamber stated that the same factual basis supported the charges of extermination and murder in the present case. It also regarded both offenses to be committed with the same mode of participation on the part of Bisengimana – aiding and abetting[1352]. Accordingly, the Trial Chamber concluded that

[1341] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.12.
[1342] COMBS (2007), *supra* note 529, p.105.
[1343] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.38.
[1344] *Ibid*., para.39.
[1345] *Ibid*., para.4.
[1346] *Ibid*.
[1347] *Ibid*.
[1348] *Ibid*.
[1349] *Ibid*., para.5.
[1350] *Ibid*.
[1351] *Ibid*., para.104.
[1352] *Ibid*., para.102.

those two crimes were materially similar[1353]. It then decided to enter a conviction and to sentence the defendant only with respect to the count of extermination[1354].

In the sentencing stage, the *Bisengimana* Trial Chamber, like in the *Rutaganira* case, praised the guilty plea[1355]. It emphasized that the accused's plea was accompanied by the recognition of his responsibility as well as "publicly expressed regrets and remorse for the crimes that he committed"[1356]. It also observed that guilty pleas can "constitute proof of the honesty of the perpetrator"[1357]. An acknowledgement of guilt can encourage other criminals to come forward as well as contribute in the process of national reconciliation in Rwanda[1358]. The judgment noted that "the timely nature of the guilty plea facilitate[d] the administration of justice and save[d] the Tribunal's resources"[1359]. Similar to the *Rutaganira* case, there was no cooperation with the Prosecution by Bisengimana.

Pursuant to the plea agreement, the Prosecutor recommended a sentence of between 12 and 14 years' imprisonment[1360]. However, the Chamber sentenced above this range[1361]. It gave particular weight to Bisengimana's official position and the massive number of people killed (more than a thousand only at the Musha Church)[1362]. In the end, the Chamber sentenced him to 15 years' imprisonment[1363].

Unlike the *Rutaganira* case, the significant difference between the facts described in the indictment and those facts in Bisengimana's admission of guilt indicated that a factually distortive charge bargain occurred in the case[1364]. Firstly, the revised version of the indictment was filed just a month prior to the conclusion of the plea agreement[1365]. While the former painted Bisengimana as an active planner and perpetrator of the genocide, killing people with his own hands, the plea agreement portrayed him as a simple passive observer who failed to fulfill his duty to protect[1366].

[1353] *Ibid*., para.102.
[1354] *Ibid*., para.105.
[1355] *Ibid*., paras.136-140.
[1356] *Ibid*., paras.136-138.
[1357] *Ibid*., para.139.
[1358] *Ibid*.
[1359] *Ibid*., para.140.
[1360] *Ibid*., para.184.
[1361] *Ibid*., para.203.
[1362] *Ibid*., para.202.
[1363] *Ibid*., para.203.
[1364] COMBS (2007), *supra* note 529, p.103.
[1365] *Ibid*., p.102.
[1366] *Ibid*.

Moreover, although the Prosecution in the *Rutaganira* case openly indicated the lack of evidence as justification for the dropping of the charges[1367], in the case at hand the prosecutor had a much more ambiguous stand[1368]. After being questioned by the President of the *Bisengimana* Trial Chamber about the blatant discrepancies between the indictment and the plea agreement, the leading prosecutor initially said that he withdrew the charges since he lacked enough evidence to prove them[1369]. However, the judges were not convinced by this response because the revised indictment, with new facts, was filed approximately a month earlier than the filing of the plea agreement[1370]. Therefore, they were not willing to accept blindly the alleged absence of evidence[1371]. After being pressured by the bench, the prosecutor admitted that the dropping of the charges and the agreed new facts, as described in the plea agreement, were "the fallout or the results of the negotiations that have been involved in this matter"[1372].

A second indication of a charge bargaining in the *Bisengimana* case was the judgment in the *Semanza* case. Laurent Semanza was an ICTR defendant that had accompanied Bisengimana in the perpetration of most of his crimes[1373]. Accordingly, several testimonies at Semanza's regular trial supported the allegations in the initial indictment of Bisengimana[1374]. The prosecutors could use the testimonies from the *Semanza* case against Bisengimana. The *Semanza* Trial Chamber even mentioned that

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[1367] *The Prosecutor v. Vincent Rutaganira*, Transcript of Session held on January 17, 2005, ICTR, Trial Chamber III, Case no. ICTR-95-1C-T, p.2-3.
[1368] COMBS (2007), *supra* note 529, p.103.
[1369] The prosecutor Charles Ayodeji Adeogun-Phillips stated the following on November 17, 2005: "Your Honours are, indeed, correct with relation to the matters which you've drawn to our attention. And in regard to the following paragraphs of the amended indictment, dated 31 October 2005, Your Honour, which has been put to the Accused this afternoon, the Prosecutor wanted to be on record that he can no longer support the allegations as outlined in paragraphs 8, 19, 20, 21, 22, 28, 38, and 39, as Your Honour has rightly pointed out. And it will suffice to say that the paragraphs in the agreement, namely, 36, 37, 38, 39, 41 and 42, as they currently stand in the agreement filed before Your Honours on the 20th of October 2005, is indicative of the current state of affairs regarding the evidence available to the Prosecutor at this stage. I'm grateful, Your Honour". Cf.: *The Prosecutor v. Paul Bisengimana*, Transcript of Session held on November 17, 2005, ICTR, Trial Chamber II, Case no. ICTR-00-60-I, p.21.
[1370] *Ibid.*
[1371] One of the judges addressed the following statement to the prosecutor: "Now, the question is, these paragraphs in the indictment do exist. What do you intend to do with them? What do you intend to do about them? Do you understand what we mean? Because this is the current indictment. This is the ongoing indictment. This is the present indictment. So what do you intend to do about that kind of disparity, if you may wish to comment? We have followed you, and we do understand you, your submissions, but we would like -- the Trial Chamber would like to hear from you what you intend to do with the current state of affairs. You have the facts as they are in the agreement, but you have also the facts that exist in the current indictment, as reflected in the relevant paragraphs that you have just cited". Cf.: *Ibid*.
[1372] *Ibid*., p.21-22.
[1373] COMBS (2007), *supra* note 529, p.105.
[1374] *The Prosecutor v. Laurent Semanza*, Judgment, ICTR, Trial Chamber III, Case no. ICTR-97-20-T, 15 May 2003, paras.149, 166, 169-180 and 253 [*The Prosecutor v. Laurent Semanza*].

Bisengimana actively participated in genocide[1375]. In addition, as part of Semanza's defense strategy, his lawyers argued that it was Bisengimana, not Semanza, the one primarily responsible for the genocide in Gikoro[1376]. The *Semanza* Trial Chamber appeared receptive to this rationale when it concluded "that the Prosecutor did not introduce sufficient evidence to prove that the accused worked in close cooperation with Bisengimana to organize the massacre at Musha church"[1377]. Thus, the Trial Chamber implied that it was Bisengimana who had organized the genocide in that area[1378].

The plea agreement in the *Bisengimana* case is highly worrisome because it created a factual discrepancy in ICTR's case-law: anyone who reads the *Semanza* judgment would conclude that Bisengimana had an active role in the planning and implementation of the killings, but the *Bisengimana* judgment portrayed him as mere spectator of the violence. This inconsistency casts a shadow of doubt in the historical record created by the ICTR and can threaten the credibility of the Tribunal, especially in Rwandan society.

Lastly, even though the *Bisengimana* Trial Chamber imposed a harsher-than-agreed-upon sentence[1379], the plea agreement earned the defendant a significant sentence discount, especially after considering the verdicts of other accused. For instance, Laurent Semanza was also involved in the Musha church massacre and was sentenced to 25 years by the Trial Chamber[1380] and to 35 years by the Appeals Chamber[1381]. Therefore, Semanza's final sentence is 20 years harsher than Bisengimana's. Jean-Paul Akayesu, a *bourgmestre* like Bisengimana, was found guilty of genocide, direct and public incitement to commit genocide and seven counts of crimes against humanity for his involvement in the violence that took place in the Taba commune[1382]. He was sentenced to life imprisonment[1383], an outcome very likely to have occurred to Bisengimana if have decided to plead not guilty and to face a full trial.

[1375] *Ibid*., paras.425, 486 and 549.
[1376] *The Prosecutor v. Laurent Semanza*, Transcript of Session held on February 27, 2002, ICTR, Trial Chamber III, Case no. ICTR-97-20-T, p.64-65; *The Prosecutor v. Laurent Semanza*, Transcript of Session held on June 18, 2002, ICTR, Trial Chamber III, Case no. ICTR-97-20-T, p.182-183.
[1377] *The Prosecutor v. Laurent Semanza*, *supra* note 1374, para.207.
[1378] COMBS (2007), *supra* note 529, p.105.
[1379] The Prosecutor recommended a sentence of between 12 and 14 years' imprisonment, but the Chamber sentenced Bisengimana to 15 years in prison.
[1380] *The Prosecutor v. Laurent Semanza*, *supra* note 1374, para.590.
[1381] *The Prosecutor v. Laurent Semanza*, Judgment, ICTR, Appeals Chamber, Case no. ICTR-97-20-A, 20 May 2005, disposition.
[1382] *The Prosecutor v. Jean-Paul Akayesu – Trial*, *supra* note 1110, verdict.
[1383] *The Prosecutor v. Jean-Paul Akayesu – Appeal*, *supra* note 904, verdict.

3.2.6 The Prosecutor v. Joseph Serugendo

Joseph Serugendo was a member of the governing board and adviser on technical matters of the RTLMC and Chief of the Maintenance Section of Radio Rwanda, attached to the Rwandan Office of Information[1384]. He was also a member of the National Committee of the *Interahamwe* militia, the authority over all militiamen in Kigali[1385]. On July 22, 2005, the Prosecutor charged him with conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide and persecution as a crime against humanity[1386]. He made his initial appearance approximately two months later and entered a plea of not guilty to all five charges[1387]. Immediately upon his arrest, Serugendo began discussions with the Prosecution with the goal to full cooperation and an eventual a guilty plea[1388].

A plea agreement was filed on January 12, 2006[1389]. Serugendo pleaded guilty to direct and public incitement to commit genocide and persecution as a crime against humanity[1390]. The Prosecution dropped all remaining charges[1391]. The defendant admitted having organized and participated in political meetings and rallies with the goal to indoctrinate and incite members of the *Interahamwe* to hunt and kill Tutsis[1392]. He also confessed to having planned, in concert with others, the founding and operation of the RTLMC as a radio station intended to foment racial hatred and violence against Tutsis and moderate Hutus[1393]. In addition to exercising control and authority over RTLMC's broadcasters and staff, he provided technical assistance and moral encouragement for the continuance of anti-Tutsi broadcasts, which incited the killing of hundreds of thousands of civilian Tutsis throughout Rwanda[1394]. Following the destruction by the RPF of the RTLMC's transmitter located in Kigali, Serugendo smuggled some transmission equipment and installed it in the top of Mount Muhe near Gisenyi, creating a new RTLMC studio to disseminate racial hatred[1395].

[1384] *The Prosecutor v. Joseph Serugendo, supra* note 216, para.16.
[1385] *Ibid.*
[1386] *Ibid.*, para.1.
[1387] *Ibid.*, para.2.
[1388] *Ibid.*
[1389] *Ibid.*, para.4.
[1390] *Ibid.*, paras.4-5.
[1391] *Ibid.*, para.5.
[1392] *Ibid.*, paras.20-21.
[1393] *Ibid.*, para.22.
[1394] *Ibid.*, paras.23-24.
[1395] *Ibid.*, paras.25-27.

On March 15, 2006, the *Serugendo* Trial Chamber confirmed that the plea was voluntary, informed, unequivocal and based on sufficient facts to establish the crimes the accused committed[1396]. The Chamber convicted him of the two counts to which he pleaded guilty – direct and public incitement to commit genocide and persecution as a crime against humanity[1397].

In sentence determination, the *Serugendo* Trial Chamber began with the accused's guilty plea[1398]. It noted that his admission of guilt "assist[ed] in the administration of justice and in the process of national reconciliation in Rwanda. It […] also spare[d] victims from coming to testify before the Tribunal"[1399]. The Chamber also pointed out that Serugendo's plea "encourage[d] others to acknowledge their personal involvement in the massacres committed in Rwanda in 1994"[1400]. The judges praised the timing of such a plea – before the commencement of the trial – because it resulted in "substantial savings in terms of time, human and financial resources"[1401]. They also decided to give credit for Serugendo's guilty plea because it "reflect[ed] his genuine remorse"[1402] and created "great personal risk to both the accused himself and his family"[1403]. Finally, the judges were convinced that Serugendo pleaded guilty out his desire to tell the truth[1404].

The *Serugendo* Trial Chamber considered the accused's cooperation "wide-ranging, leading to the clarification of many areas of investigative doubt, in relation also to crimes previously unknown by the Prosecution"[1405]. Indeed, Serugendo's depositions reportedly filled 200 pages[1406]. The Chamber concluded that his cooperation was substantial and, therefore, "a significant mitigating circumstance"[1407]. Although the guilty plea and the cooperation were both meaningful mitigating factors, the Chamber found Serugendo's diagnosis of a terminal illness particularly relevant as well[1408].

[1396] *Ibid*., para.11.
[1397] *Ibid.*
[1398] *Ibid*., paras.52-60.
[1399] *Ibid*., para.52.
[1400] *Ibid*., para.53.
[1401] *Ibid*., para.54.
[1402] *Ibid.*
[1403] *Ibid.*
[1404] *Ibid*., para.56.
[1405] *Ibid*., para.61.
[1406] *The Prosecutor v. Joseph Serugendo*, Transcript of Session held on June 1, 2006, ICTR, Trial Chamber I, Case no. ICTR-2005-84-I, p.28 [*The Prosecutor v. Joseph Serugendo – Transcript of Session of June 1, 2006*].
[1407] *The Prosecutor v. Joseph Serugendo, supra* note 216, paras.62 and 74.
[1408] *Ibid*., para.70.

A confidential medical report revealed that Serugendo was suffering from an incurable and inoperable condition, which had reduced his life expectancy[1409]. The accused's ill health required constant medical care and palliative treatment[1410]. His conditions were so poor that at his sentencing hearing on June 1, 2006, he could not stand by himself or read his statement of remorse aloud[1411]. The Prosecution had read the declaration on his behalf[1412]. Consequently, the prosecutors, in the same hearing, accepted the possibility of a sentence ranging from 6 to 10 years, even though they undertook to recommend a sentence of 6 to 14 years in the plea agreement[1413]. They expressly mentioned the accused's substantial cooperation as a reason for this leniency[1414]. The Trial Chamber also considered Serugendo's deteriorating health[1415]. Thus, in the day following his sentencing hearing, the Chamber rendered an oral judgment pronouncing his sentence of 6 years' imprisonment[1416].

3.2.7 The Prosecutor v. Joseph Nzabirinda

Joseph Nzabirinda was a youth organizer in Butare prefecture, Southern Rwanda[1417]. He was indicted on December 13, 2001, for genocide, complicity in genocide and the crimes against humanity of rape and extermination[1418]. Belgian authorities arrested him approximately one week later in Brussels[1419]. On March 27, 2002, Nzabirinda made his initial appearance before the Trial Chamber and pleaded not guilty to all four charges[1420].

On November 20, 2006, the Prosecution requested to withdraw the previous indictment and to file a new one with only one count of murder as a crime against humanity[1421]. On the same day, the defense advised the *Nzabirinda* Trial Chamber that the accused was willing to plead guilty to that charge[1422]. As the judges were not convinced that the case file had sufficient evidence in support of the new count of murder,

[1409] *Ibid*., para.71.
[1410] *Ibid*.
[1411] *The Prosecutor v. Joseph Serugendo – Transcript of Session of June 1, 2006, supra* note 1406, p.27.
[1412] *Ibid*.
[1413] *Ibid*., p.29; *The Prosecutor v. Joseph Serugendo, supra* note 216, para.79.
[1414] *The Prosecutor v. Joseph Serugendo – Transcript of Session of June 1, 2006, ibid*.
[1415] *The Prosecutor v. Joseph Serugendo, supra* note 216, para.70-74.
[1416] *Ibid*., para.14 and disposition.
[1417] *The Prosecutor v. Joseph Nzabirinda, supra* note 216, para.2.
[1418] *Ibid*., para.3.
[1419] *Ibid*.
[1420] *Ibid*.
[1421] *Ibid*., para.4.
[1422] *Ibid*., footnote 6.

they requested the Prosecution to provide additional supporting material[1423]. On December 4, 2006, the prosecutors filed the requested supplementary evidence[1424]. Four days later, the *Nzabirinda* Trial Chamber accepted the new indictment with only the count of murder as a crime against humanity[1425].

