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Plea Bargaining Under The Rwandan Statute And Rules Of Evidence And Procedure

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MEMORANDUM FOR
THE OFFICE OF THE PROSECUTOR

PLEA BARGAINING UNDER THE RWANDAN STATUTE AND RULES OF EVIDENCE AND PROCEDURE

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A. ISSUE

This research memorandum seeks to examine the following issue:

> Whether the Office of the Prosecutor for the Rwanda International Tribunal may plea bargain with persons who are willing to plead guilty and if so what are the requirements?[1]

B. Summary of Conclusions

Although immunity is specifically prohibited,[2] neither the Statute nor the Rules of Evidence and Procedure for the International Criminal Tribunal for Rwanda deny the OTP the authority to engage in plea bargaining.[3] Thus, the

[1] *See* United Nations International Criminal tribunal for Rwanda, Office of the Prosecutor, Legal Research Topics No. Ten, Fascimile dated 26 August 1999. [reproduced in Appendix, Tab K].

[2] *See* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 415-6 (1998). During the preliminary consideration of the rules by the judges, the United States suggested that immunity should be offered to defendants in exchange for their cooperation. The President of the Yugoslavia Tribunal, Judge Antonio Cassese, rejected the proposal stating that "[a]fter due reflection , we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." *Id*. [reproduced in Appendix, Tab H].

[3] *See* Vincent M. Creta, Comment: *The Search For Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia,* 20 HOUS. J. INT'L. L. 381, 407 (1998) [reproduced in Appendix, Tab C].; *See also* Murphy, *infra* note 36, at 90; *see also* United Nations, International Criminal Tribunal for Yugoslavia, Press Release dated 5 Mar. 1998,

OTP may engage in plea bargaining because plea bargaining is an implied power that is "necessary for completing the investigation and the preparation and conduct of the prosecution . . . ."[4] However, the OTP must restrict its plea negotiations strictly to those suspects and accuseds whom it considers, in its judgement, to be lower level offenders.[5]

In order for the OTP to effectively engage in productive plea bargaining, it will have to do so by strategically using the powers to amend an indictment under Rule 50[6] and withdrawal of indictments under Rule 51.[7] The OTP must maneuver in such a manner because the International Tribunal has stated that plea agreements between the OTP and accused have "no binding effect" on the Trial Chamber, but will merely be "taken into careful consideration in determining the sentence to be imposed upon the accused."[8] This position on the matter

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The Prosecutor v. Erdemovic, Sentencing Judgement Case No. ICTY , *available in* United Nations website at http://www.un.org. [reproduced in Appendix, Tab G].

[4] Rule 39 of the Rwanda Tribunal Statute provides in pertinent part:

> "In the conduct of an investigation, the Prosecutor may:
> (ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants." [reproduced in Appendix, Tab I].

[5] *See* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L. L. 365, 377-8 (1999). [reproduced in Appendix, Tab A].

[6] Rule 50 of the Rwandan Tribunal Rules provides in pertinent part: "The Prosecutor may amend an indictment, without leave, at any time before its confirmation . . . ." [reproduced in Appendix, Tab I].

[7] Rule 51(A) of the Rwandan Tribunal Rules provides: "The Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter only with the leave of the Judge who confirmed it or, if at trial, only with leave of the Trial Chamber." [reproduced in Appendix, Tab I].

[8] In Prosecutor v. Erdemovic, the Trial Chamber stated: "Plea bargain agreements are common in certain jurisdictions of the world. There is no provision for such agreements in the Statute and Rules of Evidence and Procedure of the International Tribunal. This is the first time that such a document [plea agreement] has been presented to the International Tribunal. The plea

poses a serious obstacle to the OTP seeking to obtain information and guilty plea's from lower level suspects[9] and/or accuseds.[10] This is because the suspects and accuseds will have no advance certainty of what the effect their cooperation will be.[11] Hence the OTP will need to strategically use its power to amend and withdraw indictments in order to engage in fruitful plea negotiations.

II. LEGAL DISCUSSION

A. LEGAL BASIS FOR PLEA BARGAINING

1. Fundamentals of Plea Bargaining

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agreement in this case is simply an agreement between the parties, reached on their own initiative without the contribution or encouragement of the Trial Chamber. Upon being questioned by the Presiding Judge of the Trial Chamber, the accused confirmed his agreement to and understanding of the matters contained therein. The parties themselves acknowledge that the plea agreement has no binding effect on this chamber, although submissions recommending it were made by both the Prosecutor and Defense Counsel at the hearing on 14 January 1998, in addition to the recommendations in the joint motion. Whilst in no way bound by this agreement, the Trial Chamber has taken it into careful consideration in determining the sentence to be imposed upon the accused. United Nations, International Criminal Tribunal for Yugoslavia, Press Release dated 5 Mar. 1998*, The Prosecutor v. Erdemovic, Sentencing Judgement* Case No. ICTY , *available in* United Nations website at http://www.un.org. [reproduced in Appendix, Tab G].

[9] The Rwandan Tribunal Rules define "suspect" as "[a] person concerning whom the Prosecutor possesses reliable information which tend to show that he may have committed a crime over which the Tribunal has jurisdiction. Joseph L. Falvey, Jr*., United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Evidence and Procedure of the International Tribunal for the Former Yugoslavia*, 19 FORDHAM INT'L L. J. 475, 490 (1995). [reproduced in Appendix, Tab D].

[10] The Rwandan Tribunal Rules define "accused" as "[a] person against whom an indictment has been submitted to the designated trial chamber judge for confirmation." *Id*. at 489.

