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**Whether a Guilty Plea is a Mitigating Factor for Sentencing Purposes, and if so, is it Mandatory or Permissive?: A Critique of the Kambanda Decision and a Comparative Study of Plea Bargaining and Sentencing Issues in ICTR and ICTY Jurisprudence and Other Common Law Countries**

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NEW ENGLAND SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT

IN CONJUNCTION WITH  
THE INTERNATIONAL CRIMINAL TRIBUNAL FOR  
RWANDA

MEMORANDUM FOR  
THE OFFICE OF THE PROSECUTOR

ISSUE #26

WHETHER A GUILTY PLEA IS A MITIGATING FACTOR  
FOR SENTENCING PURPOSES, AND IF SO, IS IT  
MANDATORY OR PERMISSIVE?:

A CRITIQUE OF THE KAMBANDA DECISION  
AND A COMPARITIVE STUDY OF PLEA BARGAINING  
AND SENTENCING ISSUES IN ICTR AND ICTY  
JURISPRUDENCE AND OTHER COMMON LAW  
COUNTRIES

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## I. INTRODUCTION & SUMMARY OF CONCLUSIONS

### a. ISSUES

- (i) Whether the Appeals Chamber for the International Criminal Tribunal for Rwanda (ICTR) correctly affirmed the Trial Chamber's decision to accept Jean Kambanda's guilty plea, holding that it was made (1) voluntarily; (2) knowingly; (3) unequivocally; and (4) based upon facts which would support the charges?
- (ii) Whether a valid guilty plea is a mitigating factor in sentencing, and if so, is it a mandatory or permissive factor? Did the ICTR neglect to give Kambanda's guilty plea sufficient consideration by imposing a life sentence upon him?

### b. CONCLUSIONS

Jean Kambanda's guilty plea was made voluntarily, knowingly, and unequivocally. Moreover, it was based on sufficient facts to support the charges to which he was pleading guilty. Therefore the Appeals Chamber correctly affirmed the Trial Chamber's decision to accept Kambanda's guilty plea. Most of the courts surveyed in this study apply similar criteria in judging the validity of guilty pleas. In addition, case law from these various jurisdictions illustrates a variety of conditions in which a guilty plea can be invalidated. However, the circumstances surrounding Kambanda's decision to plead guilty did not match any of these exceptional circumstances.

The jurisdictions discussed in this memorandum consider a guilty plea to be a mitigating factor in sentencing. Although the guilty plea does not appear to be explicitly mandatory in all jurisdictions, various courts make it a *de facto* part of their calculus in determining a sentence. There are compelling reasons why the ICTR imposed a life

sentence on Kambanda, notwithstanding his guilty plea. Yet, there are also various countervailing reasons for why the Tribunal might have considered a reduced sentence. By sentencing Kambanda to life imprisonment, the ICTR has sent a message to defendants that a guilty plea will not lessen their potential punishment and therefore encourages them to take their chances by pleading guilty. The ramifications of the Kambanda decision may include a larger docket of cases, and a greater difficulty for the prosecutor's office to secure guilty pleas. More importantly, Kambanda was willing to aid the prosecutor in future trials. A life imprisonment consequently forecloses the opportunity to use such a prominent individual who will likely be unwilling to help the prosecutor's office after receiving such a sentence. Lastly, numerous national courts have reduced sentences on appeal for crimes that range from murder to larceny. In these cases, appellate courts perceived a guilty plea as a greater factor for mitigation than did the trial courts. Although a deferential standard still applies when appellate courts review such cases, many of these courts have nevertheless been willing to reduce sentences for defendants who have committed serious crimes.

## **II. FACTUAL BACKGROUND AND ANALYTICAL FRAMEWORK**

### a. BACKGROUND

The Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) sentenced Jean Kambanda to life imprisonment in 1998. Kambanda pleaded guilty to charges of genocide, crimes against humanity and a host of violations during his tenure as interim prime minister in 1994. Kambanda appealed the decision to the ICTR's Appeals Chamber, claiming the Trial Chamber made numerous errors, particularly when it

accepted his plea of guilty. In the alternative he claimed that the ICTR erred in imposing a life sentence upon him and therefore failed to give sufficient weight to his guilty plea as a mitigating factor in sentencing. The Appeals Chamber affirmed the Trial Chamber's decision in its entirety. This paper will address Kambanda's appellate claims relating to the validity of his guilty plea, and whether the plea, if sufficient, demanded greater consideration in sentencing as a mitigating factor.

b. ANALYTICAL FRAMEWORK

The issues stated above will be analyzed within the framework of a comparative study which will incorporate an examination of the various legal approaches to guilty pleas as applied in the international criminal tribunals and selected national courts.<sup>1</sup> This study will examine how various jurisdictions determine the validity of a guilty plea. It will also investigate what factors national courts and the international criminal tribunals perceive as aggravating and mitigating factors in sentencing. It will then examine the status of a guilty plea as a specific mitigating factor, and what place it has been given as such in various national courts. Lastly, this study will assess the decision of the ICTR in imposing a life sentence on Kambanda, and thereby giving very little weight to his guilty plea as a mitigating factor.

**II. LEGAL DISCUSSION**

**1. REQUIREMENTS FOR A VALID GUILTY PLEA**

(i) The ICTR and ICTY

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<sup>1</sup> Due to the unavailability of sources for civil law jurisdictions, this study will focus on common law national courts such as the United States, Canada, England, Australia, New Zealand and Hong Kong.

Following an arrest, a defendant is arraigned before a court and asked to offer a plea of guilty or not guilty.<sup>2</sup> If the defendant proffers a guilty plea, the court in its discretion may accept the plea, after ensuring that it has been validly rendered. Jurisdictions vary in the extent to which a judge is required to probe into the validity of a guilty plea. The International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) take into account the following factors when considering the validity of a guilty plea: whether (1) it is made freely and voluntarily; (2) it is made knowingly and on an informed basis; (3) it is made unequivocally; and (4) it is based on sufficient facts to satisfy the elements of the crime charged, which demonstrates 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."<sup>3</sup>

(ii) The United States

United States law requires that guilty pleas be made voluntarily, knowingly and based on a sufficient factual basis. This is guaranteed in Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(c) requires a federal district court judge to address the defendant personally before accepting a guilty plea.<sup>4</sup> The judge must determine whether the accused understands the nature of the charge, the mandatory minimum sentence required, as well as the possible maximum possible penalty under the law.<sup>5</sup> The court must also inform that defendant of his/her right to be represented by legal counsel and that counsel will be provided.<sup>6</sup> The accused is also given notice that he/she may plead not

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<sup>2</sup> Some jurisdictions allow for special pleas and pleas of *nolo contendere* or no contest.

<sup>3</sup> ICTY Rules of Procedure and Evidence, Rule 62 *bis*; ICTR Rules of Procedure and Evidence, Rule 62 (B). [Reproduced at Tab 27]

<sup>4</sup> Fed. R. Crim. P. 11(c) (2002). [Reproduced at Tab 29]

<sup>5</sup> Fed. R. Crim. P. 11(c)(1) (2002). [Reproduced at Tab 29]

<sup>6</sup> Fed. R. Crim. P. 11(c)(2) (2002). [Reproduced at Tab 29]

guilty and contest the charges laid against the defendant.<sup>7</sup> The court must inform the accused that by pleading guilty, the accused is waiving a right to trial.<sup>8</sup> The court must ensure that the guilty plea was given voluntarily and was not the result of force, threats or promises (apart from a plea agreement).<sup>9</sup> It must also gauge whether the defendant's willingness to plead guilty results from prior discussions between the prosecutor and the defendant or the defendant's attorney.<sup>10</sup> Lastly, Rule 11 requires federal judges to ensure that there is a factual basis for the plea.<sup>11</sup>

