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ARTICLES

COPPING A PLEA TO GENOCIDE: THE PLEA BARGAINING OF INTERNATIONAL CRIMES

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INTRODUCTION

When Jean Kambanda, former prime minister of Rwanda, pled guilty to genocide and crimes against humanity for his role in the mass violence that engulfed his country in 1994,¹ he expected leniency

¹ Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, para. 3 (Sept. 4, 1998) [hereinafter Kambanda, Judgement and Sentence], reprinted in 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999, at 793, 794 (André Klip

in return. Brought before the International Criminal Tribunal for Rwanda (ICTR or Rwandan Tribunal),² the seemingly repentant Kambanda not only expressed his intention to plead guilty immediately, he also provided the prosecution with nearly ninety hours of recorded testimony for use in subsequent trials of senior political and military leaders³ and promised to testify for the prosecution in those trials.⁴ For these efforts, Kambanda got nothing. The ICTR Trial Chamber acknowledged that guilty pleas are generally considered mitigating circumstances in the domestic courts of most countries⁵ but nonetheless followed the prosecution's recommendation and sentenced Kambanda to the most severe penalty that the ICTR can impose: life imprisonment.⁶ Outraged, Kambanda immediately stopped cooperating with the prosecution,⁷ and he sought to revoke his guilty plea and proceed to trial.⁸ On appeal, Kambanda claimed, among other things, that the Trial Chamber had failed to consider the general principle of law that a guilty plea warrants a sentence reduction.⁹ The Appeals Chamber rejected Kambanda's appeal, but it did not call

& Göran Sluiter eds., 2001) [hereinafter 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS].

² The United Nations established the ICTR in order to provide:

[A]n international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994).

³ Prosecutor v. Kambanda, Case No. ICTR-97-23-I, Prosecutor's Pre-Sentencing Brief, 22-23 (Aug. 31, 1998) [hereinafter Kambanda, Prosecutor's Pre-Sentencing Brief] (on file with author).

⁴ Prosecutor v. Kambanda, Case No. ICTR-97-23-1, Plea Agreement Between Jean Kambanda and the Office of the Prosecutor, para. 42 (Apr. 29, 1998) [hereinafter Kambanda, Plea Agreement] (on file with author); see also *Lawyer for the Former Rwandan Prime Minister Argues for Light Sentence*, INTERNEWS (Sept. 4, 1998) (reporting prosecutors' comments that Kambanda would testify in the genocide trials of other government and military leaders), at http://www.internews.org/activities/ICTR_reports/ICTRNewsSep98.html.

⁵ Kambanda, Judgement and Sentence, *supra* note 1, at para. 61.

⁶ *Id.* at Part IV.

⁷ Letter from Carla Del Ponte, to Agwu Okali, ICTR Registrar (Apr. 25, 2000) (on file with author); Interview with Mohamed Othman, former ICTR Chief of Prosecutions (Jan. 25, 2002).

⁸ Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgement, para. 3 (Oct. 19, 2000) [hereinafter Kambanda, Appeal], at <http://www.ictr.org/wwwroot/ENGLISH/cases/Kambanda/decisions/191000.htm>.

⁹ *Id.* at para. 10(4).

into question his assertion that guilty pleas are normally compensated, as it were, by sentence reductions.¹⁰

Indeed, Kambanda is correct: The countries that use guilty pleas—primarily Anglo-American countries—usually secure those pleas by means of the controversial practice of plea bargaining. Plea bargaining can take many forms,¹¹ but the term most typically refers to the prosecutor's offer of some form of sentencing concessions in exchange for the defendant's guilty plea.¹² Although many American scholars decry plea bargaining,¹³ the practice remains, in the 1971

¹⁰ Rather, the Appeals Chamber concluded that the Trial Chamber had not abused its discretion in determining that the aggravating factors of the case negated the mitigating factors, including the guilty plea. *Id.* at paras. 120, 122, 126.

¹¹ See HERBERT S. MILLER, PLEA BARGAINING IN THE UNITED STATES, at xii (1978) (observing that no single definition of plea bargaining is universally accepted); Malcolm M. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 199-200 (1979) (noting that plea bargaining can involve "negotiation over sentence as distinct from charge, over dropping all charges as distinct from reducing them, over facts as distinct from the purely instrumental manipulation of charges [and that each form] can be implicit or explicit"). Robert Weninger, for instance, states that "[t]he widest definition of plea bargaining . . . includes any inducements that are offered in exchange for a defendant's concession of criminal liability." Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 289-90 (1987). Additionally, plea bargaining can be understood to include instances in which the defendant does not concede his own criminal liability but testifies against other defendants or becomes an informer. See William F. McDonald, *From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept*, 13 LAW & SOC'Y REV. 385, 389 (1979) (discussing "[n]egotiation to obtain the state's evidence," such as one party offering evidence to help convict another party in exchange for a favorable deal from the state).

¹² *E.g.*, WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 21 (3d ed. 2000) (explaining that guilty pleas arise when "the prosecution offers certain concessions in return for the defendant's entry of the plea").

¹³ Because the literature critical of plea bargaining is vast, this note lists only a sampling. See, *e.g.*, LLOYD L. WEINREB, DENIAL OF JUSTICE 71-86 (1977) (considering plea bargaining a "reversal" of the purported theoretical model of all criminal process); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) [hereinafter Alschuler, *Changing Plea Bargaining Debate*] (asserting that neither sentencing nor dispute resolution functions serve as adequate justifications for plea bargaining); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *Defense Attorney's Role*] (claiming that the plea bargaining system is destructive to attorney-client relationships and that the mere presence of defense counsel does not adequately guarantee fairness in guilty plea negotiations); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) [hereinafter Alschuler, *Implementing the Criminal Defendant's Right to Trial*] (listing multiple problems involved with plea bargaining and calling for its abolition in many circumstances); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1-3 (1979) [hereinafter Alschuler, *Plea Bargaining and Its History*] (relying on the history of plea bargaining to refute claims that it is a "necessity" in the criminal justice system); Albert

words of the United States Supreme Court, "an essential component of the administration of justice" in the United States.¹⁴ And, as a result of plea bargaining, American defendants who plead guilty do receive substantially lower sentences than do defendants who are convicted after trial.¹⁵

W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) [hereinafter Alschuler, *Prosecutor's Role*] (arguing that personal and political interests of prosecutors bias the plea bargaining system, leading to practices such as overcharging); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1151 (1976) [hereinafter Alschuler, *Trial Judge's Role*] (addressing the notion that "even when judicial plea bargaining is formally disapproved, it is difficult to prevent"); Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 697-99 (2001) (criticizing some forms of plea bargaining); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997) (proposing that plea bargaining is contributing to a legitimacy crisis in the criminal justice system); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38 (insisting that prosecutors "substantially dictat[e] the terms of plea agreements" by making their own assessments of criminal culpability and appropriate punishment); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 105 (1976) (suggesting that "bargains are out of place in contexts where persons are to receive what they deserve"); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 555 (1979) (arguing against those who wish to reform the plea bargaining system by maintaining that plea bargaining as a whole sacrifices the value of just deserts and violates basic liberties); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) [hereinafter Langbein, *Torture and Plea Bargaining*] (drawing parallels between the American practice of plea bargaining and the medieval European practice of torture to obtain the necessary testimony); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 261-62 (1979) [hereinafter Langbein, *Short History*] (arguing that plea bargaining has been allowed to "subvert the design of our Constitution" and eliminate the opportunity to present defenses and have guilt proved beyond a reasonable doubt); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928) (offering data to show an increasing number of guilty pleas while denouncing the simultaneous lack of public responsibility and the unfettered prosecutorial discretion involved in obtaining these pleas); George W. Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System*, 36 LA. L. REV. 947 (1976) (proposing that an alternative to the current process for determining guilt should be entertained); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) [hereinafter Schulhofer, *Is Plea Bargaining Inevitable?*] (utilizing a sample urban jurisdiction to maintain that plea bargaining can be eliminated or, at the very least, contained); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 799 (1992) [hereinafter Schulhofer, *Plea Bargaining as Disaster*] (asserting, among other things, that plea bargaining does not minimize conviction of the innocent, optimize deterrence, or accurately assess the risk of acquittal and advocating for its abolition); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 441 (1971) (suggesting reforms to "minimize the undesirable consequences of plea bargaining"); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) (attacking the state's goal of efficiency as an unjust reason for usurping constitutional protections).

¹⁴ Santobello v. New York, 404 U.S. 257, 260 (1971).

¹⁵ See William L.F. Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOC'Y REV.

As accustomed as American lawyers are to plea bargaining, many do not realize that the extent of our reliance on the practice is exceptional. In most Continental European countries, for instance, guilty pleas are unknown, and all cases involving serious crimes proceed to some sort of trial.¹⁶ The question thus arises as to whether plea bargaining should be practiced in international criminal tribunals, established to prosecute the most heinous offenses. Two ad hoc tribunals now prosecute those accused of committing genocide, war crimes, and crimes against humanity in the former Yugoslavia and Rwanda; similar entities are being established in Sierra Leone¹⁷ and East Timor,¹⁸ and a permanent international criminal court opened its doors in July 2002.¹⁹ The ICTR and its sister tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY or Yugoslavian Tribunal),²⁰

309, 314 (1979) ("In the United States, defendants who plead guilty are, in the aggregate, sentenced less severely than those who insist on trial."); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1993 (noting that, in general, American defendants who plead guilty receive sentences ranging from 25% to 75% lower than similarly situated defendants who are convicted at trial).

¹⁶ See *infra* text accompanying notes 142-46.

¹⁷ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, U.N. Doc. S/2000/915 (2000), available at <http://www.un.org/Docs/sc/reports/2000/915e.pdf>; see also Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 186, 231-41 (2001) (focusing on the creation of the Special Court in Sierra Leone); Daryl Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 935-38 (2001) (describing differences and similarities between various international criminal tribunals); *Sierra Leone: Agreement on War Tribunal*, N.Y. TIMES, Jan. 17, 2002, at A8 (discussing the creation of the Sierra Leone Tribunal).

¹⁸ *Regulation No. 2000/11 on the Organization of Courts in East Timor*, U.N. Transitional Administration in East Timor, U.N. Doc. UNTAET/REG/2000/11 (2000), available at <http://www.un.org/peace/etimor/untatetR/Reg11.pdf>; *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, U.N. Transitional Administration in East Timor, U.N. Doc. UNTAET/REG/2000/15 (2000), available at <http://www.un.org/peace/etimor/untatetR/Reg0015E.pdf>; see also Linton, *supra* note 17, at 202-30 (explaining establishment of UNTAET and the Administration's authority to adjudicate serious criminal offenses); Mundis, *supra* note 17, at 942-45 (detailing the judicial functions of UNTAET).

¹⁹ Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3. The International Criminal Court was established pursuant to the Rome Statute adopted by 120 states in July 1999. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998).

²⁰ See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES/808 (1993) (determining that "an international tribunal shall be established in Yugoslavia for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"); S.C. Res. 827,

have adopted procedures blending adversarial features, prevalent in the United States, with non-adversarial features common to the Continent. By providing for guilty pleas, both Tribunals adopted the American approach, but if they expect any defendants to plead guilty, they must also adopt the American practice of offering sentencing concessions to induce those guilty pleas. At the same time, however one views the desirability of such concessions in the domestic context, they appear particularly unseemly in the international criminal context given the gravity of the crimes being prosecuted. Kambanda, for instance, admitted to orchestrating and encouraging a genocide that killed approximately 800,000 people in one hundred days. Kambanda committed crimes vastly more serious than the ordinary fare of domestic courts and, guilty plea or no, it would be hard publicly to justify any but the most severe sentence for him.²¹

These differing perspectives highlight, at the micro level, the debate surrounding the practice of plea bargaining and, at the macro level, the difficulty inherent in transplanting domestic criminal procedures to international tribunals adjudicating in the unique and developing field of international criminal law. Whether or not it is practicable, let alone desirable, to employ plea bargaining, or any other domestic procedure, depends on a wide variety of factors, including the purposes for which the ICTR and ICTY were established, the way the Tribunals are organized, the nature of the crimes over which the Tribunals have jurisdiction, and the Tribunals' existing system of procedural and evidentiary rules. Any examination must draw upon the

U.N. SCOR, 48th Sess., 3217th mtg. at 28, U.N. Doc. S/RES/827 (1993) (establishing the ICTY).

²¹ This point is particularly compelling since lower-level, arguably less culpable, Rwandans are being sentenced to death in Rwanda's domestic courts. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentence (Oct. 2, 1998) [hereinafter *Akayesu*, Sentence] (discussing Rwandan courts' authorization to sentence similar defendants to death), reprinted in 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 1, at 810, 812; Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 393, 403 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) [hereinafter SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW] ("Rwandan national courts can impose a death penalty and have done so after abbreviated trials lacking defense counsel. Thus, the political leaders of the Rwanda genocide who were surrendered to the ICTR by neighboring countries face at worst a life in jail, rather than summary execution."); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 356-57 (1997) (observing that the Rwandan penal code provides for the death penalty while the ICTR charter does not).

experience of plea bargaining in domestic jurisdictions. Plea bargaining constitutes a vital feature of the American criminal justice system, though it plays a relatively insignificant role in most Continental criminal justice systems. The historical, functional, and ideological reasons for the different values these two systems accord the practice of plea bargaining must inform any assessment of the desirability of the practice in the international tribunals.

This article will comprehensively analyze the functional and ideological role that plea bargaining plays in various domestic jurisdictions to create a theoretical framework in which to understand and evaluate the emergence of plea bargaining in the realm of international criminal prosecutions. Part I constructs a functional account of the role that plea bargaining plays in various domestic jurisdictions. Section A details the historical rise of plea bargaining in Anglo-American jurisdictions. This section shows that plea bargaining developed primarily in response to the introduction of increasingly complex and time-consuming criminal procedures. Building on this history, Section B will describe the role that plea bargaining currently plays in the United States criminal justice system. Section C will then examine plea bargaining's lesser functional role in Continental European criminal justice systems and in the United Kingdom and Israel, two countries whose criminal procedures resemble, but are not as adversarial as, those of the United States. In sum, this Part establishes a correlation between the complexity of the country's criminal procedures and the prevalence of plea bargaining: the more complex and costly a country's criminal procedures, the more often plea bargaining will be used to evade those procedures.

Part II moves the analysis from the functional to the theoretical plane. The adversarial procedures of the United States and the non-adversarial procedures of Continental countries derive from various structural and ideological features of the countries utilizing them. Part II describes these features and explores plea bargaining's relationship to them. The Part concludes that plea bargaining is theoretically consistent with the structure and ideology of the American criminal justice system but is not especially compatible with the structural and ideological features that underpin Continental criminal justice systems. Plea bargaining's theoretical "fit" with American adversarial procedures, then, provides an additional explanation for its prevalence and resilience in the United States.

Parts III and IV apply this theoretical framework to international criminal prosecutions. Section A of Part III introduces the ICTY and

ICTR and examines the Tribunals' structural components and key players; Section B describes the procedural and evidentiary amalgam that the Tribunals have created. With this groundwork laid, Part IV explores the emergence and evolution of plea bargaining in these international criminal tribunals. Applying the functional and ideological considerations relevant to domestic plea bargaining, Section A sets forth certain hypotheses concerning the importance of plea bargaining and the role it is apt to play in international tribunals. Section B tests those hypotheses against ICTY and ICTR practice to date. It details the cases that have been disposed of by guilty plea, drawing not only upon information available from written sources but also upon interviews with prosecution and defense attorneys involved in the cases.²² Section C summarizes plea bargaining's evolution at the Tribunals—from disfavored to encouraged practice—and explains the particular forms of plea bargaining that have emerged as products of the Tribunals' unique structural and ideological features.

I. PLEA BARGAINING: ITS FUNCTION AND ROLE IN DOMESTIC JURISDICTIONS

Most criminal cases in Anglo-American countries are disposed of by guilty plea.²³ Guilty pleas are particularly prevalent in the United States, where they account for the disposition of approximately 90% of all criminal cases.²⁴ The vast majority of these American guilty pleas

²² The footnotes identify some interviewees, but many current and former Tribunal officials spoke to me on condition of anonymity. Therefore, in many footnotes, I simply cite documentary sources and omit reference to the interviews. In cases in which no documentary source was available, I cite the interview, identifying the interviewee only by pseudonymic initials.

²³ See Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 ISR. L. REV. 183, 183 (1997) ("The standard form of disposition for most English and American criminal cases is the guilty plea, by means of the plea bargain."); cf. Kent W. Roach, *Canada*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 53, 75 (Craig M. Bradley ed., 1999) (finding that in Canada, plea bargaining "concerning both charges and sentences occurs openly and is encouraged" and "[a]n early guilty plea is a significant mitigating factor in sentencing"); Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 973-75 (discussing plea bargaining in England and Canada).

²⁴ See *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) (relying on estimates "that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty"); LAFAYE ET AL., *supra* note 12, at 21-22 (observing that no more than 15% of felony charges and only 3% to 7% of misdemeanor charges are likely to be resolved by trial); Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 1 ("[R]oughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty."); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 910 (2000) (noting that in mod-

are obtained through plea bargaining.²⁵ For purposes of this Article, plea bargaining can be defined as bargaining through which a defendant agrees to plead guilty in exchange for sentencing or charging reductions. Most plea bargaining is explicit; that is, the prosecution and defense bargain openly about the concessions the defendant is to receive. And it typically takes the form of sentence bargaining or charge bargaining. When engaged in sentence bargaining, the prosecutor will expressly agree to recommend a specific sentence which the court will almost certainly impose.²⁶ As for charge bargaining, the prosecution will agree not to charge certain crimes or to dismiss charges already brought.²⁷ Plea bargaining can also be implicit: whether or not any express bargaining takes place, in many jurisdictions it is well established that judges impose more lenient sentences

ern American courtrooms, "guilty plea rates above ninety or even ninety-five percent are common"); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1993 ("[E]ighty to ninety percent of defendants currently plead guilty."); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining? The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 753 (1998) (reporting on a 1992 survey of the seventy-five most populous counties in the United States which showed that guilty pleas accounted for 92% of all convictions in state courts).

²⁵ See Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 675 (1980) ("Although a guilty plea may occasionally be the unilateral product of the defendant's genuine remorse . . . or his ignorance of the advantages to be gained by manipulating the system, it is infinitely more likely to result from a bargaining process in which the guilty plea is tendered in return for inducements . . ."); see also John Paul Ryan & James J. Alfani, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479, 479 (1979) (stating that plea bargaining "is at the core of the criminal justice system").

²⁶ See LAFAVE ET AL., *supra* note 12, at 956 (explaining that a prosecutor may "promise a certain sentence upon a guilty plea" and that the possibility is slight that the trial judge will not follow his recommendations); Alschuler, *Trial Judge's Role*, *supra* note 13, at 1065 ("Students of the criminal courts of many American jurisdictions have noted that judges almost automatically ratify prosecutorial charge reductions and sentence recommendations."); *id.* at 1063-64 (noting that five of the six felony judges in Houston, Texas followed the prosecutor's sentence recommendation in almost every case, while the sixth judge followed the prosecutor's recommendation in 90% of the cases); Gifford, *supra* note 13, at 68 ("[R]egardless of the articulated standard, courts rarely intervene in plea agreements."). In most jurisdictions, judges are not strictly bound by a prosecutor's promised sentence, see, e.g., FED. R. CRIM. P. 11(e)(1)-(2), but few judges choose to upset the bargain reached.

²⁷ E.g., LAFAVE ET AL., *supra* note 12, at 956 (explaining that an "on-the-nose" guilty plea to one charge may be exchanged for the prosecutor's agreement to drop other charges). In many cases, the dismissed charges carry mandatory sentences higher than the range of sentences available for the remaining charges, so the dismissal of the more serious charges necessarily results in a reduced sentence. See *id.*; Michael Bohlander, *Plea Bargaining Before the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 151, 151 (Richard May et al. eds., 2001).

following a guilty plea than following a conviction at trial.²⁸ The introduction of sentencing guidelines in the federal system and in some states regulated the practice of plea bargaining to some extent but did not curtail it to any significant degree.²⁹ The following sections detail plea bargaining's rise, its current role in the United States, and its more limited role in Continental Europe and other jurisdictions.

²⁸ See Alschuler, *Trial Judge's Role*, *supra* note 13, at 1076 (describing implicit plea bargaining in the federal courts); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247, 253 (1979) (discussing the unspoken understanding between defendants and judges that results in defendants being better off following a guilty plea); McDonald, *supra* note 11, at 386 (explaining that defendants may be aware that sentencing may be more harsh if they insist on proceeding to trial). In some jurisdictions, judges also impose more lenient sentences following bench trials, which are relatively short and informal, than following jury trials. See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 1029 (asserting that "Philadelphia and Pittsburgh discouraged exercise of the right to jury trial in more or less the same fashion as other cities by rewarding defendants who waived this right and by threatening defendants who exercised it with unusually severe sentences"); Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 13, at 1062 (describing Philadelphia defense lawyers' belief that in that jurisdiction "defendants convicted in jury trials receive sentences substantially more severe than those imposed in bench trials"). Jury-trial waivers can also be the product of express bargaining. Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 1029.

²⁹ See Colquitt, *supra* note 13, at 700 ("Th[e] widespread use of plea bargaining exists whether or not a jurisdiction uses guideline sentencing."); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1977-78 (1992) (describing bargaining under the federal sentencing guidelines and noting that the "percentage of guilty pleas in federal criminal cases accordingly has been stable"). The federal sentencing guidelines provide for a decrease of two levels in the offense level when the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2001). Parties in the federal system can still engage in sentence bargaining: they can enter into an agreement whereby the parties designate a specific sentence which the court may then accept or reject or the prosecutor can agree to recommend a specific sentence, FED. R. CRIM. P. 11(e)(1)(B)-(C), but the court may impose the sentence only if it is either "within the applicable guideline range" or "departs from the applicable guideline range for justifiable reasons," U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(b)-(c) (2001). As for charge bargaining, the prosecutor can move to dismiss some charges upon the defendant's plea of guilty to one or more other charges, FED. R. CRIM. P. 11(e)(1)(A), although the federal sentencing guidelines instruct judges to accept such an agreement only if they determine, "for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purpose of sentencing or the sentencing guidelines," U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (2001). The parties can evade these restrictions to some extent by beginning their bargaining before the indictment is issued. LAFAVE ET AL., *supra* note 12, at 963.

A. *The Historical Rise of Plea Bargaining*

Before the twentieth century, the vast majority of criminal cases in Anglo-American jurisdictions were disposed of by jury trial rather than by guilty plea. Guilty pleas were considered rather ill-advised,³⁰ and empirical studies focusing on particular jurisdictions indicate that guilty pleas and plea bargaining in both the United States and the United Kingdom were relatively rare until the latter half of the nineteenth century.³¹ Their use increased, sometimes dramatically, during the decades following the American Civil War and soon reached, dur-

³⁰ See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 971 (explaining that, before the nineteenth century, "[w]hen defendants offered to plead guilty, judges strongly urged them to reconsider"); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 278 (1978) (reporting on several late-seventeenth-century and early-eighteenth-century cases "in which, when an accused pleads guilty on arraignment or starts to plead guilty before the jury after having pleaded not guilty on arraignment, the court urges him to go through with the contest"). Alschuler reports that the first common law treatises do not mention any procedure resembling the guilty plea, and when guilty pleas do make their appearance, at least by the seventeenth century, courts were hesitant to receive them. Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 7, 9-12 (providing examples of, and explanations for, judicial reluctance to accept guilty pleas).

³¹ See Feeley, *supra* note 23, at 187 (observing that guilty pleas increased dramatically while trial rates declined in the mid-nineteenth century); see also Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 4 (contending that "plea bargaining was essentially unknown during most of the history of the common law"); *id.* at 10 (describing a study showing that only 11% of the defendants who came before the Boston Police Court in 1824 pled guilty); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 121 (1983) (reporting that guilty pleas were rare in the mid-eighteenth century); Moley, *supra* note 13, at 108 fig.1 (showing that in 1839 only 25% of New York's felony convictions were by guilty plea); cf. Fisher, *supra* note 24, at 966-67 (reporting that in Middlesex County, Massachusetts, guilty pleas reached a high of 71% of all adjudicated non-liquor cases in 1789-90, dropped dramatically to 26% by 1834, and remained comparatively rare until the late 1870s). For most of American history, plea bargaining was considered illegitimate. See *id.* at 915 (describing judicial hostility to plea bargaining in the late nineteenth century); Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 31 ISR. L. REV. 169, 172 (1997) (noting that for most of American history "bargaining by the parties for the 'waiver' of such rights was virtually prohibited by the formal legal system" because the pleas "tended to nullify the criminal law, . . . seemed inherently coercive[,] and thus were presumptively unlawful"); see also Griffin v. State, 77 S.E. 1080, 1084 (Ga. Ct. App. 1913) (noting that "the law favors a trial on the merits" and that it "does not favor confessions, either in or out of court"); Golden v. State, 49 Ind. 424, 424 (1875) (labeling a plea arrangement between the prosecutor and defendant a "corrupt agreement" and comparing plea bargaining to "corruptly purchas[ing] an indulgence"); Hill v. People, 16 Mich. 351, 357 (1868) (holding that it would unacceptably broaden "the generally recognized force of the obligation of contracts to hold that a defendant charged with crime might, without a trial, enter into a binding contact with the prosecuting attorney . . . to go to the penitentiary for a certain number of years in satisfaction for the offense . . .").

ing the early decades of the twentieth century, the prevalence associated with contemporary times.³²

It is sometimes asserted that plea bargaining arose as a means of managing increasingly burdensome caseloads.³³ While crowded dockets might explain plea bargaining's current prevalence, historians have convincingly argued that plea bargaining emerged largely as a response to increasingly complex trial procedures.³⁴ Indeed, to say, as I have above, that in past centuries jury trials constituted the primary means for the disposition of criminal cases is somewhat misleading because the trials of old bear scant resemblance to contemporary trials. John Langbein and Malcolm Feeley, among others, have reported that during the late seventeenth and early eighteenth centuries, jury trials were rapid,³⁵ summary proceedings.³⁶ Well into the eighteenth century, for instance, London's Central Criminal Court, the Old Bai-

³² See Feeley, *supra* note 23, at 220 (finding that guilty pleas and plea bargaining were well-established in the late nineteenth and early twentieth centuries). For instance, during the mid-1920s, 85% of all felony convictions in Chicago were by guilty plea; in Minneapolis, 90%; in St. Paul, 95%; in Los Angeles, 81%; and in St. Louis, 84%. Moley, *supra* note 13, at 105; see also Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 27 (noting that in 1908 approximately 50% of all convictions in federal courts were by guilty plea; by 1916, 72%; and by 1925, 90%, the same level as in recent years).

³³ See Feeley, *supra* note 23, at 184 ("Observers . . . conclude that plea bargaining is an adaptation to the pressure of heavy caseloads."); Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515, 516-17 (1975) ("Much of the informed thought and literature on plea bargaining assumes . . . that plea bargaining can be best . . . understood as a function of case pressure."). Others have contended that plea bargaining originated in England in the seventeenth century as a means of mitigating unduly harsh punishment. See JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 107[1] (1975) (describing early English plea bargaining methods by which a defendant could "confess[] his guilt and accuse[] a certain number of other persons" in exchange for a reduced sentence granted at the Crown's discretion (citations omitted)).

³⁴ See Feeley, *supra* note 23, at 202 (arguing that as the jury trial became more complicated, there was a rise in guilty pleas and plea bargaining); Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 27 (noting that the number of cases in federal courts declined in 1916 at the same time that guilty plea rates substantially increased and concluding, therefore, that "the increase cannot be attributed to the pressures of the caseload").

³⁵ Langbein, *supra* note 31, at 115 (noting that "[n]othing distances the trial procedure of the [1750s] from its modern counterpart so much as its dispatch" and that Sir Dudley Ryder, a trial judge in the 1750s, "saw more felony jury trials in a day or two than a modern English or American judge would expect to see in a year").

³⁶ E.g., Feeley, *supra* note 23, at 190; John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 445 (1974) ("Jury trial in early modern times was a summary proceeding."); Langbein, *Short History*, *supra* note 13, at 262.

ley, would hear between twelve and twenty felony cases per day.³⁷ Such efficiency and expediency could be obtained in large part because neither the prosecution nor the defendant were represented by counsel in most criminal trials.³⁸ There was also no voir dire of prospective jurors,³⁹ and the same panel of jurors would hear evidence in several unrelated cases before retiring to formulate verdicts in all.⁴⁰ Finally, "[t]he common law of evidence, which has injected such vast complexity into modern criminal trials, was virtually nonexistent as late as the opening decades of the eighteenth century."⁴¹ Because these jury trials were so brief and simple, there was little motivation to encourage defendants to waive their right to them.⁴²

These early trials, while perhaps enviably efficient by modern standards, were also notably lacking in procedures safeguarding de-

³⁷ Langbein, *Short History*, *supra* note 13, at 262; *see also* Langbein, *supra* note 30, at 276 ("[A] single Old Bailey jury commonly [tried] dozens of cases at a single session[.]").

³⁸ *See* Feeley, *supra* note 23, at 188; Langbein, *Short History*, *supra* note 13, at 263 ("The most important factor that expedited jury trial was the want of counsel. Neither prosecution nor defense was represented in ordinary criminal trials."); Langbein, *supra* note 30, at 282; *see also id.* at 307-08 (describing the reasons justifying the prohibition on defense counsel).

³⁹ Langbein, *Short History*, *supra* note 13, at 263. "In ordinary jury practice at the Old Bailey," wrote Langbein, "challenges were quite rare. According to the December 1678 pamphlet, the clerk at the Old Bailey faithfully made the ritual proclamation to the accused that they should 'look to their Challenges,' but none did." Langbein, *supra* note 30, at 275; *see also id.* at 279 ("[S]ince in practice the prosecution and defense took the jury as they found it, no time was spent probing jurors' backgrounds and attitudes.").

⁴⁰ Langbein, *supra* note 36, at 439 ("In the seventeenth century a criminal trial jury would be impaneled and hear evidence in six or seven unrelated cases before retiring to formulate verdicts in all."); Langbein, *supra* note 31, at 275 ("[The] practice of a single jury hearing many cases and leaving to deliberate on all of them at once was also routine.").

⁴¹ Langbein, *Short History*, *supra* note 13, at 264; *see also* Langbein, *supra* note 30, at 300-06 (discussing the modern instrument of the law of evidence). Other factors contributing to the speed of trials included the scheduling of trials soon after the crimes took place, prompt pre-trial evidence gathering, the recurrent use of jurors who were well experienced, and the guidance that the jury received from the judge, who freely commented on the merits of the case. *Id.* at 273-300; *see also* Langbein, *Torture and Plea Bargaining*, *supra* note 13, at 10 ("[T]he exclusionary rules of the law of criminal evidence were still primitive and uncharacteristic.").

⁴² Langbein, *supra* note 30, at 278 ("So rapid was trial procedure that the court was under no pressure to induce jury waivers. We cannot find a trace of plea bargaining [in the mid-1680s to the mid-1730s.]); Langbein, *Short History*, *supra* note 13, at 264 ("[T]here was no particular pressure . . . to encourage the accused to waive his right to jury trial.").

fendants' rights.⁴³ In addition, Langbein has identified a series of practices that were used to investigate crimes and gather evidence during the mid-eighteenth century which actually encouraged false testimony and the condemnation of innocent defendants.⁴⁴ As the flaws in these practices became known, procedural safeguards were developed to remedy them. For instance, certain evidentiary rules were introduced that were designed to screen untrustworthy evidence from the jury.⁴⁵ Also, lawyers increasingly came first to represent prosecuting victims and then defendants.⁴⁶ The introduction of defense counsel led to a series of major structural changes in the criminal trial, including the elimination of the defendant as a testimonial resource, the prevalence of evidentiary objections, and the evolution of the privilege against self-incrimination from an empty slogan into a doctrine of consequence.⁴⁷ In sum, during the course of the eighteenth century, English criminal procedure underwent a transformation from a predominantly non-adversarial system to an identifiably adversarial one.⁴⁸ The introduction of these adversarial features, while providing necessary safeguards, at the same time greatly lengthened and complicated the heretofore summary jury proceedings.⁴⁹ With more issues of law raised, more expert witnesses testifying, and more

⁴³ See Langbein, *Short History*, *supra* note 13, at 265 ("We should also not be surprised that this summary form of jury trial perished over the last two centuries. The level of safeguard against mistaken conviction was in several respects below what civilized peoples now require.").

⁴⁴ See Langbein, *supra* note 31, at 84-114 (describing the crown witness and reward systems).

⁴⁵ See *id.* at 96-105 (tracing the development of the corroboration and the confession rules).

⁴⁶ See Feeley, *supra* note 23, at 192; Langbein, *supra* note 31, at 124 (discussing the number of times prosecution counsel and defense counsel appeared in Old Bailey cases); Langbein, *supra* note 30, at 311 ("It appears that in the decade of the 1730s, certainly from 1734-1735, defense counsel began to be permitted to examine and cross-examine witnesses.").

⁴⁷ See Langbein, *supra* note 31, at 132; Langbein, *supra* note 30, at 283 ("[F]rom the 1670s through the mid-1730s I have not noticed a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination.").

⁴⁸ See Langbein, *supra* note 31, at 123 (describing the adversarial procedures to which English criminal procedure shifted in the eighteenth century); *cf.* Feeley, *supra* note 23, at 192 (arguing that what we now call the adversary system developed in the eighteenth century).

⁴⁹ See Feeley, *supra* note 23, at 202 (noting that "in the late seventeenth century and well into the nineteenth, a single judge and jury heard over four cases per day [but] by 1912, the average was less than one per day").

cross-examination occurring, jury trials became time-consuming, complex events dominated by professional advocates.

A second and corresponding transformation also occurred. As trials became more complex, the lawyers who were beginning to dominate them developed a more expedient alternative for case disposition: plea bargaining. Feeley, for instance, identifies a series of indicators of legal complexity, aggregates them to form a "Legal Complexity Index," which provides a single summary indicator of adversariness, and shows that as the Legal Complexity Index increased so did the percentage of cases disposed of by guilty pleas.⁵⁰ These developments led to a de facto bifurcation of criminal case disposition: a handful of cases were disposed of by increasingly complex trials while the vast majority were disposed of by guilty pleas secured through plea bargaining. Thus, as some historians have ironically noted, the reforms to the system brought about by the introduction of evidentiary rules and the dominance of lawyers ultimately destroyed the system by rendering trials unworkable as the routine way of disposing of serious criminal cases.⁵¹

B. *The Functional Role of Plea Bargaining in Contemporary United States Practice*

From the eighteenth century until the present day, American criminal proceedings have increased in complexity, length, and lawyer-domination. A brief description of the contemporary American adversarial system provides a useful starting point and a relevant contrast to the Continental non-adversarial procedures that will be taken up next.⁵²

⁵⁰ *Id.* at 215-17. The Legal Complexity Index represents the sum of seven variables: (1) the presence of prosecution attorneys; (2) the presence of defense attorneys; (3) the vigor/complexity of prosecution; (4) the vigor/complexity of defense; (5) the use of expert witnesses; (6) whether either party raised questions of law; and (7) questions of evidence and procedure. *Id.* at 217.

⁵¹ *E.g.*, Langbein, *Short History*, *supra* note 13, at 265.

⁵² No domestic system of criminal procedure contains purely adversarial or purely non-adversarial forms; every system is something of a blend. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 577 (1973) (explaining the "basic theme either of inquiry or contest is orchestrated in real life with heavy borrowings from the other camp, so that, as a result, all criminal processes appear mixed"); Richard S. Frase, *Comparative Criminal Justice Policy, in Theory and in Practice*, in INT'L CONF. FOR THE 25TH ANNIVERSARY OF THE INT'L INST. OF HIGHER STUD. IN CRIM. SCI., COMPARATIVE CRIMINAL JUSTICE SYSTEMS: FROM DIVERSITY TO RAPPROCHEMENT 109, 112-13 (1998) (concluding that "all systems in the world today are 'mixed' or hybrid systems—incorporating some

Criminal proceedings in the American adversarial system are structured in the form of a contest. The adversarial model gives to the parties the responsibility for investigating the facts, researching the law, and presenting the case in the manner most favorable to their own position.⁵³ In contemporary trials, these tasks are carried out not by the parties themselves but by their lawyers. Thus, lawyers have emerged from playing no role in criminal cases to now dominating adversarial proceedings.⁵⁴ Proceedings in an adversarial system are conducted before a factfinder who is uninformed about the case prior to trial.⁵⁵ In most cases that factfinder is a lay jury,⁵⁶ and the jury too has evolved over the centuries from a somewhat experienced body⁵⁷

features typical of the Common Law, adversary, or due-process models, along with other features typical of the Civil Law, inquisitorial, or crime-control models"); Patrick L. Robinson, *Ensuring Fair and Expeditionary Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569, 574 (2000) (observing that neither the common law accusatorial system nor the civil law non-adversarial systems actually exist in pure forms). But despite this hybridization, most systems of domestic criminal procedure are predominantly adversarial or non-adversarial, and their features vary enough that useful contrasts may be drawn.

⁵³ See MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT 74 (1997) [hereinafter DAMAŠKA, EVIDENCE LAW ADRIFT] (describing the adversary system as "a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive"); MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3 (1986) [hereinafter DAMAŠKA, FACES OF JUSTICE] (discussing the differences between the adversarial and the non-adversarial mode of process); LAFAVE ET AL., *supra* note 12, at 31 (describing the parties' responsibilities under the adversary system and noting that "[e]ach party is expected to present the facts and interpret the law in a light most favorable to its side"); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 57 (1988) (stating that the adversary system is characterized by, among other things, "assignment to the parties of the responsibility to present their own cases and challenge their opponents"); Malcolm Feeley, *The Adversary System*, in 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 753, 753 (Robert J. Janosik ed., 1987) (stating that, in an adversarial system, it is "the duty of the advocate . . . to present his or her side's position in the very best possible light"); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) ("The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard.").

⁵⁴ See Gordon van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 431 (1992) ("Lawyers in the United States produce, direct and dominate the trial process."); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1280 (1996) ("Trials have become . . . places where lawyers can display their artistry.").

⁵⁵ See LAFAVE ET AL., *supra* note 12, at 31; Sward, *supra* note 53, at 308-10 (discussing the elements of fair adjudication, including an uninformed decisionmaker).

⁵⁶ See LAFAVE ET AL., *supra* note 12, at 22 ("Over the country as a whole, roughly 70% of all felony trials are tried to a jury . . .").

⁵⁷ *Supra* text accompanying note 41.

that was strongly influenced, if not controlled, by the judge,⁵⁸ to an inexperienced but essentially autonomous body. Because contemporary jurors, unlike their predecessors, do have the power to decide the cases they hear, the selection of jurors has become an important feature of contemporary American trials. Voir dire and the exercise of peremptory challenges often comprise a significant part of the guilt phase of a trial and, in some cases, the jury selection process lasts longer than the trial itself.⁵⁹ The law of evidence has also evolved into a complex, technical labyrinth.⁶⁰ For example, the notorious hearsay⁶¹ rule, with its many exceptions and rules prohibiting the introduction of character evidence, is difficult to apply and thus frequently gives rise to objections.⁶² In addition, the United States constitutional prohibition on the admission of illegally obtained evidence⁶³ results in many motions for exclusion, which add to the length and complexity of contemporary American criminal proceedings.

The typical contemporary American criminal trial thus features extended voir dire, numerous evidentiary objections, complex jury instructions and argument thereon,⁶⁴ motions for exclusion, motions

⁵⁸ Langbein, *supra* note 30, at 284-300 (describing the methods judges used to control juries).

⁵⁹ See van Kessel, *supra* note 54, at 460-61 (noting that "voir dire and the exercise of peremptory challenges often compose a significant part of the trial of criminal cases" and giving examples); see also Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 1000 (criticizing the "devotion of substantial resources to voir dire examinations [and] to the investigation of prospective jurors outside the courtroom"); Bradley & Hoffmann, *supra* note 54, at 1283 (identifying the jury selection process as "perhaps the most egregious example of the adversary system run amok").

⁶⁰ See DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 53, at 10 (observing that, "[v]iewed through Continental eyes, [Anglo-American evidence law] seems a maze of disconnected rules, embroidered by exceptions and followed by exceptions to exceptions"); van Kessel, *supra* note 54, at 463 (reporting that Europeans "look upon our complex system with bewilderment"); cf. Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 1021-22 (describing the unnecessary and complex evidentiary rules inherited from the common law).

⁶¹ "Hearsay" evidence is defined as a "statement . . . , other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." BLACK'S LAW DICTIONARY 726 (7th ed. 1999).

⁶² See, e.g., van Kessel, *supra* note 54, at 463-64 ("Our rules against hearsay and character evidence provide ample opportunity for objections to relevant evidence which might be misused by the lay jury.").

⁶³ See *Mapp v. Ohio*, 367 U.S. 643, 649 (1961) (reaffirming an earlier Court ruling that the exclusionary rule is "of constitutional origin").

⁶⁴ Cf. Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1108-09 (2000) (proposing rules for jury instructions which make them easier for the jury to understand).

designed to preserve appellate issues, and a host of tactical maneuvers made by counsel eager to advance their clients' interests.⁶⁵ Whereas in the Old Bailey between twelve and twenty felony cases could be heard in a day, now one typical felony trial takes between two and three days,⁶⁶ and these days are preceded by considerable time (and resources) spent in preparing for trial—in investigating the facts, researching the law, and “preparing” the witnesses,⁶⁷ among other things. The contemporary American trial provides a defendant with every means to vigorously contest the charges against him, but in doing so has become, in the words of one commentator, “the most expensive and time-consuming in the world.”⁶⁸

Indeed, American criminal trials have become so expensive and time-consuming that they can only be provided to a small percentage of criminal defendants.⁶⁹ As noted above, approximately 90% of all American criminal cases are disposed of by a guilty plea secured through plea bargaining.⁷⁰ Stated differently, “[e]very two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty or nolo contendere plea.”⁷¹ Such high guilty plea rates are commonly believed necessary in order for the system to function.⁷² Indeed, even the harshest critics of plea bar-

⁶⁵ See Langbein, *supra* note 36, at 445-46.

⁶⁶ LAFAYETTE ET AL., *supra* note 12, at 22. In the late 1980s, the average felony trial in the United States federal courts lasted three days, van Kessel, *supra* note 54, at 473, and some states' felony trials took longer; for example, a 1986 study conducted by the National Center for State Courts showed that trials in Oakland, California, lasted nearly six days and capital cases took considerably longer. *Id.* at 471.

⁶⁷ E.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 647-48 (1986) (“Lawyer interviews with witnesses in preparation for testimony have become an accepted and standard practice in the United States.”). Lawyers in Continental countries are not normally permitted to “prepare” witnesses for trial. See *id.* at 648 (“[C]ontinental jurisdictions are quite severe in their prohibition against lawyer preparation of witnesses for hearings.”); Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088-89 (1975) (noting that in countries utilizing non-adversarial procedures, “[t]he parties are not supposed to try to affect, let alone to prepare, the witnesses' testimony at trial” because “[c]oaching' witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice”).

⁶⁸ William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155.

⁶⁹ See van Kessel, *supra* note 54, at 408; Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 971-72 (“Reluctant to reconsider our expensive trial procedures, we press most defendants to forego even the more expeditious forms of trial that defendants once were freely afforded as a matter of right.”).

⁷⁰ *Supra* text accompanying note 24.

⁷¹ Colquitt, *supra* note 13, at 696.

⁷² See Santobello v. New York, 404 U.S. 257, 260 (1971) (“Properly administered

gaining have limited their abolition proposals to cases involving the more serious crimes and have acknowledged that reducing or eliminating plea bargaining will require the expenditure of additional resources and the simplification of procedures.⁷³

Prosecutors have shown little interest in pursuing such reforms, however, and instead have sought to maintain high guilty plea rates, often by offering increasingly generous concessions to defendants.⁷⁴ A

[plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.”); GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS’ RIGHTS IN CRIMINAL TRIALS 191 (1996) (“In the American system, plea-bargaining seems to be inevitable. If all those who now plead guilty insisted on a jury trial, the system would collapse under the burden.”); LAFAVE ET AL., *supra* note 12, at 961 (noting that “[t]here is a considerable body of thought that . . . it is not possible to abolish plea bargaining” given the assumption that “the system can function only if a high percentage of cases are disposed of by guilty plea and that this will happen only if concessions are granted to induce pleas”); Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 474 (1996) (“Given the limited resources available to the criminal justice system and the high cost of jury trials, the majority of cases must be resolved *without* a trial.”); Langbein, *supra* note 36, at 446 (“The system as now practiced depends on the prosecutor’s exclusive authority to grant concessions in order to induce waivers of the right to jury trial.”); Nemerson, *supra* note 25, at 725 (noting that there “are insufficient quantities of judicial and other necessary trial resources to provide a trial in more than a small percentage of cases”); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RES. 52, 55 (1967) (“Among those in the system, it is generally believed that if the trial model were to become the routine mechanism for settling issues of criminality, the system would conceivably break down from overuse—there would be too many cases for too few courts.”); van Kessel, *supra* note 54, at 408 (“This system requires that the accused be subjected to threats of increased punishment for going to trial.”).

⁷³ For instance, Albert Alschuler contends that the United States could provide three-day jury trials to all felony defendants who reach the trial stage by adding approximately \$850 million to annual criminal justice expenditures; as for misdemeanor prosecutions, Alschuler proposes a short-form non-trial procedure modeled on the German penal order, Alschuler, *Implementing the Criminal Defendant’s Right to Trial*, *supra* note 13, at 936, whereby the prosecutor proposes a specific penal sanction not involving imprisonment, the court approves it, and the defendant can either accept it or go to trial, *id.* at 956-57; see also John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549, 1565-66 (1978) (describing penal orders). Alschuler also suggests simplifying American criminal trial procedures by, among other things, reducing the size of juries, simplifying jury selection procedures, and simplifying evidentiary rules. Alschuler, *Implementing the Criminal Defendant’s Right to Trial*, *supra* note 13, at 1016-22. Stephen Schulhofer, by contrast, has maintained plea bargaining can be eliminated by using bench trials rather than jury trials. Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 13, at 1037-38.

⁷⁴ See Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 235 (“The high rates of guilty pleas in the 1920s left little room for dramatic increases. In recent years, however, prosecutors may have found it necessary to offer greater concessions simply to keep those rates constant.”). The criminal procedure revolution of the 1960s likely

not atypical example is provided by *Bordenkircher v. Hayes*,⁷⁵ in which a defendant was offered a five-year sentence if he pled guilty but received a life sentence after conviction at trial.⁷⁶ Generally speaking, American defendants who plead guilty receive sentences ranging from 25% to 75% lower than similarly situated defendants who are convicted at trial.⁷⁷ Critics of plea bargaining argue that such punishment differentials are coercive and effectively penalize defendants who exercise their right to trial, while proponents maintain that these differentials are well within the range to be expected from a bargaining process.⁷⁸ However one characterizes the sentencing differentials, everyone agrees that they are what motivate most defendants to plead guilty. Defendants accused of relatively trivial infractions may plead guilty without any promise of leniency, particularly when the time and

increased the "cost" of guilty pleas by giving defendants additional procedural rights to use in obtaining concessions. See *id.* at 239 (quoting defense attorneys who stated that "rights are tools to work with" and "[a]s the defendant gains more rights, his bargaining position grows stronger").

⁷⁵ 434 U.S. 357 (1978).

⁷⁶ *Id.* at 359; see also *People v. Dennis*, 328 N.E.2d 135 (Ill. App. Ct. 1975) (rejecting a plea bargain which would have resulted in a prison term of two-to-six years, the defendant was instead sentenced to a forty- to eighty-year term); Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at 656 (noting that "in a great many cases the sentence differential in America assumes shocking proportions"); Alschuler, *Prosecutor's Role*, *supra* note 13, at 62 (describing a defendant who was sentenced to thirty-five years' imprisonment after rejecting a plea offer of five years' imprisonment and a defendant put to death after rejecting a plea to voluntary manslaughter); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 312 (1983) ("Opponents of plea bargaining point out that the [sentence] differential is quite large. Accused murderers may plead to manslaughter and receive five years in jail instead of thirty years or life in tried murder cases. Thieves receive months instead of years."); Nemerson, *supra* note 25, at 680-81 (detailing the "enormity of established sentencing differentials"). The possibility of receiving a death sentence further motivates many American defendants to plead guilty. See, e.g., *North Carolina v. Alford*, 400 U.S. 25, 31-32 (1970) (concerning a defendant who maintained that he pled guilty to avoid the possibility of death penalty).

⁷⁷ Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1993; cf. Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 245 n.71 (1989) (reporting that the United States Sentencing Commission estimated that, before the federal sentencing guidelines, defendants who pled guilty received sentences 25% to 35% lower than defendants convicted at trial).

⁷⁸ Easterbrook, *supra* note 76, at 311-12. Easterbrook maintains that the "sentencing differential available from surrendering the chance to be acquitted depends on both the likelihood of acquittal and the discount rate applied to future years in jail." *Id.* at 312. He sets forth tables with equivalences between sentences after trial and by plea for selected combinations of discount rate and conviction probability; these tables reveal that a combination of discount rate and probability of acquittal can produce a steep sentencing discount for pleading guilty. *Id.* at 313-15.

trouble of going to trial is disproportionate to the expected penalty.⁷⁹ But virtually no defendants charged with serious crimes will plead guilty absent concessions.⁸⁰

Plea bargaining thus plays an essential role in the American criminal justice system,⁸¹ and its pervasiveness shows no signs of abating.⁸² Indeed, there is little reason to expect it to abate because it not only provides a necessary expedient alternative to the time-consuming procedures that have developed, it also serves the needs of those in power: prosecutors, defense attorneys, and, to a somewhat lesser extent, judges. Plea bargaining concentrates enormous power in the hands of prosecutors who, in order to bargain effectively, must be afforded broad discretion over virtually all prosecutorial decisions,⁸³ and who, by reaching agreements with defendants as to the punishment to be imposed, largely assume the role of judge in both guilt determina-

⁷⁹ See Malcolm Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC'Y REV. 461, 461-62 (1979) ("The primary question for many defendants in lower courts is not whether to go to trial but whether to show up in court at all.").

⁸⁰ See Nemerson, *supra* note 25, at 675 (attributing guilty pleas to the bargaining process). Indeed, defendants typically will not even waive their right to a jury trial in favor of a bench trial without the assurance of sentencing concessions. Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 13, at 1062-63. The very few defendants who do plea guilty absent concessions simply recognize that they have no viable defenses to the charges. See Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at 657 (acknowledging that some defendants plead guilty because they "sense no chance of victory at trial"); Weninger, *supra* note 11, at 293.

⁸¹ See Colquitt, *supra* note 13, at 700 ("Plea bargaining permeates the criminal justice process."); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 626 (1990) ("Plea bargaining is central to the American system . . ."). But cf. Lawrence B. Mohr, *Organizations, Decisions, and Courts*, 10 LAW & SOC'Y REV. 621, 621 (1976) ("Alternatives to the textbook method of handling cases are not anomalies; they are institutions in their own right.").

⁸² See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 753 (1996) (assessing that "the likelihood of abandoning the plea bargain is almost non-existent").

⁸³ See Easterbrook, *supra* note 76, at 299 (describing prosecutorial discretion); Frase, *supra* note 81, at 612 ("The American prosecutor has broad discretion both over initial decisions to decline to file charges, and over postfiling decisions to drop all charges."); Misner, *supra* note 82, at 743-59 (providing a detailed description of the sources of broad prosecutorial discretion); van Kessel, *supra* note 54, at 442 ("American prosecutors have broad discretion limited only by the ethical duty not to bring a case to trial which is not supported by sufficient evidence."). Although prosecutorial discretion was seen as key to the emergence of plea bargaining as an initial matter, see Fisher, *supra* note 24, at 892-93; Langbein, *Short History*, *supra* note 13, at 266-67, plea bargaining itself has become so essential to the American administration of criminal justice that prosecutorial discretion must now be maintained to accommodate the practice such discretion once helped spawn, see Langbein, *supra* note 36, at 446.

tion and sentencing.⁸⁴ Plea bargaining is additionally attractive to district attorneys, particularly elected district attorneys,⁸⁵ because it helps them maintain high conviction rates, foster good relationships with influential private attorneys, and avoid high-profile trial losses.⁸⁶ Similarly, plea bargaining serves the interests of assistant prosecutors, whose goals often coincide with those of their superiors and who also desire to manage their case loads efficiently.⁸⁷

As for defense attorneys, plea bargaining offers substantial financial advantages; some defense attorneys virtually never have to try a case yet earn substantial fees. Retained defense attorneys typically charge a flat fee for their representation. That fee is always sufficient, and frequently generous, for the work involved in securing a guilty plea,⁸⁸ but it is often woefully inadequate as compensation for taking a case to trial.⁸⁹ Plea bargaining is also attractive to public defenders,

⁸⁴ See Langbein, *Torture and Plea Bargaining*, *supra* note 13, at 18 ("The dominant version of American plea bargaining . . . requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause."). Some prosecutors, however, are not entirely comfortable with the responsibility that such power brings. See Michael L. Rubenstein & Teresa J. White, *Alaska's Ban on Plea Bargaining*, 13 LAW & SOC'Y REV. 367, 371 (1979) (reporting that after Alaska banned plea bargaining, some prosecutors were "relieved at being out of the sentencing business").

⁸⁵ See generally Misner, *supra* note 82, at 733 (noting that the great majority of local prosecutors are elected officials).

⁸⁶ See Moley, *supra* note 13, at 103; Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1987; see also FLETCHER, *supra* note 72, at 192 (arguing the "state's interest may become equivalent to the prosecutor's personal political needs"); Alschuler, *Prosecutor's Role*, *supra* note 13, at 106.

⁸⁷ See Alschuler, *Prosecutor's Role*, *supra* note 13, at 54 (quoting assistant prosecutors who, for instance, will "do anything . . . to avoid adding to the backlog"); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1987-88 (noting that assistant prosecutors' motivation in plea bargaining may reflect professional interests, such as career advancement and job satisfaction, as opposed to finding the optimal strategy for controlling crime).

⁸⁸ Cf. Alschuler, *Defense Attorney's Role*, *supra* note 13, at 1182-84 (discussing a defense attorney practice of securing as many guilty pleas as possible in order to earn money quickly). Indeed, most defense attorneys structure their fee systems on the expectation that the vast majority of cases will be disposed of quickly, through plea bargaining.

