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CASE WESTERN RESERVE UNIVERSITY
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INTERNATIONAL WAR CRIMES PROJECT

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

ISSUE 2: VOLUNTARY SURRENDER TO THE CUSTODY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

PREPARED BY SCOTT D. PERLMUTER
SPRING 2006

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I. Introduction and Summary of Conclusions

A. Issues*

This memorandum addresses issues related to the proper weight to be accorded by the International Criminal Tribunal for Rwanda ("ICTR") to the voluntary surrender of defendants. Section I examines the role of voluntary surrender in ruling on defendants' provisional release at the ICTR and the International Criminal Tribunal for Yugoslavia ("ICTY"). Section II describes the weight attributed to voluntary surrender in sentencing judgments at both Tribunals. Section III takes note of the difficulty in determining whether a surrender is truly voluntary, and examines both domestic and international law that deals with this uncertainty. Specifically, by synthesizing the goals of the ICTR and principles of international law, this section rejects the use of voluntary surrender to benefit the defendant in many cases.

B. Summary of Conclusions

(1) Voluntary surrender can properly be taken into account by the ICTR in ruling on defendants' pre-trial provisional release and as a mitigating factor during sentencing.

Defendants who have voluntarily surrendered to the authority of the two ad hoc international tribunals have successfully utilized their surrender as a rationale for provisional pre-trial release, and as a mitigating factor during sentencing. However,

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* Question 2: Voluntary surrender to the custody of the International Tribunals. As a condition for bail? A mitigating circumstance? Is a surrender, under threat of impending arrest (and lack of further local protection), truly voluntary? [This is issue in Seromba case; ICTY had one related decision; Mladic, others could be/have been like this.]

surrender may only garner benefits for the defendant when it is found to be truly voluntary.

(2) Voluntary surrender, standing alone, cannot persuade a Tribunal to mitigate a sentence or lead to provisional release.

Voluntary surrender has been recognized in international criminal jurisprudence as being a viable avenue through which defendants have both received reduced sentences as well as provisional release from Tribunal custody. However, voluntary surrender is only one factor to be considered in the formulae which result in reduced sentencing or provisional release.

(3) Voluntary surrender serves as a valid reason for provisional release, or as valid mitigating factor only in very limited situations.

While voluntary surrender has been recognized both by the ICTR and by other international tribunals as benefiting defendants, a surrender must bear several specific characteristics in order to do so. For example, issues of timing, willingness to cooperate, and attendant behavior of the defendant may invalidate an otherwise proper voluntary surrender.

(4) Due to the difficulty in determining whether a surrender is truly voluntary, and the gravity of the crimes that defendants at the ICTR are accused of, the ICTR should accord voluntary surrender little or no weight when the surrender may benefit the defendant.

The voluntary nature of a defendant's surrender is essential if the surrender is to be used to the defendant's benefit. However, the circumstances which have surrounded the majority of surrenders to both ad hoc tribunals call into question the voluntariness of

these surrenders. Therefore, the ICTR should not confer benefits on defendants based on their surrenders.

II. Factual Background

A. <u>Background and Purpose of the ICTR</u>

The ICTR was created by a United Nations declaration in 1994, following the genocide in Rwanda. The purpose of the ICTR is to contribute to the restoration and maintenance of peace and the rule of law in Rwanda.[1] To accomplish this, the Tribunal tries individuals accused of the gravest possible crimes. Accordingly, the ICTR tries various high level officials and discloses the way in which citizens were manipulated into committing atrocities, creating an educational historical record, thereby attempting to prevent future atrocities from taking place.[2] By surrendering to the ICTR, defendants enhance the Tribunal's ability to accomplish its goals. Therefore, defendants' voluntary surrenders have been accepted at the ICTR as being a valid rationale for both granting provisional releases and mitigating sentences.

B. <u>Voluntary Surrender</u>

1. <u>Development in International Criminal Law</u>

Prosecutions at Nuremberg give no guidance to modern international criminal tribunals on dealing with voluntary surrenders, as there was no substantial, voluntary cooperation between prosecution and the accused at that tribunal.[3] The practice of defendants' voluntary surrenders to the international criminal courts began in 1996, when

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[1] Michael Scharf, *Trading Justice for Efficiency*, 2 J. INT'L CRIM. JUST. 1070, at 1072 (2004) [reproduced in the accompanying notebook at Tab 11].
[2] *Id.* at 1078.
[3] GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO THE INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES 220 (2002) [reproduced in the accompanying notebook at Tab 22].

Tihomir Blaskic surrendered to the ICTY.[4] Because the concept of a voluntary surrender was so novel to the tribunals, it was not explicitly taken into account in either ad hoc tribunal's rules either for sentencing or provisional release. Therefore, there exists little legal guidance regarding voluntary surrender to counsel judges on today's international criminal tribunals. Decisions passed down since 1996, as well as amendments to the Rules of Procedure and Evidence at both ad hoc tribunals have begun to carve out a framework in which to view a defendant's voluntary surrender.

Due to the benefits to the Tribunals resulting from voluntary cooperation, saving time and resources while ensuring that justice is served, both Tribunals began to reward those who surrendered.[5] Also, in several cases, the ad hoc tribunals have pointed out how voluntary surrenders contribute to the work of the Tribunal, as one defendant's voluntary surrender may influence other indictees to voluntarily surrender.[6] For this reason, the tribunals often grant provisional release or mitigate sentences in exchange for this possibility. However, concurrent with this view, the Tribunals are cautious in giving great weight to voluntary surrenders on this basis, as the assertion that any defendant's voluntary surrender will have any positive influence on indictees who remain at large is entirely speculative.[7] Several high profile indictees still remain at large years after publication of their indictments, which lends credence to this argument. For example, the persistent flight of Radovan Karadzic and Ratko Mladic at the ICTY suggests that the voluntary surrenders of other indictees have a questionable impact on the likelihood of

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[4] The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Judgement, ¶ 776 (March 3, 2000) [reproduced in the accompanying notebook at Tab 23].
[5] KNOOPS, *supra* note 3, at 220-21 [reproduced in the accompanying notebook at Tab 22].
[6] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 868 (Feb. 22, 2001) [reproduced in the accompanying notebook at Tab 24].
[7] *Id.* at ¶ 9.

other defendants surrendering. Indictments for Karadzic, a high ranking Bosnian Serb government official, and Mladic, commander of the Bosnian Serb military, were initially published in 1995.[8] However, despite the voluntary surrender of numerous other high ranking Serb officials to the ICTY, Karadzic and Mladic remain at large.[9] Similarly, at the ICTR, despite the surrender of several defendants, many more remain at large.[10] For example, Félicien Kabuga, a Rwandan businessman accused of providing funding for the genocide, remains a fugitive despite others' surrenders, as well as efforts to arrest him.[11]

2. <u>Application at the ICTR</u>

Because the ICTR lacks an independent enforcement agency, voluntary surrender has become an essential instrument for obtaining custody over those accused at the Tribunal. In the absence of such surrender, the Tribunal must rely on the international community to arrest and detain suspects.[12] At the request of the Prosecutor, confirmation of an indictment against a suspect is transmitted to States for publication in various media outlets. This publication not only can state the existence of the indictment, but also it can call upon the accused to surrender to the Tribunal and invite any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.[13]

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[8] The Prosecutor of the Tribunal v. Radovan Karadzic, Ratko Mladic, Case No. IT-95-5, Indictment (Nov. 14, 1995) [reproduced in the accompanying notebook at Tab 25].

[9] The President of the International Criminal Tribunal for Yugoslavia, Letter dated 30 November 2005 from the President 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, ¶ 35, addressed to the President of the Security Council, U.N. Doc. S/2005/781 (Dec. 14, 2005) [reproduced in the accompanying notebook at Tab 65].

[10] U.N. SCOR, 60th Sess., 5328th mtg. at 16, U.N. Doc. S/PV.5328 (Dec. 15, 2005) [reproduced in the accompanying notebook at Tab 66]. (Stating that, as of December 15, 2005, 19 indictees at the ICTR remained at large.)

[11] *Id.*

[12] Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, Decision, ¶ 42 (Nov. 3, 1999) [reproduced in the accompanying notebook at Tab 26].

[13] ICTR Rules, Rule 60 [reproduced in the accompanying notebook at Tab 1].