[11] *See Id*. at 508. The absence of a plea bargaining mechanism: (1) does not permit "to receive a commitment in advance of trial as to the exact exchange for his or her cooperation; (2) reduces the "prosecutor's ability to successfully prosecute higher-level suspects before the Tribunal through cooperation of lower level suspects; and (3) "hinders the prosecutor's ability to negotiate

Plea bargaining is a practice that dates back to the 1700's when the old English common law courts would grant pardons to accomplices in felony cases upon the defendant's conviction, or execution upon the defendant's acquittal.[12] Today, however, and for the purposes of this memorandum, plea bargaining is a mechanism whereby "the prosecutor and defense counsel [accused and/or suspect] enter into an agreement resolving one or more criminal charges against the defendant without a trial."[13]

The benefits of plea bargaining are considerable and it is considered an indispensable tool without which certain "judicial system[s] would collapse."[14] This is because the number of criminal offenders in many judicial systems often outnumber the courts, judges, prosecutors, and prisons cells.[15] Plea bargaining greatly reduces the strain on the criminal justice system and therefore is considered essential to maintain its efficient functioning. Particularly from the prosecutor's perspective, some of the benefits of plea bargaining are the saving of time and resources.[16] However, perhaps one of the most important benefits of plea bargaining to a prosecutor is that it permits him/her to gain the cooperation

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a just result without having to put vulnerable victims or witnesses through the ordeal of a trial or to negotiate victim compensation as part of the agreement." *Id*.

[12] *See* HEDIEH NASHERI, BETRAYAL OF DUE PROCESS 79 (1998). [reproduced in Appendix, Tab L].

[13] G. NICHOLAS HERMAN, PLEA BARGAINING 1 (1998). [reproduced in Appendix, Tab M].

[14] *See* NASHERI, *supra* note 12, at p.25. [reproduced in Appendix, Tab L].

[15] *See generally* NASHERI, *supra* note 12, at 25 (quoting Warren E. Burger, "*The State of the Judiciary*," 56 AMERICAN BAR ASSOC. J. 929-934 (1970) [reproduced in Appendix, Tab L]. Chief Justice Burger stated "that if rate of criminal cases settled by guilty pleas were to decrease by 10% we would need twice as many judges and courtrooms." *Id*.

[16] *See* HERMAN, *supra* note13, at 1. [reproduced in Appendix, Tab M].

of the accused "in the capture of, and compilation of evidence against, larger criminal figures."[17]

Plea bargaining can occur at several stages of the criminal process.[18] It can occur before or after the defendant is formally charged.[19] Plea bargaining pertinently results in one or more of the following: (1) an agreement by the prosecutor to not charge the defendant; (2) a plea of guilty by the defendant to a reduced charge or a lesser included charge; and/or (3) a plea of guilty by the defendant to a particular charge in exchange for a dismissal of other charges.[20] Plea agreements can and often are conditioned "upon the defendant's agreement to certain conditions such as cooperating in an investigation, giving testimony for the prosecution against another defendant [and] refraining from further violation of the law . . . ."[21]

2. The Prosecutor Has the Authority to Engage in Plea Bargaining.

Although immunity is specifically prohibited,[22] neither the Statute nor the Rules of Evidence and Procedure for the International Criminal Tribunal for

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[17] Creta, *supra* note 3, at 407 (1998). [reproduced in Appendix, Tab C].

[18] *See* HERMAN, *supra* note 13, at 1. [reproduced in Appendix, Tab M].

[19] *See Id*.

[20] *See Id*.

[21] *Id*.

[22] *See* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 415-6 (1998) [reproduced in Appendix, Tab H]. During the preliminary consideration of the rules by the judges, the United States suggested that immunity should be offered to defendants in exchange for their cooperation. The President of the Yugoslavia Tribunal,

Rwanda deny the OTP the authority to engage in plea bargaining.[23] Thus, the OTP may engage in plea bargaining because plea bargaining is an implied power that is "necessary for completing the investigation and the preparation and conduct of the prosecution . . . ."[24] However, as this memorandum will later explain, the OTP must restrict its plea negotiations exclusively to those suspects and accused's who the prosecutor considers to be lower level offenders.[25]

a. Plea Bargaining is permissible because it does not contravene the policy prohibiting granting immunity and because neither the Rwandan Statute nor the Rules of Evidence and Procedure prohibit the OTP from plea bargaining.

The President of the Yugoslavia Tribunal, Judge Antonio Cassese, specifically stated that "no one" should be granted immunity "no matter how useful their testimony may otherwise be."[26] However, the extent to which Judge

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Judge Antonio Cassese, rejected the proposal stating that "[a]fter due reflection , we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." *Id*.

[23] *See* Creta, *supra* note 3, at 407 [reproduced in Appendix, Tab C.; see *also* Murphy, *infra* note 36, at 90; *see also* United Nations, International Criminal Tribunal for Yugoslavia, Press Release dated 5 Mar. 1998*, The Prosecutor v. Erdemovic, Sentencing Judgement* Case No. ICTY , *available in* United Nations website at http://www.un.org. [reproduced in Appendix, Tab G].

[24] Rule 39 of the Rwanda Tribunal Statute provides in pertinent part:
"In the conduct of an investigation, the Prosecutor may:
(iii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants." [reproduced in Appendix, Tab I].

[25] *See* Alvarez, *supra* note 5*, at* 377-8 (1999) [reproduced in Appendix, Tab A].

[26] *See* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 415-6 (1998). During the preliminary consideration of the rules by the judges, the United States suggested that immunity should be offered to defendants in exchange for their cooperation. The President of the Yugoslavia Tribunal, Judge Antonio Cassese, rejected the proposal stating that "[a]fter due reflection, we have decided that no one

Cassese intended this statement to prohibit plea bargaining is unclear. Did Judge Cassese intend this statement to prohibit immunity that involves withdrawing one indictable charge with respect to a lower-level offender,[27] while convicting him on another, or did he intend to prohibit granting immunity that involves completely pardoning the offender without imposing any punishment?