⁸⁹ See *id.* at 1181-1206 (describing the defense attorneys' incentive, once retained, to convince their clients to plead guilty); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 28 (1967) (explaining the criminal defense lawyer's incentive to limit the scope of litigation rather than to battle); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1988 (observing that defense attorneys often render services at trial free of charge if plea negotiations fail); Skolnick, *supra* note 72, at 61 (noting the economic advantage that can accrue to the private attorney who pleads his client guilty); van Kessel, *supra*

who, although not laboring under intense financial conflicts, often labor under heavy caseloads which give them an institutional interest in resolving their cases expeditiously.⁹⁰ Plea bargaining also serves the interests of judges, though perhaps to a lesser extent. Judges, like the other professionals in the criminal justice arena, are concerned about backlogs;⁹¹ thus, many happily acquiesce in plea bargaining as a means of efficient case disposition.⁹² Plea bargaining also relieves judges of the sole responsibility for sentencing, a responsibility that some find burdensome.⁹³ Finally, by eliminating the trial, plea bargaining elimi-

note 54, at 502 (finding that retained attorneys "make more money disposing of cases by plea bargain than by trial" and that some lawyers "complain of 'losing money by going to trial'"); see also Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, 60 IOWA L. REV. 1053, 1059 (1975) (detailing other benefits that plea bargaining provides to defense attorneys).

⁹⁰ See Alschuler, *Defense Attorney's Role*, *supra* note 13, at 1248-49; Fisher, *supra* note 24, at 1063 (noting that public defenders have limited power to adjust their heavy caseloads and therefore have an incentive to plea bargain and more efficiently handle their caseloads); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 1989-90 (observing that public defenders do not face financial incentives to avoid trial but do face institutional pressure to move cases). Fisher reports that those who advocated the establishment of public defenders' offices in the early decades of the twentieth century did so with the claim that public defenders would be able to secure more guilty pleas. Fisher, *supra* note 24, at 1057. Early public defenders seemed to do just that—in 1913-1914, Los Angeles public defenders resolved 70% of their cases by guilty plea as opposed to 62% for private counsel assigned to represent indigent defendants and 49% for retained lawyers. *Id.* at 1062. But see Skolnick, *supra* note 72, at 60-61 (finding that in a California county studied in the early 1960s, five of the six leading private defense attorneys reported settling a greater percentage of their cases by guilty plea than did the public defender). Plea bargaining can also afford public defenders occasional power to influence systemic decisions. A public defender's office may periodically refuse to plea bargain certain types of cases when it believes that prosecutors are not making reasonable offers. The threat that all such cases will proceed to trial often forces prosecutorial concessions. See Alschuler, *Defense Attorney's Role*, *supra* note 13, at 1249-52 (describing public defenders' ability to encourage a "general strike" in which all clients choose to exercise their rights to trial rather than plea bargain); Skolnick, *supra* note 72, at 63 (describing the public defenders' ability to frustrate the prosecutor's office).

⁹¹ See Skolnick, *supra* note 72, at 55 (noting that judges observed and interviewed exhibited a "potent interest" in calendar movement).

⁹² Fisher reports, for instance, that judges in nineteenth-century Massachusetts initially viewed plea bargaining as an unwarranted incursion into their sentencing power but increasing caseload pressures, particularly involving civil cases, led them to embrace plea bargaining as a necessary means of moving their dockets. Fisher, *supra* note 24, at 988-89.

⁹³ Cf. Rubenstein & White, *supra* note 84, at 372 (reporting that a plea bargaining ban in Alaska resulted in "a heavier burden on sentencing judges, some of whom have objected that they would like more guidance from the district attorney" and that "[s]ome judges believe that a district attorney abdicates his responsibilities by not making specific recommendations").

nates the possibility of errors in the trial and thereby protects trial judges' reputations by shielding them from appellate reversals.⁹⁴

In sum, prosecutors, defense attorneys, and judges each have their own good reasons for favoring plea bargaining. Indeed, although they have largely divergent formal interests and role obligations, their mutual interest in processing cases efficiently exerts a potent pressure to cooperate and thus to subvert the conflict norms on which the adversary system is based.⁹⁵ Organizational theorists and social scientists have pointed to these factors, as well as to group dynamics and the human desire to minimize conflict and uncertainty, as additional reasons to consider plea bargaining an inevitable feature of the American criminal justice system.⁹⁶

In keeping with its pervasive role in the American criminal justice system, plea bargaining influences virtually all significant decisions made in that system. A prosecutor's initial charging decisions depend not only on what crime the defendant is suspected of committing but on a host of other factors relevant to the bargaining that is expected to occur. Prosecutors commonly over charge defendants, expecting to eventually withdraw some charges as part of a plea bargain.⁹⁷ The

⁹⁴ See Fisher, *supra* note 24, at 867; Moley, *supra* note 13, at 103.

⁹⁵ See Skolnick, *supra* note 72, at 53; see also Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407, 415-19 (1973) (reviewing scholarship on the subversion of conflict norms in the plea bargaining process). Lawrence Mohr notes the goal compatibility among these actors:

Judges wish to save time, keep things simple, avoid certain undesirable images, and maintain political favor. Prosecutors wish to maximize production, maximize convictions and guilty pleas, avoid over-leniency in the more serious cases, and earn favorable recommendations from superiors. Defense lawyers wish primarily to earn a fee quickly (since it cannot be large) and keep clients satisfied. The public defender wishes to relieve the time pressure of his caseload, maintain a good reputation for the office, and obtain certain resources (e.g., confidence, prosecutorial information) Basically, the prosecutors and judges need a certain level of convictions and guilty pleas, but most often it does not matter crucially to what charges, with what sentences, and with what arrangements for bail, probation, etc. Defenders and lawyers need to do well for their clients, but this is measured much more in terms of penalties than in terms of formal outcomes of guilty or not guilty. Compatibility is to be found, therefore, in a plea of guilty to *some* charge

Mohr, *supra* note 81, at 637-38.

⁹⁶ See Ryan & Alfani, *supra* note 25, at 480-81 (reviewing recent social science scholarship on the importance of relationships and social groups to plea bargaining); Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 13, at 1041-43 (discussing "two . . . theoretical perspectives—organizational analysis and socialization (or adaption) analysis," that have guided a substantial amount of social science research on plea bargaining).

⁹⁷ See LAFAVE ET AL., *supra* note 12, at 670 (describing how prosecutors will charge

concessions that prosecutors offer defendants during plea bargaining often depend less on penologically relevant factors, such as the gravity of the crime or the defendant's prior criminal record, than on factors related to bargaining. For instance, prosecutors typically offer the greatest concessions in the weakest cases.⁹⁸ In other words, the more likely it is that a defendant will be acquitted, the more attractive the plea offer that he will receive. Thus, for example, defendants with colorable claims for evidentiary exclusions will be offered greater concessions than similarly situated defendants without such claims.⁹⁹

defendants with a higher charge than normally appropriate in order to encourage pleas to lesser crimes); Alschuler, *Prosecutor's Role*, *supra* note 13, at 85-105 (providing an extensive discussion of the "problem of overcharging"); Felstiner, *supra* note 15, at 316 (characterizing overcharging as a troublesome aspect of American prosecution, particularly because defendants are normally charged before sufficient investigation may be completed and prosecutors are thereby given more leverage to encourage guilty pleas); Frase, *supra* note 81, at 621 (noting that American prosecutors "have an incentive to exaggerate initial charges so as to leave more room for later plea bargaining concessions"). In particular, many prosecutors charge defendants with crimes bearing high mandatory-minimum sentences, even though the prosecutors do not expect to be able to prove those crimes at trial. The mandatory-minimums provide a useful bargaining position for the prosecutor, who may then obtain a guilty plea for a lesser crime that, in fact, more accurately represents the defendant's conduct. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963-66 (1992) (describing this practice and examining particular cases).

⁹⁸ Felstiner, *supra* note 15, at 319. Albert Alschuler's interviews with prosecutors across the United States revealed that:

An overwhelming majority of prosecutors endorse the view that "half a loaf is better than none," and they respond to the prospect of defeat at trial by increasing the concessions available in exchange for a plea of guilty. The weaker the prosecutor's case, the more substantial the "break" that a defendant can secure by pleading guilty . . .

Alschuler, *Trial Judge's Role*, *supra* note 13, at 1126; see also Alschuler, *Prosecutor's Role*, *supra* note 13, at 58 ("The overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining."); *id.* at 59 (quoting a Chicago prosecutor as saying, "[w]hen we have a weak case for any reason, we'll reduce to almost anything rather than lose"); Scott & Stuntz, *supra* note 97, at 1941-42 (noting that a prosecutor "must offer different prices to defendants who are fairly likely to win at trial than to defendants who are sure to lose").

⁹⁹ Knowing this, some defense attorneys "advance every procedural claim that their ingenuity can devise—even claims that lack any chance for success, but which threaten to occupy the court's and the prosecutor's time." Alschuler, *Prosecutor's Role*, *supra* note 13, at 80; see also Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 939 ("[P]lea bargaining has led defense attorneys to file absurd pre-trial motions simply because 'it takes time to refute even a bad contention' and 'every motion added to the pile helps secure a better plea.'"). At the same time, Alschuler notes that "[p]rosecutors are usually as anxious to threaten the defense attorneys' time as defense attorneys are to threaten theirs," and do so, among other ways, by filing multiple charges when the law of double jeopardy or the canons of statutory construction preclude multiple convictions. Alschuler, *Prosecutor's Role*, *supra* note 13, at 99.

Similarly, because factually innocent defendants tend to have stronger cases than those who are guilty, innocent defendants typically receive especially attractive plea offers.¹⁰⁰ Other bargaining decisions are driven by workload and political pressures. For instance, many prosecutors are particularly keen to plea bargain labor-intensive cases¹⁰¹ but may be unwilling to bargain with high-profile defendants¹⁰² or even with well-known defense attorneys, against whom prosecutors may wish the opportunity to try a case.¹⁰³

In sum, plea bargaining sustains the American criminal justice system, and the American criminal justice system sustains plea bargaining. Although plea bargaining has been the subject of widespread and trenchant criticism¹⁰⁴—among other things, for encouraging inno-

¹⁰⁰ See Scott & Stuntz, *supra* note 97, at 1943. Critics thus claim that plea bargaining coerces a significant percentage of innocent defendants to convict themselves in exchange for a certain, reduced penalty. See U.S. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 48 (1973) (noting that "the plea negotiation system creates a significant danger to the innocent"); Alschuler, *Prosecutor's Role*, *supra* note 13, at 60 (explaining that a serious criticism of plea bargaining, that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent"); John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287, 298 (1979) (describing research suggesting that some innocent defendants plead guilty and concluding that "innocent persons are frequently placed at risk and that, on occasion, the weaker and less knowledgeable are wrongly persuaded to plead guilty"); Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509, 510 (1979) (noting critics' contention that plea bargaining "operates to encourage, if not coerce, even innocent defendants to waive their right to trial by jury"); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 13, at 2000 (reasoning that the innocent defendant may rationally choose to accept conviction and a small penalty rather than risk conviction on a more serious charge); Note, *supra* note 89, at 1059 (describing the pressures on innocent defendants to plead guilty).

¹⁰¹ See Alschuler, *Prosecutor's Role*, *supra* note 13, at 55-56.

¹⁰² See WEINREB, *supra* note 13, at 77 (observing that, in a highly publicized case, "the prosecutor may feel pressure to display a particularly firm or, more rarely, gentle hand"); Alschuler, *Prosecutor's Role*, *supra* note 13, at 107 (describing the political importance of publicized cases, and the corresponding difficulty in arranging plea agreements). As Jerome Skolnick put it, the prosecutor is:

[I]nterested in making a favorable impression on a diffuse public—including courts, political authorities, and the man in the street. His specific task is to strike a balance between those cases which, for a variety of reasons—usually related to the public interest—he cannot deal out; and those which, in deference to his administrative responsibilities, he needs to settle before trial. In brief, he is required to keep the calendar moving, at the same time not appear to be "giving anything away" to the defense.

Skolnick, *supra* note 72, at 55.

¹⁰³ Alschuler, *Defense Attorney's Role*, *supra* note 13, at 1187 (observing that "an attorney's reputation as a trial advocate could grow to the point that, paradoxically, it might diminish his ability to bargain successfully").

¹⁰⁴ See *supra* note 13 (canvassing scholarship critical of plea bargaining, both in

cent defendants to self-convict, for undermining other legal doctrines that society wishes to further, for resulting in sentences that cannot be justified by any legitimate penological rationale, and for contributing to widespread cynicism about the criminal justice system¹⁰⁵—it has persevered and in recent decades has won the approval of the courts, which consider it a necessary feature of the American criminal justice system.¹⁰⁶

principle and as practiced in contemporary criminal justice systems).

¹⁰⁵ See, e.g., Langbein, *Torture and Plea Bargaining*, *supra* note 13, at 10, 16 ("When people who have murdered are said to be convicted of wounding, or when those caught stealing are nominally convicted of attempt or possession, cynicism about the processes of criminal justice is inevitably reinforced."). Alschuler, one of plea bargaining's harshest critics, summarizes the "evils" the practice has wrought thus:

Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings. In contested cases, it substitutes a regime of split-the-difference for a judicial determination of guilt or innocence and elevates a concept of partial guilt above the requirement that criminal responsibility be established beyond a reasonable doubt. This practice also deprecates the value of human liberty and the purposes of the criminal sanction by treating these things as commodities to be traded for economic savings. . . .

Plea bargaining leads lawyers to view themselves as judges and administrators rather than as advocates; it subjects them to serious financial and other temptations to disregard their clients' interests; and it diminishes the confidence in attorney-client relationships that can give dignity and purpose to the legal profession and that is essential to the defendant's sense of fair treatment. In addition, this practice makes figureheads of court officials who typically prepare elaborate presentence reports only after the effective determination of sentence through prosecutorial negotiations. Indeed, it tends to make figureheads of judges, whose power over the administration of criminal justice has largely been transferred to people of less experience Moreover, plea bargaining perverts both the initial prosecutorial formulation of criminal charges and, as defendants plead guilty to crimes less serious than those that they apparently committed, the final judicial labeling of offenses.

The negotiation process encourages defendants to believe that they have "sold a commodity and that [they have], in a sense, gotten away with something." It sometimes promotes perceptions of corruption. . . . The practice of plea bargaining is inconsistent with the principle that a decent society should want to hear what an accused person might say in his defense—and with constitutional guarantees that embody this principle and other professed ideals for the resolution of criminal disputes. Moreover, plea bargaining has undercut the goals of legal doctrines as diverse as the Fourth Amendment Exclusionary Rule, the insanity defense, the right of confrontation, the defendant's right to attend criminal proceedings, and the recently announced right of the press and public to observe the administration of criminal justice.

Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 932-34 (citations omitted) (alteration in original).

¹⁰⁶ See, e.g., *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the [criminal] process but

C. *The Functional Role of Bargaining in Continental Europe,
the United Kingdom, and Israel*

Having established the vital functional role that plea bargaining plays in the American adversarial system in Section B, this Section examines the incidence of bargaining in countries that utilize less adversarial trial procedures. Subsection 1 describes criminal procedures in Continental European countries,¹⁰⁷ and is followed in Subsection 2 with a discussion of bargaining and non-trial dispositions in those

a highly desirable part for many reasons."). Efforts to restrict or eliminate plea bargaining have been few and ill-fated. Arguably, the most comprehensive effort occurred in Alaska, where, in 1975, the state's Attorney General prohibited his prosecutors from plea bargaining. Rubenstein & White, *supra* note 84, at 367. Initial reports indicated that prosecutors largely complied with the ban. Teresa White Carns & John A. Kruse, *Alaska's Ban on Plea Bargaining Reevaluated*, 75 JUDICATURE 310, 311 (1992); see Rubenstein & White, *supra* note 84, at 369-71 (finding that four years into the ban, sentence bargaining had been virtually eliminated and charge bargaining had been reduced). At the same time, defendants convicted at trial received longer sentences than defendants who pled guilty, Carns & Kruse, *supra*, at 311-12, so implicit plea bargaining remained. Further, although the ban remained in effect as an official policy, by 1985 widespread and explicit charge bargaining had returned to most of the state. See *id.* at 317.

For a discussion of unsuccessful efforts to eliminate plea bargaining in El Paso County, Texas, see Sam W. Callan, *An Experience in Justice Without Plea Negotiation*, 13 LAW & SOC'Y REV. 327 (1979); Weninger, *supra* note 11. Both courts and commentators have discussed more limited methods of restricting certain kinds of plea bargaining. See *People v. Brown*, 223 Cal. Rptr. 66, 72 & n.11 (Cal. Ct. App. 1986) (describing a California statute prohibiting plea bargaining in certain classes of cases, and noting that "[d]espite the recent enactment of laws designed to limit 'plea bargaining,' the practice not only continues, but has apparently increased"); Joseph P. Busch, *Guidelines Concerning Plea Bargaining*, CAL. ATT'YS FOR CRIM. JUST. FORUM, May-June 1975, supp. (banning sentencing bargaining but not charge bargaining); Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393, 395-98 (1979) (reporting that the Wayne County, Michigan, Prosecutor's office chose not to engage in plea bargaining with defendants accused of violating a state firearms law that imposed a mandatory sentence); Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975) (banning sentencing bargaining but not charge bargaining); Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101, 109-10 (1978) (observing that while the United States Attorney for the Southern District of California prohibited sentence bargaining, charge bargaining may have continued); Note, *supra* note 89, at 1069-70 (summarizing the positive cost-benefit effects of eliminating plea bargaining in one Iowa county).

¹⁰⁷ Any attempt to summarize the criminal procedures of Continental countries is a perilous enterprise because Continental systems of criminal procedure are diverse and constantly changing, primarily as a result of international law developments. See, e.g., Gordon van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 801-02 (1998) (recognizing the diversity of Continental procedures and the changes that have followed the development of international law). My summary will address features common to most Continental countries.

countries. Subsection 3 examines the criminal procedures and bargaining practices of some "intermediate countries," countries whose criminal procedures are more adversarial (and consequently more complex and time-consuming) than those of Continental countries but less adversarial than those of the United States. The Section as a whole confirms the relationship between trial practices and plea bargaining discussed above: complex adversarial criminal procedures create a need for bargaining to avoid them.

1. Continental Criminal Procedures

Continental criminal procedures are typically described as inquisitorial¹⁰⁸ or non-adversarial. Whereas proceedings in an adversary system are structured in the form of a contest, featuring two opposing litigants who present their best evidence and arguments to a neutral and largely passive factfinder,¹⁰⁹ proceedings in a non-adversarial system are structured more in the form of an inquiry,¹¹⁰ directed by a judge¹¹¹ on the basis of a *dossier*, a collection of written materials compiled by government officials who have investigated the case.¹¹² The *dossier* is made available in its entirety to the defendant or his counsel and is supposed to contain all the evidence relevant to the case, ex-

¹⁰⁸ The term "inquisitorial" has, particularly in the past, "conjure[d] up the excesses of the Star Chamber or the haunting memories of the Spanish Inquisition." G.E.P. Brouwer, *Inquisitorial and Adversary Procedures—A Comparative Analysis*, 55 AUSTRALIAN L.J. 207, 208 (1981) (noting further that, while the term does not conjure such images today, it is still "viewed with suspicion by many common lawyers"); see also LUBAN, *supra* note 53, at 93-94 (remarking that the label "inquisitorial" "evokes images of the auto-da-fé and the Iron Maiden, the Pit and the Pendulum"); Damaška, *supra* note 52, at 556-58 (acknowledging the "aura of dread and mistrust" surrounding the term, and describing the inquisitorial type of criminal procedure). Consequently, I will use the term "non-adversarial."

¹⁰⁹ See *supra* text accompanying notes 53-55.

¹¹⁰ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 3 ("The non-adversarial mode is structured as an official inquiry.").

¹¹¹ See Mary C. Daly, *Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems*, 2 J. INST. STUDY LEGAL ETHICS 65, 67-68 (1999); van Kessel, *supra* note 54, at 431 (contrasting the judge's role at trial in each type of system).

¹¹² See Daly, *supra* note 111, at 67-68 ("All the findings from [the pre-trial] investigation are recorded in detail and kept in a file, the *dossier*."); Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 41, 47 (Phil Fennell et al. eds., 1995) (stating that in The Netherlands, the *dossier* "reports every step in the procedure" and "not only forms the basis for the trial, but also a coherent system of supervision and control"); Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 544-46 (providing a detailed description of the *dossier* in a French murder case).

culpatory as well as inculpatory.¹¹³ The role of defense counsel in many Continental countries is far more limited than in the United States,¹¹⁴ and Continental proceedings are in general more geared toward establishing truth than their American counterparts.¹¹⁵ For that reason and others, Continental procedures are also considerably more efficient and less time-consuming than their American counterparts.

Whereas adversarial procedures are lawyer-dominated, non-adversarial procedures are judge-dominated¹¹⁶ and, as a consequence,

¹¹³ See, e.g., Damaška, *supra* note 52, at 533-34 (observing that, even in those Continental countries most restrictive regarding disclosure, "the defendant and his counsel acquire, before the case comes up for trial, an unlimited right to inspect the whole investigative [*dossier*]"); Frase, *supra* note 81, at 672 ("In France, counsel for the defendant has an absolute right to inspect the full *dossier* of the case prior to trial and at certain stages of pretrial procedure."); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 341 (1995) (noting that in Germany, the defense counsel has "the right to inspect the entire prosecution file, including both favorable and unfavorable evidence"); Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 764 (1992) ("German defense counsel has a right prior to the trial to inspect and copy the official file."); Jörg et al., *supra* note 112, at 47 (stating that in The Netherlands the *dossier* is "equally at the disposal of the prosecution and the defence").

¹¹⁴ See, e.g., A.J.H. Swart, *The Netherlands*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 279, 291 (Christine Van den Wyngaert et al. eds., 1993) (explaining that in The Netherlands, defense counsel does not have the right to be present when his client is interrogated by the police and that other restrictions can be imposed on a defense lawyer's access to his client during the pre-trial stage when "serious suspicion has arisen that contacts between accused and counsel are being used in an attempt to hinder the investigation"); Christine Van den Wyngaert, *Belgium*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, *supra*, at 1, 16 (noting that in Belgium "[d]uring the pre-trial stage, defence counsel has no right to be present when investigations are made [and] may not be present during the interrogation of his client, or when witnesses are examined, nor may he attend searches and seizure [sic] at his client's house or premises").

¹¹⁵ See Damaška, *supra* note 52, at 579, 581-89; Jörg et al., *supra* note 112, at 42-43 (concluding that, in the inquisitorial system used on the Continent, "priority is given to truth-finding"). For instance, the German Code of Criminal Procedure imposes an express legal duty on judges to find the truth. Richard S. Frase, *The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 820 (2000).

¹¹⁶ Philippe Bruno, *The Common Law from a Civil Lawyer's Perspective*, in INTRODUCTION TO FOREIGN LEGAL SYSTEMS 1, 5 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994) ("Judges are at the center of the civil law system."); Daly, *supra* note 111, at 67-68 ("In the civil law system, the judges—not the parties—drive the criminal process."); Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 841 (1997) (finding that "while the continental criminal judge takes the lion's share of factfinding activity, in Anglo-American lands procedural action is to a much greater extent in the hands of the lawyers for the prosecution and the defense"); van Kessel, *supra* note 54, at 431 ("A

are more streamlined. Criminal cases in Continental countries are either tried to a panel of judges¹¹⁷ or to a "mixed court," composed of both lay jurors and professional judges.¹¹⁸ Even where lay jurors are used, the professional judges, and in particular the presiding judge, dominate.¹¹⁹ Prior to trial, the prosecutor presents the *dossier* to the

central difference between the adversary and nonadversary systems is that in the latter the judge controls the process rather than the lawyers.").

¹¹⁷ Alphonse Spielmann & Dean Spielmann, *Luxembourg, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, *supra* note 114, at 261, 265 (noting that the use of lay jurors in criminal trials in Luxembourg was eliminated in 1987); Swart, *supra* note 114, at 288 (finding that the use of lay juries in criminal trials in The Netherlands was abolished in 1813).

¹¹⁸ German mixed courts have been extensively described in the academic literature. For a survey of these courts, see GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 182-84 (1998); Dubber, *supra* note 13, at 561-67; John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195. For a discussion of mixed courts in France, see Richard S. Frase, *France, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 23, at 143, 172-73. For a general discussion of Continental mixed courts, see van Kessel, *supra* note 54, at 422, explaining that: "The Continental court usually consists of a single professional judge in minor cases and a mixed bench, usually one professional and two lay judges or, in more serious cases, three professional and two to nine lay judges." Discontent with the jury system in some countries has resulted in reduced use of mixed panels. See, e.g., Jean Pradel, *France, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, *supra* note 114, at 105, 105-14 (finding the French "jury system is currently the target of criticism" and "in considerable demise"); Vagn Greve, *Denmark, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, *supra* note 114, at 51, 57 ("For some time there has been rather widespread discontent with the jury system, and the applicable area has been reduced markedly."); Van den Wyngaert, *supra* note 114, at 11-12 (discussing the limited role of the jury in Belgian criminal proceedings). At the same time, Spain and Russia recently reintroduced jury trials; for a general discussion of this development, see Steven C. Thaman, *The Jury Returns to Continental Europe: Russia and Spain Return to the Classic Jury as a Catalyst in a Move to a More Adversary Form of Criminal Trial*, in *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: FROM DIVERSITY TO RAPPROCHEMENT*, *supra* note 52, at 343.

¹¹⁹ See Brouwer, *supra* note 108, at 217 (describing the French presiding judge's extensive authority and noting, by contrast, that "[t]he role of the associate judges during the trial is a rather passive one"); Dubber, *supra* note 13, at 561-67 (describing the very limited influence of lay jurors); Frase, *supra* note 118, at 169 (finding that in France, "[t]he conduct of the trial itself is controlled and directed almost entirely by the presiding judge"); Frase, *supra* note 115, at 825 ("[S]tudies of the German mixed courts indicate that the lay judges have very little impact on guilt determinations . . ."). While the presiding judge does dominate in the adjudicative function, especially in relation to the lay jurors, the role of the Continental judge itself has undergone something of a transformation in recent decades as the investigative functions previously carried out by the judge have largely been transferred to the police and prosecutor. See Serge Lasvignes & Marcel Lemonde, *The Criminal Process in France, in THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS* 23, 25 (Mireille Delmas-Marty & Mark A. Summers eds., 1995) ("In 1808 the role of a *juge d'instruction* was 90% that of an investigator; by 1958, it had become 80% that of a

presiding judge, but not the lay jurors.¹²⁰ Having read the *dossier*, the presiding judge typically carries out the bulk of the questioning, and only after she is finished do the lawyers have the opportunity to suggest additional questions.¹²¹ The presiding judge is also authorized to raise all issues relevant to the charge and can even hear evidence not formally put forward by the parties.¹²²

Continental evidentiary rules¹²³ are extremely relaxed and simple

judge. This evolution continued thereafter and particularly since 1970. Today, we can assert that the role of a *juge d'instruction* is 90% that of a judge."); Françoise Tulkens, *Criminal Procedure: Main Comparable Features of the National Systems*, in *THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS*, *supra*, at 11-12 (surveying recent reforms in European criminal justice systems in such countries as Italy, Portugal, Germany, Spain, and the former Soviet bloc countries and noting that the dominant reform trends have been demarcating the roles of police, prosecutor, and judge, and streamlining the criminal process).

¹²⁰ van Kessel, *supra* note 54, at 423; see also Gerhard Dannecker & Julian Roberts, *The Law of Criminal Procedure*, in *INTRODUCTION TO GERMAN LAW* 413, 420 (Werner F. Ebke & Matthew W. Finkin eds., 1996) (explaining that, in Germany, lay jurors are not permitted to see the files).

¹²¹ See LUBAN, *supra* note 53, at 94-95 (noting that in Germany lawyers rarely ask more than a couple of questions, both because the judge has typically asked all of the relevant questions and because intruding further might be taken as criticism of the judge's work); ROBBERS, *supra* note 118, at 189 ("The examination of the accused is carried out primarily by the presiding judge."); Daly, *supra* note 111, at 70 ("The judges almost exclusively conduct the examination of witnesses, although the lawyers are free to suggest additional questions for the judges' consideration; and on occasion, they may even question a witness directly."); Damaška, *supra* note 52, at 525 ("The bulk of the questioning comes typically from the bench and it is the presiding judge who begins the examination of witnesses."); Langbein, *supra* note 36, at 447 ("[T]he procedure is fundamentally nonadversarial. It is the presiding judge who interrogates the witness and the accused."); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 143 (1983) (observing that in French trials in the *assize* courts, the "number of questions proposed by the other participants is usually quite limited, however, and the president plainly dominates the courtroom proceeding").

¹²² See Damaška, *supra* note 52, at 559 (describing the active role played by the judge in gathering evidence). As Joachim Herrmann states: "At the German trial, it is the judge who calls and interrogates the witnesses. On his own motion, he must take all evidence he considers necessary to determine the defendant's guilt and to set the appropriate punishment." Herrmann, *supra* note 113, at 760.

¹²³ There is a great deal of variation in the evidentiary rules of Continental countries. See DAMAŠKA, *EVIDENCE LAW ADRIFT*, *supra* note 53, at 7 ("[S]ince the collapse of the Roman-canon proof Continental European nations no longer share a common evidentiary regime: the range of internal differences is in modern times quite considerable."); Mirjan Damaška, *Atomistic and Holistic Evaluation of Evidence: A Comparative View*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 91, 94-98 (David S. Clark ed., 1990) [hereinafter Damaška, *Atomistic and Holistic Evaluation of Evidence*]. Yet the central tendencies of Continental evidence law are still shared, see DAMAŠKA, *EVIDENCE LAW ADRIFT*, *supra* note 53, at 7-8, and my summary will not become so detailed as to implicate national differences.

by American standards. Because Continental criminal cases are heard either by professional judges or by a mixed panel in which the professional judges guide their lay colleagues, the complex evidentiary rules so prevalent in American proceedings are less frequently used.¹²⁴ Consequently, Continental trials admit most hearsay¹²⁵ and character evidence, among other categories of evidence typically excluded from American trials,¹²⁶ and most Continental countries do not automatically exclude illegally obtained evidence.¹²⁷ As a result of their liberal

¹²⁴ See Bradley & Hoffmann, *supra* note 54, at 1287-89 (comparing restrictive American evidentiary rules with the European rules); Langbein, *supra* note 118, at 214 ("[T]he device of integrating lay and professional judges spares the mixed court the need for evidentiary exclusions or other attempts at jury control."); cf. Damaška, *Atomistic and Holistic Evaluation of Evidence*, *supra* note 123, at 95 ("Even when a party is successful in alleging a violation of an evidence rule, the exclusion of information obtained in judge-driven examination is an infrequent sanction in Continental courts.").

¹²⁵ See DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 53, at 15-16 (finding that, "[a]lthough countries outside of the common law's compass are not unaware of hearsay dangers, their reaction to them seldom assumes the form of exclusionary rules"); Jörg et al., *supra* note 112, at 50 (stating that, in Continental systems, "[h]earsay evidence, being not regarded as fundamentally unreliable, is generally accepted"); Langbein, *supra* note 36, at 447 (observing that in Germany, where judgments are rendered by professional judges working together with laymen, "[m]ost of the common law exclusionary rules, such as the prohibition of hearsay, are unknown"); Bert Swart & James Young, *The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, *supra* note 112, at 57, 71 (noting that "Dutch case law is characterized by a rather generous acceptance of hearsay evidence").

¹²⁶ Cf. DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 53, at 16 ("One also scans the legal map of Europe in vain for analogues to common law provisions that prohibit character evidence, evidence of collateral misdeeds, or similar information about a person's past life."); van Kessel, *supra* note 54, at 464 (finding that, in Continental countries, "[t]here are no hearsay, character evidence, or other rules designed to protect the lay jury"). See generally Mirjan R. Damaška, *Propensity Evidence in Continental Legal Systems*, 70 CHI-KENT L. REV. 55, 64 (1994) (concluding that "Continental judges are exposed to propensity evidence much more so than common law jurors").

¹²⁷ See DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 53, at 14 & n.19 (observing that although many countries have adopted provisions prohibiting the use of illegally obtained evidence, "a vigorous exclusionary policy in all these countries is highly unlikely"); Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 205 (1993) (describing lenient French rules governing searches and interrogations and concluding that "[e]ven these lenient rules are often ignored because . . . they are not generally backed up with an exclusionary sanction"); *id.* at 214 (finding that, while some commentators claim that the trend in Germany is to expand the use of exclusionary rules, "exclusionary decisions are still too rare to have a consistent impact on police behavior"); Stewart Field et al., *Prosecutors, Examining Judges, and Control of Police Investigations*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, *supra* note 112, at 227, 228 (reporting that in The Netherlands, "[i]n general, cases go forward with damaging statements from the accused on file, with little concrete evidence of how they were obtained"); Frase & Weigend, *supra* note

evidentiary rules, Continental proceedings can also rely more heavily on the documentary evidence contained in the *dossier* instead of requiring the more time-consuming presentation of oral testimony.

Other features of Continental trials enhance their efficiency further still. There is no *voir dire* in the selection of the lay jurors, and a panel of lay jurors might be called upon to hear more than one case.¹²⁸ The questioning at trial is quite informal by American standards, with few, if any, objections by counsel;¹²⁹ witnesses are usually permitted to testify in narrative form,¹³⁰ so the "questioning" largely takes the form of an informal conversation between the presiding judge and the witness or defendant.¹³¹ Continental countries make far more use of the defendant as a testimonial resource, and, as Langbein has noted, the defendant is "almost always the most efficient testimonial resource."¹³² The defendant has the right to remain silent¹³³ but virtually always agrees to speak¹³⁴ since it is expected that adverse in-

113, at 336 ("[I]n many [German] cases, exclusion is not an inevitable consequence of prior breaches of the law."); van Kessel, *supra* note 54, at 451 (noting that illegally obtained evidence is usually admitted in Continental countries); Thomas Weigend, *Germany, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 23, at 187, 195 (stating that in Germany "[t]here is no general exclusionary rule which would make illegally obtained evidence inadmissible").

¹²⁸ See van Kessel, *supra* note 54, at 460 (contrasting the Continental and American systems of jury selection); see also Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 991 (stating that *voir dire* did not exist in the former West Germany).

¹²⁹ See Damaška, *Atomistic and Holistic Evaluation of Evidence*, *supra* note 123, at 95 (observing that the Continental "manner of examining evidence is relatively informal, and avoids many of the complexities associated with a bilateral, lawyer-driven technique for eliciting information"); van Kessel, *supra* note 54, at 424 ("In contrast to the formal, highly structured examinations which occur in American courtrooms, the typical Continental examination takes on the character of an informal discussion between the presiding judge and the accused or the witness.").

¹³⁰ van Kessel, *supra* note 54, at 433.

¹³¹ See van Kessel, *supra* note 107, at 834 (contrasting our "formal direct and cross-examination procedure" with the "informality of the proceedings and the discussion format of [the Continental] trial").

¹³² John Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 208 (1979).

¹³³ van Kessel, *supra* note 54, at 423; see also van Kessel, *supra* note 107, at 804 ("All countries recognize some form of the right to silence and privilege against self-incrimination, which applies to both the pretrial and trial stages of a criminal case."). The defendant's right to remain silent is not identical to the American defendant's right not to take the stand, however. Questions can always be asked of the Continental defendant, but he has the right to refuse to answer at all or to refuse to answer specific questions. Damaška, *supra* note 52, at 527 (describing the Continental interrogation process).

¹³⁴ See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13,

ferences will be drawn from silence.¹³⁵ As noted above, the *dossier* is made available to the defendant, who thus becomes aware of all the evidence previously collected. Because all the participants are familiar with the evidence, the proceedings can expeditiously focus on the relevant issues. Indeed, to American observers, the Continental trial looks less like a trial than like a summary administrative hearing whose goal is to review the *dossier*.¹³⁶

Given these efficient features, it is not surprising that Continental trials are, on average, much shorter than American trials. Whereas the O.J. Simpson case lasted 372 days,¹³⁷ the most complicated French trial rarely exceeds two weeks,¹³⁸ and many French jury trials last only a day.¹³⁹ A study of German trials indicated that, on average, the guilt

at 1006 (finding that a defendant in a Continental trial “rarely remains silent”); van Kessel, *supra* note 54, at 423; van Kessel, *supra* note 107, at 833 (stating that “very few Continental defendants remain silent at trial”).

¹³⁵ See Daly, *supra* note 111, at 71 (“Since silence does not make a good impression in France, the accused very rarely declines to respond.”); Damaška, *supra* note 52, at 534 (“The pressure to speak is, I believe, somewhat stronger than the parallel pressure in the common law trial on the defendant to take the stand, as more immediate inferences can be drawn from refusal to answer specific questions than from the general refusal to submit to the questioning process.”); McKillop, *supra* note 112, at 575 (“[T]he accused was expected, both during the investigation and at the hearing, to divulge what he knew about the relevant events to complement the version otherwise established.”); van Kessel, *supra* note 107, at 833 (noting that “[j]udges and other participants expect the accused to speak,” and that in France, for instance, a “defendant’s complete silence will lead to adverse inferences by the judges”). Further, because the defendant testifies first, “the prosecutor may sit back and expect that leads or evidence damaging to the defendant will come out of his interrogation.” Damaška, *supra* note 52, at 529-30.

¹³⁶ See Daly, *supra* note 111, at 71 (arguing that “the trial is essentially a review of the *dossier*”); Mirjan Damaška, *Models of Criminal Procedure*, 51 ZBORNIK PRAVNOG FAKULLETA U ZAGREBU 477, 491 (2001) (observing that “to lawyers expecting trials to proceed without an official file, a trial conducted against the background of a *dossier* as an organizing device can easily seem to represent not much more than a review in open court of previously performed factfinding activities”); Jörg et al., *supra* note 112, at 50 (explaining that “[b]ecause of the crucial importance of the *dossier* the public hearing is often much more a verification of its contents, the results of the pre-trial investigation, than the culmination of a contest”); McKillop, *supra* note 112, at 565 (“The hearing thus became essentially a public review and confirmation of the contents of the [*dossier*], and hence of the conclusions that were reached in the investigation.”).

¹³⁷ *Simpson Trials by the Numbers*, USA Today, Jan. 28, 1997, at <http://www.usatoday.com/news/index/nns179.htm>.

¹³⁸ Daly, *supra* note 111, at 69-70.

¹³⁹ See Frase, *supra* note 118, at 172 (stating that assize court trials “generally last from one to three days,” in part because once commenced, trials “may only be recessed to allow the court to eat and sleep”); Tomlinson, *supra* note 121, at 133 (noting that, in France, “the only trials likely to last longer than a day or two are those involving either multiple defendants or a crime victim’s claim for substantial civil damages”).

phase of cases in which the defendant contests guilt lasts approximately three-quarters of a day for the ordinary felony and about one day for the gravest offense.¹⁴⁰ American felony trials, which on average last two to three days,¹⁴¹ thus often consume double or triple the time of a typical French or German trial.

2. Non-Trial Dispositions of Continental Cases

Because Continental trials are generally much quicker and more efficient than American trials, Continental countries traditionally have had much less need to resort to non-trial alternative dispositions.¹⁴² Guilty pleas do not exist in most Continental countries; consequently, a trial is held even where a defendant has made a full confession.¹⁴³

¹⁴⁰ See van Kessel, *supra* note 54, at 474-75 (summarizing the results of a 1972 study by Casper and Zeisel on the German criminal courts); JOHN LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY 77* (1977) (reporting that, according to the 1972 Casper and Zeisel study, half of all German criminal trials last just two hours).

¹⁴¹ See *supra* text accompanying note 66.

¹⁴² See Bradley, *supra* note 72, at 472 (asserting that because the Continental system "works quite efficiently, plea bargaining is not necessary to reduce the caseload, and in [C]ontinental countries this practice is circumscribed"); Frase, *supra* note 81, at 627 ("French trials are simpler and quicker [than American trials], thus reducing the need to minimize trial adjudication."); Langbein & Weinreb, *supra* note 73, at 1562 ("German trial procedure is relatively rapid, so the prosecutor has no particular incentive to try to avoid trial even if he could.").

¹⁴³ See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, para. 7 (Oct. 7, 1997) [hereinafter *Erdemović*, Cassese Dissent] (noting that the guilty plea does "not have a direct counterpart in the civil-law tradition, where an admission of guilt is simply part of the evidence to be considered and evaluated by the court"), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-adojcas971007e.htm>; Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 977 ("In most of Continental Europe, even the institution of the guilty plea is unknown, except in minor cases."); Bohlander, *supra* note 27, at 151 ("Often the mere fact that the accused has made a confession does not relieve the court of the task of finding out whether this confession is credible and supported by corroborating material."); Frase, *supra* note 118, at 169 (explaining that since "there are no defendant pleas in French criminal courts . . . and no bargaining of charge or sentence leniency in return for such a plea; in principle, all cases are tried, and the accused's confession or admission of the charges has no formal effect on the method of adjudication"); Weigend, *supra* note 127, at 208 ("Even if the defendant admits his guilt, the court remains obliged to find the facts necessary for conviction.").

At the same time, trials featuring confessions may be summary, even by Continental standards. See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 982 (discussing empirical studies reporting on the trial-time saved in European countries by a defendant's confession); Frase, *supra* note 118, at 169 (finding that "trials in [the French] Correctional Court can be substantially shortened if the defendant, before or during the trial, admits most of the alleged facts"); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems*:

Further, Continental prosecutors are accorded far less discretion than their American counterparts,¹⁴⁴ and in some countries, "prosecutors are legally bound to prosecute all serious crimes that come to their attention."¹⁴⁵ For these reasons, during the 1970s some commentators maintained that there was no bargaining over serious crime in some Continental countries.¹⁴⁶

France, Italy, and Germany, 87 YALE L.J. 240, 264-69 (1977) (describing summary uncontested trials); Herrmann, *supra* note 113, at 763 (noting that in Germany, "[u]nlike a guilty plea, a confession does not replace a trial but rather causes a shorter trial" and that in the ordinary case "trials in which the accused fully confesses take about half as long as trials without such a confession"); Langbein & Weinreb, *supra* note 73, at 1566 ("Of course a trial is likely to be shorter if the accused has confessed.").

¹⁴⁴ Frase, *supra* note 81, at 629; *see id.* at 611-13 (explaining that "prosecutorial charging discretion is significantly *more* restrained in France than in the United States" and that French prosecutors have limited discretion after charges have been filed); Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508, 508 (1970) ("The prosecuting attorney in the Federal Republic of Germany has by no means the same degree of freedom in the exercise of his discretion as belongs to his American counterpart."); Thomas Lundmark, Book Review, 47 AM. J. COMP. L. 677, 686 (1999) ("Prosecutorial discretion as such is not recognized in Germany.").

¹⁴⁵ Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 119 (1981); *see also* ROBBERS, *supra* note 118, at 184 ("As a general rule [the state prosecution service] does not have a discretion [sic] to decide whether to prosecute or not."); Frase, *supra* note 52, at 117 (noting that the "[c]ompulsory prosecution" rule . . . is a common feature of Civil Law and inquisitorial systems"); Frase & Weigend, *supra* note 113, at 337 ("Germany, unlike the United States, does not give the prosecutor complete discretion to decline to file charges. In Germany, felony (*Verbrechen*) charges must be filed if there is an adequate evidentiary basis."); Weigend, *supra* note 127, at 205 ("The [German] prosecutor is obliged by law to file charges whenever there is 'sufficient' suspicion that the suspect has committed a crime."). *See generally* Langbein, *supra* note 36, at 448-80 (describing the German principle of compulsory prosecution).

¹⁴⁶ *See* Goldstein & Marcus, *supra* note 143, at 269 (arguing that Continental jurists "deny the possibility of plea bargaining by simply noting that guilty pleas are legally impermissible"); Langbein, *supra* note 132, at 205 (noting that the former West Germany had "avoided any form or analogue of plea bargaining in its procedures for cases of serious crime"); Langbein & Weinreb, *supra* note 73, at 1562-67. As the German scholar Hans-Heinrich Jescheck stated in 1970:

The restriction on his discretion prohibits the prosecuting attorney from entering into discussions with the accused and his counsel, whether perhaps only a portion of the alleged offenses might be charged, or whether the charges themselves might be reduced in severity in order to obtain in exchange a confession which would relieve the prosecutor of his obligation of producing proof. "Plea bargaining" of this sort is fundamentally prohibited in German law, and it would not make much sense anyway to insist upon a confession at all costs, since objective proof must still be presented to the court in the case of a confession, even if perhaps within narrower limits.

Jescheck, *supra* note 144, at 511.

Whether that claim was slightly exaggerated even at the time,¹⁴⁷ it is clear now that the use of non-trial alternative procedures has increased on the Continent in the last thirty years, particularly in cases involving petty crimes, and that many of those alternative procedures bear at least surface resemblance to American plea bargaining. The clearest example comes from Italy, which radically revised its criminal procedures in 1989 to include more adversarial features.¹⁴⁸ Because these adversarial elements greatly increased the length and cost of Italian trials, the new Italian Code also provided for "special forms of procedure" aimed at avoiding the ordinary, time-consuming procedures.¹⁴⁹ Most similar to American plea bargaining is the Italian *patteggiamento sulla pena*, or simply *patteggiamento*, in which the defendant and the prosecution agree on a sentence which they request the judge to apply.¹⁵⁰ This mechanism is available only to less serious crimes, and a prison sentence imposed pursuant to this procedure cannot exceed two years.¹⁵¹ The procedure additionally differs from American plea bargaining in that the defendant is not required to admit guilt.¹⁵²

Other Continental criminal justice systems have remained predominantly non-adversarial but have also seen the limited emergence of efficient non-trial alternatives. In The Netherlands, for instance,

¹⁴⁷ See Goldstein & Marcus, *supra* note 143, at 264-79 (describing certain Continental practices as analogues of plea bargaining and the guilty plea).

¹⁴⁸ See Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1211 (1989) (asserting that the new code of Italian criminal procedure "brought into existence the first instance of an accusatorial system ever known in a country in whose tradition and culture the [non-adversarial] approach to criminal justice had always been the rule"); Rachel VanCleave, *Italy*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 23, at 245, 245 (describing Italy's process of transforming its non-adversarial system into one using a combination of non-adversarial and adversarial procedures).

¹⁴⁹ Piermaria Corso, *Italy*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, *supra* note 114, at 223, 251 (noting that Italy has shortened criminal trials by instituting procedures to bypass committal proceedings, waive trial, or waive preliminary proceedings); VanCleave, *supra* note 148, at 245 (discussing procedural reforms set out in Book VI of the Italian Code of Criminal Procedure: judgment without trial, abbreviated trial, direct trial, immediate trial, and penal decree).

¹⁵⁰ Corso, *supra* note 149, at 252-53 (describing the elements of the *patteggiamento* process and noting its acceptance among practitioners).

¹⁵¹ *Id.* at 252; VanCleave, *supra* note 148, at 272.

¹⁵² VanCleave, *supra* note 148, at 272. The Italian Code of Criminal Procedure also provides for summary trials, in which the case is judged on the basis of the prosecution's *dossier* instead of proceeding to a full trial. Sentences imposed following summary trials are reduced by one-third. *Id.* at 273. For a discussion of other full trial alternatives, including direct trials, immediate trials, and penal orders, see Corso, *supra* note 149, at 253-54; VanCleave, *supra* note 148, at 274-75.

prosecutors will engage in "conditional dismissals" and "transactions," wherein they will drop the charges if the defendant agrees to certain conditions, such as to compensate the victim or to undergo psychiatric treatment.¹⁵³ These practices do not result in the defendant's conviction, and the conditions imposed do not include imprisonment; thus, their resemblance to American plea bargaining is limited. Indeed, American prosecutors utilize practices similar to Dutch "conditional dismissals" and "transactions" under the rubric "diversion,"¹⁵⁴ yet still must plea bargain the vast majority of cases that are not diverted. An arguably closer Dutch analogue to plea bargaining is the practice of "taking offenses into consideration," wherein the prosecutor does not file additional charges that could be proved, but rather leaves them to the court to take into account in sentencing. By failing to file the additional charges, the prosecutor saves time and paper work, and the defendant is widely believed to receive milder punishment than he would have received if the charges had been formally filed.¹⁵⁵

In France, several procedures have developed, particularly in the courts hearing less serious crimes,¹⁵⁶ that are intended to save time and minimize litigation.¹⁵⁷ For instance, American commentators have analogized the French practice of "correctionalization" to American charge bargaining. In France, criminal offenses are classified as *crimes*, *délits*, or *contraventions*, with *crimes* the most serious and *contraventions* the least serious.¹⁵⁸ "Correctionalization" refers to the French practice of charging an offense as a *délit* when it could have

¹⁵³ Bert Swart, *Settling Criminal Cases Without a Trial*, 31 ISR. L. REV. 223, 225-27 (1997); see also Jörg et al., *supra* note 112, at 48 (finding that in The Netherlands, "modern tendencies have resulted in various ways of settling cases out of court with or without conditions like the payment of a legally fixed or negotiated sum of money").

¹⁵⁴ See LAFAYE ET AL., *supra* note 12, at 670 ("Diversion is the disposition of a criminal complaint without a conviction, the noncriminal disposition being conditioned on either the performance of specified obligations by the defendant, or his participation in counseling or treatment.").

¹⁵⁵ Swart, *supra* note 153, at 229-30.

¹⁵⁶ Interestingly, Bron McKillop conducted an empirical study of a French murder case involving a defendant accused of murdering his estranged wife's boyfriend. McKillop, *supra* note 112, at 529-30. The forensic and witness evidence against the defendant was overwhelming, *id.* at 534-44, so it came as no surprise when the defendant was convicted, *id.* at 560. The trial took two days, *id.* at 548-60, and, given the overwhelming evidence against the defendant, would likely have been seen by American lawyers as a waste of time and resources.

¹⁵⁷ See Frase, *supra* note 81, at 626-47 (describing French analogues to plea bargaining); Frase, *supra* note 118, at 416-17; Pradel, *supra* note 118, at 131-32 (describing French "transactions").

¹⁵⁸ Frase, *supra* note 118, at 144; Tomlinson, *supra* note 121, at 141-42.

been charged as a *crime*. *Crimes* are heard in an assize court, which utilizes comparatively elaborate procedures and mixed panels of judges and lay jurors, while *délits* are heard in a correctional court, which features less formal procedural rules and panels consisting only of professional judges.¹⁵⁹ The more formal procedures of the assize courts have proven sufficiently cumbersome that prosecutors often circumvent them by correctionalization.¹⁶⁰ Although French correctionalization does bear some resemblance to American charge bargaining, the differences between the two are also manifest. Unlike an American defendant who pleads guilty, a French defendant charged with a *délit* still receives a trial, albeit one with fewer safeguards, and French prosecutors do not explicitly bargain over the charging decision.¹⁶¹

In Germany, most misdemeanors and petty infractions are disposed of by means of penal orders—written orders describing the defendant's wrongful conduct and specifying a penalty that cannot include imprisonment. If the defendant does not object to the order within a certain period of time, the order becomes effective.¹⁶² It used

¹⁵⁹ Tomlinson, *supra* note 121, at 143-44; see also Brouwer, *supra* note 108, at 216-19 (describing proceedings in assize court). Further, before a prosecutor can bring a defendant to trial for a *crime*, he must initiate a judicial investigation in which an examining magistrate investigates the facts alleged by the prosecutor and hears the defense. For the prosecution of *délits* and *contraventions*, a judicial investigation is optional, not mandatory. Tomlinson, *supra* note 121, at 150-53.

¹⁶⁰ See Frase, *supra* note 81, at 622-23 (stating that prosecutors use correctionalization because "[t]he case is then sent directly to correction court, thereby avoiding judicial investigation"); Tomlinson, *supra* note 121, at 153-54 (describing situations in which French prosecutors "avoid[] the necessity of a judicial investigation and . . . bring the defendant to trial before a *tribunal correctionnel*").

¹⁶¹ Frase, *supra* note 81, at 630. Further, French prosecutors who engage in correctionalization may be motivated by a number of reasons that bear no relation to the defendant's cooperation: the prosecutor might believe a felony sentence would be excessive in light of the defendant's prior record, or he might fear that the assize court would view felony penalties as excessive and either acquit the defendant or impose no more than a *délit* sentence. *Id.* at 622-23.

¹⁶² See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 956-57 (providing details of German penal procedure); Dannecker & Roberts, *supra* note 120, at 445-46 (discussing German penal order procedure and noting that defendants are not required to object); Felstiner, *supra* note 15, at 310 (explaining the German penal order and its accompanying procedure); Hans-Heiner Kühne, *Germany, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, *supra* note 114, at 137, 158 (describing penal orders and noting that they are of greatest value in helping the criminal justice system cope with traffic cases). France's use of penal orders in criminal sentencing has also been the subject of scholarly attention. See Frase, *supra* note 81, at 645-47 ("Another form of tacit sentence bargaining in France is the use of penal orders."); Tomlinson, *supra* note 121, at 145 ("The overwhelming majority of cases in

to be thought that the execution of a penal order was an administrative task that involved no bargaining, but in recent years the defense and prosecution have begun bargaining over the fine to be imposed.¹⁶³ According to most commentators, however, a defendant's rejection of a penal order will not result in a higher penalty following conviction at trial.¹⁶⁴ Bargaining over confessions has also emerged recently in Germany to relieve the burden imposed by large-scale, complicated financial and drug cases.¹⁶⁵ As in most Continental countries, in Germany an admission of guilt does not obviate the need for a trial; the court must still find the facts necessary to convict. However, if the defendant makes a credible and detailed confession, and neither the prosecutor nor defense offers further evidence, the court will usually be satisfied that the defendant's confession provides a sufficient basis for the judgment and will not call additional witnesses.¹⁶⁶ Because complex economic crimes can "take months or even years to try if the defense makes use of all its procedural options, especially its

the *tribunaux de police*, . . . are disposed of through the simplified procedure of the *ordonnance pénale*.").

¹⁶³ See Dubber, *supra* note 13, at 559-60 ("In penal order bargains, the prosecutor may offer to initiate a penal order proceeding instead of filing the case in the single judge court, thereby limiting the defendant's maximum exposure to a suspended one year prison sentence . . ."); Herrmann, *supra* note 113, at 761-62 ("A higher sentence at trial, however, is not an automatic rejection of a penal order.").

¹⁶⁴ See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 956-57; Felstiner, *supra* note 15, at 314 ("West German defendants are, I believe, not penalized for rejecting a penal order and insisting upon a trial."); Herrmann, *supra* note 113, at 762 (explaining that "the accused ordinarily is not induced to accept a penal order by the prospect of a higher sentence should he elect to have a trial"); Langbein, *supra* note 132, at 214-15 ("[I]t would violate German law for prosecutors or judges to attempt to institute such sentencing differentials [in rejected penal order cases.]"); Langbein & Weinreb, *supra* note 73, at 1565 (maintaining that, "if the accused rejects disposition by a penal order in favor of a trial, the prosecutor virtually never recommends, nor does the court impose, a penalty higher than that contained in the penal order"). Some commentators question that view, however. See Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570, 1574-75 & n.18 (1978).