3. Definition of Voluntary

Because voluntary surrender to international tribunals is such a recent development in international law, there is no customary international legal standard which delineates a voluntary surrender from an involuntary surrender. Therefore, surrenders of accused individuals to the ad hoc tribunals are judged on a case by case basis to determine, based on the circumstances of the surrender, whether they are voluntary or not.

III. Voluntary Surrender as a Factor in Granting Provisional Release

A. Background and Rules Governing Provisional Release

Article 20(3)(c) of the Statute for the ICTR provides that all individuals accused before the ICTR shall be presumed innocent until found guilty. It follows from the presumption of innocence that punishment cannot begin until the accused is convicted. Therefore, detention must serve some other goal, and it serves several purposes at international tribunals. Most importantly, detention is preventative at the ad hoc tribunals, and incorporates the principle that the gravity of the crimes accused at these Tribunals requires pre-trial detention.[14] Also, detention serves the goal of keeping accused persons, who may pose a danger to any victim, witness, or other person, in a position where they are unable to do so. Witness protection has already proved difficult in Arusha,[15] therefore the Tribunal should not exacerbate the already hazardous situation, furthering frustrating the goals of the ICTR by releasing potentially dangerous and powerful defendants from their custody. For instance, two witnesses in the *Rutaganda*

[14] KNOOPS, *supra* note 3, at 141 [reproduced in the accompanying notebook at Tab 22].
[15] Goran Sluiter, *The ICTR and the Protection of Witnesses*, 3 J. INT'L CRIM. JUST. 962 (2005) [reproduced in the accompanying notebook at Tab 13].

and *Akayesu* cases were killed[16], and in *The Prosecutor v. Pauline Nyiramasuhuko*, the Trial Chamber noted an effort by those associated with the Defense to stop actual and potential witnesses from testifying on behalf of the prosecution.[17]

A defendant's voluntary surrender can be at issue prior to the trial, if the defendant applies for provisional release from the custody of the Tribunal. Provisional release, which is the practice of temporarily releasing a defendant prior to trial, is common in many national legal systems[18] and is an established principle of customary international law that has come to fruition in the jurisprudence of the ad hoc tribunals.[19] The ICTR provides for the possibility of defendants' provisional release in Rule 65(B) of the ICTR Rules of Procedure and Evidence, which states that "provisional release may be ordered by a Trial Chamber…only if it is satisfied that the accused will appear for trial". Provisional release at the ICTR Appeals Chamber is governed by Rule 65(I), which confers the Appeals Chamber the discretion to grant provisional release pending an appeal or for a specific period of time if the following requirements are met:

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[16] The Secretary-General, *Report of the International Criminal Tribunal for the Prosecutions 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*, ¶ 51, *delivered to the Security Council and the General Assembly*, U.N. Doc. A/52/582, S/1997/868 (Nov. 13, 1997) [reproduced in the accompanying notebook at Tab 67].

[17] The Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali, Case No. ICTR-97-21-T, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, ¶ 2 (July 10, 2001) [reproduced in the accompanying notebook at Tab 27].

[18] Nathalie Gadola-Duerler & Jennifer E. Payne, *The Different Interdependencies and Connections in Criminal Procedure Law, Specifically Between Pretrial Detention and Bail from a Civil and a Common Law Point of View: A Swiss and American Comparative Law Analysis*, 3 TULSA J. COMP. & INT'L L. 205, at 214 (1996) [reproduced in the accompanying notebook at Tab 12].

[19] ICCPR Art. 9 §3 "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" [reproduced in the accompanying notebook at Tab 5].

a. the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
b. the appellant, if released, will not pose a danger to any victim, witness or other person, and
c. special circumstances exist warranting such release.

The defense must establish that all of these requirements are met, or the Appeals Chamber is not authorized to grant provisional release, and the defendant remains detained.[20] Defendants frequently attempt to use their voluntary surrenders at both the Trial Chamber under 65(B), and Appeals Chambers under Rule 65(I)(a), to prove that if provisional release is granted, they will appear at trial. The argument is that a defendant's voluntary surrender displays their willingness to cooperate with the Tribunal, and shows that they are not threats to abscond if release is granted.

Also, appellants have periodically argued that their voluntary surrenders constitute a special circumstance under Rule 65(I)(c), or an exceptional circumstance under previous phrasings of the same rule.

B. Issues Affecting a Defendant's Provisional Release Under Rules 65(B) and 65(I)(a)

Both the ICTY and ICTR have recognized that a defendant's voluntary surrender supports the argument that they will return to detention if provisionally released. It is evident from numerous cases at both of these tribunals that each has essentially elevated a defendant's voluntary surrender to a prerequisite to satisfying Rules 65(B) and 65(I)(a).[21]

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[20] KNOOPS, *supra* note 3, at 143 [reproduced in the accompanying notebook at Tab 22].
[21] *See e.g.*, The Prosecutor v. Ferdinand Nahimana, Case No. ICTR-99-52-T, Decision on the Defence's Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana (Rule 65 of the Rules of Procedure and Evidence) (Sept. 5, 2002) [reproduced in the accompanying notebook at Tab 28]; Prosecutor v. Blagoje Simic, Case No. IT-95-9-A, Decision on Motion of Blagoje Simic Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father (Oct. 21, 2004) [reproduced in the accompanying notebook at Tab 29]. In each of these cases, the decision of the Trial

In fact, the only case at the ICTY in which provisional release was granted without a voluntary surrender was *Prosecutor v. Dukic*, in which provisional release was granted because the defendant had only a few weeks to live.[22]

1. <u>Attendant Circumstances at the ICTR Affecting Every Defendant's Surrender</u>

First, the ICTR has seen a persistent deficiency of international cooperation in apprehending suspects and surrendering them to the Tribunal. Several cases have demonstrated this problem, in which obtaining custody over the defendant is imperiled by other nations' refusal to comply with surrender mandates from the United Nations. There are 19 individuals who have been indicted at the ICTR who remained fugitives at the end of 2005.[23] Most of these individuals are in the Democratic Republic of the Congo, which sits adjacent to Rwanda.[24] The government of the Democratic Republic of the Congo has aggravated this matter by their frequent refusal to openly communicate with the ICTR. With the exception of the *Munyakazi* case, where the DRC surrendered the defendant to the ICTR, the Tribunal's repeated attempts to channels of communication with the DRC have been relatively fruitless.[25] This signifies that there clearly remains refuge for indictees within close proximity to both Rwanda and Tanzania.

Chamber to either grant or deny provisional release was conditioned expressly on whether the defendant did or did not voluntarily surrender themselves. In fact, in *Simic*, the chamber took special note of the fact that the defendant had twice voluntarily surrender to the custody of the ICTY, once after a provisional release.

[22] Matthew M. DeFrank, *ICTY Provisional Release: Current Practice, a Dissenting Voice and the Case for a Rule Change*, 80 TEX. L. REV. 1429 n.16 (2002) [reproduced in the accompanying notebook at Tab 19].

[23] U.N. SCOR, 60th Sess., 5328th mtg. at 16, U.N. Doc. S/PV.5328 (Dec. 15, 2005) [reproduced in the accompanying notebook at Tab 66].

[24] Press Release, ICTR, ICTR President and Prosecutor Update Security Council on Completion Strategy. ICTR/INFO-9-2-411.EN accessed at: http://69.94.11.53/ENGLISH/PRESSREL/2004/411.htm (Nov. 24, 2004) [reproduced in the accompanying notebook at Tab 68].

[25] U.N. SCOR, 59th Sess., 5086th mtg. at 14, U.N. Doc. S/PV.5086 [reproduced in the accompanying notebook at Tab 69].