(iii) Canada

Canadian courts also apply minimum criteria to determine the validity of guilty pleas. These safeguards are similar to those of the ICTY and ICTR. In Adgey v. The Queen, decided by the Canadian Supreme Court, Justice Laskin noted that a plea of guilty must be made voluntarily, unequivocally, based on an understanding of the charges, and supported by facts which would sustain such a charge.<sup>12</sup> Similarly, in the province of Ontario, the Superior Court of Justice has stated that a valid guilty plea must be unequivocal, voluntary, and informed.<sup>13</sup> In R. v. Moser, the judge explained that: "a plea must be voluntary in the sense that the plea is a conscious volitional decision of the accused to plead guilty for those reasons which he or she regards as appropriate."<sup>14</sup> This bars "coercive or oppressive conduct of others or any circumstance personal to the individual which unfairly deprives the accused of free choice in the decision not to go to

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<sup>7</sup> Fed. R. Crim. P. 11(c)(3) (2002). [Reproduced at Tab 29]

<sup>8</sup> Fed. R. Crim. P. 11(c)(4) (2002). [Reproduced at Tab 29]

<sup>9</sup> Fed. R. Crim. P. 11(d) (2002). [Reproduced at Tab 29]

<sup>10</sup> Id. [Reproduced at Tab 29]

<sup>11</sup> Fed. R. Crim. P. 11(e) (2002). [Reproduced at Tab 29]

<sup>12</sup> 13 C.C.C. (2d) 177, 180, 182 (1973) (Laskin, J. Dissenting ). [Reproduced at Tab 7]

<sup>13</sup> Re Moser and The Queen 163 C.C.C. (3d) 286, 302-4 (2002). [Reproduced at Tab 8]

<sup>14</sup> Id. at 303. [Reproduced at Tab 8]

trial.”<sup>15</sup> The court then enumerated a series of instances where undue pressure could be laid upon the accused: pressure from the court, incompetence of defense counsel, cognitive impairment or emotional disintegration of the accused, effect of illicit drugs or prescribed medications.<sup>16</sup> The court also asserted that for a plea to be considered unequivocal, “the circumstances should not be such that the plea was unintended or confusing, qualified, modified, or uncertain in terms of the accused’s acknowledgement of the essential legal elements of the crime charged.”<sup>17</sup> Lastly, the court stated that the guilty plea must be informed, for it is “essential that the accused understand the nature and the charges faced, the legal effect of a guilty plea, and the consequences of such a plea.”<sup>18</sup> The Moser court did not specifically state that a guilty plea be substantiated by facts which would support the charge in its discussion of a valid guilty plea. However, in another section of the decision, the court reviewed the transcript and noted the importance of the facts, and that they were substantiated and agreed upon by the accused.<sup>19</sup>

A. Voluntariness Of A Guilty Plea

(i) The ICTR and ICTY

The ICTR and ICTY follow similar rules of procedure for the purposes of determining the validity of a guilty plea. The voluntariness of a guilty plea involves two elements. The first element requires that “the accused must have been mentally

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<sup>15</sup> Id. [Reproduced at Tab 8]

<sup>16</sup> Id. [Reproduced at Tab 8]

<sup>17</sup> Id. at 302. [Reproduced at Tab 8]

<sup>18</sup> Id. at 303. [Reproduced at Tab 8]

<sup>19</sup> Id. at 291. [Reproduced at Tab 8]

competent to understand the consequences of his [sic] actions when pleading guilty.”<sup>20</sup>

The second element requires that a plea “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.”<sup>21</sup>

(ii) The United States

United States federal courts require that guilty pleas are made voluntarily and without threats or promises other than that of a plea-bargain.<sup>22</sup> In Brady v. U.S., the U.S. Supreme Court stated that a guilty plea was a solemn and grave act which could only be accepted after due deliberation.<sup>23</sup> Inherent in the guilty plea, in addition to the admission of guilt, is the waiver of the rights to have a trial to contest the charges and to be free from compelled self-incrimination.<sup>24</sup> The defendant in Brady pleaded guilty to kidnapping when faced with the knowledge that his co-defendant pleaded guilty and was willing to offer testimony against the defendant.<sup>25</sup> The kidnapping victim was not returned unharmed and therefore the defendants were susceptible to receiving capital punishment, should a jury have decided to recommend such a punishment.<sup>26</sup> The Brady court determined that an accused could not claim that a guilty plea was involuntary and therefore invalid, simply because it was made to avoid the death penalty.<sup>27</sup> By extension, this principle could be applied to any other sentence, such as life imprisonment. The

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<sup>20</sup> Kambanda v. Prosecutor, ICTR 97-23-A, ¶ 56 [Reproduced at Tab 1]; Prosecutor v. Erdemovic, IT-96-22, ¶ 8 (Joint Separate Opinion of Judge McDonald and Judge Vohrah). [Reproduced at Tab 6]

<sup>21</sup> Id.

<sup>22</sup> Fed. R. Crim. P. 11(d) (2002). [Reproduced at Tab 29]

<sup>23</sup> 90 S.Ct. 1463, 1468 (1970). [Reproduced at Tab 16]

<sup>24</sup> Id. at 1468, 1469. [Reproduced at Tab 16]

<sup>25</sup> Id. at 1466. [Reproduced at Tab 16]

<sup>26</sup> Id. [Reproduced at Tab 16]

<sup>27</sup> Id. at 1472. [Reproduced at Tab 16]

ICTR stated that Kambanda could not claim that his guilty plea was involuntary just because he received a sentence of life imprisonment after pleading guilty.<sup>28</sup>

The importance of ensuring voluntary guilty pleas extends to state jurisdictions within the United States. In Boykin v. Alabama, the U.S. Supreme Court determined that the voluntariness of a guilty plea and its relation to the right against self-incrimination found in the Fifth Amendment extended to the state jurisdictions through the Fourteenth Amendment.<sup>29</sup> In Boykin, the defendant was an indigent person who pleaded guilty to five counts of robbery, which was a crime punishable by death in Alabama at the time.<sup>30</sup> The court reversed, finding no evidence in the record that the trial judge enquired as to the voluntariness of the guilty plea.<sup>31</sup>

The U.S. Supreme Court has also held that the competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial. In Godinez v. Moran, the Supreme Court reversed the Ninth Federal Circuit Court of Appeals' holding that a defendant must have a higher level of mental functioning when rendering a guilty plea.<sup>32</sup> In Godinez, the defendant originally pleaded not guilty to three counts of first-degree murder.<sup>33</sup> After being determined competent to stand trial by two psychiatrists, he discharged his attorney, changed his plea to guilty and was ultimately sentenced to death.<sup>34</sup> The defendant filed an appeal stating that he was mentally incompetent to defend himself.<sup>35</sup> The Ninth Circuit, in reversing the conviction relied heavily on the fact that the defendant was on medication at the time he discharged his

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<sup>28</sup> ICTR 97-23-A, ¶ 63. [Reproduced at Tab 1]

<sup>29</sup> 89 S.Ct. 1709, 1712 (1969). [Reproduced at Tab 17]

<sup>30</sup> Id. at 1710. [Reproduced at Tab 17]

<sup>31</sup> Id. [Reproduced at Tab 17]

<sup>32</sup> 113 S.Ct. 2680, 2682, 2684 (1993). [Reproduced at Tab 18]

<sup>33</sup> Id. [Reproduced at Tab 18]

<sup>34</sup> Id. at 2682, 2683. [Reproduced at Tab 18]

<sup>35</sup> Id. at 2683. [Reproduced at Tab 18]



attorneys and changed his plea to guilty.<sup>36</sup> The U.S. Supreme Court determined that the defendant voluntarily and knowingly pleaded guilty to the crimes, and that the two psychiatrists' evaluations were sufficient to determine mental competency. Therefore, the trial court was under no heightened obligation to scrutinize the defendant's mental competency just because he was pleading guilty.

