INTERNATIONAL JOURNAL OF RESEARCH AND ANALYSIS VOLUME 5 ISSUE 2 ISSN 2347-3185 2018

GUILTY PLEA UNDER INTERNATIONAL CRIMINAL LAW: TRACES OF TRUTH, RECONCILIATION AND JUSTICE

DR. A.VIJAYALAKSHMI[1]

INTRODUCTION:

Guilty Plea is the principle which formulated to achieve the object of the Criminal Justice System. The goal of Victimology can be attained through the principle of Pleading Guilty. The accused by way pleading guilty not only help the proper administration if Criminal Justice, but also provide a remarkable contributing to the trail proceedings by way of saving the time, help the victims by court way of avoiding the repetition of pain and sufferings by way of deposing before the court during the time of trial. The principle gives discretion to the court either to reduce the sentence or to award the actual sentence to the accused those who pleaded guilty by way accepting the action committed by them which was prohibited by the existing criminal law. In this work, the author trying to trace out how the International Tribunals contributed the concept of guilty plea under International Criminal Justice System. The work will exclusively analyze the contribution of the International Criminal Tribunal for Rwanda (herein after referred to as the 'ICTR') through its Trial Chamber and Appellate Chamber decision brings out the jurisprudence of guilty plea.

On 6th April, after discussing the implementation of Aurusha Accord along with State heads in Aurusha, in Tanzania, the aircraft carrying all the persons crashed around 8:30 p.m. near Kigali airport, all aboard killed. The Rwandan army and Rwandese militia reacted immediately by way of blocking the road around Kigali, within a day they stared killing of Tutsi, moderate Hutus those who are favored Aurusha Accord. They also executed the UNAMIR personnels. Through the resolution the United Nations Security Council (herein after referred to as the 'UNSC') decided to reduce its force by way of condemning the attacks on UNAMIR people, NGO, other the United nations (herein after referred to as the 'UN') persons who are assisting in implementation of peace and distribution of humanitarian relief[2]. Then the troops gradually

[1]Dr. A. Vijayalakshmi, Assistant Professor (SS), Dept of Criminal Law and Criminal Justice Administration, The Tamil Nadu Dr. Ambedkar Law University, Chennai, Tamil Nadu.

[2]UNSC/Res/91/1994 dated 21st April 1994, the Security Council appalled at the ensuing large scale –violence in Rwanda, which in death of thousands of innocents people including women, children, displacement of significant number of Rwandese population. They decide to monitor and review constantly.

moved into Gitarama. On 12th April through Radio they publicly announced attack against the Tutsi population and targeted them as the primary enemy. During 14th to 21st April the killing of Tutsi population reached its peak, they neither spared women nor children from their goal. They attacked the places where the Tutsi population thinks to safe like hospitals, churches, schools, local government buildings. Most of these attacks were either perpetrated by Superior officials of Rwandan Government or under their supervision or aid or abetment or in their presence. They use all modes to eliminate and exterminate the Tutsi population from Rwanda. The elimination was considered to be the grave violation of the International Humanitarian Law (herein after referred to as the 'IHL') and causes threat to peace and security to the mankind. The UNSC in this regard expressed its concern. For the first time it discussed about the attacks takes place in Rwanda was against the Tutsi ethnic group, and started to mention about the international humanitarian violations committed by the Rwandese army seems to systematic and widespread attack[3]. The Security Council mentioned in its resolution regarding the Crime of Genocide. Through this resolution the UNSC requested the General Assembly to conduct investigation and report the serious violation of international humanitarian law during the conflict.

ESTABLISHMENT OF INTERNAIONAL CRIMINAL TRIBUNAL FOR RWANDA:

Then in another resolution UNSC/Res/925/1994, dated 8th June 1994, it concerned about the failure of cease-fire and reported that the investigation report indicated that acts of Genocide occurred in Rwanda. The Security Council appointed a Special Rapporteur for Rwanda from United Nations Commission for Human Rights. The Special Rapporteur filed its report that violation of international humanitarian law in Rwanda on 1st October 1994. The report once again indicated that Genocide and other systematic, widespread violation of the IHL in Rwanda. By this report the committee determined to constitute a threat to International Peace and Security, and to put an end to such crimes and to take effective measures to bring to justice the person who are responsible for them. Under these circumstances, the Council decides for the establishment of an international criminal tribunal for the prosecution of persons responsible for

[3]UNSC/Res/918/1994, dated 17th March, strongly condemns the ongoing violence in Rwanda and particularly killing of numerous civilians and deeply concerned about the death of thousand innocents, including women and children, internal displacement of a significant of Rwanda population and continuing reports of systematic and widespread and flagrant violation of international humanitarian law. The Council recalled the killing of members of an ethnic group with the intention of destroying such group in whole or in part constitutes a crime punishable under international law. The full report is available at www.un.org accessed on 23.10.2017.