On December 14, 2006, Nzabirinda pleaded guilty to aiding and abetting the charged crime, as accomplice by omission[1426]. He admitted being present as an "approving spectator" when the *Interahamwe* militia killed Pierre Murara, in Sahera sector[1427]. He also confessed his involvement in the murder of Joseph Mazimpaka, who was killed near a roadblock that Nzabirinda managed on two occasions at the request of government authorities[1428]. He admitted that by being present beside the militiamen at the roadblock as an "approving spectator", he encouraged the murder of Mazimpaka[1429]. Accordingly, the *Nzabirinda* Trial Chamber found the accused guilty for aiding and abetting the two murders[1430].

Similar to the *Bisengimana* case, the lawyers of Nzabirinda tried to avoid a future prosecution in Rwanda in relation to the withdrawn counts of the initial indictment. However, since the trial judges refused to acquit Paul Bisengimana of his dropped charges less than a year prior to Nzabirinda's guilty plea[1431], the latter pursued a new strategy during plea negotiations. Instead of bargaining with the Prosecution for the formal acquittal of the defendant in relation to the withdrawn counts – as occurred in the *Bisengimana* case –, the plea agreement in the *Nzabirinda* case determined that the Prosecution should ask for a ruling by the Trial Chamber that the *non bis in idem* principle applies to withdrawn counts even though no trial on the merits had been held thereon[1432].

However, like in the *Bisengimana* case, the attempts to shield the defendant from a future trial in Rwanda were unsuccessful. To Nzabirinda's disappointment, the Trial Chamber ruled that the *non bis in idem* principle applies only to defendants who had faced a trial in which a final judgment was effectively rendered[1433]. It concluded that, since in the *Nzabirinda* case the charges have been dropped without a final judgment on them,

[1423] *Ibid.*
[1424] *Ibid.*
[1425] *Ibid.*, para.4.
[1426] *Ibid.*, para.9.
[1427] *Ibid.*, para.5.
[1428] *Ibid.*, para.6.
[1429] *Ibid.*, para.6.
[1430] *Ibid.*, para.39.
[1431] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.12.
[1432] *The Prosecutor v. Joseph Nzabirinda*, *supra* note 216, paras.41-44.
[1433] *Ibid.*, para.46.

"the principle of *non bis in idem* [did] not apply and [could not] be invoked to bar potential subsequent trials of the accused before any jurisdiction"[1434]. Consequently, the Chamber dismissed the Prosecution's motion[1435].

In sentence determination, the *Nzabirinda* Trial Chamber praised the accused's guilty plea because it saved the ICTR's time and resources and strengthened national reconciliation in Rwanda[1436]. As for cooperation with the Prosecution, we have a peculiar situation in this case. Although it was undisputed by both parties that Nzabirinda offered to cooperate, until the date of sentencing he provided no assistance[1437]. Hence, this particular circumstance gave rise to the following question: does the mere offer to cooperate with the Prosecution entail sentence mitigation? The *Nzabirinda* Trial Chamber responded in the negative[1438]. Referring to the ICTY's case-law, it explained that the mitigating impact of cooperation with the Prosecution depended on both the quantity and quality of the information provided by the defendant[1439]. Accordingly, the judges correctly concluded that the offer to cooperate in itself could not be considered a mitigating factor because it did not entail actual assistance to the activities of the Tribunal[1440].

As for sentence recommendation, both parties suggested a range of between five and eight years' imprisonment[1441]. They also proposed that Nzabirinda should serve his sentence in Europe, preferably in France, as it is close to Belgium, where his family lives[1442]. On February 23, 2007, the Trial Chamber sentenced him within the agreed upon range – seven years' imprisonment[1443]. However, it denied the request to serve the sentence in France and stated that the President of the ICTR would eventually choose a place for that purpose[1444]. In the end, Nzabirinda remained at the ICTR's detention unit in Arusha until the completion of his 7-year sentence on December 19, 2008[1445].

[1434] *Ibid.*
[1435] *Ibid.*, para.47.
[1436] *Ibid.*, para.71.
[1437] *Ibid.*, paras.72 and 74.
[1438] *Ibid.*, para.74.
[1439] *Ibid.*, para.73.
[1440] *Ibid.*, para.74.
[1441] *Ibid.*, para.97.
[1442] *Ibid.*
[1443] *Ibid.*, para.116.
[1444] *Ibid.*, para.119.
[1445] "Rwanda: Ex-Youth Activist and Genocide Accused to be Released Friday in Arusha", *Hirondelle News Agency*, 17 December 2008. Available at: <https://allafrica.com/stories/200812180079.html>. Access on: November 26, 2018; "Genocide convict completes sentence", *The New Times*, 21 December 2008. Available at: <https://www.newtimes.co.rw/section/read/86340>. Access on: November 26, 2018; "Rwandan released after serving 7-year sentence", *Trend News Agency*, 19 December 2008. Available at: <https://en.trend.az/world/other/1376137.html>. Access on: November 26, 2018.

3.2.8 The Prosecutor v. Juvénal Rugambarara

Juvénal Rugambarara served as the *bourgmestre* of Bicumbi commune, from September 16, 1993 to April 20, 1994[1446]. He was indicted on July 13, 2000 with genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity (extermination, torture and rape) and serious violations of Common Article 3 of the 1949 Geneva Conventions[1447]. He was arrested three years later in Uganda[1448] and his initial appearance took place on August 11, 2003, when he pleaded not guilty to all charges[1449].

On June 12, 2007, the Prosecution, with the consent of defense lawyers, requested to emend the indictment, in order to drop all charges expect the one on extermination as a crime against humanity[1450]. Instead of actively committing the crime, the revised indictment accused Rugambarara of having failed on his duty to take the necessary and reasonable measures to investigate the crimes committed by his subordinates[1451]. The new indictment indicated that communal policemen, local administrators and militiamen, under the control and authority of Rugambarara, launched a series of attacks against the Tutsi gathered in several buildings, including a mosque, in the Mwulire, Mabare and Nawe sectors, resulting in the death of thousands of Tutsi civilians[1452].

On June 13, 2007, both parties filed a plea agreement and a statement of agreed facts before the *Rugambarara* Trial Chamber[1453]. Exactly a month later, the defendant pleaded guilty of having failed on his duty to take the necessary steps to ensure the proper punishment of his subordinates involved in the killing of Tutsi civilians in the Mwulire, Mabare and Nawe sectors[1454]. In conformity with the plea deal, Rugambarara stated that he became aware of the crimes only after their commission[1455].

The Chamber found that the change in his plea was voluntary, unequivocal, informed and supported by sufficient evidence[1456]. It also concluded that the agreed facts

[1446] *The Prosecutor v. Juvénal Rugambarara, supra* note 216, para.1.
[1447] *Ibid*., para.2.
[1448] *Ibid*.
[1449] *Ibid*.
[1450] *Ibid*., para.3.
[1451] *Ibid*.
[1452] *Ibid*.
[1453] *Ibid*., para.4.
[1454] *Ibid*., para.5.
[1455] *Ibid*., para.54.
[1456] *Ibid*., paras.6-8.

satisfied the elements of extermination as a crime against humanity since the attacks in those three sectors by Rugambarara's subordinates were widespread and directed against the Tutsi civilian population for ethnic reasons[1457]. Therefore, the Chamber found the accused guilty of this crime[1458].

As for sentence mitigation, Rugambarara did not engage in any form of cooperation with the Prosecution. Secondly, the Chamber highlighted that his guilty plea "saved judicial time and resources, and [contributed] to the process of national reconciliation in Rwanda"[1459] because it encouraged other criminals to come forward[1460]. Although the judges mentioned that they took the admission of guilt into account as a mitigating factor[1461], this particular element had just a minor impact in the determination of Rugambarara's sentence. One can reach this conclusion after noting that the Chamber highlighted "that the case-law on guilty plea sentencing concerning extermination [did] not follow a consistent pattern"[1462].

The *Rugambarara* Trial Chamber even described the inconsistency in ICTR's practice[1463]. It pointed out that Jean Kambanda pleaded guilty and was sentenced to life imprisonment for, *inter alia,* extermination as a crime against humanity[1464]. Paul Bisengimana was sentenced to 15 years in prison after pleading guilty to aiding and abetting extermination as a crime against humanity[1465]. Omar Serushago was also sentenced to 15 years' imprisonment, but he pleaded guilty to genocide and the crimes against humanity of murder, extermination and torture[1466]. The *Rugambarara* Trial Chamber argued that this low sentence for such numerous and grave offenses was due to the relevant mitigating circumstances in the case, including Serushago's family circumstances and the fact that he helped some Tutsi to avoid capture[1467]. Finally, Vincent Rutaganira was sentenced to six years' imprisonment after having pleaded guilty to complicity by omission in extermination as a crime against humanity[1468].

[1457] *Ibid*., para.8.
[1458] *Ibid*., para.9.
[1459] *Ibid*., para.35.
[1460] *Ibid*., para.33.
[1461] *Ibid*., para.35.
[1462] *Ibid*., para.58.
[1463] *Ibid*., footnote 89.
[1464] *The Prosecutor v. Jean Kambanda – Trial, supra* note 197, para.40 and verdict.
[1465] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.203.
[1466] *The Prosecutor v. Omar Serushago*, *supra* note 1106, disposition.
[1467] *Ibid*., paras.31-35; *The Prosecutor v. Juvénal Rugambarara, supra* note 216, footnote 89.
[1468] *The Prosecutor v. Vincent Rutaganira, supra* note 1296, disposition.

Even though the Prosecution agreed in the plea deal to recommend a sentence ranging from 9 to 12 years[1469], it suggested a term of imprisonment of not less than 12 years in its sentence brief[1470]. Moreover, both parties requested the Trial Chamber to order that Rugambarara serve his sentence in Europe, preferably in France[1471].

Although the *Rugambarara* Trial Chamber gave little credit for the guilty plea, it sentenced the defendant within the range of the plea agreement – 11 years' imprisonment[1472]. However, like in the *Nzabirinda* case, the Chamber denied the joint request to designate France as the State where Rugambarara would serve his sentence[1473]. It ruled that this matter was "premature"[1474] because the President of the ICTR, in consultation with the Chamber, would designate the place of detention in due course[1475]. In the end, Rugambarara's expectations to be imprisoned in Europe were frustrated. On May 18, 2009, the President of the ICTR ordered his transfer to Benin, where he served his remaining sentence[1476]. Approximately three years later, he was granted early release by the ICTR, after serving three-quarters of his sentence[1477].

3.2.9 The Prosecutor v. Michel Bagaragaza

The *Bagaragaza* case is worth mentioning due to the particular goal of the Prosecution in engaging negotiations with the defendant. The main objective was not to obtain a guilty plea, but to procure incriminating evidence against high-level criminals[1478]. During the genocide, Michel Bagaragaza held some relevant economic positions. He was the Director of the Office for Industrial Crops of Rwanda/Tea, the government agency responsible for controlling the important tea industry in Rwanda[1479]. He was also the Vice-President of the African Continental Bank in Rwanda and a member of the local committee in the Gisenyi prefecture of the National Republican Movement for Democracy and Development, the ruling political party of Rwanda under

[1469] *The Prosecutor v. Juvénal Rugambarara, supra* note 216, para.48.
[1470] *Ibid*., para.48.
[1471] *Ibid*., para.49.
[1472] *Ibid*., para.61.
[1473] *Ibid*., para.65.
[1474] *Ibid.*
[1475] *Ibid.*
[1476] *The Prosecutor v. Juvénal Rugambarara,* Decision on the Enforcement of Sentence, ICTR, Office of the President, Case no. ICTR-00-59, 18 May 2009, para.I.
[1477] *The Prosecutor v. Juvénal Rugambarara,* Decision on the Early Release Request of Juvénal Rugambarara, ICTR, Office of the President, Case no. ICTR-00-59, 8 February 2012, p.6.
[1478] COMBS (2007), *supra* note 529, p.108.
[1479] *The Prosecutor v. Michel Bagaragaza, supra* note 216, para.18.

President Juvénal Habyarimana[1480]. This local committee was responsible for bringing the *Interahamwe* militia to the Gisenyi prefecture[1481].

Most importantly to the Prosecutor, Bagaragaza was a member of a powerful and restricted group of people known as the *Akazu*, the inner circle surrounding President Habyarimana and his family[1482]. This organization exercised substantial political and financial power in Rwanda, and its members are believed to have conceived and organized the genocide[1483]. Hence, Bagaragaza could provide the Prosecutor with valuable inside information about the genocide, including its main planners[1484].

Bagaragaza was indicted on July 28, 2005, with conspiracy to commit genocide, genocide and, alternatively, complicity in genocide[1485]. He decided to surrender himself voluntarily, but before doing so, he reached a very advantageous bargain: in exchange for the information the Prosecution was so eager to obtain on *Akazu*'s members, the Prosecutor promised to shield Bagaragaza from trial at the ICTR and to send the case to a favorable national court[1486]. However, the accused did not obtain what he was hoping.

Upon the accused's voluntary surrender, the Prosecution requested the ICTR to detain Bagaragaza in the ICTY detention facility at The Hague because his cooperation with the Office of the Prosecutor made it too dangerous to detain him with the other ICTR accused, in Arusha[1487]. The Tribunal granted this request and he was imprisoned at The Hague[1488]. On Bagaragaza's first appearance before the Trial Chamber on August 16, 2005, he pleaded not guilty to all charges[1489].

After Bagaragaza satisfactorily delivered the requested information, the Prosecution sought to fulfill its end of the bargain[1490]. Thus, in February 2006, it requested the *Bagaragaza* Trial Chamber to refer the case to the courts of Norway[1491]. The motion stated that Norwegian authorities were willing to adjudicate the case[1492]. In addition, even

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[1480] *Ibid*.
[1481] *Ibid*.
[1482] *Ibid*., para.19.
[1483] *Ibid*.; COMBS (2007), *supra* note 529, p.108.
[1484] COMBS (2007), *ibid*.
[1485] *The Prosecutor v. Michel Bagaragaza, supra* note 216, para.1.
[1486] *Ibid*., para.2.
[1487] *Ibid*.; COMBS (2007), *supra* note 529, p.108.
[1488] *The Prosecutor v. Michel Bagaragaza, ibid.*, para.3.
[1489] *Ibid*.
[1490] COMBS (2007), *supra* note 529, p.108-109.
[1491] *The Prosecutor v. Michel Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, ICTR, Trial Chamber III, Case no. ICTR-2005-86-R11bis, 19 May 2006, para.8 [*The Prosecutor v. Michel Bagaragaza – Decision on Referral to Norway*].
[1492] *Ibid*., para.8.

though Norway's domestic criminal law did not have any provision against genocide, Bagaragaza would stand trial as an accessory to homicide or negligent homicide, for which the maximum sentence was 21 years' imprisonment[1493]. The Prosecution also presented the principle of universal jurisdiction as ground for Norwegian domestic courts' jurisdiction over the case[1494].

The possibility of Bagaragaza receiving a sentence of at most 21 years enraged the Rwandan government, which vocally opposed the referral[1495]. In its decision, the Trial Chamber was not convinced by the Prosecution's arguments and ruled that Norway did not have jurisdiction over the alleged crimes, resulting in the denial of the motion[1496]. The Appeals Chamber upheld the Trial Chamber's decision on August 30, 2006[1497].

In a second attempt, the Prosecution added a new count of killing and causing violence to health and physical or mental well-being in Bagaragaza's indictment[1498]. It requested the transfer of the case to the Netherlands, which was granted by the Trial Chamber on April 13, 2007[1499]. However, the Chamber revoked the referral four months later, arguing that Dutch courts did not have jurisdiction to try the crimes listed in the indictment[1500].

The *Bagaragaza* case illustrates that both defendants and prosecutors are not entirely in control of the situation they are bargaining over and they can face difficulties in enforcing the outcomes of their negotiations. For instance, after the Dutch authorities surrendered Bagaragaza back to the ICTR, the President of the Tribunal decided to imprison him in Arusha, not at The Hague, as before[1501]. The defense lawyers immediately challenged this decision, but failed to reverse the President's ruling[1502]. They tried a second time with a joint motion alongside the Prosecutor[1503]. Having the Prosecution on their side in this particular issue did not seem to have impressed the *Bagaragaza* Trial Chamber because it denied the motion once again[1504].