It would appear that Judge Cassese's intent was to prohibit the latter and to permit the former. Judge Cassese himself has argued that the Chapter VII mandate of the ad hoc tribunals justifies a focus on bringing to trial those who are most responsible for the underlying threat to international peace.[28] This position is well grounded since "[o]nly exceptional crimes, after all, are committed by government elites, are the subject of international treaties or customary law, and implicate transborder issues of direct concern to organizations such as the United Nations."[29]

The initial prosecution strategy of the Yugoslavia Tribunal formulated by the first prosecutor, Justice Goldstone, also called for a strategy primarily

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should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be." *Id*. [reproduced in Appendix, Tab H].

[27] For the purposes of this memorandum lower level offenders will be generally defined as those persons who do not hold higher levels of responsibility, or those who have not been personally responsible for the exceptionally brutal or otherwise extremely serious offenses. *See* Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L. L. 57, 59 (1999) (citing Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998)). [reproduced in Appendix, Tab F].

[28] See Alvarez, *supra* note 5, at 372 (citing Antonio Cassese, *The International Tribunal for the Former Yugoslavia and the Implementation of International Humanitarian Law*, THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW 229 (1996)) [reproduced in Appendix, Tab A].

[29] See Alvarez, *supra* note 5, at 372 [reproduced in Appendix, Tab A]..

focusing on pursuing and indicting higher-ups.[30] The OTP for the ICTY has already been applying the initiative to indict the higher-ups since 1997.[31] To this end, the OTP for the ICTY has continued to indict only high-level offenders.[32] The OTP for the ICTY, following the withdrawal of charges against 14 accused, stated that its strategy may be characterized as one which is "maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offenses."[33]

Many international lawyers agree on this position and also justify their preference for indicting higher-ups on grounds that the scarce resources of the international community, generally speaking, leave no other option.[34] In 1996, there were approximately 90,000 detainees being held in Rwandan Prisons and by 1998 that number had grown to approximately 130,000.[35] In the First Annual

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[30] See Richard Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMPAR. & INT'L L. 7 (1995).

[31] *See* Murphy, *supra* note 27, at 64 (citing Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998) [reproduced in Appendix, Tab F].

[32] *Id*.

[33] *Id*.

[34] *See* Alvarez, *supra* note 5, at 372 [reproduced in Appendix, Tab A]. "From the outset, international lawyers have argued that the scarce resources of the international community need to be devoted to trying those perpetrators who have the greatest responsibility, by which they mean the leaders and instigators, at a high policy level, of mass atrocities in the former Yugoslavia and in Rwanda. While circumstances such as the fortuitous sighting and subsequent arrest of a low-level Serbian perpetrator, Dusko Tadic, compelled the ICTY to proceed with his trial as its first full fledged effort, tribunal insiders and supporters have generally argued that the tribunals' success will be judged by the degree to which both reach high level perpetrators." *Id*.

[35] Alvarez, *supra* note 5, at 393 [reproduced in Appendix, Tab A].

Report of the Rwandan Tribunal,[36] it was noted that a lack of human and material resources posed serious barriers to the OTP in executing its work.[37]

That Judge Cassese's intent could not have been to prohibit plea bargaining with lower-level offender's is also supported by the fact that the greatest deterrent effect will be achieved by prosecuting major figures.[38] International lawyers argue that "trials for large numbers of perpetrators are not necessary to achieve most if not all, of their goals."[39] They argue that this is because "the ultimate foundation for prevention of future criminal behavior is the transformation of future criminal behavior and the gradual internalization of values that encourage habitual conformity with the law."[40] It is clear that "without leaders mass crimes would not occur."[41] Thus, it is felt that "enforcement advantages enjoyed by international tribunals apply only with respect to the prosecutions of higher-ups, and that for this reason, lower-level perpetrator's should mostly be dealt with by national courts 'as guided by the decisions of the international tribunal.'"[42]

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[36] U.N. Doc. A/51/399-S/1996/778, Annex(1996).

[37] *Id*.

[38] *See* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 219 (1998) [reproduced in Appendix, Tab H].

[39] Alvarez, *supra* note 5, at 378 [reproduced in Appendix, Tab A].

[40] *Id*.

[41] Madeleine Morris, Symposium: *Justice in Cataclysm Crim. Trials In Wake of Mass Violence: Article: The Trials of Concurrent Jurisdiction: The Care of Rwanda,* 7 DULE J. COMP. & INT'L L. 349, 367 (1997).

[42] Alvarez, *supra* note 5, at 377-8 [reproduced in Appendix, Tab A].

A final argument in support of the OTP's authority to engage in plea bargaining is that both the structure of the Rwandan Tribunal, which is largely based on an adversarial model,[43] and the sole responsibility placed with the OTP to initiate and conduct investigations, indicate that the drafters of Rwandan Statutes and Rules of Evidence and Procedure preferred the approaches found traditionally in the common law[44]-- including plea bargaining.[45] Therefore, plea bargaining would appear be an unobjectionable exercise of authority by the OTP because it is a practice consistent with the drafters' preference for the common law model. This is important because the OTP would not thereby be engaging in any overreaching of authority by plea bargaining

The implied power of the OTP to engage in plea bargaining would appear to be exercisable pursuant to the power to "undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution."[46] Plea bargaining, therefore, would be an "implied necessary power"[47] because if the OTP were prohibited from engaging in plea negotiations with lower level offenders, the ability of the OTP to fulfill an important purpose behind establishing the International Tribunal for Rwanda,

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[43] *See* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 380 (1998) [reproduced in Appendix, Tab H].

[44] *See* Johnson, *supra* note 81 , at 144 [reproduced in Appendix, Tab B].