Genocide and other violations of the IHL will contribute to ensuring that such violations are halted and effectively redressed as the prime objective of the tribunal[4]. The Security Council after receiving the letter from the permanent representatives of Rwanda[5] established the Tribunal for the sole purpose of prosecuting persons responsible for Genocide and other serious violations of the IHL committed in the territory of Rwanda and Rwandan citizens responsible for such crimes committed in the neighboring States, between 1st January to 31st December of 1994 and to this to adopt the Statue of the Tribunal for Rwanda. The ICTR shall function in accordance with the provisions of the Statute. The Statue of the ICTR (herein after referred to as the 'Statute') consists of 32 Articles and the seat of the Tribunal shall be in Aurusha, United Republic of Tanzania. The Tribunal has III Trial Chamber and an Appellate Chamber. The completion will on 2015. The jurisdiction of the tribunal shall have the power to prosecute persons commit (i) Crime of Genocide[6], (ii) Crime against Humanity[7], (iii) Violation of Article 3 common to the

[4]UNSC/Res/955/1994, dated 8th November 1994, the tribunal was established and acting according to Chapter VII of the United Nation Charter, "*Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"* , Under Art 39— The Security Council shall determine the existence of any threat to the peace, breach of peace or acts of aggressions and shall make recommendations, or decide what measures shall be taken in accordance with Article 4 and 42, to maintain or restore international peace and security.

[5]S/1994/1115.

[6]Article 2, Crime of Genocide reads as follows:

1. The ICTR shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group
(b) Causing serious bodily or mental harm to the members of the group:
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part:
(d) Imposing measures with the intent to prevent births within the group:
(e) Forcibly transferring children of the group to another group:

3. The following acts shall be punishable:
   (a) Genocide;
   (b) Conspiracy to commit Genocide;
   (c) Direct and public incitement to commit Genocide;
   (d) Attempt to commit genocide;
   (e) Complicity in genocide.

[7]Article 3, Crime Against Humanity

The ICTR shall have the power to prosecute persons responsible for the following crimes when committed as a part of a widespread or systematic attack against any civilian population on national, ethnical, racial or religious grounds;

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecution on political, racial or religious ground;
(i) Other inhuman acts.

Geneva Convention and of Additional protocols[8]. The resolution also indicated that before passing sentence the tribunal should notify it to the Government of Rwanda[9]. That the shall be served in Rwanda or any of the State on a list indicated to the UNSC willing to accept the convicts, and such imprisonment shall be in accordance with the applicable law of the State concerned. With regard to the pardoning or Commutation of Sentence, it shall be by the President of the tribunal after consultation with the judges. The Penalties provisions are also indicated the manner in which the Chamber impose sentence, the factors to taken in to consideration etc[10]. According to the Article 14 [11]of the Statute, the Rules and Procedure has been adopted and came into entry on 29th June 1995. So far the tribunal has completed 45 cases by the Trial Chamber, 12 cases are pending before the Appellate Chamber. Out of the 45 cases in some cases the accused persons pleaded guilty and the Chamber pass sentence according to the sentencing procedure of the tribunal. The next chapter will discuss about the jurisprudence evolved by the tribunal in dealing with Guilty Plea Principle.

APPLICABLE LAW OF SENTENCING PATTERN:

The Statute and the rules and procure of the tribunal speaks about the sentencing pattern. The applicable laws and principles of the tribunal has to coup up with the object of the establishment of the tribunal, i.e, to contribute to the process of national reconciliation and to the restoration

[8]Article 4: Violation of Article 3 common to the Geneva convention and of Additional protocols II: The ICTR shall have the power to prosecute persons committing or ordering to be committed serious violation of Article 3 common to Geneva Convention of 12 August 1949 for the protection of the War victims, and of Additional Protocol II there of 8 June 1977. These violations shall include, but not limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrage upon personal dignity, in particular humiliation and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
(g) The passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized people;
(h) Threats to commit any of the foregoing acts.

[9]Article 26 and 27 speaks about the enforcement of Sentence, Pardon or Commutation of sentence.

[10]Article 23 of the Statute of the ICTR.

[11]Article 14, Rules of Procedure and Evidence: The judge of the ICTR shall adopt, for the purpose of the proceedings before the tribunal, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Criminal tribunal for Yugoslavia with such changes as they deem necessary.

and maintenance of peace and to ensure that the violations of the IHL in Rwanda were halted and effectively redressed[12]

(a) Article 6[13] of the Statue;
(b) Article 22
(c) Article 23
(d) Rule 101 of the Rules and Procedure of the Tribunal[14];
(e) Rule 103[15].

The tribunal has the power to impose sentence up to life imprisonment and no place for death penalty. In this regard there was a conflict between the tribunal and the Rwandan Government and the government not shown cooperation with the tribunal, and they executed some of the accused publicly as the Rwandan Penal Code prescribes Death Sentence for murder or the like crimes.