Furthermore, as stated by the ICTY in the *Blaskic* case, where the defendant alleged that his voluntary surrender constituted an exceptional circumstance warranting his provisional release, "the legal principle is detention of the accused and…release is the exception".[26] One reason for this is stated in *Brdanin*, where the ICTY noted the absence of any power in the Tribunal to execute its own arrest warrant, thereby placing a substantial burden on the accused to prove that they would appear for trial if provisional release is granted.[27] Like the ICTY, the ICTR also lacks an independent police force to execute its own arrest warrants.[28] For this reason, the ICTY has recognized a heightened hurdle for the defense to overcome when applying for provisional release. Any risk of flight posed by the defendant is exacerbated by the inability of the tribunals to independently search out and recover absconding indictees.[29]

Also, the gravity of the crimes that indictees are accused of at the ICTR is relevant in ruling on provisional release. Any sentence that will be imposed if the accused is convicted will be heavy, so as to suit the crime for which they are being sentenced. The probability of the defendant who appears at trial receiving a long prison sentence creates an incentive for the defendant to flee.[30] The ICTY has held the incentive

[26] The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14, Order Denying a Motion for Provisional Release (Dec. 20, 1996) [reproduced in the accompanying notebook at Tab 30].
[27] Prosecutor v. Radoslav Brdanin & Momir Talic, Case No. IT-99-36, Decision on Motion by Radoslav Brdanin for Provisional Release, ¶ 18 (July 25, 2000) [reproduced in the accompanying notebook at Tab 31].
[28] Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, Decision, ¶ 42 (Nov. 3, 1999) [reproduced in the accompanying notebook at Tab 26].
[29] Prosecutor v. Radoslav Brdanin & Momir Talic, Case No. IT-99-36, Decision on Motion by Radoslav Brdanin for Provisional Release, ¶ 18 (July 25, 2000) [reproduced in the accompanying notebook at Tab 31].
[30] The Prosecutor v. Ljube Boskoski Johan Tarculovski, Case No. IT-04-82-AR65.1, Decision on Johan Tarculovski's Interlocutory Appeal for Provisional Release, ¶ 6 (Oct. 4, 2005) [reproduced in the accompanying notebook at Tab 32].

is still present even in cases where Tribunal conceded that the defendant had voluntarily surrendered.[31]

2. Legal Standards by which Surrenders are Judged

In *Prosecutor v. Radoslav Brdanin*, the ICTY set out a general standard by which they judge voluntary surrenders in ruling on provisional release. The Trial Chamber, ruling on Brdanin's provisional release held that

> where an accused person has voluntarily surrendered to the tribunal, and depending upon the circumstances of the particular case, considerable weight is often given to that fact in determining whether the accused will appear at his trial. Conversely, and again depending upon the circumstances of the particular case, considerable weight would be given to the fact that the accused did not voluntarily surrender to the tribunal when determining that issue.[32]

Prosecutor v. Delic[33] gives greater guidance on the particular amount of weight that voluntary surrender is given at international tribunals in ruling on provisional release. Unlike the general rule stated in *Brdanin*, the ICTY in *Delic* specified that voluntary surrender alone wasn't sufficient to establish that the accused would return for trial. Delic surrendered six weeks after publication of his indictment, and immediately after an oral summons from the police. While the Trial Chamber did not dispute that Delic's surrender was voluntary, his concurrent behavior, including challenging his indictment, indicated that he posed some risk of flight from the tribunal in the event that his provisional release was granted. Therefore, this decision showed that voluntary surrender

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[31] The Prosecutor v. Vujadin Popovic Ljubisa Beara Drago Nikolic Ljubomir Borovcanin Zdravko Tolimir Radivoje Miletic Milan Gvero Vinko Pandurevic Milorad Trbic, Case No. IT-05-88-PT, Decision on Drago Nikolic's Request for Provisional Release, ¶ 16 (Nov. 9, 2005) [reproduced in the accompanying notebook at Tab 33].

[32] Prosecutor v. Radoslav Brdanin & Momir Talic, Case No. IT-99-36, Decision on Motion by Radoslav Brdanin for Provisional Release, ¶ 17 (July 25, 2000) [reproduced in the accompanying notebook at Tab 31].

[33] Prosecutor v. Zejnil Delalic Zdravko Mucic also known as 'Pavo' Hazim Delic Esad Landzo also known as 'Zenga', Case No. IT-96-21, Decision on Motion for Provisional Release Filed by the Accused Hazim Delic (Oct. 24, 1996) [reproduced in the accompanying notebook at Tab 34].

alone is not sufficient to prove the accused will return for trial. The defendant failed to establish unequivocally that he would return with any evidence independent of his supposed voluntary surrender, therefore Delic's provisional release was denied.

3. Time Elapsed Between Indictment and Surrender

Another aspect of a surrender that weighs heavily in determining whether the accused is likely to return for trial under 65(B) and (I)(a), is the amount of time between the indictment of an individual and his or her surrender. In *Prosecutor v. Jadranko Prlic*,[34] the defendant surrendered within weeks of the date in which his indictment was confirmed. In granting Prlic's provisional release, the Trial Chamber made note of the fact that, in addition to his quick surrender, the defendant had not made any effort to abscond or interfere with the authority of the ICTY prior to his voluntary surrender.[35] This was especially relevant given his individual circumstances. Prlic had held a position of authority with the ousted Bosnian government, therefore, in the ICTY's view, he was likely aware of his impending indictment,[36] and made no effort to exercise his power for unlawful purposes.[37] Therefore, Prlic's prompt surrender reinforced his argument that he would cooperate with the Tribunal.

Conversely, defendants who have remained at large after issuance of an indictment have regularly been denied provisional release on the basis that their failure to cooperate with authorities creates substantial doubt as to whether they will return for trial, even where the defendant has voluntarily surrendered. The ICTY has not conferred on

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[34] Prosecutor v. Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovoc Valentin Coric Berislav Pusic, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlic (July 30, 2004) [reproduced in the accompanying notebook at Tab 35].
[35] *Id.* ¶ 30.
[36] *Id.*
[37] *Id.* ¶ 26.

defendants the benefit of great weight attached to their surrenders when the surrenders are not made in a timely fashion. For example, in *Prosecutor v. Milan Martic*,[38] the defendant remained at large for seven years after learning of his indictment, and also did not surrender immediately after becoming aware of the commencement of court proceedings against him. This seven year period indicated to the Trial Chamber that there was some doubt as to whether Martic would appear back for trial, therefore they rejected his application for provisional release. Similarly, in *Nikolic*, the defendant remained at large for two years and five months after learning of his indictment.[39] The Prosecutor alleged that this absence cast doubt on the voluntary nature of the defendant's surrender. The ICTY Trial Chamber held that the defendant's flight itself did not establish that the surrender was not voluntary, however it did lead the Chamber to attach little weight to the surrender in ruling on Nikolic's request for provisional release.[40] Therefore, Nikolic's provisional release was denied.

4. <u>Reasons for Failure to Surrender</u>

Where a delay before surrender creates doubt as to the likelihood that the defendant will return for trial, the defendant may theoretically overcome this doubt by stating justifiable reasons for not surrendering earlier. However, such arguments have found limited success in practice. Most cases have turned on the legitimacy of the defendant's explanation for failing to promptly surrender. A valid, substantiated justification for fleeing custody is so essential in cases of delayed surrenders because, to satisfy Rule 65,

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[38] Prosecutor v. Milan Martic, Case No. IT-95-11-PT, Decision on the Motion for Provisional Release (Oct. 10, 2002) [reproduced in the accompanying notebook at Tab 36].
[39] The Prosecutor v. Vujadin Popovic Ljubisa Beara Drago Nikolic Ljubomir Borovcanin Zdravko Tolimir Radivoje Miletic Milan Gvero Vinko Pandurevic Milorad Trbic, Case No. IT-05-88-PT, Decision on Drago Nikolic's Request for Provisional Release, ¶ 19 (Nov. 9, 2005) [reproduced in the accompanying notebook at Tab 33].
[40] *Id.* ¶ 20.

the defendant must establish that they pose no threat of flight. Unwarranted delays prior to surrender demonstrate defendants' past refusal to cooperate with authorities, as well as their ability to successfully evade the obligation to surrender.

In *Prosecutor v. Vinko Pandurevic*,[41] the defendant alleged that he remained at large for over three years after becoming aware of his indictment, because an earlier surrender would have put his family's lives in jeopardy.[42] After Pandurevic's provisional release was denied at the Trial Chamber, the Appeals Chamber held that this rationale did not justify the defendant's three year flight from the ICTY.[43] The mere allegation that surrendering would put Pandurevic's family in danger was held to be too unsubstantiated and vague to validate not surrendering earlier. The Appeals Chamber noted that Pandurevic failed to explain either in his original pleadings or in his Appeal the specific nature of the threat posed to his family by his surrender.[44] This case exemplifies the standard held by the ICTY that any delay in surrender must be accompanied by a valid excuse for the delay.