[45] *See* NASHERI, *supra* note 12, at 79[reproduced in Appendix, Tab L].

[46] Rule 39(ii) of the Rwandan Tribunal Rules [reproduced in Appendix, Tab I].

[47] 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 454 (1998) [reproduced in Appendix, Tab H].

which is to reach those in control of committing the atrocities,[48] would be severely impaired. Without the power to enter into plea bargains, and if the OTP were forced to try every case against lower level offenders, many of the most serious perpetrators would escape prosecution because the limited resources of the international community would become exhausted trying the lower level offenders.

B. WHEN AND HOW THE OFFICE OF THE PROSECUTOR MAY PLEA BARGAIN WITH A SUSPECT AND AN ACCUSED.

The International Tribunal has stated that plea agreements between the OTP and accused have "no binding effect" on the Trial Chamber, but will merely be "taken into careful consideration in determining the sentence to be imposed upon the accused."[49] This decision by the International Tribunal to reject the binding effect of a plea agreement poses a serious obstacle to the OTP seeking

[48] *See* Alvarez, *supra* note 5, at 372 [reproduced in Appendix, Tab A].

[49] In Prosecutor v. Erdemovic, the Trial Chamber stated: "Plea bargain agreements are common in certain jurisdictions of the world. There is no provision for such agreements in the Statute and Rules of Evidence and Procedure of the International Tribunal. This is the first time that such a document [plea agreement] has been presented to the International Tribunal. The plea agreement in this case is simply an agreement between the parties, reached on their own initiative without the contribution or encouragement of the Trial Chamber. Upon being questioned by the Presiding Judge of the Trial Chamber, the accused confirmed his agreement to and understanding of the matters contained therein. The parties themselves acknowledge that the plea agreement has no binding effect on this chamber, although submissions recommending it were made by both the Prosecutor and Defense Counsel at the hearing on 14 January 1998, in addition to the recommendations in the joint motion. Whilst in no way bound by this agreement, the Trial Chamber has taken it into careful consideration in determining the sentence to be imposed upon the accused. United Nations, International Criminal Tribunal for Yugoslavia, Press Release dated 5 Mar. 1998*, The Prosecutor v. Erdemovic, Sentencing Judgement* Case No. ICTY , *available in* United Nations website at http://www.un.org. [reproduced in Appendix, Tab G].

to obtain information and guilty plea's from lower level suspects[50] and/or accuseds.[51] This is because such persons have no advance certainty what the effect their cooperation will be.[52] Thus, in post indictment situations the OTP, in order to engage in effective plea bargaining, must do so by strategically using the powers to amend an indictment under Rule 50[53] and to withdraw indictments under Rule 51.[54]

The OTP may engage in plea bargaining with a suspect or an accused by agreeing to add or drop various charges or indictments in return for a guilty plea on other charges and indictment and/or in return for information. However, the OTP must be aware of the substantial difference between the level of freedom the OTP has to plea bargain with <u>suspects</u> prior to indictment (hereinafter "pre-indictment") and the level of freedom it has to plea bargain with <u>accused persons</u>

[50] The Rwandan Tribunal Rules define "suspect" as "[a] person concerning whom the Prosecutor possesses reliable information which tend to show that he may have committed a crime over which the Tribunal has jurisdiction. *See* Falvey, *supra* note 9, at 490 [reproduced in Appendix, Tab D].

[51] The Rwandan Tribunal Rules define "accused" as "[a] person against whom an indictment has been submitted to the designated trial chamber judge for confirmation." *Id*. at 489.

[52] *See Id*. at 508. The absence of a plea bargaining mechanism: (1) does not permit "to receive a commitment in advance of trial as to the exact exchange for his or her cooperation; (2) reduces the "prosecutor's ability to successfully prosecute higher-level suspects before the Tribunal through cooperation of lower level suspects; and (3) "hinders the prosecutor's ability to negotiate a just result without having to put vulnerable victims or witnesses through the ordeal of a trial or to negotiate victim compensation as part of the agreement." *Id*.

[53] Rule 50 of the Rwandan Tribunal Rules provides in pertinent part: "The Prosecutor may amend an indictment, without leave, at any time before its confirmation . . . ." [reproduced in Appendix, Tab I]

[54] Rule 51(A) of the Rwandan Tribunal Rules provides: "The Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter only with the leave of the Judge who confirmed it or, if at trial, only with leave of the Trial Chamber." Id.

subsequent to indictment (hereinafter "post-indictment").[55] The OTP has much more freedom to plea bargain with pre-indictment suspects.[56] In contrast, the level of freedom to plea bargain is much more circumscribed with post-indictment accuseds.[57] Finally, an alternative available to the OTP is to have lower level offenders be prosecuted by the Rwandan local courts, and to use the information generated through their plea bargaining mechanism to pursue the higher ups.[58]

1. Pre-Indictment Plea Bargaining

If the plea agreement involves the promise not to bring certain charges or an indictment against the suspect prior to indictment in return for information about other suspects or a guilty plea on other charges,[59] the OTP may do so without having to seek prior approval of the Trial Chamber Judge.[60] This is considered to be within the discretion of the OTP prior to a judicial determination

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[55] *See generally* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 480 (1998) [reproduced in Appendix, Tab H].

[56] *See Id*.

[57] *See Id*.

[58] Rwandan local courts have a plea bargaining mechanism in place. *See* Alvarez, *supra* note 5, at 400 [reproduced in Appendix, Tab A].

[59] 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 480 (1998). Rule 49 of the Rwanda Tribunal Rules provides that: "Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused. [reproduced in Appendix, Tab H].

[60] 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 480 (1998); *See also* Rule 50 of the Rwanda Tribunal Rules; *See also* Rule 51 of the Rwanda Tribunal Rules. [reproduced in Appendix, Tab H].

of the matter.[61] Hence, the OTP enjoys considerable freedom in pre-indictment plea bargaining because there is no role for Trial Chamber review at that stage.