(iii) Canada

Canadian provincial appellate courts have also reviewed trial decisions which relate to the voluntary nature of guilty pleas. In Regina v. Djekic, the Ontario Court of Appeal held that the trial judge applied undue pressure upon the defendant by forcing her to give a guilty plea.<sup>37</sup> The defendant had arrived in court regarding a charge related to welfare fraud. The judge informed her that a pre-trial meeting had been convened between the court, the Crown, and defense counsel. It was then decided that if the defendant agreed to plead guilty to the charge of welfare fraud, she would be sentenced to one year in prison.<sup>38</sup> If she refused, she would be arrested for tampering with a witness, a charge in which the Crown was willing to drop in exchange for the guilty plea on the charge of welfare fraud.<sup>39</sup> The defendant had brought her child with her and was faced with arrest and quickly needed to arrange for someone to care for her child. The appellate court noted that "the defendant was emotionally distraught, as the [trial] judge observed, she had to deal with her child, the issue of a potential penitentiary sentence if she did not accept a plea, as well as the fact that she had not attended court on that date prepared to

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<sup>36</sup> Id. at 2864, footnote 4. [Reproduced at Tab 18]

<sup>37</sup> 147 C.C.C. (3d) 572, 576 (2000). [Reproduced at Tab 9]

<sup>38</sup> Id. at 573. [Reproduced at Tab 9]

<sup>39</sup> Id. [Reproduced at Tab 9]

consider the full disposition of her charge.”<sup>40</sup> Given the circumstances, the appellate court determined that plea was not tendered voluntarily.<sup>41</sup>

Similarly, the Court of Appeal for Ontario reversed a decision where a trial court judge was found to have used his influence to pressure a defendant to plead guilty.<sup>42</sup> In R. v. Rajaeefard, the defendant was accused of assaulting his wife and was represented by a law student who was merely authorized to represent the client on a motion to adjourn.<sup>43</sup> The judge directed the attorneys to discuss the case with him outside the courtroom without the defendant present.<sup>44</sup> Although the student repeated that he could only represent the client for the purposes of adjournment, the judge nevertheless informed the student that he would not adjourn the case and furthermore, if the client pleaded guilty, he would impose a probationary sentence and order the defendant to attend counseling sessions.<sup>45</sup> The defendant agreed to a guilty plea based on what the student informed him about the discussion outside the courtroom.<sup>46</sup> The defendant appealed the decision, claiming that the guilty plea was involuntary.<sup>47</sup> The Court of Appeal held that the guilty plea was involuntary as a result of undue influence by the judge, who had initiated the out of court discussion with the student attorney who was acknowledged as lacking the legal competence to represent the defendant on the issue of a guilty plea.<sup>48</sup> Moreover, since the

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<sup>40</sup> Id. at 576. [Reproduced at Tab 9]

<sup>41</sup> Id. [Reproduced at Tab 9]

<sup>42</sup> R. v. Rajaeefard 27 O.R. (3d) 323, 331 (1996). [Reproduced at Tab 10]

<sup>43</sup> Id. at 326. [Reproduced at Tab 10]

<sup>44</sup> Id. at 327. [Reproduced at Tab 10]

<sup>45</sup> Id. [Reproduced at Tab 10]

<sup>46</sup> Id. at 328. [Reproduced at Tab 10]

<sup>47</sup> Id. [Reproduced at Tab 10]

<sup>48</sup> Id. at 333. [Reproduced at Tab 10]

student was unauthorized to represent the defendant on a guilty plea, the defendant had no real representation during the out of court meeting.<sup>49</sup>

B. The Guilty Plea Must Be Knowingly Proffered And Based On An Informed Decision

(i) The ICTR and ICTY

The ICTY and ICTR have determined that an accused should fully comprehend the nature of the guilty plea and ramifications of making such a decision. This requires that the accused be made aware of the nature of the charges leveled against him/her and what the general consequences are after pleading guilty. In addition, the tribunals must ensure that the defendant understands the nature and distinction between any alternative charges and the consequences of pleading guilty to one rather than the other.<sup>50</sup>

In Erdemovic, the ICTY's Judge McDonald and Judge Vohrah explained what these provisions entailed in their joint separate opinion.<sup>51</sup> They held that the conviction should be overturned because the defendant Erdemovic did not fully understand the charges to which he was pleading guilty. They admonished the Trial Chamber for inadequately apprising Erdemovic of the general nature and consequences of a guilty plea at the initial hearing. For instance, Erdemovic was not clearly informed that by pleading guilty, he would be losing: (1) his right to a trial; (2) the right to be considered innocent until proven guilty and to assert his innocence and his lack of criminal responsibility for

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<sup>49</sup> Id. [Reproduced at Tab 10]

<sup>50</sup> Kambanda, ICTR 97-23-A, ¶ 65 [Reproduced at Tab 1] ; Erdemovic, ¶ 14 (Joint Separate Opinion of Judge McDonald and Judge Vohrah). [Reproduced at Tab 6]

<sup>51</sup> Erdemovic, ¶¶ 15-16 (Joint Separate Opinion of Judge McDonald and Judge Vohrah). [Reproduced at Tab 6]

the offences in any way.<sup>52</sup> Furthermore, Erdemovic's counsel demonstrated his lack of understanding when he advanced legal arguments which conflicted with the guilty plea.<sup>53</sup> These appellate judges concluded that the Trial Chamber failed to determine that Erdemovic understood the nature of the charges made against him. Erdemovic's attorney was unaware of the difference between crimes against humanity and war crimes, and specifically, the elements that must be proven for each.<sup>54</sup> The Trial Chamber asked Erdemovic whether he was pleading guilty to a crime against humanity or a war crime, and he responded that he was pleading guilty to the former. Judges McDonald and Vohrah determined that due to Erdemovic's lack of understanding regarding the difference between the two crimes, he erroneously chose the crime which they regarded as intrinsically more serious.<sup>55</sup> The implied assumption here was that if Erdemovic understood the difference between the two crimes, he would naturally have chosen the crime which was inherently of a less severe nature and therefore would have garnered a less severe sentence.<sup>56</sup>

(ii) Canada

In R v. N.C., the Ontario Court of Appeal determined that a defendant must understand the nature of the charges he/she is pleading guilty to.<sup>57</sup> It held that the defendant grandfather had not understood the nature of the charges when he pleaded guilty to sexual interference with his twelve-year old granddaughter and reversed the trial court's decision to accept the guilty plea.<sup>58</sup> The defendant claimed that he did not

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<sup>52</sup> Id. ¶ 15. [Reproduced at Tab 6]

<sup>53</sup> Id. ¶ 16. [Reproduced at Tab 6]

<sup>54</sup> Id. ¶ 18. [Reproduced at Tab 6]

<sup>55</sup> Id. ¶¶ 19,20. [Reproduced at Tab 6]

<sup>56</sup> Id. ¶¶ 19-24. [Reproduced at Tab 6]

<sup>57</sup> 151 O.A.C. 249 (2001). [Reproduced at Tab 11]

<sup>58</sup> Id. [Reproduced at Tab 11]

understand that by pleading to the charge, he was admitting that he touched his granddaughter for “a sexual purpose”.<sup>59</sup> The charge, which included the sexual aspect of the interference, was mentioned only once during the reading, and was never mentioned again.<sup>60</sup> Throughout the remainder of the proceedings, the attorneys described the sexual actions by the equivocal word “inappropriate.”<sup>61</sup> The defendant’s counsel informed him that the charge would be watered down if he pleaded guilty.<sup>62</sup> It was only after pleading guilty that the defendant realized the sexual nature implicated in the charge when he read the newspaper account the following day.<sup>63</sup>

(iii) The United States

In United States federal courts, Rule 11(c) requires that the judge inform defendants that they have a right to legal counsel, and a right to be informed of the possible minimum and maximum sentences that they might receive for pleading guilty, in addition to the ramifications of pleading guilty to the charge.<sup>64</sup>

C. The Guilty Plea Must Be Stated Unequivocally

(i) ICTR and ICTY

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<sup>59</sup> Id. [Reproduced at Tab 11]

<sup>60</sup> Id. [Reproduced at Tab 11]

<sup>61</sup> Id. [Reproduced at Tab 11]

<sup>62</sup> Id. [Reproduced at Tab 11]

<sup>63</sup> Id. [Reproduced at Tab 11]

<sup>64</sup> For example, should a defendant plead guilty to a felony charge, they will forfeit their right to hold office. The writer observed a Rule 11 hearing on October 11, 2002 at the Federal District Court for the District of Massachusetts. The Rule 11 hearing involved three defendants pleading to various charges of drug trafficking and conspiracy to sell narcotics. The prosecution was unable to inform the court or the particular defendant of the ramifications of his pleading to a misdemeanor charge. The presiding judge, Judge Wolfe admonished the prosecutors for not properly informing the defendant of the ramifications of his guilty plea, implicating constitutional issues of fairness. U.S. v. Gilpalacio, U.S. v. Fernandez, U.S. v. Vargas. CR01-10151.