The Prosecutor v. Vujadin Popovic,[45] in which the defendant made similar arguments as in *Pandurevic*, the ICTY Appeals Chamber again illustrated the requirement that justifications for flight must be substantiated with actual evidence. Popovic argued that his flight from the ICTY for over two years after confirmation of his indictment and issuance of a warrant for his arrest was justified given his inability to get

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[41] The Prosecutor v. Vinko Pandurevic Milorad Trbic, Case No.: IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurevic's Application for Provisional Release (Oct. 3, 2005) [reproduced in the accompanying notebook at Tab 37].
[42] *Id*. ¶ 6.
[43] *Id*.
[44] *Id*.
[45] The Prosecutor v. Vujadin Popovic, Case No. IT-02-57-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popovic's Provisional Release (Oct. 28, 2005) [reproduced in the accompanying notebook at Tab 38].

guarantees for his safety and that of his family in the event that he surrendered.[46] However, the Appeals Chamber held that without the defendant actually stating reasons why he was unable to get such guarantees, or why they were necessary, his motion for provisional release was denied.[47]

In *The Prosecutor v. Savo Todovic*,[48] the defendant surrendered following a three year flight from the ICTY following the publication of his indictment, yet argued that his failure to surrender was justified by the fact that other indictees had been killed by international law enforcement forces attempting to effect arrests.[49] The Tribunal rejected this argument, stating that the fact that other indictees were killed in this manner should have led Todovic to the conclusion that voluntary surrender to the Tribunal would be safer than absconding.[50] This unsatisfactory explanation cast doubt on the voluntary nature of Todovic's surrender and revealed his propensity for flight, so the Trial Chamber denied his application for provisional release.

5. <u>Other Case by Case Attendant Circumstances</u>

Other cases which feature defendants who have surrendered turn on other circumstances surrounding the defendant's surrender. In these cases, even often with short delays in surrendering, the length of time prior to a voluntary surrender is viewed in light of the defendant's apparent willingness to surrender, which can be discerned from extrinsic evidence. For example, in *Prosecutor v. Pasko Ljubicic*,[51] the Trial Chamber denied the defendant's motion for provisional release, despite the fact that Ljubicic

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[46] *Id.*
[47] *Id.*
[48] The Prosecutor v. Mitar Raevic, Savo Todovic, Case No. IT-97-25/1-PT, Decision on Savo Todovic's Application for Provisional Release (July 22, 2005) [reproduced in the accompanying notebook at Tab 39].
[49] *Id.* ¶ 18.
[50] *Id.* ¶ 21.
[51] The Prosecutor v. Pasko Ljubicic, Case No. IT-00-41-PT, Decision on the Defence Motion for the Provisional Release of the Accused (Aug. 2, 2002) [reproduced in the accompanying notebook at Tab 40].

argued that he had voluntarily surrendered within 14 months of his indictment.[52] Upon a second application for provisional release, the Trial Chamber noted that any flight discounts a defendant's submission that he will return for trial. In both decisions, the Trial Chamber noted that in addition to the delay before the defendant's surrender, the defendant had gone into hiding and used a false name after learning that he was a suspect within the jurisdiction of the ICTY.[53]

Other cases have further narrowed the circumstances in which provisional release will be granted. In *Prosecutor v. Delic*,[54] the Trial Chamber found that, despite the defendant's voluntary surrender six weeks following his indictment, there remained a risk of flight based on Delic's behavior concomitant to his surrender, and rejected his motion for provisional release. The chamber cited Delic's challenge of extradition to the ICTY as evidence of the risk of flight posed, as Delic denied that he was the party named on the indictment and arrest warrant.[55]

Notably, in *Brdanin*, the ICTY stated that the prosecution cannot raise the fact that the defendant did not voluntarily surrender when they have been arrested under a sealed indictment without independent evidence of the defendant's intentions regarding surrender.[56] Therefore, a defendant's failure to surrender prior to publication of their indictment cannot be used as evidence of their refusal to cooperate with the Tribunals, unless extrinsic evidence demonstrates the defendant's uncooperative attitude with

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[52] *Id.*
[53] *Id.*
[54] Prosecutor v. Zejnil Delalic Zdravko Mucic also known as 'Pavo' Hazim Delic Esad Landzo also known as 'Zenga', Case No. IT-96-21, Decision on Motion for Provisional Release Filed by the Accused Hazim Delic (Oct. 24, 1996) [reproduced in the accompanying notebook at Tab 34].
[55] *Id.*
[56] Prosecutor v. Radoslav Brdanin & Momir Talic, Case No. IT-99-36, Decision on Motion by Radoslav Brdanin for Provisional Release, ¶ 17 (July 25, 2000) [reproduced in the accompanying notebook at Tab 31].

respect to surrendering. Without such evidence, a defendant is presumably unaware of his indictment, and lacks the opportunity to voluntarily surrender.[57]

C. Voluntary Surrender as a Special Circumstance Pursuant to Rule 65(I)(iii)

As previously stated, the ICTR Rules of Procedure and Evidence require that special circumstances regarding the defendant that warrant provisional release must exist in order for the Tribunal to grant such release. Defendants at the ad hoc tribunals have attempted to use their voluntary surrender to constitute such special circumstances and satisfy that provision under the Rules. However, this argument has been consistently rejected. In the ICTY's Trial Chamber's provisional release ruling in *Kunarac*, the voluntary nature of the defendant's surrender was uncontested by the Tribunal; however, the Trial Chamber held that voluntary surrender does not constitute a special circumstance for purposes of provisional release.[58] In so holding, the chamber stated that "it could even be said that indictees who know that they have been indicted, should voluntarily surrender themselves to the International Tribunal. To base a request for provisional release on such surrender is unacceptable".[59]

IV. Voluntary Surrender as a Mitigating Factor During Sentencing

The purpose of jurisprudence at the ICTR is evident from sentencing decisions, which frequently make reference to the gravity of the crimes committed in the reasoning for the decision. In *The Prosecutor of the Tribunal v. Jean-Paul Akayesu*, the Tribunal made clear in its sentencing judgment precisely what goals were to be achieved in sentencing convicted persons at the ICTR. The court held that sentencing serves two

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[57] *Id.*
[58] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Request for Provisional Release of Dragoljub Kunarac, ¶ 4 (Nov. 11, 1999) [reproduced in the accompanying notebook at Tab 41].
[59] *Id.*

purposes; on one hand punishment is retribution for crimes committed, and equally importantly, punishment serves as a deterrent,

> dissuading for good those who will be tempted in future to perpetrate such atrocities by showing them that the International community was no longer ready to tolerate serious violations of International humanitarian law and human rights.[60]

During the sentencing hearings which follow trials at the ICTR, convicted defendants frequently argue that their voluntary surrender should result in a lesser sentence. Like the judiciary at all other international tribunals, judges at the ICTR are allowed great discretion in determining the proper sentence for convicted individuals. Article 23(1) of the ICTR Statute limits penalties to imprisonment and stipulates that, in the determination of the terms of imprisonment, the ICTR shall have recourse to the general practices regarding prison sentences in the court of Rwanda.[61] Rwandan courts are permitted to consider mitigating factors in sentencing, therefore the ICTR shall have the same discretion.[62] For example, in *Prosecutor v. Dragan Nikolic*, the ICTY Trial Chamber noted that in most of the national jurisdictions a guilty plea or confession mitigates the sentence.[63] However, the chamber also observed that the mitigating effect

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[60] The Prosecutor of the Tribunal v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Decision (Oct. 2, 1998) [reproduced in the accompanying notebook at Tab 42]. *See also*, The Prosecutor v. Georges Ruggiu, Case No. ICTR-97-32-1, Judgement and Sentence, ¶ 33 (June 1, 2000) [reproduced in the accompanying notebook at Tab 43]. In this case, the Tribunal stated that" the jurisprudence of the ICTR with regard to penalties has addressed the principal aims of sentencing, namely retribution, deterrence, rehabilitation and justice."

[61] ICTR Statute, art. 23 §1 [reproduced in the accompanying notebook at Tab 2].

[62] William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, at 479 (1997) [reproduced in the accompanying notebook at Tab 14].