INDIVIDUAL CRIMINAL RESPONSIBILITY:

Article 6(2) of the Statute states as, the official position of any accused person, whether the Head of State or Government or as responsible Government official, shall not relive such person of criminal responsibility nor mitigate punishment. At the same time, Sub-Section 3 of Article 6 of

[12]UNSC/Res/955/1994, 8 November 1994.
[13]Individual Criminal Responsibility
A person whom planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation of execution of a crime referred to n article 2 to 4 of the Statute, shall be individually responsible for the crime.
[14]Rule 101 of the Rules and Procedure: Penalties
(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.
(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:
(i) any aggravating circumstances;
(ii) any mitigating circumstances including the substantial co-operation
with the Prosecutor by the convicted person before or after conviction;
(iii) the general practice regarding prison sentences in the courts of Rwanda;
(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.
(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
(D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Rule 1 02(B).
(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the tribunal or pending trial or appeal.
[15]Rule 103, Place of Imprisonment.
(A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons. Prior to a decision on the place of imprisonment, the
Chamber shall notify the Government of Rwanda.
(B) Transfer of the convicted person to that State shall be affected as soon as possible after the time- limit for appeal has elapsed.

the Statute referred that, the acts under Arts.2 to 4, if committed by the subordinate does not relieve his or her superior of criminal responsibility if or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Article 6(1) of the Statute constitutes various stages of the commission of the crime right from the planning, to the commission of the crime. Article 6(1) thus appears to be in accordance with the judgments passed in Nuremberg Tribunal[16], in which it was held that the not only responsible for the crime committed by him directly but also who ordered it, incur individual criminal responsibility.[17] In The *Prosecutor v. Dusko Tadic*[18] decision the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (herein after referred to as the 'ICTY')[19], the tribunal held that, "a person only is criminally responsible for conduct where it is determined that he knowingly participated in the commission of an offence and his participation directly and subsequently affected the commission of that offence through supporting the actual commission before, during and after the incident". Therefore the mere 'participation' according to 6(1), simply shift the responsibility of the accused, he must act knowingly or he must have know that his subordinate were going to commit such a nature of crime or failed to take necessary action to prevent it. This only impose the individual criminal responsibility of the perpetrators if be the superior. Thus Article 6(3) speaks about the Superior criminal responsibility and 6(1) speaks about the direct involvement of the perpetrators. The element of *mens rea* in Article 6(3) can be taken into account on two view, (i) according to the law of strict liability in which, the superior is responsible for the act committed by his or her subordinates, (ii) the negligence on the part of the perpetrators not to prevent the atrocities committed by his subordinates. For this we can take the help of Geneva Conventions[20], the 'Commentary on the

[16]Established by the four Allied Powers, France, Great Britain, the USSR and the United States of America drafted an agreement for the prosecution and punishment of Major War Criminals of the European Axis. Through this agreement they established the International Military Tribunal which popularly called as Nuremberg Tribunal, on 8th August 1945.

[17]Para 474, *The Prosecutor v. Jean Paul Akeyesu*, ICTR-96-4-T

[18] Para 692, Page 270, *The Prosecutor v. Dusko Tadic*, ICTY-94-1-T, 7 May 1997.

[19]International Criminal tribunal for Former Yugoslavia established under UNSC/Res808 & 827/1993 on 25th May 1993, by the Security Council, to act under Chapter VII of the UN Charter. With the aim to prosecute person committed serious violations of IHL in Former Yugoslavia. Available at www.icty.org

[20]The Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects. They specifically protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. The Conventions and their Protocols call for measures to be taken to prevent or put an end to all breaches. They contain stringent rules to deal with what are known as "grave

Additional Protocols of Geneva Conventions of 12 August 1949', stated that "the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place"[21]. Therefore to assess the individual criminal responsibility it has to done case by case, and there is no hard and fast rule regarding the application of Article 6(1) & (3) of the Statue.

Determination of sentences for the accused found guilty of any of the offence under the Statute of the Tribunal:

The Statute however did not prescribe any specific penalty that can be imposed for any kind of offence. The determination of penalty for the commission of offence is left to the discretion of the Chamber and at the same time, the Statue gave a guiding principle that, at the time of awarding penalty, it has to take into account the general practice of Rwandan court in regard to prison sentences along with other factors like, gravity of the offence, individual circumstances, the existence of aggravating and mitigating circumstances etc[22]. The scaling pattern for imposing penalties for the crime listed in Arts.2 to 4 can be done according to the above said manner. Because, weighting all the crimes in the same scale would cause injustice. At the eye of the tribunal, though the gravity of offence has to be considered as a factor, this may differ from crime to crime. For example, the Crime against Humanity may seem to be lesser crime that Crime of Genocide[23]. In this regard the Chamber could refer the judgments of International Military Tribunal and International Military Tribunal for Far East[24] (herein after referred to as the 'IMT & IMTFE') as there were traces of Crime against Humanity and War Crime but the Crime of Genocide and its concept defined later, which was called as "Crime of Crimes". The

---

breaches". Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold. Available at www.icrc.org

[21]Claude Pilloud et al., Commentry on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12 August 1945", *The Prosecutor v. Jean Paul Akayesu*, para 488, Available at www.ictr.org

[22]Article 23 and 101.