[1493] *Ibid*., para.9.
[1494] *Ibid*.,
[1495] COMBS (2007), *supra* note 529, p.109.
[1496] *The Prosecutor v. Michel Bagaragaza – Decision on Referral to Norway*, *supra* note 1491, para.17.
[1497] *The Prosecutor v. Michel Bagaragaza,* Decision on Rule 11*bis* Appeal, ICTR, Appeals Chamber, Case no. ICTR-05-86-AR11bis, 10 August 2006, para.19.
[1498] *The Prosecutor v. Michel Bagaragaza, supra* note 216, para.5.
[1499] *Ibid*., para.6.
[1500] *Ibid*.
[1501] *Ibid*., para.7.
[1502] *Ibid*., footnote 11.
[1503] *Ibid*.
[1504] *Ibid*.

The two failed attempts to refer the case to a favorable national court and the possibility of standing the whole trial detained in Arusha left Bagaragaza with no much room for maneuver. To make matters worse, the judges were not willing to accept the outcomes of the parties' negotiations. In addition to rejecting Bagaragaza's two requests for transfer to the ICTY's detention unit, the plea agreement both parties filed on April 14, 2008 became useless after the Trial Chamber denied the Prosecution's motion to drop all charges, expect the one on complicity in genocide[1505]. The judges pointed out to the inexistence of strong enough evidence to support this charge[1506]. Pursuant to the plea agreement, the accused would plead guilty only to the charge of complicity in genocide, and the Prosecution would dismiss the other counts[1507]. The resistance from the trial judges forced the parties to withdraw their plea agreement on July 22, 2008[1508].

They tried a second time on August 17, 2009, when both parties presented the plea agreement once more to the *Bagaragaza* Trial Chamber[1509]. Alongside the agreement, they filed a statement of admitted facts signed by the defendant, in order to satisfy the judges' need for more evidence corroborating the charge of complicity in genocide[1510]. A month later, Bagaragaza pleaded guilty to this charge and the Trial Chamber, now satisfied, allowed the Prosecution to withdraw all charges, but complicity in genocide[1511].

Bagaragaza admitted to having contributed to the killings of Tutsi civilians who sought refuge at Kesho Hill, in the Kabaya area, and at Nyundo Cathedral in Gisenyi prefecture[1512]. In the beginning of April 1994, by attending a meeting with the *bourgmestre* and the chief of the *Interahamwe* militia in the Giciye commune, he became aware of their plans to attack the Tutsis gathered in those two places[1513]. In support of the plan, he provided vehicles and fuel from the Rubaya and Nyabihu Tea Factories to transport *Interahamwe* militiamen, and personnel from these two factories to participate in the assault[1514]. During the genocide, he gave a substantial amount of money to *Interahamwe*'s leaders, in order to buy alcohol for distribution among militiamen as a

[1505] *Ibid*., para.8.
[1506] *Ibid*.
[1507] *Ibid*.
[1508] *Ibid*.
[1509] *Ibid*., para.10.
[1510] *Ibid*.
[1511] *Ibid*., para.11.
[1512] *Ibid*., para.25.
[1513] *Ibid*.
[1514] *Ibid*.

means to motivate them to continue killing[1515]. The attack against Kesho Hill and Nyundo Cathedral resulted in the slaughter of more than one thousand Tutsis[1516].

In sentence determination, the *Bagaragaza* Trial Chamber gave particular weight to the defendant's early admission of guilt[1517] and his "genuine remorse"[1518]. The judgment also listed the several advantages a guilty plea can bring[1519]. However, the mitigating factor that most impressed the judges by far was Bagaragaza's "invaluable" cooperation with the Office of the Prosecutor[1520]. They noted he had been collaborating for seven years and had provided the Prosecution with substantial information about his own role and the role of others in the genocide[1521]. He continued his cooperation unreservedly even after his identity was disclosed in breach of court orders and despite threats to his own life and to the life of his family members[1522]. The Chamber praised the fact that he had been collaborating even after the denial of his transfer to the ICTY's detention unit[1523]. As a result, he had to remain in solitary confinement for security reasons for five years[1524]. He also testified for the Prosecution in the *Zigiranyirazo* case and made himself available for future testimonies if needed[1525]. In conclusion, the Trial Chamber found that Bagaragaza's assistance "constitute[d] substantial cooperation to an unusually high degree"[1526].

Pursuant to the plea agreement, both parties jointly recommended a sentence of between 6 and 10 years of imprisonment[1527]. After the past resistance showed by the *Bagaragaza* Trial Chamber, one could reasonably expect a sentence harsher than that. However, the Chamber sentenced the accused to 8 years' imprisonment[1528], an amount within the parties' suggested range. The main reason for this favorable outcome was Bagaragaza's cooperation, which really impressed the judges[1529]. The judgment even

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[1515] *Ibid.*
[1516] *Ibid.*, para.26.
[1517] *Ibid.*, para.38.
[1518] *Ibid.*
[1519] *Ibid.* The judgment reads as follows: "The jurisprudence has established that a guilty plea may have mitigating effects because it shows remorse and repentance and contributes to reconciliation, the establishment of the truth, the encouragement of other perpetrators to do so, the sparing of a lengthy investigation and trial and thus resources and time, and relieves witnesses from giving evidence in court".
[1520] *Ibid.*, para.39.
[1521] *Ibid.*
[1522] *Ibid.*
[1523] *Ibid.*
[1524] *Ibid.*
[1525] *Ibid.*
[1526] *Ibid.*, para.40.
[1527] *Ibid.*, para.41.
[1528] *Ibid.*, para.44.
[1529] *Ibid.*, para.42.

stated "that extraordinary mitigating circumstances exist[ed] [in the case], which warrant[ed] a substantial reduction of the sentence that the accused's actions would otherwise carry"[1530].

Accordingly, even though Bagaragaza's initial desire was to face trial before the judiciary of a favorable State, he had a very fortunate outcome at the ICTR, and his plea agreement played an important role in this aftermath. For instance, the defendant Protais Zigiranyirazo, a businessperson with no governmental post, had been sentenced to 20 years' imprisonment for his involvement in the Kesho Hill massacre[1531], more than twice the amount of Bagaragaza. Zigiranyirazo did not plead guilty and was tried and convicted as a principal perpetrator of the genocide[1532], a fate very likely to have been applied to Bagaragaza in the absence of his admission of guilt and cooperation.

Although Bagaragaza had a fortunate aftermath, it is necessary to emphasize once more how dangerous to the defendant collaborating with the Prosecution can be if effective protective measures are not in place. The *Uwilingiyimana* case illustrates the high stakes surrounding this practice. Juvénal Uwilingiyimana, the defendant, was the Minister of Commerce and Industry of Rwanda (1988 - 1990) and director of the Rwandan Office of Tourism of the National Parks, from 1990 until the genocide[1533]. Like Bagaragaza, he was a member of *Akazu*, which meant he had strategic information valuable to the Prosecutor[1534]. The Prosecution charged Uwilingiyimana through a sealed indictment on June 13, 2005, with the following counts: conspiracy to commit genocide; direct and public incitement to commit genocide; genocide; alternatively, complicity in genocide; and murder as a crime against humanity[1535]. The indictment described numerous speeches Uwilingiyimana gave in which he incited hate and the killing of Tutsis[1536]. He also held several meetings with local authorities in Rwanda, prior to the genocide, in order to disseminate the government's killing campaign against Tutsis[1537]. Uwilingiyimana was the founder and commander of the *Interahamwe* militia in the Gisenyi prefecture, being criminally responsible for all the killings by militiamen under

[1530] *Ibid*.
[1531] *The Prosecutor v. Protais Zigiranyirazo*, Judgment, ICTR, Trial Chamber III, Case no. ICTR-01-73-T, 18 December 2008, para.468.
[1532] *Ibid*.
[1533] *The Prosecutor v. Juvénal Uwilingiyimana,* Indictment, ICTR, Case no. ICTR-2005-83-I, 10 June 2005, para.2 [*The Prosecutor v. Juvénal Uwilingiyimana – Indictment*].
[1534] COMBS (2007), *supra* note 529, p.108.
[1535] *The Prosecutor v. Juvénal Uwilingiyimana – Indictment*, *supra* note 1533, p.2.
[1536] *Ibid*., para.14-20.
[1537] *Ibid*., paras.22-27.

his authority in this prefecture[1538]. He publicly ordered the *Interahamwe* to hunt down Tutsis and kill them[1539].

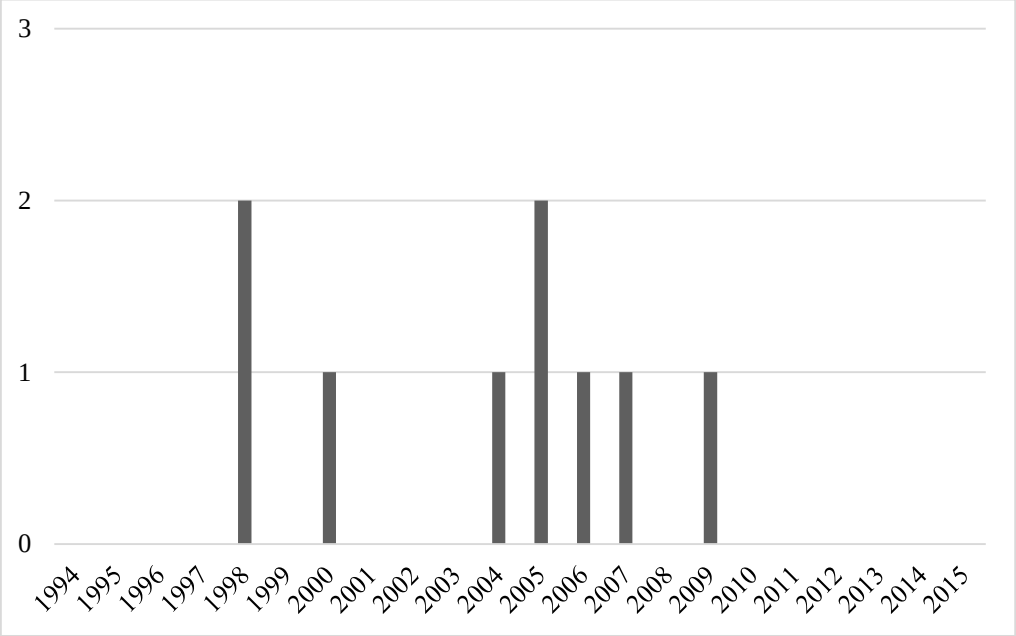
ICTR investigators located Uwilingiyimana in Europe and, due to his willingness to reveal information capable of implicating other *Akazu*'s members in the genocide, the prosecutors agreed to hold the arrest warrant in abeyance[1540]. Investigators interviewed him for several weeks until November 18, 2005, when he disappeared. Four days later, his wife reported to police authorities that he was missing[1541].

On November 28, 2005, a mysterious letter appeared on the Internet, which was supposedly signed by Uwilingiyimana and addressed to the Prosecutor[1542]. The letter accused ICTR prosecutors and investigators of coercing the defendant to lie about former Hutu authorities in order to confirm the Prosecution's allegations[1543]. The Office of the Prosecutor highlighted that the letter had not been delivered to any ICTR official and the cooperation of Uwilingiyimana had continued for many days after the date of the purported letter – November 5, 2005[1544]. In response to the letter and the accused's failure to attend his interviews, the *Uwilingiyimana* Trial Chamber unsealed the indictment, upon request of the Prosecution[1545]. On December 17, 2005, Belgian authorities found Uwilingiyimana's badly decomposed body in a canal in Brussels[1546]. Investigations were inconclusive as to the cause of his death[1547].

[1538] *Ibid*., para.32.
[1539] *Ibid*., para.23.
[1540] *The Prosecutor v. Juvénal Uwilingiyimana*, Prosecutor's Motion to Unseal the Indictment and Warrant of Arrest (Pursuant to Rule 53, Rules of Procedure and Evidence), ICTR, Trial Chamber I, Case no. ICTR-2005-83-I, 29 November 2005, para.2 [*The Prosecutor v. Juvénal Uwilingiyimana – Motion to Unseal the Indictment and Warrant of Arrest*].
[1541] *Ibid*., para.4.
[1542] *Ibid*., para.5.
[1543] COMBS (2007), *supra* note 529, p.110.
[1544] *The Prosecutor v. Juvénal Uwilingiyimana – Motion to Unseal the Indictment and Warrant of Arrest*, *supra* note 1540, para.5.
[1545] *The Prosecutor v. Juvénal Uwilingiyimana*, Decision on Prosecutor's Motion to Unseal the Indictment and Warrant of Arrest, ICTR, Trial Chamber I, Case no. ICTR-2005-83-I, 29 November 2005.
[1546] "Prosecutor's Statement Regarding the Death of ICTR Indictee Juvénal Uwilingiyimana", *ICTR Press release*, 23 December 2005. Available at: <http://unictr.irmct.org/en/news/prosecutor%E2%80%99s-statement-regarding-death-ictr-indictee-juv%C3%A9nal-uwilingiyimana>. Access on: November 26, 2018; SIMONS, Marlise. "Rwandan Who Cooperated With Tribunal Is Found Dead", *The New York Times*, 23 December 2005. Available at: <https://www.nytimes.com/2005/12/23/international/africa/rwandan-who-cooperated-with-tribunal-is-found-dead.html>. Access on: November 26, 2018; PFLANZ, Mike. "Rwandan ex-minister found dead in canal", *The Telegraph*, 24 December 2005. Available at: <https://www.telegraph.co.uk/news/worldnews/europe/belgium/1506263/Rwandan-ex-minister-found-dead-in-canal.html>. Access on: November 26, 2018; VASAGAR, Jeevan. "Body of genocide witness found in river", *The Guardian*, 24 December 2005. Available at: <https://www.theguardian.com/world/2005/dec/24/rwanda.warcrimes>. Access on: November 26, 2018.
[1547] COMBS (2007), *supra* note 529, p.110.

3.3 The Evolution of Plea-Bargaining at the ICTR: Some Remarks

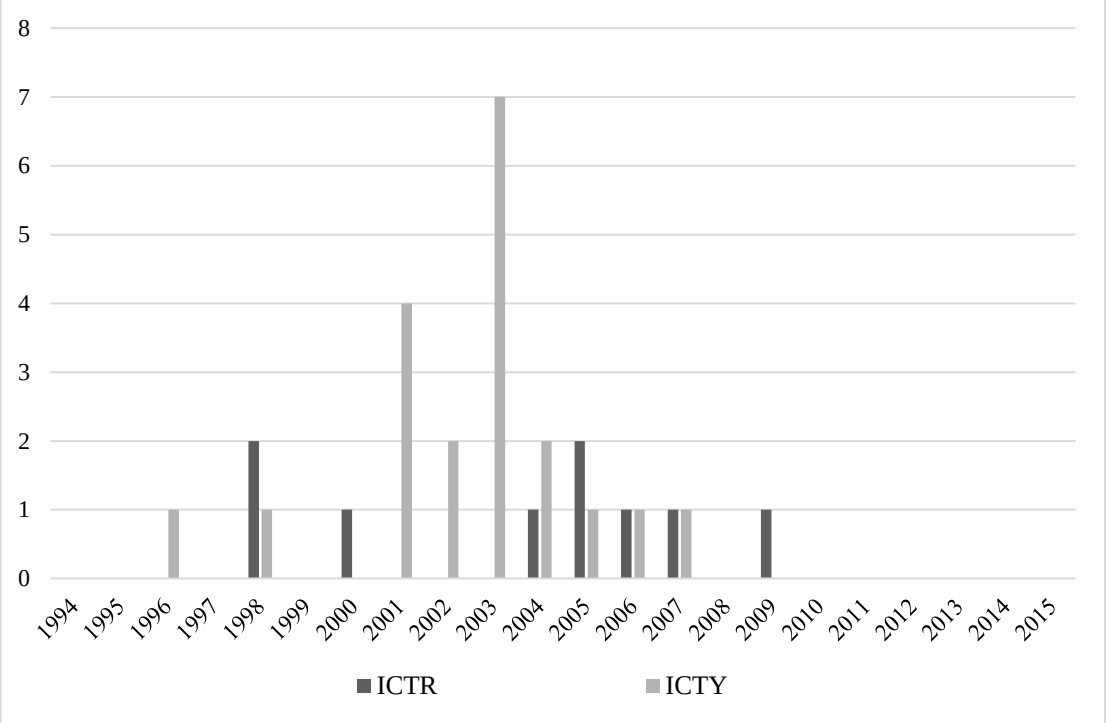
Even though the practice of plea-bargaining at both the ICTY and the ICTR had undergone dramatic changes[1548], each of these Tribunals had certain particularities that affected how this evolution on plea negotiations took place at The Hague and in Arusha. The first relevant difference concerns the defendants. The accused at the ICTR were particularly resistant to engage in plea negotiations, even when offered substantial sentence discounts[1549]. Their firm conviction that no genocide occurred in Rwanda and their community organization in the detention unit prevented most of them from entering guilty pleas and reaching plea agreements with the Prosecution[1550]. Graph 3, below, illustrates how admissions of guilt were sporadic and rare at the ICTR. In its 21 years of existence, only nine accused confessed their crimes and these confessions occurred mostly just once a year. Only 1998 and 2005 had two guilty pleas; all other years had only one or none.