¹⁶⁵ See Frase & Weigend, *supra* note 113, at 345 (noting the increase in complex economic offenses). Joachim Herrmann has observed:

Previously unknown problems in criminal justice administration are today posed by new kinds of cases involving white-collar crimes, which require the court to consider a great number of witnesses, thousands of pages of business records, expert testimony about fraudulent bookkeeping, and often involve the juggling of assets between different business enterprises. The same applies to drug cases involving international conspiracies, where witnesses tend either not to testify at all or not to tell the truth, or to keep disappearing.

Herrmann, *supra* note 113, at 763.

¹⁶⁶ Weigend, *supra* note 127, at 208.

right to request further proof-taking,"¹⁶⁷ a confession in these cases proves an especially welcome time-saving device.¹⁶⁸ Therefore, prior to formal charging, the defense and prosecution might negotiate over the charges that will be brought following the defendant's confession; alternatively, after charging but before or during trial, the judge and defendant might engage in discussions regarding the sentence that will be imposed following the defendant's confession.¹⁶⁹ Joachim Herrmann estimated that in 1992, bargaining occurred in at least 20% to 30% of German cases, though he emphasized that it was largely reserved to petty crimes and large, complex crimes, and was thus rarely used in cases involving violent or other very serious crimes.¹⁷⁰ Further, in 1997 the Federal Court of Justice set strict guidelines as to when plea bargaining should be allowed¹⁷¹ so bargaining may now be less prevalent as a result.

The increased use of these and other non-trial and summary-trial alternatives on the Continent has resulted from a rise in crime, par-

¹⁶⁷ Frase & Weigend, *supra* note 113, at 345.

¹⁶⁸ Indeed, confessions are generally thought to halve the trial time necessary for an ordinary case, and they offer far greater time savings in large-scale, complex cases. See Herrmann, *supra* note 113, at 763. Herrmann goes on to note that, unlike in the United States, bargaining over confessions does not "serve to process a great number of ordinary cases[,] but rather "is a specific device reserved for handling big and difficult cases." *Id.*

¹⁶⁹ *Id.* at 756, 764-65; see also Kühne, *supra* note 162, at 157 (noting that, although "[u]nder the principles of instruction and legality, there is no room for plea bargaining in the strict sense of German criminal procedure," in complicated cases, counsel may "promise a confession by his client on some points of the indictment, and in return the court will pronounce a sentence not exceeding a certain limit"); Weigend, *supra* note 127, at 208 ("[I]n complex cases the defense sometimes intimates to the court that the defendant would be ready to make a statement and refrain demanding the taking of further evidence in exoneration if he could be certain that his sentence would not exceed a certain maximum.").

¹⁷⁰ Herrmann, *supra* note 113, at 763; see also Bohlander, *supra* note 27, at 159 ("German law finds the idea of bargaining for lesser charges unacceptable and allows sentencing bargain [sic] only in very limited circumstances."); Heike Jung, *The Criminal Process in the Federal Republic of Germany—An Overview*, in *THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS*, *supra* note 119, at 59, 61-62 (describing the 1975 reforms which "introduced 'bargaining' elements into the phase of preliminary investigations").

¹⁷¹ The Federal Court of Justice held, among other things, that (1) plea negotiations must take place in an open session of the court in the presence of all the judges and parties; (2) the court is not permitted to indicate a certain sentence but can only state an upper limit in case of a confession; and (3) it is not permissible to negotiate a waiver of appeal before sentencing. See Bohlander, *supra* note 27, at 159-60 (summarizing the court's holdings).

ticularly petty crime and complex financial crime,¹⁷² and from an increasing convergence between adversarial and non-adversarial procedural systems.¹⁷³ The convergence itself stems in part from increasingly burdensome caseloads. As Abraham Goldstein put it: "There are simply too many offenses, too many offenders, and too few resources to deal with them all. One result of this overload has been a steady movement towards a convergence of legal systems—towards borrowing from others those institutions and practices that offer some hope of relief."¹⁷⁴ Liberal reforms, some undertaken voluntarily¹⁷⁵ and others imposed by decisions of the European Court of Human Rights,¹⁷⁶ have provided a second factor inspiring a convergence of systems and, in particular, have resulted in the importation of some adversarial features into non-adversarial systems.¹⁷⁷ The European Court

¹⁷² See Damaška, *supra* note 136, at 485 ("Everywhere, swelling dockets favored the replacement of methodically conducted official activities by flexible arrangements with the defense."); Frase & Weigend, *supra* note 113, at 345 ("One reason for the growth of plea bargaining is the increase of complicated cases of economic crime.").

¹⁷³ See Daly, *supra* note 111, at 72-73. See generally Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809 (2000); Bradley, *supra* note 127 (detailing the emerging international consensus on international criminal procedure); Jörg et al., *supra* note 112, at 45, 53-56 (describing the gradual convergence between the adversarial and non-adversarial systems).

¹⁷⁴ Goldstein, *supra* note 31, at 159.

¹⁷⁵ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 190-91 ("Sooner or later, liberal reforms were inaugurated in all Continental countries.").

¹⁷⁶ See Joachim Herrmann, *Criminal Justice Policy and Comparativism: A European Perspective*, in *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: FROM DIVERSITY TO RAPPROCHEMENT*, *supra* note 52, at 129, 134-36 ("Published opinions . . . of the European Court of Human Rights have demonstrated . . . that there is a visible trend towards humanizing the protection of individual rights in European countries."); Swart & Young, *supra* note 125, at 83-84 (describing the implementation of case law promulgated by the European Court of Human Rights).

¹⁷⁷ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 190 (discussing importation of adversarial features as a result of liberal reforms); Lasvignes & Lemonde, *supra* note 119, at 29 (describing reforms in France that have "accentuate[d] the adversarial nature of the proceedings"); Swart & Young, *supra* note 125, at 84-86 (explaining importation of adversarial procedures as a result of the European Court of Human Rights's judgments); Christine Van den Wyngaert, *Foreword to CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, *supra* note 114, at i, ii (noting that "many of the 'continental' countries have recently imported features of the Anglo-American 'adversarial system'"); see also Bradley, *supra* note 72, at 474-75 (observing that "inquisitorial systems have become more adversarial"). Bradley goes on to maintain that the adversarial model "is the wave of the future" and contends that:

As societies become more diverse (i.e., more like the United States), the notion that government can be trusted to do right by minority groups seems anachronistic. The more informal approach of the continental system may be well suited to a society in which everyone is of the same or similar background. But it is not suitable where minority groups are mistrusted by, and

of Human Rights has, among other things, required Continental countries to permit defendants greater opportunity to question witnesses appearing against them¹⁷⁸ and required Continental judges to limit the roles they play in criminal cases in order to preserve the appearance of impartiality.¹⁷⁹ The importation of these and other safeguards that tend to lengthen trials and reduce the efficiency of trial procedures give additional impetus for the use and development of non-trial alternative dispositions.

For the above reasons, Continental and Anglo-American criminal procedures differ less than they used to, but they still differ considerably. Although the use of bargaining and non-trial dispositions has increased on the Continent in recent years, it remains quite limited by American standards. In many countries, such procedures are restricted to petty crime and what bargaining occurs is often implicit or if express, more carefully regulated than in the United States. Plea bargaining thus does not play the essential role in Continental criminal justice systems that it does in the American criminal justice system. Continental trials, even those not featuring confessions, are still sufficiently simple and efficient that they can be viably used to dispose of a large percentage of cases. At the same time, it is clear that growing caseloads and the introduction of more complex procedures result, both on the Continent and elsewhere, in the development and use of non-trial alternatives.¹⁸⁰ The following section will briefly detail the procedures of England and Israel to confirm the functional correla-

mistrust, the majority and its police forces. In the absence of shared norms, formal delineation of rules by courts or legislatures, and their enforcement by counsel, are essential.

Id. at 482.

¹⁷⁸ See *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) 21 (1989) (holding that applicant has a right to challenge and question witnesses appearing against him). See generally Annemarieke Beijer et al., *Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, *supra* note 112, at 283, 288-89.

¹⁷⁹ See, e.g., *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) (1991) (finding a violation of the European Convention on Human Rights because the trial judge had participated in a decision on a pre-trial request to order the prosecution of the defendant); *Hauschildt v. Denmark*, 154 Eur. Ct. H.R. (ser. A) (1989) (finding a violation of the European Convention on Human Rights because the trial judge had decided requests for pre-trial detention); *DeCubber v. Belgium*, 86 Eur. Ct. H.R. (ser. A) (1984) (finding a violation of the European Convention on Human Rights because the trial judge had previously acted as the examining judge).

¹⁸⁰ See Herrmann, *supra* note 113, at 755 (arguing that German plea bargaining is "mainly a consequence of the over-burdened criminal justice system").

tion between complicated, adversarial procedures and plea bargaining.

3. Criminal Procedures and Non-Trial Dispositions in the United Kingdom and Israel

Although the adversary system originated in England, English procedures are now considerably less adversarial than American procedures; that is, English procedures are simpler and more efficient.¹⁸¹ England abolished the grand jury,¹⁸² voir dire is strictly limited, peremptory challenges were eliminated in 1998, and the grounds on which a challenge for cause can be based are quite restricted.¹⁸³ English procedures also provide more information to the parties and to the court. Disclosure requirements are not as broad as on the Continent, but unlike most American jurisdictions, English law does require defendants to disclose before trial the nature of their defenses and the matters on which the defense intends to join issue with the prosecution.¹⁸⁴ England also follows the Continental approach of using rules

¹⁸¹ In July 2002, Britain announced sweeping changes to its criminal justice system, among other things, abolishing the double jeopardy rule and allowing for the admission of hearsay evidence. Warren Hoge, *British Change Rules to Cut Crime*, INT'L HERALD TRIB., July 18, 2002, at 3. It will remain to be seen how these reforms will affect the prevalence of plea bargaining.

¹⁸² See LAFAVE ET AL., *supra* note 12, at 402-03 ("During the 1820s, Jeremy Bentham vigorously criticized the English grand jury, claiming that it was both unrepresentative and inefficient. . . . England . . . finally heeded Bentham's advice and abolished the grand jury."); Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 976 ("Although English trial and pretrial procedures are substantially more burdensome than those of many nations that sense no need to engage in plea bargaining, these procedures are also less elaborate than our own. The grand jury in England has been discarded . . ."). In the United States, by comparison, eighteen states, the District of Columbia, and the federal government grant defendants the right not to answer a felony charge unless the charge has been issued by a grand jury through an indictment or presentment. LAFAVE ET AL., *supra* note 12, at 733. Four states require prosecution by an indictment screened by the grand jury only with respect to the most severely punished felonies, *id.* at 735, and the remaining states allow the prosecution to proceed either by an indictment screened by the grand jury or by an "information," *id.* at 737. If felony charges have not first been screened by a grand jury, most states require that a judicial officer approve the charges at a preliminary hearing, unless the defendant waives that protection. *Id.* at 669.

¹⁸³ Grounds for challenge have been effectively restricted to "(a) ineligibility or disqualification and (b) reasonable suspicion of bias." David J. Feldman, *England and Wales*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 23, at 91, 123. See also A.T.H. Smith, *England and Wales*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, *supra* note 114, at 73, 78-79 (describing English jury selection procedures following recent reforms).

¹⁸⁴ Feldman, *supra* note 183, at 121.

of procedure and evidence that encourage the defendant to testify.¹⁸⁵ Further, in England, as in most countries, the products of unlawful searches and seizures are not automatically excluded from evidence.¹⁸⁶ Turning to English judges, they do not exercise the same degree of control over the trial process as their Continental counterparts, but they do command more authority than an American trial judge. For instance, at the end of a trial, English judges are required to sum up the case; the judge will summarize the evidence and arguments on both sides and present the inferences that the jurors may draw from their conclusions about primary facts.¹⁸⁷

Because English trial procedures are more efficient than American procedures, it should come as no surprise that there is less plea bargaining in England than in the United States. Indeed, less than three decades ago it was widely (but erroneously) believed that plea bargaining was not practiced at all in England.¹⁸⁸ Since then, plea bargaining, and in particular, implicit plea bargaining, has come to light; English defendants are now understood to routinely receive a sentence reduction upon a plea of guilty.¹⁸⁹ Still, plea bargaining in England is more limited than in the United States: only 50% or so of the defendants charged with a serious crime plead guilty.¹⁹⁰

¹⁸⁵ van Kessel, *supra* note 54, at 481. By testifying, the defendant is not automatically subject to impeachment with prior felony convictions; further, if a defendant does not testify, the judge may comment on that fact to the jury. *Id.*; see also Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 976 (arguing that the privilege against self-incrimination, as interpreted and applied in England, encourages defendants to testify).

¹⁸⁶ See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 976 ("[T]he products of unlawful searches and seizures are admitted into evidence in most cases."); Bradley, *supra* note 127, at 186-91 (describing the limited categories of evidence that are excluded); Langbein & Weinreb, *supra* note 73, at 1549, 1554-55 ("In England, where criminal procedure more closely resembles ours, the automatic application of an exclusionary rule has consistently been rejected.").

¹⁸⁷ van Kessel, *supra* note 54, at 433. van Kessel goes on: "Though the principal actors of the English trial are the lawyers, the fact that the English judge wields more authority than her American counterpart means that the English lawyers possess less authority, thereby rendering the powers of the lawyers and the judge more balanced than in our system." *Id.* at 481.

¹⁸⁸ See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 973 ("The frequent denial that plea bargaining occurs in England is apparently based largely on semantics."); Baldwin & McConville, *supra* note 100, at 288 (noting the belief that plea bargaining does not exist in England).

¹⁸⁹ Baldwin & McConville, *supra* note 100, at 299.

¹⁹⁰ John Spencer, *Criminal Procedure in England—A Summary of its Merits and Defects—The Outlines of the System*, in *THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS*, *supra* note 119, at 67, 69. According to Spencer, virtually all defendants charged with petty crimes plead guilty. *Id.* Baldwin and McConville es-

Israeli criminal proceedings, like American criminal proceedings, are adversarial in character,¹⁹¹ but they have remained more faithful to their English roots;¹⁹² in addition, they have incorporated many Continental nonadversarial features¹⁹³ that make Israeli trials less complicated and more efficient. For instance, Israeli trials are bench trials,¹⁹⁴ and Israeli judges, like Continental judges, play a substantial role in examining witnesses and can summon witnesses on their own initiative.¹⁹⁵ Further, resembling their Continental counterparts, Israeli prosecutors are under broad disclosure obligations and cannot introduce any evidence that was not subject to discovery.¹⁹⁶ Moreover, Israel, like England and Continental countries, has no exclusionary rule¹⁹⁷ and makes more use of the defendant as a testimonial resource. Defendants are not required to testify but failing to do is often considered circumstantial evidence of guilt.¹⁹⁸ Owing in part to these and

timated that in 1976, approximately two-thirds of defendants charged with serious crimes pled guilty, while about 90% of defendants charged with less serious crimes pled guilty. Baldwin & McConville, *supra* note 100, at 287 n.1. These guilty plea rates were estimated to be less than those in America. *Id.* at 287; see also Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 973 (arguing that England, among other nations, is not "as dependent on plea bargaining as we are").

¹⁹¹ See Eliahu Harnon, *Plea Bargaining in Israel—The Proper Functions of the Prosecution and the Court and the Role of the Victim*, 31 ISR. L. REV. 245, 247 (1997); Eliahu Harnon & Alex Stein, *Israel, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 23, at 217, 240.

¹⁹² Abraham Abramovsky, *Partners Against Crime: Joint Prosecutions of Israeli Organized Crime Figures by U.S. and Israeli Authorities*, 19 FORDHAM INT'L L.J. 1903, 1912 (1996).

¹⁹³ Kenneth Mann, *Criminal Procedure*, in INTRODUCTION TO THE LAW OF ISRAEL 267, 267, 293 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

¹⁹⁴ Harnon, *supra* note 191, at 247; Harnon & Stein, *supra* note 191, at 239.

¹⁹⁵ Cf. Mann, *supra* note 193, at 286-87 (explaining that the absence of a jury and widespread absence of representation of defendants in criminal trials forces judges to protect the defendant's interests).

¹⁹⁶ Harnon & Stein, *supra* note 191, at 238; see also Eliahu Harnon, *Criminal Procedure and Evidence*, 24 ISR. L. REV. 592, 594-98 (1990) (describing the accused's right to inspection and discovery of evidence); Mann, *supra* note 193, at 285 (explaining that the prosecution must disclose all "investigatory material," including "all factual materials collected by or known to the police relevant in any way to the offence charged" immediately after issuing the indictment).

¹⁹⁷ Mann, *supra* note 193, at 274.

¹⁹⁸ See Abramovsky, *supra* note 192, at 1913-14 (observing that a defendant's "failure to take the stand may be commented upon by the prosecution and will 'add to the weight' of the prosecution's case in an Israeli court"); Harnon, *supra* note 196, at 599 ("A defendant's silence in court may strengthen the *prima facie* evidence and add to its probative weight."); Harnon & Stein, *supra* note 191, at 242; Mann, *supra* note 193, at 287-88 (stating that "in many situations a suspect's refusal to make a statement at the police station may constitute circumstantial evidence of guilt" and that "if the suspect is

other, more efficient procedures, Israeli court calendars are not nearly as congested as their American counterparts.¹⁹⁹ Consequently, while plea bargaining is practiced in Israel, it is not nearly so widespread as in the United States. At least 30% to 35% of criminal cases go to trial, and a significant proportion of the 65% to 70% of the defendants who plead guilty do so without prior negotiations or plea agreements.²⁰⁰

D. Summary

This Part has examined the functional role of plea bargaining in a variety of jurisdictions, and has shown a correlation between the complexity and inefficiency of a country's trial procedures and its use of plea bargaining. Simply put, it has shown that the more complex and time-consuming the country's trial procedures, the more those procedures will be avoided in favor of non-trial alternatives. Thus, American criminal trials, with their many safeguards and intensely adversarial character, are among the least utilized in the world. As Lloyd Weinreb has noted: "No country relies so much as we on the defendant's formal acknowledgement of his guilt."²⁰¹ Plea bargaining and non-trial alternatives play a correspondingly lesser role in countries such as England and Israel that utilize more moderate adversarial procedures, and they play a lesser role still in Continental countries that utilize relatively quick and efficient non-adversarial procedures.

presented with a document that incriminates him, his silence . . . may be used as evidence against him").

¹⁹⁹ See Abramovsky, *supra* note 192, at 1913.

²⁰⁰ Mann, *supra* note 193, at 284. About twenty years ago, Albert Alschuler interviewed David Libai, a former Israeli prosecutor and defense attorney, who opined that guilty plea rates in Israel were substantially lower than those in the United States. He described plea bargaining in Israel as "neither very widespread nor very unusual," because Israeli trials are not to a jury:

[T]here is no feeling that the great mass of defendants must be induced to plead guilty. Two or three ordinary trials, involving neither terribly simple nor terribly complex cases, can usually be conducted in a single morning. It is a rare case that cannot be proven with two or three witnesses, and prosecutors know that they may very well spend more time bargaining a case than they would spend at trial. Accordingly they do not regard plea bargaining as a great administrative boon.

Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 973 n.207.

²⁰¹ LLOYD WEINREB, DENIAL OF JUSTICE 148 (1977).

II. THE IDEOLOGICAL AND STRUCTURAL UNDERPINNINGS OF PLEA BARGAINING

Part I described plea bargaining's functional role in various criminal justice systems. This part examines plea bargaining as a theoretical construct. It explores certain ideological and structural features of Anglo-American and Continental jurisdictions, and it shows how these features can facilitate or impede the use of plea bargaining. In particular, it shows that the non-hierarchical structure and laissez-faire ideology of the American criminal justice system provides a perfect setting for plea bargaining to flourish, whereas the more hierarchical structure and managerial tendencies of most Continental criminal justice systems inhibit the development and use of plea bargaining.

Mirjan Damaška, arguably the foremost comparative law scholar in the United States, has linked many of the features commonly associated with Anglo-American and Continental procedural systems to the structures of authority²⁰² and political ideologies of the states utilizing those systems.²⁰³ Using the structure of procedural authority and the purposes of adjudication as classificatory principles, Damaška developed four models: two types of officialdom—the hierarchical and the paritary—and two types of procedural purpose—the policy-implementing, characteristic of interventionist states, and the conflict-solving, characteristic of laissez-faire states.²⁰⁴ All four models were conceived as ideal types; no actual procedural system bears all of their traits yet, as a general matter, Continental criminal justice systems are more hierarchical in structure²⁰⁵ and manifest a greater disposition to

²⁰² "Structures of authority" refers to the organization of governmental authority, in particular, into hierarchical or non-hierarchical models. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 481 (1975).

²⁰³ Damaška, *supra* note 136, at 495-97; see DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 9 (asserting that "even such intangibles" as the tone of proceedings, attitudes toward documents and deadlines, and the division of the tribunal into judge and jury "may be influenced by a particular character of authority").

²⁰⁴ Damaška, *supra* note 136, at 495-96.

²⁰⁵ The hierarchical nature of the judiciary and the prosecuting authority in most Continental countries has been discussed frequently in comparative law scholarship. See, e.g., Dannecker & Roberts, *supra* note 120, at 422 ("The state attorney's offices [in Germany] are hierarchically structured and subordinated to the ministry of justice."); Frase, *supra* note 81, at 559-61, 564-66 (depicting the hierarchical authority of the French prosecuting authority and judiciary); Jörg et al., *supra* note 112, at 44 ("[The] criminal justice system in the Netherlands conforms closely to th[e] model of hierarchical/pyramidal organization, the underlying assumption being that the state . . . [can] be trusted to 'police' itself as long as authority is organized in a way that will al-

pursue governmental ends than their Anglo-American counterparts.²⁰⁶

These structural and ideological features find ready expression in the adversarial and non-adversarial criminal procedures discussed above.²⁰⁷ Legal proceedings in a hierarchical setting tend to be held in a methodical succession of stages that need a mechanism to integrate their segments into a meaningful whole, and that function is performed by the *dossier*.²⁰⁸ Officials in a hierarchy are professionalized, organized into strict echelons, and inclined to jealously guard their bailiwick against outsiders.²⁰⁹ Legal proceedings in Continental countries, then, are not controlled by the parties but are largely driven by hierarchically ordered bureaucrats.²¹⁰ As for ideology, the greater disposition to manage society results in a legal process organized around a central idea of an official inquiry,²¹¹ which places great emphasis on reaching accurate, or "correct," substantive results.²¹² The managerial disposition also combines with the hierarchical structure to result in substantial official control over the process and, in particular, a significant substantive role for the decisionmaker,²¹³ thus reducing party and lawyer involvement.²¹⁴

low it to do so."); Kühne, *supra* note 162, at 140-41 (describing the hierarchical nature of the German police and prosecutorial authority); Langbein & Weinreb, *supra* note 73, at 1555-56 (describing the hierarchical nature of French police); *id.* at 1560-64 (noting the hierarchical nature of German police forces and prosecutors' offices); Pradel, *supra* note 118, at 111 ("The public prosecutor [in France] forms part of a body known as the *ministère public* (or *parquet*)[,], the dominant characteristic of which is its hierarchical nature."); Van den Wyngaert, *supra* note 114, at 7-8 (explaining the hierarchical nature of the Belgian prosecuting authority).

²⁰⁶ See Damaška, *supra* note 136, at 499; Tulkens, *supra* note 119, at 8 ("An inquisitory system is mostly directed towards maintaining public order.").

²⁰⁷ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 47-66, 77-80, 189-93 (investigating procedural implications and conflict resolution approaches of various justice systems); Jörg et al., *supra* note 112, at 43-44.

²⁰⁸ See DAMAŠKA, *FACES OF JUSTICE* *supra* note 53, at 47-48, 51-53.

²⁰⁹ See *id.* at 18-19 (observing that permanently placed officials develop a view of the world as divided between "insiders" and "outsiders"); see also Damaška, *supra* note 136, at 495 ("[O]fficials are professionals, organized in a hierarchy, who base their decisions on abstract, technical norms.").

²¹⁰ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 56.

²¹¹ See *id.* at 147; see also Damaška, *supra* note 52, at 525, 564; Tomlinson, *supra* note 121, at 134.

²¹² See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 160 (asserting that the activist state attempts to get "the facts right" as a pre-condition to realizing the goal of the legal process).

²¹³ See *id.* at 154, 168.

²¹⁴ See *id.* at 172-78 (describing the diminished role of the bar); Bruno, *supra* note 116, at 5 ("The civil lawyer looks very frail and weak compared to his almighty and powerful common law colleague.").

By contrast, Anglo-American jurisdictions generally, and the United States specifically, are less hierarchical in structure and less interventionist in disposition. In a non-hierarchical setting, power is widely distributed among roughly equal non-bureaucratic officials who each command broad discretion over the realm in which they operate.²¹⁵ The laissez-faire disposition of these states means that they envision the task of government primarily as providing a supporting framework within which citizens can pursue their autonomous goals.²¹⁶ Because the state is considered to have no interests apart from private interests, adjudication is conceived of primarily as a means of conflict resolution²¹⁷ rather than as a means of reaching "correct" outcomes.²¹⁸ Instead of structuring criminal proceedings in the form of an official inquiry, then, Anglo-American states structure them in the form of a contest.²¹⁹ Because the state is not considered hierarchically superior to the individual,²²⁰ adjudication, even criminal adjudication, can be

²¹⁵ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 25-26 (calling this phenomenon a "horizontal distribution of authority"); see also LAFAYE ET AL., *supra* note 12, at 675 ("The prosecution function [in the United States] has traditionally been decentralized, so that state attorneys-general exercise no effective control over local prosecutors.").

²¹⁶ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 73; Jörg et al., *supra* note 112, at 45 ("Common law ways of thinking about accountability and state derive initially from a negative image of the state and a minimalist view of its functions.").

²¹⁷ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 73 ("[G]enuine extremes of reactive ideology tend to collapse the protection of order into dispute resolution."); Damaška, *supra* note 123, at 103 ("On the Anglo-American side, the absence of an official investigating apparatus combined with forms of private prosecution to impart even to the criminal justice system a pronounced conflict-solving flavor."); Damaška, *supra* note 52, at 563 (explaining that in the adversary model the "procedural aim is to settle the conflict"); *id.* at 581 ("It is openly stated by some common law lawyers that the aim of criminal procedure is not so much the ascertainment of the real truth as the just settlement of a dispute.").

²¹⁸ That is not to say that the American criminal justice system is unconcerned with truth-seeking. Indeed, many commentators argue that an adversarial presentation of facts and arguments is most likely to reveal truth. See, e.g., *United States v. Cronin*, 466 U.S. 648, 655 (1984) ("Truth . . . is best discovered by powerful statements on both sides of a question." (citation omitted)); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975) ("[T]he adversary system assumes that the most efficient and fair way of determining the truth is by presenting the strongest possible case for each side of the controversy before an impartial judge or jury."); Frase, *supra* note 115, at 818 (presenting the arguments that adversarial presentation is most effective at determining truth).

²¹⁹ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 88 (linking American process with "the key image of contest"); Swart & Young, *supra* note 125, at 71 ("[I]n common law countries a trial is seen as a legal contest between two parties . . .").

²²⁰ LAFAYE ET AL., *supra* note 12, at 33 ("Consistent with the premise that the individual is the source of the government's sovereignty, the adversary system treats the

conceived of as a contest between two formally equal parties without violating any perceived sense of order.²²¹ The non-hierarchical nature of state authority also affords prosecutors the broad discretion to conduct the case as they see fit: to determine, among other things, who to prosecute, what charges to bring, and the manner in which to conduct the investigation.²²² The non-bureaucratic officials of a non-hierarchical state draw no rigid lines between official and private domains, so many functions that are the exclusive province of bureaucrats in a hierarchical system can be entrusted to private lawyers. The preparation of the case and the presentation of evidence, for instance, is not the responsibility of state officials but of the parties themselves.²²³

The laissez-faire political ideology accords a high value to individual autonomy and participation and thereby reinforces some of these procedural arrangements. For instance, the substantial control that the parties exert over the preparation and presentation of the case reflects not only the willingness of non-bureaucratic officials to relinquish control but the state's disinclination to intervene and the affirmative value that the system places on autonomy and party participation.²²⁴ The parties do not search for truth to be presented in

defendant as an equal to the prosecution.”).

²²¹ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 184, 223-24; Tomlinson, *supra* note 121, at 134 (“The common-law trial is the main act of a dispute between two theoretically equal parties who enjoy considerable leeway to determine themselves, through pleadings and stipulations, the limits and outcome of their dispute.”); see also Church, *supra* note 100, at 523 (noting that the American judicial system “is based on the proposition that just resolution of disputes will flow from the clash of interests of litigants whose legal fates are committed almost entirely to the hands of professional counsel”).

²²² See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 65 (“[The trial’s] preparation is not the responsibility of a specialized branch of the judiciary or of other specialized state officials, but is relegated to the parties involved in the case.”); LAFAYE ET AL., *supra* note 12, at 670 (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”); *id.* at 669 (noting that “discretionary enforcement of the criminal law has traditionally been an important part of the American prosecutor’s function”).

²²³ DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 63, 65; see Tulkens, *supra* note 119, at 8 (explaining “the accusatory system is litigant-driven; the state’s intervention is relatively limited”).

²²⁴ See Sward, *supra* note 53, at 318 (observing that party control is understood to preserve individual autonomy and dignity because it gives litigants the “fullest voice possible” in their cases). Lon Fuller believed, for instance, that “[t]he essence of the adversary system is that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments.” Lon Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30, 41 (H. Berman ed., 1961).

a neutral, unbiased way; they search for favorable evidence and present it in the manner most advantageous to their position. In a criminal case, even though the prosecutor is a representative of the state, he is not considered a neutral official, as in some Continental countries,²²⁵ but rather a partisan who operates under some constraints but whose primary aim is to convict those brought to trial.²²⁶ A further reflection of the high value accorded individual autonomy is that American defendants are provided numerous rights applicable at various stages of the proceedings, including the right to silence,²²⁷ the

Enhancing litigant autonomy does not necessarily mean advancing the best interests of the litigant, however. For instance, in the United States, a criminal defendant has the right to defend himself, even if his interests would clearly be better served by the assistance of appointed counsel. See *Faretta v. California*, 422 U.S. 806, 807 (1975) (deciding that it is unconstitutional for a state to "hale a person into its criminal courts and then force a lawyer upon him, even when he insists that he wants to conduct his own defense"). By contrast, many Continental countries appoint counsel for defendants regardless of the defendants' desires in order to serve the interests of the defendants and the criminal justice system. See ROBBERS, *supra* note 118, at 190 ("In some cases, legal representation is mandatory."); Corso, *supra* note 149, at 231 ("[In Italy, the] presence of defence counsel is compulsory."); Jorge de Figueiredo Dias & Maria Joao Antunes, *Portugal, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY*, *supra* note 114, at 317, 321 (noting that in Portugal, defense counsel "can be nominated to be present at certain acts without or even against the wishes of the accused"); Frase, *supra* note 118, at 177 (finding that defendants must be represented in French assize court); Greve, *supra* note 118, at 59 (reporting that in Denmark "it is not within the free discretion of the accused whether he wants legal assistance or not" because it is mandatory "in any case where the court regards defence counsel as desirable").

²²⁵ See ROBBERS, *supra* note 118, at 184 (arguing that "in contrast to some other legal systems, the German state prosecution service is not a party to the case in a criminal trial," but "[i]nstead it is a strictly neutral institution"); Jescheck, *supra* note 144, at 510 (observing that, while the American prosecutor is "one of two 'suits' in the trial," the German prosecutor "is supposed to be an objective 'guardian of the law'").

²²⁶ See Damaška, *supra* note 52, at 563 (noting that "the prosecutor's role is to obtain a conviction"); van Kessel, *supra* note 54, at 439 (contending that prosecutorial zeal to convict is sometimes excessive). Although prosecutors in most Anglo-American jurisdictions are under certain ethical constraints, see, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 (2001) (requiring prosecutors to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); N.Y. CODE OF PROF'L RESPONSIBILITY EC 7-13 (2002) (obliging prosecutors "to seek justice [and] not merely to convict"), the ethical obligations are subjective and amorphous and are not apt to be enforced, see Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 1006 (1995) (observing that no New York prosecutor has ever received a disciplinary sanction for violating the ethical obligation to "seek justice").

²²⁷ In the United States, for example, the right to silence is guaranteed in the Fifth Amendment to the Constitution, and it has been interpreted as prohibiting a court from making an adverse inference from the defendant's silence. E.g., *Mitchell v.*

right to confront witnesses,²²⁸ the right to exclude evidence from unreasonable searches,²²⁹ and the right to refuse counsel.²³⁰ To Continental observers, the broad scope of some of these rights may seem almost perverse in their ability to impede the government in its legitimate goal of investigating and prosecuting crime. But in the rhetoric of the adversary system, these rights protect individual autonomy and dignity and prevent governmental overreaching into private spheres.

The same structural and philosophical features that underlie American adversarial procedures and Continental non-adversarial procedures make plea bargaining the fitting alternative method of case disposition in the former but an uncomfortable anomaly in the latter. As a structural matter, plea bargaining can more readily flourish in non-hierarchical criminal justice systems: while it would violate the proper sense of order in a hierarchical environment to place a prosecutor—the representative of the state—in a bargaining position parallel to that of a criminal defendant,²³¹ a non-hierarchical system can accommodate plea bargaining's assumption of two formally equal parties capable of reaching a mutually beneficial outcome. Further, a non-hierarchical system can afford the prosecutor the wide discretion necessary to bargain effectively, discretion not typically bestowed on

United States, 526 U.S. 314, 330 (1999) ("The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden [of proof] while respecting the individual's rights."). Most, if not all, Continental countries also guarantee the right to silence, but courts may draw adverse inferences from such silence, thus motivating defendants to testify. See *supra* text accompanying note 135.

²²⁸ U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

²²⁹ U.S. CONST. amend. IV (protecting "against unreasonable searches and seizures" and forming the basis of the American exclusionary rule). Continental countries also prohibit certain searches and seizures but may enforce those prohibitions without excluding the evidence gained from them. See *supra* text accompanying note 127.

²³⁰ See *Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that it is unconstitutional for a state to "hale a person into its criminal courts and there force a lawyer upon him").

²³¹ See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 184. Damaška notes further that "notions of negotiation and bargaining between the state prosecutor and the defendant are out of place. Where an official close to the center of government begins to negotiate state interests with a private individual, in the perspective of hierarchical authority this practice approximates an abdication of state sovereignty." *Id.*; see also Jörg et al., *supra* note 112, at 50 ("An inquisitorial trial is a procedure between two essentially unequal parties.").

Continental prosecutors, who are hierarchically ordered and strictly accountable to their superiors.²³² Indeed, by allowing prosecutors to settle cases for agreed-upon sentences, plea bargaining sharply enhances the power of prosecutors at the expense of judges. Even in a lawyer-dominated criminal justice system like that of the United States, this transfer of judicial power to prosecutors can be controversial;²³³ in judge-dominated Continental systems, it is apt to prove untenable. Finally, a non-hierarchical structure allows the actors in an adversarial criminal justice system to step outside their roles, which are based on norms of conflict, to pursue their individual interests in cooperation.²³⁴

As an ideological matter, plea bargaining advances the goal of conflict resolution that underlies the non-interventionist governmental disposition.²³⁵ Indeed, by allowing the parties to resolve a criminal prosecution in a way that best meets their needs, plea bargaining exemplifies the American commitment to conflict resolution over the Continental emphasis on reaching accurate outcomes.²³⁶ Damaška has noted that in the United States, "the criminal justice system often seems satisfied with establishing merely a rough basis for punishment—sometimes a mere torso of actual wrongdoing—leaving the more precise delineation of factual parameters to the initiative of the parties."²³⁷ Consequently, as a result of plea bargaining, the defendant might

²³² See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 223.

²³³ See Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 13, at 933 (lamenting the way in which plea bargaining makes "figureheads of judges").

²³⁴ As Feeley describes it:

What emerges from the analysis of the operations of the criminal justice system is a clear picture of an organization which has highly specified rules and goals, but has virtually no instruments by which to enforce them. Rather than the highly rationalized, rule-bound and bureaucratically structured system that Weber depicted the process to be, one finds a highly decentralized and decidedly non-hierarchical system of exchange in which there are virtually no instruments to supervise practices and secure compliance to the formal goals of the organization.

Feeley, *supra* note 95, at 422.

²³⁵ Interestingly, one of the most ardent defenders of plea bargaining as an inherent feature of the adversarial system is Judge Mazza of Israel's Supreme Court. Judge Mazza has maintained that plea bargaining "satisfies the methodological and conceptual justifications that underpin the adversarial system" because that system does not just dictate a contest between two parties but also encourages dialogue to reduce the controversy. Harnon, *supra* note 191, at 259.

²³⁶ See Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at 684 (arguing that certain approaches to plea bargaining envisage "the process primarily as a form of dispute resolution rather than as a sentencing device").

²³⁷ DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 112.

plead guilty to a lesser crime that he clearly did not commit,²³⁸ or even plead guilty to a hypothetical crime that does not exist.²³⁹ Such resolutions would be impossible in legal systems more fully committed to reaching accurate outcomes.

Turning to party autonomy and participation, plea bargaining not only reflects those values but can be understood to enhance them.²⁴⁰ By allowing defendants to opt for certain but less severe punishment, plea bargaining is said to expand a defendant's choices and to afford him a measure of control over his fate.²⁴¹ Indeed, while critics cite the tendency of innocent defendants to self-convict as one of plea bargaining's gravest flaws, defenders of the practice trumpet this choice as one of plea bargaining's greatest advantages. Proponents of plea bargaining note that under any system of criminal justice, innocent defendants run the risk of conviction at trial.²⁴² Plea bargaining allows

²³⁸ See Alschuler, *Trial Judge's Role*, *supra* note 13, at 1141 (observing that charge bargaining frequently mislabels the conduct that it punishes so that "[g]uns are 'swallowed' as armed robberies become unarmed robberies; burglaries committed at night are transformed through prosecutorial wizardry to burglaries during the day; and defendants solemnly affirm that they have driven the wrong way on one-way streets in towns without one-way streets"); Colquitt, *supra* note 13, at 740-41 (discussing *People v. West*, 477 P.2d 409, 410 (Cal. 1970), in which no facts stated in the appellate opinion support the charge to which the defendant was allowed to plead); Langbein, *Torture and Plea Bargaining*, *supra* note 13, at 16 ("In the plea bargaining that takes the form of charge bargaining (as opposed to sentence bargaining), the culprit is convicted not for what he did, but for something less opprobrious.").

²³⁹ See Alschuler, *Trial Judge's Role*, *supra* note 13, at 1142 (noting that "[s]ome courts permit defendants to plead guilty even to offenses whose commission would be legally impossible"); Colquitt, *supra* note 13, at 741 (lamenting that some parties "agree to a settlement based on a plea to a nonexistent crime").

²⁴⁰ See Easterbrook, *supra* note 29, at 1978 (asserting that "autonomy and efficiency support" plea bargaining). Not all commentators agree, however. See Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at 695-703 (noting that restrictions on contractual autonomy are widely accepted and should be applicable to plea bargaining).

²⁴¹ See Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 685 (1975) (contending that the rules governing plea bargaining "are rooted in a basic commitment of the legal system to respect human dignity by protecting the right of every adult to determine what he shall do and what may be done to him"); Scott & Stuntz, *supra* note 97, at 1933 (asserting that defendants who refuse to bargain, go to trial, and are convicted "at least have the option, ex ante, of taking a different course of action" when plea bargaining is allowed); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1136 (1998) (relating that "some commentators suggest that a plea-bargaining system empowers defendants by giving them choices regarding the outcome over which they have no control in the trial process").

²⁴² See Easterbrook, *supra* note 29, at 1970 (attributing the incorrect separation of the guilty from the innocent not to a "flaw in the bargaining process but [to] a flaw at

innocent defendants to assess this risk and to opt for less severe punishment if it seems in their best interests to do so. Prohibiting plea bargaining, in the guise of concern for innocent defendants, amounts, on this view, to a paternalistic restriction on the defendants' legitimate choices.²⁴³

Plea bargaining, then, has flourished in the United States not only because it fills a functional need but also because it reflects and reinforces fundamental features of American structures of authority and ideology. Indeed, it is this ideological consistency that has caused many American scholars, judges, and practitioners to embrace plea bargaining not as a necessary evil but as a desirable feature of the American criminal justice system.²⁴⁴ The very fact that so few efforts have been made to restrict, or even to regulate, plea bargaining in the United States is in part a testament to plea bargaining's ideological "fit."²⁴⁵ Bargaining on the Continent, by contrast, is a different story. For many years, what little bargaining took place was shrouded in se-

trial"); *id.* at 1978 (asserting that the imperfections in plea bargaining "reflect the imperfections of an anticipated trial").

²⁴³ See *id.* at 1976-77 (arguing that liberty is too important to be left solely to the government and its agents, rather than to the criminal defendant); Scott & Stuntz, *supra* note 97, at 1925 (noting that "legal regulation is often motivated by paternalism").

²⁴⁴ See, e.g., *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the [criminal] process but a highly desirable part for many reasons."); *People v. Selikoff*, 318 N.E.2d. 784, 788-89 (N.Y. 1974) (asserting that "plea negotiation serves the ends of justice" and describing its many advantages); Church, *supra* note 100, at 513 ("[P]lea bargaining in its broadest sense—the implicit exchange of sentencing consideration for a defendant's admission of guilt—need not be unfair to either the defendant or the public."); Easterbrook, *supra* note 76, at 309, 308-22 ("[P]lea bargaining is desirable, not just defensible, if the system attempts to maximize deterrence from a given commitment of resources."); Easterbrook, *supra* note 29, at 1978 ("Plea bargains are compromises. Autonomy and efficiency support them."); Scott & Stuntz, *supra* note 97, at 1911 (arguing that contract theory supports plea bargaining). Of course, as noted above, see *supra* note 13, plea bargaining does have many foes.

²⁴⁵ It is notable that American efforts to restrict plea bargaining have been more successful in jurisdictions that, relatively speaking, were more bureaucratic and hierarchically organized. See Heumann & Loftin, *supra* note 106, at 401-02 (describing how, long before a plea-bargaining restriction was adopted, the Wayne County prosecutor had taken steps to bureaucratize the disposition process, so that "the probability of compliance with the ban on plea bargaining . . . was higher in Detroit than it would be in other large jurisdictions that are frequently unaccustomed to stringent organizational constraints"); Rubenstein & White, *supra* note 84, at 367-68 (observing that the Alaska Attorney General had been able to virtually eliminate widespread, explicit plea bargaining in part because "Alaska is a very unified jurisdiction from an administrative standpoint" with "all state prosecution personnel" answerable to the Attorney General).

crecy.²⁴⁶ Now plea bargaining analogues have come to light, but they remain extremely controversial.²⁴⁷ In a 1983 article, for instance, Albert Alschuler reported on interviews he had conducted with numerous Continental lawyers, academics, and judges, and noted that “these sources generally bridled at any suggestion that European sentencing practices might serve the same function as American plea bargaining; they used words like ‘ridiculous’ and ‘unthinkable.’”²⁴⁸ The hierarchical structure of Continental criminal justice systems also enables them to better regulate any bargaining that is permitted, and they have largely restricted bargaining to specific spheres that generally do not include violent crimes. In contrast, as George Fisher has shown, when bargaining emerged in the United States, it did so not in an organized, intentional manner, but rather sprung up in particular realms in which the legislature’s sentencing scheme enabled prosecutors to exercise control over the ultimate sentence via their charging decisions.²⁴⁹

In sum, the prevalence of plea bargaining in any given jurisdiction is a function of the jurisdiction’s practical need for alternative dispositions and of various structural and ideological features of the jurisdiction that can inhibit or facilitate the practice. The foregoing analysis

²⁴⁶ E.g., Herrmann, *supra* note 113, at 755 & n.2 (describing secrecy of German plea bargaining). As noted above, *supra* text accompanying note 188, plea bargaining was not publicly acknowledged even in England until the 1970s.

²⁴⁷ See, e.g., Damaška, *supra* note 136, at 483 (arguing that, although “various kinds of ‘deals’ with the defense have lately been legitimated in some continental jurisdictions, objections that these deals ‘ontologically’ belong in the sphere of civil litigation still resonate . . . and continue to make the extension of the polarization between party contest and official inquest controversial”); Frase & Weigend, *supra* note 113, at 344-45 (remarking that the legality and desirability of plea bargaining are still hotly debated in Germany); Herrmann, *supra* note 113, at 756 (maintaining that plea bargaining “has given rise to much criticism and heated controversy in German legal publications and in the media”); Jung, *supra* note 170, at 61-62 (describing the controversy in Germany). Hans-Heiner Kühne, for instance, complains that the “problem with these arrangements [reached through bargaining] is that they are reached *quasi* privately, outside the formal proceedings. Therefore, all procedural guarantees inherent in the formalized and public trial are running idle.” Kühne, *supra* note 162, at 157; see also Alfredo Etcheberry, *The Impact of the Nature and Volume of Crime and Administrative Processes on Criminal Justice Systems: New Trends in Combating Organized Crime*, in COMPARATIVE CRIMINAL JUSTICE SYSTEMS: FROM DIVERSITY TO RAPPROCHEMENT, *supra* note 52, at 333, 341-42 (asserting that plea bargaining within “certain limits is not to be rejected altogether . . . [b]ut if the prevailing result is one in which plea bargaining is the method used to handle a large majority of criminal cases, . . . it would amount to abandoning of the social function of a public trial and of legal punishment”).

²⁴⁸ Alschuler, *Implementing the Criminal Defendant’s Right to Trial*, *supra* note 13, at 987.

²⁴⁹ Fisher, *supra* note 24, at 868-916.

suggests a close relationship between the use of plea bargaining and the functional needs and theoretical underpinnings of adversary systems of procedure and, in particular, of the especially adversarial American criminal justice system. Efficiently circumventing elaborate and lengthy trial practices, satisfying the human need to cooperate, and advancing the goal of conflict resolution and the value of individual autonomy, plea bargaining has become a pervasive and entrenched feature of the American criminal justice system. By contrast, plea bargaining is of considerably less importance to Continental criminal justice systems. The greater efficiency of Continental procedures renders plea bargaining of lesser functional value to Continental countries, and the practice is theoretically less consistent with various structural and ideological features of Continental criminal justice systems. This background sets the stage for the following Part, which describes the structural and procedural features of the international criminal tribunals.

III. THE PROCEDURAL SYSTEMS OF THE INTERNATIONAL CRIMINAL TRIBUNALS

A. *Introduction to the Tribunals: Organization and Key Players*

War broke out in the Socialist Federal Republic of Yugoslavia (former Yugoslavia) in 1991 when many of its constituent republics sought independence.²⁵⁰ The Republic of Bosnia-Herzegovina saw particularly brutal fighting following its declaration of independence, and international observers soon began to document widespread violations of international humanitarian law.²⁵¹ In 1993, the United Na-

²⁵⁰ See generally M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 25-63 (1996) (describing the war in the former Yugoslavia); *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, paras. 9-10 (Aug. 2, 2001) [hereinafter *Krstic*, Judgement] (surveying political conditions in Yugoslavia from the late 1980s to 1992), at <http://www.un.org/icty/krstic/TrialCI/judgement/krs-tj010802e.pdf>.

²⁵¹ Following reports of "widespread violations of international humanitarian law," the United Nations in 1992 established a Commission of Experts to examine and analyze the information received. S.C. Res. 780, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48 (1992). The Commission of Experts confirmed that grave breaches, including "ethnic cleansing," mass killings, torture, and rape, were occurring. See Letter from the Secretary-General to the President of the Security Council (Feb. 10, 1993) (on file with author); see also Kelly Dawn Askin, *The ICTY: An Introduction to its Origins, Rules and Jurisprudence*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 13, 15-16. For a description of the difficulties involved in establishing the Commission and in the Commission's carrying out its mandate, see MICHAEL P.

tions Security Council (Security Council), determining that the situation constituted a "threat to international peace and security," established the ICTY to prosecute those accused of genocide, crimes against humanity, and violations of the laws and customs of war on the territory of the former Yugoslavia since January 1, 1991.²⁵²

A little more than a year later, brutal ethnic violence erupted in Rwanda, a small country in the Great Lakes Region of Africa, whose population has historically been divided into two predominant groups, the Hutu and the Tutsi.²⁵³ After an airplane carrying the country's Hutu president was shot down, extremist Hutu immediately began killing large numbers of Tutsi and moderate Hutu,²⁵⁴ massacring between 500,000 and one million people in one hundred days.²⁵⁵ Heeding calls for an international tribunal similar to the ICTY,²⁵⁶ the Security Council established the ICTR²⁵⁷ and accorded it jurisdiction similar to that of the ICTY.²⁵⁸ The seat of the ICTY is in The Hague, The Netherlands, and the seat of the ICTR is in Arusha, Tanzania.

SCHARF, BALKAN JUSTICE 37-49 (1997).

²⁵² S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); see also S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 28, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]. The ICTY has jurisdiction over genocide, crimes against humanity, and the laws or customs of war pursuant to articles 2, 3, 4, and 5 of the ICTY Statute. *Id.*

²⁵³ 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 48 (1998).

²⁵⁴ *Id.* at 53; Morris, *supra* note 21, at 351.

²⁵⁵ MORRIS & SCHARF, *supra* note 253, at 58.

²⁵⁶ On June 28, 1994, the Commission on Human Rights of the United Nations reported on the gravity of the Rwandan situation. *Report on the Situation of Human Rights in Rwanda*, U.N. ESCOR, 51st Sess. at 5-8, U.N. Doc. E/CN.4/1995/7 (1994). Two days later, the Security Council adopted Resolution 935 requesting the establishment of an impartial Commission of Experts to examine and analyze further evidence of grave violations of humanitarian law in Rwanda. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg., U.N. Doc. S/RES/935 (1994). The Commission recommended either the creation of a new international criminal tribunal or the expansion of the ICTY's jurisdiction to cover crimes in Rwanda. *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935*, Commission of Experts on Rwanda, 49th Sess., Annex to the Letter, at 31-32, U.N. Doc. S/1994/1125 (1994).

²⁵⁷ See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/RES/955 & Annex (1994) [hereinafter ICTR Statute].

²⁵⁸ Like the ICTY, the ICTR has jurisdiction over genocide and crimes against humanity, although the definition of crimes against humanity differs between the ICTY and ICTR statutes. Compare *id.* at art. 3, with ICTY Statute, *supra* note 252, at art. 5. As for war crimes, the ICTY has jurisdiction generally over "[v]iolations of the laws or customs of war" and specifically over grave breaches of the 1949 Geneva Conventions, *id.* at arts. 2-3, while the ICTR has jurisdiction over violations of article 3 common to the 1949 Geneva Conventions, ICTR Statute, *supra* note 257, at art. 4.

The Tribunals have adopted virtually identical procedural rules and are similarly organized.²⁵⁹ The Tribunals are comprised of three organs: the Chambers, consisting of three Trial Chambers and an Appeals Chamber; the Office of the Prosecutor (OTP); and the Registry, which assists both the Chambers and the OTP.²⁶⁰ The ICTY's Appeals Chamber and Prosecutor also serve the ICTR.²⁶¹ The Tribunals began with two Trial Chambers but soon added a third,²⁶² and the ICTY's Trial Chambers have recently been expanded by the addition of twenty-seven ad litem judges.²⁶³ The Tribunals have two official languages—English and French.²⁶⁴ Courtroom proceedings are typi-

²⁵⁹ See STEVEN S. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 176 (1997) (noting that "the Rwanda Tribunal's judges adopted the Rules of Procedure and Evidence of the Yugoslavia Tribunal, with only minor changes"); Gabrielle Kirk McDonald, *Trial Procedures and Practices*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, *supra* note 21, at 552 n.6.

²⁶⁰ ICTY Statute, *supra* note 252, at art. 11. The Registry has been described as both the "administrative arm of the Tribunal" as well as the "judicial lung" in terms of the management of facilities and of the administration of cases. ICTY Bulletin, No. 2, Jan. 22, 1996, at 2. The Registry provides the Tribunals' security and translation services both to investigators and the chambers. *Id.* It manages the system of legal aid to indigent defendants, runs the Victims and Witnesses Unit, and manages the Detention Center, which houses defendants. *Id.* For a more detailed description of Registry decisions and their appealability, see Christian Rohde, *Are Administrative Decisions from the Registry Appealable*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 509.

²⁶¹ ICTR Statute, *supra* note 257, at arts. 12(2), 15(3).

²⁶² See S.C. Res. 1166, at para. 1, U.N. Doc. S/Res/1166 (1998) (adding third Trial Chamber to ICTY); S.C. Res. 1165, at para. 1, U.N. Doc. S/Res/1165 (1998) (adding third Trial Chamber to ICTR).

²⁶³ Press Release, ICTY, Pool of 27 *Ad Litem* Judges Elected by U.N. General Assembly (June 13, 2001), at <http://www.un.org/icty/pressreal/p596-e.htm>. The ad litem judges do not participate in pre-trial matters but are appointed to participate in trials. Press Briefing, ICTY (Dec. 6, 2000), at <http://www.un.org/icty/briefing/PB061200.htm>. With the addition of the ad litem judges, each Trial Chamber can be divided into three sections containing both permanent and ad litem judges. ICTY Statute, *supra* note 252, at art. 12(1). The ICTR has recently asked the Security Council for ad litem judges. *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, U.N. ICTY, 56th Sess. at para. 5, U.N. Doc. A/56/351-S/2001/863 (2001) [hereinafter *ICTR 2001 Annual Report*]. These changes in the composition of the Trial and Appeals Chambers required the Security Council to amend the ICTY Statute. See U.N. Doc. S/Res/1329 (2000).