The ICTR and ICTY acknowledge that a guilty plea is equivocal when the defendant persists in explaining their actions which would in law amount to a defense.<sup>65</sup> In Erdemovic, the defendant soldier had been forced to kill civilians or be executed himself for refusing to carry out the order. After submitting a guilty plea, he attempted to justify his actions through what was essentially a defense of duress.<sup>66</sup> Judges McDonald and Vohrah analyzed that duress was not a valid defense for either crimes against humanity or war crimes when the victims were innocent people.<sup>67</sup> They held that because the defense of duress failed, the guilty plea was therefore unequivocal and valid in that respect.<sup>68</sup>

(ii) Canada

British Columbia, like other Canadian provinces, requires that a guilty plea must be made unequivocally. In R. v. Malone the defendant was charged with having committed fraud. He maintained his innocence and resisted tendering a guilty plea despite his first attorney's advice to the contrary. After the defendant was shown a videotape, which may have implicated him, he signed a guilty plea.<sup>69</sup> Immediately after doing so, the defendant wrote a memo to the judge stating that he was innocent despite the guilty plea. However, the trial court nevertheless entered a judgment against him. The British Columbia Supreme Court determined that the defendant had protested his innocence throughout the period in question and disputed the facts relied upon by the

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<sup>65</sup> Kambanda, ICTR 97-23-A, ¶ 79. [Reproduced at Tab 1]

<sup>66</sup> Erdemovic, ¶ 28 (2) (Joint Separate Opinion of Judge McDonald and Judge Vohrah). [Reproduced at Tab 6]

<sup>67</sup> Id. ¶ 89. [Reproduced at Tab 6]

<sup>68</sup> Id. The ICTY ultimately reversed stating that the guilty plea was invalid because it was not made knowingly. [Reproduced at Tab 6]

<sup>69</sup> 1997 W.C.B.J. 423138 \*\*27. [Reproduced at Tab 12]

prosecution.<sup>70</sup> The court therefore reversed, holding that the defendant had misgivings about the plea immediately after the plea was tendered and acted to have it set aside in a timely manner.<sup>71</sup>

(iii) The United States

Although the United States has clear provisions for ensuring the validity of a guilty plea, it does not require that guilty pleas be given unequivocally. Indeed, Judge McDonald, a former federal court judge stated in her Erdemovic opinion that the United States was the sole common law country which does not require that a plea of guilty be unequivocal.<sup>72</sup>

D. The Guilty Plea Must Be Supported By Sufficient Facts

(i) ICTR and ICTY

According to Rule 62 of the Rules of Procedure and Evidence for both the ICTR and ICTY, a guilty plea must be based on sufficient facts to support the charge and establish 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. In Kambanda, the prosecutor cited the ICTY Trial Chamber's judgment in Jelusic, to argue that when accepting the plea of guilty, the ICTY had accepted that the prosecutor and defendant agreed on the factual basis for the prosecution.<sup>73</sup>

(ii) The United States

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<sup>70</sup> Id. at \*\*38. [Reproduced at Tab 12]

<sup>71</sup> Id. [Reproduced at Tab 12]

<sup>72</sup> Erdemovic, ¶ 29 (Joint Separate Opinion of Judge McDonald and Judge Vohrah). [Reproduced at Tab 6]

<sup>73</sup> Kambanda, ICTR 97-23-A, ¶ 91. [Reproduced at Tab 1]

United States federal judges must also ensure that there is a sufficient factual basis for the rendering of a guilty plea. Rule 11(f) categorically states that: “Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.”<sup>74</sup>

E. The ICTR Appeals Chamber Correctly Affirmed Kambanda’s Conviction Stating That The Plea Of Guilty Was Valid

The ICTR correctly rejected Kambanda’s appeal that his guilty plea was invalid because he submitted the plea voluntarily, knowingly, and unequivocally. Furthermore, Kambanda’s guilty plea was based on sufficient facts to support the charges.<sup>75</sup>

The elements for ensuring that a guilty plea is given voluntarily are that: (1) an accused must have been mentally competent to understand the consequences of his actions when pleading guilty; and (2) the plea 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 sentences.<sup>76</sup>

Kambanda claimed that his plea was not given voluntarily, because he was detained and questioned in an unofficial place of detention and signed the plea agreement while being deprived of chosen counsel.<sup>77</sup> At a hearing in the Trial Chamber, Kambanda testified that his place of detention contributed to an oppressive atmosphere that compelled him to sign the plea agreement, and therefore the guilty plea was not truly

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<sup>74</sup> Fed. R. Crim. P. 11(f) (2002). [Reproduced at Tab 29]

<sup>75</sup> Kambanda, ICTR 97-23-A, ¶¶ 49, 64, 78, 87, 95. [Reproduced at Tab 1]

<sup>76</sup> Id. ¶61. [Reproduced at Tab 1]

<sup>77</sup> Id. ¶57, quoting Kambanda’s appellate brief ¶ 41. [Reproduced at Tab 1]



voluntary.<sup>78</sup> The prosecutor rebutted the claim, stating that Kambanda confirmed that he voluntarily and consciously wished to plead guilty, and that he was not being forced to do so.<sup>79</sup>

The Appeals Chamber stated that there was no indication in the record that Kambanda was mentally incompetent or failed to understand the consequences of pleading guilty. The court rejected Kambanda's claim that his plea was involuntary due to depression resulting from isolation. Furthermore, the court asserted that since Kambanda held the position of prime minister, he was accustomed to dealing with highly stressful situations and to making decisions under adverse circumstances. Lastly, the court found that Kambanda never mentioned that he was being threatened in any way.

The court correctly determined that Kambanda's guilty plea was given voluntarily. This is clear when comparing his case with those mentioned above. Unlike many of the defendants in the previously discussed cases, Kambanda was a seasoned official who held the post of prime minister. He was dissimilar to the defendant in Boykin who was indigent and relatively powerless. Kambanda was also unlike the defendant in Djekic, who was pressured by the judge to plead guilty, or be arrested, with child in hand. Kambanda had adequate counsel representing him, whereas, the defendant in Rajaeeefard was inadequately represented by counsel. Moreover the student counsel in Rajaeeefard was persuaded by the judge to represent the client in an unauthorized manner. Kambanda admitted signing the plea voluntarily and did so with counsel who was authorized to represent him to the fullest capacity. Kambanda's depression did not require the trial court to take any extra measures to ensure that he was mentally capable of making the

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<sup>78</sup> Id. ¶58, quoting Transcript, 27 June 2000, at 87-89. [Reproduced at Tab 1]

<sup>79</sup> Id. ¶60. [Reproduced at Tab 1]

guilty plea. This conforms to the standard expressed by the U.S. Supreme Court in Godinez.

The Kambanda court also correctly rejected Kambanda's claim that his plea was neither informed nor made knowingly.<sup>80</sup> Kambanda asserted that the Trial Chamber did not properly apprise him of the nature and consequences of pleading guilty and that it could result in life imprisonment.<sup>81</sup> The court responded that Kambanda acknowledged that he was aware of the consequences of his guilty plea.<sup>82</sup> The court also pointed that the record illustrates that both parties were aware that by pleading guilty, the sentence of life imprisonment was a possible result.<sup>83</sup>

Kambanda's case was unlike that of Erdemovic, where the latter's attorney was clearly unaware of the legal ramifications of pleading guilty and the differences between the crimes with which he was charged. Also, Kambanda, unlike Erdemovic was a high ranking official who would more likely understand the ramification and charges that were being made against him. Also there was no indication in the record that Kambanda's attorney was incapable of understanding the charges made against Kambanda.

Kambanda is also different from the defendant in R v. N.C. who was not fully aware of the charges made against him. Kambanda knew the gravity of the crimes of which he was accused and his complicity in ordering them to be carried out.