Graph 3: Number of defendants who pleaded guilty per year at the ICTR[1551].

[1548] *Ibid.*
[1549] RAUXLOH, *supra* note 754, p.765-766; MCCLEERY, *supra* note 46, p.1106.
[1550] COMBS (2006), *supra* note 409, p.118-120.
[1551] Graph created by the author based on information from the official ICTR website. Cf.: <http://unictr.irmct.org/en/cases>. Access on: December 2, 2018.

While guilty pleas were intermittent at the ICTR, the ICTY's prosecutors managed to negotiate successfully a steady stream of such pleas[1552]. Graph 4, below, depicts this comparison between the two *ad hoc* tribunals. A feature that attracts attention is the gap between 2000 and 2004 at the ICTR. It discloses that the sentence lenience in the *Serushago* and *Ruggiu* cases was not enough to overcome the defendants' resolve and the initial strong resistance of the judges in the *Kambanda* case[1553]. At the same time, the ICTY had its most fertile period between 2000 and 2004: out of its 20 plea agreements, 15 of them were reached in those years.



Graph 4: Comparison of the number of defendants who pleaded guilty per year at the ICTY and ICTR[1554].

The obstinacy of the defendants, together with the blunder in the *Kambanda* case and the insistence of the UNSC in reducing the ICTR's caseload as soon as possible, created a challenge to the Prosecution. Therefore, it had to turn to more aggressive and even distortive forms of bargaining after 2004 (much more lenient than the ICTY's plea deals), in order to convince the defendants to negotiate such agreements[1555]. The

[1552] MCCLEERY, *supra* note 46, p.1106.
[1553] *Ibid.*, p.1105-1106.
[1554] Graph created by the author based on information from Graphs 2 and 3 of this thesis.
[1555] COMBS (2007), *supra* note 529, p.112.

prosecutors agreed to: (i) drop genocide charges[1556]; (ii) seek the acquittal of the accused in relation to those dropped charges, in order to avoid future prosecutions in Rwanda[1557]; (iii) significantly change the facts of the case in favor of the defendants[1558]; (iv) relieving them of the obligation to provide incriminating information on other accused[1559]; (v) recommend that the sentence should be served in Europe[1560], since most of the convicted defendants were serving their sentences in Mali, Benin and Senegal[1561]; and (vi) the transfer of a case from the ICTR to a favorable European national court[1562].

All those tempting promises and the possibility of a referral to Rwanda finally convinced some ICTR defendants to engage in plea negotiations[1563]. However, the prosecutors' considerable efforts to introduce plea-bargaining in a significant scale ended up unsuccessful[1564]. Even in this phase of aggressive bargaining, only six defendants decided to plead guilty[1565]. This particular failure of the Prosecution at the ICTR "highlight[ed] the complex nature of international plea bargaining and the substantial influence of factors that would play little or no role in the context of domestic crimes"[1566].

Like in the ICTY, the defendants at the ICTR stopped pleading guilty and engaging in negotiations with the Prosecution because the trial judges were not willing to enforce the plea agreements[1567]. For instance, Paul Bisengimana agreed to plead guilty to one charge of the indictment, expecting a sentence that would not surpass fourteen years' imprisonment and the acquittal of the remaining charges[1568]. However, his expectations were not fulfilled at all: he was sentenced to fifteen years in prison[1569] and can face trial

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[1556] *The Prosecutor v. Vincent Rutaganira*, *supra* note 1296, para.103; *The Prosecutor v. Juvénal Rugambarara*, *supra* note 216, paras.2-3; *The Prosecutor v. Joseph Nzabirinda*, *supra* note 216, para.4.
[1557] *The Prosecutor v. Vincent Rutaganira*, *ibid*.; *The Prosecutor v. Paul Bisengimana*, *supra* note 216, para.229.
[1558] *The Prosecutor v. Paul Bisengimana*, *ibid*., para.12; *The Prosecutor v. Juvénal Rugambarara*, *supra* note 216, para.3.
[1559] *The Prosecutor v. Paul Bisengimana*, *ibid*., para.127.
[1560] *The Prosecutor v. Paul Bisengimana*, *ibid*., para.187; *The Prosecutor v. Juvénal Rugambarara*, *supra* note 216, para.49; *The Prosecutor v. Joseph Nzabirinda*, *supra* note 216, para.97; *The Prosecutor v. Vincent Rutaganira*, Transcript of Session held on January 17, 2005, ICTR, Trial Chamber III, Case no. ICTR-95-1C-T, p.35.
[1561] Cf.: "Key Figures of ICTR Cases", last update in September 2018, p.2. <http://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf>. Access on: December 3, 2018.
[1562] *The Prosecutor v. Michel Bagaragaza*, *supra* note 216, para.2.
[1563] RAUXLOH, *supra* note 754, p.765.
[1564] *Ibid*., p.762; COMBS (2006), *supra* note 409, p.102.
[1565] Those six defendants were Vincent Rutaganira, Paul Bisengimana, Joseph Serugendo, Michel Bagaragaza, Juvénal Rugambarara and Joseph Nzabirinda.
[1566] COMBS (2006), *supra* note 409, p.102.
[1567] *Ibid*.; p.99-100; COMBS (2007), *supra* note 529, p.91.
[1568] *The Prosecutor v. Paul Bisengimana*, *supra* note 216, paras.12 and 184.
[1569] *Ibid*., para.203.

again at any time before Rwanda's national courts because the *Bisengimana* Trial Chamber refused to acquit him of the dropped counts[1570]. Likewise, the attempt to shield Nzabirinda from a future criminal prosecution in Rwanda ended up unsuccessful as well[1571].

In the *Bagaragaza* case, the judges repeatedly rejected several outcomes of plea negotiations. The Prosecutor's initial promise to send the case to trial in a favorable European State was rejected by the Trial Chamber twice[1572]. In the end, the Prosecution failed to deliver its end of the bargain and Bagaragaza was prosecuted and convicted at the ICTR[1573]. During his trial, he was detained in solitary confinement in Arusha[1574] because the judges denied the joint Prosecution-defense request for his transfer to the ICTY's detention unit[1575]. The Trial Chamber dismissed the first plea agreement he reached with the Prosecution for lack of sufficient corroborating evidence[1576]. The Chamber accepted Bagaragaza's second plea deal only after he provided an affidavit with incriminating information[1577]. Despite all this resistance from the judges, they accepted the agreed-upon sentence recommendation of 6 to 10 years[1578] and sentenced the defendant to 8 years' imprisonment[1579]. The reluctance of the *Bagaragaza* Trial Chamber to enforce the bargains was the final straw to the defendants. Accordingly, Bagaragaza was the ninth and last accused at the ICTR to enter a plea of guilty.

The ICTR had another peculiar element that could have contributed to the deterrence of a culture of plea-bargaining: Rwanda[1580]. As Rwandan internal law is based on the French and Belgian legal systems, which are both civil law States, Rwanda does not have a tradition of plea-bargaining[1581]. Thus, the Rwandese government condemned in harsh terms any blatant leniency rising out of plea negotiations in the ICTR[1582]. To make matters worse, the Tribunal was in an awkward position in relation to Rwanda: it could not antagonize the Rwandese government because its capability to conduct the trials

[1570] *Ibid*., para.231.
[1571] *The Prosecutor v. Joseph Nzabirinda, supra* note 216, paras.46-47.
[1572] *The Prosecutor v. Michel Bagaragaza, supra* note 216, paras.4 and 6.
[1573] *Ibid*., para.44.
[1574] *Ibid*., para.39.
[1575] *Ibid*., footnote n. 11.
[1576] *Ibid*., para.8.
[1577] *Ibid*., para.10.
[1578] *Ibid*., para.41.
[1579] *Ibid*., para.44.
[1580] COMBS (2007), *supra* note 529, p.112.
[1581] RAUXLOH, *supra* note 754, p.761.
[1582] COMBS (2007), *supra* note 529, p.112.

relied heavily on Rwanda's willingness to cooperate[1583]. Although the former-Yugoslavia and the States created out of its fragmentation had a civil law tradition as well[1584], the ICTY could count on the assistance of NATO forces present in the area where the crimes were committed[1585]. The ICTR, however, needed the indispensable cooperation of Rwanda to work properly, and any of its decisions that displeased the Rwandese government could hamper such cooperation[1586].

One example was the so-called "witnesses crisis"[1587]. In December 2000, Prosecutor Carla Del Ponte publicly announced a full-fledged investigation into the RPF's crimes during the genocide[1588]. This investigation and the prospect of indictments against the RPF's members infuriated Rwanda[1589]. In response, Kigali instituted a travel ban that blocked witnesses selected by the Prosecution to travel to Arusha in order to testify in two cases at the ICTR[1590]. Without witnesses, the Tribunal was forced to adjourn the trials for two months[1591]. In the end, Rwanda suspended the travel restrictions, but no member of the RPF was ever indicted by the ICTR[1592].

Another moment of crisis followed the ICTR's decision to dismiss the indictment and to release Jean-Bosco Barayagwiza, one of the main planers of the genocide, as reparation for violations of his procedural rights[1593]. In response, the Rwandese government abruptly ceased any cooperation with the ICTR, including refusing Del Ponte

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[1583] *Ibid*.
[1584] RAUXLOH, *supra* note 754, p.761.
[1585] MCDONALD, Gabrielle Kirk. "Problems, Obstacles and Achievements of the ICTY", *Journal of International Criminal Justice*, vol.2, n.2, p.558-571, 2004, p.564-565.
[1586] COMBS (2007), *supra* note 529, p.112.
[1587] MCGREAL, Chris. "Witness boycott brings Rwandan genocide trials to a halt", *The Guardian*, 29 July 2002. Available at: https://www.theguardian.com/world/2002/jul/29/chrismcgreal>. Access on: December 2, 2018; "General Rusatira's Release Heightens Tension Between Rwanda and the ICTR", *Hirondelle News Agency*, 30 November 2001. Available at: <https://www.justiceinfo.net/en/hirondelle-news/16862-en-en-general-rusatiras-release-heightens-tension-between-rwanda-and-the-ictr76287628.html>. Access on: December 2, 2018.
[1588] "Rwanda: Del Ponte addresses alleged RPF massacres with Kagame", *ReliefWeb*, 14 December 2000. Available at: <https://reliefweb.int/report/rwanda/rwanda-del-ponte-addresses-alleged-rpf-massacres-kagame>. Access on: December 1, 2018; "Carla Del Ponte Tells of Her Attempts to Investigate RPF in her New Book", *Hirondelle News Agency*, 30 November 2001. Available at: <https://www.justiceinfo.net/en/component/k2/19965-en-en-020408-ictrrwanda-carla-del-ponte-tells-of-her-attempts-to-investigate-rpf-in-her-new-book1076210762.html>. Access on: December 1, 2018.
[1589] PESKIN, Victor. "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *Journal of Human Rights*, vol.4, n.2, p.213-231, 2005, p.225.
[1590] *Ibid.*
[1591] *Ibid.*
[1592] *Ibid.*
[1593] COMBS (2007), *supra* note 529, p.112.

a visa to travel to Rwanda[1594]. Relations returned to normal only after a new decision of the Appeals Chamber reestablished the proceedings against Barayagwiza[1595].

In one interview, Del Ponte commented on the influence of Rwanda over the ICTR: "If I don't get cooperation from Rwanda, […] I can first open the door at the detention center and set them [the defendants] all free and then second I can close the door to my office because without them I cannot do anything at all"[1596]. One of the most symbolic power moves of Rwanda was the dismissal of Del Ponte from office, in 2003, at the request of President Paul Kagame, due to his dissatisfaction with her investigations into the RPF's crimes[1597]. Accordingly, one could reasonably assume that the trial chambers' refusals to accept the outcome of the plea negotiations in the *Bisengimana*, *Bagaragaza*, *Nzabirinda* and *Rugambarara* cases could come, at least in part, from the need to placate Rwanda[1598].

Two main lessons come from the ICTR's experience with plea deals, especially for lawyers and prosecutors at the ICC. First, plea-bargaining is a practice that cannot be used only in isolated cases; the establishment of a culture of negotiated justice depends on a long-term strategy[1599]. Second, substantial concessions, especially those related to the facts of the case and the sentence, can spark a judicial backlash and trigger vociferous criticism[1600]. Hence, judges can refuse to enforce the plea agreements, which undermines the authority of the prosecutors to conduct future negotiations and to make reliable promises to the accused[1601]. In addition, blatant concessions can threaten the credibility

[1594] FISHER, Ian. "Rwanda Refuses to Grant a Visa for U.N. Tribunal's Prosecutor", *The New York Times*, 23 November 1999. Available at: <https://www.nytimes.com/1999/11/23/world/rwanda-refuses-to-grant-a-visa-for-un-tribunal-s-prosecutor.html>. Access on: December 2, 2018.
[1595] COMBS (2007), *supra* note 529, p.112.
[1596] *Ibid.*
[1597] HOOPER, John. "'I was sacked as Rwanda genocide prosecutor for challenging president', says Del Ponte", *The Guardian*, 13 September 2003. Available at: <https://www.theguardian.com/world/2003/sep/13/johnhooper>. Access on: December 2, 2018; CASTLE, Stephen. "Del Ponte fights to keep job as chief prosecutor in Rwanda genocide tribunal", *Independent*, 28 July 2003. Available at: <https://www.independent.co.uk/news/world/politics/del-ponte-fights-to-keep-job-as-chief-prosecutor-in-rwanda-genocide-tribunal-97902.html>. Access on: December 2, 2018; "Rwanda: Carla Del Ponte Replaced as ICTR Prosecutor", *Hirondelle News Agency*, 29 August 2003. Available at: <https://allafrica.com/stories/200308290746.html>. Access on: December 2, 2018; EDWARDS, Steven. "Del Ponte Says UN Caved to Rwandan Pressure", *Global Policy Forum*, 17 September 2003. Available at: <https://www.globalpolicy.org/component/content/article/163/29047.html>. Access on: December 2, 2018.
[1598] COMBS (2007), *supra* note 529, p.112.
[1599] RAUXLOH, *supra* note 754, p.763.
[1600] COMBS (2007), *supra* note 529, p.91.
[1601] *Ibid.*

of the tribunal; trigger criticism from States and other stakeholders; and, more seriously, reduce the States' willingness to cooperate[1602].

4 PLEA-BARGAINING AT THE ICC

The thesis will now evaluate the practice of plea-bargaining at the ICC. Firstly, it will describe the process of creation of this Court. Secondly, it will focus on the drafting history of Article 65 of the Rome Statute, which regulates the trial proceedings after a defendant enters an admission of guilt. Lastly, the thesis will address the *Al Mahdi* case, which is the so far only guilty plea case before the ICC. The assessment of this particular case aims at verifying, firstly, whether Al Mahdi's plea agreement was a good deal for him in terms of sentence discount and, secondly, whether the case can bring some light to what can one expect for the future of plea-bargaining at the ICC.

4.1 Background: The Long and Bumpy Road Heading to the Creation of the ICC

The various versions of the historical evolution of International Criminal Law often have one thing in common: they describe a linear chain of events from Nuremberg, in 1945, to The Hague, in 2002, the year the ICC Rome Statute entered into force. In fact, books and papers on this issue often have something like this in their titles: "from the Nuremberg to The Hague"[1603]. However, this linear narrative can be deceiving.