[23]The term 'Genocide' was coined by Prof Raphael Lemkin in his book *"Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress"*, in 1994, which was written about the Nazi crimes in Europe during World War II. Available at www.preventnocide.org .Following which the UN General Assembly adopted the convention to introduce Crime of Genocide as International Crime, *delictum juris gentium.* The *Convention on the Prevention and Punishment of Crime of Genocide* adopted by the General assembly UNGA/Res/260 A (III) on 9th December 1948. In which the definition for Crime of Genocide, Punishable acts of Genocide has been defined in Article II and III. Available at https://treaties.un.org accessed on 15.01.2018.

[24]International Military Tribunal and International Military Tribunal for Far East popularly called as 'Tokyo Tribunal' which was convened on 29. 4. 1946 to try the leaders of Empire of Japan for three types of War Crime. Available at www.jus.uio.no accessed on 23.12.17.

Chamber notes in this regard, the judgments of IMT and IMTFE, were very much resemblance of genocide even without any definition. The crime of genocide is somewhat different because its elements, *dolus specialis* (Special intent) which means the crime has to commit with the intent to destroy in whole or in part, a national, racial, ethnical or religious group[25]. Thus on the account of extreme gravity, the both crimes Crime against humanity and genocide must be punished. But countries like Rwanda have its own domestic criminal legislation which imposes severe penalties for crimes like genocide and crime against humanity. For the better cooperation with the Tribunal, they established a separate Law, known as *Rwandan Organic Law on the Organization of Prosecutions for offences constituting the Crime of Genocide and Crime against Humanity*, committed since 1990, adopted in 1996[26]. From this committee they categories the accused persons into four group namely,

Category 1

a) Person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity

b) Persons who acted in positions of authority at the national, perfectoral, communal, sector or cell level, or in a political party, the or fostered such crimes;

c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;

d) Persons who committed acts sexual torture;

[25] Refer Article 2 of the Statue.

[26] The purpose of the law is to organize the criminal proceedings against the person who are having since 1 October 1990 committed acts set out and sanctioned under the penal code and which constitute, either crime of genocide or crime against humanity or serious violations of Geneva Convention and its Additional Protocols ratified by Rwanda. Available at www.prevent genocide.org/law/domestic.rwanda.htm

Category 2

Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators of accomplices of intentional homicide or of serious assault against the person causing death;

Category 3

Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person;

Category 4

Person who commits offence against property[27]. Article 14 of the Law prescribes death penalty for 1st category, life imprisonment for 2nd category, shorter term of imprisonment for 3rd category[28]. Here the question arises whether it is mandatory for the Chamber to consider the Rwandan law while determining prison sentences for the accused, where the Statute did not prescribes death penalty for any offence. For this they refer the judgment of ICTY in *Erdemovic case*[29], in which it was stated that "the reference to this practice can be used for guidance, but it is not binding", which was also supported by the United Nations General Assembly while establishing ICTY.

While determining the sentence, the Chamber has to apply its mind that the object of establishing this tribunal is to prosecute and punish the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace. So the penalties imposed have to play dual role of retribution and deterrence effect. Retributive in nature is that he must be punished which was witnessed by the victims and deterrent nature is

[27] Article 2 of Organic Law.
[28] *The Prosecutor v. Jean Kambanda*, para 28, ICTR-97-23-S.
[29] The Trial Chamber endorses the opinion of Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia which in its decision of 29 November 1996 , in the matter of "The Prosecutor versus Drazen Erdemovic", held that "it might take into account that the accused surrendered voluntarily to the International Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse or contrition and stated his willingness to supply evidence with probative value against other individuals for crimes falling within the jurisdiction of the International Tribunal, if this manner of proceeding is beneficial to the administration of justice, fosters the co-operation of future witnesses, and is consistent with the requirements of a fair trial." '*The Prosecutor v. Omar Serushago*' ICTR-98-39 Dated 5.2.1999, para 41, page 14. Available at www.ictr.org/cases

that prevent others who will attempt in future to commit such serious crimes. Altogether , the applicable laws for determination of sentence, it is required as envisaged by Article 23(2) of the Statute and Rule 101(B) of the Rules, to take into account various factors like gravity of offence, individual circumstances, existence of aggravating and mitigating circumstances which includes co-operation of the accused, age, background, education, intelligence, mental structure etc.

MITIGATING FACTORS:

While determining the sentence, the tribunal shall take into account the factors which dealt under Article 23(2) of the Statue and along with it; the following are other mitigating factors,

(a) The Guilty Plea;
(b) Individual circumstances;
(c) Personal and family situation;
(d) Character of the accused;
(e) Assistance given to certain victim;
(f) Lack of prior conviction and good character;
(g) Age and ill-health;
(h) Lack of personal Participation in the crime.