[63] Prosecutor v. Dragan Nikolic, Case No. IT-94-2-S, Sentencing Judgement, ¶ 232 (Dec. 18, 2003) [reproduced in the accompanying notebook at Tab 44].

is limited to less serious crimes in jurisdictions where the courts are obliged to apply a maximum statutory penalty for serious crimes.[64]

Other statutory guidance given to ICTR judges comes from Article 23(2), stating that the Trial Chamber must take into account "the gravity of the offence and the individual circumstances of the convicted person."[65] At the ICTY, this provision is held to mean that the "punishment must fit the crime."[66]

In this vein, most of the charges alleged at the ICTR are crimes punishable by death in Rwandan domestic jurisprudence. However, the ICTR is prohibited from imposing the death penalty in sentencing.[67]

The Rules of Procedure and Evidence for the ICTR give similarly little guidance to judges, however adding that the Trial Chamber is required to take into account mitigating and aggravating circumstances in determining sentences.[68] The Rules recite only "substantial cooperation" as an example of a factor which must be accounted for in determining a defendant's sentence; however, a variety of other factors are frequently considered.[69] While the Trial Chamber is required to consider mitigating factors during sentencing, the weight attributed to mitigating factors is a matter for the Chamber's discretion.[70]

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[64] Rodney Dixon, Alexis Demirdjian, *Advising Defendants about Guilty Pleas before International Courts*, 3 J. INT'L CRIM. JUST. 680, at 684 (2005) [reproduced in the accompanying notebook at Tab 15].
[65] ICTR Statute, art. 23 §2 [reproduced in the accompanying notebook at Tab 2].
[66] The Prosecutor v. Biljana Plavsic Sentencing Judgement, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 23 (Feb. 27, 2003) [reproduced in the accompanying notebook at Tab 45].
[67] William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, at 463 (1997) [reproduced in the accompanying notebook at Tab 14].
[68] ICTR Rules, Rule 101 [reproduced in the accompanying notebook at Tab 1].
[69] ICTR Rules, Rule 101(B)(ii) [reproduced in the accompanying notebook at Tab 1].
[70] Jean Kambanda v The Prosecutor, Case No. ICTR-97-23-A, Judgement, ¶ 124 (Oct. 19, 2000) [reproduced in the accompanying notebook at Tab 46].

Aside from this tribunal legislation, judges on the ICTR are guided by principles of customary international law. These principles can be gleaned from treaties which have near universal acceptance among nations. For example, the Genocide Convention requires proportionate punishment for the crime of genocide,[71] and the 1984 Torture Convention requires prosecution and proportionate punishment for those who commit the crime of torture.[72] These provisions of these treaties are absolute, meaning that "grants of…token sentences are not permitted with respect to these offences.[73] Nevertheless, as the jurisdiction of the Tribunals is independent from the states that are parties to these international agreements, the obligations imposed by these treaties do not flow to the Tribunal.[74]

A. Substantial Cooperation

During sentencing at ICTR trials, the rationale for using a defendant's voluntary surrender as a mitigating factor may incorporate one or each of three paradigms. First, according to the ICTR, voluntary surrender before, or soon after the confirmation of an indictment against a defendant may properly be treated as an indication of the defendant's respect for the international administration of justice. In this view, voluntary surrender is evidence of "substantial cooperation" on the part of the defendant. As a corollary to this argument, voluntarily surrendering saves the ICTR valuable time and resources, and defendants ought to have some incentive to do so. In this respect, voluntary surrender serves the ICTR, which lacks a police force, more than national

[71] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. V, 78 U.N.T.S. 277 [reproduced in the accompanying notebook at Tab 7].
[72] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. IV, G.A. Res. 39/46, 197, U.N. GAOR., 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984), entered into force June 26, 1987 [reproduced in the accompanying notebook at Tab 8.]
[73] Scharf, *supra* note 1, at 1075 [reproduced in the accompanying notebook at Tab 11].
[74] *Id.*

courts, which benefit from domestic law enforcement. Therefore, mitigating sentences as a result of a defendant's voluntary surrender serves as a valuable endorsement of such surrender to other indictees.

Nevertheless, the mission of the ICTR militates against employing this rationale as the basis for reducing convicted persons' sentences. For such grave crimes, mitigation of sentences should be a guarded practice in international tribunals, even in the event that substantial cooperation is of great benefit to the tribunal. On this rationale, the ICTY was guarded in its sentencing judgment in *Tadic*. The Trial Chamber, in noting mitigating factors, discussed Tadic's cooperation with authorities, which included not only his voluntary surrender, but also his providing the Prosecution with valuable information, and his behavior, as he was described by a detaining officer as "a model detainee."[75] They found that Tadic's behavior, including voluntarily surrender, constituted cooperation; however the Trial Chamber did not find that this body of cooperation, which lacked a guilty plea, rose to the level of substantial cooperation, which is required under the Rules to factor into sentencing. The Appeals Chamber affirmed this decision, citing that the Trial Chamber made no errors of discretion.[76]

However, in *Prosectuor v. Milan Babic*,[77] the Trial Chamber properly took into account the voluntary surrender by the defendant to the ICTY prior to his indictment in mitigating his sentence. Babic, a government official, voluntarily surrendered to the ICTY promptly after confirmation of his indictment. He subsequently pled guilty to

[75] Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Sentencing Judgement, ¶ 23 (Nov. 11, 1999) [reproduced in the accompanying notebook at Tab 47].
[76] Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Transcript, at 46 (Jan. 26, 2000) [reproduced in the accompanying notebook at Tab 48].
[77] Prosecutor v. Milan Babic, Case No. IT-03-72-S, Sentencing Judgement (June 29, 2004) [reproduced in the accompanying notebook at Tab 49].

participation in a joint criminal enterprise in which persecutory acts including murder, deportations, imprisonments and destruction of property were visited on the non-Serb population. In Babic's sentencing judgment, the ICTY Trial Chamber pointed out that the defendant's prompt voluntary surrender, which occurred prior to the issuance of an arrest warrant for him, was an indication for his respect for the international system of justice.[78] In light of other factors, which included a guilty plea, behavior subsequent to his criminal offenses which showed remorse, limited participation in the joint criminal enterprise, and voluntary participation as a witness in other trials, the ICTY held Babic's surrender to be an element of his substantial cooperation.[79]

Furthermore, the ICTY has required actual voluntary surrender to constitute substantial cooperation, even when extrinsic evidence points toward the defendant's willingness to cooperate. In *Prosecutor v. Deronjic*, the defendant argued that he was unaware that he had been indicted before he was arrested within 72 hours of confirmation of his indictment.[80] Therefore, Deronjic argued that his voluntary surrender was rendered an impossibility. Deronjic also submitted statements that he had made publicly prior to his indictment that he would voluntarily surrender if indicted. The Trial Chamber acknowledged his claim of willingness to surrender and considered it as a mitigating factor during sentencing, but attached little weight to this indication of willingness because it was speculative.[81]

[78] *Id.* ¶ 86.
[79] *Id.* ¶ 73.
[80] Prosecutor v. Miroslav Deronjic, Case No. IT-02-61-S, Sentencing Judgement, ¶ 265 (March 30, 2004) [reproduced in the accompanying notebook at Tab 50].
[81] *Id.* at ¶ 267.

B. Encouragement to Other Indictees

Second, as the defendant pointed out in *Prosecutor v. Miodrag Jokic*, "voluntary surrender of an accused has been considered by the jurisprudence of the Tribunal as a mitigating factor mainly because it may inspire other indictees to do the same."[82] Jokic was a Major in the Serbian military who pled guilty to murder, cruel treatment, unlawful attacks on citizens, devastation not justified by military necessity, and destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science.[83] Jokic's argument that his voluntary surrender might convince others to do the same was especially persuasive in his case because of his high ranking. In addition to being a senior official in the Serbian military, he was also the first officer to surrender to the custody of the ICTY.

On the other hand, there is little concrete proof that one defendant's surrender has any impact on another's. The argument that fugitives are induced to surrender by the surrender of their peers seemingly would lead to a somewhat steady increase in voluntary surrenders following the first surrender. At the ICTY, however, there is no evidence of such a pattern; in 1996, one indictee voluntarily surrendered, in 1997, 10 surrendered, in 1998, there were four surrenders, followed by none in 1999 or 2000, and 11 in 2001.[84]

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[82] Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-S, Sentencing Judgement, ¶ 70 (March 18, 2004) [reproduced in the accompanying notebook at Tab 51].
[83] Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-S, Sentencing Judgement, ¶ 8 (March 18, 2004) [reproduced in the accompanying notebook at Tab 51].
[84] Prosecutor v. Nikola Sainovic & Dragoljub Ojdanic, Case No. IT-99-37-AR65, Dissenting Opinion of Judge David Hunt on Provisional Release, ¶ 1 (Oct. 30, 2002) [reproduced in the accompanying notebook at Tab 52].