No one can deny that the trials in Nuremberg were a breakthrough for international criminal justice[1604]. Despite the criticism from German nationals[1605] and contemporary

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[1602] *Ibid.*

[1603] SANDS, Philippe (ed.). *From Nuremberg to the Hague: The Future of International Criminal Justice*, Cambridge: Cambridge University Press, 2003; KOI, Mata. "From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law", *Auckland University Law Review*, vol.14, p.81-114, 2008; KRESS, Claus. "Versailles-Nuremberg-The Hague: Germany and International Criminal Law", *The International Lawyer*, vol.40, n.1, p.15-39, 2006; FERREIRA GOMES, Juan Pablo. "De Nuremberg a Haia: Uma Análise Histórica Sobre o Desenvolvimento dos Tribunais Internacionais Penais", *Revista do Instituto Brasileiro de Direitos Humanos*, vol.10, n.10, p.169-182, 2016. One can find other variations of titles, but all with the same linear construction: CASSESE, Antonio. "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court", p.3-19, p.3. In CASSESE, Antonio; GAETA, Paola; and JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court – A Commentary*, vol.II, Oxford: Oxford University Press, 2002; BASSIOUNI, M. Cherif. "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", *Harvard Human Rights Journal*, vol.10, p.11-62, 1997; JUNIOR, Arno Dal Ri and ZEN, Cássio Eduardo. "Entre Versailles e Roma - A instituição de uma jurisdição penal internacional permanente como virada paradigmática na história do Direito Internacional", p.1-27. In STEINER, Sylvia Helena and BRANT, Leonardo Nemer Caldeira (eds.). *O Tribunal Penal Internacional: Comentários ao Estatuto de Roma*, Belo Horizonte: Del Rey, 2016.

[1604] WERLE, *supra* note 398, p.7.

[1605] TOMUSCHAT, *supra* note 75, p.832-834.

scholarship[1606], the Nuremberg trial was truly "revolutionary"[1607] because it was the first time in history when individuals responsible for violations of International Law were prosecuted and convicted before an international court[1608]. The Tribunal itself concluded that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[1609]. Moreover, the American Chief-Prosecutor of the Nuremberg Tribunal Robert H. Jackson said: "The principles of the [London Charter[1610]], no less than its wide acceptance, establish its significance as a step in the evolution of a law-governed society of nations"[1611].

The London Charter and the Tribunal's judgment have brought innovations that "form the nucleus of substantive international criminal law"[1612]. These basic and fundamental principles include: (i) the inapplicability of immunity of head of States and other government officials in proceedings at international criminal courts[1613]; (ii) the mere

[1606] WERLE, *supra* note 398, p.9-11; CASSESE *et al.*, *supra* note 12, p.257-258; KITTICHAISAREE, Kriangsak. *International Criminal Law*, New York: Oxford University Press, 2002, p.18-20.
[1607] WERLE, *ibid.*, p.7; TOMUSCHAT, *supra* note 75, p.830.
[1608] CASSESE *et al.*, *supra* note 12, p.258; CRYER, Robert. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005, p.39.
[1609] *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, 1 October 1946, p.447.
[1610] The London Charter is the treaty adopted in the London Conference on August 8, 1945, to create and regulate the activities of the Nuremberg Tribunal.
[1611] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*, US Department of State, Publication no. 3080, International Organization and Conference Series II, 1949, p.vii.
[1612] WERLE, *supra* note 398, p.7.
[1613] *Charter of the Nuremberg Tribunal*, *supra* note 78, art.7. This provision states: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment". Replicating this rule, article 27 of the ICC Rome Statute states: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

compliance with superior orders does not exempt criminal liability[1614]; and (iii) the obligation to ensure due process of law to defendants[1615].

Despite the relevant progress made in Nuremberg, the four decades following the trial did not have significant advancements in the institutional realm of International Criminal Law[1616]. In fact, this period is paradoxical[1617]: the UNGA adopted a series of resolutions to consolidate the principles established in the Nuremberg Era[1618]; conversely, States lacked the will and ability to apply these principles in criminal procedures[1619]. Hence, the history of International Criminal Law is not linear; it is not a process of constant development moving forward. Between the early achievements in Nuremberg

[1614] *Charter of the Nuremberg Tribunal, ibid.,* art.8. This provision states: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Replicating this rule, article 33 of the ICC Rome Statute states: "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful".

[1615] *Charter of the Nuremberg Tribunal, ibid.,* art.16. This provision states: "In order to ensure fair trial for the Defendants, the following procedure shall be followed: (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial; (b) During any preliminary examination or trial of a Defendant he will have the right to give any explanation relevant to the charges made against him; (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands; (d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel; and (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution". Replicating this rule, article 67 of the ICC Rome Statute states: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially". After that, article 67 lists several rights of the accused.

[1616] WERLE, *supra* note 398, p.7 and 14-15.

[1617] *Ibid.,* p.15.

[1618] *Resolution of the UNGA no. 95(I) ("Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal"),* UNDoc.A/RES/95(I), 11 December 1946; *Resolution of the UNGA no. 177(II) ("Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal"),* UNDoc.A/RES/177(II), 21 November 1947; *Resolution of the UNGA no. 897(IX) ("Draft Code of Offences against the Peace and Security of Mankind"),* UNDoc.A/RES/897(IX), 4 December 1954; *Resolution of the UNGA no. 36/106 ("Draft Code of Offences against the Peace and Security of Mankind"),* UNDoc.A/RES/36/106, 10 December 1981; *Resolution of the UNGA no. 260(III)B ("Study by the International Law Commission of the question of an international criminal jurisdiction"),* UNDoc.A/RES/260(III)B, 9 December 1948; *Resolution of the UNGA no. 489(V) ("International criminal jurisdiction"),* UNDoc.A/RES/489(V), 12 December 1950; *Resolution of the UNGA no.* 687(VII) *("International criminal jurisdiction"),* UNDoc.A/RES/687(VII), 5 December 1952; *Resolution of the UNGA no. 898(IX) ("International criminal jurisdiction"),* UNDoc.A/RES/898(IX), 14 December 1954; *Resolution of the UNGA no. 1187(XII) ("International criminal jurisdiction"),* UNDoc.A/RES/1187(XII), 11 December 1957.

[1619] WERLE, *supra* note 398, p.15.

and the consolidation at The Hague, with the creation of the ICC[1620], there was a period lasting four decades with setbacks and lethargy.

These four decades served as a confirmation and standstill phase due to the Cold War[1621]. During this period, there was widespread disagreement in the UN, especially in the UNSC[1622], because rivalry, distrust and mutual suspicion prevented the normal flow of friendly relations and cooperation between capitalist and socialist States[1623]. Moreover, the two superpowers (US and the Soviet Union) assumed the role of policemen and guarantors in their respective sphere of influence to the detriment of multilateral forums of debate and enforcement[1624]. This framework barred the growing of international criminal institutions[1625].

However, the early efforts to create a permanent international criminal court began just a few years after the Nuremberg Trial. On December 9, 1948, the UNGA Resolution 260B(III) invited the ILC "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes"[1626]. The ILC appointed two special rapporteurs to address this question: Ricardo Joaquín Alfaro (Panama) and Emil Sandström (Sweden)[1627]. In 1950, each of them delivered a report with conflicting conclusions. While Sandström affirmed that "a permanent judicial criminal organ established in the actual organization of the international community would be impaired by very serious defects and would do more harm than good"[1628], Joaquín Alfaro favored the creation of the court[1629].

Following Alfaro's recommendation, the UNGA created a committee of seventeen States and entrusted them with the task of drafting the statute of an international

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[1620] CASSESE, Antonio. "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court", p.3-19, p.3. In CASSESE, Antonio; GAETA, Paola; and JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court – A Commentary*, vol.II, Oxford: Oxford University Press, 2002.
[1621] WERLE, *supra* note 398, p.14.
[1622] CONFORTI, Benedetto. *The Law and Practice of the United Nations*, 3rd ed., Leiden: Martinus Nijhoff Publishers, 2005, p.177.
[1623] CASSESE *et al.*, *supra* note 12, p.258.
[1624] *Ibid.*
[1625] JAPIASSÚ, *supra* note 325, p.83.
[1626] *Resolution of the UNGA no. 260(III)B ("Study by the International Law Commission of the question of an international criminal jurisdiction"),* UNDoc.A/RES/260(III)B, 9 December 1948.
[1627] RHEA, Harry. "The Evolution of International Criminal Tribunals", *International Journal of Criminology and Sociology*, vol.6, p.52-64, 2017, p.59.
[1628] ILC. "Report on the Question of International Criminal Jurisdiction by Special Rapporteur Emil Sandström", UNDoc.A/CN.4/20, *Yearbook of the International Law Commission,* Vol. II, 30 March 1950, p.23.
[1629] ILC. "Report on the Question of International Criminal Jurisdiction by Special Rapporteur Ricardo J. Alfaro", UNDoc.A/CN.4/15 and Corr.1, *Yearbook of the International Law Commission,* Vol. II, 3 March 1950, p.17.

criminal court[1630]. In 1951, the committee presented its first draft[1631]. A second committee, consisting again of representatives from seventeen States, revised the document[1632] and delivered its final draft statute in 1953[1633]. The UNGA, influenced by political tensions associated with the Cold War[1634], decided in 1954 to postpone consideration of the draft until the adoption of an acceptable definition of aggression[1635]. In 1957, the UNGA postponed the matter once again for the same reason – absence of consensus on the definition of aggression[1636]. Even though the UNGA eventually adopted a resolution defining aggression in 1974[1637], the work on the proposed international criminal tribunal did not resume until the end of the Cold War[1638].

The lack of political will to create the so-expected international criminal court resulted in some skepticism about the future of International Criminal Law. For instance, Ian Brownlie wrote in 1990: "the likelihood of setting up an international criminal court is very remote"[1639]. However, a number of scholars insisted on keeping alive the project of an international criminal court, especially Benjamin B. Ferencz[1640], Cherif Bassiouni[1641] and Robert Kurt Woetzel[1642]. In the end, their persistence paid off. In 1993, the UNSC created the first international criminal court since the Nuremberg Era: the ICTY[1643]. In the following year, the UNSC created another international penal court: the ICTR[1644].

[1630] *Resolution of the UNGA no. 489(V) ("International criminal jurisdiction"),* UNDoc.A/RES/489(V), 12 December 1950.
[1631] *Draft Statute for an International Criminal Court,* UNDoc.A/AC.48/4, 4 September 1951. Reprinted in *American Journal of International Law,* vol.46, no.1, p.1-11, 1952, p.1-11.
[1632] *Resolution of the UNGA no. 687(VII) ("International criminal jurisdiction"),* UNDoc.A/RES/687(VII), 5 December 1952.
[1633] *Resolution of the UNGA no. 898(IX) ("International criminal jurisdiction"),* UNDoc.A/RES/898(IX), 14 December 1954 [*Resolution of the UNGA no. 898(IX)*].
[1634] SCHABAS, William. *An Introduction to the International Criminal Court*, 3rd ed., Cambridge: Cambridge University Press, 2007, p.9 [SCHABAS (2007)].
[1635] *Resolution of the UNGA no. 898(IX), supra* note 1633.
[1636] *Resolution of the UNGA no. 1187(XII) ("International criminal jurisdiction"),* UNDoc.A/RES/1187(XII), 11 December 1957.
[1637] *Resolution of the UNGA no. 3314 (XXIX) ("Definition of Aggression"),* UNDoc.A/RES/3314, 14 December 1974.
[1638] SCHABAS (2007), *supra* note 1634, p.9.
[1639] BROWNLIE, Ian. *Principles of Public International Law,* 4th ed., Oxford: Clarendon Press, 1990, p.563-564.
[1640] FERENCZ, Benjamin B. "International Criminal Code and Court: Where They Stand and Where They're Going", *Columbia Journal of Transnational Law*, vol.30, p.375-399, 1992, p.275-299; FERENCZ, Benjamin B. *An International Criminal Court: A Step Toward World Peace - A Documentary History and Analysis*, New York: Oceana Publications, 1980.
[1641] BASSIOUNI, M. Cherif. *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal,* Leiden: Martinus Nijhoff Publishers, 1987.
[1642] STONE, Julius and WOETZEL, Robert K. *Toward a Feasible International Criminal Court*. Geneva: World Peace Through Law Center, 1970.
[1643] Cf. section 2.1 of the present thesis.
[1644] Cf. section 3.1 of the present thesis.

The kick-off to re-initiate the debates at the UN to create a permanent international criminal court came from Trinidad and Tobago[1645], one of the Caribbean States plagued by narcotics trafficking and related transnational crime[1646]. In 1989, it tabled a draft resolution in the UNGA, inviting the ILC to restart the studies on international criminal responsibility of individuals, specifically for acts of international trafficking in narcotic drugs[1647]. In Resolutions 45/41 of November 28, 1990 and 46/54 of December 9, 1991, the UNGA expanded the debate proposed by Trinidad and Tobago and invited the ILC to consider the general question of establishing an international criminal court[1648]. In 1992 and 1993, the UNGA requested the ILC to elaborate the draft statute for such a court as a matter of priority[1649]. Under the supervision of special rapporteur James Crawford, the ILC delivered an initial draft statute in 1993[1650]. In the next year, the Commission submitted its final draft to the UNGA[1651].

On December 9, 1994, UNGA established the *Ad Hoc* Committee on the Establishment of an International Criminal Court to assess the ILC's draft and to consider the possibility of convening an international conference to further discuss the draft and adopt it as a treaty[1652]. The *Ad Hoc* Committee met in two sessions[1653], in which it reviewed the draft and decided to recommend an international conference[1654]. The different views raised during the meetings motivated the UNGA to create the Preparatory Committee on the Establishment of an International Criminal Court, whose membership

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[1645] LIMA, Renata Mantovani de and BRINA, Marina Martins da Costa. *O Tribunal Penal Internacional*, Belo Horizonte: Del Rey, 2006, p.45.
[1646] SCHABAS (2007), *supra* note 1634, p.9.
[1647] *Resolution of the UNGA no. 44/39 ("International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities"),* UNDoc.A/RES/44/39, 4 December 1989.
[1648] *Resolution of the UNGA no. 45/41,* UNDoc.A/RES/45/41, 28 November 1990; *Resolution of the UNGA no. 46/54,* UNDoc.A/RES/46/54, 28 November 1990.
[1649] *Resolution of the UNGA no. 47/33,* UNDoc.A/RES/47/33, 25 November 1992; *Resolution of the UNGA no. 48/31,* UNDoc.A/RES/48/31, 9 December 1993.
[1650] *Revised Report of the Working Group on a Draft Statute for International Criminal Court*, UNDoc.A/CN.4/L.490 and Add.1, *Yearbook of the International Law Commission,* vol. II, Part Two, 1993.
[1651] ILC. "Draft Statute for an International Criminal Court with commentaries", *Yearbook of the International Law Commission,* vol. II, Part Two, 1994 [*ILC's Draft Statute for an International Criminal Court with Commentaries*]; BERG, Bradley E. "The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure", *Case Western Reserve Journal of International Law,* vol.28, p.221-264, 1996, p.221-264.
[1652] *Resolution of the UNGA no. 49/53,* UNDoc.A/RES/49/53, 9 December 1994.
[1653] The *Ad Hoc* Committee's two sessions were held from 3 to 13 April 1995 and from 14 to 25 August 1995.
[1654] *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,* UNDoc.A/CONF.183/10, Rome, 17 July 1998, para.5 [*Final Act of the Rome Conference*].

encompassed all members of the UN[1655]. The Committee's goal was to further discuss the ILC's draft and prepare a new consolidated version that would have a chance of being accepted at the future conference[1656]. The issues were so complex that the Committee held six sessions, in two years, to debate all points and create the new draft statute[1657].

Finally, in its Resolution 51/207 of December 17, 1996, the UNGA decided to hold a diplomatic conference in 1998, aiming at finalizing and adopting a treaty on the establishment of an international criminal court[1658]. The UNGA eventually accepted Italy's offer to host the conference and decided to hold the event in Rome, from June 15 to July 17, 1998[1659]. All 160 State delegations met at the headquarters of the UN Food and Agriculture Organization[1660]. In the last day of the conference, they adopted the Rome Statute of the International Criminal Court[1661]. It entered into force approximately four years later, on July 1, 2002, creating the first and only permanent international criminal tribunal in history.

4.2 Drafting History of the Rome Statute's Article 65 (Proceedings on an Admission of Guilt)

The issue of guilty pleas and, more specifically, plea-bargaining were the source of strong disagreement throughout the whole negotiation process of the Rome Statute[1662]. To jurists in many parts of the world, allowing a prosecutor to negotiate with a defendant the terms of a guilty plea is profoundly offensive and unacceptable[1663]. However, article 65 of the Rome Statute contemplates such a possibility while regulating the trial proceedings following a defendant's admission of guilt[1664]. The entire content of article 65 follows:

> 1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
>
> > (a) The accused understands the nature and consequences of the admission of guilt;

[1655] JAPIASSÚ, *supra* note 325, p.100.
[1656] *Final Act of the Rome Conference*, *supra* note 1654, para.7.
[1657] The six sessions were held in the following dates: 25 March to 12 April 1996; 12 to 30 August 1996; 11 to 21 February 1997; 4 to 15 August 1997; 1 to 12 December 1997; and 16 March to 3 April 1998.
[1658] *Resolution of the UNGA no. 51/207,* UNDoc.A/RES/51/207, 17 December 1996.
[1659] *Resolution of the UNGA no. 52/160,* UNDoc.A/RES/52/160, 15 December 1997.
[1660] *Final Act of the Rome Conference*, *supra* note 1654, paras.13-14.
[1661] *ICC Rome Statute*, *supra* note 9.
[1662] OLUPONA, *supra* note 318, p.923.
[1663] SCHABAS (2010), *supra* note 98, p.775.
[1664] *Ibid.*

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court[1665].