The mitigating circumstances relates only to the assessment of the punishment and in no way going to help in gravity of crime. But the defence Counsel of the accused who opted to plead guilty always argued that the judges have the discretionary power with mitigating circumstances. For the purpose of considering the mitigating circumstances the tribunal sought the help of the International Criminal Tribunal for Former Yugoslavia (ICTY). The jurisprudence evolved by the ICTY had underlined several mitigating circumstances and showed why guilty plea has its effect in determining the sentence. Pleading guilty shows remorse, repentance, contribution to the reconciliation, the establishment of the truth, the encouragement of the other perpetrators to came forward, save the time of investigation and trial and relieving the victims and witnesses. But the most important factor is timing of pleading guilty[30]. While considering the guilty plea, the chamber would look in to the official position of the accused. If the accused was in Superior

[30]*The Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T.

Official position, took part directly in the commission of crime under Art 2 to 4 of the Statue or aided, abetted, encouraged, planned or prepared for the commission of the crime. The Official position of the accused has been considered as the aggravating circumstances of the case. If the mitigating circumstances were surrounded by aggravating factors the chamber would not consider the mitigating circumstances. As there was no specific provision in the Statute to refer when any of the accused plead guilty and files plea agreement, but the relevant provision may be Rule 62(B) and 62 *bis*[31].

GUILTY PLEA CASES UNDER ICTR:

The trial chamber so far completed nearly 47 cases. 16 cases has been taken up to Appeal and pending before the Appellate Chamber, 12 cases ended in acquittal, 10 cases transferred to national jurisdiction, 2 released as indictments withdrawn by the Prosecution, 7 accused persons released after serving the sentence[32]. Out of 47 cases before the Trial Chamber, in 8 cases the accused persons pleaded guilty. These cases and its judgment gave way for the jurisprudential outcome of the doctrine of Guilty Plea before ICTR. In this article the author going to discuss about the following cases in which the sentence passed by the Chamber without full trial for the reason of guilty plea.

[31]Rule 62: Initial Appearance of Accused and Plea
(B) If an accused pleads guilty in accordance with Rule 62 (A)(v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:
(i) is made freely and voluntarily;
(ii) is an informed plea;
(iii) is unequivocal; and
(iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case. Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.
Rule 62 *bis*: Plea Agreement Procedure
(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
(i) apply to amend the indictment accordingly;
(ii) submit that a specific sentence or sentencing range is appropriate;
(iii) not oppose a request by the accused for a particular sentence or sentencing range.
(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A) (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty. Available at www.ictr.org/rules

(a) ***The Prosecutor v. Paul Bisengimana***[33]***;***

(b) ***The Prosecutor v. Jean Kambanda***[34]***;***

(c) ***The Prosecutor v. Georges Ruggiu***[35] ***;***

(d) ***The Prosecutor v. Omer Serushago***[36]***;***

(e) ***The Prosecutor v. Rutaganira Vincent***[37]**.**

As discussed earlier about the relevant provisions for recording guilty plea, the Chamber has to ascertain various points. The Chamber should be convinced about the validity of the guilty plea offered by the accused person. It is the duty of the Chamber to inform the accused that if he did not plead guilty, he is presumed to be innocent till the conclusion of the trial until the prosecution proves the case beyond all reasonable doubt. And in case if he pleads guilty, he will lose his right to fair trial (right to cross examine, right to produce defence witness). The Chamber has to question the accused whether he is aware of the consequences of the pleading guilty, as he renouncing his rights. Until and unless the accused answered positively the guilty plea considered to be invalid. Under Rule 62 (B)(i), (ii) and (iii), the chamber will determine that the guilty plea was offered voluntarily, freely, and whether the accused fully aware of what he is doing and he was not threatened or pressured. Then the Chamber has to ask that the accused knew that the plea was not compatible with any of the defence that would contradict it i.e.; unequivocal. The Chamber has to satisfy about the fulfillment of the following elements of the plea agreement:

(i) The guilty plea was asked by the accused with his free will and full knowledge,

(ii) That the accused fully aware of the consequences of pleading guilty of the offence that he committed,

(iii) The decision of pleading guilty is totally voluntary, informed and unequivocal.

[33] ICTR Case no;. ICTR-00-60-T, dated 13.4.2006
[34] ICTR Case No; ICTR-97-23-s, dated 4 September 199
[35] ICTR Case No; CTR-97-32-1, dated 1 June 2000.
[36] ICTR Case No; ICTR-93-39-A,dated 6 April 2000.
[37] ICTR Case No; ICTR-95-90-T, dated 14 March 2005.