²⁶⁴ ICTY R.P. & EVID. 3(A) (2001), http://www.un.org/icty/basic/rpe/IT32_rev24.htm (last updated Aug. 5, 2002) [hereinafter ICTY RPE]; ICTR R.P. & EVID. 3(A) (2001), <http://www.ictr.org/wwwroot/ENGLISH/rules/index.htm> (last visited Oct. 10, 2002) [hereinafter ICTR RPE].

cally conducted in one of these two languages, or in Bosnian/Croatian/Serbian at the ICTY and Kinyarwanda at the ICTR and simultaneously translated into the other languages.²⁶⁵

1. The Prosecutor's Office

Carla Del Ponte, the Tribunals' current Prosecutor, heads the OTP and is assisted at each Tribunal by a Deputy Prosecutor. The bulk of the OTP's work is conducted in two divisions: the Investigations Division and the Prosecution Division, which are headed by a Chief of Investigations and Chief of Prosecution, respectively. The Investigations Divisions are themselves divided into numerous investigations teams; the ICTY's investigations teams are assigned to particular geographical areas,²⁶⁶ while the ICTR's investigations teams typically concentrate on prominent figures in the command structures of the government, the military, and other walks of life, such as the media, the clergy, and the business world.²⁶⁷ Each ICTY investigations team is headed by a team leader and a team trial attorney. Team leaders report to one of five Investigations Commanders, who themselves report to the Chief of Investigations.²⁶⁸

The Prosecutor and other high-level OTP officials exercise a fair degree of control both over the general scope of the investigations and over their particulars. Unlike a domestic police force, which normally investigates all serious crimes as they are brought to its attention, the Tribunals carefully select their targets of investigation,²⁶⁹ tak-

²⁶⁵ ICTY RPE, *supra* note 264, at R. 3; ICTR RPE, *supra* note 264, at R. 3.

²⁶⁶ The ICTY Prosecutor, for example, initially launched thirteen investigations, focusing on atrocities that occurred at

five concentration camps (the Susica camp in eastern Bosnia, the Omarska camp, the Trnopolje camp, the Keraterm camp, and the Luka camp in northwestern Bosnia); six Bosnian and Croat cities (Bosanski Šamac in northeastern Bosnia, Sarajevo and Stupni Do in central Bosnia, Srebrenica in eastern Bosnia, and Zagreb and Vukovar in Croatia); and two areas (the Prijedor district in northwestern Bosnia and the Lašva Valley in central Bosnia).

SCHARF, *supra* note 251, at 85.

²⁶⁷ Carla Del Ponte, Address to the United Nations Security Council by the Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (Nov. 27, 2001) [hereinafter Prosecutor's 2001 Address to the Security Council] (on file with author).

²⁶⁸ *Post Summary, 2001* (Office of the Prosecutor: Investigations Division) (on file with author).

²⁶⁹ Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 774-77 (1998) (describing the issues facing the Prosecutor in the selection of investigations).

ing account of various factual, legal, and political considerations,²⁷⁰ including the number of victims and scale of criminal activity,²⁷¹ the availability of evidence and witness testimony, the desire to focus attention on certain types of crime, including those involving sexual violence, the desire to develop and expand certain theories of criminal liability, such as command responsibility, and, particularly at the ICTY, the desire to prosecute some members of all the ethnic groups involved in the conflict.²⁷² The investigations, once selected, are carefully managed.

A successful investigation leads to an indictment. Once an indicted defendant is in custody, the case is assigned to a Senior Trial Attorney from the Prosecution Division who is assisted by a Legal Officer. The team trial attorney of the investigation also joins the trial team. The Senior Trial Attorneys typically have considerable trial experience, and the team trial attorneys, because they were involved in the investigations, bring considerable factual knowledge; thus, they make a formidable team. Nonetheless, in comparison to American prosecutors, their authority is fairly limited. The Prosecutor must approve each indictment and each amendment to an indictment. Al-

²⁷⁰ The ICTY's first Prosecutor, Richard Goldstone, not surprisingly, denied that political considerations in any way influenced the Tribunals' prosecutorial strategy. See RATNER & ABRAMS, *supra* note 259, at 172; SCHARF, *supra* note 251, at 86 (describing and doubting Goldstone's denial).

²⁷¹ Prosecutor's 2001 Address to the Security Council, *supra* note 267 (noting that "we have not investigated all crimes" and that "[w]e have concentrated on the areas in which the worst massacres occurred"). Del Ponte explained:

[C]hoice of cases to pursue is not at all simple. . . . [Although vital to prosecute the architects of the atrocities, for] the local people, the victims and the survivors, it was [the organizers at the district or local level] who brought their world to an end, not the remote Governmental architects of the overall policy of genocide. Unless these local leaders are brought to justice in both Rwanda and the former Yugoslavia, the ordinary population will not come to terms with the past, and the process of reconciliation and building a stable peace will suffer accordingly.

Id.

²⁷² See Akhavan, *supra* note 269, at 781-82 (discussing ethnic parity in prosecutions); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2039 (1998); Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L.J. 440, 448-49 (1999). There were no Muslims among the first fifty-two people indicted by the ICTY, but in response to criticism, the ICTY's Prosecutor "announced that he would make a concerted effort to indict a Muslim, to show the parties that the Tribunal was not one-sided." Michael Scharf & Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635, 645 (1996). The ICTR OTP has also recently begun investigating allegations of crimes committed by Tutsi armed forces. See Prosecutor's 2001 Address to the Security Council, *supra* note 267.

though the Senior Trial Attorneys are afforded considerable discretion over trial strategy and the theory of the case, most regularly consult with their superiors about any significant decisions, particularly any which might reflect on the reputation of the Tribunals or impact other cases. Specifically, the Prosecutor is kept informed of plea negotiations; she provides guidelines for the concessions that can be offered in a particular case and must approve the plea agreement.²⁷³

It is not surprising that the discretion of the Senior Trial Attorneys is comparatively limited given the small number of Tribunal cases and the gravity of the crimes prosecuted. An American prosecutor might dispose of dozens of cases in a given month, and he will usually plea bargain them or otherwise dispose of them in accordance with well-established practices that have been developed over a number of years. Few of these domestic cases will be related to one another and fewer still will generate any significant publicity. Under these circumstances, the prosecutor can be afforded considerable discretion over virtually all decisions, including plea bargaining. By contrast, Tribunal cases are few, highly publicized, and often interrelated. The Tribunals together have fewer than fifty cases currently in pre-trial or trial proceedings, so the Tribunals' Prosecutor has the practical ability to supervise their progress. Most of the cases generate considerable publicity,²⁷⁴ and many of them are interrelated in that they feature defen-

²⁷³ Interview with Daryl Mundis, Legal Officer, Legal Advisory Section, ICTY OTP (Aug. 19, 2001).

²⁷⁴ The Tribunals' activities are widely publicized both in the news media and in the legal literature. See, e.g., *Judge Releases Serb from Custody*, INT'L HERALD TRIBUNE, Aug. 30, 2001, at 5 (reporting on the provisional release of Biljana Plavšić); Steven Lee Myers, *The World; Wanted but how Badly?*, N.Y. TIMES MAG., May 21, 2000 (reporting on arrests of Tribunal indictees); Tina Rosenberg, *Defending the Indefensible*, N.Y. TIMES MAG., Apr. 19, 1998 (describing defense of Dr. Milan Kovacevic, charged with genocide); Marlise Simons, *An Unexpected Reversal of War-Crimes Convictions*, N.Y. TIMES, Oct. 29, 2001, at A7 ("[ICTY] judges quashed the conviction of three Croatian fighters . . . and reduced the sentences of two others in the same case."); Marlise Simons, *5 Bosnian Serbs Guilty of War Crimes at Infamous Camp*, N.Y. TIMES, Nov. 3, 2001, at A5 (reporting on the ICTY conviction of five Bosnian Serbs for their knowledge of and participation in the "rape, torture and killing of Muslim and Croat men and women under their control"); Marlise Simons, *Serb Charged in Massacre Commits Suicide*, N.Y. TIMES, June 30, 1998, at A6 (reporting the suicide of Slavko Dokmanovic, who had been indicted for aiding the massacre of several hundred people who had taken refuge in a civilian hospital); Marlise Simons, *Top Bosnian Serb Officer Arrested for U.N. Tribunal*, N.Y. TIMES, Aug. 26, 1999, at A10 (covering the arrest of General Momir Talic); Marlise Simons, *War Crimes Trial Seeks to Define the Balkan Conflict*, N.Y. TIMES, May 12, 1996, at A8 (describing prosecution strategy of defining what happened in Yugoslavia as an international conflict, not just a local civil war, for the purpose of trying the defendants on charges of "grave breaches of the laws of war"); Marlise Simons & Carlotta Gall, *The Handover of Milošević*, N.Y. TIMES, June 29, 2001, at A1; see also

dants who were the leaders of the former Yugoslavia or Rwanda and who collaborated to pursue common ends.²⁷⁵ Under these circumstances, there is an especially strong need for consistency in approach, including in the conduct of plea negotiations, and considerable involvement by the Prosecutor is to be expected.

2. The International Community and the Cooperation of States

Because the Security Council established the Tribunals as Chapter VII enforcement measures, their decisions and orders are binding on all states.²⁷⁶ States are required to cooperate with the Tribunals in

Patricia M. Wald, *Judging War Crimes*, 1 CHI. J. INT'L L. 189, 191 (2000) (noting that the ICTY and the ICTR have "spawned over 300 articles in the international journals, more than any other topic in international law in the last decade").

²⁷⁵ For instance, *Blaškić*, *Kordić*, and *Aleksovski* all concerned Bosnian Croatian defendants charged with committing war crimes and crimes against humanity against Muslims in the Lašva Valley area of Central Bosnia. Blaškić was the commander of the Croatian Defense Council armed forces headquarters during the relevant period, Prosecutor v. Blaškić, Case No. IT-94-14-T, Judgement, para. 9 (Mar. 3, 2000) [hereinafter *Blaškić*, Judgement], at <http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf>, Čerkez was commander of a brigade of the Croatian Defense Council, Kordić was the most important Bosnian Croatian political figure in the area, Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, para. 1 (Feb. 26, 2001) [hereinafter *Kordić*, Judgement], at <http://www.un.org/icty/kordic/trialc/judgement/kor-tj010226e.pdf>, and Aleksovski was the commander of the Kaonik prison, which detained Muslim men captured during the conflicts involving Blaškić, Kordić, and Čerkez, Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, paras. 23, 90 (June 25, 1999) [hereinafter *Aleksovski*, Judgement], at <http://www.un.org/icty/aleksovski/trialc/judgement/ale-tj990625e.pdf>. Similarly, the indictments against Biljana Plavšić and Momčilo Krajisnik note their association with indictee Radovan Karadžić, Prosecutor v. Krajisnik, Case No. IT-00-39-I, Amended Indictment, para. 2 (Mar. 21, 2000), at <http://www.un.org/icty/indictment/english/kra-lai000321e.htm>; Prosecutor v. Plavšić, Case No. IT-00-40-I, Indictment, para. 2 (Apr. 7, 2000), at <http://www.un.org/icty/indictment/english/pla-ii000407e.htm>, and their high-ranking positions, as members of the collective Presidency of Bosnia-Herzegovina, will likely mean that the cases against all three will also be intertwined with that of Slobodan Milošević for crimes committed in Bosnia.

As for the ICTR, the Prosecutor has endeavored to join related cases, *see infra* text accompanying note 377, but she has not always been successful, and some related cases will be tried separately. See Alison Campbell, *Rwandan War Crimes Trials—Appeal Court Decision a Setback for Collective Trials*, INTERNEWS (June 8, 1998) (stating that the ICTR Appeals Chamber "rejected an appeal from the Prosecutor which could have opened the way for twenty-nine people to be indicted together"), available at http://www.internews.org/activities/ICTR_Reports/ICTRNewsJun98.html.

²⁷⁶ See U.N. CHARTER art. 25. The United Nations considered establishing the ICTY by means of a treaty but determined that concluding a treaty would take too much time, and the resulting entity might be undermined if ratifications were not received from "those States which should be parties to the treaty if it is to be truly effective." *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*

their investigations and prosecutions,²⁷⁷ and in particular must “comply without undue delay” with any request to identify and locate persons, to take testimony and produce evidence, and to arrest or detain persons, among other things.²⁷⁸ State cooperation, or the lack thereof, has proven a contentious issue at the ICTY in particular.²⁷⁹ During its

at para. 20, U.N. Doc. S/25704 (1993); *see also* SCHARF, *supra* note 251, at 54-55 (“[I]t would take time to negotiate a treaty and possibly years before enough governments ratified it.”). The defendant in the ICTY’s first trial maintained that the Tribunal was “invalid under the Charter of the United Nations” or “not duly established by law,” contentions that the Tribunal rejected. *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras. 1-44 (Oct. 2, 1995), reprinted in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998, at 33 (André Klip & Göran Sluiter eds., 1999) [hereinafter 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS].

²⁷⁷ ICTY Statute, *supra* note 252, at art. 29(1); ICTR Statute, *supra* note 257, at art. 28(1). One ICTY official has described state cooperation, and particularly the cooperation of the States of the former Yugoslavia, as “one of the most delicate areas in the work of the Tribunal.” Nikolaus Toufar, *State Request for Review*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 525, 525.

²⁷⁸ ICTY Statute, *supra* note 252, at art. 29(2); ICTR Statute, *supra* note 257, at art. 28(2). The U.N. Secretary-General’s Report, appended to Security Council Resolution 827, establishing the ICTY, states that an “order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.” *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 276, at para. 126.

²⁷⁹ The countries to which ICTR defendants fled have typically been more cooperative regarding their arrest and transfer than the states of the former Yugoslavia. In January 1995, the leaders of Burundi, Kenya, Rwanda, Tanzania, Uganda, Zaire, and Zambia agreed to transfer defendants to the ICTR. Stuart Beresford, *In Pursuit of International Justice: The First Four-Year Term of the International Criminal Tribunal for Rwanda*, 8 TULSA J. COMP. & INT’L L. 99, 109 (2000); *see also* *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, para. 8 (June 7, 2001) [hereinafter *Bagilishema*, Judgement] (stating that the defendant was arrested in South Africa), at <http://www.ictr.org/wwwroot/ENGLISH/cases/Bagilishema/judgement/index.htm>; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, paras. 14-15 (May 21, 1999) (noting that defendant Kayishema was arrested in Zambia and defendant Ruzindana was arrested in Kenya), at <http://www.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, para. 9 (Sept. 2, 1998) [hereinafter *Akayesu*, Judgement] (explaining that the defendant was arrested in Zambia), at <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>; Press Release, ICTR, ICTR/INFO-9-2-277.EN (July 12, 2001), at <http://www.ictr.org/ENGLISH/PRESSREL/2001/277.htm> (reporting on the arrests of three defendants in Switzerland, The Netherlands, and Belgium); Press Release, ICTR, ICTR/INFO-9-2-254.EN (Nov. 25, 2000), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2000/251.htm> (reporting the arrest of defendant Sagahutu in Denmark); Press Release, ICTR, ICTR/INFO-9-2-247.EN (Oct. 30, 2000), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/2000/247.htm> (announcing

first two years of existence, the ICTY had no defendants in custody. Duško Tadić was not transferred to the ICTY until 1995, and another year passed before any other indictees were transferred.²⁸⁰ The NATO peace-keeping force stationed in Bosnia initially was not instructed to arrest Tribunal indictees;²⁸¹ it was not until mid-1997 that the U.N. force in Croatia and then NATO in Bosnia began detaining indictees.²⁸² Cooperation has improved in recent years, particularly follow-

that defendant Muvunyi was arrested, detained, and transferred by the United Kingdom). But some African states have refused to cooperate. *E.g.*, Press Release, ICTR, ICTR/INFO-9-2-254.EN (Dec. 13, 2000), at <http://www.icttr.org/wwwroot/ENGLISH/PRESSREL/2000/254.htm> (reporting the Prosecutor's observation that the "arrests of some indicted individuals was being hampered by two African countries which were harbouring them").

²⁸⁰ Askin, *supra* note 251, at 16-17. The President of the ICTY has made eleven reports to the Security Council regarding lack of state cooperation, with the majority of these complaining about the Federal Republic of Yugoslavia's refusal to arrest persons indicted by the Tribunal. Daryl A. Mundis, *Reporting Non-Compliance: Rule 7bis, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 421, 424-36 (describing these reports). In response, the Security Council has typically issued Presidential Statements which might, for instance, "deplore the failure . . . of the Federal Republic of Yugoslavia to execute arrest warrants issued by the Tribunal" *Statement by the President of the Security Council*, U.N. SCOR, U.N. Doc. S/PRST/1996/23 (1996). These Statements seemed to have little, if any, effect.

State cooperation in the gathering of evidence was a problem in the Tribunal's first trial in the Tadić case. On appeal, Tadić maintained that the Republika Srpska intimidated certain defense witnesses into not appearing at trial, thus violating the principle of equality of arms and prejudicing his right to a fair trial. Prosecutor v. Tadić, Case No. IT-94-I-A, Opinion and Judgement, paras. 29, 34 (July 15, 1999), at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>. After canvassing the precedents of the European Court of Human Rights addressing domestic proceedings, the Appeals Chamber noted that domestic courts have the capacity to control matters that could materially affect the fairness of a trial. The ICTY, by contrast, must rely on the cooperation of States but has no power to compel them to cooperate. *Id.* at para. 51. Consequently, the Appeals Chamber held that the principle of equality of arms must be given a more liberal interpretation than applicable in domestic courts, and it specified various practical measures that the Trial Chambers could adopt in seeking to assist a party in presenting its case, including taking evidence by video link, summoning witnesses and ordering their attendance, and issuing binding orders to States for the taking and production of evidence. *Id.* at para. 52.

²⁸¹ See THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 281 (1998); Akhavan, *supra* note 269, at 795-96 (discussing the international community's "unwilling[ness] to make the sacrifices necessary to arrest indicted persons"); Gabrielle Kirk McDonald, *Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*, 24 HASTINGS INT'L & COMP. L. REV. 155, 160 (2001); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 358 (1999); Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 15, 22 (1997) (arguing that NATO's failure to arrest Karadžić and Mladić "is accurately seen as a symptom of the international community's ambivalence towards the Tribunal").

²⁸² McDonald, *supra* note 281, at 161.

ing the October 2000 ouster of former Yugoslav President Slobodan Milošević.²⁸³ In June 2001, the new Yugoslav government succumbed to Western pressure and transferred Milošević to the ICTY to stand trial on charges of war crimes and crimes against humanity in Kosovo.²⁸⁴ Milošević's appearance increased the ICTY's authority and motivated further cooperation by the Balkan states.²⁸⁵ Still, problems persist. Former Bosnian Serb leader Radovan Karadžić and his military commander Ratko Mladić remain at large although they were indicted six years ago, and the ICTY continues to have difficulty obtaining access to documents, archives, and witnesses.²⁸⁶

²⁸³ Press Release, ICTY, Milomir Stakic Transferred to the ICTY (Mar. 23, 2001) (reporting on Yugoslavia's arrest and transfer of Milomir Stakic), at <http://www.un.org/icty/pressreal/p581e.htm>; Press Release, ICTY, Dragen Obrenovic Transferred Into the Custody of the International Tribunal (Apr. 16, 2001) (reporting on the arrest and transfer of Dragen Obrenovic by the Stabilization Force in Bosnia and Herzegovina), at <http://www.un.org/icty/pressreal/p586e.htm>; see also Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, Address to the United Nations General Assembly (Nov. 27, 2001) (noting that "the number of people who have been arrested or who have voluntarily surrendered has multiplied in the last few months"), at <http://www.icty.org/wwwroot/ENGLISH/speeches/jorda271101scc.htm>.

²⁸⁴ See Marlise Simons & Carlotta Gall, *Milošević is Given to the U.N. for Trial in War Crimes Case*, N.Y. TIMES, June 29, 2001, at A1 ("Milosevic . . . was the first former head of state delivered by a government to face an international war crimes court."). Milošević was arrested by Yugoslav authorities in April 2001, Steven Erlanger & Carlotta Gall, *Milošević Arrest Came with Pledge for a Fair Trial*, N.Y. TIMES, Apr. 2, 2001, at A1, an arrest which largely resulted from American legislation that conditioned further aid to Yugoslavia on its cooperation with the ICTY, Richard Holbrooke, *Risking a New War in the Balkans*, N.Y. TIMES, Apr. 8, 2001, §4, at 15.

²⁸⁵ For instance, soon after Milošević was transferred, the Bosnian Serb government of the Republika Srpska indicated that it would be willing to arrest indicted suspects. Marlise Simons, *Bosnian Serbs Are Ready to Seize Men for Tribunal*, N.Y. TIMES, July 5, 2001, at A7. Croatia, also under intense Western pressure to cooperate with the Tribunal, decided in July 2001 to send two indictees to the Tribunal, Carlotta Gall & Marlise Simons, *Croatia in Turmoil After Agreeing to Send 2 to Tribunal*, N.Y. TIMES, July 9, 2001, at A3, and in August 2001, the authorities of the Federation of Bosnia-Herzegovina for the first time arrested Bosnian Muslim indictees, Press Release, ICTY, Arrest of General Enver Hadzihasanovic, General Mehmed Alagic and Colonel Amir Kubura (Aug. 3, 2001), at <http://www.un.org/icty/pressreal/p610-e.htm>; 3 *Bosnian Muslim Officers Charged: Hague Court Indictments Cite Atrocities Against Serbs and Croats*, INT'L HERALD TRIB., Aug. 4-5, 2001, at 4.

²⁸⁶ E.g., Prosecutor's 2001 Address to the Security Council, *supra* note 267; ICTY, Weekly Press Briefing (Oct. 3, 2001), at <http://www.un.org/icty/briefing/PB031001.htm>; ICTY, Weekly Press Briefing (Nov. 8, 2000), at <http://www.un.org/icty/briefing/PB081100.htm>.

B. *The Tribunals' Procedural and Evidentiary Systems*

The Statutes of the ICTY and ICTR authorize the Tribunals' judges to adopt Rules of Procedure and Evidence (RPE or rules).²⁸⁷ Although the Tribunals' initial set of rules contained both adversarial and non-adversarial features, many commentators viewed the amalgam as a whole to bear more affinity to adversarial systems.²⁸⁸ Recent amendments to the rules, however, have tilted the balance in the other direction. For reasons that will be developed in Part IV, Tribunal trials are extremely lengthy and costly, and recent rule amend-

²⁸⁷ ICTY Statute, *supra* note 252, at art. 15; ICTR Statute, *supra* note 257, at art. 14.

²⁸⁸ See HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 142 (1999) (stating the Tribunal's RPE, as adopted in 1994 and amended in 1996, "tilt toward the common-law, adversarial mode because so many of the judges come from that system"); RATNER & ABRAMS, *supra* note 259, at 169 (stating in 1997 that "[a]lthough something of a hybrid, the [ICTY's] procedure more closely resembles an adversarial model, rather than the inquisitorial system characteristic of civil law countries"); SCHARF, *supra* note 251, at 67 ("The judges [initially] decided to embrace a largely adversarial approach to their Rules of Procedure, rather than the inquisitorial system prevailing in continental Europe."); Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 524 (1997) ("[T]he Tribunal's Rules of Evidence and Procedure are based largely on an adversarial model and do not follow the inquisitorial approach used in civil law systems."); Daryl A. Mundis, *From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367, 368 (2001) (reporting that "the first few trials at the [ICTY] closely resembled common law criminal trials"); Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 508 (1994) (finding that, in 1994, "the rules tend[ed] to lean more toward the common law adversarial system than toward the civil law inquisitorial system, in keeping with the Statute's preference for a modified adversarial model"); Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 537 (2001) ("In their original form as adopted in 1994, the adversarial mode of trial predominated in the Rules."). *But see* Robinson, *supra* note 52, at 588 (describing the "legal system established by the [ICTY] Statute and Rules [as] neither common law accusatorial, nor civil law inquisitorial, nor even an amalgam of both; it is *sui generis*").

Tribunal judges are elected for a four-year term by the General Assembly from a list of nominees submitted by states. ICTY Statute, *supra* note 252, at art. 13*bis*. The ICTY's first judges came from countries with a variety of legal backgrounds, with no one procedural system clearly dominating. Specifically, the ICTY's first judges were Adolphus Godwin Karibi-White of Nigeria, Rustam Sidhwa of Pakistan, Elisabeth Odio-Benito of Costa Rica, Gabrielle Kirk McDonald of the United States, Jules Deschênes of Canada, Antonio Cassese of Italy, George Michel Abi-Saab of Egypt, Li Haopei of China, Claude Jorda of France, Lal Chand Vohrah of Malaysia, and Sir Ninian Stephen of Australia. Press Release, ICTY, International War Crimes Tribunal for the Former Yugoslavia Opened on 17 November 1993 in The Hague (Nov. 15, 1993) (on file with author).

ments have introduced more non-adversarial features in an effort to simplify and expedite proceedings.²⁸⁹

1. Pre-trial Procedures

As in Anglo-American countries, the Statutes of the Tribunals vest in the Prosecutor, rather than the judges, the responsibility for investigating and prosecuting the crimes within the Tribunals' jurisdiction.²⁹⁰ Once formally charged, Tribunal defendants may plead guilty or not guilty to each count in the indictment.²⁹¹ If the defendant pleads guilty, no trial is held, and the parties proceed directly to a pre-sentencing hearing.²⁹² If the defendant pleads not guilty, the parties prepare for trial. As part of this preparation, the Tribunals require substantial disclosure by both parties. The prosecution must disclose, among other things, a witness list which must summarize each witness's testimony, an exhibits list;²⁹³ all material which accompanied the indictment when confirmation was sought; copies of all statements of witnesses that the prosecution intends to call at trial;²⁹⁴ and any exculpatory evidence.²⁹⁵ Upon request, the prosecution must allow the defense to inspect certain books, documents, photographs, and tangible

²⁸⁹ See generally McDonald, *supra* note 281, at 161-62; Mundis, *supra* note 288, at 382; Daryl A. Mundis, *The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals*, 1 INT'L CRIM. L. REV. 191, 205 (2002).

²⁹⁰ ICTY Statute, *supra* note 252, at art. 16(1); ICTR Statute, *supra* note 257, at art. 15(1). In some Continental countries, judges bear at least some of this responsibility, see Brouwer, *supra* note 108, at 212-13 (describing tasks undertaken by the French *juge d'instruction*); Pradel, *supra* note 118, at 110, 125-26 (describing French *juge d'instruction*); Van den Wyngaert, *supra* note 114, at 6-7 (describing the Belgian *juge d'instruction*), although even in these countries many of the investigative functions previously carried out by the judge have been transferred to the police and prosecutor, see *supra* note 119.

²⁹¹ ICTY RPE, *supra* note 264, at R. 62(iii); ICTR RPE, *supra* note 264, at R. 62(A)(iii).

²⁹² ICTY RPE, *supra* note 264, at R. 62bis; ICTR RPE, *supra* note 264, at R. 62(B). Before accepting a guilty plea, the Trial Chamber must be satisfied that the plea (1) has been made voluntarily; (2) is informed; (3) is not equivocal; and (4) is supported by a sufficient factual basis for the crime and the defendant's participation in it. ICTY RPE, *supra* note 264, at R. 62bis; ICTR RPE, *supra* note 264, at R. 62(B); see also Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 8 (Oct. 7, 1997) [hereinafter Erdemović, Joint Opinion of Judges McDonald and Vohrah], at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm>.

²⁹³ ICTY RPE, *supra* note 264, at R. 65ter(E).

²⁹⁴ *Id.* at R. 66(A)(i)-(ii); ICTR RPE, *supra* note 264, at R. 66(A)(i)-(ii).

²⁹⁵ ICTY RPE, *supra* note 264, at R. 68; ICTR RPE, *supra* note 264, at R. 68.

objects.²⁹⁶ As for the defense, it must notify the prosecution if it intends to raise an alibi defense or any special defenses, such as lack of mental responsibility, and must provide certain information regarding the defenses.²⁹⁷ It must also provide the prosecution with a witness list, a summary of witness testimony, and an exhibits list,²⁹⁸ and if the defense exercises its right to inspect tangible objects within the custody or control of the prosecution, it must make available those same kinds of objects within its custody or control.²⁹⁹ The Tribunals' disclosure provisions thus steer a middle course between those typically found in adversarial and non-adversarial systems. The Tribunals do not require as much disclosure from the prosecution as most Continental countries, which make the prosecutor's entire file available to the defendant.³⁰⁰ However, they do require more disclosure than that typically required of American defendants³⁰¹ and prosecutors, since some of the latter are required only to disclose exculpatory evidence and statements of the defendant in their possession.³⁰²

²⁹⁶ The objects must be "in the Prosecutor's custody or control" and "material to the preparation of the defence," or "intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused." ICTY RPE, *supra* note 264, at R. 66(B); ICTR RPE, *supra* note 264, at R. 66(B).

²⁹⁷ ICTY RPE, *supra* note 264, at R. 67(A)(ii)(a)-(b); ICTR RPE, *supra* note 264, at R. 67(A)(ii)(a)-(b). With respect to an alibi defense, the defendant must inform the prosecution of the places where they claim to have been, and with respect both to alibis and special defenses, the defendant must disclose the names and addresses of the witnesses and any other evidence on which they intend to rely. ICTY RPE, *supra* note 264, at R. 67(A)(ii)(a)-(b); ICTR RPE, *supra* note 264, at R. 67(A)(ii)(a)-(b).

²⁹⁸ ICTY RPE, *supra* note 264, at R. 65*ter*(G).

²⁹⁹ *Id.* at R. 67(C); ICTR RPE, *supra* note 264, at R. 67(C). For a discussion of the many unresolved questions regarding these disclosure provisions, see generally Renee Pruitt, *Discovery: Mutual Disclosure, Unilateral Disclosure and Non-Disclosure Under the Rules of Procedure and Evidence*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 305.

³⁰⁰ *Supra* text accompanying note 113.

³⁰¹ Only about one dozen American states require defendants to provide witness statements or give notice of defenses other than alibi and insanity, and only about half the states require disclosure of witness lists. LAFAYE ET AL., *supra* note 12, at 943-44.

³⁰² See Craig Bradley, *United States*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 23, at 395, 416-17; van Kessel, *supra* note 54, at 414 (noting "the American system's aversion to unlimited pretrial discovery in criminal cases"). In recent years, American jurisdictions have begun granting criminal defendants greater discovery rights, see LAFAYE ET AL., *supra* note 12, at 913-14, but those rights are still comparatively limited. Only slightly more than one-third of American jurisdictions require prosecutors to disclose the statements of co-defendants and witnesses, but a majority of American jurisdictions now require the disclosure of scientific reports relating to the case, the defendant's criminal record, and documents and tangible items which will be used at trial. *Id.* at 922-26. For a discussion of the disclosure obligations placed on British and Irish prosecutors, see Feldman, *supra* note 183, at 119-21; Finbarr McAuley

Initially, the Tribunals left the parties to prepare for trial without significant interference or oversight. Early Tribunal trials were labeled excessively lengthy and inefficient, however, so the Tribunals, and especially the ICTY, have amended their rules to allow the judges to exercise greater control over both the pre-trial phase and the trial itself. The ICTY assigns a pre-trial judge soon after the defendant's initial appearance and directs the judge to "ensure that the proceedings are not unduly delayed and . . . [to] take any measure necessary to prepare the case for a fair and expeditious trial."³⁰³ The pre-trial judge carries out this directive by, among other things, establishing a work plan, which sets forth the parties' obligations and the dates upon which they must be met.³⁰⁴ The pre-trial judge also conducts status conferences, which, among other things, "organize exchanges between the parties."³⁰⁵ After preliminary motions are disposed of, the pre-trial judge orders the parties to file a series of documents, including pre-trial briefs, witness lists, and exhibits lists.³⁰⁶ With this information, the pre-trial judge records the points of agreement and disagreement over facts and law, and presents to the Trial Chamber, among other things, all of the parties' filings and the transcripts of the status conferences.³⁰⁷ Both Tribunals now require the Trial Chambers to convene pre-trial conferences³⁰⁸ and permit them to convene pre-defense conferences.³⁰⁹ The Trial Chambers are authorized during these conferences to set the number of witnesses that the prosecution and defense may call and to determine the time available to both par-

& John O'Dowd, *Ireland*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, *supra* note 114, at 185.

³⁰³ ICTY RPE, *supra* note 264, at R. 65ter(A)-(B). To further expedite proceedings, the ICTY has recently begun to grant legal officers greater responsibility over the pre-trial stage in order to give the judges more time to try the cases. See Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, Address to the United Nations General Assembly, *supra* note 283 (endorsing reforms that give judges "a more active role both during the pre-trial phase and the trial itself").

³⁰⁴ ICTY RPE, *supra* note 264, at R. 65ter(D).

³⁰⁵ *Id.* at R. 65bis(A). The ICTR permits a Trial Chamber or judge to convene a status conference. ICTR RPE, *supra* note 264, at R. 65bis.

³⁰⁶ ICTY RPE, *supra* note 264, at R. 65ter(E)-(G); see also *id.* at R. 90(G) (authorizing a Trial Chamber to "refuse to hear a witness whose name does not appear" on the witness list). The ICTR permits, but does not require, a Trial Chamber or pre-trial judge—if one is designated—to order the filing of the above-mentioned documents. ICTR RPE, *supra* note 264, at R. 73bis.

³⁰⁷ ICTY RPE, *supra* note 264, at R. 65ter (H), (L).

³⁰⁸ *Id.* at R. 73bis(A); ICTR RPE, *supra* note 264, at R. 73bis(A).

³⁰⁹ ICTY RPE, *supra* note 264, at R. 73ter(A); ICTR RPE, *supra* note 264, at R. 73ter(A).

ties for presenting their evidence.³¹⁰ These pre-trial procedures resemble the procedures of many Continental countries, which typically grant judges considerable authority to gather information and manage the case prior to trial.³¹¹ Such management typically results in a more efficient, streamlined trial.

2. Trial Procedures

The Tribunals' trial procedures are generally adversarial in nature, but again, recent amendments to the rules have introduced more non-adversarial elements in the hopes of shortening the trials. Tribunal trials, like those in Anglo-American countries, are divided into a prosecution "case," in which the prosecution presents evidence and calls witnesses who will testify on its behalf, and a defense "case," in which the defense team does the same.³¹² The presentation of evi-

³¹⁰ ICTY RPE, *supra* note 264, at R. 73bis(C), (E) and R. 73ter(C), (E); *see also* ICTR RPE, *supra* note 264, at R. 73bis(C)-(D) and R. 73ter(C)-(D) (outlining judicial authority over the introduction and examination of witnesses); Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 197, 211 (noting that R. 65ter was adopted to codify a practice by which "[j]udges had started taking a more active role in trials by questioning counsel and witnesses, cutting off irrelevant or repetitive testimony and excluding witnesses whose testimony is cumulative or of no material assistance with respect to disputed issues"); Mundis, *supra* note 288, at 374-75 (describing the pre-trial conference in the Krnojelac case, conducted under a previous version of the rules which did not authorize the Trial Chambers to set the number of witnesses, and in which Judge Hunt, among other things, encouraged the prosecution to reduce the number of witnesses; encouraged the prosecution to withdraw counts under Article 2 of the ICTY Statute because they would be too time-consuming to prove and similar counts were charged under Articles 3 and 5 of the Statute; and elicited several admissions from the defense that the prosecution had previously attempted to elicit without success).

³¹¹ *See* Brouwer, *supra* note 108, at 209 (explaining that French criminal law regards the pre-trial and trial phases "as one continuum and has to a considerable extent judicialized the pre-trial phase"); Almiro Rodrigues & Cécile Tournaye, *Hearsay Evidence*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 291, 293 (describing the non-adversarial judge's active participation in the search for evidence); *see also supra* text accompanying notes 119-122.

³¹² ICTY RPE, *supra* note 264, at R. 85(A); ICTR RPE, *supra* note 264, at R. 85(A). After the prosecution's case closes, the Trial Chamber may enter a judgment of acquittal if it finds that the evidence is insufficient to sustain a conviction on the charges. ICTY RPE, *supra* note 264, at R. 98bis; ICTR RPE, *supra* note 264, at R. 98bis. The Trial Chamber in *Prosecutor v. Jelisić*, for example, *proprio motu*, acquitted the defendant of genocide at the conclusion of the prosecution's case. *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgement, paras. 15-16 (Dec. 14, 1999) [hereinafter *Jelisić*, Judgement], at <http://www.un.org/icty/brcko/trialcl/judgement/jel-tj991214e.pdf>; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeal, paras. 30-40 (July 5, 2001) [hereinafter *Jelisić*, Ap-

dence and witness testimony also follows the adversarial model; the parties examine the witnesses they call, and opposing parties can cross-examine those witnesses.³¹³ At the same time, the rules authorize Tribunal judges to “exercise control over the mode and order of interrogating the witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth and avoid needless consumption of time.”³¹⁴ Tribunal judges may also order the submission of evidence; they may summon wit-

peal] (reversing Trial Chamber’s acquittal), at <http://www.un.org/icty/brcko/appeal/judgement/jel-aj010705.pdf>. In most cases, however, the Trial Chamber acts in response to a defendant’s motion. See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Decision on Defence Motions for Acquittal, paras. 16, 25 (Dec. 15, 2000) (acquitting defendants on charges relating to crimes committed in the Keraterm and Trnopolje camps) (on file with author); *Prosecution v. Kunarac*, Case No. IT-96-23-T, Decision on Motion for Acquittal, para. 28 (July 3, 2000) (acquitting defendant Kunarac of plunder and holding that defendant Vukovic had “no case to answer” in relation to charges of rape and torture), at <http://www.un.org/icty/foca/trialc2/decision-e/00703DC213246.htm>; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-PT, Decision on Defence Motions for Judgement of Acquittal, paras. 35-36 (Apr. 6, 2000) (holding that Kordić and Čerkez had “no case to answer” with respect to plunder at twelve locations but rejecting the remainder of the defendants’ claims), at <http://www.un.org/icty/kordic/trialc/decision-e/00406DC512861.htm>.

In Continental countries, there is no division of evidence into one or the other side’s “case”; rather the “trial is in the nature of an official inquiry presided over by the judge: whatever evidence he decides to examine becomes *his*—or, rather, the *court’s*—evidence. Accordingly, there is strictly speaking no ‘prosecutor’s case’ and there are no ‘witnesses for the prosecution.’” Damaška, *supra* note 52, at 525; see also Langbein, *supra* note 118, at 201 (observing that in Germany, “there is no occasion to think of the ‘prosecution case’”); cf. van Kessel, *supra* note 54, at 442-43 (“[W]itnesses technically do not belong to the parties, but are called by the court.”).

³¹³ ICTY RPE, *supra* note 264, at R. 85(B); ICTR RPE, *supra* note 264, at R. 85(B); see also ICTY Statute, *supra* note 252, at art. 21(4)(e) (granting a defendant the right to “examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”); ICTR Statute, *supra* note 257, at art. 20(4)(e) (same). See generally Rodrigues & Tournaye, *supra* note 311, at 295-96 (observing that the “presentation of evidence is more akin to the adversarial system than that in the inquisitorial system” because “[t]he parties control the evidence adduced and they can agree on the issues they want to debate at trial”).

³¹⁴ ICTY RPE, *supra* note 264, at R. 90(F). This provision was added to Rule 90 in April 2001 seemingly in response to the suggestions of an expert group that examined the operation and functioning of the Tribunals. The expert group encouraged the judges to take more control over the examination of witnesses because it found the parties’ examination to be “characterized by the absence of crisp, focused questions and by long, rambling answers tending to be . . . vague, repetitive and irrelevant.” Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT’L L. 759, 764 (2000).

nesses,³¹⁵ and they may question those witnesses³¹⁶—judicial tasks common in Continental countries.³¹⁷ Although Tribunal judges have always had the authority to perform these functions, they have recently made greater use of that authority in order to expedite proceedings.³¹⁸

The Tribunals' evidentiary rules are primarily Continental in character in that they are few and relatively simple.³¹⁹ In contrast to the voluminous and complicated evidentiary codes found in American jurisdictions, the Tribunals address the bulk of evidentiary matters in one rule, which provides, among other things, that a Chamber "may admit any relevant evidence which it deems to have probative value."³²⁰

³¹⁵ ICTY RPE, *supra* note 264, at R. 98; ICTR RPE, *supra* note 264, at R. 98; *see also* Robinson, *supra* note 52, at 583-84 (noting that in Blaškić, the Trial Chamber called nine witnesses); Blaškić, Judgement, *supra* note 275, at para. 56 & nn.114-19 (describing the Trial Chamber's summoning of various witnesses).

³¹⁶ ICTY RPE, *supra* note 264, at R. 85(B); ICTR RPE, *supra* note 264, at R. 85(B).

³¹⁷ *See supra* text accompanying notes 121-22.

³¹⁸ *See* Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, Address to the United Nations General Assembly, *supra* note 283 (explaining that judges ought to have a more active role in expediting proceedings); Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda, Address to the United Nations Security Council (Nov. 27, 2001) (reporting the consensus among Tribunal judges "that there was a need for greater control over the presentation of evidence by the parties"), at <http://www.ictcr.org/wwwroot/ENGLISH/speeches/pillay271101sc.htm>. For instance, in *Prosecutor v. Kordić*, the prosecution planned to call twenty-seven rebuttal witnesses. In order to expedite the trial, the Trial Chamber refused to allow that many witnesses, ordering that "only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case-in-chief" would be permitted. Mundis, *supra* note 288, at 376; *see also* Jelisić, Appeal, *supra* note 312, at para. 16 (observing that "in long and complicated cases, such as most of those which come to the Tribunal, it is necessary for the Trial Chamber to exercise control over the proceedings" and further noting that "control may well need to be vigorous, provided of course that it does not encroach on the right of a party to a fair hearing").

The judges are also active as factfinders; in a recent ICTR trial, the judges visited the sites of the alleged massacres, Bagilishema, Judgement, *supra* note 279, at para. 10, and in a recent ICTY trial, the judges made plans for an on-site visit but cancelled them due to security concerns, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, para. 19 (Jan. 14, 2000), at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf>.

³¹⁹ *See* Gideon Boas, *Admissibility of Evidence Under the Rules of Procedure and Evidence of the ICTY: Development of the Flexibility Principle*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 27, at 263, 265 ("It is clear that the principle of 'la liberté de la preuve' understood in the French criminal law system, allowing the court to rule any form of evidence admissible, is to an extent present in the Rules and practice of the ICTY."); Rodrigues & Tournaye, *supra* note 311, at 296 (explaining that "the ICTY Rules have adopted a free system of evidence, both with regard to admissibility and evaluation, characteristic of the civil law model").

³²⁰ ICTY RPE, *supra* note 264, at R. 89(C); ICTR RPE, *supra* note 264, at R. 89(C).

Hearsay is in principle admissible, and the Tribunal evaluates its admissibility in the same way it does any other evidence.³²¹ These liberal evidentiary rules are seen as appropriate to enable the Tribunals to create a historical record³²² and to combat the difficulties that parties in the Tribunals necessarily encounter in gathering evidence.³²³

As noted above, recent amendments to the rules have sought to shorten Tribunal trials. Following Continental procedures, defendants are now permitted to make an opening statement which precedes the prosecution's presentation of evidence.³²⁴ Such statements can provide the prosecution with information that enables it to reduce the evidence presented (in the event the defendant concedes certain points) or to tailor its case to the defenses likely to be pre-

Rule 89 reads in full:

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

ICTY RPE, *supra* note 264, at R. 89; ICTR RPE, *supra* note 264, at R. 89.

³²¹ See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, paras. 7, 15-19 (Aug. 5, 1996) [hereinafter *Tadić*, Decision on the Defence Motion on Hearsay] (explaining that hearsay is admissible where it is relevant and has probative value), reprinted in INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, JUDICIAL REPORTS 111, 115-17, U.N. Sales No. E/F.02.III.P.2 (2002).

³²² See Richard May & Marieke Wierda, *Evidence Before the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 249, 252-53 (discussing the trial record's role in preventing historical revisionism).

³²³ See *Rodrigues & Tournaye*, *supra* note 311, at 296.

³²⁴ ICTY RPE, *supra* note 264, at R. 84*bis*; ICTR RPE, *supra* note 264, at R. 84; see also *Damaška*, *supra* note 52, at 529 ("[I]n all continental systems the defendant is used as an evidentiary source before any other evidence has been examined at trial."); *Lahiouel*, *supra* note 310, at 210 (observing that the procedures providing for a defendant's voluntary statement "draw from the civil law inquisitorial system in which it is common for the accused to make whatever statement he wishes about the case"); *Mundis*, *supra* note 288, at 373 (explaining that Rule 84*bis* "has its origins in the civil law tradition, in which the accused is often called upon, at the outset of the trial, to provide the examining magistrate or prosecutor with his or her version of the events in question").

sented.³²⁵ Further, because hearsay is admissible, the Tribunals have begun to rely on alternative means of presenting evidence in an effort to reduce the number of live witnesses.³²⁶ The Tribunals, and especially the ICTY, are increasingly relying on documentary evidence, including transcripts from related trials,³²⁷ affidavits, depositions, and compilations of evidence by experts,³²⁸ and they have begun making greater use of judicial notice as a means of reducing the time devoted to establishing background facts that have already been established in other cases.³²⁹

³²⁵ See Damaška, *supra* note 52, at 529-30 ("At the beginning of the case the [Continental] prosecutor may sit back and expect that leads or [incriminating] evidence . . . will come out of [the defendant's] interrogation. Also, the prosecutor may hope that the concocted story of a guilty defendant will crumble in the light of testimony of subsequent witnesses."); Lahiouel, *supra* note 310, at 210 n.61 (stating that time would have been saved in *Blaškić* if the accused had made a statement at the beginning of the trial); Mundis, *supra* note 288, at 373-74 (arguing that considerable time might have been saved in *Blaškić* had Rule 84*bis* been in existence). An expert group that recently assessed the Tribunals' functioning recommended that the defendant be required to describe in general terms the nature of his defense so that if the defendant asserted a different theory at trial, the Trial Chamber could "draw the appropriate conclusions." Mundis, *supra* note 314, at 766-67.

³²⁶ Previous versions of the ICTY's rules had provided that "witnesses shall, in principle, be heard directly by the Chambers," but that provision was deleted in December 2000. Compare ICTY RPE, *supra* note 264, at R. 90(A), Revision 18 (amended July 14, 2000), http://www.un.org/icty/basic/rpe/IT32_rev18.htm#Rule 90, with ICTY RPE, *supra* note 264, at R. 90, Revision 19 (amended Dec. 1 & 13, 2000), at http://www.un.org/icty/basic/rpe/IT32_rev19con.htm. The ICTR RPE still contain the provision. See ICTR RPE, *supra* note 264, at R. 90(A).

³²⁷ See ICTY RPE, *supra* note 264, at R. 92*bis*(D) (authorizing the admission of a transcript); see also Prosecutor v. Sikirica, Case No. IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts Under Rule 92*bis* (May 23, 2001) (admitting transcripts of several witnesses but requiring cross-examination with respect to some), at <http://www.un.org/icty/sikirica/trialc/decision-e/10523AE515806.htm>; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence (July 29, 1999) (admitting transcripts from the *Blaškić* case and documentary evidence, including photographs and video footage), at <http://www.un.org/icty/kordic/trialc/decision-e/90729EV58864.htm>; Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, paras. 14-21 (Feb. 16, 1999) (affirming the Trial Chamber's decision to admit the transcript and video-recording of a witness's testimony in the *Blaškić* case), reprinted in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999, 245-47 (André Klip & Göran Sluiter eds., 1999) [hereinafter 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS].

³²⁸ See ICTY RPE, *supra* note 264, at R. 92*bis*(A) (authorizing the admission of a written statement of a witness in lieu of oral testimony under certain conditions); see also Lahiouel, *supra* note 310, at 209 (discussing the use of exhibits, affidavits, and depositions); May & Wierda, *supra* note 322, at 256-61.

³²⁹ See Prosecutor v. Kvočka, Case No. IT-98-30-I, Decision on Judicial Notice (June

3. Sentencing

The Tribunals are limited in their selection of penalties to terms of imprisonment; they cannot impose fines or issue death sentences.³³⁰ In determining the length of the imprisonment, the Tribunals' Statutes and rules instruct them to take into account various factors, including the gravity of the offense and the individual circumstances of the defendant,³³¹ the general practice regarding prison sentences in the courts of the former Yugoslavia and Rwanda (for the ICTY and ICTR, respectively) as well as any aggravating or mitigating circumstances.³³² That is the extent of the guidance provided to—or the constraints imposed upon—the Trial Chambers. The Tribunals' Statutes and rules delineate no aggravating circumstances and only one mitigating circumstance: "substantial cooperation with the Prosecutor by the convicted person before or after conviction."³³³ Further, the Statutes and the rules do not provide any guidance as to the comparative "gravity" of the various offenses within the Tribunals' jurisdiction; nor do they indicate which "individual circumstances" might be relevant to sentencing or how they might be relevant.

8, 2000) (taking judicial notice of facts contained in a previous judgment), at <http://www.un.org/icty/kvocka/trialc/decision-e/00608AF112963.htm>; Prosecutor v. Simić, Case No. IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina (Mar. 25, 1999) (refusing to take judicial notice of the international character of the armed conflict but taking judicial notice of Bosnia-Herzegovina's proclamation of independence from the Socialist Federal Republic of Yugoslavia on March 6, 1992 and of the subsequent recognition of the new State by the European Community and the United States), at <http://www.un.org/icty/simic/trialc3/decision-e/90325PT56373.htm>; Lahiouel, *supra* note 310, at 210 n.60 (observing that the Trial Chamber in *Kvočka* took judicial notice of facts in previous cases which relieved the Prosecutor of proving those items).

³³⁰ ICTY Statute, *supra* note 252, at art. 24(1); ICTR Statute, *supra* note 257, at art. 23(1). The Tribunals can impose terms up to and including the remainder of the convicted person's life. ICTY RPE, *supra* note 264, at R. 101(A); ICTR RPE, *supra* note 264, at R. 101(A); see also Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement, para. 25 (Nov. 29, 1996) [hereinafter Erdemović, First Sentencing Judgement] (noting that death sentences are not available in sentencing), reprinted in INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, JUDICIAL REPORTS, *supra* note 321, at 1593. The Tribunals can, however, "order the return of any property and proceeds acquired by criminal conduct, including duress, to their rightful owners." ICTY Statute, *supra* note 252, at art. 24(3); ICTR Statute, *supra* note 257, at art. 23(3).

³³¹ ICTY Statute, *supra* note 252, at art. 24(2); ICTR Statute, *supra* note 257, at art. 23(2).

³³² ICTY RPE, *supra* note 264, at R. 101(B) (i)-(iii); ICTR RPE, *supra* note 264, at R. 101(B) (i)-(iii).

³³³ ICTY RPE, *supra* note 264, at R. 101(B) (ii); ICTR RPE, *supra* note 264, at R. 101(B) (ii).

The Trial Chambers consequently have broad discretion in sentencing, discretion that they have not, through their case law, attempted to limit in any significant way. In *Furundžija*, the Appeals Chamber denied a prosecution request to delineate sentencing guidelines on the ground that it would be “inappropriate to establish a definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now.”³³⁴ With respect to the gravity of the offense, an ICTY Trial Chamber in *Tadić* attempted to impose some structure on the sentencing process by holding that, all things being equal, a punishable offense, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon as a war crime.³³⁵ However, the Appeals Chamber rejected this hierarchy, holding that in law there is “no distinction between the seriousness of a crime against humanity and that of a war crime.”³³⁶ Fi-

³³⁴ Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement, para. 238 (July 21, 2000), at <http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf>.

³³⁵ Prosecutor v. Tadić, Case No. IT-94-1-T, Sentencing Judgement, para. 73 (July 14, 1997) [hereinafter Tadić, Sentencing Judgement], reprinted in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 276, at 498; *see also* Erdemović, Joint Opinion of Judges McDonald and Vohrah, *supra* note 292, at paras. 20-26.

³³⁶ Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals, para. 69 (Jan. 26, 2000) [hereinafter Tadić, Appeals Sentencing Judgement], at <http://www.un.org/icty/tadic/appeal/judgement/tad-asj000126e.pdf>; *see also* Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement, paras. 240-43 (July 21, 2000) [hereinafter Furundžija, Judgement] (echoing the *Tadić* Appeals Sentencing Judgement); Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgement and Sentence, para. 449 (Dec. 6, 1999) [hereinafter Rutaganda, Judgement and Sentence] (“Whereas in most national systems [penalties track] the gravity of the offence, [the ICTR] Statute does not rank the various crimes falling under the jurisdiction of the Tribunal In theory, the sentences are the same for each of the three crimes, namely a maximum sentence of life imprisonment.”), reprinted in 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 1, at 709, 781. In two recent cases, however, ICTY Trial Chambers indicated that defendants convicted of persecution as a crime against humanity deserve a more severe penalty than defendants convicted of other crimes against humanity, because persecution, unlike other crimes against humanity, requires a showing of discriminatory intent. Prosecutor v. Todorović, Case No. IT-95-9/1, Sentencing Judgement, paras. 32, 113 (July 31, 2001) [hereinafter Todorović, Sentencing Judgement], at <http://www.un.org/icty/todorovic/judgement/tod-tj010731e.pdf>; Blaškić, Judgement, *supra* note 275, at para. 785. Further, an ICTR Trial Chamber stated that violations of Common Article 3 of the Geneva Conventions and Protocol II thereto are “lesser crimes than genocide or crimes against humanity.” Kambanda, Judgement and Sentence, *supra* note 1, at para. 14. The ICTR has not expressly ranked genocide and crimes against humanity, *id.*, but it has, at times, called genocide “the crime of crimes,” Akayesu, Sentence, *supra* note 21, at para. 8; Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, para. 15 (Feb. 5, 1999) [hereinafter

nally, although the Chambers must consider the general sentencing practices of the courts of the former Yugoslavia and Rwanda, they have held themselves not to be bound by those practices.³³⁷

In some cases, the Trial Chambers provide a detailed discussion of various sentencing objectives,³³⁸ but these considerations rarely seem to play any significant role in the ultimate sentence imposed. The Chambers have also delineated various aggravating and mitigating circumstances, but their treatment of these factors has not always been consistent or cogent. For instance, the ICTR has repeatedly treated as an aggravating circumstance the fact that the offenses for which the defendant stands convicted are "extremely serious."³³⁹ The ICTR has

Serushago, Sentence], *reprinted in* 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 1, at 823, 826, suggesting that it may be the most serious of the crimes falling within the ICTR's jurisdiction. Such distinctions are of less import in the ICTR, however, because the Chambers have repeatedly held that a genocide took place in Rwanda during the period over which the ICTR has jurisdiction, *see, e.g.*, Akayesu, Judgement, *supra* note 279, at para. 129; Prosecutor v. Musema, Case No. ICTR-96-13, Judgement and Sentence, para. 931 (Jan. 27, 2000) [hereinafter Musema, Judgement and Sentence], at <http://www.ictr.org/wwwroot/ENGLISH/cases/Musema/judgement/6.htm>; Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, para. 528 (May 21, 1999), *reprinted in* 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 1, at 555, 657, and all of the ICTR defendants convicted thus far have been convicted of genocide, either alone, or in combination with crimes against humanity.