C. **Remorse**

Finally, the judges at the ICTR are entitled to take into account the defendants' remorse in determining their sentences, as long as that remorse is sincere.[85] By publicly showing remorse for offenses committed, defendants at Tribunals may provide a valuable truth-telling function. In this way, evidence of defendants' remorse should facilitate peace and reconciliation. In *Jokic*, the defendant voluntarily surrendered just over one month after his indictment was unsealed. The Appeals Chamber upheld a Trial Chamber ruling that the defendant's post-conflict conduct, including his voluntary surrender, may properly be considered evidence of his sincere remorse.[86]

However, in actuality, defendants' cooperation and showing of remorse at international tribunals does not always have the desired effect. For example, the post-conflict cooperation with ICTY prosecution of Biljana Plavsic was viewed by a majority of Serbs as an act of treachery in return for benefits, rather than a truthful exposition to that population regarding the atrocities committed by Milosevic's regime.[87]

1. **Comparative Domestic Law Involving Remorse and Surrender During Sentencing**

By comparison, the federal sentencing guidelines for the United States of America give some guidance as to how the American courts treat the voluntary surrender of a defendant during sentencing. While it is recognized that domestic law is subservient to international law at the ICTR, the American federal sentencing guidelines demonstrate one standard on mitigation, an issue that remains somewhat unsettled in international law.

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[85] Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic, Dragoljub Prcac, Case No. IT-98-30/1-A, Judgement, ¶ 715 (Feb. 28, 2005) [reproduced in the accompanying notebook at Tab 53].

[86] Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, ¶ 82 (Aug. 30, 2005) [reproduced in the accompanying notebook at Tab 54].

[87] Scharf, *supra* note 1, at 1080 [reproduced in the accompanying notebook at Tab 11].

Under these guidelines, a defendant is entitled to a mitigated sentence in the event that he "clearly demonstrates acceptance of responsibility for his offense."[88] The comments to the guidelines explicitly state that voluntary surrender promptly after commission of the offense in question may appropriately be viewed as evidence of such acceptance of responsibility.[89] However, the comments go on to explain that this reduction in sentence is not intended to apply to those individuals that deny the essential facts of guilt before and during trial, only to be convicted, at which point they admit guilt and express remorse.[90] This tends to indicate that a plea of guilty, or at least an admission of the factual basis of the offense of which an individual is accused, is required for a defendant's voluntary surrender to factor into sentencing to their benefit. Furthermore, the comments indicate that this guilty plea is required prior to the beginning of the trial in order to mitigate the sentence, because otherwise the prosecution will have already had to bear the burden of proof.[91]

In another example from a national jurisdiction, Chinese law includes a comparable requirement involving the relation of a guilty plea and voluntary surrender. Chinese courts recognize voluntary surrender as a mitigating circumstance, but Chinese law requires the surrender to be accompanied by a defendant's "true account of his criminal activities."[92]

[88] United States Sentencing Commission, Guidelines Manual, §3E1.1. (Nov. 2005) [reproduced in the accompanying notebook at Tab 3].
[89] USSG §3E1.1, comment (n. 1(d)) (Nov. 2005) [reproduced in the accompanying notebook at Tab 3].
[90] USSG §3E1.1, comment (n. 2) (Nov. 2005) [reproduced in the accompanying notebook at Tab 3].
[91] USSG §3E1.1, comment (n. 3) (Nov. 2005) [reproduced in the accompanying notebook at Tab 3].
[92] Hong Lu, Terance D. Miethe, *Confessions and Criminal Case Disposition in China*, 37 LAW & SOC'Y REV. 549, at 576 (2003) [reproduced in the accompanying notebook at Tab 16].

2. Remorse at the ICTR and ICTY

This standard, which requires a guilty plea in order for the judiciary to consider other mitigating factors evidencing remorse, has been followed with some consistency at the ICTR.[93] However, the crimes in question at the ICTR are universally considered more severe than the ones at issue in cases governed by the federal sentencing guidelines. Also, as the Tribunal stated in *Akayesu*, trials and punishments handed down at the ICTR have more value than mere domestic deterrence or enforcement of individual responsibility. Therefore, justices at the ICTR ought to be at least as guarded in mitigating sentences as justices in the American federal judiciary are required to be, as the international educational value of the sentences at the ICTR far surpasses that of sentences handed down at United States federal criminal courts.[94]

Additionally, it is illogical that an individual could be remorseful and yet not pled guilty for the crimes of which he is accused. As was stated in *The Prosecutor v. Sylvestre Gacumbtsi*, "in response to the specific allegation of lack of remorse, the Defence submitted that the Accused, following his line of defence, could not express any such remorse in respect of events for which he is not responsible."[95] Hence, voluntary surrender may be utilized by a defendant seeking a mitigated sentence only when that defendant has first pled guilty at the beginning of the trial.

[93] KNOOPS, *supra* note 3, at 220 [reproduced in the accompanying notebook at Tab 22] (noting the difference in sentences received by co-defendants Omar Serushago, who voluntarily surrendered, pled guilty to four of five counts and received a 15 year sentence, and Jean Kambanda, who did not cooperate with the ICTR and received a life sentence).

[94] This type of amalgamation between domestic laws and international law is frequently used at international tribunals. Judge Cassese, in his dissent in Prosecutor v. Drazen Erdemovic, Case No. IT-96-22, Separate and Dissenting Opinion of Judge Cassese, ¶ 3(Oct. 7, 1997) [reproduced in the accompanying notebook at Tab 55], stated that "the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law."

[95] The Prosecutor v. Sylvestre Gacumbtsi, Case No. ICTR-2001-64-T, Judgement, ¶ 351 (June 17, 2004) [reproduced in the accompanying notebook at Tab 56].

Even in the event that voluntary surrender is rightfully found to be evidence of a defendant's remorse, it is improper to significantly lighten a sentence based on conduct that has no bearing on the gravity of the offense, or the degree of responsibility of the offense in question. As the ICTR stated in *Akayesu*, just sentences "must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender."[96] Severely mitigating a sentence based on a voluntary surrender would disturb this requisite proportionality, because it diminishes neither the gravity of the offence, nor the degree of responsibility of the offender.

Finally, even in cases when the defendants are found to be remorseful in the view of the tribunal, their voluntary surrenders carry little persuasive value toward a mitigated sentence compared to other potentially mitigating factors, and are outweighed by these other factors. This notion was made clearest in *Prosecutor v. Biljana Plavsic*, where the defendant's post-conflict conduct, as well as her conduct concomitant with the offenses for which she was charged, led the ICTY to reduce her sentence significantly. Biljana Plavsic was the Serbian Representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina. She was also the first high ranking Bosnian Serb to plead guilty, admitting the policy of ethnic cleansing employed by the Serb government in that region. She had surrendered voluntarily to the Tribunal; while her indictment was confirmed nearly nine months prior to her surrender, it remained sealed until after she surrendered.[97] While the sentencing judgment did point to the defendant's voluntary surrender as a mitigating factor, it also indicated that other factors weighed much more

[96] The Prosecutor of the Tribunal v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Decision (Oct. 2, 1998) [reproduced in the accompanying notebook at Tab 42].
[97] The Prosecutor v. Biljana Plavsic Sentencing Judgement, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 1 (Feb. 27, 2003) [reproduced in the accompanying notebook at Tab 45].

heavily in affecting her sentence. After the genocide, Plavsic contributed heavily to the post-war process in the area, including helping to build a multi-ethnic governmental coalition, and removing obstructive officials from their posts. The chamber made clear that while advanced age and voluntary surrender gained Plavsic some benefit, her guilty plea and post-conflict conduct were given greater weight.[98] Together, these circumstances made a formidable body of mitigation. Plavsic plead guilty prior to the beginning of the case, and the fact that she was the first high ranking official not to deny what had occurred weighed much more heavily than her voluntary surrender in determining a sentence. Despite the factors weighing in favor of Plavsic's mitigated sentence, this judgment has come under fire internationally for its lenience and its inconsistency with other sentences at the ICTY.[99]

V. <u>Difficulty in Ascertaining Voluntary Character of Surrender</u>

In his dissent to the judgment in *Prosecutor v. Drazen Erdemovic*, Judge Cassasse pointed out that drafters of the Statute and Rules deliberately omitted any endorsement of out-of-court plea bargaining so as to avert those distortions of the free will of the accused which may be linked to plea bargaining.[100] The same rationale supports a restriction on the use of voluntary surrender as a rationale for provisional release or as a mitigating factor at the ICTR. To determine that a defendant's surrender should weigh in the defendant's favor, the Tribunal must rely heavily on the voluntary nature of the surrender. As with plea agreements, drafters of both the ICTR Statute and the Rules of

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[98] *Id.* ¶ 109.
[99] *See*, *e.g.*, Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, at 583-84 (2005) [reproduced in the accompanying notebook at Tab 20]; and Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 J. INT'L CRIM. JUST 82, at 91 (2005) [reproduced in the accompanying notebook at Tab 21].
[100] Prosecutor v. Drazen Erdemovic, Case No. IT-96-22, Separate and Dissenting Opinion of Judge Cassese, ¶ 10 (Oct. 7, 1997) [reproduced in the accompanying notebook at Tab 55].