Under this analysis, pre-indictment plea bargaining would appear to be a continuation or extension of the OTP's investigative powers during which period the OTP is primarily engaged in gathering evidence to build its prima facie case necessary for an indictment.[62] In essence, the OTP would contact a suspect informing him of the strength of the evidence against him and give the suspect an opportunity to cooperate by providing the OTP with information against other higher level offenders. In return the OTP would offer to not bring certain indictments and/or charges.

2. Post-indictment Plea Bargaining

In contrast, though the decision to withdraw an indictment is considered to be within the discretion of the OTP, OTP may not as freely engage in post-indictment plea bargaining. This is because the OTP must first obtain approval from the judge who originally confirmed the indictment.[63] Hence, a decision to withdraw an indictment will be subject to "judicial review to ensure that there are reasons for doing so."[64] The above arguments, however, should provide a

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[61] 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 480, 483 (1998). [reproduced in Appendix, Tab H].

[62] *See* 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 478 (1998). [reproduced in Appendix, Tab H].

[63] *See* Rule 50 of the Rwanda Tribunal Rules. [reproduced in Appendix, Tab I].

[64] 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 484 (1998). [reproduced in Appendix, Tab H].

sufficient enough justification for withdrawal of charges against a lower level offender who pleads guilty to other charges and or provides information against other higher level perpetrators.

In practice, it appears that the International Tribunal has been fairly lenient in granting permission to amend and withdraw charges from an indictment.[65] In May 1998, the OTP for the ICTY withdrew charges against fourteen persons stating that it was necessary to focus "the resources of the of the Tribunal on persons holding higher levels of responsibility . . . ."[66] The Trial Chambers permitted this despite the fact that the decision to withdraw the charges was not based on any lack of evidence.[67]

III. PLEA BARGAINING IN THE COMMON LAW COUNTRIES OF THE UNITED STATES AND CANADA

A. PLEA BARGAINING: PROSECUTORIAL CONSIDERATIONS

Generally speaking, a prosecutor's typical objective will be to "obtain a plea that is as close to the result that would be obtained if the defendant were convicted as charged."[68] Accordingly, the following discussion will concentrate

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[65] *See* Murphy, *supra* note 27, at 72-3.

[66] *See Id*. at 64 (citing Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998).

[67] *Id*. "The prosecutor stated that the decision to seek the withdrawal was based on the need to focus the resources of the Tribunal on persons holding higher levels of responsibility than has been held by these accused. She stated that 'this decision is not based on any lack of evidence in respect of these accused. I do not consider it feasible at this time to hold multiple separate trials for related offenses committed by perpetrators who could appropriately be tried in another judicial forum, such as a state court.'" *Id*.

[68] HERMAN, *supra* note 16, at 5. [reproduced in Appendix, Tab M].

on the factors a prosecutor will need to qualitatively and quantitatively consider in achieving this objective.

1. Fundamental Considerations

Generally, one of the most important and initial factors a prosecutor should consider prior to entering into plea negotiations is the strength of their case.[69] The prosecutor must consider whether he/she possesses proof sufficient to satisfy the threshold of proof necessary for a conviction.[70] This is an important consideration because if the OTP lacks sufficient evidence to convict a suspect or accused, the suspect or accused will not be inclined to engage in plea negotiations. In sum, "the relative strength of the prosecutor's case, the likelihood of an appeallable issue, and the relative trial skills of the defense counsel and the prosecutor" will be imperative factors that should be evaluated prior to the decision of whether to plea bargain with a suspect or accused.[71]

An obvious consideration the OTP will need to entertain in deciding whether to plea bargain is the severity of the crime and the nature and extent of the suspect or accused's participation in the commission of the offense.[72] There is a great deal of consensus among international lawyers and policy makers that those persons who are the orchestrators, the military leaders and politicians

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[69] See *Id*.

[70] *Id*.

[71] *Id*. at 5-6.

[72] *See Id*.

should be prosecuted to the fullest.[73] Hence, the OTP should not engage in plea bargaining with the higher-ups no matter how useful their testimony may otherwise be. Rather plea bargaining should be an option reserved exclusively for lower-level suspects and accused persons.

The "background and status" of the suspect and accused should also be considered in determining whether to engage in plea bargaining.[74] Specifically, the "age, . . . , family circumstances, health, . . . , prior criminal record . . . [ ], all should be considered.[75]

"Budgetary and resource constraints" are always a necessary consideration.[76] It is quite clear that the OTP for the Rwandan Tribunal is constrained by the limited budget, time and personnel.[77] Plea bargaining is one of the most effective mechanisms by which to greatly reduce the depleting to these already scarce resources.

Finally, one of the most important considerations the OTP will need to consider is the ability of the defendant to assist in the indictment of the higher-level offenders.[78] For example, a suspect or offender who is at the bottom of the hierarchy of offenders and who had little or no contact with any of the higher-ups, will have very little to add to what the prosecutor may already know. It would

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[73] *See* Alvarez, *supra* note 5, at 362. [reproduced in Appendix, Tab A].

[74] *See* HERMAN, *supra* note 16, at 6. [reproduced in Appendix, Tab M].