³³⁷ See Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement, para. 813 (Feb. 20, 2001) [hereinafter Delalić, Judgement], at <http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf>; Prosecutor v. Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, para. 30 (Apr. 6, 2000) [hereinafter Serushago, Appeal] (observing that the Trial Chamber is obliged only to take account of the sentencing practices in Rwanda), at <http://www.ictr.org/wwwroot/ENGLISH/cases/serushago/decisions/app20000406.htm>; Kambanda, Judgement and Sentence, *supra* note 1, at para. 23 (determining that the sentence applicable in Rwanda "is but one of the factors to take into account in determining sentences").

³³⁸ See, e.g., Todorović, Sentencing Judgement, *supra* note 336, at paras. 28-30 (discussing general considerations for sentencing); Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, paras. 836-44 (Feb. 22, 2001) (describing general sentencing factors), at <http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e.pdf>; Blaškić, Judgement, *supra* note 275, at paras. 761-64 (explaining the purposes served by the defendant's sentence); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, paras. 1230-34 (Nov. 16, 1998) (considering sentencing objectives), *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 327, at 363, 629-30.

³³⁹ Rutaganda, Judgement and Sentence, *supra* note 336, at para. 468; Musema, Judgement and Sentence, *supra* note 336, at para. 1001. In *Ruggiu*, an ICTR Trial Chamber made the cryptic and not very helpful remark that "[g]enocide and crimes against humanity are inherently aggravating offences because they are heinous in nature and shock the collective conscience of mankind." Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, para. 48 (June 1, 2000) [hereinafter Ruggiu,

also deemed aggravating other facts that would seem incorporated in the crimes themselves.³⁴⁰ Equally inappropriately, the ICTY has considered a defendant's failure to cooperate with the prosecution an aggravating circumstance³⁴¹ even though a defendant is under no obligation to cooperate. The Tribunals have done a bit better at identifying relevant mitigating circumstances, but their application has not always been consistent. For instance, some Trial Chambers have considered as mitigating the fact that the defendant has no prior convictions³⁴² or has young children,³⁴³ while others have noted that many, if not most,

Judgement and Sentence], at <http://www.ictr.org/wwwroot/ENGLISH/cases/Ruggiu/judgement/rug010600.htm>.

³⁴⁰ For instance, in *Musema*, after the Trial Chamber held the defendant criminally responsible under Article 6(3) of the ICTR Statute as the superior of certain employees who committed crimes within the jurisdiction of the Tribunal because the defendant "failed to take the necessary and reasonable measures to prevent the commission" of those crimes, *Musema*, Judgement and Sentence, *supra* note 336, at paras. 889-926, the Trial Chamber went on to consider as an aggravating factor the fact that "Musema did nothing to prevent the commission of the crimes and that he took no steps to punish the perpetrators over whom he had control," *id.* at para. 1004. *See also id.* at para. 1002 (considering as an aggravating factor the fact that Musema "took no steps to prevent tea factory employees or vehicles from taking part in the attacks"). In *Kayishema*, the Trial Chamber considered as an aggravating circumstance the fact that the defendants "voluntarily committed and participated in the offences," *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, at Sentence para. 13 (May 21, 1999) [hereinafter *Kayishema*, Judgement], *reprinted in* 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 1, at 555. One would expect voluntary commission to be the norm and that any showing of involuntariness would constitute a mitigating factor. *See Erdemović*, Joint Opinion of Judges McDonald and Vohrah, *supra* note 292, at paras. 81, 88 (holding that duress is not a complete defense for charges of crimes against humanity or war crimes which involve the killing of innocent people but that it can be used in mitigation of punishment).

Although it is inappropriate to consider these facts aggravating circumstances, one must sympathize with the ICTR Trial Chambers in that they are directed to consider aggravating circumstances for crimes, like genocide, that are so heinous that it is difficult to envisage their aggravation. In *Erdemović*, an ICTY Trial Chamber took a more sensible approach, holding that "when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration." *Erdemović*, First Sentencing Judgement, *supra* note 330, at para. 45.

³⁴¹ *Blaškić*, Judgement, *supra* note 275, at para. 774 ("[The] Trial Chambers have, on several occasions, ruled that failure to co-operate constitutes an aggravating circumstance.").

³⁴² *Ruggiu*, Judgement and Sentence, *supra* note 339, at paras. 59-60; *Jelišić*, Judgement, *supra* note 312, at para. 124; *Aleksovski*, Judgement, *supra* note 275, at para. 236; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, para. 284 (Dec. 10, 1998) [hereinafter *Furundžija*, Judgement], *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 327, at 685; *Akayesu*, Sentence, *supra* note 21.

³⁴³ *See Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, para. 16(i) (Mar. 5, 1998) [hereinafter *Erdemović*, Second Sentencing Judgement] (listing

persons convicted of international crimes will be in similar circumstances so that little weight can be accorded to such considerations.³⁴⁴ In addition, while both Tribunals appear to consider the young age of a defendant as a mitigating circumstance, there is no consensus regarding the definition of "young": the ICTY considers defendants aged nineteen to twenty-three to be young, while the ICTR appears to define youth in the thirty-two to thirty-seven-year-old range.³⁴⁵

The one mitigating circumstance that the rules expressly identify—"substantial cooperation with the prosecutor by the convicted person before or after conviction"³⁴⁶—is most often invoked in cases in which the defendant has pled guilty. The Tribunals have considered a defendant to have substantially cooperated with the Prosecutor³⁴⁷ when

the fact that the defendant has a three-year-old child under "mitigating factors"), *reprinted in* 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 276, at 685.

³⁴⁴ See Furundžija, Judgement, *supra* note 342, at para. 284 (refusing to give "significant weight" to "the fact that the accused has no previous convictions and is the father of a young child" because these same factors apply to many defendants); Jelisić, Judgement, *supra* note 312, at para. 124 (referring to the Trial Chamber's admonition in *Furundžija*, that such considerations cannot be given too much weight). The Yugoslavian Tribunal rejected the notion that the Trial Chamber should consider the goal of incapacitation as a general sentencing factor on the basis that

[i]n many, if not most cases before the International Tribunal, the convicted persons would have no record of previous criminal conduct *relevant to those committed during the armed conflict*. In practically all cases before the International Tribunal, the convicted persons would be first time offenders *in relation to international crimes*.

Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, para. 843 (Feb. 22, 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e.pdf>.

³⁴⁵ Blaškić, Judgement, *supra* note 275, at para. 778 (summarizing ICTY and ICTR sentencing decisions). Interestingly, in *Krnjelac*, the ICTY Trial Chamber noted that it "had regard in sentencing" to the fact that the defendant was, at the time of sentencing, sixty-two years old, but it did not explicitly pronounce that fact to be a mitigating circumstance. Prosecutor v. Krnojelac, Case No. IT-97-25, Judgement, para. 533 (Mar. 15, 2002) [hereinafter *Krnjelac*, Judgement], at <http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e.pdf>. Other mitigating circumstances include a defendant's voluntary surrender, Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, para. 868 (Feb. 22, 2001) [hereinafter *Kunarac*, Judgement], at <http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e.pdf>; Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, paras. 843, 850, 853 (Jan. 14, 2000) [hereinafter *Kupreškić*, Judgement], at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf>; Serushago, Sentence, *supra* note 336, at para. 34, and poor health, Krstić, Judgement, *supra* note 250, at para. 716.

³⁴⁶ *E.g.*, ICTY RPE, *supra* note 264, at R. 101(B)(ii).

³⁴⁷ The Appeals Chamber has held that it is for the Tribunal, not the Prosecutor, to decide whether the defendant has provided the Prosecutor substantial cooperation. See Jelisić, Appeal, *supra* note 312, at para. 126 (explaining the responsibility of the

he has testified for the prosecution in other trials or has promised to do so,³⁴⁸ and even when he has admitted certain facts at trial.³⁴⁹ In one case, a defendant's substantial cooperation after his conviction provided grounds for the Appeals Chamber to reduce his sentence on appeal.³⁵⁰ While one might consider that a guilty plea, in and of itself, constitutes substantial cooperation with the prosecution, the Chambers have typically treated it as an independent mitigating factor.³⁵¹ Similarly, they have considered expressions of remorse, which also are most likely to appear in cases in which the defendants have pled guilty, to be an independent mitigating circumstance.³⁵²

The Tribunals' Trial Chambers have acquitted three defendants³⁵³

Trial Chamber to determine "whether the cooperation should be considered substantial and therefore whether it constitutes a mitigating factor").

³⁴⁸ See Todorović, Sentencing Judgement, *supra* note 336, at para. 84 (taking note of defendant's plea agreement, in which the defendant agreed to assist prosecutors in ongoing and future investigations); Serushago, Sentence, *supra* note 336, at paras. 31-33 (terming the defendant's cooperation "substantial and ongoing" and pointing out that defendant had agreed to testify in other pending trials); Kambanda, Judgement and Sentence, *supra* note 1, at paras. 46-47 (relying on Prosecutor's confirmation of defendant's "substantial co-operation," both by providing information to prosecutors and agreeing to testify in future trials); Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 16(iv) (noting that the defendant's testimony provided investigators with new information).

³⁴⁹ See Musema, Judgement and Sentence, *supra* note 336, at para. 1007 (finding that these admissions "facilitated an expeditious trial").

³⁵⁰ Prosecution v. Kupreškić, Case No. IT-95-16-A, Appeal Judgement, paras. 461-463 (Oct. 23, 2001) [hereinafter Kupreškić, Appeal Judgement], at <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>.

³⁵¹ See Todorović, Sentencing Judgement, *supra* note 336, at paras. 74-88 (setting out four mitigating factors: "[t]he accused's guilty plea, his substantial cooperation with the [p]rosecution, his expressed remorse for his crime, and the question of his diminished mental capacity"); Ruggiu, Judgement and Sentence, *supra* note 339, at paras. 53-58 (looking first at the defendant's level of remorse, as expressed through his guilty plea, and then at his cooperation with the Prosecutor as an independent mitigating circumstance); Serushago, Sentence, *supra* note 336, at paras. 31-35 (dealing with the cooperation factor separately from the guilty plea factor); Kambanda, Judgement and Sentence, *supra* note 1, at paras. 46, 61 (assessing defense counsel's claims of cooperation and "plea of guilty" as "[separate] factors in mitigation"); Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 16 (enumerating four mitigating factors and dealing separately with defendant's cooperation and his admission of guilt).

³⁵² See, e.g., Ruggiu, Judgement and Sentence, *supra* note 339, at paras. 52-80; Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 16(iii); see also Akayesu, Sentence, *supra* note 21, at paras. 31-32.

³⁵³ See Bagilishema, Judgement, *supra* note 279 (acquitting Ignace Bagilishema); Kupreškić, Judgement, *supra* note 345, at para. 769 (acquitting Dragan Papić); Delalić, Judgement, *supra* note 337, at paras. 721, 1285 (acquitting Zejnil Delalić).

and convicted thirty-eight,³⁵⁴ nine of whom pled guilty.³⁵⁵ The Trial Chambers have sentenced the thirty-eight convicted to terms of imprisonment ranging from two-and-one-half years' to life imprisonment.³⁵⁶ The Appeals Chamber has also been heavily involved in sen-

³⁵⁴ For a list of these cases, see *infra* note 356.

³⁵⁵ Prosecutor v. Sikirica, Case No. IT-95-8-T, Sentencing Judgement, paras. 17-39 (Nov. 13, 2001) [hereinafter Sikirica, Sentencing Judgement], at <http://www.un.org/icty/sikirica/judgement/sik-ts011113e.pdf>; Todorović, Sentencing Judgement, *supra* note 336, at para. 17; Ruggiu, Judgement and Sentence, *supra* note 339, at para. 10; Jelisić, Judgement, *supra* note 312, at para. 11; Serushago, Sentence, *supra* note 336, at para. 6; Kambanda, Judgement and Sentence, *supra* note 1, at para. 5; Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 5.

³⁵⁶ An ICTY Trial Chamber imposed the two-and-one-half-year sentence on Zlatko Aleksovski, see Aleksovski, Judgement, *supra* note 275, at para. 244, and ICTR Trial Chambers have sentenced five defendants to life imprisonment for genocide and crimes against humanity, see Musema, Judgement and Sentence, *supra* note 336 (sentencing defendant to life imprisonment for genocide and for extermination and rape as crimes against humanity), at <http://www.ictor.org/wwwroot/ENGLISH/cases/Musema/judgement/8.htm>; Rutaganda, Judgement and Sentence, *supra* note 336, at 785 (sentencing defendant to life imprisonment for genocide and for extermination and murder as crimes against humanity); Akayesu, Sentence, *supra* note 21, at 817 (sentencing Akayesu to life imprisonment for genocide, incitement to commit genocide, and extermination as a crime against humanity); Kambanda, Judgement and Sentence, *supra* note 1, at 807 (sentencing defendant to life imprisonment for genocide); Kayishema, Judgement, *supra* note 340, at para. 32 (sentencing Kayishema to life imprisonment for genocide).

In between those extremes, ICTY Trial Chambers sentenced Milorad Krnojelac to seven-and-a-half years' imprisonment for persecution and inhumane acts as crimes against humanity and cruel treatment as a violation of the laws and customs of war, Krnojelac, Judgement, *supra* note 345, at para. 536, sentenced Stevan Todorović to ten years' imprisonment for persecution as a crime against humanity, Todorović, Sentencing Judgement, *supra* note 336, at para. 115, sentenced Duško Sikirica, Damir Došen, and Dragan Kolundžija to fifteen years', five years', and three years' imprisonment, respectively, for persecution as a crime against humanity, Sikirica, Sentencing Judgement, *supra* note 355, at para. 245, sentenced Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, and Dragoljub Prcać to seven years', six years', twenty years', twenty-five years', and five years' imprisonment, respectively, for persecution as a crime against humanity and murder, torture, and cruel treatment, Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgement, paras. 754, 757, 760, 763, 766 (Nov. 2, 2001) [hereinafter Kvočka, Judgement], at <http://www.un.org/icty/kvocka/trialc/judgement/kvo-tj011002e.pdf>, sentenced Radislav Krstić to forty-six years' imprisonment for genocide, Krstić, Judgement, *supra* note 250, at para. 727, sentenced Dario Kordić and Mario Čerkez to twenty-five years' and fifteen years' imprisonment, respectively, for crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war, Kordić, Judgement, *supra* note 275, at 310, sentenced Dragoljub Kunarac, Radomir Kovac, and Zoran Vuković to twenty-eight years', twenty years' and twelve years' imprisonment, respectively, for crimes against humanity and violations of the laws and customs of war, Kunarac, Judgement, *supra* note 345, at paras. 885, 887, 890, sentenced Tihomir Blaškić to forty-five years' imprisonment for persecution as a crime against humanity and violations of the laws and customs of war, Blaškić, Judgement, *supra* note 275, at 270, sentenced Zoran Kupreškić, Mirjan Ku-

tencing, hearing appeals to virtually every sentence that the Trial Chambers have issued. The Appeals Chamber has held that it will not substitute its sentence for that of a Trial Chamber unless it believes that the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow applicable law.³⁵⁷ Despite that deferential-sounding standard of review, the ICTY Appeals Chamber has revised four of the six sentences on which it has passed judgment, increasing the sentences in two of the cases and decreasing them in the other two.³⁵⁸ One notable fact about all the sentences, whether

preškić, and Vlatko Kupreškić to ten years', eight years', and six years' imprisonment, respectively, for persecution as a crime against humanity, and it sentenced Vladimir Šantić and Drago Josipović to twenty-five years' and fifteen years' imprisonment, respectively, for murder as a crime against humanity, Kupreškić, Judgement, *supra* note 345, at 324-27, sentenced Goran Jelisić to forty years' imprisonment for crimes against humanity and violations of the laws and customs of war, Jelisić, Judgement, *supra* note 312, at para. 139, sentenced Duško Tadić to twenty-five years' imprisonment for murder as a crime against humanity, Tadić, Sentencing Judgement, *supra* note 335, at para. 32, sentenced Anto Furundžija to ten years' imprisonment for torture as a violation of the laws and customs of war, Furundžija, Judgement, *supra* note 342, at 748, sentenced Hazim Delić, Esad Landžo, and Zdravko Mucić to twenty years', fifteen years', and seven years' imprisonment, respectively, for grave breaches of the Geneva Conventions and violations of the laws and customs of war, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, para. 1285 (Nov. 16, 1998), *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 339, at 640-45, and sentenced Dražen Erdemović to five years' imprisonment for violations of the laws and customs of war, Erdemović, Second Sentencing Judgement, *supra* note 343, at 670. The ICTR sentenced Georges Ruggiu to twelve years' imprisonment for persecution as a crime against humanity and direct and public incitement to commit genocide, Ruggiu, Judgement and Sentence, *supra* note 339, at Verdict, sentenced Obed Ruzindana to twenty-five years' imprisonment for genocide, Kayishema, Judgement, *supra* note 340, at para. 32, and sentenced Omar Serushago to fifteen years' imprisonment for genocide and crimes against humanity, Serushago, Sentence, *supra* note 336, at 833-34.

³⁵⁷ Delalić, Judgement, *supra* note 337, at para. 725.

³⁵⁸ See *id.* at paras. 851, 853 (holding that in sentencing Mucić to seven years' imprisonment, the Trial Chamber "did not have sufficient regard to the gravity of the offences committed by Mucić in exercising its sentencing discretion, and as a result it imposed a sentence which did not adequately reflect the totality of Mucić's criminal conduct," and suggesting that a sentence of approximately ten years' imprisonment would be more appropriate); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, paras. 186, 191 (Mar. 24, 2000) [hereinafter Aleksovski, Appeals Judgement] (increasing defendant's sentence from two-and-one-half years' imprisonment to seven years' imprisonment), at <http://www.un.org/icty/aleksovski/appeal/judgement/aleasj000324e.pdf>; Tadić, Appeals Sentencing Judgement, *supra* note 336, at paras. 55-58 (reducing defendant's sentence from twenty-five years' imprisonment to twenty years' imprisonment).

In *Delalić*, *Aleksovski*, and *Tadić*, the Appeals Chamber effectively reversed the Trial Chambers' sentencing analysis; by contrast, in *Kupreškić*, the Appeals Chamber reversed certain of the Trial Chambers' factual findings that were relevant to the sentences the Trial Chamber had imposed, and primarily for that reason the Appeals

imposed by a Trial Chamber or the Appeals Chamber, is that they have never exceeded the sentence recommended by the prosecution.³⁵⁹

Chamber reduced the defendants' sentences. Kupreškić, Appeal Judgement, *supra* note 350, at paras. 438, 465.

³⁵⁹ In the first round of sentencing in *Erdemović*, the prosecution recommended a sentence not exceeding ten years, Erdemović, First Sentencing Judgement, *supra* note 330, at text accompanying n.140, and the Trial Chamber sentenced Erdemović to ten years' imprisonment, *id.* at text accompanying n.141. In the second round of sentencing, the parties agreed in a plea agreement "that seven years' imprisonment would be an appropriate sentence," Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 18, but the Trial Chamber sentenced Erdemović to five years' imprisonment, *id.* at para. 23.

In the initial *Tadić* sentencing judgment, the prosecution asked for a sentence of life imprisonment, Tadić, Sentencing Judgement, *supra* note 335, at para. 5, and the Trial Chamber sentenced Tadić to twenty years' imprisonment, *id.* at para. 74. In the second round of sentencing, following an appeal in which Tadić was convicted of additional counts, the prosecution asked for a fifteen-year sentence of imprisonment for the additional counts to be served in addition to the original twenty-year sentence. Prosecutor v. Tadić, Case No. IT-94-I-T, Sentencing Judgement, para. 4 (Nov. 11, 1999), at <http://www.un.org/icty/tadic/trialc2/judgement/tad-tsojrob991111e.pdf>. The Trial Chamber imposed a total sentence of twenty-five years' imprisonment. *Id.* at para. 32.

The prosecution in *Aleksovski* asked the Trial Chamber to impose a ten year sentence, Aleksovski, Judgement, *supra* note 275, at para. 232, and it imposed a sentence of two-and-one-half years, *id.* at para. 244. On appeal, the prosecution asked for a sentence of not less than seven years, Aleksovski, Appeals Judgement, *supra* note 358, at para. 179, and the Appeals Chamber sentenced Aleksovski to seven years' imprisonment, *id.* at para. 191.

The prosecution in *Kordić* submitted "that a sentence of life imprisonment for both accused is appropriate in this case, with a recommendation that Kordić serve a minimum of 30 years and Čerkez a minimum of 25 years." Kordić, Judgement, *supra* note 275, at para. 844. The Trial Chamber sentenced Kordić to twenty-five years' imprisonment and Čerkez to fifteen years' imprisonment. *Id.* at paras. 854, 856. In *Krstić*, the prosecution recommended that General Krstić receive consecutive life sentences for each of his convictions. Krstić, Judgement, *supra* note 250, at para. 690. The Trial Chamber sentenced Krstić to forty-six years' imprisonment. *Id.* at para. 726.

In *Jelišić*, the prosecution asked for a sentence of life imprisonment, Jelišić, Judgement, *supra* note 312, at para. 119, and the Trial Chamber sentenced Jelišić to forty years' imprisonment, *id.* at para. 139. In *Todorović*, the parties entered into a plea agreement prohibiting the prosecution from recommending a sentence in excess of twelve years' imprisonment. Todorović, Sentencing Judgement, *supra* note 336, at para. 11. The prosecution recommended a sentence of twelve years' imprisonment, *id.*, at para. 22, and the Trial Chamber sentenced Todorović to ten years' imprisonment, *id.* at para. 115.

In *Sikirica*, the parties entered into plea agreements in which the prosecution agreed not to recommend sentences exceeding seventeen years', seven years', and five years' imprisonment for Sikirica, Došen, and Kolundžija, respectively. Sikirica, Sentencing Judgement, *supra* note 355, at paras. 25, 31, 37. The prosecution recommended the maximum sentences for each defendant, *id.* at para. 42, and the Trial

4. Appeals

Tribunal defendants can appeal their convictions,³⁶⁰ and, as in many Continental countries, the prosecution can also appeal.³⁶¹ In

Chamber sentenced Sikirica, Došen, and Kolundžija to fifteen years', five years', and three years' imprisonment, respectively, *id.* at para. 245.

In *Kvočka*, the prosecution recommended sentences of life imprisonment for Radić and Žigić, Kvočka, Judgement, *supra* note 356, at para. 695, and the Trial Chamber sentenced them to twenty- and twenty-five year terms of imprisonment, respectively, *id.* at paras. 745, 750. In that same case, the prosecution recommended that Kos be sentenced to twenty-five years' imprisonment and that Kvočka and Prcać each be sentenced to thirty-five years' imprisonment. *Id.* at para. 695. The Trial Chamber sentenced Kos to six years' imprisonment, *id.* at para. 735, Kvočka to seven years' imprisonment, *id.* at para. 718, and Prcać to five years' imprisonment, *id.* at para. 726.

In *Musema*, *Rutaganda*, and *Kambanda*, the prosecution recommended sentences of life imprisonment, and those are the sentences that the Trial Chambers imposed. *Musema*, Judgement and Sentence, *supra* note 336, at para. 994; *Rutaganda*, Judgement and Sentence, *supra* note 336, at para. 464; *Kambanda*, Judgement and Sentence, *supra* note 1, at para. 60.

In *Akayesu*, the prosecution recommended a series of sentences, ranging from fifteen years' to life imprisonment, for the nine crimes of which Akayesu was convicted, and the Trial Chamber imposed life imprisonment for several of the crimes for which the prosecution sought it and, for the remainder, shorter terms of imprisonment than the prosecution had recommended. *Akayesu*, Sentence, *supra* note 21. In *Kayishema*, the prosecution sought life sentences for both defendants, *Kayishema*, Judgement, *supra* note 340, at Sentence para. 25, and the Trial Chamber imposed a life sentence on *Kayishema* and a sentence of twenty-five years' imprisonment on *Ruzindana*, *id.* at Sentence paras. 27-28. In *Ruggiu*, the prosecution asked that a twenty year term of imprisonment be imposed, *Ruggiu*, Judgement and Sentence, *supra* note 339, at para. 81, and the Trial Chamber sentenced *Ruggiu* to twelve years' imprisonment, *id.* at Verdict.

In *Kunarac* and *Kupreškić*, the Trial Chamber indicated that the prosecution submitted sentencing recommendations, but it did not state what those recommendations were. *Kunarac*, Judgement, *supra* note 345, at para. 824; *Kupreškić*, Judgement, *supra* note 345, at para. 835. In *Furundžija*, the Trial Chamber noted that the prosecution had not made a "specific recommendation for the length of sentence." *Furundžija*, Judgement, *supra* note 342, at para. 279.

In *Blaškić*, *Delalić*, and *Serushago*, the Trial Chambers gave no indication that the prosecution had made sentencing recommendations. *Delalić* came before the Trial Chamber for a re-sentencing following an appeal, and at that time the prosecution sought a ten year sentence for Mucić. *Prosecutor v. Mucić*, Case No. IT-96-21-Tbis-R117, Sentencing Judgement, para. 23 (Oct. 9, 2001) (on file with author). The Trial Chamber sentenced Mucić to nine years' imprisonment. *Id.* at para. 27.

³⁶⁰ ICTY Statute, *supra* note 252, at art. 25(1); ICTR Statute, *supra* note 257, at art. 24(1).

³⁶¹ ICTY Statute, *supra* note 252, at art. 25(1); ICTR Statute, *supra* note 257, at art. 24(1). Appeals must allege "a) an error on a question of law invalidating the decision; or b) an error of fact which has occasioned a miscarriage of justice." *Id.* Prosecutors can appeal acquittals in most Continental countries. *See, e.g.*, Dannecker & Roberts, *supra* note 120, at 442-43 (summarizing German criminal appellate procedure); Richard S. Frase, *Introduction to THE FRENCH CODE OF CRIMINAL PROCEDURE* 1, 36 (Gerald L. Kock & Richard S. Frase trans., 1988); Swart, *supra* note 114, at 314 (describing ap-

virtually all Tribunal cases to date, one or both of the parties have taken advantage of this right.³⁶² Indeed, so many appeals were filed³⁶³ that changes had to be made. Specifically, the Tribunals recently added two judges to the Appeals Chamber³⁶⁴ and amended their rules to restrict interlocutory appeals.³⁶⁵ Appeals are attractive to both parties because of their likelihood for success. The Appeals Chamber, particularly of the ICTY, regularly reverses Trial Chamber decisions. In only one of seven ICTY appeals did the Appeals Chamber affirm the Trial Chamber's judgment in all respects.³⁶⁶

IV. PLEA BARGAINING AT THE INTERNATIONAL TRIBUNALS

Parts I and II analyzed plea bargaining's functional and ideological role in various domestic jurisdictions, while Part III described the Tribunals' structure and procedural system. Parts I through III, then, lay the necessary foundation for this Part's examination of plea bargaining in the Tribunals. Section A will apply the functional, ideological, and structural frameworks developed with respect to domestic criminal justice systems to the international tribunals. In doing so, it

pellate procedures in The Netherlands); Van den Wyngaert, *supra* note 114, at 47 (describing appellate procedures in Belgium); Weigend, *supra* note 127, at 201 (describing appellate procedures in Germany).

³⁶² For instance, the only ICTY defendants who failed to appeal were precluded from doing so; they had entered into plea agreements with the prosecution wherein both parties agreed not to appeal any sentences that fell within the range that they had agreed upon, and they were sentenced within that range. Todorović, Sentencing Judgement, *supra* note 336, at paras. 11, 115; Sikirica, Sentencing Judgement, *supra* note 355, at paras. 25, 31, 37, 235, 239, 243. As for the ICTR, seven of nine convicted defendants have appealed. *ICTR 2001 Annual Report*, *supra* note 263, at para. 34.

³⁶³ See McDonald, *supra* note 281, at 162 ("By March 2000 . . . the appellate judges had a docket of over forty ICTY and ICTR matters. . . . While this figure represents a normal, or even light workload for a national court, it swamped the Tribunal.").

³⁶⁴ *ICTR 2001 Annual Report*, *supra* note 263, at para. 46; Press Release, ICTR, The Security Council Enlarges the Appeals Chamber (Dec. 5, 2000), <http://www.ictor.org/wwwroot/ENGLISH/PRESSREL/2000/253.htm>.

³⁶⁵ *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 56th Sess., Supp. No. 1, at para. 207, U.N. Doc. A/56/1 (2001). Further, to manage appellate proceedings, the ICTY has appointed pre-appeals judges in a number of cases. See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellant's Request for an Extension of Time and Authorization to Exceed the Page Limit on his Reply to the Prosecutor's Response to Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 (Apr. 20, 2001) (referring to June 8, 2000 order appointing pre-appeals judge); *Prosecutor v. Delalić*, Case No. IT-96-21-A, Order Appointing a Pre-Appeal Judge (Oct. 12, 1999), described in ICTY Judicial Supplement, No. 8 (Nov. 15, 1999), at 3.

³⁶⁶ *Furundžija*, Judgement, *supra* note 336, at Disposition.

will set forth certain hypotheses concerning the importance of plea bargaining and the role that it is apt to play in the international tribunals. Section B will test those hypotheses against Tribunal practice to date by describing the ICTY and ICTR cases that have been resolved by guilty plea. Section C summarizes the evolution that plea bargaining has undergone in the Tribunals and explains the particular forms of plea bargaining that have emerged as products of the Tribunals' unique structural and ideological features.

A. Plea Bargaining in Comparative Perspective

1. The Tribunals' Functional Need for Plea Bargaining

Part I developed the correlation in the domestic setting between time-consuming, complex procedures and the use of plea bargaining. As a result of a variety of factors that do not arise in the domestic setting, Tribunal trials are exceptionally lengthy, costly, and complicated; thus, plea bargaining has the potential to play a vital functional role in the administration of international criminal justice in the Tribunals.

The average ICTY pre-trial period lasts a little over ten months, and the average ICTY trial takes a little over a year.³⁶⁷ The ICTY's first trial, *Tadić*, was relatively short, lasting only 6 months and featuring 126 witnesses, 461 exhibits, and a 7015-page transcript.³⁶⁸ The ICTY's *Kordić* trial was more typical, however, lasting 20 months and featuring 241 witnesses, 4665 exhibits, and a transcript of more than 28,000 pages.³⁶⁹ Fewer witnesses typically appear at ICTR trials,³⁷⁰ but the tri-

³⁶⁷ *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia Presented by Judge Claude Jorda on Behalf of the Judges of the Tribunal*, U.N. Doc. A/55/382-S/2000/865 (2000) [hereinafter Jorda Report], at <http://www.un.org/icty/pressreal/RAP000620e.htm>.

³⁶⁸ *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion and Judgement, paras. 27-34 (May 7, 1997), reprinted in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 276, at 299-301; May & Wierda, *supra* note 322, at 250.

³⁶⁹ *Kordić*, Judgement, *supra* note 275, at para. 3. The *Blaškić* trial lasted more than two years and featured 158 witnesses and more than 1300 exhibits. *Blaškić*, Judgement, *supra* note 275, at para. 19. The *Čelebići* trial covered a period of nineteen months and featured over 1500 exhibits and a transcript of more than 16,000 pages. *Delalić*, Judgement, *supra* note 337, at para. 33. The *Kupreškić* trial featured 157 witnesses and 700 exhibits. *Prosecutor v. Kupreškić*, *supra* note 318, at para. 29; see also May & Wierda, *supra* note 322, at 250 (reporting the number of witnesses and exhibits and stating that such figures "led President McDonald to say that 'these are not trials involving ordinary crimes'").

³⁷⁰ *E.g.*, *Akayesu*, Judgement, *supra* note 279, at para. 24 (reporting that 41 witnesses were heard and 155 exhibits introduced); see also *Report of the International Crimi-*

als themselves can take just as long to complete.³⁷¹ The lengthy periods during which defendants have been held in pre-trial detention have led some to question whether the Tribunals are observing the defendants' right to an expeditious trial.³⁷² Defendants have been de-

nal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, 55th Sess., Agenda Item 53, at paras. 145-46, U.N. Doc. A/55/435-S/2000/927 (2000) [hereinafter *ICTR 2000 Annual Report*] (noting that thirty witnesses appeared in *Musema* and that thirty-three witnesses appeared in *Bagilishema*).

³⁷¹ One of the ICTR's first trials, *Akayesu*, was tried in sixty days of hearings that fell within a nearly fifteen-month period. *Akayesu*, Judgement, *supra* note 279, at paras. 9-28; see also *ICTR 2000 Annual Report*, *supra* note 370, at paras. 145-46 (noting that the *Musema* trial lasted five months and that the *Bagilishema* trial lasted eleven months).

³⁷² See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 184, 193 (2000) (remarking that "[e]arly procedural errors and delays may be leading to due process violations"); Lahiouel, *supra* note 310, at 197; see also *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, para. 106 (Nov. 3, 1999) (dismissing charges against defendant and releasing him due to pre-indictment delay), reprinted in 2 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 1, at 169; *ICTR 2000 Annual Report*, *supra* note 370, at annex III, para. 8 (noting that several defendants in the *Butare* cases have been detained for more than three years before trial).

These delays occur despite the fact that various treaties protect the right to be tried without unreasonable delay. *E.g.*, American Convention on Human Rights, Nov. 22, 1969, art. 7(5), 1144 U.N.T.S. 123, 147 (entitling any person detained "to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings"); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9(3), 999 U.N.T.S. 171, 175 (providing that "[a]nyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(3), 213 U.N.T.S. 221, 226 (providing that "[e]veryone arrested or detained . . . shall be entitled to trial within a reasonable time or to release pending trial").

Recently, however, the ICTY has begun making greater use of provisional release to reduce pre-trial detention. See, *e.g.*, *Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Milan Simić's Application for Provisional Release (May 29, 2000) (granting defendant's motion for provisional release), at <http://www.un.org/icty/simic/trialc3/decision-e/00529PR512846.htm>; *Judge Releases Bosnian Serb from Custody*, INT'L HERALD TRIB., Aug. 30, 2001, at 5 (reporting on the provisional release of Biljana Plavšić); Press Release, ICTY, Enver Hadzihanovic, Mehmed Alagic and Amir Kubura Granted Provisional Release (Dec. 13, 2001) (announcing the provisional release of three defendants justified by, among other things, the fact that they voluntarily surrendered to the Tribunal), at <http://www.un.org/icty/pressreal/p649-e.htm>. At their outsets, the Tribunals' RPE provided that "[r]elease may be ordered by a Trial Chamber only in exceptional circumstances," a requirement that has since been eliminated. Compare ICTY, R.P. & EVID. 65(B) (as amended July 2, 1999), at http://www.un.org/icty/basic/rpe/IT32_rev16.htm, with ICTY, R.P. & EVID. 65(B) (as amended Nov. 17, 1999), at http://www.un.org/icty/basic/rpe/IT32_rev17.htm. Many motions for provisional release, however, continue to be denied. See, *e.g.*, *Prosecutor v. Brdjanin*, Case No. IT-

tained for up to four years during pre-trial, trial, and appellate proceedings,³⁷³ and the length of detention might well increase as the Tribunals experience greater success in obtaining custody over indictees who must then join the queue.

The considerable length and cost of Tribunal trials has generated much criticism³⁷⁴ and consequently spurred reform. The Tribunals

99-36-PT, Decision on Motion by Momir Talic for Provisional Release, paras. 38, 46 (Mar. 28, 2001) (denying a motion for provisional release because the tribunal was not satisfied that Talic would appear for his trial), at <http://www.un.org/icty/brdjanin/trialc/decision-e/10328PR215226.htm>; Prosecutor v. Galic, Case No. IT-98-29, Order on the Defence Motion for Provisional Release (July 27, 2000) (denying the defendant's motion for provisional release and describing the length of pre-trial detention as acceptable), at <http://www.un.org/icty/galic/trialc/order-e/00727PR113247.htm>; Prosecutor v. Kvočka, Case No. IT-98-30/1, Decision on Motion for Provisional Release of Miroslav Kvočka (Feb. 2, 2000) (denying motion for provisional release and noting both the likelihood that the accused would pose a danger to victims and witnesses, and that the Trial Chamber anticipates an early trial commencement date), at <http://www.un.org/icty/kvoča/trialc/decision-e/00202PR512949.htm>.

³⁷³ Lahiouel, *supra* note 310, at 201.

³⁷⁴ See, e.g., John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 167, 170 ("One of the major criticisms levelled at the Tribunal is the length of trials."); Carroll, *supra* note 372, at 181 ("The ICTR has been criticized for not achieving its mandate swiftly enough."); Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 623 (1998) (noting that the ICTR's "slowness is perceived as foot-dragging by many Rwandans"); Patricia McNerney, *The International Criminal Court: Issues for Consideration by the United States Senate*, 64 LAW & CONTEMP. PROBS. 181, 188-89 (2001) (questioning the efficacy of the Tribunals and noting that in 2000, the United States was assessed \$58 million for its 25% share of the expenses of the two tribunals); Mundis, *supra* note 314, at 759 (describing the justified criticism of the Tribunals' "inordinately long trials"); Penrose, *supra* note 281, at 364-69 (criticizing the pace of the Tribunals' proceedings); Robinson, *supra* note 52, at 584 (noting that the ICTY's record of completed cases "on its face . . . would seem to be poor"); Wald, *supra* note 288, at 536 ("The Tribunal has been criticized widely for not moving its docket faster."); James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 432 (2001) (describing the ICTR as "too slow for the demands of justice"); Press Release, International Crisis Group, *The International Criminal Tribunal for Rwanda: Justice Delayed* (June 7, 2001) (describing the number of ICTR trials completed as "lamentable" and noting that the group's report—*Tribunal Pénal International pour le Rwanda: L'urgence de juger*—"calls on the UN Security Council to review the performance of the [ICTR] and its judges, demand a trial schedule giving priority to suspects already in custody, and importantly set a final date for the completion of investigations"), at <http://www.intl-crisis-group.org/projects/showpress.cfm?reportid=305>. But see Press Release, ICTR, Statement by the Registrar, Mr. Adama Dieng, on the Report of the International Crisis Group (June 11, 2001) (responding to the criticisms of the International Crisis Group), at <http://www.icty.org/wwwroot/ENGLISH/PRESSREL/2001/9-3-01.htm>. Some of the most trenchant criticism of the ICTY's slow pace has come from victims of the Yugoslavian conflict. See Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the*

have sought to enhance general productivity by making more efficient use of courtroom space³⁷⁵ and judicial resources.³⁷⁶ The Prosecutor, particularly in the ICTR, has made efforts to combine related cases: she has filed joint indictments and motions for joinder of defendants to consolidate several indictments into a single trial.³⁷⁷ Also, recogniz-

Former Yugoslavia, 37 STAN. J. INT'L L. 255, 309, 329 (2001) (reporting the results of studies examining war victims' perceptions of the ICTY and noting that one of the most frequent objections was the Tribunals' slow pace).

³⁷⁵ See Lahiouel, *supra* note 310, at 207 (describing the effort by the ICTY to conduct trials "for no more than some hours per day, in order to make the courtrooms available for other cases").

³⁷⁶ For instance, the Tribunals amended Rule 62 of their RPE to provide that the initial appearance of the defendant could be conducted before a single judge rather than the full Trial Chamber. Compare ICTY, R.P. & EVID. 62 (as amended July 2, 1999) (requiring that "[u]pon transfer of an accused to the seat of the Tribunal . . . [t]he accused shall be brought before that Trial Chamber without delay"), at http://www.un.org/icty/basic/rpe/IT32_rev16.htm, with ICTY, R.P. & EVID. 62 (as amended Nov. 17, 1999) (providing that "[u]pon transfer of an accused to the seat of the Tribunal . . . [t]he accused shall be brought before that Trial Chamber or a Judge thereof"), at http://www.un.org/icty/basic/rpe/IT32_rev17.htm. Rule 15 was amended so that it no longer disqualifies a judge who confirmed an indictment against a defendant from sitting at that defendant's trial. Compare ICTY, R.P. & EVID. 15 (as amended July 2, 1999) (disqualifying the judge who "reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61"), at http://www.un.org/icty/basic/rpe/IT32_rev16.htm, with ICTY, R.P. & EVID. 15 (as amended Nov. 17, 1999) (stating explicitly that the review of an indictment does not disqualify the judge), at http://www.un.org/icty/basic/rpe/IT32_rev17.htm. In the July, 2001 amendments to the ICTY's RPE, Rule 65^{ter} was amended to authorize a Senior Legal Officer to perform some of the functions previously assigned to the pre-trial judge. Compare ICTY, R.P. & EVID. 65^{ter} (as amended Dec. 1 & 13, 2000) (designating a pre-trial judge alone to be responsible for the pre-trial hearings), at http://www.un.org/icty/basic/rpe/IT32_rev19.htm, with ICTY, R.P. & EVID. 65^{ter} (as amended July 12, 2001) (allowing the Senior Legal Officer to oversee implementation of the work plan developed during the pre-trial phase), at http://www.un.org/icty/basic/rpe/IT32_rev21.htm.

³⁷⁷ See Beresford, *supra* note 279, at 129-30; *ICTR 2000 Annual Report*, *supra* note 370, at paras. 138-39 (noting that such actions have been taken and that their "objective is to maximize efficiency in the use of judicial resources, to spare victims and witnesses the inconvenience, exposure and emotional burden of having to repeat their testimony in several trials, and to facilitate proof of the conspiracy to commit genocide, the theory that undergirds the prosecution"); see also, e.g., *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, Decision on the Prosecutor's Motion for Joinder and Decision on Barayagwiza's Extremely Urgent Motions for Lack of Jurisdiction and for Waiver of Time Limits Under Rule 72(A) and (F) of the Rules (June 6, 2000) (granting the Prosecutor's motion for joinder of cases), at <http://www.ictr.org/wwwroot/ENGLISH/cases/Barayagwiza/decisions/dcs060600.htm>. The Prosecutor has not been able to pursue that strategy as effectively at the ICTY because that Tribunal has had such difficulty obtaining custody over some defendants whose cases might otherwise be joined to those of defendants already in custody. For instance, in November 1995, the Prosecutor brought an indictment against six Croats alleged to have committed atrocities in the Lašva Valley area of Central Bosnia. One of these defen-

ing that scarce Tribunal resources are best spent prosecuting the political and military leaders who planned and instigated the atrocities rather than their subordinates who carried out their plans, the Prosecutor has withdrawn indictments against several lower-level officials.³⁷⁸ Finally, as described above,³⁷⁹ recent amendments to the RPE (and especially to the ICTY RPE) have introduced procedural elements found in continental systems in an effort to reduce the length and cost of Tribunal trials.

These efforts will no doubt expedite proceedings considerably, but there are a variety of reasons why Tribunal proceedings are apt to remain relatively lengthy, complicated, and costly. The fact that Tri-

dants, Tihomir Blaškić, voluntarily surrendered himself to the Tribunal in April 1996; the prosecution then prepared an amended indictment charging only him, and he was tried separately. Blaškić, Judgement, *supra* note 275, at paras. 2, 18. Two other defendants, Dario Kordić and Mario Čerkez, did not surrender to the ICTY until October 1997, and the prosecution prepared a separate indictment for these two and tried them together. Kordić, Judgement, *supra* note 275, at para. 2. The Trial Chamber granted the fourth defendant's motion to separate his trial from the others, Prosecutor v. Aleksovski, Case No. IT-95-14/1-PT, Decision of Trial Chamber 1 in Respect of the Motion of 19 June 1997 Requesting Separation of Trials (Sept. 25, 1997) (on file with author), and the prosecution withdrew the charges against the remaining two defendants, Prosecutor v. Skopljak, Case No. IT-95-14/2-PT, Order on Prosecutor's Motion for Leave to Withdraw the Indictment Against Pero Skopljak (Dec. 19, 1997), at <http://www.un.org/icty/kordic/trialc/order-e/kor-worder2-971219e.pdf>; Prosecutor v. Šantić, Case No. IT-95-14/2-PT, Order on Prosecutor's Motion for Leave to Withdraw the Indictment Against Ivan Šantić (Dec. 19, 1997), at <http://www.un.org/icty/kordic/trialc/order-e/kor-worder1-971219e.pdf>. In *Kvočka*, however, the Trial Chamber began a trial involving four defendants; when a fifth co-indictee was subsequently arrested, the Trial Chamber adjourned the trial, ordered the joinder of trials, and recommenced against the five defendants. Prosecution v. Kvočka, Case No. IT-98-30/1-T, Judgement, para. 768 (Nov. 2, 2001), at <http://www.un.org/icty/kvočka/triale/judgement/kvo-tj011002e.pdf>. For further examples of potential joinders obstructed by difficulty in obtaining custody, see Press Release, ICTY, The Indictment Against Vinko Pandurevic is Unsealed (Dec. 14, 2001), at <http://www.un.org/icty/pressreal/p651-e.htm>; Weekly Press Briefing, ICTY (Feb. 27, 2002), at <http://www.un.org/icty/briefing/PB270202.htm>.

³⁷⁸ ICTY Bulletin, No. 21, July 27, 1998, at 4; see also Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 74-75 (1999) (describing withdrawn indictments); *id.* at 59 ("Since 1997, the ICTY [P]rosecutor has pursued a strategy that calls for indicting only high-level offenders . . ."); Press Release, ICTR, Tribunal to Target 'Big Fish' (July 3, 1997) (announcing steps taken to improve "effectiveness and efficiency, including targeting the so called 'big fish' who were involved in the 1994 Rwanda genocide"), at <http://www.icttr.org/wwwroot/ENGLISH/PRESSREL/1997/060.htm>. At the same time, the "trials of accused who are alleged to have been the veritable architects of the killings will necessarily be legally and factually more complex and take longer than the trials of persons of lesser rank and status." *ICTR 2001 Annual Report*, *supra* note 263, at para. 42.

³⁷⁹ See *supra* Part III.B.2.

bunal trials are held far from the locations of the crimes makes it time-consuming and expensive for the parties to investigate the cases and locate witnesses and evidence.³⁸⁰ Witnesses can be particularly difficult to find because they dispersed following the crimes,³⁸¹ or because they fear coming forward.³⁸² As mentioned above, parties before

³⁸⁰ See, e.g., Kupreškić, Appeal Judgement, *supra* note 350, at para. 44 (describing the “numerous practical difficulties that all parties at trial before the Tribunal face in locating all relevant witnesses and documentary evidence from distant countries, not always co-operative with the Tribunal”).

³⁸¹ See *ICTR 2000 Annual Report*, *supra* note 370, at para. 78 (noting that in *Bagilishema*, fifteen defense witnesses were called from twelve different countries).

³⁸² See Christine Chinkin, *The Protection of Victims and Witnesses*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* *supra*, note 21, at 456; see also *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, Order in the Matter of the Prosecutor’s *Ex Parte* Further Allegations of Contempt, para. II (July 19, 2001), at <http://www.ictr.org/wwwroot/ENGLISH/cases/nyiramasuhuko/decisions/190701.htm>; *Prosecutor v. Nyiramasuhuko*, 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, para. 2 (July 10, 2001) (describing the prosecution’s allegations that members of the defense team contacted prosecution witnesses and “attempted to ‘mak[e] them change their mind not to testify for the Prosecution’”), at <http://www.ictr.org/wwwroot/ENGLISH/cases/nyiramasuhuko/decisions/100701b.htm>; LAWYERS COMM. FOR HUMAN RIGHTS, *PROSECUTING GENOCIDE IN RWANDA: A LAWYERS COMMITTEE REPORT ON THE ICTR AND NATIONAL TRIALS*, at III(D)(4) (1997) [hereinafter *LAWYERS COMMITTEE REPORT*] (detailing violence suffered by ICTR witnesses including raids often targeting genocide victims and “targeted killing to eliminate potential witnesses”), available at <http://www.lchr.org/pubs/rwanda.htm>; SCHARF, *supra* note 251, at 139 (noting that the prosecution in the Tadić case had “been forced to pare down the number of . . . [eyewitnesses] because several had become unwilling to testify”). Because the Tribunals’ ability to ensure protection is far more limited than that of a domestic court, Tribunal witnesses have particular reason to fear testifying. See Chinkin, *supra*, at 456 (noting that Tribunals “cannot draw upon domestic resources such as police, witness protection programmes and support services”). To combat these fears as much as possible, the Tribunals have adopted a number of rules providing for the protection of victims and witnesses. See *ICTY RPE*, *supra* note 264, at R. 39(ii) (authorizing the Prosecutor to take “special measures to provide for the safety of potential witnesses and informants” during investigations); *ICTR RPE*, *supra* note 264, at R. 39(ii) (same); *ICTY RPE*, *supra* note 264, at R. 69(A) (authorizing “the non-disclosure of the identity of a victim or witness who may be in danger or at risk”); *ICTR RPE*, *supra* note 264, at R. 69(A) (same); *ICTY RPE*, *supra* note 264, at R. 75 (authorizing the Trial Chambers to order “measures to prevent the disclosure to the public or the media of the identity or whereabouts of a victim or a witness”); *ICTR RPE*, *supra* note 264, at R. 75 (same); see also *Prosecutor v. Tadić*, Case No. IT-94-I, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, para. 86 (Aug. 10, 1995) (permitting certain witnesses to testify anonymously), reprinted in *1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS*, *supra* note 276, at 74. Despite their best efforts, the Tribunals are not always able to prevent violence to witnesses. In January 1997, “Hutu extremists murdered a witness, her husband, and seven children after she appeared before the . . . [ICTR] and was promised protection. Another tribunal witness was killed with his daughter, brother, nephew and

the ICTY in particular have experienced difficulties obtaining access to documents and witnesses,³⁸³ difficulties which inevitably increase the time and cost of trial preparation. The Tribunals often attempt to assist the parties in securing evidence and witness testimony,³⁸⁴ but these attempts can be unsuccessful and, even when successful, can be time-consuming, because the Tribunals themselves have no enforcement mechanisms and thus must rely on states' voluntary compliance.³⁸⁵ Even when states do comply, the logistics can prove daunting. For instance, numerous lower-level participants in the Rwandan genocide are currently in Rwandan prisons awaiting trial or serving sentences. Both ICTR prosecutors and defendants frequently seek testimony from these Rwandan prisoners. The Tribunals' rules authorize a judge or Trial Chamber to order the transfer of such detained persons, but the party requesting the transfer must first obtain documen-

seven others the previous December." Nasser Ega-Musa, *Another Failure of Justice in Africa*, WASH. POST, Mar. 6, 1997, at A21.

Defense witnesses may also be reluctant to come forward because they fear prosecution themselves or retaliation at home. See Kupreškić, Appeal Judgement, *supra* note 350, at para. 173 (noting that the defense had difficulty persuading Bosnian Muslim victims to testify in favor of the Bosnian Croat defendants, even though they were otherwise agreeable to doing so, because the witnesses feared "the condemnation and harassment within the close-knit Muslim community that would surely follow from associating themselves with the Defendants"), at <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>; SCHARF, *supra* note 251, at 103 (noting that some defense witnesses "dreaded the local warlord, Prijedor Police Chief Simo Drljac, who made it clear that he did not recognize the legitimacy of the Tribunal"). Consequently, the Tribunals have authorized protective measures to encourage defense witness testimony as well. See *id.* at 103 (speaking of the use of protective measures such as granting "temporary immunity to defense witnesses who come to the Hague" and allowing others "to testify from Bosnia by video-link").

³⁸³ See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, paras. 29-56 (July 15, 1999) (discussing the appellant's argument that a "lack of cooperation and . . . obstruction" by several governmental authorities in providing access to appellant witnesses compromised his case, thereby depriving appellant of a fair trial), reprinted in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 327, at 771-78; Delalić, Judgement, *supra* note 337, at paras. 55-57 (describing the issuances of subpoenas and other difficulties in obtaining witness testimony), reprinted in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 327, at 385-86; Weekly Press Briefing, ICTY (Nov. 8, 2000) (addressing questions about the cooperation of several nations in providing the tribunal with necessary witnesses and documentation), at <http://www.un.org/icty/briefing/PB081100.htm>.

³⁸⁴ For instance, in *Kupreškić*, the Trial Chamber summoned Muslim defense witnesses as "court witnesses" so that the witnesses would not be associated with the Croatian defendants. Kupreškić, Appeal Judgement, *supra* note 350, at paras. 173-75.

³⁸⁵ See *ICTR 2000 Annual Report*, *supra* note 370, at para. 80 (noting that "[w]ithout the cooperation of countries such as Benin, the Congo, France, Kenya, Mozambique, Mauritania, Swaziland, Rwanda, the United Kingdom, Zambia and Zimbabwe, none of the witnesses would have been able to be heard by the Tribunal").

tation from the detaining state establishing that the witness is not required for any criminal proceedings in the detaining state during the period that the witness is required by the Tribunal, and that the witness's transfer will not extend the period of the witness's detention.³⁸⁶ Even when this documentation is provided, motions for transfer are often opposed, thus necessitating an exchange of briefing.³⁸⁷

Another factor contributing to the considerable length of Tribunal proceedings is the nascent state of the law to be applied in those proceedings. The Tribunals were charged with prosecuting genocide, crimes against humanity, and war crimes at a time when genocide had never before been prosecuted, and the contours of all the crimes were in some doubt.³⁸⁸ Thus the Tribunals, particularly at the outset, had to

³⁸⁶ ICTR RPE *supra* note 264, at R. 90*bis*.

³⁸⁷ See Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21-T, Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, paras. 1-8 (July 24, 2001) (recounting several motions, counter-motions and supplemental motions relied on by the Tribunal in issuing its decision), at <http://www.ictor.org/wwwroot/ENGLISH/cases/nyiramasuhuko/decisions/240701.htm>; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Decision on the Prosecutor's Motion to Reinstate a Witness on the List of Witnesses to Be Called at Trial and Order for the Transfer of Four Detained Witnesses Pursuant to Rule 90*bis*, paras. 1-4 (June 29, 2001) (listing the submissions of the parties, including motions, summaries of witness testimony and a letter), at <http://www.ictor.org/wwwroot/ENGLISH/cases/kajelijeli/decisions/290601.htm>; Prosecutor v. Bagambiki, Case No. ICTR-99-46-I, Decision on the Prosecutor's Motion for the Transfer of Detained Witnesses Pursuant to Rule 90*bis* (Aug. 23, 2000) (considering several briefs and other papers in reaching its decision to transfer eleven witnesses to a detention center), at <http://www.ictor.org/wwwroot/ENGLISH/cases/Imanishimwe/decisions/230800a.htm>. But see Prosecutor v. Nahimana, Case No. ICTR-99-52-I, Order for Temporary Transfer of Three Detained Witnesses (AFZ, AGI, AHA) Pursuant to Rule 90*bis* of the Rules of Procedure and Evidence (Sept. 26, 2000) (granting *unopposed* motion), at <http://www.ictor.org/wwwroot/ENGLISH/cases/barayagwiza/decisions/260900.htm>; ICTR 2000 Annual Report, *supra* note 370, at para. 78 (noting that in *Bagilishema*, the Victims Support Section produced three detainee witnesses from Kigali).