After satisfying about the above said elements for accepting the guilty plea, the Chamber will pass sentence accordingly. As discussed earlier, pleading guilty going to do nothing with the gravity of the offence and only relates to assess the sentence. It will play as one of the factor of mitigating factor. Analyzing the cases in which the accused persons pleaded guilty will be helpful to bring out the jurisprudence.

1. ***THE PROSECUTOR V. BISENGIMAN,*** (*Case No:ICTR-00-60-T)* Decided on 13th April, 2006.

OVER VIEW OF THE CASE:

The accused Paul Bisengimana[38] was a former *bougmester* of Gikoro *commune* in Kigali-Rural *prefecture.* He was charged with the following indictment against him. (i) aiding and abetting the murder and extermination of Tutsi civilians at Musha Church and Ruhanga Protestant Church and School in Gikoro *commune* between 13 to 15th April 1994. After the killing of President Habiyarimana, 7th April, massacres and murders of Tutsi civilians were perpetrators throughout the territory of Rwanda by the military people and common army personnel. Based on such incidents, he was charged with five counts, (1) Genocide, Art. 2(3)(a) (2) Complicity in Genocide Art.2(3)(e), (3) Murder as Crime against Humanity, Art 3(a), (4) Extermination as Crime against Humanity, Art.3(b) and (5) Rape as Crime against Humanity, Art.3(g) which are punishable under the Statute of the Tribunal.

Acknowledged facts of the accused regarding the charges:

The accused admitted the facts reading his participation in the above said indictments. He admitted his guilt for aiding and acknowledging the commission of crime of extermination and murder as Crime against Humanity. He admitted that nearly thousands of Tutsi civilians sought refuge in Musha Church and Ruhanga Church complex in Gikoro *commune* thought to be the safe place in which the accused was the *bourgmestre*. He admitted that with his knowledge, the Rwandan army, communal police, militia personnels distributed the arms to launch attack in

[38]Paul Bisengimana was born on 194 in Duha *commune,* Kigal- Rural *prefecture.* His parents were Verdiana Nyirabatera and Gervais Ngirumpatse. He was married and had 10 children. The seven children of which born out of the wedlock between his first wife Docra Kantarama, who died on 1991. After her death, he married one Marie Herondine Mugandagijmana and had two children. He adopted his second wife's child.He completed his '*premier cycle'* in Rwamagana n 3 years. In 1970 he became a teacher with D5 certificate. From 1970 to 1974 he worked in his native as a teacher, then as a head master in Nyanza. From 1978 to 1981 he was Presiding Judge of the Cantonal court of Nyamata, Kigali. In May 1981, he was appointed as *bourgmestrer* of Gikoro *commune until 1994.* Available at www.ictr.org/cases

these places which resulted in killing of several Tutsi civilians. He further admitted that during this attack, they used grenades, guns, machetes, pangas and other traditional weapons. Being a *bourgmestre,* he is having both *de jure and de facto* powers and he is having power to prevent the attack and save the civilians from it and at the same time power to punish the perpetrators those who are violating the rules. The accused admitted these facts and replied though he had all means to prevent or oppose the killings of the Tutsi civilians in his *commune* he remained silent by way *endorsing* it.

It is the duty of the prosecution to prove the *mens rea* of the accused i.e his intention to kill or his gross negligence to avoid it. The prosecution also bound to prove beyond reasonable doubt that the accused must have knowledge that the collective act or murder committed against the civilian population with discriminatory ground. From the above said charges and the accused participation in the crime against humanity have been proved beyond all reasonable doubt and the accused pleaded guilty for that way of by way of acknowledging it.

In case of indictment of murder as crime against humanity, the accused admitted that he was present at the Musha Church complex when the principle perpetrators committed murder of one Tutsi Civilian Rusanganwa, on 13th April, 1994. In relation to the aggravating circumstances the case in Paul Bisengimana, his position as *bourgmestre* of Gikoro *commune,* he bore special responsibility and duty to protect the population and prevent and punish the illegal acts. His presence and silence at the time of commission of offences encouraged them. Above all he didn't take any steps to protect the Tutsi civilians. Apart from that, regarding his personal individual circumstances like, education, family situation etc also play a vital role in the aggravating circumstances. The defence did not raise any objection over this.

Role of Defence Counsel:

In guilty plea cases, the role of defence counsel is remarkable. In relation to the mitigating circumstances in this case, the primary factor raised by the defence counsel in this case is, Guilty plea and publicly expressed regrets. The defence counsel expressed his submission by way of quoting the jurisprudence recognized that the guilty plea of an accused constitutes mitigating circumstances. The defence counsel claimed that the accused expressed his deepest regret and

apologies to the victims of the attack happened in Rwandan territory. He expressed his inability that he has no courage to personally oppose the attacks and massacre. The defence counsel submitted that the intention of the accused through his public regret, it will reach and heard by the Rwandan and International community, and it will help the process of peace and national reconciliation. The defence further stressed that his guilty plea should give rise to a reduction in sentence and importantly in establishing the truth. The defence counsel stressed other mitigating circumstances like personal family situation. Being a married man and a father of ten children, and his wife along with two children lives in France and his wife obtained refugee status. This personal and family situation will help the accused for his rehabilitation. The defence counsel then stressed about the good character of the accused and had no record of extremism before 1994. The other mitigating circumstances raised by the defence counsel is like, accused provides assistance to the victims of Tutsi civilians, lack of personal participation, age, ill-health etc. The defence played a important role in raising various factors as mitigating factors apart from guilty plea.