In his appeal, Kambanda also failed to demonstrate how his plea was made equivocally. Unlike Erdemovic, who attempted to provide a defense to his actions, Kambanda made no such remarks and advanced no defenses. Also, unlike the defendant

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<sup>80</sup> Id. ¶ 78. [Reproduced at Tab 1]

<sup>81</sup> Id. ¶ 68. [Reproduced at Tab 1]

<sup>82</sup> Id. ¶ 76. [Reproduced at Tab 1]

<sup>83</sup> Id. [Reproduced at Tab 1]

in R v. Malone, Kambanda neither intimated any intent to plead not guilty nor, after making the guilty plea, did he make a timely statement asserting his innocence.

Lastly, the Kambanda court correctly rejected Kambanda's allegation that the charges were not substantiated by sufficient facts. In his initial appearance, Kambanda pleaded guilty to the charges stated against him. Moreover, he signed a written agreement with the prosecutor acknowledging full responsibility for all the charges made against him. Also the Appeals Chamber noted that there was no disagreement between the prosecutor and Kambanda over the facts stated in the indictment.

In summary, the ICTR correctly determined that Kambanda's guilty plea was validly made and his attempt to appeal on those grounds appropriately failed.

## 2. **GENERAL CONSIDERATIONS IN SENTENCING**

Courts apply two primary factors when considering sentencing for defendants who plead guilty before them. They look at both aggravating and mitigating factors and weigh them against one another. The aggravating factors are those which tend to influence the court in increasing a sentence. Conversely, mitigating factors are those factors which will help to reduce the sentence.

### A. **Aggravating Factors**

When weighing the aggravating factors for sentencing, most courts look to the gravity and nature of the crimes committed. The courts focus on the defendant's specific role in the commission of the crime, and look to the context in which the crime was committed. For example, a court may look to whether the defendant committed the crime

voluntarily or whether the defendant was acting under some duress. Some jurisdictions indicate that a lack of remorse may be an aggravating factor in sentencing. Other factors will include whether the offender was a first time offender or whether there has been a lengthy record of offences committed. In addition, courts will also look to the impact upon the victims and their families, and to the impact on society in general.

(i) ICTR and ICTY

Rule 101 of the ICTR and ICTY's Rules of Procedure and Evidence states, that the respective tribunal shall take any aggravating circumstances into consideration for the purposes of sentencing.<sup>84</sup> While the rules provide no specific list of sentencing circumstances, the tribunals' case law has elaborated on some of them.

The ICTR has generally looked to the gravity and nature of the crimes that it prosecutes under the ICTR statute. In Prosecutor v. Ruggiu, the ICTR stated that genocide and crimes against humanity were inherently aggravating offences because they are heinous in nature and shock the collective conscience of mankind.<sup>85</sup> In Prosecutor v. Akayesu, the ICTR referred to genocide as the crime of crimes and similarly that crimes against humanity "were particularly shocking to the human conscious [sic] because they typify inhumane acts committed against civilians on a discriminatory basis."<sup>86</sup> Based on these descriptions, the ICTR has repeatedly stressed that commission of these crimes is a strong aggravating factor when passing sentence in cases that come before it.

The ICTR has also considered the degree of participation in which an accused partakes in the crimes they are convicted of. In Prosecutor v. Serushago, the Trial

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<sup>84</sup> ICTY Rules of Procedure and Evidence, Rule 101(B)(1); ICTR Rules of Procedure and Evidence, Rule 101(B)(1). [Reproduced at Tab 27]

<sup>85</sup> ICTR-97-32-I, ¶ 48. [Reproduced at Tab 3]

<sup>86</sup> ICTR-96-4-T. [Reproduced at Tab 4]

Chamber determined that one of the aggravating factors was Serushago's voluntary participation in the genocide.<sup>87</sup> On appeal, Serushago argued that the Trial Chamber gave him a harder sentence than did the ICTY in sentencing Erdemovic to five years for essentially having committed the same crimes.<sup>88</sup> The Appeals Chamber distinguished the cases, stating that Erdemovic was forced to kill citizens under the threat of being killed himself.<sup>89</sup>

The ICTR has also considered the personal role in which an accused plays in the commission of particular crimes as an aggravating factor. Omar Serushago was a de facto leader of the *Interahamwe* in Gisenyi, with personal responsibility over various militia soldiers who murdered numerous people.<sup>90</sup> Georges Ruggiu was a journalist and broadcaster with Radio Television Libre des Milles Collines ("RTLM"). As such he "played a crucial role in the incitement of ethnic hatred and violence, which RTLM vigorously pursued."<sup>91</sup>

(ii) Canada

Jurisdictions around the world apply various aggravating factors when sentencing criminals. Most typically this also includes an analysis of the gravity of the crimes committed. In R. v. Brown, the Newfoundland Court of Appeal reviewed a trial court's conviction of a defendant accused of attempting to kill his girlfriend.<sup>92</sup> The aggravating factors, which the trial court took into consideration, included the gravity of the offence. These factors included: (1) the nature of the crime committed which was attempted

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<sup>87</sup> ICTR-98-39-T, ¶ 30. [Reproduced at Tab 5]

<sup>88</sup> ICTR-98-39-A, ¶ 26. [Reproduced at Tab 5]

<sup>89</sup> Id. ¶27. [Reproduced at Tab 5]

<sup>90</sup> ICTR-98-39-T, ¶ 29. [Reproduced at Tab 5]

<sup>91</sup> ICTR-97-32-I, ¶ 50. [Reproduced at Tab 3]

<sup>92</sup> 152 C.C.C. (3d) 26, 33. [Reproduced at Tab 13]

murder; (2) the circumstances surrounding the actual commission of the offence; and (3) the degree of premeditation involved.<sup>93</sup>

In addition to federal and provincial courts weighing relevant aggravating circumstances on a case-by-case analysis, the Canadian Criminal Code enumerates various aggravating circumstances, which are to be considered for the purposes of sentencing. Section 718.2 includes the following<sup>94</sup>:

- (a) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
- (b) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,
- (c) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
- (d) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
- (e) evidence that the offence was a terrorism offence.

These factors have been referred to in Canadian court cases since their promulgation.

(iii) The United States

In 1987, the United States Sentencing Commission promulgated the Federal Sentencing Guidelines Manual (FSGM). The FSGM suggests that for the purpose of sentencing, certain aggravating factors deserve a higher sentence, in addition to the baseline sentence for the actual crime committed. Under § 3B1.1 of the FSGM, a federal court may impose a higher sentence on the defendant for the latter's role as an organizer, leader, manager or supervisor of a criminal activity that involved five or more

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<sup>93</sup> Id. [Reproduced at Tab 13]

<sup>94</sup> Consolidated Statutes of Canada, Criminal Code PART XXIII Sentencing, R.S.C. 1985, c. C-46, s. 718.2. [Reproduced at Tab 28]

participants. In addition, §3B1.3 favors a higher sentence for defendants who abuse a position of trust.

Part K of the FSGM provides a listing of numerous aggravating factors (and mitigating factors) which a federal court may consider for the purposes of sentencing. Some of these factors include where a crime results in death,<sup>95</sup> physical injury,<sup>96</sup> and extreme psychological injury.<sup>97</sup> The FSGM also posits that where a crime threatens public welfare, such that national security, public health, or safety, are significantly endangered, an increased sentence is encouraged.<sup>98</sup>

(iv) New Zealand

In R. v. Namana, New Zealand's High Court and Court of Appeal stressed that an attack on a police officer was considered a serious aggravating factor for sentencing considerations.<sup>99</sup> In addition, the court took into consideration the defendant's knowledge that the victim was a police officer and the defendant's long and violent criminal record.<sup>100</sup> In R. v. Nua, the Court of Appeal enumerated various aggravating factors relating corruption charges made against a customs officer. The court looked to the heightened trust placed on public figures and the expectation that they not engage in corrupt acts, in addition to the magnitude of personal gain, the frequency of the incidents, and the ultimate loss to public revenue.<sup>101</sup>

B. Mitigating Factors

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<sup>95</sup> United States Sentencing Commission, Federal Sentencing Guidelines Manual (FSGM) 2001 Edition, § 5K2.1, 385 (West, 2001). [Reproduced at Tab 29]

<sup>96</sup> Id. § 5K2.2, at 385. [Reproduced at Tab 29]

<sup>97</sup> Id. § 5K2.3, at 386. [Reproduced at Tab 29]

<sup>98</sup> Id. § 5K2.14, at 389. [Reproduced at Tab 29]

<sup>99</sup> 2000 NZLR LEXIS 147, at \*35. [Reproduced at Tab 25]

<sup>100</sup> Id. at \*37. [Reproduced at Tab 25]

<sup>101</sup> 2001 NZLR LEXIS 159, \*17. [Reproduced at Tab 24]

In considering proper sentences, courts will also look to mitigating circumstances to which aggravating circumstances will be weighed against. Mitigating factors allow for defendants to persuade the court to render a lighter sentence if it believes that extenuating circumstances existed.