While preparing its version of the draft statute for the future international criminal court, the ILC was notably restrained on the issue of guilty pleas. Article 38(1)(d) of its draft simply stated: "at the commencement of the trial, the Trial Chamber shall: […] (d) allow the accused to enter a plea of guilty or not guilty"[1666]. The draft contained no criteria for the validity of such a plea; it did not specify how a confession would affect the trial proceedings; and there was no provision on plea negotiations. The ILC justified this

[1665] *ICC Rome Statute*, *supra* note 9, art.65.
[1666] ILC. "Draft Statute for an International Criminal Court", *Yearbook of the International Law Commission,* vol. II, Part Two, 1994, art.38(1)(d).

simplistic approach by pointing to the worldwide diversity regarding guilty pleas in the domestic laws of the States[1667].

As the ILC wrote and delivered its draft before the ICTY's *Erdemović* case, it had no international decision on this matter to guide its work. It was a natural choice to rely heavily on the domestic laws of States. Moreover, in order to preserve the balance of the draft, not leading to a particular legal system to the detriment of others, it decided to include the possibility of an accused to plead guilty or not guilty, but only if he wants to do so[1668]. No defendant would be required by the judges to enter a plea at the commencement of the trial[1669]. In fact, the ILC determined that "the court should ascertain in advance whether an accused does wish to enter a plea: if not, the matter would simply not be raised at the trial"[1670].

In the absence of a plea, the defendant would be presumed not guilty, and the trial would simply proceed[1671]. On the other hand, if the accused decided to enter a plea of guilty, he would not necessarily receive a summary trial nor be automatically convicted[1672]. Although the ILC left open for the chambers to decide how to proceed in a guilty-plea case[1673], it required the judges to, at least, hear some allegations by the Prosecution in order to ensure "that the guilty plea was freely entered and [was] reliable"[1674]. Thus, to guarantee a truthful historical record, the judges should ensure that there was enough evidence to support a conviction[1675]. In addition, in order to protect the rights of the accused, the judges should verify if the accused was coerced or deceived to admit his guilty[1676]. In cases where the defendant was not represented by a lawyer, the ILC believed to be "usually […] prudent to ignore the plea and to conduct the proceedings as far as possible in the same way as if they were being vigorously defended"[1677].

[1667] *ILC's Draft Statute for an International Criminal Court with Commentaries*, *supra* note 1651, p.55. The ILC portrayed this worldwide discrepancy in the following terms: "in some legal systems there is no provision at all for such a plea; in some others, an accused is actually required to plead. In some legal systems a guilty plea substantially shortens the trial, and avoids the need for any evidence to be called on the question of culpability; in others it makes very little difference to the course of the proceedings".
[1668] *Ibid.*
[1669] *Ibid.*
[1670] *Ibid.*
[1671] *Ibid.*
[1672] *Ibid.*
[1673] *Ibid.*
[1674] *Ibid.*
[1675] *Ibid.*
[1676] *Ibid.*
[1677] *Ibid.*

The ILC's simplistic approach was criticized in the *Ad Hoc* Committee on the Establishment of an International Criminal Court[1678]. In fact, the Committee's report indicated that "a number of delegations reiterated, in the context of [article 38(1)(d)], their view that the draft was not explicit enough on procedures and that more details should be provided, possibly through the rules of the court"[1679]. Some States argued that the differences between civil law and common law systems demanded a clear specification, in the statute, of the effects a guilty plea would have in the trial[1680]. The *Ad Hoc* Committee also concluded that "in view of the gravity of the crimes within the jurisdiction of the court, it would be inappropriate to permit plea bargaining"[1681].

Article 38(1)(d) also gave rise to strong debate at the Preparatory Committee on the Establishment of an International Criminal Court, especially due to the fundamental differences on guilty pleas in civil law and common law States[1682]. In summary, three positions formed in the Preparatory Committee. The first one – sustained by common law States – claimed that all defendants should plead guilty or not guilty at the beginning of the trial[1683]. Those who pleaded guilty would admit their crimes and accept their sentence[1684]. The procedural effect of such plea would be to avoid a regular trial, with the additional outcomes of sparing victims and witnesses of any further suffering and saving the Court's money and time[1685]. Moreover, the Court would be permitted to take the guilty plea into account in sentencing the accused[1686]. If the defendant decided to plead not guilty, he would face a regular trial, in light of all procedural guarantees[1687]. Finally, the Court would not be bound to accept a plea or a recommendation for leniency by the defense or the Prosecution[1688].

The second approach – sustained by civil law States – agreed that defendants should be able to acknowledge their crimes before the Court and such admission could

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[1678] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UNDoc.A/50/22, 6 September 1995, paras.169-170. Available at: <https://www.legal-tools.org/doc/b50da8/pdf/>. Access on: November 30, 2018.
[1679] *Ibid*., para.169.
[1680] *Ibid*., para.170.
[1681] *Ibid*.
[1682] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I: Proceedings of the Preparatory Committee during March-April and August 1996, UNDoc.A/51/22, 13 September 1996, para.261-264. Available at: <https://www.legal-tools.org/doc/e75432/pdf/>. Access on: November 30, 2018.
[1683] *Ibid*., para.261.
[1684] *Ibid*.
[1685] *Ibid*.
[1686] *Ibid*.
[1687] *Ibid*.
[1688] *Ibid*.

be included into evidence[1689]. However, even when the accused pleads guilty, the Court still would have the duty to determine his guilt or innocence by means of a full trial, due to the seriousness of the crimes and the interests of the victims and of the international community as a whole[1690]. The Court would not be authorized to convict a defendant based solely on his admission of guilt or a single testimony[1691]. The statute should have a minimum evidentiary rule applicable in guilty-plea cases, and the Court should be subject to a rule of legal reasoning for its decisions[1692]. Finally, some delegations argued for the deletion of article 38(1)(d) entirely because it could contradict the constitutions of some States, a fact that would prevent their ratification of the statute[1693].

The third approach defended the need to cope with the disparities between the different legal systems, by finding common denominators[1694]. It suggested that, when the accused admits his guilt, the trial chamber would conduct an abbreviated proceeding to hear a summary of the Prosecution case, in order to verify the existence of the facts the defendant pleaded guilty to[1695]. The Court would accept the admission of guilt only if three criteria were fulfilled: (i) the accused fully understood the nature and consequences of his confession; (ii) the admission of guilt was made voluntarily, without coercion or undue influence; and (iii) there was enough evidence supporting the admission[1696]. The judges would be permitted to request additional evidence, conduct an expedited proceeding or reject the plea of guilty and conduct a full trial[1697].

Plea-bargaining was also a reason of disagreement at the Preparatory Committee[1698]. Some States argued that such a practice should not be admitted "given the fact that it is in contradiction with the structure of the Court and also given the serious nature of the crimes which affected the interests of the international community as a whole"[1699]. Nevertheless, some delegations argued that not every guilty plea results in plea-bargaining and, thus, they could be accepted[1700].

[1689] *Ibid*., para.262.
[1690] *Ibid*.
[1691] *Ibid*.
[1692] *Ibid*.
[1693] *Ibid*.
[1694] *Ibid*., para.263.
[1695] *Ibid*.
[1696] *Ibid*.
[1697] *Ibid*.
[1698] *Ibid*., para.264.
[1699] *Ibid*.
[1700] *Ibid*.

Eventually, the third approach described above was the one all States agreed upon[1701]. Argentina, the main supporter of this approach, circulated on August 13, 1996, its "Working Paper on Rules of Procedure", suggesting an "intermediate solution" between the common law and the civil law traditions[1702]. The Argentinean proposal suggested a summary procedure – a common practice in civil law States – following the admission of guilt by the accused, in which the judges would verify the validity of such admission and the existence of enough facts to corroborate its content[1703]. The Working Paper emphasized that the defendant would not be ordered by the judges to plead guilty or not guilty to the charges in the indictment[1704]. Actually, he would be "called on to make any statement he or she considers appropriate after the indictment is read"[1705]. Only in the cases in which the accused decides to confess his crimes, the trial chamber would proceed to the summary procedure[1706].

On August 20, 1996, Argentina and Canada circulated a joint follow-up proposal, containing the current wording of the first four paragraphs of article 65 of the Rome Statute[1707]. The main difference between Argentina's Working Paper on Rules of Procedure and the joint proposal was the initial statement by the defendant[1708]. While in the former, the accused would be allowed to say whatever he wanted, in the Argentinean-Canadian draft the defendant was limited to enter a plea of not guilty or to make an admission of guilt[1709].

The main change in article 65 following the 1996 Argentinean-Canadian proposal was the inclusion of its fifth paragraph[1710], at the fourth session of the Preparatory Committee, in August 1997[1711]. This paragraph was the result of a compromise with those delegations that wanted to make sure that the proceedings on admission of guilt would

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[1701] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.27.
[1702] "Working Paper on Rules of Procedure Submitted by Argentina", UNDoc.A/AC.249/L.6, 13 August 1996, p.8. Available at: <http://www.legal-tools.org/doc/c7eca0/pdf/>. Access on: November 30, 2018.
[1703] *Ibid*.
[1704] *Ibid*.
[1705] *Ibid*.
[1706] *Ibid*.
[1707] "Proposal for Articles 38, 38*bis*, 41 and 43 submitted by Argentina and Canada", UNDoc.A/AC-249/WP-16, 21 August 1996. Available at: <http://www.legal-tools.org/doc/37a20a/pdf/>. Access on: November 30, 2018.
[1708] *Ibid*.
[1709] *Ibid*.
[1710] Article 65(5) states the following: "Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court".
[1711] SCHABAS (2010), *supra* note 98, p.776-777.

not open the door for the introduction of plea-bargaining[1712]. Accordingly, article 65(5) explicitly states that any inter-parties' discussions or arrangements do not bind the trial chambers, a view acceptable to both plea bargaining defenders and opponents[1713].

At the Rome Conference, there were just a few minor changes in article 65[1714]. The most significant ones were the inclusion of "Any" before "discussions" and the exclusion of "legally" before "binding", both in article 65(5)[1715]. In the final part of the second paragraph, the Preparatory Committee left two options for the Conference: "and [may] [shall] convict the accused of that crime"[1716]. The delegations preferred the word "may"[1717]. In the end, article 65 was adopted together with the rest of the Rome Statute on July 17, 1998, at the conference[1718].

4.3 ICC's Case-Law on Plea-Bargaining: the Al Mahdi Case

The first prosecution before the ICC referring to the destruction of cultural property is also the first and, so far, only guilty-plea case before that tribunal[1719]. On September 18, 2015, the Pre-Trial Chamber I issued the arrest warrant of the defendant, Ahmad Al Faqi Al Mahdi[1720]. He was arrested approximately one week later; and his first appearance took place on September 30, 2015[1721]. Next December, the Prosecution filed a single charge asserting that Al Mahdi had destroyed ten historical and religious buildings in Timbuktu, Mali, between June and July 2012, amounting to the war crime of attacking protected objects, under article 8(2)(e)(iv) of the Rome Statute[1722].

Al Mahdi's trial was the fastest so far in the history of the ICC: only three days (between 22 and 24 of August 2016)[1723]. In his initial appearance, the defendant made an

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[1712] *Ibid*., p.780; GUARIGLIA, *supra* note 314, p.1623; BEHRENS, Hans-Jörg. "The Trial Proceedings", p.238-246, p.242. In LEE, Roy (ed.). *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, New York: Kluwer Law International, 1999.
[1713] TERRIER, *supra* note 315, p.1290.
[1714] SCHABAS (2010), *supra* note 98, p.777.
[1715] *Ibid*.
[1716] *Ibid*.
[1717] *Ibid*.
[1718] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.26.
[1719] BISHOP-BURNEY, Uzma S. "Prosecutor v. Ahmad Al Faqi Al Mahdi", *American Journal of International Law*, vol.111, no.1, p.126-132, 2017, p.129.
[1720] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.1.
[1721] *Ibid*.
[1722] Article 8(2)(e)(iv) of the Rome Statute states the following: "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives".
[1723] AKSENOVA, Marina. "The Al Mahdi Judgment and Sentence at the ICC: A Source of Cautious Optimism for International Criminal Justice", *EJIL: Talk!*, 13 October 2016. Available at:

admission of guilt to the charge as described in the indictment, in the terms of a plea agreement reached on February 18, 2016[1724]. The *Al Mahdi* Trial Chamber proceeded to verify the validity of such admission: it questioned the defendant if he understood the nature of the charge and the consequences of his admission of guilt; and if he admitted his guilt voluntarily, after sufficient consultation with his lawyer[1725]. Al Mahdi replied in the affirmative to both questions[1726]. Then, the Trial Chamber verified whether the admission of guilt was supported by the facts of the case[1727]. In addition to the guilty plea, the Chamber heard testimony of three witnesses and took into account the hundreds of pages of documentary evidence presented by the Prosecution and accepted by Al Mahdi[1728]. This evaluation aimed at verifying "whether evidence could establish the facts independently of the accused's admissions"[1729].

Al Mahdi's plea agreement and the additional supporting evidence indicated that in January 2012, a non-international armed conflict began in Northern Mali, between Malian armed forces and the groups Ansar Dine and AQIM[1730]. In April 2012, following the retreat of the official armed forces, these two groups took control over the area of Timbuktu and imposed religious and political rule until January 2013[1731]. Ansar Dine and AQIM established a local government that included an Islamic tribunal, police force, media commission, and morality brigade (called "*Hesbah*")[1732].

Al Mahdi arrived in Mali in April 2012, to assist these armed groups[1733]. He was in direct contact with Ansar Dine's and AQIM's leadership[1734], which meant he possessed valuable information for the Prosecution. Moreover, Al Mahdi was very active in the administration of these groups and, as a scholar on religion and the Koran, he was consulted on these issues, including by the Islamic tribunal[1735]. From April to September 2012, he served as the head of *Hesbah*, being responsible for regulating the morality of

<https://www.ejiltalk.org/the-al-mahdi-judgment-and-sentence-at-the-icc-a-source-of-cautious-optimism-for-international-criminal-justice/>. Access on: December 1, 2018.

[1724] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, paras.3 and 7; *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Agreement Regarding Admission of Guilt, ICC, Trial Chamber VIII, Case no. ICC-01/12-01/15, 18 February 2016, para.1.

[1725] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, ibid.,* para.30.

[1726] *Ibid.*

[1727] *Ibid.,* para.29.

[1728] *Ibid.*

[1729] *Ibid.*

[1730] *Ibid.,* para.31.

[1731] *Ibid.*

[1732] *Ibid.*

[1733] *Ibid.,* para.32.

[1734] *Ibid.*

[1735] *Ibid.*

the people of Timbuktu, and for preventing and suppressing any behavior or belief deemed immoral by the occupiers[1736].

The mausoleums of saints and the mosques of Timbuktu were an integral part of the religious life of the local inhabitants[1737]. The residents and pilgrims frequently visited them as places of prayer[1738]. In late June 2012, Ansar Dine and AQIM decided to demolish the mausoleums because Islam prohibits any construction over a tomb[1739]. At first, Al Mahdi recommended not destroying them in order to maintain good relations between the local population and the occupying forces[1740]. However, Iyad Ag Ghaly, the leader of Ansar Dine, gave the order to demolish the buildings anyway[1741]. Such command was transmitted to Al Mahdi[1742].

Despite his initial reservations, Al Mahdi conducted the attack without hesitation after receiving Ag Ghaly's orders[1743]. He committed the following acts: (i) procuring tools and machinery; (ii) providing men from *Hesbah*; (iii) arranging logistics; (iv) determining the sequence of actions; (v) overseeing the execution of these actions in all of the attack sites; (vi) giving instructions and moral support to the attackers; (vii) actively participating in the destruction of mausoleums in at least five sites[1744]; and (viii) explaining and justifying the destruction of the buildings to journalists[1745]. The attacks were carried out between June 30 and July 11, 2012, resulting in the complete demolition of ten of the most important sites in Timbuktu[1746]. All of them, except the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, had the status of protected UNESCO World Heritage sites[1747].