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id*. at 7.

therefore be of no advantage to engage in plea bargaining with such a suspect or accused. In this connection, the OTP will also need to assess the trustworthiness and willingness of the suspect or accused to cooperate.[79]

B. PLEA BARGAINING SYSTEMS IN CANADA AND THE UNTIED STATES

The plea bargaining systems of Canada and the United States are being used illustratively in this memo because the roles of the OTP and the Trial Chamber judges are greatly similar to the roles of the prosecutor and judges in these two countries.[80]

1. Similarity Between he Roles of the Prosecutor and Judge in the ICTR and the United States Criminal Justice Systems.

Similar to the OTP, prosecutors in the United States are given tremendous discretion in the exercise of their investigative and prosecutorial powers.[81] A prosecutor in the United States "has broad authority to decide whether to investigate, grant immunity, or permit a plea bargain and to determine whether to bring charges, what charges to bring, when to bring charges, and where to bring charges."[82] The prosecutor's broad discretion is recognized by courts of the

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[79] *Id*.

[80] Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L. LEG. PERSP. 111, 141 (1998). "The ICTY's organizational structure is not unlike that of many domestic systems which have separate adjudicative, prosecutorial and administrative functions. The roles of the prosecutor and judges are, however, more akin to the common law systems found in countries such as Australia, Canada, Great Britain and the United States." *Id*. [reproduced in Appendix, Tab B].

[81] NASHERI , *supra* note 12, at 26. [reproduced in Appendix, Tab L].

[82] Micehelle A. Gail, *Prosecutorial Discretion*, 85 GEO. L. J. 983, 983 (1997).

United States "in part out of regard for the separation of powers doctrine and in part because 'the decision to prosecute is particularly ill-suited to judicial review.'"[83] This separation of powers doctrine is akin to the OTP which "constitutes the separate and independent organ of the Rwandan Tribunal . . . ."[84]

Further similarity may be observed by comparing the role of the judges in the plea bargaining process. In the ICTR system, the judge does not participate whatsoever in the pre-indictment plea negotiation/plea bargaining process.[85] Similarly, because plea bargaining often takes place at such an early stage of American proceedings, the judges are often unable to review the prosecutor's judgment,[86] while judges in the federal systems are completely prohibited from participating in the plea negotiation.[87] A final similarity between the two systems may be observed in that plea agreements in both the ICTY and United States are ultimately subject to judicial scrutiny.[88]

2. Similarity Between the Role of the Judge and Prosecutor in the ICTR and the Canadian Criminal Justice Systems.

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[83] *Id*.

[84] 1 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 383 (1998). [reproduced in Appendix, Tab H].

[85] This is because, as discussed, this is considered within the discretion of the OTP and because the judge does not become involved in the prosecutor's case until the OTP has filed an indictment.

[86] NASHERI, *supra* note 12, at 25 [reproduced in Appendix, Tab L]; *see also* HERMAN, *supra* note 16, at 143 (stating that a study investigating the level of judicial participation in plea bargaining revealed that seventeen of the fifty judges interviewed participated in plea bargaining). [reproduced in Appendix, Tab M].

[87] NASHERI, *supra* note 12, at 35. [reproduced in Appendix, Tab L].

[88] *Id*. at 34; *see* also Murphy, *supra* note 27, at 43. [reproduced in Appendix, Tab F].

The Canadian plea bargaining system is especially relevant because it is a mechanism that is "not well entrenched" into the criminal justice system.[89] A Canadian commentator states that:

> [b]argaining has never been fully recognized as a legitimate practice in Canada, at least not to the same extent as in some American jurisdictions. There is by no means a uniform set of rules governing this process, and the way in which functions depends primarily on the kinds of relationships that have grown up between magistrates, Crown attorneys and defense counsel in particular parts of the province.[90]

This treatment of plea bargaining is relevant because plea bargaining in the ICTR is similarly not a commonly accepted practice.[91] Plea bargaining, or "plea negotiation" as it is referred to in Canada,[92] has gained what is described as a "silent acceptance."[93] This description is used because although Canadian courts "have reluctantly dealt with the legal entanglements that arise in plea bargaining," they have nonetheless let it continue.[94]

In contrast to the United States and ICTR, the prosecutor[95] is not the sole individual responsible for investigation of an offense in the Canadian criminal

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[89] NASHERI, *supra* note 12, at 48. [reproduced in Appendix, Tab L].

[90] *Id*. at 48.

[91] *Id*.

[92] NASHERI, *supra* note 12, at 48. [reproduced in Appendix, Tab L].

[93] *Id*. at 63.

[94] *Id*. at 63.

[95] Prosecutor is referred to as the Crown Attorney in the Canadian criminal justice system. *Id*. at 48.

justice system.[96] Notwithstanding this, the prosecutor does engage in plea bargaining once the case has been referred to its office.[97] It appears that this is ordinarily done during a meeting that is held once the accused decides to plead guilty[98] in the Crown Attorney's Office.[99] It is at this meeting that the accused, accompanied by defense counsel, discusses with the Crown Attorney what would be the appropriate sentence in return for a guilty plea and whether the accused will plead guilty to reduced charges or a lesser included offense.[100]

However, as is the case in the United States and the ICTR, the plea agreement is again ultimately subject to judicial scrutiny. Similar to the United States and the ICTR, the judge does not participate in the plea negotiation[101] but retains the ultimately authority to accept or reject the plea agreement.[102] In the Canadian criminal justice system the judge is not required to inquire into the propriety of the plea agreement entered into, and ordinarily will accept it provided that he is "'sufficiently' informed of the facts upon which the defendant pleads

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[96] In the Canadian system there are two types of criminal cases: police cases and government department created cases. Though Crown Attorneys are expected to supervise and control police cases, the police are primarily responsible in police cases with charging someone, choosing the charge, and the investigation of police cases. Hence, the Crown Attorney does not really become involved until the police have completed their investigation and charged an offender and have referred the case to the Crown Attorney's office for prosecution. In contrast, the Crown Attorney is fully responsible for the investigation and prosecution of government cases. *Id*. at 49.

[97] *Id*. at 62.

[98] *Id*. at 49.

[99] *Id*. at 68.

[100] *Id*. at 49, 62.