(i) ICTR and ICTY

The ICTR and ICTY are obligated to take into consideration any mitigating circumstances including the substantial cooperation with the prosecutor by the convicted person before or after conviction. This is stated in Rule 101 (B)(ii) of their respective Rules of Procedure and Evidence.

The ICTR has noted various mitigating factors which it has considered in passing sentences in cases where guilty pleas have been proffered.<sup>102</sup> Specifically, Rule 101 (B)(ii) states that a mitigating factor will also include any substantial cooperation a defendant provides to the prosecution. The ICTR has also taken into account expressions of remorse, voluntary surrender to authorities, as well as any assistance that might be provided to victims. The ICTR has also considered the degree to which a defendant holds little or no actual political authority, in addition to any facts that have shown that the defendant did not personally participate in the killings.

(ii) The United States

The Federal Sentencing Guidelines Manual (FSGM) suggests a reduction in sentence where certain mitigating factors exist. §3B1.2 of the FSGM recommends a decrease in sentence where the defendant played a minimal role or was a minor participant in the commission of a criminal activity.

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<sup>102</sup> Prosecutor v. Ruggiu, ICTR 97-32-I, ¶ 53 [Reproduced at Tab 3]; Prosecutor v. Serushago 98-39-S, ¶ 35 [Reproduced at Tab 5]; Prosecutor v. Kambanda ICTR 97-23-S, ¶ 46. [Reproduced at Tab 2]



The FSGM also highlights a defendant's acceptance of responsibility as a mitigating factor during sentencing under § 3E1.1. For this provision to be effective, the defendant must clearly demonstrate his/her acceptance of responsibility for the offense.<sup>103</sup> If the defendant does so, then a federal court may also take into consideration the defendant's assistance to authorities in the investigation or prosecution of his/her own misconduct by doing one of the following: the defendant (1) timely provides complete information to the government concerning the defendant's own involvement in the offense; or (2) timely notifies authorities of the defendant's intent to plead guilty, thereby permitting the government to avoid trial preparation and allowing the court to allocate its resources efficiently.<sup>104</sup> The commentary section for § 3E1.1 suggests other considerations when considering the defendant's acceptance of responsibility. Namely it suggests that a federal court should enquire as to whether the defendant: (1) truthfully admitted any additional relevant conduct; (2) voluntarily terminated or withdrew from criminal conduct or associations; (3) voluntarily surrendered to authorities promptly after commission of the offense; (4) voluntarily resigned from the office or position held during the commission of the offense; and (5) engaged in post-offense rehabilitative efforts.<sup>105</sup> The commentary section also points out that the sentencing judge is in a unique position to evaluate the defendant's acceptance of responsibility and therefore is entitled to great deference on review.<sup>106</sup>

The FSGM provides for a federal court to depart from the sentencing guidelines when the prosecutor motions that the defendant has provided substantial assistance in the

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<sup>103</sup> FSGM § 3E1.1(a), at 307. [Reproduced at Tab 29]

<sup>104</sup> *Id.* § 3E1.1 (b), at 307. [Reproduced at Tab 29]

<sup>105</sup> *Id.* Part E, Commentary Section, #1, at 307-8. [Reproduced at Tab 29]

<sup>106</sup> *Id.* Part E, Commentary Section, #5, at 308. [Reproduced at Tab 29]

investigation or prosecution of another person who has committed an offense.<sup>107</sup> The FSGM suggests that various factors can be taken into consideration for determining the appropriate reduction: (1) an evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and (5) the timeliness of the defendant's assistance.<sup>108</sup>

Lastly, the FSGM recommends a reduction in sentence where the defendant "voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense..."<sup>109</sup> Furthermore, if such an offense was unlikely to have been otherwise discovered, a court may be warranted in departing from the guidelines.<sup>110</sup>

(iii) Canada and Other Common Law Jurisdictions

In addition to the considerations listed above, many national jurisdictions also take other mitigating factors into consideration for the purposes of sentencing. In R. v. Ervin, the Alberta Provincial Court took into consideration for the purposes of mitigation, the accused's age, the defendant's record, and the fact that he had the support of his family, in addition to his guilty plea.<sup>111</sup>

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<sup>107</sup> Id. § 5K1.1, at 382. [Reproduced at Tab 29]

<sup>108</sup> Id. § 5K1.1(a) at 382. [Reproduced at Tab 29]

<sup>109</sup> Id. § 5K2.16 at 390. [Reproduced at Tab 29]

<sup>110</sup> Id. [Reproduced at Tab 29]

<sup>111</sup> 2002 Alta. D. Crim. J. 265, \*106. [Reproduced at Tab 14]

In R v. Place, the Supreme Court of South Australia's Court of Criminal Appeal stated that the defendant's status as a first time offender was a mitigating factor in sentencing.<sup>112</sup> The court also emphasized that the defendant's emotional breakdown during the time of the commission of crimes, which resulted from the breakdown of his marriage were mitigating factors.<sup>113</sup> Lastly, they agreed with the trial court's assessment that the defendant was not likely to repeat his crimes.<sup>114</sup>

In the New Zealand case, R. v. Nua, the Court of Appeal noted the trial court's attention to certain mitigating factors. Namely, the court looked at the defendant's early plea of guilty, resignation from a position of authority, and cooperation with the authorities.<sup>115</sup>

### **3. SPECIFIC CONSIDERATIONS FROM A PLEA OF GUILTY**

#### **(i) The ICTR**

In sentencing Jean Kambanda to life imprisonment, despite his plea of guilty, the ICTR delivered a message that a plea of guilty will not in and of itself relieve a defendant from a sentence of life imprisonment for committing crimes such as genocide. Although a plea of guilty may not effectively reduce a prison sentence, it does call into question whether the court is obligated to consider it as a mitigating factor in sentencing. From the case law surveyed, there does not appear to be any specific statement by any of the courts that states that a guilty plea must be a mandatory consideration when formulating a sentence. However, at the same time, all the courts surveyed acknowledge that it is a

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<sup>112</sup> 189 A.L.R. 43. (2002). [Reproduced at Tab 23]

<sup>113</sup> Id. [Reproduced at Tab 23]

<sup>114</sup> Id. [Reproduced at Tab 23]

<sup>115</sup> 2001 NZLR LEXIS 159, \*7, 8. [Reproduced at Tab 24]

mitigating factor which they do take into consideration. This indicates that while not explicitly stated, a guilty plea is a *de facto* or perhaps “common law” mandatory consideration in determining sentences. In the cases that will be reviewed below, many appellate courts reviewed the sentences handed down and consequently reduced the sentences imposed by trial courts, partly because the trial courts did not give the guilty pleas “enough” consideration. Nevertheless, in almost all of the cases reviewed, the guilty pleas were considered as mitigating factors. The appellate review of lower court sentences also implicates issues related to standards of review. The ICTR Appeals Chamber has been far more reluctant to reduce sentences imposed by the Trial Chambers, applying an abuse of discretion standard. However, many national appellate courts have engaged in reducing trial court sentences, and in some cases increasing them.