The *Al Mahdi* Trial Chamber found the accused guilty of the war crime of attacking protected objects, under article 8(2)(e)(iv) of the Rome Statute[1748]. At the

[1736] *Ibid.*, para.33.
[1737] *Ibid.*, para.34.
[1738] *Ibid.*
[1739] *Ibid.*, para.36.
[1740] *Ibid.*
[1741] *Ibid.*
[1742] *Ibid.*
[1743] *Ibid.*, para.37.
[1744] *Ibid.*, para.40.
[1745] *Ibid.*
[1746] *Ibid.*, para.38. The list of destroyed buildings follows: Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum, Sheikh Mohamed Mahmoud Al Arawani Mausoleum, Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum, Alpha Moya Mausoleum, Sheikh Mouhamad El Mikki Mausoleum, Sheikh Abdoul Kassim Attouaty Mausoleum, Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum, the door of the Sidi Yahia Mosque and the two mausoleums adjoining the Djingareyber Mosque.
[1747] *Ibid.*, para.39.
[1748] *Ibid.*, paras.62-63.

sentencing stage, the Chamber was particularly welcoming to admissions of guilt in general and to Al Mahdi's specifically. It pointed out that "such admissions, when accepted by the Chamber, can have a multitude of benefits to the Court and the interests of justice more generally"[1749]. The judgment listed the following benefits: (i) the swifter resolution of a case; (ii) the saving of the Court's time and resources, which can be otherwise spend to enhance the course of international justice on other areas; (iii) sparing victims of the stress of testifying to their personal tragedies and being exposed to cross-examination; (iv) contribution to the search for the truth; and (v) gathering of information useful in cases against other defendants[1750].

Regarding Al Mahdi's admission of guilt, the Trial Chamber noted that his confession "was made early, fully and appears to be genuine, led by the real desire to take responsibility for the acts he committed and showing honest repentance"[1751]. It also pointed out that Al Mahdi's plea of guilty allowed the rapid resolution of the case[1752]. Moreover, his admission of guilt can promote peace and reconciliation in Mali, "by alleviating the victims' moral suffering through acknowledgement of the significance of the destruction"[1753] and by deterring others to commit similar crimes[1754]. Accordingly, the Chamber considered his admission of guilt a mitigating circumstance with "substantial weight"[1755].

The Chamber also praised Al Mahdi's spontaneous cooperation with the Prosecution[1756].The judgment noted that he answered the investigators' questions in an honest manner, showing no reluctance in describing his own actions[1757]. Even though Al Mahdi did not report any fact that the prosecutors did not already know, his testimony was relevant for corroborating, clarifying and specifying information in possession of the Prosecution[1758]. The Chamber also highlighted that despite knowing that his cooperation could expose his family to danger, Al Mahdi agreed to do so[1759]. The judgment concluded

[1749] *Ibid.*, para.28.
[1750] *Ibid.*
[1751] *Ibid.*, para.100.
[1752] *Ibid.*
[1753] *Ibid.*
[1754] *Ibid.*
[1755] *Ibid.*
[1756] *Ibid.*, paras.101-102.
[1757] *Ibid.*, para.101.
[1758] *Ibid.*
[1759] *Ibid.*, para.102.

that "Al Mahdi's substantial cooperation with the Prosecution is an important factor going to the mitigation of the sentence to be imposed"[1760].

In its final findings, the *Al Mahdi* Trial Chamber noted that, in addition to the "significant gravity" of the charges[1761], no aggravating circumstance applied in the case[1762]. On other hand, five mitigating circumstances favored the accused: admission of guilt[1763]; cooperation with the Prosecution[1764]; demonstration of remorse and empathy towards the victims[1765]; his initial hesitancy to commit the crime and his steps to limit the damages from his actions[1766]; and good behavior in detention[1767]. In light of all these factors, the Chamber sentenced Al Mahdi to 9 years' imprisonment[1768], the minimum amount sought by the Prosecution[1769] (cf. Annex I).

4.3.1 Was Al Mahdi's plea agreement a good deal for him?

The ICTY and the ICTR were both particularly resistant to their early plea agreements. Although the first defendant to plead guilty before the ICTY – Dražen Erdemović – received significant leniency for his admission of guilt and collaboration with the Tribunal, the second accused to enter a guilty plea – Goran Jelisić – was not so lucky. He gained virtually no leniency, since the Trial Chamber sentenced him to spend 40 years in prison[1770], an amount that nearly implied a life sentence due to Jelisić's age at his conviction (31 years old). At the ICTR, the first plea agreement was not a good deal at all for the defendant. Although Jean Kambanda expected to receive a sentence of at most two years in exchange for his substantial cooperation, he was sentenced to life imprisonment[1771].

The *Jelisić* and *Kambanda* cases created expectations about how the ICC would react to its very first guilty-plea case. Unlike those two cases, the *Al Mahdi* Trial Chamber praised the defendant's cooperation and guilty plea, and the judgment indicated that the

[1760] *Ibid.*
[1761] *Ibid.*, para.109.
[1762] *Ibid.*
[1763] *Ibid.*, paras.98-100.
[1764] *Ibid.*, paras.101-102.
[1765] *Ibid.*, paras.103-105.
[1766] *Ibid.*, paras.89-93.
[1767] *Ibid.*, para.97.
[1768] *Ibid.*, para.109.
[1769] The Prosecution recommended a sentence of between nine and eleven years' imprisonment. Cf.: *Ibid.*, para.106.
[1770] *The Prosecutor v. Goran Jelisić, supra* note 313, para.139.
[1771] *The Prosecutor v. Jean Kambanda – Trial, supra* note 197, para.60 and verdict.

Chamber gave relevant mitigation in his sentence due to these two factors[1772]. In fact, Al Mahdi was sentenced to only 9 years' imprisonment[1773]. However, two questions remain: What was the effective impact of Al Mahdi's cooperation and guilty plea in his sentence? Did his plea agreement result in real benefits in comparison to other defendants who did not plead guilty in past cases?

The methodology applied so far to identity if a plea bargain was a good deal to the defendant, in terms of sentence discount, had proven problematic in the *Al Mahdi* case. By applying this method, the author compared the sentence imposed in a guilty-plea case with the verdicts in non-guilty-plea cases. So far, this approach had been particularly useful in assessing the case-law of the ICTR and ICTY because both have a voluminous body of decisions. Accordingly, the author managed to find cases at those two courts with comparative elements.

However, two main reasons prevented the application of that method of evaluation to the *Al Mahdi* case. Firstly, the ICC did not issue many convictions so far, and the few cases in existence have very different charges from one another. In its sixteen years into existence so far, the ICC convicted only eight people, five of them in one case alone[1774]. The first one was Thomas Dylio Lubanga, found guilty on March 14, 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities[1775]. The second person convicted was Germain Katanga, who was found guilty on March 7, 2014, as an accessory to one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of enemy property and pillaging) committed in 2003, in the Democratic Republic of Congo[1776].

The case with five defendants was *Bemba et al.*, in which all of them – Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido – were found guilty of various offenses against the administration of justice in the *Bemba* case[1777]. Finally, there was the conviction of Al

[1772] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, paras.100-102.
[1773] *Ibid.,* para.109.
[1774] Cf.: <https://www.icc-cpi.int/Pages/defendants-wip.aspx>. Access on: December 1, 2018.
[1775] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC, Trial Chamber I, Case no. ICC-01/04-01/06, 14 March 2012, para.1358; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC, Appeals Chamber, Case no. ICC-01/04-01/06 A 5, 1 December 2014, para.529.
[1776] *The Prosecutor v. Germain Katanga,* Judgment, ICC, Trial Chamber II, Case no. ICC-01/04-01/07, 7 March 2014, disposition [*The Prosecutor v. Germain Katanga*].
[1777] *The Prosecutor v. Jean-Pierre Bemba Gombo et al.,* Judgment, ICC, Trial Chamber VII, Case no. ICC-01/05-01/13, 19 October 2016, verdict; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.,* Judgment, ICC, Appeals Chamber, Case no. ICC-01/05-01/13 A A2 A3 A4 A5, 8 March 2018, para.1631.

Mahdi in 2016[1778]. Although Jean-Pierre Bemba Gombo was found guilty by the Trial Chamber on March 21, 2016, of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging), allegedly committed between 2002 and 2003 in Central African Republic[1779], he was later acquitted by the Appeals Chamber[1780].

As for the sentences, Lubanga was condemned to 14 years of imprisonment[1781] and Katanga to 12 years[1782]. In the *Bemba et al.* case, the five defendants were sentenced with different ranges, varying from six months to two and a half years[1783]. Before his acquittal, the Trial Chamber had sentenced Jean-Pierre Bemba to 18 years' imprisonment[1784].

In comparison with Lubanga, Katanga and Bemba, Al Mahdi's sentence of 9 years' imprisonment[1785] appears to be relatively lenient. However, there is not enough judicial practice by the ICC to draw firm conclusions on whether most of this leniency came from the guilty plea and cooperation with the Prosecution or from the very nature of the charges. The *Al Mahdi* case was the first one in which the ICC dealt exclusively with destruction of property, with no direct and physical harm to human beings. As mentioned in the *Al Mahdi* judgment, "even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons"[1786]. Therefore, one could reasonably argue that most of the sentence reduction derived from this fact, especially after attesting that Lubanga's, Katanga's and Bemba's harsher sentences were imposed in cases concerning serious offenses against people. A future non-guilty-plea case referring to destruction of property alone could make matters clearer.

Another aspect that prevents solid deductions is the difference of only three years between Katanga's and Al Mahdi's sentences. Despite the fact that Katanga was

[1778] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.109.
[1779] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, ICC, Trial Chamber III, Case no. ICC-01/05-01/08, 21 March 2016, para.752.
[1780] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, ICC, Appeals Chamber, Case no. ICC-01/05-01/08 A, 8 June 2018, paras.196-198 [*The Prosecutor v. Jean-Pierre Bemba Gombo – Appeal*].
[1781] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC, Trial Chamber I, Case no. ICC-01/04-01/06, 10 July 2012, para.107.
[1782] *The Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC, Trial Chamber II, Case no. ICC-01/04-01/07, 23 May 2014, para.170.
[1783] *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment, ICC, Trial Chamber VII, Case no. ICC-01/05-01/13, 22 March 2017, operative provisions.
[1784] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, ICC, Trial Chamber III, Case no. ICC-01/05-01/08, 21 June 2016, para.97.
[1785] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.109.
[1786] *Ibid.*, para.77.

convicted of crimes far severer than Al Mahdi, including murder as both a crime against humanity and a war crime[1787], he was sentenced to just three years more than the Malian defendant. As the trial chambers convicted Al Mahdi as a co-perpetrator of the crimes[1788] and Katanga as a mere accessory[1789], the difference of three years could indicate that the judges gave substantial weight to the mode of liability in each case. Accordingly, it is difficult to determine if the sentence discount Al Mahdi received in exchange for his cooperation and admission of guilt was, in fact, significant in comparison to the sentence imposed on other defendants at the ICC.

Since comparison within ICC's case-law appears to be unreliable, one could compare the sentence in the *Al Mahdi* case with the ones issued by other international criminal tribunals concerning the same subject matter, that is, destruction of cultural property in armed conflict. Accordingly, the ICTY's cases *Jokić*[1790] and *Strugar*[1791], both about the shelling of the Old Town of Dubrovnik, listed as a UNESCO World Cultural Heritage site, could be useful. Moreover, the *Jokić* case is similar to the *Al Mahdi* for a second reason: both defendants pleaded guilty and provided substantial cooperation to the Prosecution[1792].

In fact, at the hearing of August 24, 2016, defense lawyers called the attention of the *Al Mahdi* Trial Chamber to the *Jokić* and *Strugar* cases[1793]. These two precedents are of particular interest to the accused, due to the low sentences in both: while Miodrag Jokić was condemned to spend only seven years in prison[1794], Pavle Strugar was sentenced to eight years' imprisonment[1795], which was later reduced to seven and a half years by the Appeals Chamber[1796].

However, we have here the second difficulty in applying the abovementioned comparative method of assessment. The *Al Mahdi* Trial Chamber advised that any comparison between its sentence and the verdicts of other international tribunals can be

[1787] *The Prosecutor v. Germain Katanga, supra* note 1776, disposition.
[1788] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.56.
[1789] *The Prosecutor v. Germain Katanga, supra* note 1776, disposition.
[1790] *The Prosecutor v. Miodrag Jokić, supra* note 820.
[1791] *The Prosecutor v. Pavle Strugar ("Dubrovnik"),* Judgment, ICTY, Trial Chamber II, Case no. IT-01-42-T, 31 January 2005 [*The Prosecutor v. Pavle Strugar*].
[1792] *The Prosecutor v. Miodrag Jokić, supra* note 820, paras.77-78 and 95-96; *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, paras.100-102.
[1793] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, ibid*., p.52-60.
[1794] *The Prosecutor v. Miodrag Jokić, supra* note 820, para.116.
[1795] *The Prosecutor v. Pavle Strugar, supra* note 1791, para.481.
[1796] *The Prosecutor v. Pavle Strugar ("Dubrovnik"),* Judgment, ICTY, Appeals Chamber, Case no. IT-01-42-A, 17 July 2008, disposition.

problematic[1797]. The judges were emphatically dismissive to previous precedents, as one can see in the following quote from the decision: "The Chamber stresses that sentencing an individual for crimes he committed is a unique exercise for which comparison with different cases can be of very limited relevance only, if any"[1798]. The judgment expressly considered the *Jokić* and *Strugar* cases "irrelevant"[1799] because they "were based on vastly different circumstances, including the applicable modes of liability and sources of law"[1800].

Although any reliable comparison between the *Al Mahdi* case and the convictions in other cases appears to be impossible, one cannot deny that the Office of the Prosecutor and the Trial Chamber were both particularly welcoming to the plea agreement. The wording of the *Al Mahdi* judgment was much more favorable to the cooperative defendant than the language used by the ICTY and ICTR in the *Jelisić* and *Kambanda* cases, respectively.

4.3.2 What can one expect for the future of plea-bargaining at the ICC?

ICC's *ad hoc* siblings – the ICTY and ICTR – began to implement plea-bargaining as a desperate measure to tackle the pressure from their heavy caseloads and to finish their activities in just a few years as ordered by the UNSC. Accordingly, plea-bargaining was introduced before the ICTY and ICTR as an extraordinary measure to cope with the great urgency at the time. This scenario raised the following question: even tough plea-bargaining is a practice expressly present in the Rome Statute, will the ICC Prosecutor engage in plea negotiations with defendants in the absence of this similar urgency? The path to be chosen by the ICC Prosecutor was of extreme relevance because, on one hand, it could burry international plea-bargaining as an exotic experiment exclusively at the *ad hoc* tribunals or, in the other hand, it could consolidate plea-bargaining as a regular element of international criminal justice.

The reluctance to include plea-bargaining in the Rome Statute and the absence of an urgent need to reduce costs and to finish the activities of the ICC[1801] could motivate

[1797] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, supra* note 89, para.107; COLE, Daniel M. "From The Hague to Timbuktu: *The Prosecutor v. Ahmad Al Faqi Al Mahdi*; a Consequential Case of Firsts for Cultural Heritage and for the International Criminal Court", *Temple International and Comparative Law Journal*, vol.31, p.397-462, 2017, p.418-419.
[1798] *The Prosecutor v. Ahmad Al Faqi Al Mahdi, ibid.*
[1799] *Ibid.*
[1800] *Ibid.*
[1801] DAMAŠKA, *supra* note 40, p.1036.

the Office of the Prosecutor to refuse any proposal from defendants to engage in plea negotiations. Even if prosecutors and defense lawyers eventually reach plea agreements, the trial judges could ignore them, refusing to give relevant sentence credit to the defendants and sentencing above the agreed upon range, as occurred in the *Dragan Nikolić*[1802] and *Bisengimana*[1803] cases, before the ICTY and ICTR respectfully (cf. Annex I).

The most favorable path to plea-bargaining, however, was the one chosen by both the Office of the Prosecutor and the Trial Chamber. In addition to accept negotiating a plea agreement with Al Mahdi, the ICC Chief-Prosecutor Fatou Bensouda came before the Trial Chamber and praised the accused's admission of guilt, highlighting its benefits to the Court as well as to the victims[1804]. Likewise, the Office of the Prosecutor's written submission on sentencing asked for leniency in light of the admission of guilt and "significant cooperation"[1805]. Most importantly, the trial judges sentenced Al Mahdi within the range agreed upon by the parties, which indicates their willingness to take plea agreements into account while determining the sentence.