³⁸⁸ See Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion and Judgement, para. 694 (May 7, 1997) (noting that persecution as a crime against humanity "has never been clearly defined"), reprinted in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 276, at 435; Louise Arbour, Foreword to SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, *supra* note 21, at ix, x ("[C]ertain elements of certain offences and doctrines of criminal responsibility, and a myriad of issues of procedure and evidence remain to be elaborated in all their detail."); Schrag, *supra* note 281, at 18 n.9; *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1998 (2001) [hereinafter *Developments in the Law*] ("The crimes within the subject matter jurisdiction of the ICTY and the ICTR—genocide, crimes against humanity, and war crimes as described in the Geneva and Hague Conventions—were vaguely defined and seldom enforced prior to the creation of the tribunals."). When the Tribunals have been asked to clarify the elements of a crime or defense in advance, they have refused. See Prosecutor v. Delalić, Case No. IT-96-21-T, Order on

receive submissions and hear argumentation on issues as fundamental as the elements of the crimes with which the defendants were charged. The procedures applicable in international tribunals were in an even earlier stage of development;³⁸⁹ consequently, the Tribunals often have found themselves inundated with pre-trial and trial motions seeking the resolution of multifarious issues regarding, for instance, the admissibility of evidence,³⁹⁰ the form of indictments,³⁹¹ the protections afforded to victims and witnesses,³⁹² and the length of pre-trial detention,³⁹³ among many, many others.³⁹⁴

Esad Landžo's Request for Definition of Diminished or Lack of Mental Capacity (July 15, 1998), at <http://www.un.org/icty/celebici/trialc2/order-e/80715MS2.htm>.

³⁸⁹ See W.J. Fenrick, *International Humanitarian Law and Criminal Trials*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 23, 26 (1997) ("[A]lthough it is practicable to determine a reasonably specific list of offenses under international humanitarian law, it is much more difficult to determine the applicable law for evidentiary or procedural matters . . .").

³⁹⁰ See, e.g., Tadić, Decision on the Defence Motion on Hearsay, *supra* note 321, at para. 5 (stating that "there is no [ICTY] rule that calls for the exclusion of out-of-court, or hearsay, statements," thus requiring a determination of admissibility by the Tribunal), *reprinted* in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 276 at 195.

³⁹¹ See generally Michael J. Keegan & Daryl A. Mundis, *Legal Requirements for Indictments*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 123-36 (describing the basic requirements of drafting an indictment or charging document for the ICTY).

³⁹² See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, paras. 4-11 (Aug. 10, 1995), *reprinted* in 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 276, at 155-56.

³⁹³ See, e.g., Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision, paras. 41-113 (Nov. 3, 1999) (dismissing indictment against defendant as a result of pre-indictment delay) (on file with author); Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Prosecutor's Request for Review or Reconsideration (Mar. 31, 2000) (quashing its earlier judgment) (on file with author).

³⁹⁴ See Blaškić, Judgement, *supra* note 275, at para. 19 (noting that "[t]he proceedings against Tihomir Blaškić before the Tribunal were complex and at each stage gave rise to many questions, often without precedent" and further noting that during the "pretrial phase, the Tribunal rendered eighty-two interlocutory decisions"); Delalić, Judgement, *supra* note 337, at paras. 33-83 (noting that "[t]he Trial Chamber had been called upon to address a host of unprecedented procedural and substantive issues relating to the trial" and describing them); ICTR 2000 Annual Report, *supra* note 370, at paras. 15, 17, 18 (highlighting that in only one year the Trial Chamber ruled on twenty-eight motions in *Nahimana*, thirty-seven motions in *Ndayambaje*, and eighty-three motions in *Niyitigeka*); *id.* at annex I (setting forth the pre-trial litigation in *Bagilishema*); *id.* at annex II (noting that the Trial Chamber was "inundated with pre-trial motions, which contributed to the delay in the commencement" of trial in the "media" cases); see also *Developments in the Law*, *supra* note 388, at 1998 (noting that the "attorneys who represent the first waves of defendants in international criminal courts since Nuremberg must often litigate numerous essential, yet inchoate and untested,

The elements of the crimes within the Tribunals' jurisdiction, even when clearly delineated, are complex and time-consuming to prove. For instance, to prosecute murder as a crime against humanity in the ICTY, the prosecution must prove not only that the defendant killed the victim but that the murder was committed as part of an armed conflict that was directed against a civilian population.³⁹⁵ To prosecute grave breaches of the Geneva Conventions under article 2 of the ICTY Statute, the prosecution must prove that the offenses took place in the context of an international armed conflict.³⁹⁶ Establishing these and other elements often requires days of witness and expert testimony and the introduction of dozens, if not hundreds, of exhibits.³⁹⁷ Indeed, whereas the typical domestic criminal case concerns

questions of law by referring to case law and statutes scattered across the globe, buried for fifty years, and written in languages from Norwegian to Hebrew").

Although numerous motions can be expected given how new and unsettled this area of law is, some motions are frivolous and criticized as such. See *Prosecutor v. Krajisnik*, Case No. IT-00-39-I, Decision on Motion Challenging Jurisdiction—With Reasons, para. 27 (Sept. 22, 2000) (noting that the "Tribunal as a whole is overburdened with work" and admonishing that the "Trial Chambers should not be called upon to adjudicate on arguments in motions that have already been definitively determined by the Appeals Chamber"), at <http://www.un.org/icty/krajisnik/trialc/decision-e/00922JN513918.htm>.

³⁹⁵ ICTY Statute, *supra* note 252, at art. 5. The definition of crimes against humanity in the ICTR's statute does not include a nexus to an armed conflict. ICTR Statute, *supra* note 257, at art. 3.

³⁹⁶ See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 79-84 (Oct. 2, 1995) (citing and explaining article 2 of the ICTY Statute); see also W. Hays Parks, 28 GEO. WASH. J. INT'L L. & ECON. 207, 213 (1994) (book review) ("[I]t is much easier to gain conviction of an accused for the simple and well-established offense of murder than it is to allege—and prove—a war crime . . .").

³⁹⁷ See SCHARF, *supra* note 251, at 137 (noting that the first five weeks of the *Tadić* trial elapsed "without a shred of testimony as to the alleged crimes of the defendant" because the prosecution had to prove "that the conflict was international and that the abuses were widespread and systematic" and consequently "took a very cautious approach and elicited a lot of evidence in support of [that] . . . determination"). As former ICTY President McDonald noted:

It is time-consuming to prove, or to respond to, a charge that offences have been committed as part of a widespread or systematic campaign, as is required for establishing crimes against humanity. Similarly, proof that a conflict is international requires considerable evidence that goes beyond proof of the specific crimes with which the accused is charged. Finally, proving or defending against an allegation of genocide is more complex than the core crime of murder.

Gabrielle Kirk McDonald, Speech at the Inauguration of New Judges (Nov. 16, 1998), quoted in May & Wierda, *supra* note 322, at 250; see also May & Wierda, *supra* note 322, at 250 (noting that "it may be necessary for the Prosecution to call evidence relating to the historical and political background if these are not familiar to the Trial Chamber"). Moreover, because many witnesses are themselves victims or are relatives of vic-

one crime committed in one specific location, Tribunal trials often concern widespread atrocities occurring in many locations and taking place over a period of months.³⁹⁸ The difference in size and scale between Tribunal trials and domestic trials makes it difficult to compare the two, even superficially. Few domestic trials will have as many as fifty witnesses; in contrast, only one ICTY trial so far has had fewer than fifty witnesses and most have had more than one hundred, each of whom, on average, take up a full trial day.³⁹⁹

The way in which Tribunal crimes are defined also leads to complexity and inefficiency. Many of the crimes overlap,⁴⁰⁰ and many offenses can be charged as more than one crime. As one commentator noted:

[T]he four offences set out in the Statute of the Tribunal can be committed in numerous ways. No less than eight individual types of conduct amount to grave breaches of the Geneva Conventions. The offence of violation of customs of war specific to ICTY is not fully defined, rather, five acts are indicated as non-exhaustive examples. The rest has to be found in customary international law. Therefore, the position of the Prosecution has been that it has no choice but to indict for as many crimes as appear to have been committed and to introduce as much evi-

times, "they tell their stories in their own way and at their own pace." Lahiouel, *supra* note 310, at 204. "It is difficult to ensure that the examination is rapidly focused on a particular piece of evidence." *Id.*

³⁹⁸ See May & Wierda, *supra* note 322, at 249-50 (discussing the broader scope of cases before the Tribunal in comparison with cases before domestic courts).

³⁹⁹ See Wald, *supra* note 288, at 549 (reporting the average number of witnesses heard by the Tribunal and the nature of the witnesses' testimony); see also Lahiouel, *supra* note 310, at 204 (discussing delays in a case before the Tribunal due to the large number of witnesses called, exhibits required, and other practical considerations); Robinson, *supra* note 52, at 584 (commenting on the large scale of Tribunal hearings, specifically with regard to the number of witnesses and the length of their testimony). As two ICTY officials have noted:

[T]he nature of the crimes within the mandate of the ICTY is drastically different from the national prosecution experience of any individual. There is no legal system in the world that deals on a routine basis with the types of cases that fall within the mandate of the ICTY or with the limitations that the ICTY faces in the exercise of its jurisdiction.

Keegan & Mundis, *supra* note 391, at 124; see also ICTR 2001 Annual Report, *supra* note 263, at para. 40 ("It is important to recall, however, that conducting judicial proceedings at the international level is a far more complicated task than at the national level.").

⁴⁰⁰ See Gabrielle Kirk McDonald & Olivia Swaak-Goldman, *Introduction to SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW*, *supra* note 21, at xiii, xiv (noting that certain "crimes tend to fall under more than one general heading").

dence and as many witnesses as appear necessary to establish guilt beyond a reasonable doubt for all of them.⁴⁰¹

Additional delays are caused by the need for language translation. While the ICTY's simultaneous translations of courtroom proceedings are considered very good,⁴⁰² the ICTR has experienced some difficulty because the syntax and everyday modes of expression in Kinyarwanda—the language spoken by most ICTR witnesses—are complex and difficult to translate into French or English.⁴⁰³ In both Tribunals, large quantities of documentary evidence also must be translated, and these translations can take considerable time.⁴⁰⁴ Indeed, the transla-

⁴⁰¹ Lahiouel, *supra* note 310, at 203 (footnote omitted).

⁴⁰² Problems do arise, however. In the *Tadić* trial, for instance, Prosecutor Michael Keegan expected a prosecution witness to place Tadić at the scene of one of the crimes. When asked whether Tadić was present, however, the witness answered "no," a response Keegan later attributed to translation problems. SCHARF, *supra* note 251, at 162.

⁴⁰³ See Akayesu, Judgement, *supra* note 279, at para. 145. The Chamber went on to explain that the "difficulties affected the pre-trial interviews carried out by investigators in the field, as well as the interpretation of examination and cross-examination during proceedings in Court." *Id.* Testimony in Kinyarwanda is first translated to French and then from French to English, "entail[ing] obvious risks of misunderstandings in the English version." *Id.*; see also Musema, Judgement and Sentence, *supra* note 336, at para. 102 (noting "the significant syntactical and grammatical differences between" French, English, and Kinyarwanda); Rutaganda, Judgement and Sentence, *supra* note 336, at para. 23 (noting the translation-related difficulties); ICTR 2001 Annual Report, *supra* note 263, at para. 40 (listing "interpretation of testimony from Kinyarwanda into French and English" as one of the problems contributing to the difficulty of "conducting judicial proceedings at the international level"). The ICTR has, at times, relied on the testimony of a linguistic expert to clarify the meaning of certain terms, and it has noted various cultural factors that affect witness testimony. See Akayesu, Judgement, *supra* note 279, at para. 156 (referring to an expert's testimony that in the Rwandan culture, people sometimes do not answer questions directly); Musema, Judgement and Sentence, *supra* note 336, at para. 103 (noting that "cultural constraints appeared to induce [witnesses] to answer indirectly certain questions regarded as delicate"). In addition, a linguistic expert testified in *Akayesu* that "most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else." Akayesu, Judgement, *supra* note 279, at para. 155; see also Musema, Judgement and Sentence, *supra* note 336, at para. 103 ("[T]here appears . . . to be in Rwandan culture a 'tradition that the perceived knowledge of one becomes the knowledge of all' . . .").

⁴⁰⁴ E-mail from Jenny S. Martinez, former ICTY Junior Legal Officer, to Nancy & Bruce Combs (Aug. 16, 2001, 22:27:13) (on file with author). Complaints about translation delay are rampant in the ICTY, where the translators are regularly unable to meet the word requirements set for them. Interview with F. Indeed, at times, the Tribunals have lacked the resources to translate all the documents that might ideally be translated. See Wald, *supra* note 288, at 541 (noting that a Trial Chamber was receptive to the prosecution's proposal to introduce summaries of witness testimony, but "the proposal floundered on the requirement by the Trial Chamber that the summaries be given in advance to the defendants in their native language [and] (the translation facilities of the ICTY were not adequate for the job)" (parentheses in original)); Press

tion of documents caused sufficient delays in ICTR trials that the Tribunal recently amended its rules to allow defendants to use outside translation services instead of relying on the ICTR translation section.⁴⁰⁵ Language difficulties can also impede the speedy issuance of judgments. Many, if not all, of the judges can speak both French and English at least at a rudimentary level, but most are considerably more proficient in one and prefer to work in that language. Thus, the judges must wait for drafts of the Tribunals' lengthy judgments to be translated before they can be discussed.⁴⁰⁶ In addition, without the aid of simultaneous interpretation, informal oral communications about the cases can prove time-consuming and awkward.

In sum, although the Tribunals' efforts to shorten and simplify their proceedings are laudable, they will not result in short, simple proceedings. The Tribunals, then, have a functional need for alternative methods of case disposition, and plea bargaining seems an attractive means of avoiding the time-consuming, costly trials that otherwise must take place. But, as developed in Part II, functional value is not the only factor influencing the prevalence of plea bargaining in a criminal justice system. Other factors, which will be addressed next, include the structure of the criminal justice system and its prevailing ideology.

2. The Structural and Ideological Components

As a structural matter, the OTP is relatively hierarchical, at least in comparison to the offices of most American district attorneys. With respect to plea bargaining, specifically, the Prosecutor must approve any concessions that are offered as well as the ultimate plea agreement, leaving the Senior Trial Attorneys and their assistants without substantial authority over the content of the bargain. Further, the

Release, ICTR, Media Trial Opens (Oct. 23, 2000) (reporting that the ICTR's President denied a defendant's request to translate all seventy-one issues of a newspaper of which the defendant was editor because the Tribunal "did not have the resources" to do so), at <http://www.ictor.org/wwwroot/ENGLISH/PRESSREL/2000/245.htm>.

⁴⁰⁵ See *ICTR 2000 Annual Report*, *supra* note 370, at para. 58 ("These amendments . . . [n]ow give the defence the option of utilizing outside translation services, instead of relying on the ICTR translation section, to translate documents, thus reducing the delays caused by the translation of documents . . .") (footnote omitted)).

⁴⁰⁶ See *ICTR 2001 Annual Report*, *supra* note 263, at para. 48 (acknowledging that "[t]he translations of decisions and other documents prepared by the judges . . . [is] a major problem"); *id.* at para. 64 (reporting that although the written judgment in the *Kayishema* appeal was ready in June 2001, "it has not been made available for distribution, due to translation difficulties").

ideological elements underpinning the adversary system and reinforcing the use of plea bargaining in the United States do not feature so prominently in Tribunal proceedings. As Part II described, plea bargaining is most likely to flourish in a procedural system that prizes party autonomy and participation and that conceives of adjudication largely in terms of its ability to resolve disputes. The Tribunals' initial procedures did permit the parties to operate with a great deal of autonomy; as a general matter, Tribunal proceedings were structured in the form of a contest between two relatively unregulated parties, both of whom had substantial control over the development and presentation of their cases.

However, recent reforms undertaken to expedite proceedings have altered, perhaps fundamentally, the nature of Tribunal proceedings by moderating the contest form and by transferring much party control to the judges. Although the parties continue to be primarily responsible for preparing their cases, the Tribunals now carefully monitor that preparation during the pre-trial phase. The parties must provide their opponents and the Trial Chamber substantial documentation, which reduces surprise and educates the Trial Chamber about the case prior to trial, thus allowing the Trial Chamber to direct subsequent proceedings. In particular, this documentation allows the Trial Chamber to restrict the number of witnesses that the parties may call and to reduce the amount of time that the parties may use for examining their witnesses. Although the parties retain primary responsibility for calling, examining, and cross-examining the witnesses that do appear, the Trial Chambers have begun playing a greater role in that arena as well. Thus, although adversarial elements clearly remain in Tribunal proceedings, the proceedings now bear a much closer resemblance to the official inquiries of Continental jurisdictions, which are predominantly directed from above, by the court, rather than propelled from below, by the parties.

The highly adversarial procedures utilized in the United States reflect not only the considerable value placed on party autonomy, but also the conception of adjudication as primarily a method of dispute resolution. As discussed in Part II, plea bargaining, by which the parties negotiate a mutually beneficial outcome, both reflects and reinforces this conception of adjudication in the United States. It is not a conception of adjudication, however, that seems appropriate to inter-

national tribunals prosecuting the gravest of crimes.⁴⁰⁷ The Tribunals' primary and most obvious purpose, of course, is to pass judgment on individuals accused of committing crimes within the Tribunals' jurisdiction, a purpose that can be viewed more or less in terms of dispute resolution, as comparison of the American and Continental criminal justice systems shows. However, unlike any domestic criminal justice system, the Tribunals also were established to "contribute to the restoration and maintenance of peace,"⁴⁰⁸ and to "contribute to the settlement of wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia"⁴⁰⁹ and Rwanda.⁴¹⁰ One way that the Tribunals try to do this is by creating a historical record,⁴¹¹ which is designed to thwart later attempts at revisionism⁴¹² and to help promote reconciliation and healing.⁴¹³ Under

⁴⁰⁷ Damaška acknowledges that even in Anglo-American jurisdictions, "criminal law enforcement cannot entirely be fitted into the conflict-solving mode of proceeding," but he notes that "more contest forms can be identified in Anglo-American criminal prosecutions than in any other contemporary system of criminal justice." DAMAŠKA, *FACES OF JUSTICE*, *supra* note 53, at 222.

⁴⁰⁸ S.C. Res. 808, U.N. SCOR, 3175th mtg. at 2, U.N. Doc. S/Res/808 (1993).

⁴⁰⁹ Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 21.

⁴¹⁰ See May & Wierda, *supra* note 322, at 252 (noting that the ICTY "was established to contribute to peace in the region by dispensing justice and deterring future breaches of humanitarian law" and that one way it does so is by providing "a reliable historical record"). As Rodrigues and Tournaye state:

Many victims or their relatives, years later, are still carrying out investigations with a view to discovering how and where their friends, neighbours or relatives disappeared. Their relentless quest for truth must be addressed as a prerequisite to peace, and the Tribunal, notably through its procedure, has to take this into account.

Rodrigues & Tournaye, *supra* note 311, at 296-97.

⁴¹¹ See Alvarez, *supra* note 272, at 2044-46 (discussing how the Tribunals help to preserve the collective memory). Alvarez, however, goes on to detail why the demands of criminal prosecution preclude the rendering of a nuanced history. *Id.* at 2055-56.

⁴¹² As Madeleine Albright, then-United States Ambassador to the United Nations, noted, one of the Tribunals' primary functions is to "establish the historical record before the guilty can reinvent the truth." Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 430 (2001). After the conclusion of the ICTY's first trial, Judge McDonald observed:

[W]e have begun the task of creating a historical record. In the Judgement that followed the conclusion of our first full trial, . . . we established as a judicial fact what happened in a corner of north-eastern Bosnia in 1992, findings that no amount of revisionism or amnesia will erase.

Gabrielle Kirk McDonald, Remarks to the Georgetown and George Washington International Law Societies, 2d Annual International Law Weekend Conference (Feb. 7, 1998), *quoted in* May & Wierda, *supra* note 322, at 253. The Nuremberg and Tokyo trials have served the same function. See Bernard D. Meltzer, *War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. U. L. REV. 895, 902 (1996) ("The evidence of the Holocaust was so strong in 1945 that I doubt that anyone then foresaw

these circumstances, the dispute resolution that results from Tribunal trials seems much less important than other values that the adjudication serves.⁴¹⁴ The very notion, then, that a Tribunal prosecutor and defendant would negotiate for the defendant to plead guilty to a crime that does not accurately reflect his criminal behavior, as not infrequently occurs in the United States, would seem perverse at best.

Theoretical and practical considerations aside, certain structural aspects of the Tribunals and their procedures may also impede plea bargaining. For one thing, the typical Tribunal defendant has committed large-scale atrocities motivated by intense nationalism or ethnic or religious hatred. Such a defendant is more apt to consider a guilty plea abhorrent, viewing it as capitulation before an illegitimate international body⁴¹⁵ than the typical domestic defendant who commits his crimes for more mundane reasons. The nascent state of the international criminal law applied in the Tribunals acts as another impediment to the conclusion of plea bargains. Most defendants in domestic jurisdictions are charged with crimes that have been prosecuted hundreds, if not thousands, of times before. The elements of those crimes are well-established, and the quantum of proof necessary to prove those elements is equally well-established. Thus, a defendant considering a guilty plea before a domestic court is well-informed as to the likelihood that he will be convicted if he instead proceeds to trial. By contrast, at the time the Tribunals were established, the

the so-called Auschwitz lie—the recent denials that the Holocaust actually happened. The trial record surely serves as a corrective of such fantastic revisionism.”); Richard A. Minear, *The Individual, the State, and the Tokyo Trial*, in *THE TOKYO WAR CRIMES TRIALS* 159, 160 (Chihiro Hosoya et al. eds., 1986) (“The Tokyo trial was—or purported to be—a legal proceeding; but its purpose was as much historical as legal: to establish once and for all the record of Japanese misdeeds in the Pacific.”).

⁴¹³ Akhavan, *supra* note 269, at 766 (positing that individualization of guilt shifts victims’ anger away from the entire ethnic group, thus promoting reconciliation).

⁴¹⁴ Of course, it is conceivable that plea bargaining can also advance these other values. As I will discuss below, Tribunal judges have recently begun to claim that guilty pleas advance the Tribunals’ truth-telling function by conclusively establishing the truth in relation to a crime. *See infra* text accompanying notes 685-95. However, as I will discuss, the granting of sentencing concessions and the bargaining process itself have the capacity to subvert the Tribunals’ truth-telling function as much as to advance it.

⁴¹⁵ *See* Prosecutor v. Milošević, Case No. IT-99-37, Decision on Preliminary Motions, para. 5 (Nov. 8, 2001) (noting the defendant’s argument that the Tribunal is an “illegal entity”), at <http://www.un.org/icty/milosevic/triale/decision-e/1110873816829.htm>; Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion on Jurisdiction for Interlocutory Appeal on Jurisdiction, para. 2 (Oct. 2, 1995) (on file with author) (describing the defendant’s challenges to the Tribunal, including that it is an illegitimate body).

crimes within their jurisdiction and their defenses were relatively vague concepts whose elements were anything but clear.⁴¹⁶ The contours of the crimes are quickly being refined with each Tribunal trial, but uncertainties remain, and these uncertainties may make a trial appear a more promising prospect than it otherwise would be.

Finally, the Tribunal judges' wide discretion in sentencing inhibits plea bargaining by making a guilty plea a potentially perilous exercise for defendants. George Fisher's examination of nineteenth-century Massachusetts criminal proceedings persuasively shows that plea bargaining emerges where defendants can be assured of sentencing concessions in exchange for their guilty pleas.⁴¹⁷ In Massachusetts, plea bargaining arose initially in cases in which the prosecutor, by dropping charges, had the unilateral power to restrict the sentence that the judge could impose.⁴¹⁸ Later, in Massachusetts and elsewhere, judges also saw the advantages of encouraging guilty pleas, so prosecutors became free to engage in explicit sentence bargaining with the assurance that the judges would sentence accordingly.⁴¹⁹ In comparison, at least until very recently, Tribunal prosecutors could offer Tribunal defendants only weak assurances. Tribunal prosecutors may drop charges, but doing so by no means guarantees that the defendant will receive any particular sentence on the remaining charge(s), let alone a sentence that the defendant considers acceptable. The Prosecutor can, in addition, promise to recommend a certain sentence. Such a promise is of some value, since up until now, a Trial Chamber has never imposed a sentence longer than that which was sought by the prosecution. Still, the Trial Chambers are by no means restricted from doing so,⁴²⁰ and the Appeals Chamber's inclination to revise sentences creates an additional worry for a defendant who is counting on a reduced sentence as compensation for relinquishing his chance for acquittal at trial.

⁴¹⁶ *Supra* text accompanying notes 388-89.

⁴¹⁷ *See generally* Fisher, *supra* note 24.

⁴¹⁸ *Id.* at 868-93.

⁴¹⁹ *Id.* at 864.

⁴²⁰ *See* Todorović, Sentencing Judgement, *supra* note 336, at para. 79 ("Although the Plea Agreement does indicate a range within which the parties have agreed Todorović's sentence should fall, the Trial Chamber reiterates that it is in no way bound by this agreement. It is the Chamber's responsibility to determine an appropriate sentence."); Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 19 ("The parties themselves acknowledge that the plea agreement has no binding effect on this Chamber.").

The foregoing analysis indicates that with respect to plea bargaining, the Tribunals have conflicting tendencies. While certain procedural features of the Tribunals and the purposes they are intended to serve can be viewed as militating against plea bargaining, Tribunal trials are exceedingly lengthy, costly, and complex and thus constitute ideal targets for alternative methods of disposition. The foregoing analysis also suggests that plea bargaining's role in the Tribunals is likely to change as the Tribunals and the field of international criminal law mature. Bargains should become easier to conclude as more trials are held because the crimes which form the subject of the trials will become better defined and the sentencing practices of the judges will become at least somewhat more predictable. Both the prosecution and the defense will thus be better informed as to the value of the rights they are relinquishing and the concessions they will receive in return. Further, the longer the Tribunals are in existence and the more trials they hold, the less publicity each case will receive. Because plea bargains are generally considered unseemly, they are more apt to be concluded when they do not fall squarely in the public glare. In sum, as the Tribunals conduct more trials, they will begin more closely to resemble domestic courts; that is, they will become bodies that prosecute relatively well-established crimes, sentence along relatively predictable patterns, and conduct their business largely outside the public view. For all of these reasons, plea bargaining is more likely to occur. The practical need to avoid the lengthy, costly Tribunal trials is likely to overshadow any ideological and symbolic factors militating against plea bargaining. The next section describes the Tribunals' guilty plea cases, and it along with the following section show that plea bargaining has evolved from a shadowy, questionable practice to an unconcealed, encouraged feature of the Tribunals' administration of criminal justice.

B. *The Tribunals' Guilty Plea Cases*

Of the thirty-eight Tribunal defendants who have been convicted, nine pled guilty. The circumstances surrounding their guilty pleas varied widely as did the resulting sentences. Subsection 1 describes the ICTY cases while subsection 2 describes the ICTR cases.

1. The ICTY's Guilty Plea Cases

a. *Background*⁴²¹

From 1945 until 1990, Yugoslavia was composed of six republics: Bosnia-Herzegovina, Croatia, Montenegro, Serbia, Slovenia, and Macedonia. Most of the republics were predominantly populated by one ethnic group with Bosnia-Herzegovina a multi-ethnic exception, having substantial Serbian, Muslim, and Croatian populations. For many years, these and other ethnic groups lived together peacefully, but the economic woes and the end of communist rule in the late 1980s set the stage for rising nationalism and ethnic friction. In 1991, the republics began declaring independence from the Federal Republic of Yugoslavia. While some secessions were followed by only short-lived armed conflict, the fighting between the Serbs, Croats, and Muslims in Bosnia-Herzegovina was fierce and lengthy.⁴²² The Bosnian conflict resulted in approximately 200,000 deaths,⁴²³ approximately 20,000 rapes,⁴²⁴ the forced relocation of more than two million people,⁴²⁵ and the "reappearance of concentration camps on European soil."⁴²⁶ Fighting continued until 1995 when the Presidents of Bosnia-Herzegovina, the Federal Republic of Yugoslavia, and Croatia entered into the Dayton Peace Accords.⁴²⁷

⁴²¹ The facts surrounding the war resulting from the dissolution of the former Yugoslavia and the Rwandan genocide are too complicated to relate in detail. Consequently, this subsection and the corresponding subsection addressing Rwanda, *see infra* Part IV.B.2, will provide only summary background treatment.

⁴²² *See* Krstic, Judgement, *supra* note 250, at paras. 7-10 (explaining the history of the region, the ethnic composition of the region, and the ensuing conflict).

⁴²³ Rosemary E. Libera, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291, 293 (2001).

⁴²⁴ SCHARF, *supra* note 251, at 52; Makau Matua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 223 (2001).

⁴²⁵ 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, at xiii (1995); Lynn Hastings, *Implementation of the Property Legislation in Bosnia-Herzegovina*, 37 STAN. J. INT'L L. 221, 221 (2001).

⁴²⁶ *Developments in the Law*, *supra* note 388, at 1953; *see also* SCHARF, *supra* note 251, at 31-32 (describing reports of ethnic cleansing received by the United States, Britain, and France in 1991).

⁴²⁷ The Accords affirm the independent state of Bosnia-Herzegovina as comprising two entities: the federation of Bosnia-Herzegovina and the Serbian Republika Srpska. In addition, they provide for democratic elections, international monitoring, and human rights guarantees. Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT'L L. 103, 105-07 (2001). For more detailed treatments of the Dayton Peace Accords, *see* Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT'L L. 147, 147-50 (1996); John

b. Erdemović

In July 1995, Serbian forces launched an offensive against the primarily Muslim city of Srebrenica in eastern Bosnia.⁴²⁸ Thousands of Bosnian Muslim civilians fled, some to a nearby United Nations compound and some to the woods.⁴²⁹ Serbian forces separated the Bosnian Muslim men from the women and children, transported the men to various sites, and executed approximately seven thousand of them.⁴³⁰ One of these sites was the Branjevo Farm in Pilica, and one of the soldiers assigned to the executions was Dražen Erdemović, a Croat, who had reluctantly joined the Bosnian Serb army.⁴³¹ Erdemović and the other soldiers shot and killed approximately 1200 unarmed Muslim men during a five-hour period, with Erdemović killing approximately seventy of them.⁴³² Erdemović stated that he initially refused to carry out the executions but was threatened with instant death. He was told: "If you don't wish to do it, stand in line with the rest of them and give others your rifle so that they can shoot you."⁴³³

The ICTY had never heard of Dražen Erdemović or the Branjevo Farm until Erdemović brought himself and the massacre to the Tribunal's attention. While in Belgrade, Erdemović made several at-

R.W.D. Jones, *The Implications of the Peace Agreements for the International Criminal Tribunal for the Former Yugoslavia*, 7 EUR. J. INT'L L. 226, 226-44 (1996).

⁴²⁸ See Krstić, Judgement, *supra* note 250, at paras. 11, 31 (describing the religious composition of Srebrenica and the initial stages of the offensive).

⁴²⁹ *Id.* at para. 37.

⁴³⁰ Erdemović, First Sentencing Judgement, *supra* note 330, at para. 76; Krstić, Judgement, *supra* note 250, at para. 1. For comprehensive discussions of the Srebrenica massacre, see JAN WILLEM HONIG & NORBERT BOTH, *SREBRENICA: RECORD OF A WAR CRIME* (1996); DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE'S WORST MASSACRE SINCE WORLD WAR II* (1997).

⁴³¹ Erdemović maintained that he had tried to avoid the war altogether. He ignored summonses to join the army of Bosnia-Herzegovina. He was mobilized into the Croatian Defence Council (HVO) but left that organization after he was arrested and beaten by HVO soldiers for having helped a Serbian woman and her children return to their territory. He also unsuccessfully sought to obtain identity papers that would have enabled him to go to Switzerland with his wife. Erdemović, First Sentencing Judgement, *supra* note 330, at para. 79; see also Akhavan, *supra* note 269, at 791-92 (describing Erdemović's efforts to avoid military service).

⁴³² Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 15. Erdemović himself did not know how many he killed, but estimated that it was between seventy and one hundred. During his testimony in the Rule 61 hearing against Karadžić and Mladić, Erdemović stated: "I cannot estimate but, to be quite frank, I would rather not know how many people I killed." Prosecutor v. Erdemović, Case No. IT-96-22-T, Prosecutor's Brief on Aggravating and Mitigating Factors, at n.8 (Nov. 11, 1996) [hereinafter Erdemović, Brief on Aggravating and Mitigating Factors] (on file with author).

⁴³³ Erdemović, First Sentencing Judgement, *supra* note 330, at para. 80.

tempts to contact the Tribunal, mostly through journalists to whom he told his story, and these attempts led to his arrest by Yugoslav authorities.⁴³⁴ He was subsequently transferred to the Tribunal⁴³⁵ and was charged with one count of a crime against humanity, and in the alternative, one count of a violation of the laws or customs of war.⁴³⁶ Immediately upon his arrival at the Tribunal, Erdemović provided the prosecution with a great deal of information about the Srebrenica massacres,⁴³⁷ and on his initial appearance before the Trial Chamber, he pled guilty to the count of a crime against humanity.⁴³⁸ He also testified on behalf of the prosecution in the Rule 61 proceedings in the Karadžić case.⁴³⁹ The prosecution described Erdemović's cooperation as "substantial, full and comprehensive" and in particular noted that Erdemović had provided the prosecution with facts of which they had previously been unaware, enabling them to initiate on-site investigations that confirmed Erdemović's statements.⁴⁴⁰ Erdemović also repeatedly expressed remorse about what had happened at Srebrenica.⁴⁴¹

The Trial Chamber accepted Erdemović's guilty plea, dismissed the alternative war crimes count,⁴⁴² and subsequently sentenced him to ten years' imprisonment.⁴⁴³ The Trial Chamber did not accept Erdemović's claim to have acted under duress because he did not produce

⁴³⁴ Prosecutor v. Erdemović, Case No. IT-96-22-T, Transcript, 31-34, 37-38 (Jan. 14, 1998) [hereinafter Erdemović, Transcript], at <http://www.un.org/icty/transe22/980114it.html>.

⁴³⁵ Erdemović, First Sentencing Judgement, *supra* note 330, at para. 2; Erdemović, Transcript, *supra* note 434, at 25-26.

⁴³⁶ Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgement, para. 3 (Oct. 7, 1997).

⁴³⁷ Erdemović, Transcript, *supra* note 434, at 35-38.

⁴³⁸ Erdemović, First Sentencing Judgement, *supra* note 330, at paras. 3, 10.

⁴³⁹ *Id.* at para. 6. Rule 61 provides for something of a mini-trial in cases in which a warrant for arrest has not been executed within a reasonable period of time. Rule 61 proceedings allow the prosecution to introduce in open court (and thus preserve) witness testimony, documentation, physical evidence, and the like. If a majority of the Trial Chamber concludes that "there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine." ICTY RPE, *supra* note 264, at R. 61(c). If a majority of the Trial Chamber additionally determines that the failure to execute the arrest warrant resulted from a refusal to cooperate by the state concerned, then it can transmit a certification of its conclusions to the U.N. Security Council as a basis for possible sanctions. *Id.* at R. 61(d).

⁴⁴⁰ Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 16(iv); Erdemović, First Sentencing Judgement, *supra* note 330, at para. 99.

⁴⁴¹ Erdemović, Transcript, *supra* note 434, at 48.

⁴⁴² Erdemović, First Sentencing Judgement, *supra* note 330, at para. 3.

⁴⁴³ *Id.* at text accompanying n.141.

any evidence corroborating that claim.⁴⁴⁴ The Chamber did, however, consider the extreme remorse that Erdemović repeatedly expressed and his substantial cooperation with the prosecution to be mitigating factors and discussed these at length, noting in particular that the prosecution had made Erdemović no promises in exchange for his testimony.⁴⁴⁵ As for Erdemović's guilty plea, the Trial Chamber mentioned it as a mitigating factor at the very end of the opinion,⁴⁴⁶ but the very cursory reference and its placement indicate that the Trial Chamber did not place substantial weight on it in mitigation.

Erdemović appealed, and the Appeals Chamber sent the case back to the Trial Chamber.⁴⁴⁷ In doing so, the Appeals Chamber made certain pronouncements about the advantages of guilty pleas and plea bargaining. Judges McDonald and Vohrah noted that common-law countries recognize the benefits that guilty pleas provide "to the public in minimising costs, in the saving of court time and in avoiding the in-

⁴⁴⁴ *Id.* at para. 91.

⁴⁴⁵ *Id.* at para. 99; *see also* Erdemović, Brief on Aggravating and Mitigating Factors, *supra* note 432, § E (Nov. 11, 1996) (telling the court that "[n]o promises were made by the OTP to Mr. Erdemović to induce his co-operation"). The Chamber also considered other mitigating factors: Erdemović's youth; his subordinate level in the military hierarchy; the fact that he did not constitute a danger; the corrigible character of his personality; and the fact that he would serve his sentence in a prison far from his own country. Erdemović, First Sentencing Judgement, *supra* note 330, at para. 111.

⁴⁴⁶ Erdemović, First Sentencing Judgement, *supra* note 330, at para. 111.

⁴⁴⁷ The Appeals Chamber held that before a Trial Chamber can accept a guilty plea, it must satisfy itself that the plea is voluntary, informed, and not equivocal. Erdemović, Joint Opinion of Judges McDonald and Vohrah, *supra* note 292, at para. 8. In a subsequent case, defendant Dragoljub Kunarac pled guilty to rape as a crime against humanity, Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1, Transcript, 5-6 (Mar. 9, 1998), but then-President Cassese declined to accept the plea, finding that it was not informed. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1, Transcript, 44-45 (Mar. 13, 1998).

The Erdemović Appeals Chamber further held that, all things being equal, an offense charged as a crime against humanity is more serious and should entail a harsher penalty than the same offense charged as a war crime. Erdemović, Joint Opinion of Judges McDonald and Vohrah, *supra* note 292, at para. 20. Because Erdemović was charged with alternative counts of a crime against humanity and a war crime and pled guilty to the crime against humanity—the more serious crime—the Appeals Chamber concluded that his plea was not informed. *See id.* at para. 26 ("Had he been properly apprised of the less serious charge and his entitlement to plead to it, we have grave doubts that he would have continued to plead guilty to the more serious charge."); Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, para. 5 (Oct. 7, 1997) (finding that while the guilty plea was voluntary, it was not sufficiently informed or unambiguous to be acceptable).

convenience to many, particularly to witnesses."⁴⁴⁸ They went on to opine that the institution of the guilty plea should

find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.⁴⁴⁹

Striking a similar note, Judge Cassese's separate and dissenting opinion also noted the financial and logistical difficulties of conducting criminal trials in international tribunals and concluded that by pleading guilty the defendant "undoubtedly contributes to public advantage."⁴⁵⁰ Judge Cassese went on to describe the benefits that a guilty plea secures for a defendant himself, and in particular noted that "the accused may expect that the court will recognise his cooperative attitude by reducing the sentence it would have imposed had there not been a plea of guilty: in other words, the accused may hope that the court will be more lenient in recognition of his admission of guilt."⁴⁵¹ Judge Cassese thus endorsed implicit plea bargaining, but he ended his endorsement there. He went on to say that:

⁴⁴⁸ Erdemović, Joint Opinion of Judges McDonald and Vohrah, *supra* note 292, at para. 2.

⁴⁴⁹ *Id.*

⁴⁵⁰ Erdemović, Cassese Dissent, *supra* note 143, at para. 8. The following is Judge Cassese's full treatment of the difficulties attendant upon international criminal trials:

It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties—it bears stressing—are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.).

Id.

⁴⁵¹ *Id.* Judge Cassese also noted that by pleading guilty a defendant might "salve his conscience and atone for his wrongdoing." *Id.* He also will "avoid the indignity and the possible demoralisation of undergoing a trial," as well as the attendant psychological ordeal, and he will "eschew the public exposure that may ensue from trial, and the adverse consequences for his social position and the life of his family and relatives." *Id.*

[B]oth the Statute and the Rules deliberately do not make provision for plea bargaining—or, at least, for any endorsement or acknowledgement by the Chambers of out-of-court plea bargaining. This means, among other things, that the framers of the Statute and the Rules aimed at averting those distortions of the free will of the accused which may be linked to plea bargaining.⁴⁵²

At his next appearance before the Trial Chamber, Erdemović pled guilty to the war-crimes charge,⁴⁵³ and at the second sentencing hearing, the prosecution and defense presented the Trial Chamber with an American-style “Plea Bargain Agreement.”⁴⁵⁴ The agreement recorded that the parties had agreed, among other things, on the “factual basis of the allegations” and, in particular, that Erdemović had acted under duress.⁴⁵⁵ The parties further agreed that “seven years’ imprisonment would be an appropriate sentence in this case, considering the mitigating circumstances,”⁴⁵⁶ and the prosecution “agreed not to proceed with the alternative count of a crime against humanity.”⁴⁵⁷ At the pre-sentencing hearing, the prosecution emphasized the enormous value of Erdemović’s cooperation⁴⁵⁸ and the fact that it was offered “freely and voluntarily,”⁴⁵⁹ without expectation of leniency,⁴⁶⁰ and “at some personal

⁴⁵² *Id.* at para. 10.

⁴⁵³ Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 8.

⁴⁵⁴ *Id.* at para. 18.

⁴⁵⁵ *Id.* at para. 18(c).

⁴⁵⁶ *Id.* at para. 18(d).

⁴⁵⁷ *Id.* at para. 18(e).

⁴⁵⁸ Erdemović, Transcript, *supra* note 434, at 28. The prosecution noted the particular value of the information that Erdemović provided, stating, for instance, that information regarding the massacre at the Branjevo Farm in Pilica

was not available to the Office of the Prosecutor in any great detail prior to the assistance that was given by Mr. Erdemović. The location of the site was . . . of significant importance to the Office of the Prosecutor and permitted an exhumation to be carried out at the site where the victims were uncovered.

Id. The prosecution also noted that the ICTY had a greater need for such information than a domestic jurisdiction because

in national jurisdictions the prosecutor officials [sic] have access to police forces who are mobile on the ground and can obtain evidence and information much more readily and easily than occurs with the Office of the Prosecutor here in the Tribunal, which to a large extent is dependent upon the cooperation of states and other international and non-international bodies, before that information can be collected and gathered.

Id.

⁴⁵⁹ *Id.* at 29.

⁴⁶⁰ *See id.* at 38, 46 (asserting that Erdemović repeatedly did not attempt to trade information for a reduced sentence or charge).

risk" to Erdemović himself.⁴⁶¹ In addition, the prosecution emphasized that Erdemović was fully aware that his coming forward would likely result in his prosecution for international crimes.⁴⁶²

While noting that it was in no way bound by the recommendations in the plea agreement, the second Trial Chamber stated that it took them "into careful consideration" in determining Erdemović's sentence.⁴⁶³ In addition, the second Trial Chamber showed greater appreciation for the utility of guilty pleas and a greater willingness to reward them, perhaps in consequence of the Appeals Chamber's discussion of the question. Thus, instead of treating Erdemović's guilty plea as something of an afterthought, perhaps as a factor that should not be discussed too openly, the second Trial Chamber announced that "[a]n admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators."⁴⁶⁴ The Trial Chamber further noted that Erdemović's "voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended."⁴⁶⁵

In March 1998, nearly eighteen months after the first Trial Chamber pronounced its ten-year sentence upon Erdemović, the second Trial Chamber sentenced him to five years' imprisonment.⁴⁶⁶ Some of the difference between the two sentences presumably reflected the belief—which has subsequently been invalidated—that a war crime should ordinarily result in a lighter penalty than a crime against humanity. But one suspects the second Trial Chamber's greater appreciation for Erdemović's guilty plea also played a role. The Trial Chamber noted the benefits that a guilty plea affords to the Tribunal and the desirable qualities that it reflects in the defendant who makes it.⁴⁶⁷ And because Erdemović was that rare defendant whose guilty plea did seem motivated by true remorse and a desire to state the truth, the Trial Chamber's words rang true, which would not always be the case in subsequent cases.

⁴⁶¹ *Id.* at 29.

⁴⁶² *Id.* at 45-46.

⁴⁶³ Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 19.

⁴⁶⁴ *Id.* at para. 16(ii).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at para. 23.

⁴⁶⁷ *Id.* at para. 16.

c. Jelisić

The next ICTY defendant to plead guilty, Goran Jelisić, was not nearly so sympathetic a character as his predecessor. Jelisić was the de facto commander of the Luka detention camp, the camp to which Muslim men were transported and imprisoned following the Serbs' May 1992 attack on Brčko, in northeastern Bosnia.⁴⁶⁸ Jelisić presented himself to his Muslim detainees and later to the Tribunal as the "Serbian Adolf" and allegedly told the detainees that 70% of them were to be killed and the remaining 30% beaten.⁴⁶⁹ Jelisić reportedly declared that he had to execute twenty to thirty people in a morning before being able to drink his coffee and allegedly kept detainees informed of the running count of Muslims that he had killed.⁴⁷⁰ On May 11, 1992, he claimed to have killed 150 people.⁴⁷¹

In an amended indictment, Jelisić was charged with one count of genocide and thirty-nine counts of crimes against humanity and violations of the laws or customs of war.⁴⁷² Jelisić pled not guilty to the count of genocide, but, after indicating his willingness to plead guilty to thirty-one of the war-crimes and crimes-against-humanity counts,⁴⁷³ the parties prepared an "Agreed Factual Basis for the Guilty Pleas to be Entered by Goran Jelisić," and the prosecution dropped the remaining war-crimes and crimes-against-humanity counts.⁴⁷⁴ In the Agreed Factual Basis, Jelisić admitted to killing thirteen people,⁴⁷⁵ inflicting bodily harm on four people,⁴⁷⁶ and stealing money from the Luka camp detainees.⁴⁷⁷ More specifically, Jelisić admitted to severely beating some of his victims

⁴⁶⁸ Jelisić, Judgement, *supra* note 312, at paras. 18, 21.

⁴⁶⁹ *Id.* at para. 102. He went on to state that of the 30% who would be beaten, only 4% "might not be badly beaten." *Id.*

⁴⁷⁰ *Id.* at para. 103.

⁴⁷¹ *Id.*

⁴⁷² Prosecutor v. Jelisić, Case No. IT-95-10-PT, Amended Indictment, paras. 16-41 (Mar. 3, 1998) [hereinafter Jelisić, Amended Indictment], reprinted in *Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, Y.B. 1998, at 168, U.N. Sales No. E.00.III.P.1 [hereinafter *Int'l Tribunal*, 1998 Y.B.].

⁴⁷³ Jelisić, Judgement, *supra* note 312, at paras. 8, 11, 24.

⁴⁷⁴ *Id.* at para. 10. Compare Jelisić, Amended Indictment, *supra* note 472, at paras. 16-41, with Prosecutor v. Jelisić, Case No. IT-95-10-T, Second Amended Indictment, paras. 15-63 (Oct. 19, 1998) [hereinafter Jelisić, Second Amended Indictment], reprinted in *Int'l Tribunal*, 1998 Y.B., *supra* note 472, at 178.

⁴⁷⁵ Jelisić, Judgement, *supra* note 312, at paras. 3, 38.

⁴⁷⁶ *Id.* at paras. 3, 42-44.

⁴⁷⁷ *Id.* at paras. 3, 49.

with truncheons and clubs before killing them.⁴⁷⁸ The Trial Chamber noted the “repugnant, bestial and sadistic nature” of Jelisić’s crimes.⁴⁷⁹

The Trial Chamber held a trial on the genocide count and acquitted Jelisić after hearing only the prosecution’s submissions.⁴⁸⁰ At the pre-sentencing hearing on the counts to which Jelisić had pled guilty, the prosecution sought a sentence of life imprisonment.⁴⁸¹ The prosecution maintained that Jelisić’s cooperation had “not been substantial and ongoing,” and it contended that his guilty plea should not be considered a substantial mitigating factor.⁴⁸² The prosecution maintained that, unlike some guilty pleas, Jelisić’s did not evidence remorse or spare the victims the burden of testifying, since he went to trial on the genocide count.⁴⁸³ Further, the prosecution noted that Jelisić was aware of incriminating evidence in the prosecution’s possession, and that he had admitted little more than what was shown in the evidence.⁴⁸⁴

The Trial Chamber did not impose a life sentence but came close, sentencing Jelisić to forty years’ imprisonment for the crimes to which he had pled guilty.⁴⁸⁵ Unlike the second *Erdemović* Trial Chamber, which spoke so glowingly about Erdemović’s guilty plea, the *Jelisić* Trial Chamber gave Jelisić little, if any, credit for his plea. Although the Trial Chamber “considered [Jelisić’s] guilty plea out of principle,” it went on

⁴⁷⁸ *Id.* at para. 38.

⁴⁷⁹ *Id.* at para. 130.

⁴⁸⁰ *Id.* at para. 15. The Appeals Chamber subsequently reversed the Trial Chamber’s conclusion that the evidence was not sufficient to sustain a conviction on genocide. Jelisić, Appeal, *supra* note 312, at para. 57. However, it did not send the case back to the Trial Chamber for a new trial. *Id.* at paras. 73-77.

⁴⁸¹ Jelisić, Judgement, *supra* note 312, at para. 119; Prosecution v. Jelisić, Case No. IT-95-10-T, Transcript, 3070, 3132 (Nov. 25, 1999) [hereinafter Jelisić, Transcript], at <http://www.un.org/icty/transe10/991125it.htm>.

⁴⁸² Jelisić, Transcript, *supra* note 481, at 3077-79. In particular, the prosecution maintained that:

[Jelisić’s] cooperation was not significant and did not contribute in a meaningful way. It did not contribute to the effective arrest of other defendants or to the effective pursuit of other suspects or targets, and it did not lead to significant investigations. The defendant did not surrender himself voluntarily. The information provided was not considered by the Prosecution as useful, taking into consideration the fact that it was mainly public information or information of common knowledge, except with respect to his own acts. The Prosecution considers part of the information to be unreliable or incorrect because of inconsistencies and because of the sanitised version of events given.

Id. at 3078.

⁴⁸³ *Id.* at 3079-80.

⁴⁸⁴ *Id.* at 3080-81.

⁴⁸⁵ Jelisić, Judgement, *supra* note 312, at para. 139.

to note that Jelisić was fully aware of photographs that showed him committing some of the crimes and “demonstrated no remorse . . . for the crimes he committed.”⁴⁸⁶ Accordingly, the Trial Chamber accorded “only relative weight to his plea.”⁴⁸⁷ The Trial Chamber further noted that “Jelisić’s crimes were committed under particularly aggravating circumstances”⁴⁸⁸ that far outweighed the mitigating circumstances.⁴⁸⁹ The Trial Chamber noted in particular Jelisić’s “cold-blooded” and “enthusiastic” commission of the crimes, which, according to the Trial Chamber, attested “to a profound contempt for mankind and the right to life.”⁴⁹⁰

Although Jelisić pled guilty, the case did not involve a plea bargain because Jelisić got nothing in return for his plea. According to one of Jelisić’s lawyers, Jelisić pled guilty, over the objections of his lawyers, on the mistaken belief that his guilty plea would be considered substantial cooperation with the prosecution.⁴⁹¹ In fact, prosecution lawyers told Jelisić that they would offer him nothing for his plea⁴⁹² and true to their word, they sought the harshest available sentence. The prosecution did withdraw eight of the thirty-nine counts of war crimes and crimes against humanity, but it did so as a result of evidentiary deficiencies, not to grant Jelisić a concession.⁴⁹³ As for the Trial Chamber, by imposing a forty-year sentence on the thirty-one-year-old Jelisić,⁴⁹⁴ it issued the practical equivalent of a life sentence, showing that no implicit plea bargaining took place.

⁴⁸⁶ *Id.* at para. 127.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at para. 129.

⁴⁸⁹ *See id.* at para. 134 (explaining why the Trial Chamber imposed such a high standard).

⁴⁹⁰ *Id.* at paras. 130-31.

⁴⁹¹ Telephone Interview with Nicola Kostić, Defense Counsel (Oct. 25, 2001).

⁴⁹² Telephone Interview with Terree Bowers, former ICTY Senior Trial Attorney (Oct. 30, 2001).

⁴⁹³ *Id.* Indeed, the withdrawal, whatever the reason for it, was not likely to (and did not) result in a substantial sentence reduction given the counts that remained. Of the eight dropped charges, four related to the killing of two people, two related to the general conditions at the Luka camp, and two related to the torture of a victim that Jelisić admitted to killing. While these charges are obviously serious, they do not add substantially in quality or quantity to the egregious criminal conduct to which Jelisić pled guilty.

⁴⁹⁴ Jelisić, Judgement, *supra* note 312, at para. 124.

d. Todorović

Stevan Todorović, the third ICTY defendant to plead guilty, was indicted along with four other defendants for atrocities committed as part of the Serbs' ethnic cleansing of Bosanski Šamac and Odžak in northern Bosnia-Herzegovina.⁴⁹⁵ Following the Serb take-over of Bosanski Šamac in April 1992, Todorović, a wicker-furniture factory executive, was appointed Chief of Police of Bosanski Šamac.⁴⁹⁶ Todorović participated in the take-over of the municipality and in the deportation and detention of the non-Serb population.⁴⁹⁷ While acting as police chief, Todorović engaged in murder, sexual assaults, and beatings.⁴⁹⁸ As a result of these offenses, Todorović was charged with twenty-seven counts of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war.⁴⁹⁹

Todorović pled not guilty to these counts⁵⁰⁰ and prepared, along with his co-defendants, for trial. Unlike his co-defendants, however, Todorović held a bargaining chip—the ability to embarrass NATO—that would assist him in obtaining sentencing concessions. Todorović had been captured by four bounty hunters while in his home in the Federal Republic of Yugoslavia.⁵⁰¹ He was allegedly dealt a heavy blow to the head⁵⁰² while being transported to Bosnia-Herzegovina and into the hands of the NATO forces deployed there (SFOR).⁵⁰³ Upon his

⁴⁹⁵ According to the indictment, Croats and Muslims accounted for 17,000 of the total population of 33,000 of Bosanski Šamac prior to the Serb take-over of the municipality in April 1992. By May, 1995, fewer than 300 of the 17,000 Croat and Muslim residents remained. Prosecutor v. Simić, Case No. IT-95-9-PT, Second Amended Indictment, para. 8 (Mar. 25, 1999) [hereinafter Simić, Second Amended Indictment], at <http://www.un.org/icty/indictment/english/sim-r2ai990325e.pdf>.