Procedure and Evidence omitted any explicit endorsement of voluntary surrender as a vehicle though which defendants could achieve provisional release or mitigated sentences. If the drafters had made an inducement so apparent to indictees, as to include promised benefits in the ICTR's Rules in exchange for cooperation, they would have put the voluntary nature of any surrender in doubt. A guilty plea, which comes as the result of a threat, inducement, or promise, loses its voluntary character.[101] The same reasoning should apply to a defendant's surrender.

This reasoning is consistent with past decisions at each of the Tribunals, which have rewarded surrenders made in the absence of inducements, and attached little weight to surrenders possibly resulting from threat or inducement. At the ICTR, a defendant whose surrender is effected without the threat of arrest that results from a public indictment is likely to be regarded as truly voluntary. In *The Prosecutor v. Omar Serushago*, the defendant surrendered prior to being indicted, and pled guilty to several crimes against humanity which he committed as a militiaman, including murder, torture, and extermination.[102] The ICTR accepted the defendant's voluntary surrender as a mitigating factor during his sentence. The Prosecution presented no evidence that Serushago had incentive to surrender; his surrender was made not only prior to his indictment, but also without his inclusion on a list of suspects wanted by Rwandan authorities.[103] Furthermore, Serushago knew that by surrendering himself, he was subjecting himself to indictment.[104] Therefore, Serushago's surrender was held to be voluntary, because of the lack of any threat or inducement which may have manipulated his free will.

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[101] *Id.*
[102] The Prosecutor v. Omar Serushago, Case No. ICTR-98-39-S, Sentence, ¶ 4 (Feb. 5, 1999) [reproduced in the accompanying notebook at Tab 57].
[103] *Id.*¶ 34.
[104] *Id.*

A. <u>In Context of Provisional Release</u>

This difficulty in ascertaining the voluntariness of the surrender after a defendant's indictment spells almost certain defeat for those applying for provisional release. In *Prosecutor v. Nikola Sainovic*, the co-defendants were indicted in May of 1999, and surrendered in the spring of 2002.[105] The Appeals Chamber noted the Prosecutions submission that in case of doubt as to whether, if released, an accused will need to be re-arrested to appear for trial, provisional release should be denied.[106] The co-defendants' provisional releases, which were granted by the Trial Chamber, were denied by the Appeals Chamber, largely on the basis that the voluntary nature of their surrenders were questionable, casting doubt on the likelihood of their return for trial. Since provisional release requires a truly voluntary surrender, which is difficult or impossible to ascertain, such applications should therefore consistently be rejected, at least in the case of those surrendering after publication of their indictment.

Several cases at the ICTY in which voluntary surrenders are at issue have turned on whether the circumstances surrounding the surrender indicate that the surrender is truly voluntary. In many of these cases, the ICTY has denied defendants' provisional releases because of the doubt cast on their supposedly voluntary surrender in cases where the defendant surrenders after his previous behavior indicates that he is not willing to cooperate with the tribunal.

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[105] Prosecutor v. Nikola Sainovic & Dragoljub Ojdanic, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 4 (Oct. 30, 2002) [reproduced in the accompanying notebook at Tab 58].
[106] *Id.*

In *Popovic*, the Appeals Chamber upheld the Trial Chamber's denial of the defendant's provisional release.[107] The Trial Chamber's decision cited over two years of flight after publication of his indictment, issuance of an arrest warrant, surrender mandates to UN Member States, and the mistaken arrest of Popovic's brother indicated that the defendant's surrender.[108] In its decision to deny provisional release, the Trial Chamber also noted the Prosecution's submission that, under these circumstances, the defendant's surrender could not be characterized as voluntary.[109]

Also, the ICTY has held that a defendant who, while hiding, makes his surrender conditional does not reap the benefits of a voluntary surrender. In *Pandurevic*, the defendant made a statement to authorities saying that his voluntary surrender was conditioned upon receipt of governmental guarantees that he would be granted pre-trial provisional release.[110] The Trial Chamber therefore attached little value to this voluntary surrender.[111] Upon the defendant's appeal, the ICTY took special note of the Prosecution's submission that "the Accused's surrender was *explicitly* made conditional on his receipt of a government guarantee for his provisional release [and] such a surrender is not truly voluntary".[112] Furthermore, the Appeals Chamber found that the "mere fact that [Pandurevic] failed to surrender earlier shows that he considered that he

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[107] The Prosecutor v. Vujadin Popovic, Case No. IT-02-57-AR65.1, Decision on Interlocutory Appeal From Trial Chamber Decision Denying Vujadin Popovic's Application for Provisional Release (Oct. 28, 2005) [reproduced in the accompanying notebook at Tab 38].

[108] Prosecutor v. Vujadin Popovic, Case No. IT-02-57-PT, Decision on Motion for Provisional Release, ¶ 8 (July 22, 2005) [reproduced in the accompanying notebook at Tab 39].

[109] *Id*.

[110] Prosecutor v. Vinko Pandurevic, Milorad Trbic, Case No. IT-05-86-PT, Decision on Vinko Pandurevic's Application for Provisional Release, ¶ 9 (July 18, 2005) [reproduced in the accompanying notebook at Tab 60].

[111] *Id.* ¶ 18.

[112] The Prosecutor v. Vinko Pandurevic Milorad Trbic, Case No.: IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurevic's Application for Provisional Release, ¶ 6 (Oct. 3, 2005) [reproduced in the accompanying notebook at Tab 37].

had to give priority to other factors and surrendered only when those factors had ceased to be relevant."[113] In this sense, the ICTY required that the defendant consider his surrender to be his main concern in order to view the surrender as voluntary.

In *Ljubicic*, the defendant asserted that his surrender was voluntary despite following a year long flight from custody after a warrant for his arrest was issued. During this period, he used a false name and outside assistance in furtherance of his attempts to remain at large. In denying his motion for provisional release, the Trial Chamber held that the defendant's characterization of this surrender as voluntary was "entirely misleading".[114]

In *Prosecutor v. Milutinovic*, the defendant, while avoiding custody, made statements to the media indicating his intention to remain at large.[115] The Trial Chamber found that such statements are highly relevant to discovering the circumstances surrounding the defendant's surrender.[116] Given these circumstances, the Trial Chamber held that Miluntinovic's surrender could not be described as voluntary.[117]

Finally, the ICTY significantly narrowed the scope of what constitutes a voluntary surrender in *Todovic*. In that case, the defendant was taken into custody three years after publication of his indictment.[118] While the Trial Chamber found that both parties agreed that Todovic was not arrested, it determined that his surrender came as a result of successful efforts on behalf of the governments of Serbia and Montenegro to persuade

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[113] *Id.* at ¶ 7.
[114] The Prosecutor v. Pasko Ljubicic, Case No. IT-00-41-PT, Decision on the Defence Motion for the Provisional Release of the Accused (Aug. 2, 2002) [reproduced in the accompanying notebook at Tab 40].
[115] The Prosecutor v. Milan Milutinovic, Case No. IT-99-37-PT, Public Version Decision on Provisional Release, ¶¶ 12-13 (June 2, 2003) [reproduced in the accompanying notebook at Tab 61].
[116] *Id.* at ¶ 12.
[117] *Id.* at ¶ 30.
[118] The Prosecutor v. Mitar Raevic, Savo Todovic, Case No. IT-97-25/1-PT, Decision on Savo Todovic's Application for Provisional Release, ¶ 18 (July 22, 2005) [reproduced in the accompanying notebook at Tab 39].