As the recent quashing of the conviction of Jean-Pierre Bemba Gombo by the Appeals Chamber[1806] indicates that the appellate judges are willing to take a strong stand and fundamentally disagree with the trial chambers, one has to wait in order to confirm whether the Appeals Chamber will repeat the same approach in a future case concerning plea agreement[1807]. Until then, the *Al Mahdi* case means that plea-bargaining is here to

[1802] Cf. section 2.2.3 of the present thesis.
[1803] Cf. section 3.2.5 of the present thesis.
[1804] The relevant part of Fatou Bensouda's statement follows: "This is an admission the accused has consistently given and voluntarily so, while fully informed and assisted by legal counsel. The general terms of this agreement were published on Friday last week. He fully recognizes the facts of the case and his own individual responsibility. I am pleased and satisfied with this development in the case. I am satisfied because it is the first-ever admission of guilt before the Court. Mr Al Mahdi was transferred to the Court less than one year ago. The current trial should take only a few days. It will contribute to the expeditiousness of proceedings. And such expeditiousness will benefit the victims just as much as it will benefit the accused. Above all, I am satisfied because Mr Al Mahdi's admission directly helps bring justice. It helps uncover the truth and leads to the catharsis that should arise from any judicial process. In preparation of this case, my Office collected overwhelming evidence of guilt of the accused. You will have the opportunity to judge this for yourselves in the coming hours. An admission of guilt facilitates the establishment of the truth. The fact that the accused recognizes his criminal responsibility is crucial for Timbuktu's victims. It will also support the reconciliation process in the field. In addition, this admission of guilt and your Honour's ultimate judgment will set a clear precedent, sending an important and positive message to the entire world". Cf.: *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript of Session held on August 22, 2016, ICC, Trial Chamber VIII, Case no. ICC-01/12-01/15, p.22.
[1805] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of "Prosecution's submissions on sentencing", ICC, Trial Chamber VIII, Case no. ICC-01/12-01/15, ICC-01/12-01/15-139-Conf, 22 July 2016, paras.51-54.
[1806] *The Prosecutor v. Jean-Pierre Bemba Gombo – Appeal*, *supra* note 1780, paras.196-198.
[1807] No appeal was filed in the *Al Mahdi* case as agreed upon in the plea agreement.

stay. It is reasonable to conclude that the Office of the Prosecutor's and the Trial Chamber's encouraging position in this case will motivate other defendants to admit their guilt and negotiate plea agreements with the prosecutors in the future.

CONCLUSION

On a personal note, the favorite book of the author of this thesis is "Blindness"[1808], a novel by the Portuguese writer José Saramago[1809]. The book is not an easy read. On the contrary, it is brutal and violent; its 300 pages provide constant distress and profound agony. While describing the events after everyone in an unnamed country – except one person – went mysteriously blind, the novel unveils the true core of human nature: human beings are selfish and cruel. Reading the book was a painful experience.

The research for this thesis was *déjà vu*. The same tormenting feeling of reading "Blindness" resurfaced while the author was reading the judgments of the ICTY, ICTR and ICC. The most brutal and atrocious acts imaginable were committed in our past. Unfortunately, these crimes continue to be committed today. In fact, in some place of the world, they are occurring right now, the exact moment you are reading this work. Maybe William Shakespeare was correct: "Hell is empty, and all the devils are here"[1810].

At first sight, one can deem unacceptable any kind of negotiation between the prosecutors of international criminal tribunals and the individuals responsible for these heinous offenses. However, plea-bargaining was introduced into international fora to help the criminal prosecution becoming more efficient and expedient. This controversial practice is now undeniably a part of international penal procedure.

As the research progressed through the judicial practice of the ICTY and ICTR, it quickly became evident that initially International Criminal Law averted plea-bargaining. Those two *ad hoc* tribunals introduced this practice as one of the numerous measures to fulfill their completion strategies in accordance with pressing deadlines imposed by the UNSC. Plea-bargaining was not transplanted into international criminal procedure following ideological motives or a well-planned and long-term strategy to improve the international justice system. It was merely a pragmatic response to the extraordinary circumstances the ICTY's and ICTR's judges and prosecutors were facing at that time.

However, one has to be fair: it is not just the international criminal courts that yielded to plea-bargaining's appealing advantages. States around the world have introduced this practice into their laws to cope with their growing caseloads and the complexity of certain criminal investigations and trials. Some States with no record of trial waiver mechanisms four decades ago, today apply plea-bargaining as an integral part

[1808] Original title in Portuguese: "*Ensaio Sobre a Cegueira".*
[1809] SARAMAGO, José. *Ensaio Sobre a Cegueira*, Rio de Janeiro: Companhia das Letras, 2002.
[1810] SHAKESPEARE, William. *The Tempest*, New Haven: Yale University Press, 2006, p.23-24.

of their criminal justice system. Accordingly, although not anticipated nor planned, the introduction of plea-bargaining in the international fora is not an isolated phenomenon, but part of the worldwide expansion of such practice. It is unreasonable to prohibit international criminal tribunals to make use of adaptable and lawful legal tools that national judges, lawyers and prosecutors all over the globe are using. In fact, this is a good development because it shows that international criminal justice is adapting to the times so as to ensure that its procedure remains relevant and open to new improvements.

The *Al Mahdi* case at the ICC disclosed that the era of plea-bargaining as an extraordinary measure is gone. Plea agreements are no longer a mere piece of completion strategies or tools to handle unsustainable caseloads in international criminal courts. They successfully became an integral element of international criminal procedure. The favorable position of the Prosecution as well as the welcoming language in the *Al Mahdi* judgment towards admissions of guilt obtained via plea negotiations indicates that this practice is here to stay. However, one cannot overlook the practice at the ICTY and ICTR. The case-law of these two courts indicated that judges and prosecutors have to protect the integrity of the historical record they build through their judicial activities. Plea negotiations cannot create disruptive factual distortions and discrepancies; the Prosecution and the accused cannot expect the trial chambers to enforce plea deals with charges unsubstantiated by sufficiently strong evidence.

As far as procedural safeguards are concerned, trial chambers shall accept only plea agreements resulting from the informed, voluntary and unequivocal will of the defendants. Any guilty plea failing to fulfill these criteria must be vacated by the judges. Accordingly, the accused has to be properly advised about the nature of the charges against him, the rights he is waiving by acknowledging his guilt and the consequences of his guilty plea. The informed criterion may entail obligatory assistance by legal counsel because unrepresented defendants are not equipped to evaluate the strength of the prosecutors' case and the fairness of the deals proposed to them. As for voluntariness, the judges have to inquire if the accused entered his plea of guilty with no improper coercion or inducement. Lastly, in order to enforce the principle of presumption of innocence in the context of guilty-plea cases, judges shall quash any admission of guilt that it is not supported by sufficient evidence and whose content amounts to a legal defense.

As part of the hypothesis of this research, the author assumed that one of the main reasons for the need to ensure the protection of those procedural safeguards of the defendants is their vulnerable position in relation to the prosecutors during plea

negotiations. However, the research proved this premise only partially true. Although the judges must ensure compliance with fair trial guarantees in every single case and the defendants are, in fact, often in a weak position, the assumption that the Prosecution is *always* in control of plea negotiations is not true, as one can see in the ICTR's case-law. The resistance from the Rwandese defendants to engage in plea negotiations forced the Office of the Prosecutor into a corner. In response, it adopted the following prosecutorial strategy: any plea agreement is better than none. The result was a set of plea deals extremely favorable to the defendants, whose terms the accused imposed on the prosecutors. The ICTR defendants managed to reach much more advantageous bargains than their counterparts at the ICTY did.

However, the Prosecutor at the ICTR's policy of bending over the will of the accused in order to obtain plea deals eventually backfired. The prosecutors agreed to promises they could not and, in fact, failed to deliver because the trial chambers refused to enforce certain aspects of those extremely favorable agreements. Consequently, the practice of plea-bargaining was eventually abandoned at the ICTR altogether. Extreme leniency in plea negotiations at the ICTY – although not as extreme as in the ICTR – also resulted in judicial backlash and the abandonment of plea-bargaining in that Tribunal. These developments at the ICTY and ICTR remain as a relevant lesson to judges, prosecutors and defense lawyers at the ICC.

ANNEX I: ALL GUILTY-PLEA CASES AT THE ICTY, ICTR AND ICC

Defendant	Rank/position	Convicted of	Date of guilty plea	Prosecution's sentence recommend.	Date of the Trial Decision	Trial Sentence	Date of the Appeals Decision	Appeals Sentence
ICTY								
Dražen Erdemović (I)	Foot soldier of the Army of the Serb Republic	Murder as a crime against humanity	31 May 1996	10 years	29 Nov. 1996	10 years	7 Oct. 1997	N/A
Dražen Erdemović (II)		Murder as a war crime	14 Jan. 1998	7 years	5 Mar. 1998	5 years	N/A	N/A
Goran Jelisić	Commander of the Luka concentration camp	War crimes (murder, cruel treatment and plunder) and crimes against humanity (murder and inhumane acts)	29 Oct. 1998	Life in prison	14 Dec. 1999	40 years	5 Jul. 2001	40 years
Stevan Todorović	Chief of Police in the Municipality of Bosanski Šamac, in Bosnia and Herzegovina	Persecutions on political, racial and religious grounds (crime against humanity)	13 Dec. 2000	12 years	31 Jul. 2001	10 years	N/A	N/A
Dragan Kolundžija	Shift commander at the Logor Keraterm concentration camp	Persecutions on political, racial and religious grounds (crimes against humanity)	4 Sep. 2001	5 years	13 Nov. 2001	3 years	N/A	N/A
Damir Došen	Shift commander at the Logor Keraterm concentration camp	Persecutions on political, racial and religious grounds (crimes against humanity)	19 Sep. 2001	7 years	13 Nov. 2001	5 years	N/A	N/A
Duško Sikirica	Commander of Security at the Logor Keraterm concentration camp	Persecutions on political, racial and religious grounds (crimes against humanity)	19 Sep. 2001	17 years	13 Nov. 2001	15 years	N/A	N/A
Milan Simić	Member of the Bosnian Serb Crisis Staff and President of the Municipal Assembly of Bosanski Šamac, in Bosnia and Herzegovina	Torture as a crime against humanity	15 May 2002	3 to 5 years	17 Oct. 2002	5 years	N/A	N/A

Defendant	Rank/position	Convicted of	Date of guilty plea	Prosecution's sentence recommend.	Date of the Trial Decision	Trial Sentence	Date of the Appeals Decision	Appeals Sentence
Biljana Plavšić	President of the Serb Republic	Persecutions on political, racial and religious grounds (crimes against humanity)	2 Oct. 2002	15 to 25 years	27 Feb. 2003	11 years	N/A	N/A
Momir Nikolić	Assistant Commander and Chief of Security and Intelligence of the Bratunac Brigade of the Serb Republic's Army	Persecutions on political, racial and religious grounds (crimes against humanity)	7 May 2003	15 to 20 years	2 Dec. 2003	27 years	8 Mar. 2006	20 years
Dragan Obrenović	A commander of the Bosnian Serb Army in the Srebrenica area	Persecutions on political, racial and religious grounds (crimes against humanity)	21 May 2003	15 to 20 years	10 Dec. 2003	17 years	N/A	N/A
Predrag Banović	Guard at the Logor Keraterm concentration camp	Persecutions on political, racial and religious grounds (crimes against humanity)	26 Jun. 2003	8 years	28 Oct. 2003	8 years	N/A	N/A
Darko Mrđa	Member of the Prijedor Police "Intervention Squad"	Murders (war crimes) and inhumane acts (crimes against humanity)	24 Jul. 2003	15 to 20 years	31 Mar. 2004	17 years	N/A	N/A
Miodrag Jokić	A commander of the Yugoslav Navy, during the attack on the Old City of Dubrovnik	Murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, unlawful attacks on civilian objects, and destruction or wilful damage against cultural heritage (war crimes)	27 Aug. 2003	10 years	18 Mar. 2004	7 years	30 Aug. 2005	7 years
Dragan Nikolić	Commander of the Sušica detention camp	Persecutions on political, racial and religious grounds, murder, sexual violence and torture (crimes against humanity)	4 Sep. 2003	15 years	18 Dec. 2003	23 years	4 Feb. 2005	20 years
Miroslav Deronjić	President of the Bratunac Municipal Board of the Serbian Democratic Party and President of the Bratunac Crisis Staff	Persecutions on political, racial and religious grounds (crimes against humanity)	30 Sep. 2003	10 years	30 Mar. 2004	10 years	20 Jul. 2005	10 years

Defendant	Rank/position	Convicted of	Date of guilty plea	Prosecution's sentence recommend.	Date of the Trial Decision	Trial Sentence	Date of the Appeals Decision	Appeals Sentence
Ranko Češić	Member of the Bosnian Serb Territorial Defence and of the Intervention Platoon of the Bosnian Serb Police Reserve Corps, in the Municipality of Brčko	Murder, humiliating and degrading treatment (war crimes), and murder and rape (crimes against humanity)	8 Oct. 2003	13 to 18 years	11 Mar. 2004	18 years	N/A	N/A
Milan Babić	President of the self-declared Republic of Serbian Krajina, in north-eastern Croatia	Persecutions on political, racial and religious grounds (crimes against humanity)	27 Jan. 2004	11 years	29 Jun. 2004	13 years	18 Jul. 2005	13 years
Miroslav Bralo	Member of the "Jokers," the anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council, the Bosnian Croat army	Murder, torture, inhuman treatment, rape and unlawful confinement (war crimes), and persecutions on political, racial and religious grounds (crimes against humanity)	19 Jul. 2005	25 years	7 Dec. 2005	20 years	2 Apr. 2007	20 years
Ivica Rajić	A commander of the Croatian Defence Council	Wilful killing, inhumane treatment (including sexual assault), appropriation of property, extensive destruction not justified by military necessity.	26 Oct. 2005	12 to 15 years	8 May 2006	12 years	N/A	N/A
Dragan Zelenović	Bosnian Serb soldier and *de facto* military policeman in the city of Foča	Torture and rape as both war crimes and crimes against humanity	17 Jan. 2007	10 to 15 years	4 Apr. 2007	15 years	31 Oct. 2007	15 years
ICTR								
Jean Kambanda	Prime Minister of the Interim Government of Rwanda	Genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; complicity in genocide; and crimes against humanity (murder and extermination)	1 May 1998	Life in prison	4 Sep. 1998	Life in prison	19 Oct. 2000	Life in prison

Defendant	Rank/position	Convicted of	Date of guilty plea	Prosecution's sentence recommend.	Date of the Trial Decision	Trial Sentence	Date of the Appeals Decision	Appeals Sentence
Omar Serushago	One of the leaders of the *Interahamwe* militia	Genocide and crimes against humanity (murder, extermination and torture)	14 Dec. 1998	25 years	14 Dec. 1998	15 years	14 Feb. 2000	15 years
Georges Ruggiu	Journalist and broadcaster for RTLMC	Direct and public incitement to commit genocide and persecution as a crime against humanity	15 May 2000	20 years	1 Jun. 2000	12 years	N/A	N/A
Vincent Rutaganira	*Conseiller communal* of Mubuga sector	Extermination as a crime against humanity	8 Dec. 2004	6 to 8 years	14 Mar. 2005	6 years	N/A	N/A
Joseph Serugendo	Member of the governing board of the RTLMC and Chief of the Maintenance Section of Radio Rwanda	Direct and public incitement to commit genocide and persecution as a crime against humanity	30 Sep. 2005	6 to 10 years	12 Jun. 2006	6 years	N/A	N/A
Paul Bisengimana	*Bourgmestre* of Gikoro commune, in the Kigali prefecture	Extermination as a crime against humanity	17 Nov. 2005	14 years	13 Apr. 2006	15 years	N/A	N/A
Joseph Nzabirinda	Youth organiser in Ngoma commune, in Butare province	Aiding and abetting in murder as a crime against humanity	14 Dec. 2006	5 to 8 years	23 Feb. 2007	7 years	N/A	N/A
Juvénal Rugambarara	*Bourgmestre* of Bicumbi commune, in the Kigali-Rural prefecture	Extermination as a crime against humanity	13 Jul. 2007	12 years	16 Nov. 2007	11 years	N/A	N/A
Michel Bagaragaza	Director of the Office for Industrial Crops of Rwanda/Tea	Complicity in genocide	17 Aug. 2009	6 to 10 years	17 Nov. 2009	8 years	N/A	N/A
ICC								
Ahmad Al Faqi Al Mahdi	Head of the morality brigade (*Hesbah*) in occupied Timbuktu	War crime of attacking protected objects	22 Aug. 2016	9 to 11 years	27 Sep. 2016	9 years	N/A	N/A

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