[101] This is done primarily to avoid any compromise of the case that may result if the trial judge were to be present when the defendant decides to enter a guilty plea. *Id*. at 50.

guilty, especially when the charge carries a heavy maximum sentence or the defendant might have good grounds for a defense."[103] Furthermore, in the Canadian criminal justice system, the judge makes the ultimate determination regarding the sentence to be imposed.[104]

3. Fundamental Observations on Plea Bargaining in the United States.

Approximately 90% of all criminal cases are resolved through plea bargaining in the Untied States.[105] The process of plea bargaining in the United States is guided by three sources of law: (1) the United States Constitution; (2) statutes; and (3) judicial pronouncements found in case law.[106] While plea bargaining on the federal and state level is commonly governed by statute,[107] the focus of the following discussion will be some of the more important and general principles as found in case law before the enactment of Rule 11(e) of the Federal Rules of Criminal Procedure[108] and case law discussing the performance and breach of plea agreements.

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[102] *Id*. at 73.

[103] *Id*. at 73.

[104] *Id*. at 68.

[105] *Id*. at 1.

[106] *Id*. at 14.

[107] *Id.*

[108] Reproduced in Appendix, Tab O.

Prior to the enactment of Rule 11(e), the focus on plea bargaining revolved around the voluntaries of the guilty plea.[109] The general criteria required for a guilty plea obtained through plea bargaining was that the guilty plea must not have been "induced by promises or threats which deprived [the plea] of a voluntary act."[110] A plea will not be considered voluntary if it was induced by threats or coercion,[111] was based on unfulfilled[112] or improper promises,[113] or if the defendant was mentally incompetent.[114] In addition, the

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[109] *Id*. at 14.

[110] *See Id*. at 19 (citing Marchibroda v. U.S., 386 U.S. 487 (1969) in which an imprisoned defendant filed an appeal claiming he was induced to plead guilty by promises of an Assistant United States Attorney that if he pleaded guilty, he would receive a total sentence of not more than 20 years. The defendant also alleged (1) that he was told by the Assistant United States Attorney that if he advised his lawyer of the promises, unsettled matters relating to other robberies would be added to his difficulties, and (2) that he wrote four unanswered letters, two to the sentencing court and two to the United States Attorney General, regarding the Assistant United States Attorney's promises. The Supreme Court held the plea invalid because the lower court did not afford the defendant with a final hearing and opportunity to make a statement before entering the plea.)).

[111] HERMAN, *supra* note 16, at 12 (citing Walker v. Johnston, 312 U.S. 275 (1941)). [reproduced in Appendix, Tab M].

[112] *Id*. (citing Marchibroda v. U.S., 368 U.S. 467 (1962)).

[113] *Id*. (citing Brady v. United States, 397 U.S. 487 (1970) in which a defendant had been charged with kidnapping. Once the kidnapping statute was held unconstitutional, the defendant claimed his plea was invalid because fear of receiving the death penalty was coercive factor in his decision to enter the plea. On certiorari, the Supreme Court held the decision in United States v Jackson did not require that every guilty plea entered under the kidnapping statute be invalidated, even when the fear of death was shown to have been a factor in the plea; (2) the voluntaries of a guilty plea under the statute was to be determined by considering all of the relevant circumstances, including the possibility of a heavier sentence following a guilty verdict; (3) even assuming that the defendant would not have pleaded guilty except for the death penalty provision of the statute, nevertheless such assumption merely identified the penalty provision as a "but for" cause of his plea, and the fact that the statute caused the plea in such sense did not necessarily prove that the plea was coerced and invalid as an involuntary act;(4) a guilty plea was not invalid under the Fifth Amendment whenever it was motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face the possibility of a greater penalty after trial; (5) the Fifth Amendment did not forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges; (6) a plea of guilty was not invalid merely because entered to avoid the possibility of a death penalty; and (7) the guilty plea in the case at bar was properly held to be valid as voluntarily and knowingly made, notwithstanding that the defendant might have been partially motivated by fear of the death

entry of the plea must be knowledgeable.[115] A court will invalidate the plea itself if it determines that the defendant does not have a full understanding of the plea and of its consequence.[116] American courts will also invalidate a plea if it finds that the prosecutor obtained the plea by threatening the defendant with prosecution if the defendant refuses to provide information or testify without first promising to grant some sort immunity to the defendant. [117]

Issues involving the performance and breach of plea agreements have also been addressed by courts of the United States. These issues have typically been analyzed using traditional contract principles.[118] In general, the United States Supreme Court has stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[119] Therefore, it could be inferred that if the prosecutor withdraws his plea before the defendant enters a guilty plea or before the defendant has significantly relied upon the prosecutor's promise, the defendant will ordinarily have no recourse,

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penalty and notwithstanding that the death penalty provision of the statute was subsequently declared to be unconstitutional.

[114] *Id*. (citing Chavez v. U.S., 656 F.2d 512 (9th Cir. 1981)).

[115] NASHERI , *supra* note 12, at 19. (citing Boykin v. Alabama, 395 U.S. 238 (1969) in which the Supreme Court reversed a lower court decision holding that the defendant's plea was voluntary because there was no record evidencing the such voluntariness. The Supreme Court held that not only must the plea be completely voluntary, but that there must also be a written record indicating such voluntariness)). [reproduced in Appendix, Tab L].

[116] HERMAN, *supra* note 16, at 12 (citing Boykin v. Alabama, 395 U.S. 238 (1969)). [reproduced in Appendix, Tab M].

[117] *See id*. (citing 385 U.S. 511 (1967)).