JUDGES VIEW:

The Chamber after considering the both mitigating and aggravating circumstances of the case, they find that the position of the accused as *bourgmestre* of the Gikoro *commune,* and an educated man who is well aware of his duties, responsibilities, powers etc. The failure on the part of the accused in keeping silence and gross negligence in not preventing or failed to take any step in punishing the illegal acts. This factor, his official position is an overwhelming aggravating circumstance. For this factor, the Chamber refereed the earlier decision passed by the Appellate Tribunal in *Samenza* case[39], in which it was held that, the person one who orders would be imposed with higher sentence than one who aid or abet it. But in the present case, the accused‘s non participation would not be taken into account as aiding or abetting. The Chamber

[39] *The Prosecutor v. Laurent Samenza,* (AC), para, 388; “Despite the Trial Chamber’s conscientious treatment of the Appellant’s sentence, the Appeals Chamber is not satisfied that the 15-year sentences for complicity in genocide and aiding and abetting extermination that the Trial Chamber imposed are commensurate with the gravity of the Appellant’s offences, as determined by the Appeals Chamber. The Appeals Chamber has concluded above that the Appellant’s actions at Musha church amounted to perpetration in the form of ordering rather than mere complicity in genocide and aiding and abetting extermination. This form of direct perpetration entails a higher level of culpability than complicity in genocide and aiding and abetting extermination convictions entered by the Trial Chamber. The Appeals Chamber recently held in Krsti that “aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator.” The Appeals Chamber endorses this reasoning to the extent that a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets exterminations.”

notes that the omission to protect the time of attack, and his presence at the time of wide spread and systematic attacks against the Tutsi civilian population itself attracts the elements of the Crime against humanity (Extermination and murder). The Chamber clarifies that the accuser's presence considered being the serious and aggravating form of participation and thousands of Tutsi's were killed because of this. According to the general rule of sentencing in Rwanda[40], the Chamber could not impose death sentence for serious offences like murder according to Rwandan Penal Code. For the instance case, the Chamber feels it to be relevant to refer Rwandan Organic Law setting up "Gacaca Jurisdiction"[41], and modifying the law for compelling it, as because it speaks about the provisions for pleading guilty[42]. Under this Law it recommends for 25 years of imprisonment as a minimum sentence to life imprisonment as maximum sentence on the ground, "when a person acting in a position of authority and if he encouraged others to commit a crime against humanity, and if he pleads guilty, his or her sentence would be reduced to 20 to 25 years of imprisonment to life. The Chamber after considering the previous sentencing pattern before ICTY and this Trial Chamber for the Crime of Crime against Humanity like murder or extermination, based on the degree of participation. From the submission by both the sides, the Chamber records that; acknowledgement of guilt may constitute proof of honesty and encourage others to come forward. The Chamber stressed its view on guilty plea that, it mainly contributes to the process of national reconciliation in Rwanda. The Chamber satisfied that it is sufficient to sentence the accused only for the indictment of extermination as Crime against Humanity, and he was discharged from the indictment murder as crime against humanity. He was finding guilty of killing number of persons in the territory of Rwanda. The Chamber convicted and sentenced Paul Bisengimana for the indictment of extermination as Crime against Humanity, to undergo the sentence of 15 years of Imprisonment, though he pleaded guilty, as the aggravating circumstances surrounded the mitigating factors[43].

[40]See Art.23 of the Statute and Rule 101 of the Rules.

[41]Organic Law setting up "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1990 and December 31, 1994, N. 40/2000 of 26/01/2001, Official Gazette of the Republic of Rwanda, Year 40, n° 6, 15th March 2001 ("Organic Law of 26 January 2001"). Available at www.rwandanpenal.org

[42]Organic Law modifying and completing Organic Law n 40/2000 of January 26, 2001 setting up "Gacaca Jurisdictions" and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1,1990 and December 31, 1994, Official Gazette of the Republic of Rwanda, Year 40, n° 14, 15th July 2001 ("Organic Law Modifying and Completing the Organic Law of 26 January 2001").

[43]Refer judgments in *Muhimana case and Laurent Samenza* Case.