⁴⁹⁶ *Id.* at para. 17.

⁴⁹⁷ Todorović, Sentencing Judgement, *supra* note 336, at paras. 35, 42, 45.

⁴⁹⁸ *Id.* at paras. 36-41.

⁴⁹⁹ Simić, Second Amended Indictment, *supra* note 495, at paras. 29-30, 34, 38, 40-47.

⁵⁰⁰ Todorović, Sentencing Judgement, *supra* note 336, at paras. 2, 4.

⁵⁰¹ See Major Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 217 n.11 (2001); Marlise Simmons, *War Crimes Court Takes It Easy on a Cooperative Bosnian Serb*, N.Y. TIMES, Aug. 1, 2001, at A4 (reporting that the method of Todorović's arrest set his case apart from others and was a difficult issue for the court to handle). A regional court in Serbia subsequently convicted nine people of "kidnapping for money." *9 Convicted of Kidnap of War-Crimes Suspect*, N.Y. TIMES, Dec. 12, 2000, at A15; see also Prosecutor v. Todorović, Case No. IT-95-9/1, Transcript, 786 (Dec. 13, 2000) (detailing the defense counsel's discussion of Todorović's capture and his capturers' subsequent prosecution), at <http://www.un.org/icty/transe9/001213.htm>.

⁵⁰² See Susan Lamb, *Illegal Arrest and the Jurisdiction of the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 27, 35 n.33 (discussing Todorović's injury); Laura Palmer & Cristina Posa, *The Best*

hands of the NATO forces deployed there (SFOR).⁵⁰³ Upon his arrival at the ICTY, Todorović asked for an evidentiary hearing to address the legality of his arrest.⁵⁰⁴ Once the Trial Chamber granted his request for an evidentiary hearing, Todorović filed a motion for judicial assistance, asking the Trial Chamber to order “NATO/SFOR or other military and security forces operating in Bosnia to provide documents and witnesses regarding Todorović’s detention” and transfer to Bosnia.⁵⁰⁵ The Trial Chamber granted Todorović’s motion, over SFOR’s vehement objections, and ordered SFOR and the states participating in SFOR to provide Todorović with, among other things, the names of the persons who had transported him to Bosnia-Herzegovina and copies of correspondence, audio and video tapes, and pre- and post-operations reports relating to Todorović’s arrest.⁵⁰⁶ NATO, the United States, and several other NATO states appealed, and the Appeals Chamber stayed the Trial Chamber’s decision pending appeal.⁵⁰⁷

While the case was pending before the Appeals Chamber, Todorović and the prosecution negotiated a plea agreement. Pursuant to the plea agreement, Todorović pled guilty to one count of persecution as a crime against humanity,⁵⁰⁸ promised to testify against his co-defendants and in other proceedings—one of which may be the *Milošević* case⁵⁰⁹—and withdrew his motions challenging the legality of

Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground, 12 HARV. HUM. RTS. J. 361, 382 n.116 (1999) (repeating the defense attorney’s statements that Todorović was hit in the head with a baseball bat during his capture).

⁵⁰³ Sean D. Murphy ed., *Contemporary Practice of the United States Relating To International Law*, 95 AM. J. INT’L L. 387, 401 (2001).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 401; see also *Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to Be Provided by SFOR and Others, para. 1 (Oct. 18, 2000) [hereinafter *Simić*, Decision on Motion for Judicial Assistance], at <http://www.un.org/icty/simic/trialc3>. For a detailed treatment of Todorović’s motions regarding his arrest, see Lamb, *supra* note 502, at 34-36.

⁵⁰⁶ *Simić*, Decision on Motion for Judicial Assistance, *supra* note 505, at disposition.

⁵⁰⁷ *Prosecutor v. Simić*, Case No. IT-95-9-A, Decision and Scheduling Order (Nov. 8, 2000), at <http://www.un.org/icty/simic/appeal/decision-e/01108JA314063.htm>; see also Wald, *supra* note 288, at 549 n.64 (noting the “high-decibel protests by NATO countries and SFOR” against the Trial Chamber’s order of disclosure).

⁵⁰⁸ Todorović, Sentencing Judgement, *supra* note 336, at para. 4.

⁵⁰⁹ *Id.* at para. 84. Todorović’s plea agreement remains under seal, so the particulars of his promises to cooperate are not available. However, a Tribunal prosecutor told the *New York Times* that Todorović, because of his position, had valuable information about the wartime political chain of command—in particular the role of the paramilitary groups from Serbia and their connections with the Belgrade government. According to the prosecutor, the trail “could well lead” to Milošević. Simmons, *supra*

his arrest.⁵¹⁰ The prosecution, for its part, withdrew the remaining twenty-six counts⁵¹¹ and agreed to recommend to the Trial Chamber a prison sentence of between five and twelve years.⁵¹² Both parties agreed not to appeal any sentence imposed by the Trial Chamber within that range,⁵¹³ and both parties agreed that if either side did not fulfil its end of the bargain, the plea agreement would be dissolved and the case would proceed to trial.⁵¹⁴ *Todorović* thus represents the first ICTY case to expressly feature plea bargaining.

Although on the surface, the withdrawal of twenty-six of the twenty-seven counts would seem a substantial prosecutorial concession, in fact, it had limited significance because the one count to which *Todorović* pled guilty encompassed the offenses contained in the other twenty-six counts. Specifically, in the twenty-six counts that the prosecution dropped, *Todorović* was alleged to have participated in the deportation and transfer of non-Serb civilians;⁵¹⁵ to have ordered the torture of a Muslim civilian;⁵¹⁶ and to have killed, beaten, and sexually assaulted other, specified non-Serb civilians.⁵¹⁷ The one count to which *Todorović* pled guilty—persecution as a crime against humanity—charged *Todorović* with the same offenses; and in pleading guilty,

note 501. At *Todorović*'s sentencing hearing, the Senior Trial Attorney described *Todorović*'s cooperation with the prosecution as follows:

I can confirm that Mr. *Todorović* has spoken with representatives of our offices on multiple occasions, and on each occasion he has participated in a fully cooperative and forthright manner. Some of the information he has provided might not have been accessible to the Prosecution but for his cooperation. Mr. *Todorović* has agreed to continue his cooperation, and there are plans to interview him on future occasions. In addition, he has agreed to testify at the trial in this case and in other cases in which his assistance might be useful.

Prosecutor v. *Todorović*, Case No. IT-95-9/1, Transcript, 54-55 (May, 4, 2001) (on file with author).

⁵¹⁰ *Todorović*, Sentencing Judgement, *supra* note 336, at para. 5.

⁵¹¹ Prosecutor v. *Todorović*, Case No. IT-95-9/1, Decision on the Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions, para. 5 (Feb. 26, 2001), at <http://www.un.org/icty/todovoric/trialc/decision-e/10226DC515095.htm>; *Todorović*, Sentencing Judgement, *supra* note 336, at para. 5.

⁵¹² *Todorović*, Sentencing Judgement, *supra* note 336, at para. 11.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at para. 8; *see also* Prosecutor v. *Todorović*, Case No. IT-95-9/1, Transcript, 810-12 (Jan. 19, 2001) (reserving the right of the Prosecutor to reinstate the indictment should the accused fail to fulfil his obligations under the plea agreement), at <http://www.un.org/icty/transe9/010119iaed.htm>.

⁵¹⁵ Prosecutor v. *Simić*, Second Amended Indictment, *supra* note 495, at paras. 38, 40-47.

⁵¹⁶ *Id.* at para. 47.

⁵¹⁷ *Id.* at paras. 43-46.

ed Todorović with the same offenses; and in pleading guilty, Todorović admitted in a written “Factual Basis for the Crimes to which Stevan Todorović has pled guilty” to the same killing, beatings, sexual assaults, torture, and deportations that were included in the twenty-six dropped counts.⁵¹⁸ Thus, the withdrawal of the twenty-six counts should have made little or no difference to Todorović’s sentence. The real sentencing concession bestowed on Todorović was the prosecution’s promise not to seek a sentence exceeding twelve years’ imprisonment. At Todorović’s sentencing hearing, the prosecution opined that had Todorović been convicted at trial, he probably would have been sentenced to a term of imprisonment ranging from fifteen to twenty-five years or more.⁵¹⁹

On this point, the Trial Chamber agreed. Although the Trial Chamber repeatedly noted that it was not bound by the plea agreement,⁵²⁰ it sentenced Todorović to ten years’ imprisonment⁵²¹—thus within the range specified by the parties—and stated that it would have sentenced Todorović to a much longer term of imprisonment but for his timely guilty plea and his cooperation with the prosecution.⁵²² Indeed, if *Todorović* represents the first ICTY case in which prosecutorial plea bargaining became evident, it also represents the Trial Chambers’ first explicit blessing of plea bargaining. Specifically, the Trial Chamber expressly held “that a guilty plea should, in principle, give rise to a reduction in the sentence that the accused would otherwise have received.”⁵²³ In justifying this view, the Trial Chamber not only noted the

⁵¹⁸ See Todorović, Sentencing Judgement, *supra* note 336, at paras. 7, 9.

⁵¹⁹ Prosecutor v. Todorović, Case No. IT-95-9/1, Transcript, 55 (May 4, 2001) (on file with author). That estimate seems reasonable: Tadić received a twenty-year sentence for somewhat similar conduct, and Tadić did not hold a superior position as did Todorović. And Jelisić, even after pleading guilty, received a forty-year sentence. Jelisić killed more people than Todorović, so he deserved a harsher sentence, but there are many terms of imprisonment that are shorter than forty years and longer than twelve years.

⁵²⁰ Todorović, Sentencing Judgement, *supra* note 336, at paras. 16, 79, 86.

⁵²¹ *Id.* at para 115.

⁵²² *Id.* at para. 114. The prosecution sought the maximum sentence that it could seek under the plea agreement—twelve years—and argued that Todorović had already been compensated for his cooperation and guilty plea by the prosecution’s promise not to seek a sentence longer than twelve years’ imprisonment, so that the Trial Chamber should not impose a shorter sentence. *Id.* at para. 68. The Chamber rejected that argument, holding that “the fact that an accused has gained or may gain something pursuant to an agreement with the Prosecution does not preclude the Trial Chamber from considering his substantial cooperation as a mitigating circumstance in sentencing.” *Id.* at para. 86.

⁵²³ *Id.* at para. 80.

financial and logistical advantages of guilty pleas,⁵²⁴ it set forth an additional benefit, stating that “[a] guilty plea is always important for the purpose of establishing the truth in relation to a crime.”⁵²⁵ Finally, the Trial Chamber gave Todorović credit for remorse. At his sentencing hearing, Todorović had made a statement, expressing his “profound repentance and remorse.”⁵²⁶ He told the Trial Chamber that he had not wanted to become police chief, that he had lacked the courage to prevent the atrocities, and that if allowed to return to Bosnia, he would “invest every effort in the new multi-ethnic Bosnia” as a means of atoning for his sins.⁵²⁷ The Trial Chamber considered these expressions of remorse sincere and treated them as a mitigating factor.⁵²⁸

e. Sikirica

In April 1992, Serb forces took control of the town of Prejidor, in northwestern Bosnia-Herzegovina and soon after began seizing Bosnian Muslims and Bosnian Croats and transferring them to detention facilities. *Sikirica* involved one of those detention facilities—the Keraterm camp—and featured as defendants Duško Sikirica, Keraterm’s Commander of Security, and Damir Došen and Dragen Kolundžija, two of Keraterm’s shift leaders.⁵²⁹ Keraterm’s detainees were kept in appalling conditions. They were confined in crowded rooms where there was so little space that they had to take turns standing.⁵³⁰ They had little or no access to medical care, toilets,⁵³¹ or water⁵³² and were fed only starvation rations.⁵³³ Most detainees were beaten on arrival at the camp,⁵³⁴ and guards and visitors thereafter beat the detainees at will, killing many of them.⁵³⁵ In the camp’s most notorious incident—the so-called Room 3 massacre—Serb forces entered Keraterm, locked approximately 150 to

⁵²⁴ *Id.*

⁵²⁵ *Id.* at para. 81.

⁵²⁶ *Id.* at para. 90.

⁵²⁷ Prosecutor v. Todorović, Case No. IT-95-9/1, Transcript, 59-62 (May 4, 2001).

⁵²⁸ Todorović, Sentencing Judgement, *supra* note 336, at para. 92.

⁵²⁹ Sikirica, Sentencing Judgement, *supra* note 355, at paras. 118, 153, 200.

⁵³⁰ *Id.* at paras. 62-63.

⁵³¹ *Id.* at paras. 68, 74.

⁵³² *Id.* at para. 73.

⁵³³ *Id.* at para. 70. Each detainee lost, on average, forty-four pounds. *Id.* at para.

72.

⁵³⁴ *Id.* at para. 57.

⁵³⁵ *Id.* at paras. 84-100.

200 detainees in a room, and fired upon them with machine guns, killing virtually all of them.⁵³⁶

Recounting these and other facts, the indictment charged the defendants with persecution as a crime against humanity and several other crimes against humanity and war crimes.⁵³⁷ In addition, the indictment charged Sikirica with one count of genocide and one count of complicity to commit genocide.⁵³⁸ All three defendants pled not guilty and proceeded to trial.⁵³⁹ At the close of the prosecution's case, the three defendants filed motions for acquittal. The Trial Chamber granted Sikirica's motion with respect to the counts of genocide and complicity to commit genocide,⁵⁴⁰ and it granted Došen's motion with respect to four counts of crimes against humanity and war crimes involving the beating of detainees because the prosecution conceded that "the only evidence connecting Damir Došen to the alleged incident [was] exculpatory in nature."⁵⁴¹

Following the Trial Chamber's judgment, Sikirica and Došen put on their defenses, but when it came time for Kolundžija to put on his defense, he instead pled guilty. He and the prosecution entered into a plea agreement in which he pled guilty to one count of persecution as a crime against humanity, and the prosecution dropped the remaining four counts.⁵⁴² Three days after Kolundžija entered his guilty plea, Sikirica and Došen informed the Trial Chamber that they too had entered into plea agreements with the prosecution wherein they pled guilty to one count of persecution as a crime against humanity, and the prosecution dropped the remaining counts.⁵⁴³ Although all three defendants pled guilty to the count of persecution as a crime against humanity, they acknowledged varying levels of culpability. The prosecution count alleged persecution by five methods: (a) murder; (b) torture and beating; (c) sexual assault and rape; (d) harassment, hu-

⁵³⁶ *Id.* at paras. 101-03.

⁵³⁷ Prosecutor v. Sikirica, Case No. IT-95-8-PT, Second Amended Indictment (Jan. 3, 2001), at <http://www.un.org/icty/indictment/english/sik-2ai001220e.htm>.

⁵³⁸ *Id.* at paras. 26-34.

⁵³⁹ Sikirica, Sentencing Judgement, *supra* note 355, at paras. 2-4.

⁵⁴⁰ Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, paras. 97, 172 (Sept. 3, 2001), at <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>.

⁵⁴¹ *Id.* at paras. 134, 151.

⁵⁴² Sikirica, Sentencing Judgement, *supra* note 355, at paras. 12-13; Prosecutor v. Kolundžija, Case No. IT-95-8-T, Admitted Facts Relevant to the Plea Agreement for Dragan Kolundžija, para. 7 (Sept. 4, 2001) [hereinafter Kolundžija, Plea Agreement] (on file with author).

⁵⁴³ Sikirica, Sentencing Judgement, *supra* note 355, at paras. 14-15.

miliation, and psychological abuse; and (e) confinement in inhumane conditions.⁵⁴⁴ Sikirica acknowledged participating in all of those methods and in particular admitted to killing one detainee;⁵⁴⁵ Došen admitted to participating in (b), (d), and (e);⁵⁴⁶ and Kolundžija admitted only (e).⁵⁴⁷ All three defendants acknowledged the murders and beatings that took place at Keraterm and the inhumane conditions prevailing,⁵⁴⁸ but the plea agreements also noted the defendants' limited responsibilities. They stated, for instance, that none of the defendants had had the power to punish subordinates⁵⁴⁹ and that they had little, if any, ability to prevent other persons, not on the staff, from entering Keraterm at will and mistreating the detainees.⁵⁵⁰ Sikirica's and Došen's plea agreements stated that they were not responsible for ensuring adequate food, water, clothing, medical assistance, and accommodation for the detainees,⁵⁵¹ and Došen's and Kolundžija's plea agreements noted certain efforts that those defendants had made to assist detainees.⁵⁵²

The *Sikirica* plea agreements and sentencing proceedings bore great similarity to those of *Todorović*. As in *Todorović*, the prosecution in *Sikirica* agreed to recommend sentences that fell within specified ranges, and both parties agreed not to appeal any sentence that fell within that range.⁵⁵³ Specifically, the prosecution agreed to recommend

⁵⁴⁴ *Id.* at para. 18.

⁵⁴⁵ *Id.* at paras. 18, 21.

⁵⁴⁶ *Id.* at para. 26.

⁵⁴⁷ *Id.* at para. 32.

⁵⁴⁸ Kolundžija, Plea Agreement, *supra* note 542, at para. 3; Prosecutor v. Došen, Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Damir Došen Concerning a Plea Agreement and Admitted Facts, paras. 8-10 (Sept. 6, 2001) [hereinafter Došen, Plea Agreement] (on file with author); Prosecutor v. Sikirica, Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Duško Sikirica Concerning a Plea Agreement and Admitted Facts, paras. 8-10 (Sept. 6, 2001) [hereinafter Sikirica, Plea Agreement] (on file with author).

⁵⁴⁹ Sikirica, Sentencing Judgement, *supra* note 355, at paras. 19, 27.

⁵⁵⁰ *Id.* at paras. 20, 28, 34.

⁵⁵¹ *Id.* at paras. 19, 27.

⁵⁵² Kolundžija, Plea Agreement, *supra* note 542, at paras. 4-5; Došen, Plea Agreement, *supra* note 548, at para. 13; *see also* Prosecutor v. Sikirica, Case No. IT-95-8-T, Prosecution's Sentencing Brief, paras. 70, 86 (Sept. 28, 2001) [hereinafter Sikirica, Prosecution's Sentencing Brief] (recording that while not responsible for prisoner conditions, Sikirica attempted to improve them) (on file with author); Sikirica, Sentencing Judgement, *supra* note 355, at paras. 27, 29, 33-35 (stating that all three defendants attempted to improve conditions of detainees). Indeed, at trial, forty-one prosecution witnesses testified about Kolundžija's efforts. Prosecutor v. Sikirica, Case No. IT-95-8-T, Transcript, 5773 (Oct. 8, 2001) [hereinafter Sikirica, Transcript] (on file with author).

⁵⁵³ Sikirica, Sentencing Judgement, *supra* note 355, at paras. 25, 31, 37. In

sentences between ten and seventeen years' imprisonment for Sikirica, between five and seven years' imprisonment for Došen, and between three and five years' imprisonment for Kolundžija.⁵⁵⁴ Further, each of the *Sikirica* defendants, like Todorović, made statements at the sentencing hearing expressing his remorse. While the Keraterm statements were not identical, they were quite similar both to each other and to Todorović's. They all emphasized that they had not worked at Keraterm voluntarily; that they were sorry that they had not done more to prevent the atrocities; and that, when they returned to Prejidor, they would speak out against ethnic divisions and try to promote reconciliation and harmony.⁵⁵⁵ One significant difference between *Sikirica* and *Todorović*, however, is that the *Sikirica* defendants did not promise to cooperate with the prosecution.

The Trial Chamber also followed *Todorović* in its treatment of several sentencing issues. First, the Trial Chamber sentenced the defendants to terms of imprisonment within the ranges set forth in the plea agreements; specifically, it sentenced Sikirica, Došen, and Kolundžija to prison terms of fifteen years, five years, and three years, respectively.⁵⁵⁶ Second, over the prosecution's objection, the Trial Chamber concluded that the defendants' statements of remorse were sincere and treated them as mitigating factors.⁵⁵⁷ Finally, and most importantly, the *Sikirica* Trial Chamber reiterated *Todorović*'s endorsement of guilty pleas and indeed expanded upon it. Todorović had pled guilty before his trial began, and after noting the savings that thus had accrued to the Tribunal, the *Todorović* Trial Chamber went on to note that:

[A] plea of guilt will only contribute to the above-described public advantage if it is pleaded before the commencement of the trial against the accused [I]f pleaded at a later stage of the proceedings, or even after the conclusion of the trial, a voluntary admission of guilt will not

Sikirica's plea agreement, the prosecution also agreed not to appeal the Trial Chamber's decision that Sikirica had no case to answer with respect to the genocide counts. *Sikirica*, Plea Agreement, *supra* note 548, at para. 5(b).

⁵⁵⁴ *Sikirica*, Sentencing Judgement, *supra* note 355, at paras. 25, 31, 37. Also, like Todorović, the prosecution in *Sikirica* recommended the maximum sentence for each defendant. *Sikirica*, Transcript, *supra* note 552, at 5687; *Sikirica*, Sentencing Judgement, *supra* note 355, at para. 42.

⁵⁵⁵ *Sikirica*, Transcript, *supra* note 552, at 5718-20, 5736-37, 5741-43.

⁵⁵⁶ *Sikirica*, Sentencing Judgement, *supra* note 355, at para. 245.

⁵⁵⁷ *Id.* at paras. 152, 194, 230. The prosecution had maintained that neither Sikirica nor Došen had shown any remorse. *Id.* at paras. 141, 174; see also *Sikirica*, Prosecution's Sentencing Brief, *supra* note 552, at para. 56.

save the International Tribunal the time and effort of a lengthy investigation and trial.⁵⁵⁸

Sikirica involved just such “late” guilty pleas and required the Trial Chamber to determine what, if any, mitigating value should attach to them. The *Sikirica* Trial Chamber reiterated *Todorović*’s conclusion that a guilty plea assists the Tribunal not only by saving it time and resources when it is timely made, but also, no matter when it is made, by contributing “directly to one of the fundamental objectives of the International Tribunal: namely, its truth-finding function.”⁵⁵⁹ The Trial Chamber thus held that a defendant who enters a late plea will not get full credit—as does a defendant who pleads guilty before trial—but he still stands to receive some credit.⁵⁶⁰ Indeed, with respect to *Sikirica*, the Trial Chamber stated that even though his plea was very late, “he would have received a much longer sentence” had he not pled guilty.⁵⁶¹

On December 28, 2001, the ICTY added Rule 62*ter*, entitled “Plea Agreement Procedure” to its RPE. Rule 62*ter*(A) provides that if a defendant pleads guilty to one or more counts of the indictment, the Prosecutor may apply to amend the indictment accordingly, submit that a specific sentencing range is appropriate, and/or not oppose a request by the defendant for a particular sentence or sentencing range. Subsection (B) states, however, that “[t]he Trial Chamber shall not be bound by any agreement specified in paragraph (A).”⁵⁶² Rule 62*ter* does not provide for anything new; it merely identifies the practices that had been taking place and reiterates the Trial Chambers’ ultimate sentencing discretion. The appearance of the rule, however, serves to publicize and legitimize the practices.

⁵⁵⁸ *Todorović*, Sentencing Judgement, *supra* note 336, at para. 81.

⁵⁵⁹ *Sikirica*, Sentencing Judgement, *supra* note 355, at para. 149.

⁵⁶⁰ *Id.* at para. 150. The Trial Chamber gave Kolundžija “close to the full credit for his guilty plea” because he pled guilty before the commencement of his case in defense. *Id.* at para. 228.

⁵⁶¹ *Id.* at para. 234. *Sikirica*’s plea agreement states that the prosecution would not have accepted a plea along the lines set forth in the agreement before trial, noting, among other things, that the second amended indictment included genocide charges which the Trial Chamber subsequently dismissed. *Sikirica*, Plea Agreement, *supra* note 548, at para. 5(e). The Trial Chamber did not mention this point, but it may have influenced its decision to grant *Sikirica* a substantial sentencing discount, since it indicates that *Sikirica*’s guilty plea was as timely as it could have been.

⁵⁶² ICTY RPE, *supra* note 264, at R. 62*ter*.

2. The ICTR's Guilty Plea Cases

a. Background

The years leading up to the 1994 Rwandan genocide saw other smaller-scale massacres of the Tutsi and the exile of thousands of Tutsi to neighboring countries.⁵⁶³ Rwanda became an authoritarian state in the 1970s; it was ruled by Hutu President Habyarimana and had a single political party, the Republican Movement for Democracy.⁵⁶⁴ During these years, the exiled Tutsi formed an army, the Rwandan Patriotic Front (RPF) and engaged in several clashes with the Rwandan government.⁵⁶⁵ After the Rwandan government and the RPF fought to a standstill in the early 1990s, they entered into the Arusha Accords, which provided, among other things, for a new transitional government with a prime minister acceptable to both sides and for multi-party general elections with the full participation of the RPF.⁵⁶⁶ However, President Habyarimana began to undermine the Accords as soon as he adhered to them and, in particular, attempted to shore up support among his fellow Hutu by relying on "the unifying specter of a common enemy"—the Tutsi.⁵⁶⁷ Habyarimana's government established a training camp for

⁵⁶³ See BALL, *supra* note 288, at 159-60; MORRIS & SCHARF, *supra* note 253, at 47, 50; William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 523-524 (1996).

⁵⁶⁴ PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE U.N. CRIMINAL TRIBUNAL 14 (2000) (noting Habyarimana's overthrow of Kayibanda, Rwanda's previously elected president); MORRIS & SCHARF, *supra* note 253, at 50 (discussing Habyarimana's government); Carroll, *supra* note 372, at 167-68 (describing Rwanda's government as a "one-party system").

⁵⁶⁵ MORRIS & SCHARF, *supra* note 253, at 50; Carroll, *supra* note 372, at 168.

⁵⁶⁶ BALL, *supra* note 288, at 162; MAGNARELLA, *supra* note 564, at 16-17; MORRIS & SCHARF, *supra* note 253, at 50-51.

⁵⁶⁷ MORRIS & SCHARF, *supra* note 253, at 51; *see also* Drumbl, *supra* note 374, at 558-59 (detailing the tactics used by the Habyarimana government to ensure Hutu support). Drumbl states:

The Habyarimana government used the failed [RPF] invasion as an excuse to arrest tens of thousands and massacre hundreds of Tutsi. Fear of the RPF was falsely whipped up among the Hutu population by a staged attack on Kigali, in which Habyarimana soldiers fired into the air to create the illusion of an attack. During this time period, the Hutu government began to develop a propaganda machine calculated to instill within the Hutu citizenry a fear of the Tutsi. It was frequently emphasized in rural villages that Tutsi "devils" lurked in the bushes and were about to attack . . . Peasants were told by officials that their *umuganda* (a day of unpaid labor, usually once a month, for public service projects, akin to the *corvée* in European medieval society) would be satisfied if they spent the day killing Tutsi under official supervision.

Id.

Hutu militia to indoctrinate them in ethnic hatred and instruct them on methods of mass murder. The trainees later became members of the militia known as the *Interahamwe*. The government also distributed millions of dollars worth of firearms and machetes throughout the country.⁵⁶⁸

Immediately after President Habyarimana's plane was shot down on April 6, 1994,⁵⁶⁹ Hutu soldiers, the Presidential Guard, and the *Interahamwe* militia began to hunt down and kill Tutsi and moderate Hutu. These armed forces conducted house-to-house searches, killing all the Tutsi they could find and murdering Tutsi who had taken refuge in churches, hospitals, schools, and Red Cross buildings.⁵⁷⁰ Two days after Habyarimana's death, an interim government was established in Rwanda without a single Tutsi minister.⁵⁷¹ After hundreds of thousands of Tutsi and moderate Hutu had been massacred, the genocide came to an end approximately one hundred days after it had begun when the RPF conquered the Rwandan army.⁵⁷²

b. Kambanda

Jean Kambanda was prime minister of the interim government of Rwanda, established after President Habyarimana's death.⁵⁷³ Kambanda was arrested in Kenya along with several other former members of the

⁵⁶⁸ MORRIS & SCHARF, *supra* note 253, at 52. As William Schabas described it: Extremist elements refused to accept the Arusha compromise. Habyarimana's personal commitment to Arusha also seems questionable, and in any case, members of his entourage took direct steps to sabotage the agreement. They set up a private radio station, Radio-Television Libre Mille-Collines, which battered Rwanda with hate propaganda over the following months. Secretly, they imported arms from abroad and organized militias, notably the *Interahamwe*, for the coming holocaust. Lists were prepared designating Tutsi houses so as to expedite the killings once the order was given.

Schabas, *supra* note 563, at 524.

⁵⁶⁹ See Pauline Jelinek, *Rwanda, Burundi Leaders Are Killed in Crash—A Rocket Was Fired at Plane*, *Diplomats Report*, BOSTON GLOBE, Apr. 7, 1994, at 2 (reporting the downing of the plane).

⁵⁷⁰ See MORRIS & SCHARF, *supra* note 253, at 53-54 (describing the violence that ensued after Hutu extremists accused the RPF of assassinating Habyarimana); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 390 (1999) (detailing the events that immediately followed Habyarimana's death). For a detailed and grisly description of the massacres, see BALL, *supra* note 288, at 164-70.

⁵⁷¹ Beresford, *supra* note 279, at 103; *Former Rwandan Prime Minister to Appear in War Crimes Court for Pre-Sentencing Session*, INTERNEWS (Aug. 21, 1998), at http://www.internews.org/activities/ICTR_reports/ICTRNewsAug98.html.

⁵⁷² MORRIS & SCHARF, *supra* note 253, at 58.

⁵⁷³ See *id.* at 55.

interim government,⁵⁷⁴ and he was charged with six counts of genocide and crimes against humanity.⁵⁷⁵ Immediately upon his arrest, Kambanda expressed his intention to plead guilty and began cooperating with the prosecution. Kambanda provided the OTP with nearly ninety hours of recorded testimony to be used in subsequent trials of senior political and military leaders.⁵⁷⁶ The prosecution described Kambanda's cooperation as "invaluable."⁵⁷⁷ However, by thus cooperating with the prosecution, Kambanda placed his family at risk of retaliation, so the prosecution arranged for protective measures, including the relocation of Kambanda's family to a different country.⁵⁷⁸

At his initial appearance before the Trial Chamber in May 1998, Kambanda pled guilty to all the counts in the indictment.⁵⁷⁹ Specifically, Kambanda and the prosecution entered into a plea agreement in

⁵⁷⁴ Kambanda, Judgement and Sentence, *supra* note 1, at para. 1; Press Release, ICTR, Rwanda: Top Figures of Former Regime Arrested (July 18, 1997), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/1997/061.htm>.

⁵⁷⁵ Kambanda, Judgement and Sentence, *supra* note 1, at para. 3. Specifically, Kambanda was charged with genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, murder as a crime against humanity, and extermination as a crime against humanity. *Id.* Kambanda was not indicted until approximately three months after he was arrested. Press Release, ICTR, Former Prime Minister Kambanda and Nsabimana Indicted (Oct. 17, 1997), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/1997/085.htm>.

⁵⁷⁶ Kambanda, Prosecutor's Pre-Sentencing Brief, *supra* note 3, at 23.

⁵⁷⁷ *Id.* at 22-23; *see also* Prosecutor v. Kambanda, Case No. ICTR-97-23-I, Transcript, 12 (Sept. 3, 1998) [hereinafter Kambanda, Transcript] (informing the court of Kambanda's cooperation with the prosecution) (on file with author). The prosecution described Kambanda's cooperation thus:

The accused has assisted the Prosecutor in interpreting the horrific events that occurred [sic] in Rwanda between 7 April and 7 July 1994, as well as direct evidence involving other accused and suspects. Without disclosing the substance of his audio recorded statement, his testimony has enabled the Prosecutor to have first hand information, and evidence of such key facts as the meeting between the Council of Ministers and *Prefets* held on 11 April 1994, where the topic of massacres committed against the civilian population was raised; the contents of deliberations and decisions agreed upon by consensus in the numerous closed sessions of the Cabinet; the involvement of Ministers, senior Military officers and *Prefets* in the commission of offences within the jurisdiction of the Tribunal.

Kambanda, Prosecutor's Pre-Sentencing Brief, *supra* note 3, at 23.

⁵⁷⁸ Kambanda, Prosecutor's Pre-Sentencing Brief, *supra* note 3, at 21, 23. The prosecution noted in addition that defendants collaborating in a substantial way with the prosecution "may be the target of intimidation, physical threats and even assassination." *Id.* at 21; *see also* Interview with M (Oct. 31, 2001) (noting that Kambanda's cooperation placed him and his family at risk).

⁵⁷⁹ Press Release, ICTR, Ex-Rwandan Prime Minister Jean Kambanda Pleads Guilty to Genocide (May 1, 1998), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/1998/118.htm>.

which Kambanda admitted, among other things, that in 1994 a widespread and systematic attack took place against the civilian population of Tutsi, the purpose of which was to exterminate them.⁵⁸⁰ Kambanda acknowledged his de jure and de facto authority over members of the government, the civil service, and the military.⁵⁸¹ Kambanda further admitted to participating in the planning and execution of the massacres by, among other things, distributing arms and ammunition to various groups, setting up roadblocks to facilitate the massacres, and using media broadcasts to incite and encourage the massacres.⁵⁸² Kambanda also agreed to testify for the prosecution in subsequent cases.⁵⁸³

Kambanda's plea agreement stated that the parties had made "no agreements, understandings or promises" with respect to Kambanda's sentence,⁵⁸⁴ and when it came time for sentencing, the prosecution had a difficult line to walk. It wanted to recognize the substantial assistance that Kambanda had provided, and it wanted to encourage other defendants to do likewise, but it could not ignore the "heinous and intolerable" nature of the crimes for which Kambanda was convicted.⁵⁸⁵ So,

⁵⁸⁰ Kambanda, Plea Agreement, *supra* note 4, at para. 18.

⁵⁸¹ *Id.* at paras. 21-22.

⁵⁸² *Id.* at paras. 23-40; Kambanda, Judgement and Sentence, *supra* note 1, at para. 39. In addition to admitting the facts specifically relevant to the charges against him, Kambanda also attested to facts potentially relevant to other cases. For instance, Kambanda "acknowledge[d] the use of the media as part of the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population[.]" and specifically identified the Radio Television Libre des Mille Collines (RTL) as "a radio station whose broadcasts incited killing, the commission of serious bodily or mental harm to, and persecution of[,] Tutsi and moderate Hutu." *Id.* at paras. 39(vi)-(vii). These "admissions" are relevant to the prosecution's case against Ferdinand Nahimana and Jean Bosco Barayagwiza, founding members of the RTL. Further, Kambanda's Plea Agreement implicates Pauline Nyiramasuhuko, former Minister of Family and Women Affairs and a defendant in another ICTR case, in the massacres. Kambanda, Plea Agreement, *supra* note 4, at para. 36; Press Release, ICTR, Ex-Rwandan Prime Minister Jean Kambanda Pleads Guilty to Genocide, *supra* note 579.

⁵⁸³ Kambanda, Judgement and Sentence, *supra* note 1, at para. 47; *Lawyer for the Former Rwandan Prime Minister Argues for Light Sentence*, INTERNEWS (Sept. 4, 1998) at http://www.internews.org/activities/ICTR_reports/ICTRNewsSep98.html.

⁵⁸⁴ Kambanda, Judgement and Sentence, *supra* note 1, at para. 48. Indeed, according to the former ICTR Chief of Prosecutions, Mohamed Othman, Kambanda's defense counsel was aware that the prosecution was going to recommend a life sentence. Interview with Mohamed Othman, *supra* note 7.

⁵⁸⁵ Kambanda, Prosecutor's Pre-Sentencing Brief, *supra* note 3, at 2; Kambanda, Transcript, *supra* note 577, at 6-11. At the pre-sentencing hearing, the prosecution began by stating that it had to "think very seriously" before making its sentencing recommendations. *Id.* at 6. After emphasizing the gravity of the crime of genocide and the need to draw the attention of those who in the future may consider the commission of genocide, the prosecution also stated its belief that justice and reconciliation

the prosecution tried to have it both ways. The prosecution sought a sentence of life imprisonment for Kambanda, arguing that "the maximum penalty envisaged by the Tribunal's sentencing regime[] is the only appropriate sentence for the grave offences to which the accused has pled guilty."⁵⁸⁶ At the same time, the prosecution asked that any future application for pardon or commutation of sentence "be considered favorably on the basis of past, current and future significant cooperation extended to the prosecution."⁵⁸⁷

As for Kambanda's guilty plea, both the prosecution and defense urged the Trial Chamber to interpret the plea as a sign of Kambanda's "remorse, repentance and acceptance of responsibility,"⁵⁸⁸ but the Trial Chamber did not seem convinced. Since his sentencing hearing was held approximately two years before *Todorović* and *Sikirica* were decided, Kambanda did not yet know that a statement of remorse, however implausible, would constitute a mitigating factor, and he consequently chose not to make a statement at his sentencing hearing. Referring to Kambanda's silence, the Trial Chamber noted that, despite his guilty plea, "Kambanda has offered no explanation for his voluntary participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber."⁵⁸⁹ The Trial Chamber further noted that "remorse is not the only reasonable inference that can be drawn from a guilty plea."⁵⁹⁰ At the same time, the Trial Chamber did acknowledge that most jurisdictions consider an admission of guilt to be a mitigating factor and that Kambanda's guilty plea is likely to encourage other individuals to acknowledge their own guilt.⁵⁹¹ Consequently, the Trial Chamber recognized Kambanda's guilty plea as a mitigating factor, but

would be better served "when people come forward voluntarily and openly before [the] court to help [it] to understand . . . because there cannot be reconciliation when the truth is not known." *Id.* at 8.

⁵⁸⁶ Kambanda, Prosecutor's Pre-Sentencing Brief, *supra* note 3, at 2.

⁵⁸⁷ *Id.* The prosecution also argued that Kambanda's cooperation had already been compensated for, as it were, by the protective measures given to his family. *Id.* at 23; Kambanda, Judgement and Sentence, *supra* note 1, at para. 49.

⁵⁸⁸ Kambanda, Judgement and Sentence, *supra* note 1, at para. 52.

⁵⁸⁹ *Id.* at para. 51. Almost three years later, the ICTR Registrar, responding to a report critical of the Tribunal, had more generous words for Kambanda's guilty plea. He stated: "The confession, conviction and sentencing of the former Prime Minister of their country for genocide was a cathartic moment in the post-genocide healing + in Rwanda." Press Release, ICTR, Statement by the Registrar, Mr. Adama Dieng, on the Report of the International Crisis Group, *supra* note 374.

⁵⁹⁰ Kambanda, Judgement and Sentence, *supra* note 1, at para. 52.

⁵⁹¹ *Id.* at paras. 52, 61.

it nonetheless concluded that “the aggravating circumstances surrounding the crimes committed by Jean Kambanda negate the mitigating circumstances,”⁵⁹² and it sentenced Kambanda to life imprisonment.⁵⁹³

Outraged, Kambanda appealed and immediately ceased cooperating with the prosecution.⁵⁹⁴ He further sought to revoke his guilty plea and to proceed to trial,⁵⁹⁵ asserting on appeal that he had been “forced” to sign a “fabricated” plea agreement.⁵⁹⁶ Appealing his sentence also, Kambanda maintained that the Trial Chamber had failed to apply the general principle of law that a guilty plea “as a mitigating factor carries with it a discount in sentence.”⁵⁹⁷ The Appeals Chamber rejected Kambanda’s arguments. It affirmed his conviction, holding that his guilty plea was voluntary, informed, unequivocal, and supported by a factual basis.⁵⁹⁸ As for his sentence, the Appeals Chamber held that the Trial

⁵⁹² *Id.* at para. 62.

⁵⁹³ *Id.* at Verdict.

⁵⁹⁴ Letter from Carla Del Ponte to Agwu Okali, ICTR Registrar, *supra* note 7; Interview with Mohamed Othman, *supra* note 7.

⁵⁹⁵ Kambanda, Appeal, *supra* note 8, at para. 3.

⁵⁹⁶ Prosecution v. Kambanda, Case No. 97-23-A, Provisional Appellant’s Brief and Motion for Extension of Time-Limits and for Admission of New Evidence on Appeal Pursuant to Rules 115 and 116 of the Rules of Procedure and Evidence, paras. 10, 12 (Mar. 29, 2000) (on file with author); *see also* Kambanda “Forced” to Sign Guilty Plea, IRINNEWS.ORG (June 27, 2000), at http://www.irinnews.org/report.asp?ReportID=2418&SelectRegion=Great_Lakes&SelectCountry=RWANDA. Kambanda also claimed ineffective assistance of counsel. One week after he was sentenced, Kambanda sent a bitter, five-page letter to the Tribunal registry accusing his lawyer of working against him. *Former Rwandan Prime Minister Who Pleaded Guilty to Genocide Insists upon the Lawyer of His Choice*, INTERNEWS (Oct. 14, 1998), at http://www.internews.org/activities/ICTR_reports/ICTRNewsOct98.html. In submissions to the Appeals Chamber, Kambanda claimed, among other things, that his guilty plea was not informed because he was not adequately advised by his counsel. Specifically, he stated that his counsel:

[D]id not take affirmative action on his client’s behalf, that in the space of two years counsel and accused “had only one hour’s consultation”, and that counsel “did not study the case completely nor did he investigat[e] in order to evaluate the file and to inform Kambanda properly. In doing so, Kambanda did not plea guilty informed [sic], since he himself did not know the ins and outs of the charges brought against him, nor did he know the ins and outs of the guilty plea.

Kambanda, Appeal, *supra* note 8, at para. 67. The ironic feature of Kambanda’s complaints about his trial counsel before the Appeals Chamber is that they were made by appellate counsel who, themselves, seemed barely competent. *See, e.g., id.* at para. 79 (noting that the relevance of the passage counsel cites “is unclear”); *id.* at para. 96 (noting that with respect to five grounds for appeal “[t]he Appellant puts forward no arguments in support of these grounds, in either the Appellant’s Brief or the Appellant’s Reply”).

⁵⁹⁷ *Id.* at para. 10.

⁵⁹⁸ *Id.* at paras. 64, 78, 87, 95.

Chamber clearly considered Kambanda's guilty plea, along with several other factors, as mitigating circumstances.⁵⁹⁹ The Appeals Chamber further held that the weight to be attached to mitigating circumstances is a matter for the discretion of the Trial Chamber, and because the crimes for which Kambanda was convicted were of the most serious nature, the Trial Chamber could not be held to have abused its discretion in sentencing Kambanda to life imprisonment.⁶⁰⁰

c. Serushago

The next ICTR defendant to plead guilty, Omar Serushago, voluntarily surrendered himself to the authorities in the Ivory Coast in June 1998, when he had not yet been indicted or included on the list of suspects wanted by Rwandan authorities.⁶⁰¹ He had been cooperating with the prosecution even before he surrendered⁶⁰² and played a vital role in an operation, code-named NAKI, which led to the arrests of several high-level ICTR defendants, including Kambanda and Georges Rugiu,⁶⁰³ whose case will be discussed next. Following Serushago's surrender, the prosecution drew up a five-count indictment, and during his initial appearance before the Trial Chamber, Serushago pled guilty to four of the five counts. Specifically, Serushago pled guilty to genocide; and to murder, torture, and extermination, as crimes against humanity; and the prosecution dropped the fifth count, of rape,⁶⁰⁴ which accused Serushago of not preventing his subordinates from raping.⁶⁰⁵ In a plea

⁵⁹⁹ *Id.* at paras. 120-22.

⁶⁰⁰ *Id.* at paras. 124-26.

⁶⁰¹ Serushago, Sentence, *supra* note 336, at paras. 1, 34.

⁶⁰² Prosecutor v. Serushago, Case No. ICTR-98-39, Transcript, 14-15 (Jan. 29, 1999) [hereinafter Serushago, Transcript] (on file with author).

⁶⁰³ See *Militia Leader Who Confessed to Genocide Gets Fifteen Years in Prison*, INTERNEWS (Feb. 5, 1998) (reporting the arrest of Kambanda), at http://www.internews.org/activities/ICTR_reports/ICTRNewsFeb99.htm; Press Release, ICTR, Rwanda: First Non-Rwandese Suspect Arrested (July 23, 1997) (reporting the arrest of Georges Rugiu), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/1997/062.htm>; Press Release, ICTR, Rwanda: Top Figures of Former Regime Arrested (July 18, 1997) (reporting Kambanda's arrest as a result of the NAKI operation), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/1997/061.htm>.

⁶⁰⁴ Serushago, Sentence, *supra* note 336, at paras. 2-4. A press release announcing Serushago's guilty plea and his plea agreement announced, somewhat implausibly, that the plea "agreement is not a plea bargain." Press Release, ICTR, Former Militia Leader, Omar Serushago Pleads "Guilty" to Genocide and Other Crimes but "Not Guilty" to Rape (Dec. 14, 1998), at <http://www.ictr.org/wwwroot/ENGLISH/PRESSREL/1998/155.htm>.

⁶⁰⁵ See Prosecutor v. Serushago, Case No. ICTR-98-39-I, Indictment, paras. 5.10-5.11 (Sept. 18, 1998) (on file with author).

agreement, Serushago admitted to having been a de facto leader of the *Interahamwe* in the Gisenyi prefecture and to having commanded five *Interahamwe* militiamen.⁶⁰⁶ Serushago supervised a roadblock, at which he searched for Tutsi and ordered his subordinates to execute them.⁶⁰⁷ Specifically, Serushago killed four Tutsi personally and his subordinates killed thirty-three.⁶⁰⁸ Serushago further admitted that, on the order of his superiors, he and his militiamen abducted numerous Tutsi and transported them to an execution site where they were killed.⁶⁰⁹ Serushago also acknowledged that he participated in several meetings, held by civil and military authorities, during which the progress and smooth operation of the massacres were discussed and encouraged.⁶¹⁰ Indeed, in the context of these and other "admissions" in his plea agreement, Serushago implicated no less than twenty-nine named individuals, and he attested to numerous facts that are seemingly relevant only to future prosecutions of other defendants.⁶¹¹

Serushago acknowledged in the plea agreement that "sentencing is at the entire discretion of the Trial Chamber,"⁶¹² and the prosecution

⁶⁰⁶ Serushago, Sentence, *supra* note 336, at paras. 25(viii), 29; *see also* Serushago, Appeal, *supra* note 337, at para. 16.

⁶⁰⁷ Serushago, Sentence, *supra* note 336, at para. 25(vii).

⁶⁰⁸ *Militia Leader Who Confessed to Genocide Gets Fifteen Years in Prison*, *supra* note 603.

⁶⁰⁹ Serushago, Sentence, *supra* note 336, at paras. 25(ix)-(xii).

⁶¹⁰ *Id.* at paras. 25(xv)-(xvii); *see also* Serushago, Appeal, *supra* note 337, at para. 18 (admitting attendance at secret Hutu meetings).

⁶¹¹ Prosecutor v. Serushago, Case No. ICTR-98-37, Plea Agreement Between Omar Serushago and the Office of the Prosecutor, paras. 18-23, 25, 28-28, 31-33 (Dec. 4, 1998) [hereinafter *Serushago, Plea Agreement*] (on file with author). Serushago, like Kambanda, acknowledged the occurrence of a "widespread and systematic attack" on civilian Tutsi and moderate Hutu "on political, ethnic or racial grounds," which resulted in the deaths of hundreds of thousands and was carried out in order to exterminate the Tutsi. Serushago, Sentence, *supra* note 336, at para. 25(i); *see also id.* at para. 25(xxii) (admitting most victims were killed because they were Tutsi). Serushago went on to describe various meetings, and he named the high-level political leaders and local authorities who conducted those meetings and the orders that they gave, *id.* at para. 25(iii); *see also id.* at paras. 25(vii), (xv)-(xvi) (describing a meeting that Serushago attended and naming other attendees), even though Serushago himself does not appear to have attended all of the meetings that he described. *Id.* at para. 25(v) (Serushago stating he was informed by Thomas Mugirareza and Jumapiri Nyaribogi of the orders given during the meeting); *see also id.* at para. 25(xvii) (describing a meeting in Gisenyi and subsequent orders to execute certain Tutsi and Hutu). Serushago also identified the leaders of the militiamen most involved in the massacres in the Gisenyi prefecture. *Id.* at para. 25(vi). Serushago concluded by declaring that "[m]ilitary officers, members of the Interim Government, militia leaders and Civilian authorities, planned, prepared, instigated, ordered, aided and abetted their subordinates and others in carrying out the massacres of the Tutsi population and their 'accomplices.'" *Id.* at para. 25(xxiv).

⁶¹² Serushago, Plea Agreement, *supra* note 611, at para. 40.

made no promises as to its sentencing recommendations. Like Kambanda, however, Serushago placed himself and his family at risk of retaliation,⁶¹³ so the OTP “undert[ook] to ensure the protection and safety” of Serushago’s wife and children.⁶¹⁴ The prosecution also noted the “valuable information” that Serushago had provided “in some of its most important investigations,” and stated its expectation that Serushago would continue to cooperate.⁶¹⁵ Like Kambanda, Serushago agreed to testify on behalf of the prosecution in future trials⁶¹⁶ but, unlike Kambanda, Serushago is holding up his end of the bargain. He has been described as a “key witness” in the so-called media trial and in the military trial⁶¹⁷ and has already given his testimony in the former.⁶¹⁸ At his pre-sentencing hearing, Serushago tearfully begged for the forgiveness of his country and of the Tutsi.⁶¹⁹

The prosecution recommended a sentence of not less than twenty-five years,⁶²⁰ but the Trial Chamber sentenced Serushago to only fifteen years’ imprisonment⁶²¹ and thus rendered Serushago the first ICTR defendant to receive a sentence of less than life imprisonment.⁶²² In its

⁶¹³ See Serushago, Transcript, *supra* note 602, at 25 (informing the court of the inherent risks of cooperating with the prosecution, including risks to Serushago’s family).

⁶¹⁴ Serushago, Plea Agreement, *supra* note 611, at para. 45. Serushago reportedly was quite aware of the danger in which his cooperation and guilty plea placed him and repeatedly asked for security to be provided when he appeared in court. See Mary Kimani, *Former Rwandan Militia Leader Asks for the Forgiveness of Rwanda*, INTERNEWS (Jan. 29, 1998), at http://internews.org/activities/ICTR_reports/ICTRnewsJAN99.html.

⁶¹⁵ Serushago, Plea Agreement, *supra* note 611, at paras. 43-44.

⁶¹⁶ *Id.* at para. 41.

⁶¹⁷ Prosecutor v. Serushago, Case No. ICTR-98-39-A, Order for the Continued Detention of Omar Serushago in the ICTR Detention Facility in Arusha (Apr. 3, 2001); Mary Kimani, *‘Media Trial’: Key Prosecution Witness Fails to Testify*, INTERNEWS (Nov. 14, 2001) (reporting that Serushago did not testify as scheduled because of illness but was planning to testify the following day), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsNov01.html.

⁶¹⁸ See Mary Kimani, *Media Trial: ‘Genocide Suspect Was Member of ‘Death Squad,’ Witness Alleges*, INTERNEWS (Nov. 15, 2001) (reporting Serushago’s testimony against defendants in the “Media Trial”), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsNov01.html. In addition to implicating defendants Barayagwiza and Ngeze in the genocide, Serushago also claimed that Ngeze had written to him in August 2001, urging him not to testify for the prosecution. See Mary Kimani, *Media Trial: ‘Hassan Ngeze Did Not Want Me to Testify,’ Genocide Convict Claims*, INTERNEWS (Nov. 15, 2001), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsNov01.html.

⁶¹⁹ Serushago, Transcript, *supra* note 602, at 38-44; *Militia Leader Who Confessed to Genocide Gets Fifteen Years in Prison*, *supra* note 603.

⁶²⁰ Serushago, Transcript, *supra* note 602, at 14.

⁶²¹ Serushago, Sentence, *supra* note 336, at Verdict.

⁶²² Of the eight convicted ICTR defendants, five have received sentences of life

sentencing judgment, the Trial Chamber had little to say about Serushago's guilty plea, although it duly noted the plea as a mitigating factor.⁶²³ The Trial Chamber seemed more impressed with Serushago's substantial and ongoing cooperation with the prosecution⁶²⁴ and his "[p]ublic expression of remorse and contrition."⁶²⁵ Despite the comparative leniency of the sentence, Serushago appealed, contending that the Trial Chamber had failed to give due weight to the mitigating factors in his case and arguing that his sentence was manifestly excessive in light of the sentencing practices of the Rwandan courts.⁶²⁶ The Appeals Chamber rejected Serushago's contentions with little discussion and affirmed the fifteen-year sentence.⁶²⁷

d. Ruggiu

The third and most recent ICTR defendant to plead guilty is Georges Ruggiu, a Belgian. Ruggiu developed an interest in Rwanda and its politics in the early 1990s when he met Rwandan students, who were his neighbors in Belgium.⁶²⁸ He subsequently became one of the key players in the Rwandan community in Belgium, participating in major political debates and meeting with President Habyarimana several times.⁶²⁹ Ruggiu became radically opposed to the RPF, and in late 1993, he

imprisonment. Since Serushago, two other ICTR convicts have received terms less than life imprisonment, one of whom—Georges Ruggiu—also pled guilty. *See supra* note 356 (listing prison terms for all defendants convicted by the Trial Chambers).

⁶²³ Serushago, Sentence, *supra* note 336, at para. 35. The Trial Chamber's discussion of Serushago's guilty plea as pertaining to his sentence consisted of the following:

It is important to recall that the accused pleaded guilty to four counts, namely genocide and three counts of crimes against humanity (murder, extermination, torture). As the Chamber established, his guilty plea was made voluntarily and was unequivocal. Omar Serushago clearly understood the nature of the charges against him and their consequences.

Id.

⁶²⁴ *Id.* at para. 31.

⁶²⁵ *Id.* at para. 40.

⁶²⁶ Serushago, Appeal, *supra* note 337, at para. 6.

⁶²⁷ *Id.* at paras. 21-34.

⁶²⁸ Ruggiu, Judgement and Sentence, *supra* note 339, at para. 38. At Ruggiu's presentencing hearing, Ruggiu's lawyer maintained that Ruggiu "had come to know Rwanda through highly partisan friends who gave him a biased idea of the political situation in the country." *How Belgian Journalist Became Involved in Hate Media*, INTERNEWS (May 15, 2000), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsMay00.html; *see also* Prosecution v. Ruggiu, Case No. ICTR-97-32, Transcript, 109-12 (May 15, 2000) [hereinafter Ruggiu, Transcript] (tracing Ruggiu's introduction to Rwandan politics) (on file with author).