[118] *Id*. at 22.

unless perhaps the defendant has waived a constitutional right,[120] or has provided substantial cooperation by providing information.[121]

A promise made by a prosecutor must also be kept by a subsequent prosecutor who is assigned the case.[122] However, a prosecutor is not bound by a promise which is not accepted by and which does not cause the defendant to rely to his detriment on it.[123]

The typical remedy for a defendant in the event the prosecutor has breached the agreement, is specific performance.[124] Thus, if the prosecutor breaches his promise to withdraw certain charges, the defendant may have the agreement judicially enforced and have the charges withdrawn.

The prosecutor is permitted to breach his promise in certain limited instances. Most common is where the prosecutor learns that the defendant has defrauded the prosecutor, or because the defendant has committed another

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[119] HERMAN, *supra* note 16, at 183. [reproduced in Appendix, Tab M].

[120] *Id*. at 184.

[121] *Id*. at 184.

[122] NASHERI, supra note 12, at 22 (citing Santobello v. U.S., 404 U.S. 257 (1971)). [reproduced in Appendix, Tab L]. In Santobello, the prosecutor agreed to make no recommendation to the judge concerning the sentence to be imposed. Later in the case, another prosecutor was assigned the case and decided that the agreement was not binding on him, and proceeded to recommend a sentence of one year. The Supreme Court ruled that the subsequent prosecutor was bound to the agreement entered into by the first prosecutor. *Id*.

[123] *See id. (*citing Mabry v. Johnson, 467 U.S. 505 (1984)). In Mabry, the Supreme Court appears to have reduced adherence to contract principles. The Court held that a defendant who had not relied upon the prosecutor's promise by waiving any constitutional rights and pleading guilty, could not have the terms of the agreement enforced. *Id*.

[124] HERMAN, *supra* note 2, at 184. [reproduced in Appendix, Tab M].

crime after the prosecutor has made the promise.[125] In contrast, the prosecutor may not breach his promise: (1) because he has had a change of heart; (2) because another prosecutor in the office disagrees with the promise; (3) in the absence of fraud, because of a unilateral mistake or a mutual mistake; or (4) in light of the discovery of new evidence/ facts concerning the seriousness of the defendant's offense .[126]

4. Fundamental Observations on Plea Bargaining in Canada

In contrast to the United States, "there are very few cases in which Canadian Courts have expressed a view as to the merits or propriety of prosecutorial plea bargaining or have hinted at plea bargaining in any way."[127] In fact the most noteworthy and significant cases concerning plea bargaining did not take place until after 1970.[128] In addition, there are even fewer guidelines governing plea bargaining.[129] The approach applied by the Canadian criminal justice system is "cautious."[130] The Canadian courts have not provided a "clear stamp of approval" to plea bargaining.[131] However, courts that have addressed the issue, have been mainly concerned with "avoiding unfairness 'not only to the

[125] *Id*. at 194.

[126] *See Id*.

[127] NASHERI, *supra* note 1, at 58. [reproduced in Appendix, Tab L].

[128] *Id*. at 63.

[129] *Id*. at 53, 58.

[130] *Id*. at 74.

[131] *Id*. at 58.

Magistrate but to the accused.'"[132] Canadian courts have also attempted to achieve this end even when dealing with issues of breach and performance.[133]

As a preliminary matter, judges in the Canadian criminal justice system, who are responsible for determining the appropriate sentence to be imposed on a defendant,[134] can under no circumstance intimate to a defendant the sentence he will impose if the defendant agrees with the prosecutor to plead guilty nor if the defendant decides to plead not guilty and is convicted.[135] The reason courts prohibit participation by the judge in the plea bargaining process is to provide the defendant "complete freedom of choice to plead guilty or not guilty."[136] Thus, it is clear that Canadian courts addressing plea bargaining are primarily concerned with avoiding guilty pleas by defendants who are innocent yet consider pleading guilty because of their uncertainty regarding the ultimate disposition.

Similar to the United States, issues of breach and performance of plea agreements have also been resolved using traditional contract principles. However, the purpose of these decisions has not been to rule on the propriety of plea bargaining, but rather have focused upon the fairness to the defendant who accepts the plea agreement and relies on it to his detriment. Thus, Canadian courts have often simply ignored the entire issue of the propriety of the plea agreements, but acknowledged its presence and proceeded to hold the

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[132] *Id*.

[133] *Id*. at 58.

[134] *Id*.

[135] *See Id*. (citing Frank Richard Turner, 54 Cr.App.R.352 (C.C.A.1970)).

[136] *Id*.

prosecutor to his promise on the contract theory of detrimental reliance.[137] An identical issue was presented to the Quebec Court of Appeals in Attorney General of Canada v. Roy (1972)[138] and again the contract theory of detrimental reliance was applied. The court stated:

> [t]he Crown, like any other litigant, ought not to be heard to repudiate before and appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate its counsel was somehow misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence.[139]

One final and extremely important case, though highly exceptional,[140] is Perkins & Pigeau v. The Queen (1976).[141] In this case, the Quebec Court of Appeals addressed a plea agreement that involved a promise by the prosecutor to the defendant for an offense that was less serious and different from the offense for which he had been originally charged. The court rejected such an agreement, stating:

> "[e]ither the accused was guilty and must face the mandatory sentence impose by law or he was innocent and must be acquitted. A plea to a lesser offense may be accepted if the Crown doubts its ability to prove a charge, but that was not the case here since the Crown attorney admitted having enough evidence to establish importing."[142]

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[137] *See Id*. (citing R. v. Wood, 26 C.C.C. (2d) 100 (Atla.A.C.App.Div. 1975)).

[138] Id. (citing 18 C.R.N.S. 222 (Que.C.A. 1976)).

[139] *Id*.

[140] *Id*.

[141] 35 C.R.N.S. 222 (Que.C.A.1976).

[142] *Id*.

This case, however, is the exception rather than the rule.[143]

[143] *Id*. at 58.