Todovic to surrender.[119] The Trial Chamber held that "these circumstances indicate that while the Accused surrendered himself to authorities, he did not do so solely of his own volition, but was able to be persuaded to do so."[120] Therefore, the Trial Chamber denied the defendant's motion for provisional release. Subsequently, the Appeals Chamber, agreeing with the reasoning of the Trial Chamber, upheld the decision to deny release.[121]

The *Sainovic* case is also particularly instructive in that it diminishes the argument that a surrender was voluntary when it occurred after the Federal Republic of Yugoslavia passed a "Law on Co-operation" on April 11, 2002. According to the ICTY in *Sainovic*, this statute made it clear to defendants still at large that they would "no longer find a reliable refuge in the Federal Republic of Yugoslavia."[122] The co-defendants in *Sainovic* surrendered after the passage of this law, yet the Trial Chamber still held their surrenders to be voluntary, which it relied upon in granting provisional release to both defendants. The Appeals Chamber, taking issue with the Trial Chamber's assumption that the surrenders had been voluntary, overturned the decision, and denied the provisional releases. In light of the law, as well as of the defendants' public statements prior to the passage of the law to the effect that neither would not surrender voluntarily, the Appeals Chamber held that the Trial Chamber made an error of fact and law in granting provisional release when the voluntary nature of the surrenders were in question. This disposition was echoed by the ICTY in *Martic*, where the Yugoslavian Trial Chamber held that a defendant who remained at large for seven years, only to turn himself over to

[119] *Id*. at ¶ 17.
[120] *Id*.
[121] The Prosecutor v. Mitar Raevic, Savo Todovic, Case No. IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todovic's Application for Provisional Release, ¶ 29 (Oct. 7, 2005) [reproduced in the accompanying notebook at Tab 62].
[122] Prosecutor v. Nikola Sainovic & Dragoljub Ojdanic, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 10 (Oct. 30, 2002) [reproduced in the accompanying notebook at Tab 58].

the authorities after the Law on Co-operation was passed, left doubt as to whether he would return for trial. In this case, the ICTY again noted that the combination of Martic's indictment, along with the new legislation in the FRY, had made it clear to the defendant that he was really left with no other option than to surrender.[123] Therefore, the Trial Chamber denied the defendant's motion for provisional release.[124]

A similar piece of legislation has been passed, enhancing UN Member States' cooperation with the ICTR. On August 28, 2003, the United Nations passed Security Council resolution 1503, requiring that states parties intensify cooperation with and render all necessary assistance to the ICTR. [125] The Security Council also stated that the cooperation of all member states in apprehending any at large person indicted by the ICTR was necessary to achieving the ICTR's goals.[126] This Resolution has a similar implication for ICTR indictees that the Law on Co-operation had for indictees at the ICTY. Prior to resolution 1503, the United Nations demonstrated some indifference toward countries that failed to surrender indictees hiding within their borders to the ICTR, in spite of previous decrees that member states must do so.[127] On March 26, 2004, the UN Security Council passed resolution 1534, which reiterated the goals set out in resolution 1503.[128] These resolutions served to demonstrate the UN's increasing determination to persuade Member States to comply with the ICTR Statute by publicizing

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[123] Prosecutor v. Milan Martic, Case No. IT-95-11-PT, Decision on Second Motion for Provisional Release, ¶ 21 (Sept. 12, 2005) [reproduced in the accompanying notebook at Tab 63].
[124] Prosecutor v. Milan Martic, Case No. IT-95-11-PT, Decision on the Motion for Provisional Release, ¶ 39 (Oct. 10, 2002) [reproduced in the accompanying notebook at Tab 36].
[125] S.C. Res. 1503, ¶ 3, U.N. Doc. S/RES/1503 (August 28, 2003) [reproduced in the accompanying notebook at Tab 9].
[126] *Id.* at ¶ 4.
[127] *See, e.g.*, ICTR Statute, Art. 28 [reproduced in the accompanying notebook at Tab 2], which stipulates that "States shall comply without undue delay with any request for assistance or an order issued by the Trial Chamber". This obligation was further emphasized in the body of Security Council Resolution 955.
[128] S.C. Res. 1534, U.N. Doc. S/RES/1534 (March 26, 2004) [reproduced in the accompanying notebook at Tab 10].

states whose cooperation with the ICTR had been unsatisfactory.[129] This development was especially important when contrasted with the UN's apparent indifference toward Rwanda during the genocide and the early stages of the ICTR.[130] Resolutions 1503 and 1534, in combination with individual indictments, gave indictees incentive to surrender. Under *Sainovic* and *Martic*, these incentives negate the voluntary nature of any surrender occurring after the passage of resolution 1503. This is especially true for defendants who have remained at large for a significant period of time following the issuance of an indictment, only to surrender after this resolution was passed.

Furthermore, domestic legislation passed in several countries throughout the world has given indictees incentive to surrender to the ICTR, where the passage of such legislation indicates to the indictees that they are left with no other options. In 1995, the United States entered into the Agreement on Surrender of Persons Between the Government of the United States and the Tribunal,[131] which is an executive agreement with the ICTR, committing the United States to carry out its obligations under paragraph 2 of Resolution 955. In 1996, the United States Congress passed § 1342 of the National Defense Authorization Act for Fiscal Year 1996, which implemented the executive agreement.[132] This statute has the same effect on indictees hiding in the United States that the Law on Co-operation had to those hiding in Yugoslavia. Since that statute was

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[129] *Id.* at ¶ 2.

[130] *See*, M. Cherif Bassiouni, *Appraising UN Justice-Related Fact Finding Missions*, 5 WASH U. J.L. & POL'Y 35, at 43 (2001) [reproduced in the accompanying notebook at Tab 17].

[131] Agreement on Surrender of Persons, January 24, 1995, U.S.-Int'l Trib. Rwanda, *available* in 1996 WL 165484, which states, in relevant part "surrender to the Tribunal . . . persons . . . found in its territory whom the Tribunal has charged with . . .a violation or violations within the competence of the Tribunal" [reproduced in the accompanying notebook at Tab 6].

[132] National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996) ("Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda"), provides that the existing statutes relating to extradition "shall apply in the same manner and extent to the surrender of persons . . . to . . . the International Tribunal for Rwanda, pursuant to the [surrender] agreement [reproduced in the accompanying notebook at Tab 4].

passed, the United States has taken action in pursuance thereof, arresting a ICTR fugitive on September 2 of that year, and subsequently surrendering him to the Tribunal.[133] Similar legislation has been passed in several other countries including France and Germany.[134] Indictees who surrender in countries which have such legislation, especially after remaining at large for long periods following their indictments, cannot be considered to be surrendering voluntarily, according to the reasoning in *Sainovic* and *Martic*.

B. <u>In Context of Sentencing</u>

The difficulty in ascertaining the voluntary character of surrenders makes mitigation of sentences based on defendants' voluntary surrenders equally perilous. For example, in the *Jokic* case, the defendant's voluntary surrender was cited as a mitigating factor primarily because it may entice other indictees to follow suit and surrender.[135] Also, Jokic was the first military officer to surrender to the ICTY, and the Trial Chamber acknowledged that this factor weighed in favor of a mitigated sentence for the defendant. However, the persuasive value of Jokic's surrender weighs equally against mitigating his sentence. Once judgments such as these are processed and publicized, defendants may be informed of the decisions. Defendants apprised of such information may choose to surrender themselves, not voluntarily as a result of their remorse or desire to cooperate, but rather as a rational choice made by weighing their potential outcomes. If they turn themselves over to the authorities, they can expect a reduced sentence, but if they remain

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[133] Elizaphan Ntakirutimana v. Janet Reno, et al, 184 F.3d 419 (1999) [reproduced in the accompanying notebook at Tab 64].
[134] Robert Kushen, Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda,* 90 AM. J. INT'L L 510 (1996) [reproduced in the accompanying notebook at Tab 18].
[135] Prosecutor v. Miodrag Jokic, Case No. IT-01-42/1-S, Sentencing Judgement, ¶ 70 (March 18, 2004) [reproduced in the accompanying notebook at Tab 51].

at large and are captured, this aggravating factor is also taken into consideration and can worsen their sentence. This manipulation of indictees' free will is what the dissenting Judge in *Erdemovic* sought to avoid in proscribing out of court plea agreements.

The voluntary nature of a surrender is integral to supply a rationale for weighing it in either provisional release or mitigated sentencing, and this voluntariness is nearly impossible to determine. Therefore, arguments are ultimately weak which utilize a defendant's voluntary surrender to buttress either action.

VI. Conclusion

The ICTR permits defendants to use their surrender to their benefit when it is truly voluntary. However, it is very difficult, given the circumstances surrounding nearly all surrenders to international tribunals, to determine whether a surrender is voluntary or not. Given the serious nature of the crimes alleged at the ICTR, granting provisional release or mitigating sentences based on a defendant's voluntary surrender should be a guarded practice, employed in only rare cases where all of the circumstances favor the defendant.