⁶²⁹ Ruggiu, Judgement and Sentence, *supra* note 339, at para. 41.

moved to Rwanda and began work as a journalist and broadcaster for the Radio Television Libre des Mille Collines (RTLM),⁶³⁰ the government radio station whose broadcasts had for years incited ethnic tension and ethno-political murders.⁶³¹ Ruggiu used his broadcasts to encourage the killing of Tutsi and to accuse Belgium of various subversive actions, including assassinating President Habyarimana and supporting the RPF.⁶³²

Ruggiu was arrested in July 1997 in Kenya as part of the NAKI operation⁶³³ and was indicted on one count of public incitement to commit genocide and one count of persecution as a crime against humanity.⁶³⁴ Ruggiu initially pled not guilty to the charges,⁶³⁵ but he began cooperating with the prosecution in July 1999 and was conspicuously absent from the list of media defendants scheduled to have a joint trial.⁶³⁶ In May 2000, Ruggiu changed his plea to guilty and entered into a plea agreement with the prosecution in which he admitted to making various broadcasts, which encouraged the killing of Tutsi.⁶³⁷ Ruggiu also attested in his plea agreement to a series of facts relevant to future prosecutions and, in particular, relevant to the prosecution of RTLM officials Nahimana and Barayagwiza.⁶³⁸ Ruggiu agreed to con-

⁶³⁰ *Id.* at para. 41.

⁶³¹ *Id.* at paras. 41-42; see also Alvarez, *supra* note 570, at 392 (describing RTLM's role in the killings).

⁶³² Ruggiu, Judgement and Sentence, *supra* note 339, at paras. 44(iv)-(v), 50.

⁶³³ Press Release, ICTR, Rwanda: First Non-Rwandese Suspect Arrested (July 23, 1997), at <http://www.ictor.org/wwwroot/ENGLISH/PRESSREL/1997/062.htm>.

⁶³⁴ Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Amended Indictment, 12-15 (Dec. 18, 1998) (on file with author). Ruggiu was also indicted on counts of conspiracy to commit genocide, complicity in genocide, murder as a crime against humanity, and extermination as a crime against humanity. *Id.*

⁶³⁵ Ruggiu, Judgement and Sentence, *supra* note 339, at para. 4.

⁶³⁶ Mary Kimani, *Hate Media Journalist Scheduled to Plead Guilty to Genocide Charges*, INTERNEWS (May 9, 2000), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsMay00.html.

⁶³⁷ Ruggiu, Judgement and Sentence, *supra* note 339, at paras. 7, 44.

⁶³⁸ For instance, Ruggiu not only acknowledged the statements that he broadcast over RTLM, but also "admit[ted] that all [RTLM] broadcasts were directed towards rallying the population against the 'enemy,' the RPF and those who were considered to be allies of the RPF." *Id.* at para. 44(i). Ruggiu further acknowledged "that RTLM broadcasts reflected the political ideology and plans of extremist Hutu, . . . [and] that RTLM broadcasts incited young Rwandans, *Interahamwe* militiamen and soldiers to engage in armed conflict against the 'enemy' and its accomplices and to kill and inflict serious bodily and mental harm on Tutsis and moderate Hutu." *Id.* at para. 44(xi). Finally, Ruggiu "admit[ted] that RTLM broadcasters, managerial and editorial staff bear full responsibility for the 1994 massacre of Tutsis and Hutu opposition party members." *Id.* at para. 44(xiii).

tinue cooperating with the prosecution,⁶³⁹ and, like Serushago, he has done so.⁶⁴⁰ As in *Serushago* and *Kambanda*, the prosecution made Ruggiu no promises about his sentence,⁶⁴¹ but it did promise to contact Belgian authorities to seek their cooperation in ensuring the safety of Ruggiu's family.⁶⁴²

The Trial Chamber issued its sentencing judgment in June 2000, and, as in the ICTY, the Chamber's view of guilty pleas seems to have evolved. *Kambanda*, the ICTR's first defendant to plead guilty, was sentenced to life imprisonment and thus appeared to obtain no benefit for having pled guilty. *Serushago*, the ICTR's next defendant to plead guilty, did receive a relatively lenient sentence following his guilty plea, but the Trial Chamber did not discuss in any detail the role played by the guilty plea. By the time *Ruggiu* was decided, the ICTR, like the ICTY in *Todorović* and *Sikirica*, was expressly willing to recognize the benefits that guilty pleas afford the Tribunals. It noted, for instance, that guilty pleas "facilitate[] the administration of justice by expediting proceedings and saving resources" and that Ruggiu's guilty plea "has spared the Tribunal a lengthy investigation and trial, thus economising time, effort and resources."⁶⁴³ Accordingly, like the *Todorović* and *Sikirica* Trial Chambers, the *Ruggiu* Trial Chamber announced that guilty pleas will be compensated by sentencing discounts; the Trial Chamber held that it "considers that it is good policy in criminal matters that some form of consideration be shown towards those who have confessed their guilt, in order to encourage other suspects and perpetrators of crimes to come forward."⁶⁴⁴ As for Ruggiu's case in particular, the Trial Chamber opined that his guilty plea "reflects his genuine awareness of his guilt, especially since he changed his plea after much reflection."⁶⁴⁵ According to the Trial Chamber, Ruggiu's "acknowledgement of his mistakes and crimes is a healthy application of reason

⁶³⁹ Kimani, *supra* note 636.

⁶⁴⁰ Interview with E (Nov. 26, 2001).

⁶⁴¹ See Ruggiu, Transcript, *supra* note 628, at 65, 69-70 (recording Ruggiu's admission that he received no promises in exchange for his plea); Prosecution v. Ruggiu, Case No. ICTR-97-32-DP, Plea Agreement Between Georges Ruggiu and the Office of the Prosecutor, paras. 220-30 (May 12, 2000) [hereinafter Ruggiu, Plea Agreement] (on file with author).

⁶⁴² Ruggiu, Plea Agreement, *supra* note 641, at para. 226.

⁶⁴³ Ruggiu, Judgement and Sentence, *supra* note 339, at para. 53.

⁶⁴⁴ *Id.* at para. 55. The Trial Chamber went on to say that "[i]t is important to encourage all those involved in crimes committed in Rwanda in 1994 to confess and admit their guilt." *Id.*

⁶⁴⁵ *Id.* at para. 54.

and sentiment, which illustrates the beginning of repentance.”⁶⁴⁶ Like Serushago, Ruggiu had begged for forgiveness from survivors and victims’ families during his pre-sentencing hearing,⁶⁴⁷ and the Trial Chamber considered these expressions of remorse a mitigating factor.⁶⁴⁸ The Trial Chamber also noted Ruggiu’s “substantial cooperation” with the prosecution as a mitigating factor.⁶⁴⁹ The prosecution recommended concurrent twenty-year sentences for each count,⁶⁵⁰ but the Trial Chamber instead sentenced Ruggiu to twelve years’ imprisonment. Ruggiu did not appeal, becoming the first ICTR defendant to fail to take advantage of that right.

C. *The Evolution of Plea Bargaining in International Criminal Prosecutions*

The cases described above show an evolution in the way the Tribunals conceive of and practice plea bargaining. When the Tribunals were first established, plea bargaining was looked upon with some suspicion. The Tribunals’ civil lawyers and judges were unfamiliar, and hence uncomfortable, with the practice, and the vital task with which the Tribunals had been entrusted—to bring justice to war-torn lands through the prosecution of those responsible for mass atrocities—seemed too noble to be sullied by bargaining. Consequently, when the United States proposed including a provision in the Tribunals’ RPE authorizing the prosecution to grant defendants full or limited testimonial immunity in exchange for their cooperation, that proposal was rejected. As then-ICTY President Cassese put it: “The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhuman acts. After due reflection, we have decided that *no one* should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.”⁶⁵¹ That view likewise prevailed with respect to sentencing concessions for guilty pleas. Although prosecutors schooled in common law systems understood well that defendants were unlikely to plead guilty unless they were promised a sentence reduction, the general feeling at the Tribunals’ inception was that the crimes within

⁶⁴⁶ *Id.* at para. 55.

⁶⁴⁷ Mary Kimani, *Prosecution Asks for a Twenty Year Sentence for Hate Media Journalist*, INTERNEWS (May 15, 2000), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsMay00.html.

⁶⁴⁸ Ruggiu, *Judgement and Sentence*, *supra* note 339, at paras. 69-72.

⁶⁴⁹ *Id.* at paras. 56-58.

⁶⁵⁰ *Id.* at para. 81.

⁶⁵¹ SCHARF, *supra* note 251, at 67.

the Tribunals' jurisdiction were too grave to be bargained over. If every case went to trial, so be it.

The manifest difficulties delineated above of bringing even some of the cases to trial, however, have caused an evolution in the perception of plea bargaining at the Tribunals. The Tribunals have had little choice but to recognize the utility of guilty pleas as well as the necessity of plea bargaining to secure those pleas. The practice of plea bargaining has developed in a slightly different fashion in each Tribunal. Both utilize implicit plea bargaining; that is, both Tribunals' Trial Chambers have made clear that defendants will receive a sentence reduction if they plead guilty. In the ICTY, in addition, the prosecution and defense engage in explicit bargaining over the prosecution's sentencing recommendations, and the Trial Chambers have thus far sentenced within the range upon which the parties agreed. ICTR prosecutors have made no similar promises to that Tribunal's defendants. Finally, neither Tribunal has engaged in charge bargaining. Although Tribunal prosecutors have withdrawn charges following a guilty plea, the withdrawal of those charges cannot be considered instances of charge bargaining. In *Jelisić* and *Kolundžija*, charges were withdrawn because they lacked evidentiary support; in *Serushago*, the withdrawal of the one charge should have had no effect on the sentence;⁶⁵² and in the remaining cases, the defendants pled guilty to crimes that substantially encompassed the conduct alleged in the withdrawn counts.

A summary recapitulation of the cases reveals the course of plea bargaining's evolution. At the ICTY, plea bargaining did not appear to play an obvious role until *Todorović*. The ICTY's first guilty plea in *Erdemović* was secured without plea bargaining because Erdemović was that very unusual defendant whose guilty plea was not motivated by a desire to secure sentencing concessions.⁶⁵³ Erdemović essentially volunteered himself to the ICTY when the Tribunal had never heard of him or the executions in which he participated and immediately began co-

⁶⁵² See ICTR Bulletin No. 2, *Musema's Genocide Conviction Upheld 2* (Dec. 2001) (noting that although the Appeals Chamber quashed Musema's conviction for rape, it upheld his conviction for genocide and extermination and held that "the quashing of his conviction for rape could not affect the exceptional gravity of the crimes for which he had been convicted" and thus refused to lower his sentence), at <http://www.ictor.org/wwwroot/ENGLISH/bulletin/dec/dec01.pdf>.

⁶⁵³ Erdemović, Transcript, *supra* note 434, at 38 (recording that an OTP investigator who conducted numerous interviews with Erdemović opined that Erdemović's "motivation is not to please the Office of the Prosecutor to get some weakening of his possible punishment, he was very clear on that point since the beginning").

operating with the prosecution in every way possible.⁶⁵⁴ According to the prosecution, Erdemović “never tried to bargain anything, . . . never asked if his collaboration would be of help for him in judicial terms.”⁶⁵⁵ Rather, he wanted “the truth to be known about these events and he want[ed] the people who are responsible for these events to face justice.”⁶⁵⁶ Plea bargaining was still something of a confusing concept to the Tribunals’ civil lawyers at the time of Erdemović, a fact reflected in Judge Cassese’s comments about the practice in that case. After stating that a defendant who pleads guilty can expect “that the court will be more lenient,”⁶⁵⁷ Cassese went on to say that the 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.”⁶⁵⁸ Cassese does not explain just what “distortions of the free will” would be produced by out-of-court plea bargaining that would not equally be produced by the implicit plea bargaining that Cassese himself endorses. Any distortion of the defendant’s free will results from the fact that the defendant receives a reduction in sentence if he pleads guilty. Whether that reduction follows out-of-court bargaining with the prosecutor or an in-court dispensation is irrelevant.

The ICTY’s second guilty plea, in *Jelisić*, also did not involve plea bargaining, but for a very different reason: the prosecution refused to bargain because Jelisić had nothing to offer. Jelisić’s guilty plea to the war-crimes and crimes-against-humanity charges did not save the prosecution any time and expense because Jelisić insisted on going to trial on the genocide charge, and the facts supporting that charge overlapped almost entirely with the facts supporting the charges to which Jelisić pled guilty. Further, the prosecution had photographs of Jelisić committing many of the crimes,⁶⁵⁹ and it believed that his conviction on the counts to which he pled guilty was virtually assured. Thus, the prosecution had no interest in offering Jelisić concessions to self-convict.

⁶⁵⁴ *Id.* at 35-38, 43-47 (describing Erdemović’s cooperation); Erdemović, Brief on Aggravating and Mitigating Factors, *supra* note 432, § C & n.24 (noting that “Erdemović had expressed a strong desire to surrender to the authorities here in The Hague” even though doing so “would most likely result in criminal liability”).

⁶⁵⁵ Erdemović, Transcript, *supra* note 434, at 46.

⁶⁵⁶ *Id.* at 38.

⁶⁵⁷ Erdemović, Cassese Dissent, *supra* note 143, at para. 8.

⁶⁵⁸ *Id.* at para. 10.

⁶⁵⁹ See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Transcript, 2615-17 (Nov. 10, 1999), at <http://www.un.org/icty/transe10/991110ed.htm>.

In *Todorović* and *Sikirica*, by contrast, the defendants did have benefits to offer the prosecution, and they did expect something in return for them; consequently, the cases were plea bargained. In *Todorović*, the prosecution saved the time and expense of a trial and stood to save the time and expense of an appeal; it obtained Todorović's cooperation and future testimony; and it silenced Todorović's embarrassing inquiries into his arrest. In return, the prosecution promised to withdraw twenty-six counts and to recommend a sentence of not longer than twelve-years' imprisonment.⁶⁶⁰ The obviousness of the quid pro quo was highlighted by the plea agreement's provision that if Todorović failed to fulfil his obligations under the plea agreement, the prosecution could reinstate the entire indictment and proceed to trial.⁶⁶¹ The prosecution had clearly learned a lesson from *Kambanda*.⁶⁶²

As noted above, the primary benefit Todorović received from the plea agreement was the prosecution's lenient sentencing recommendation, but because the Trial Chamber was in no way bound by the prosecution's recommendation, Todorović took a risk. The fact that a Trial Chamber had never before imposed a sentence longer than that sought by the prosecution must have provided Todorović some comfort. But because in *Todorović* the prosecution, at least in theory, was recommending a sentence shorter than what would otherwise have been appropriate for the crimes in question, the Trial Chambers' past treatment of prosecutorial recommendations was not necessarily relevant. What was relevant, however, was that the Tribunal's Trial Chambers, like the judicial branches of many domestic jurisdictions, stood to gain almost as much from the plea bargain as the prosecution. The Tribunals are overworked. They spend vast sums of money to conduct very few trials and are roundly criticized for that fact.⁶⁶³ The judges themselves spend considerable time debating proposals to improve efficiency, and they spend more time still responding to the suggestions and criticisms of others.⁶⁶⁴ Improvements have been made: procedural

⁶⁶⁰ Prosecutor v. Todorović, Case No. IT-95-9/1, Transcript, 801-03 (Jan. 19, 2001), at <http://www.un.org/icty/transe9/010119iaed.htm>.

⁶⁶¹ *Id.* at 810-11.

⁶⁶² However, this remedy also has its problems. During Todorović's presentencing hearing, Judge Hunt repeatedly raised his concern that Todorović's testimony in subsequent cases will be deprived of considerable credibility because he stands to have his plea agreement dissolved if he does not "fulfil his obligations." *Id.* at 805-06, 812-14.

⁶⁶³ See *supra* note 374 and accompanying text.

⁶⁶⁴ See Jorda Report, *supra* note 367 (suggesting reforms and responding to the proposals of a U.N.-appointed expert group which reviewed the ICTY's efficiency);

reforms have been undertaken, ad litem trial judges have been appointed, and the Appeals Chamber has been enlarged by the addition of two judges. But none of these reforms, however efficacious, can compare to the dispatch with which a guilty plea disposes of a case, and in *Todorović*, the prosecution sweetened the deal with the promise not to appeal any sentence falling within the agreed-upon range, a promise that must have seemed especially attractive to judges accustomed to appellate reversal.

With these advantages in mind, the *Todorović* Trial Chamber not only sentenced Todorović within the agreed-upon range, but it gave notice to all future defendants that guilty pleas would be rewarded with sentencing concessions. And it was scarcely more than a month after the *Todorović* Trial Chamber made this announcement that the *Sikirica* defendants pled guilty and agreed to terms similar to those appearing in *Todorović*. Despite the *Todorović* Trial Chamber's favorable stance on plea bargaining, the *Sikirica* defendants still had some reason to fear that they would not receive sentence reductions. The *Todorović* Trial Chamber had promised leniency only to defendants who made "timely" guilty pleas.⁶⁶⁵ Sikirica's and Došen's guilty pleas came after their cases had been fully tried; only Kolundžija's guilty plea saved the Tribunal any time at all. Further, Todorović had extended substantial cooperation to the prosecution. The *Sikirica* defendants did not, and the last defendant to enter a guilty plea without cooperating with the prosecution—Goran Jelisić—received a forty-year sentence. But the Trial Chamber did not let the *Sikirica* defendants down. Because their tardy guilty pleas did not generate all the benefits of timely guilty pleas, the Trial Chamber held that the defendants were not entitled to "full credit;"⁶⁶⁶ it made clear, however, that a guilty plea, whenever made, justifies some credit. Future defendants can plead guilty with the expectation that they will receive some sentencing concessions

Press Release, ICTR, Statement by the Registrar, Mr. Adama Dieng, on the Report of the International Crisis Group, *supra* note 374 (responding to the International Crisis Group's critical report, which stated, among other things, that the ICTR's record of nine verdicts in seven years is "lamentable"). The U.N.'s Inspector General has produced two reports detailing waste and managerial problems at the ICTR. McNerney, *supra* note 374, at 189; see also *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, U.N. GAOR, 51st Sess., Annex, Agenda Items 139 and 141, at 2-4, U.N. Doc. A/51/789 (1997) (criticizing the ICTR's administration and management, and finding, among other things, that not a single administrative area of the ICTR registry "functioned effectively"); Beresford, *supra* note 279, at 130-31 (summarizing the Office of Internal Oversight Services report).

⁶⁶⁵ Todorović, Sentencing Judgement, *supra* note 336, at para. 114.

⁶⁶⁶ Sikirica, Sentencing Judgement, *supra* note 355, at para. 150.

even if they wait until the last possible moment to plead and fail to cooperate with the prosecution.

The ICTR's evolution towards accepting plea bargaining followed a similar path. The first ICTR defendant to plead guilty—Jean Kambanda—thought that he and the prosecution were plea bargaining. Kambanda pled guilty at his first appearance; he immediately began providing the prosecution with invaluable information, and he promised future cooperation and testimony. Kambanda, not surprisingly, expected leniency in return,⁶⁶⁷ but no true bargaining took place because the prosecution never promised Kambanda anything.⁶⁶⁸ Indeed, under the circumstances, the prosecution really could not promise Kambanda anything. Kambanda was the highest-ranking political authority in Rwanda during the genocide. Given his high-level status and substantial involvement in the planning and execution of the genocide, if anyone deserved a life sentence, it was Kambanda.⁶⁶⁹ No matter how much assistance Kambanda offered, the prosecution simply could not request a more lenient sentence without generating horrendous publicity. For these same reasons, the Trial Chamber could not engage in implicit plea bargaining and impose a more lenient sentence.

The prosecution and the Trial Chamber avoided a public relations disaster by requesting and imposing a life sentence on Kambanda, but Kambanda's subsequent disavowal of his guilty plea and his refusal to continue cooperating caused no small amount of trouble. Fortunately for the ICTR, the next defendant to plead guilty—Omar Serushago—was of sufficiently minor status that the prosecution could request a twenty-five-year sentence, and, more importantly, the Trial Chamber could impose a mere fifteen-year sentence. The *Serushago* Trial Chamber said little about the value it placed on Serushago's guilty plea, but by the time the same Trial Chamber sentenced Ruggiu, plea bargaining had become sufficiently well-accepted that the Trial Chamber could publicly

⁶⁶⁷ At the pre-sentencing hearing, Kambanda's lawyer asked for a sentence of no longer than two years' imprisonment. Kambanda, Transcript, *supra* note 577, at 33; *Lawyer for the Former Rwandan Prime Minister Argues for Light Sentence*, INTERNEWS (Sept. 4, 1998), at http://www.internews.org/activities/ICTR_Reports/ICTRNewsSep98.html.

⁶⁶⁸ The prosecution did implement protective measures for Kambanda's family, but those measures only became necessary as a result of the cooperation Kambanda agreed to provide. Thus, they cannot be seen as compensation for Kambanda's cooperation or his guilty plea.

⁶⁶⁹ Jean Paul Akayesu, the first person the ICTR convicted of genocide, received a life sentence, and he was just a relatively lowly mayor of the Taba commune. Akayesu, Judgment, *supra* note 279, at para. 54.

announce that guilty pleas were to be encouraged by granting "some form of consideration" to those who make them.⁶⁷⁰

Thus, both Tribunals came to endorse plea bargaining. Flush with the success of obtaining custody over more and more important defendants, the Tribunals now must also succeed in managing their dockets effectively. With that need in mind, they have turned to plea bargaining. In this way, the Tribunals' functional need for expeditious alternatives to necessarily lengthy trials trumped the structural and ideological features that seemed to militate against plea bargaining. That it did should come as little surprise. Even on the Continent, caseload pressures and the introduction of certain adversarial procedures have increased the use of bargaining analogues, thus showing that criminal justice systems, whatever their structure or ideological underpinnings, must find some way of adapting to work pressures.

While adapt they must, structure and ideology play a significant role in determining the way in which a criminal justice system adapts. Specifically, the way in which the Tribunals conceive of and practice plea bargaining reflects their unique amalgam of adversarial and non-adversarial procedures and the purposes for which the Tribunals were established. As noted above, Tribunal proceedings are more party-dominated than Continental proceedings but more judge-dominated than American proceedings. In keeping with this balance of power, then, Tribunal parties can bargain about sentence recommendations, but Tribunal judges retain firm control over the ultimate sentence. Whereas many American judges happily admit to following the prosecution's recommendations in every case⁶⁷¹ and American federal judges, among others, must accept an agreed-upon sentence or allow the defendant to withdraw his plea,⁶⁷² Tribunal judges jealously guard the sentencing function, repeating over and over that they are not bound by any agreements reached by the parties.⁶⁷³

The Tribunals' greater orientation toward establishing truth is also reflected in the forms of plea bargaining that have emerged, and particularly in the fact that neither Tribunal has practiced charge bargaining.⁶⁷⁴ The Tribunals consider that one of their primary purposes is to

⁶⁷⁰ Ruggiu, *Judgement and Sentence*, *supra* note 339, at para. 55.

⁶⁷¹ See Alschuler, *Plea Bargaining and Its History*, *supra* note 13, at 1063-65 & n.21 (providing statistics as to how many recommendations are followed by various judges).

⁶⁷² LAFAYE ET AL., *supra* note 12, at 1003.

⁶⁷³ Of course, by sentencing within the range agreed upon by the prosecution, the Chambers implicitly legitimize the Prosecutor's recommendations.

⁶⁷⁴ See *supra* note 27 and accompanying text (defining charge bargaining).

create a historical record. Because charge bargaining virtually always distorts the factual basis upon which a conviction rests, its use would severely undermine that purpose. American prosecutors routinely charge crimes that they cannot prove and accept pleas to lesser crimes that the defendant clearly did not commit, practices consistent with a dispute-resolution orientation but hardly likely to “establish[] the truth behind the evils perpetrated” in the former Yugoslavia and Rwanda.⁶⁷⁵ Indeed, for charge bargaining to be a viable form of plea bargaining at the Tribunals, the factual distortion would have to be especially great because Tribunal prosecutors have little power to manipulate sentences through their charging decisions. That is, the Trial Chambers have such broad sentencing discretion, and the crimes within the Tribunals’ jurisdiction are so grave, that a prosecutorial promise to withdraw a few charges here and there will not provide a defendant adequate certainty that he is getting something for his plea. So long as the remaining charges are sufficiently serious, a Trial Chamber may well sentence a defendant to the same term of imprisonment. In other words, while an American defendant can plead guilty to manslaughter instead of first-degree murder and be assured of a sentence reduction, a Tribunal defendant who admits to killing five people and beating twenty in satisfaction of charges that he killed eight people and beat thirty can be assured of nothing. Thus, in order to provide the defendant with anything close to certain value for his plea, the prosecution would have to withdraw charges in such a way as to fundamentally alter the criminal conduct at issue. That is something Tribunal prosecutors have not been willing to do.

The Tribunals’ treatment of guilty pleas, once made, also reflects their orientation toward establishing truth and the substantial involvement of Tribunal judges. Before accepting a guilty plea, the Trial Chamber must satisfy itself not only that the plea is voluntary, informed, and unequivocal, but also that there is a factual basis for the plea.⁶⁷⁶ While some American jurisdictions now also require judges to make a determination as to the accuracy of the plea,⁶⁷⁷ Tribunal judges appear less inclined to rely blindly on the agreement reached by the parties. In *Ruggiu*, for instance, the Trial Chamber actively questioned the prosecution as to various details of the crimes and challenged its interpretation of certain facts.⁶⁷⁸ Further, Tribunal plea

⁶⁷⁵ Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 21.

⁶⁷⁶ ICTY RPE, *supra* note 264, at R. 62*bis*; ICTR RPE, *supra* note 264, at R. 62(B).

⁶⁷⁷ LAFAYE ET AL., *supra* note 12, at 1000.

⁶⁷⁸ Ruggiu, Transcript, *supra* note 628, at 76-101.

agreements typically contain a detailed recitation of the facts,⁶⁷⁹ and these are often published, almost in their entirety, in the Trial Chambers' judgments along with background facts to provide the context in which to understand the defendants' admissions. While these judgments are shorter than those following a full-scale trial, they nonetheless provide substantial information about the crimes and thereby contribute to the creation of a historical record.

The Tribunals' practice of plea bargaining has also avoided thus far many of the abuses associated with American plea bargaining. For instance, because the Tribunals' work is so widely publicized, the Tribunals are less inclined to issue excessively lenient sentences to encourage guilty pleas since such sentences generate bad press. Prosecutors are also less likely to base their sentencing concessions on the strength of the evidence because making vastly different sentence recommendations for defendants indicted for similar wrongdoing is difficult to justify publicly. In addition, the Tribunals' broad disclosure obligations prevent prosecutors from using an information differential to mislead defendants.⁶⁸⁰ Finally, plea bargaining has proven especially valuable to the Tribunals because, unlike most American plea bargaining in which the only benefit to the prosecution is the guilty plea itself,⁶⁸¹ in virtually every case of Tribunal plea bargaining, the prosecution has also benefited from the defendant's substantial cooperation. The inclusion of substantial cooperation makes Tribunal plea bargaining less objectionable as a theoretical matter because, by exchanging sentencing concessions for information leading to the conviction of more serious offenders, the government trades commensurate things: "It agrees to a sacrifice of its legitimate penological objectives in one case in exchange for an opportunity to further similar but more important penological purposes in others."⁶⁸² As a practical matter, obtaining substantial cooperation is vitally important to

⁶⁷⁹ See, e.g., Prosecutor v. Jelisić, Case No. IT-95-10-PT, Factual Basis for the Charges to Which Goran Jelisić Intends to Plead Guilty (Sept. 29, 1998) (supporting specific counts to which the defendant pled guilty with witness statements) (on file with author); Ruggiu, Plea Agreement, *supra* note 641 (containing twenty-two pages and 181 paragraphs of facts supporting the plea).

⁶⁸⁰ Cf. Mann, *supra* note 193, at 286 (noting that because Israeli prosecutors know that defendants will receive all relevant information through disclosure mechanisms, the prosecutor's "representation of the case to the defendant's attorney must be tightly rooted in the evidence [thus] . . . [t]here is little room for puffing in this procedural setting").

⁶⁸¹ Gifford, *supra* note 13, at 44.

⁶⁸² Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at 671.

the Tribunals. Unlike the *Nuremberg* prosecutors who had the benefit of a voluminous paper trail, ICTY and ICTR prosecutors must obtain information from human sources,⁶⁸³ and the best human sources as to, say, a particular command structure or the orders given within that structure, are likely to be the subordinates who received those orders.

In sum, the Tribunals have reconciled their conflicting tendencies. They have begun practicing plea bargaining to expedite proceedings, but they have been practicing it in a way that is largely compatible with their unique procedural amalgam and institutional goals. The Tribunals themselves have justified their practice of plea bargaining on several grounds, and this Section ends with an assessment of those justifications. The Trial Chambers have candidly acknowledged the financial and administrative benefits of guilty pleas, but they have gone on to maintain that guilty pleas indicate certain desirable character traits in defendants who make them and advance the Tribunals' truth-telling function.

Turning to the first justification, the Trial Chambers have considered a guilty plea as evidence of honesty⁶⁸⁴ and of an "acknowledgement of [the defendant's] mistakes and crimes," which "is a healthy application of reason and sentiment."⁶⁸⁵ These statements, reminiscent of similarly naïve-sounding platitudes appearing in decades-old American cases and scholarly literature,⁶⁸⁶ have no factual basis. Indeed, em-

⁶⁸³ See Alvarez, *supra* note 272, at 2066 ("In the *Tadić* case, the vast bulk of the evidence to convict came not in the form of . . . written records of atrocities, as at Nuremberg—but through the oral testimony of . . . live eyewitnesses . . ."); Meltzer, *supra* note 412, at 908 ("Nor does the ICTY have Nuremberg's paper trail. . . . Hence, the ICTY must rely heavily on oral testimony from witnesses . . .").

⁶⁸⁴ Ruggiu, Judgement and Sentence, *supra* note 339, at para. 55; Erdemović, Second Sentencing Judgement, *supra* note 343, at para. 16(ii).

⁶⁸⁵ Ruggiu, Judgement and Sentence, *supra* note 339, at para. 55.

⁶⁸⁶ For instance, in 1968, the American Bar Association Project on Standards for Criminal Justice offered six possible justifications for granting sentencing concessions to defendants who plead guilty, including that by pleading guilty, the defendant "has acknowledged his guilt and shown a willingness to assume responsibility for his conduct." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a) (ii); see also *Brady v. United States*, 397 U.S. 742, 753 (1970) (indicating that a defendant who pleads guilty "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary"); *Scott v. United States*, 419 F.2d 264, 270 (D.C. Cir. 1969) (noting the argument that "the defendant's choice of plea shows whether he recognizes and repents his crime"); *Commonwealth v. Bethea*, 379 A.2d 102, 105 n.8 (Pa. 1977) (noting that "it is argued that a guilty plea indicates a first step toward rehabilitation and, conversely, that a refusal to plead guilty indicates a lack of remorse and repentance"). But see Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at

pirical studies indicate that the primary difference between defendants who plead guilty and those who do not involves the ability to calculate risk. Defendants who plead guilty make a rational calculation and opt for the course of least punishment. Most similarly situated defendants who insist on a trial do so because of an overly optimistic assessment of the likelihood of acquittal. That is, good judgment and self-interest inspire most guilty pleas, not honesty, responsibility, or any other virtue.⁶⁸⁷ One can assume that by attributing positive character traits to defendants who plead guilty, the Trial Chambers are attempting to differentiate the sentences they impose on defendants who plead guilty from the harsher sentences they impose on defendants who do not, on grounds more penologically relevant than the guilty plea itself. While the Trial Chambers' desire to blur the harsh realities of plea bargaining is understandable, they do not advance their cause by making indefensible statements.

As for the truth-telling justification, at first glance, it is not particularly compelling. In most of the Tribunal cases involving guilty pleas, the defendants have not admitted to anything more than that which the prosecution was intending to prove at trial. Such guilty pleas, then, arguably would not advance truth-telling unless the defendants would otherwise have been acquitted. In other words, one could argue that when the factual basis of the conviction would be the same for a conviction following a trial as a conviction following a guilty plea, the guilty plea advances truth-telling only to the extent that it renders the conviction a certainty.

Although that analysis may be persuasive with respect to domestic crime, it does not adequately capture the complex role of truth-telling in the international tribunals. Truth-telling is not valuable as an end in itself but as a means of promoting healing and reconciliation, and whether or not it advances those ends has a great deal to do with how the truth is told. Specifically, there is a profound difference between facts found by a judge and facts admitted by a perpetrator in how those facts are received and in their potential to promote reconciliation. For every Damir Došen and Omar Serushago, there are thousands who behaved similarly and will not be prosecuted, and many others who benefited from their violent acts—Serbs who appropriated the homes of Muslims after their rightful inhabitants were expelled and Hutu who stepped into powerful positions, even if only briefly. While any conviction

661-62 (refuting the argument that guilty pleas are evidence of remorse and repentance); Nemerson, *supra* note 25, at 723 (same).

⁶⁸⁷ See Alschuler, *Changing Plea Bargaining Debate*, *supra* note 13, at 661-69.

tion can lead to deterrence, self-conviction has the additional potential to encourage those similarly situated to reflect on and face up to their roles in the horror. And, as importantly, it has considerable potential to bring closure to victims and enable them to forgive. The defiant Slobodan Milošević,⁶⁸⁸ who disdains even the attempt to hold him accountable, is far more likely to fuel further ethnic hatred and revenge than the seemingly repentant Kambanda, who, in his lawyer's words, "felt that he had a duty to himself, to his own country to tell the truth about Rwanda and the genocide."⁶⁸⁹

Whether that potential for enhancing reconciliation is realized depends largely on the circumstances of the self-conviction, and in particular on the defendant's perceived motivation for pleading guilty. To put it bluntly, guilty pleas that seem to be motivated by sincere remorse and a genuine acknowledgement of wrongdoing are much more likely to encourage dialogue and forgiveness than guilty pleas that appear motivated solely by sentencing concessions. Kambanda himself provides a perfect example. Before being sentenced, Kambanda "declare[d] that his prime motivation for pleading guilty [was his] profound desire to tell the truth . . . [and] his desire to contribute to the process of national reconciliation."⁶⁹⁰ Building on this theme at the pre-sentencing hearing, Kambanda's lawyer read a letter Kambanda had received from a woman whose husband and three children had been killed in the genocide. After recounting her loss, she stated:

⁶⁸⁸ On Milošević's first appearance before the ICTY, he announced: "I consider this Tribunal a false Tribunal and the indictment a false indictment." *Prosecutor v. Milošević*, Case No. IT-99-37, Transcript, 2 (July 3, 2001) [hereinafter *Milošević*, July 3 Transcript], at <http://www.un.org/icty/transe54/010703IA.htm>. The Trial Chamber eventually turned off Milošević's microphone when he continued in the same fashion. *See id.* at 5 ("The Interpreter: I'm sorry, the microphone is not on."); *Prosecutor v. Milošević*, Case No. IT-99-37-I, Transcript, 19-20 (Aug. 30, 2001) [hereinafter *Milošević*, Aug. 30 Transcript] ("The Accused: . . . [C]an I speak or are you going to turn off my microphone like the first time?"), at <http://www.un.org/icty/transe54/010830SC.htm>. Milošević refused to enter a plea of guilty or not guilty, *Milošević*, July 3 Transcript, *supra*, at 4, and he refused to inform himself as to the crimes charged against him in the indictment. *Milošević*, Aug. 30 Transcript, *supra*, at 8-10; *see also Milošević Brings Air of Scorn to Tribunal*, N.Y. TIMES, July 4, 2001, at A7 (reporting Milošević's refusal to hear the indictments against him). In subsequent court appearances, Milošević has continued to show nothing but contempt for the Tribunal that he refuses to recognize. *Milošević Again Defies Tribunal*, INT'L HERALD TRIB., Oct. 30, 2001, at 7 ("After four months in prison, former President Slobodan Milošević remained combative Monday, denouncing new war crimes charges by U.N. prosecutors and scorning three lawyers assigned to his defense.").

⁶⁸⁹ Kambanda, Transcript, *supra* note 577, at 25.

⁶⁹⁰ Kambanda, Plea Agreement, *supra* note 4, at paras. 4-5.

[N]aturally, I would always have reasons to hate you until the end of my days. I have every reason to become an extremist. However, your [guilty plea] rekindles hope in me particularly because the perpetrators of the genocide if they recognize their guilt [sic], reconciliation among Rwandans would become inevitable.⁶⁹¹

However much Kambanda's guilty plea might initially have advanced reconciliation and forgiveness, those goals were dealt a severe blow when Kambanda, not receiving the sentence reduction he expected, stopped cooperating with the prosecution, disavowed his guilty plea, and attempted to litigate his guilt.

The Tribunals, thus, attempt to use the guilty plea's potential to promote reconciliation as a justification for rewarding it with sentencing concessions, but rewarding it with sentencing concessions undermines its potential to promote reconciliation. Indeed, the only way to be sure that a defendant has the "right" motivation for pleading guilty is to eliminate any other motivation—that is, to eliminate sentencing concessions. However, that is not a viable option because doing so would substantially reduce the number of guilty pleas. Perhaps with these realities in mind, the Trial Chambers continue to reward guilty pleas with sentencing concessions but at the same time encourage defendants to couch them in the right language by treating statements of remorse as mitigating factors, and by commenting negatively when such statements are not forthcoming.⁶⁹² Indeed, the Trial Chambers seem so keen to encourage statements of remorse that they have treated as mitigating factors statements that do not even sound especially remorseful. For instance, Todorović spent more time describing the horror of war in his town and the difficulties that Todorović himself suffered than he did expressing remorse for his part in creating much of that horror. Todorović further sought to diminish his responsibility by claiming that he never wanted to be police chief but that "destiny or a set of unfortunate circumstances put [him] in that position, and at the worst possible time, the time of war."⁶⁹³ Finally, although Todorović

⁶⁹¹ Kambanda, Transcript, *supra* note 577, at 28.

⁶⁹² See, e.g., Prosecutor v. Krnojelac, Case No. IT-97-25, Judgement, para. 513 (Mar. 15, 2002) at <http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e.pdf>; Jelisić, Judgement, *supra* note 312, at para. 127 (stating that the accused showed no remorse in trial, and that the remorse he expressed to the expert psychiatrist was of questionable sincerity); Kambanda, Judgement and Sentence, *supra* note 1, at para. 51 (commenting that Kambanda has not "expressed contrition, regret or sympathy for the victims in Rwanda").

⁶⁹³ Prosecutor v. Todorović, Case No. IT-95-9/1, Transcript, 59 (May 4, 2001) (on file with author).

pled guilty to beating one man to death, severely beating numerous others, and sexually assaulting others still, he said nothing of those acts in his statement but rather noted only that "he lacked the courage to prevent the illegal and inhuman activities that were going on."⁶⁹⁴ The *Sikirica* defendants appear to have modeled their statements on Todorović's, so they are not much better. Yet the Chambers, eager to promote reconciliation, excerpt the best parts of the statements for the judgment, pronounce the statements "sincere,"⁶⁹⁵ and treat them as mitigating factors. Although the Trial Chambers' efforts are not especially adept, their motivations are understandable.

CONCLUSION

States have traditionally been rather chauvinistic about their own criminal justice systems and suspicious of foreign systems. Indeed, prior to the mid-1960s, criminal procedure was of relatively little interest to comparativists.⁶⁹⁶ About that time and following, however, American scholars, dissatisfied with certain inefficiencies of the American criminal justice system, and in particular with the widespread use of plea bargaining needed to counteract those inefficiencies, looked with longing to the simple, efficient Continental criminal proceedings that could be provided to virtually all criminal defendants. But, while many reforms were discussed, few were undertaken.⁶⁹⁷ In more recent years, Continental countries, now imposing their criminal sanctions on more ethnically diverse populations, have adopted certain adversarial procedures that better reflect the distrust with which minority populations often view governmental officials. The systems have therefore converged to some degree, but they still retain their essential features. In particular, the United States has retained most of its adversarial trial procedures and thus continues to maintain its heavy reliance on plea bargaining

⁶⁹⁴ *Id.* at 59-60. Todorović also stated that he "didn't have sufficient courage or determination to prevent volunteers and local criminals from committing evil and plundering the non-Serb population." *Id.* at 59.

⁶⁹⁵ *Sikirica*, Sentencing Judgement, *supra* note 355, at paras. 152, 194, 230; *see also* Todorović, Sentencing Judgement, *supra* note 336, at para. 92 (pronouncing Todorović's expressions of remorse "genuine").

⁶⁹⁶ *See* Van den Wyngaert, *supra* note 177, at i; *see also* Joachim Herrmann, *Criminal Justice Policy and Comparativism: A European Perspective*, in *COMPARATIVE CRIMINAL JUSTICE SYSTEMS*, *supra* note 52, at 130-37 (finding that comparativists considered criminal justice "an exclusively domestic matter" until the need for reform arose in post-Socialism Eastern Europe).

⁶⁹⁷ *See* Jörg et al., *supra* note 112, at 48-49, 54 (noting calls for reform, but lamenting that fundamental changes have not occurred).

while Continental countries still provide comparatively simple and inexpensive trials and continue to provide them to virtually all defendants charged with serious crimes.

The judges of the ICTY and ICTR had the opportunity to blend the best of both systems when they drafted the Tribunals' procedural rules, and although their initial amalgam was predominantly adversarial in character, the judges did not provide for the mainstay of adversarial procedures, the plea bargain. With few, if any, defendants in the dock and consequently few trials on the horizon, there was little reason to provide for expedient alternatives to trial. Further, Tribunal judges from civil law countries were unfamiliar with plea bargaining, and the whole idea of it appeared unseemly and inconsistent with the noble mission that the Tribunals had undertaken. Noble as it may be, however, the Tribunals' mission has been a difficult one to fulfil. Tribunal crimes are complex and usually cannot be proved without the testimony of dozens of witnesses and the admission of boxes of exhibits. Witnesses and evidence are far away, difficult to locate, and costly to transport to the Tribunals. Witnesses must be protected and evidence must be translated. Tribunal proceedings consequently take forever and cost the moon.

During its eight-year existence, the ICTY has amended its RPE twenty-two times, with many, if not most, of those amendments seeking to make Tribunal proceedings quicker and more efficient.⁶⁹⁸ The Tribunals have thus adopted many Continental procedures, and in doing so, have significantly altered the nature of Tribunal proceedings. The introduction of these more efficient procedures helps, but many of the reasons that Tribunal trials are so long and complex are not amenable to remedy by procedural rule. Pre-trial judges can review wit-

⁶⁹⁸ Most other amendments can be classified as gap-filling; the early versions of the RPE were understandably brief and general, see Michèle Buteau & Gabriël Oosthuizen, *When the Statute and Rules Are Silent: The Inherent Powers of the Tribunal*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 65-66 (noting that the Rules of Evidence and Procedure are "fairly basic"); Jon Cina & David Tolbert, *The Office of the President: A Third Voice*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD, *supra* note 27, at 86 ("The initial version of the Rules was necessarily limited in scope."); *Developments in the Law*, *supra* note 388, at 1985 ("Although the rulemakers codified the procedures to a greater extent than had their predecessors at Nuremberg and Tokyo, they also intentionally left the Rules vague, expecting many of the details to be worked out through amendments and case-by-case adjudication."), and many of the amendments provided necessary detail as the Tribunals resolved unforeseen difficulties, see Askin, *supra* note 251, at 19 ("During the course of [the *Tadić*] trial, many Rules were added or amended to reflect evolving needs and unforeseen circumstances affecting the defendant and the victims and witnesses.").

ness lists, for instance, but they cannot make those witnesses easier to find or less expensive to transport and protect. Relieving much of the burden of Tribunal trials requires eliminating some of those trials altogether. So, while the Tribunals adopt more and more non-adversarial procedures, they have at the same time begun practicing that hallmark of the adversary system—plea bargaining.

Plea bargaining practices vary from jurisdiction to jurisdiction, and the Tribunals have developed forms of plea bargaining that reflect their unique procedural amalgam, institutional structure, and wide-ranging goals. Plea bargaining practices at the Tribunals are more circumscribed than they are in the United States, and despite bargaining between ICTY prosecutors and defendants over sentence recommendations, Tribunal judges continue to exercise considerable control over the sentencing function. Further, plea bargaining at the Tribunals is thus far practiced at the margins. Occasional Tribunal defendants plead guilty, in contrast to the United States, where only occasional defendants have trials. Plea bargaining does not occur in every Tribunal case or even in most every case. Indeed, more than one Tribunal prosecutor told me that they do not initiate plea discussions; although they are happy to respond to any offers made by defense counsel, they do not feel comfortable beginning the negotiations. Although this reticence might fade as more plea bargaining takes place, it highlights the fact that plea bargaining is not currently considered the primary method of case disposition, as it is in the United States, but a useful expedient in the occasional case.

Even occasional instances of plea bargaining are distasteful to purists, but the “culture of impunity”⁶⁹⁹ that provides context to the Tribunals’ establishment and current operations cautions against seeking ideal international criminal prosecutions. Atrocities that we would now label genocide or crimes against humanity have taken place throughout human history,⁷⁰⁰ yet they have virtually never been pun-

⁶⁹⁹ Louise Arbour, *The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL’Y 13, 23 (1999) (describing the “‘culture of impunity,’ where enforcement of humanitarian law is the rare exception and not the rule” (footnote omitted)).

⁷⁰⁰ Howard Ball states:

Whether it was the poisoning of springs and wells to kill the enemy, showing no quarter to a defeated enemy in the field, mistreating prisoners of war, laying siege to undefended towns populated by civilians, or intentionally killing groups of people, young and old alike, because of race, color, religion, or ethnicity, the world has for centuries experienced war, war crimes, and acts of brutality that violated the customs and conventions of war and the “conscience” of humanity.

ished by criminal sanctions.⁷⁰¹ The Nuremberg and Tokyo trials were supposed to usher in an era of accountability for international crimes,⁷⁰² but a violent and bloody fifty years passed⁷⁰³ before the international community mustered the political will to establish the

BALL, *supra* note 288, at 11; see also Jean Graven, *Les crimes contre l'humanité*, 76 RECUEIL DES COURS 427, 433 (1950) (noting that crimes against humanity are as old as humanity itself); Daniel D. Ntanda Nsereko, *Genocide: A Crime Against Mankind*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, *supra* note 21, at 117-18 (noting that "[t]he history of the human race abounds with episodes of genocide" and chronicling some of them).

⁷⁰¹ See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 570-71 (2d rev. ed. 1999) (listing mass atrocities that were not prosecuted); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 3 (1996) ("Silence and impunity have been the norm rather than the exception . . ."); M. Cherif Bassiouni, *The Future of International Criminal Justice*, 11 PACE INT'L L. REV. 309, 312 (1999) (describing the twentieth century as one in which approximately 250 conflicts around the world led to an estimated 70 to 170 million deaths through genocide, crimes against humanity, and war crimes, with virtually none of the perpetrators brought to justice).

⁷⁰² SCHARF, *supra* note 251, at xiii ("There was hope that the legacy of Nuremberg would be the institutionalization of a judicial response to atrocities committed by anyone, anywhere around the globe.").

⁷⁰³ See *id.* (noting Stalin's purges, China's Cultural Revolution, Cambodia's killing fields, and Argentina's Dirty War, among other massacres); Akhavan, *supra* note 269, at 815 ("Idi Amin, Mengistu, Pol Pot, Sadaam Hussein, and a litany of other mass murderers living without fear of punishment underscore[s] the tragic culture of impunity that has prevailed in the international arena for so long."); Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 169 (1997) ("The horrors in Cambodia under Pol Pot, Uganda under Idi Amin, Guatemala under the military, and Iraq under Saddam Hussein, among many others, did little to push states to national or international prosecution of heinous crimes against civilian populations.").

Although the 1949 Geneva Conventions, the Genocide Convention, and other treaties require states parties to prosecute offenders in domestic courts, such courts have been severely underutilized for the prosecution of international crimes. See John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L REV. RED CROSS 445, 453 (1998) (noting that "[n]ational courts have a poor record when it comes to the prosecution of war crimes and other international crimes arising out of armed conflicts"), <http://www.icrc.org/irceng.nsf/5cacdf48ca698b641256242003b3295/1daee6e828886a1f412566c70051c269?OpenDocument>; Axel Marschik, *The Politics of Prosecution: European National Approaches to War Crimes*, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 65, 87 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) (noting that there have been no war crimes trials in the United Kingdom since the 1950s); see also Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378, 381-87 (1999) (discussing the inability of United States courts to prosecute many instances of genocide, crimes against humanity, and war crimes for lack of appropriate domestic jurisdiction and substantive legislation).

ICTY and ICTR.⁷⁰⁴ And once the Tribunals were established, the international community provided them only inconstant support, funding them inadequately at their outsets⁷⁰⁵ and failing to assist them—particularly the ICTY—in obtaining custody over defendants.⁷⁰⁶ In

⁷⁰⁴ The proposal to create an international criminal tribunal to prosecute those responsible for the atrocities in the former Yugoslavia met with considerable opposition. See, e.g., Alfred P. Rubin, *An International Criminal Tribunal for Former Yugoslavia?*, 6 PACE INT'L L. REV. 7, 17 (1994) (describing the ICTY as “a model of the legal order under which the laws of war are administered by an ‘impartial’ agent of organized humanity,” and criticizing it for its “fundamental incompatibility” with the Westphalian model, “under which the laws of war are administered by each body corporate of the international legal order within its own competence”). Some argued that the Tribunal would obstruct peace negotiations. See, e.g., BASSIOUNI & MANIKAS, *supra* note 250, at 202-03; MERON, *supra* note 281, at 282 (suggesting that the Tribunal may “obstruct peace negotiations” because “those who make decisions at the negotiating table . . . [would not] agree to provisions that might endanger their leadership and bring them to justice”); Akhavan, *supra* note 269, at 738 (noting that “commentators of a realist persuasion suggested that the ICTY was . . . an impediment, and not a contribution, to reconciliation in the former Yugoslavia”); Anthony D’Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT’L L. 500, 500-02 (1994) (arguing that it is not realistic to expect Serbian, Muslim, and Croatian political and military leaders who are potential targets of the Tribunal “to agree to a peace settlement in Bosnia if, directly following the agreement, they may find themselves in the dock”). Others objected to the Tribunal’s establishment by means of a Security Council resolution. See, e.g., BASSIOUNI & MANIKAS, *supra* note 250, at 203 (“Some [Security Council] members . . . felt that such a judicial organ should be established by the [General Assembly] or by a multilateral treaty.”); Simonovic, *supra* note 272, at 444-45 (noting that “Brazil and China expressed concern that the interpretation of Security Council powers had been overstretched” and that “Mexico presented an official report, challenging the Security Council’s authority to act as it did”). Scharf thus considered it “[a]gainst great odds” that the ICTY was in fact created. SCHARF, *supra* note 251, at xv; see also Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 237 (1994) (“One may call it truly amazing that the international community, acting through the Security Council, has been able to set up two international criminal jurisdictions in the recent past.”).

⁷⁰⁵ See LAWYERS COMMITTEE REPORT, *supra* note 382, at VI(B) (describing the ICTR’s funding as “inadequate and unpredictable since its inception”); MERON, *supra* note 281, at 280 (mentioning the ICTY’s “budgetary difficulties”); RATNER & ABRAMS, *supra* note 259, at 188 (noting both Tribunals’ “resource problems”); SCHARF, *supra* note 251, at 79-84 (detailing the ICTY’s funding difficulties); Catherine Cissé, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 103, 115 (1997) (stating that the ICTR’s “inadequate budget” led to inefficient work); Meltzer, *supra* note 412, at 908 (noting the ICTY’s “serious underfunding and understaffing”); Sara Darehshori, *Inching Toward Justice in Rwanda*, N.Y. TIMES, Sept. 8, 1998, at A25 (reporting that when co-counsel in *Akayesu* arrived in Arusha, she and her approximately twelve office-mates “created makeshift desks by removing doors from their hinges and placing them on crates . . . fought over garbage cans, which [they] used as chairs [and that] . . . [t]he one telephone line was erratic”).

⁷⁰⁶ See *supra* text accompanying notes 281-86. As one commentator noted in 1999, “[a]lthough the political will existed to establish a criminal tribunal for the purposes of

other words, the international community's commitment to ending impunity for mass atrocities is, at best, a fragile one.

Whether the establishment of international criminal tribunals, ad hoc or permanent, is the most appropriate response to large-scale violence is a controversial question that cannot be addressed here.⁷⁰⁷ But assuming that international prosecutions are a desirable response in at least some circumstances, those prosecutions must be conducted at a cost and length palatable to the international community. Since they were created, the ICTY has spent nine years and nearly \$500 million to dispose of fourteen cases,⁷⁰⁸ and the ICTR has spent eight years and more than \$400 million to dispose of nine cases,⁷⁰⁹ statistics that can do the cause of international criminal justice little good. Plea bargaining, though problematic for a host of reasons, will enhance the Tribunals' productivity, and will probably enhance the likelihood that future international criminal prosecutions are undertaken. Given the short and troubled history of international criminal justice, that benefit may be worth the costs.

trying individuals accused of war crimes and crimes against humanity, the political will apparently does not exist to arrest and detain such individuals to enable the Tribunals to function as designed." Penrose, *supra* note 281, at 361.

⁷⁰⁷ For assessments of various responses to mass violence, see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 48-51 (1998); RATNER & ABRAMS, *supra* note 259, at 131-200; ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 170-85 (1997); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7-31 (2001); Alvarez, *supra* note 272, at 2108-12; Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 292-94 (1994) (book review).

⁷⁰⁸ ICTY Key Figures, at <http://www.un.org/icty/glance/keyfig-e.htm> (last updated July 24, 2002).

⁷⁰⁹ See Coalition for International Justice, *Frequently Asked Questions-ICTR* (providing budgetary figures from 1996-2000), at <http://www.cij.org/index.cfm?fuseaction=faqs&tribunalID=2> (last visited Aug. 6, 2002); *Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994*, U.N. GAOR 5th Comm., 55th Sess., Agenda Item 128, at para. 1, U.N. Doc. A/55/692 (2000) (appropriating more than \$93 million for 2001); *Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994*, U.N. GAOR 5th Comm., 56th Sess., Agenda Item 132, at para. 9, U.N. Doc. A/RES/56/248 (2001) (appropriating over \$192 million for the biennium 2002-2003).

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