In Kambanda v. Prosecutor, Kambanda appealed claiming the Trial Chamber failed to consider his plea of guilty as a mitigating factor, which he asserted carried a greater discount in sentence.<sup>116</sup> Rule 101 (B)(ii) of the Rules of Procedure and Evidence clearly requires that the Trial Chamber must take into account, any mitigating factors. If the Trial Chamber fails to consider mitigating factors, it commits an error of law.<sup>117</sup> The Appeals Chamber also questioned that even if a Trial Chamber were to commit such an error, it would be debatable as to whether the decision itself would be invalidated.<sup>118</sup>

The Trial Chamber weighed the aggravating factors against the mitigating factors, and concluded that the aggravating factors, such as the gravity of the crimes, Kambanda’s position as prime minister, and his lack of explanation for his voluntary participation in the events outweighed the mitigating factors, such as the guilty plea, and his cooperation

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<sup>116</sup> ICTR 97-23-A, ¶ 114. [Reproduced at Tab 1]

<sup>117</sup> Id. ¶ 117. [Reproduced at Tab 1]

<sup>118</sup> Id. [Reproduced at Tab 1]

with the prosecutor.<sup>119</sup> The Trial Chamber also noted that Kambanda failed to show any contrition, remorse, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so.<sup>120</sup> The Appeals Chamber affirmed the Trial Chamber's decision stating that the latter took sufficient note of the mitigating circumstances, including the guilty plea, and it was therefore in the Trial Chamber's discretion to weigh all the factors and sentence Kambanda accordingly to a life imprisonment.<sup>121</sup>

In Prosecutor v. Ruggiu, the Trial Chamber looked at the guilty plea with greater significance. It acknowledged that a guilty plea should be considered a mitigating circumstance because it facilitates the administration of justice by expediting the judicial process and saves resources.<sup>122</sup> The Trial Chamber then noted that although not all

“legal systems recognise that a guilty plea constitutes a mitigating factor or may be considered advantageous to the accused, in the instant case, there is need to note the striking significance of the plea. The accused's acknowledgment of his mistakes and crimes is a healthy application of reason and sentiment, which illustrates the beginning of repentance . . . . This chamber . . . considers that it is good policy in criminal matters that some form of consideration be shown towards those who have confessed their guilt, in order to encourage other suspects and perpetrators of crimes to come forward. It is important to encourage all those involved in crimes committed in Rwanda in 1994 to confess and admit their guilt. Confession should then be considered as constituting a mitigating factor whose weight and importance will still need to be considered by the Chamber.”<sup>123</sup>

The statement above is interesting in many ways. The court stated that not all legal systems recognized that a guilty plea is a mitigating factor without providing examples of those that do not. However, it goes on to emphasize the importance of the guilty plea as a mitigating factor, and furthermore that it would be good policy to encourage others to do

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<sup>119</sup> Kambanda, ICTR 97-23-S, ¶¶ 61, 62. [Reproduced at Tab 2]

<sup>120</sup> Id., ¶ 51. [Reproduced at Tab 2]

<sup>121</sup> ICTR 97-23-A, ¶ 124. [Reproduced at Tab 1]

<sup>122</sup> Prosecutor v. Ruggiu, ICTR-97-32-I, ¶ 53. [Reproduced at Tab 3]

<sup>123</sup> Id., ¶ 55. [Reproduced at Tab 3]

so, particularly in the context of the crimes committed in Rwanda in 1994. The statement at a minimum conforms to the requirements of Rule 101 (B)(ii), requiring courts to take into consideration any mitigating factors when sentencing a defendant. The Ruggiu court's decision would appear to signal a more active policy proposal that guilty pleas be given "greater" weight.

The Ruggiu court enumerated several other mitigating factors, which it took into consideration in imposing sentence. It considered the cooperation given to the prosecution, the lack of a prior criminal record, Ruggiu's open expression of remorse, and his assistance to child victims as well as to other Tutsis.<sup>124</sup> The court also determined that Ruggiu held no political power, but was a subordinate who took orders, unlike Jean Kambanda who held a high political position of power.<sup>125</sup> The prosecutor proposed a sentence of twenty years imprisonment, however the Trial Chamber, weighing the mitigating factors, sentenced Ruggiu to a total of twelve years.<sup>126</sup> It is difficult to assess how much emphasis the court placed solely on the guilty plea, amongst the many mitigating factors it took into consideration. Nevertheless, the Ruggiu court made clear its desire to emphasise the guilty plea as an important mitigating factor, as distinguished from other national courts that do not consider it a mitigating factor at all.

(ii) Hong Kong

Although the ICTR never stated specifically which courts did not consider a guilty plea as a mitigating factor, a possible example might be the Hong Kong courts. In R. v. Ho Tung Shing & Ors, the Court of Appeal stated that: "when a court comes to the conclusion that life imprisonment would be proper, factors such as pleas of guilty, co-

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<sup>124</sup> Id. ¶¶ 58-60; 69-72; 73-74. [Reproduced at Tab 3]

<sup>125</sup> Id. ¶¶ 75-76. [Reproduced at Tab 3]

<sup>126</sup> Id. ¶ 81. [Reproduced at Tab 3]

operation with the police and remorse, if it exists, have little relevance in the sentencing process.”<sup>127</sup> In that case however, the defendants were appealing an excessive sentence of 22 years imprisonment for armed robbery. The court found that the defendants’ guilty pleas and the nature of the crimes did not warrant such a high sentence and accordingly reduced the sentence to 18 years imprisonment.<sup>128</sup>

(iii) Canada

In the Canadian case, R. v. Brown, a Newfoundland trial court judge imposed a sentence of life imprisonment upon a defendant who pleaded guilty to attempted murder of his girlfriend, by repeated stabbing.<sup>129</sup> The trial court judge noted the mitigating factors, such as the defendant’s age, his guilty plea, and his status as a first time offender.<sup>130</sup> The judge nevertheless imposed a sentence of life imprisonment, finding that the gravity of the crime far outweighed the mitigating factors.<sup>131</sup> The central issue on appeal was whether the offence and offender belonged to a category such that no other imprisonment was justified.<sup>132</sup> The Newfoundland Court of Appeal reviewed other cases where the crimes committed were so heinous that no other punishment, but for life imprisonment, would be justified. The court then found that the instant case did not fall into that category and reduced the sentence of life imprisonment to 14 years.<sup>133</sup> In so doing, the appellate court could not have neglected to consider the guilty plea as a mitigating circumstance when reducing the sentence.

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<sup>127</sup> 1994 HKC LEXIS 654, \*8. [Reproduced at Tab 26]

<sup>128</sup> Id. at \*10. [Reproduced at Tab 26]

<sup>129</sup> 152 C.C.C. (3d) 26, (2000). [Reproduced at Tab 13]

<sup>130</sup> Id. at 33. [Reproduced at Tab 13]

<sup>131</sup> Id. at 34. [Reproduced at Tab 13]

<sup>132</sup> Id. [Reproduced at Tab 13]

<sup>133</sup> Id. at 56. [Reproduced at Tab 13]

In Della Liliane St-Coeur v. Sa Majesté la Reine, the Quebec Court of Appeal reduced a sentence imposed by the trial court judge.<sup>134</sup> The defendant killed her daughter by smothering the child's face with a pillow.<sup>135</sup> She pleaded guilty and was subsequently sentenced to life imprisonment with no possibility of parole until after fifteen years.<sup>136</sup> The Court of Appeal held that the minimum fifteen years imposed was too high and reduced it accordingly to ten years.<sup>137</sup> Here also, the court most likely took into consideration various mitigating factors, such as the defendant's guilty plea when reducing the time period for waiting to get parole eligibility.

(iv) England

In R. v. De Haan, an English Court of Appeal viewed the guilty plea as a mitigating factor.<sup>138</sup> Here the defendant pleaded guilty to housebreaking and larceny. The lower court took notice of the guilty plea, but nevertheless sentenced the defendant to four and half years in prison. The Court of Appeal reduced the sentence, stating that the lower court in imposing sentence did not adequately take into consideration the mitigating value of the guilty plea.<sup>139</sup> Similarly, in R v. Watson, the Court of Appeal (Criminal Division) reduced a sentence of the trial court upon the defendant who killed an individual through his reckless driving.<sup>140</sup> The Court of Appeal considered the aggravating circumstances, which were the reckless driving and the danger such actions posed to society and weighed them against the mitigating factors such as the guilty plea

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<sup>134</sup> 43 Q.A.C. 141 (1991). [Reproduced at Tab 15]

<sup>135</sup> Id. ¶ 3. [Reproduced at Tab 15]

<sup>136</sup> Id. ¶ 11. [Reproduced at Tab 15]

<sup>137</sup> Id. ¶ 13. [Reproduced at Tab 15]

<sup>138</sup> 2 Q B 108 (1968). [Reproduced at Tab 19]

<sup>139</sup> Id. [Reproduced at Tab 19]

<sup>140</sup> EWCA Crim 2002, ¶ 18. [Reproduced at Tab 20]



and the expressions of remorse. The court reduced the sentence accordingly from a five-year sentence in a youth offenders' institution to a three-year sentence.<sup>141</sup>

English appellate courts however, have lengthened sentences for crimes such as rape when they have felt the sentences handed down by the trial courts were too lenient and gave the mitigating factors too much weight. In R v. Attorney General's Reference No 8 of 1991, the Court of Appeal (Criminal Division) ruled that the trial court allowed too much weight to be given to the mitigating factors.<sup>142</sup> In this case, the defendant raped the 13 year-old friend of his daughter. The defendant pleaded guilty after being arrested. The sentencing judge took into consideration factors such as the guilty plea and the fact that it spared the victim the ordeal of testifying in court, in addition to the defendant attending classes to deal with his problems. The judge also looked at the defendant's degree of remorse and that there was no evidence that the defendant had any obsessions of raping or sexual engaging with young children. The Court of Appeal, while noting the mitigating factors mentioned by the lower court, stressed that the aggravating factors such as the age of the victim, the planning which the defendant undertook to commit the rape, and the degree of responsibility which the defendant had as an adult over this child outweighed the mitigating factors. The Court of Appeal increased the sentence from thirty months to five years.

In Attorney General's Reference (No 1 of 1989), the Court of Appeal (Criminal Division) similarly held that a sentence imposed by the lower court judge was unduly lenient.<sup>143</sup> In that case, the defendant had perpetrated various sexual acts

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<sup>141</sup> Id. [Reproduced at Tab 20]

<sup>142</sup> 13 Cr App R(S) 360 (1991). [Reproduced at Tab 21]

<sup>143</sup> [1989] NI 245 (1989). [Reproduced at Tab 22]

with the six year-old daughter of his friend. The defendant was sentenced to five years, but the Court of Appeal increased the sentence to eight years. The aggravating circumstances were specifically that the victim was very young, the defendant was in a position of trust, and the number of incidents which took place were numerous. The court took into consideration numerous mitigating factors: (1) The defendant's remorse; (2) his good work history; (3) his early confession to the police; (4) that he made it clear that he would plead guilty and followed through; (5) the fact that he did not use force against the girl and that with the exception of the tearing of the hymen, she suffered no other physical injuries; (6) that there was no risk that he would perpetrate this again on other children; (7) and that he was himself the victim of sexual abuse.<sup>144</sup> The court stated that because the aggravating circumstances were so severe, the list of mitigating factors stated by the defendant amounted to mere "non-aggravating" factors.<sup>145</sup> The only mitigating factor that the court considered as such was the plea of guilty.<sup>146</sup> However, given the gravity of the crime, the court sentenced him to eight years in prison.<sup>147</sup>

### **III. CRITIQUE OF THE ICTR'S DECISION TO IMPOSE LIFE IMPRISONMENT ON JEAN KAMBANDA, REGARDLESS OF HIS GUILTY PLEA**

The ICTR's decision to impose life imprisonment on Jean Kambanda, despite his guilty plea demonstrates various countervailing considerations within the process of determining appropriate sentences. The ICTR's Appeals Chamber has steadfastly

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<sup>144</sup> Id. [Reproduced at Tab 22]

<sup>145</sup> Id. [Reproduced at Tab 22]

<sup>146</sup> Id. [Reproduced at Tab 22]

<sup>147</sup> Id. [Reproduced at Tab 22]

maintained its choice to affirm the Trial Chamber's sentences. It has applied that abuse of discretion standard to the Kambanda, and Serushago decisions where the defendant claimed that the Trial Chamber did not place enough weight on mitigating factors, specifically the plea of guilty. Most national courts apply a similar standard on appellate review, giving due deference to the lower court's place in weighing aggravating and mitigating factors, as well as observing demeanor and degrees of remorse which the defendants may or may not exhibit. Nevertheless, many of the courts mentioned in this study have reduced trial court sentences when they believed that the latter did not adequately take into consideration the mitigating factors. This took place in a variety of circumstances, ranging from murder, attempted murder, armed robbery to larceny. Conversely, appellate courts have also imposed greater sentences in cases of rape, such as those mentioned above, when trial courts were perceived to have been too lenient during sentencing.

In altering lower court sentences, numerous appellate courts have taken a pragmatic approach to the discretionary standard which they apply by changing such sentences. The guilty plea plays an important role for the purposes of judicial economy, regardless of a court's jurisdiction, whether it focuses on the gravest crimes handled by the ICTR or ICTY, or the panoply of crimes handled by national courts. The ICTR Appeals Chamber's reluctance to alter the Trial Chamber's imposition of sentences, such as in the Kambanda and Serushago cases poses numerous problems not only for the ICTR itself, but also for the prosecutor's office. Faced with the ICTR's reluctance to give greater credence to guilty pleas, defendants will show less willingness to cooperate with the tribunal by pleading guilty. Moreover, this will merely increase the ICTR's caseload.

The prosecutor's office will also face similar difficulties, as greater resources will need to be spent prosecuting defendants instead of encouraging them to plead guilty for their crimes. Also, the prosecutor may also have to reduce indictments against defendants in order to induce the latter to make guilty pleas. This would ultimately run counter to the purpose of the tribunal, which is to restore peace and justice to Rwanda by prosecuting those guilty of committing crimes. By taking these measures, there is a risk that the ICTR's reputation and legitimacy may become weakened, particularly if it is perceived that defendants are not being tried for the crimes they have committed.

To be fair to the Trial Chamber's decision to impose life imprisonment and the Appeals Chamber's decision to affirm the sentence on Kambanda, one must take into consideration the serious aggravating factors at play. Kambanda's role and his position in the political hierarchy during 1994 were considerable aggravating factors. It is quite likely that national courts would similarly rule as did the ICTR. In some of the cases surveyed, convicted defendants, in whom great amounts of trust have been placed, have not necessarily received lighter sentences, despite their guilty pleas. For instance, in R. v. Nua the New Zealand Court of Appeal was adamant regarding the need to root out the scourge of corruption. The court was reluctant to lessen the sentence imposed by the trial court despite the defendant's plea of guilty and open expression of remorse for his wrongdoing. In the English rape cases described above, the appellate courts were willing to increase sentences, considering the perceived severity of the crimes committed and the position of trust the defendants held over their under aged victims. The crimes in which Kambanda was accused of were of the most gruesome kind and as prime minister, he maintained a pivotal role by ordering that the killings take place. The ICTR has noted that

he was in a position of trust to ensure the security and safety of the people in Rwanda. It is clear that he failed to do so.

In assessing the approach found in the national courts for grave crimes such as murder, the ICTR should follow its own expressed policy in Ruggiu by placing greater emphasis on the guilty plea as a mitigating factor. In sentencing Kambanda, the ICTR need not have perceived anything short of a life imprisonment as failing to execute justice. Imposing lesser sentences on individuals such as Kambanda and others similarly situated will not necessarily fail to deter others to repeat the same crimes in the future. Moreover, the ICTR by imposing a life sentence neglected the recommendation of the prosecution that Kambanda should receive a reduced sentence due to his cooperation. Furthermore, defendants such as Kambanda who are willing to provide help in future prosecutions are vital, when considering the sizeable docket that the ICTR currently has. Imposing stiff sentences on such prominent individuals cuts off resources from the prosecutor's office and consequently its ability to play an effective part in administering justice in the ICTR.