THE PROSECUTOR V. JUVENAL RUGAMBARA **(ICTR-00-59-T Dated: 16 November 2007)**

OVER VIEW OF THE CASE:

The accused Juvenal Rugambarara[44], was charged with several indictments like, genocide, complicity in genocide, conspiracy in committing genocide, direct and public indictment in committing genocide, extermination, torture, rape as crime against humanity, serious violations of Common Article 3 of the Geneva Convention 12 August, 1949, which are punishable under the Statute of the Tribunal under Art 2,3,4. On 15th August the accused made his first appearance before the tribunal and pleaded not guilty for the indictments. After the amended indictment the accused filed the Guilty Plea agreement between the accused and the Prosecutor in pursuant to the rule 62(B) and 62*bis* of the Rules of Procedures and Evidence. After the filing of Guilty Plea, the Chamber verified the validity of the plea by questioning and informed the consequences of pleading guilty. The accused also accepted the consequences of guilty as his acceptances would not no way reduce the sentence and authorized the guilty plea out of his free will and no guarantee or promise and confirmed that his plea was made without any pressure or coercion.

The Chamber found the facts set out by the prosecution satisfied the elements of the Crime of Extermination of crime against Humanity, and the scale of killings undoubtedly amounts to extermination[45].

According to the applicable law under the Tribunal and its objectives of the establishment of the tribunal, the Chamber clearly understood that they are limited to imprisonment. In determination of the sentence is left to the discretion of the Chamber and at the exercising it, the Tribunal shall consider the factors like aggravating and mitigating circumstances and the personal circumstances and above all the general practice regarding sentences in the court of Rwanda.

[44]Juvenal Rugambara was born in 1959, in Bumba *secteur*, Tare *commune*, Kigali-Rural *prefecture.* He spent his adulthood in Bicumbi *commune* and worked as Medical Officer. In 4 August 1993, he was appointed as *bourgmester* of Bicumbi *commune* by succeeding Laurent Samenza, He served there from 16th September to 20th April, 1994.

[45] *The Prosecutor v. Ndindabahizi*, ICTR -2000-71-A-pages 135.

AGGRAVATING AND MITIGATING CIRCUMSTANCES:

Gravity of offences: the mass killing occurred as a part of wide-spread and systematic attack as a wider part to exterminate the Tutsi civilians throughout Rwanda. The scale of killing would shock the collective concise. The defence submits that the accused either directly participates in the crime or personally participated in it. The Chamber finds that the seriousness of the crime and the degree of the consequences are considered as the aggravating circumstances because of the heinous nature of the crime. The failure of the accused in not preventing the attacks attracts gross violation of the IHL.

Nature of the Crime: the *actus reus* of the crime of extermination, requires large number of killings and not the numerical minimum[46]. The crime which the accused pleaded guilty involves deaths of thousands of Tutsi civilians. This constitutes the aggravating circumstances.

Official Position of the accused: As *bourmestre* of the Bicumbi *commune* in Kigali-Rural *prefecture* was n first rank leadership. He holds the high administrative authority over the entire commune. Rugambarara was also charged with enforcement and regulations of the laws. With all his power and responsibilities, the accused failed in his duty to take necessary and reasonable measures to ensure the punishment of his subordinates. Thereby he failed to create an environment of discipline and respect for the laws. The accused was well educated and in a position to know and appreciate the dignity and value of human life. These factors again considered as the aggravating circumstances.

MITIGATING CIRCUMSTANCES:

a. Guilty plea and Public expression of remorse,
b. Assistance provided to certain individuals,
c. Personal and family situation,
d. Lack of prior criminal record, good character of he accused etc..
e. Absence of hierarchical position etc…[47]

[47] *The Prosecutor v. Juvenal Rugambarara*, Judgments, paras 30 to 47, pp. 8 to 12.

VERDICT:

The chamber sentences the accused Juvenal Rugambarara to 11 years of imprisonment and credit given to time spent in detention. The reason recorded by the tribunal for the sentence was, the tribunal considered the sentence pattern under Rwandan law though the chamber not bound by it. But that may be the factor supporting the imposition of a heavy penalty upon the convicted. The chamber is of the opinion that sentences of similar cases should be consistent but it does not create any obligation to expressly compare the case of one accused to that of another. The Chamber recalls that it has found that Rugambarara's superior responsibility for the crime of extermination as a crime against humanity constitutes a very serious offence and is a gross violation of international humanitarian law. The Chamber also recalls that the gravity of his crime is reduced by the fact, as set forth in the Plea Agreement, that the Accused only had *post facto* knowledge of the crimes committed by his subordinates. On examination of the sentencing practice of this Tribunal, the Chamber notes that there is only limited authority on sentencing for superior responsibility in relation to the crime of extermination[48]. Furthermore, the Chamber notes that the case law on guilty plea sentencing concerning extermination does not follow a consistent pattern[49]. Finally, the Chamber is mindful that the sentence should reflect the totality of the criminal conduct of the accused.

[48]In a judgement yet to be decided on appeal (which further limits its authority), Jean-Bosco Barayagwiza was convicted of, *inter alia*, genocide pursuant to Articles 2 and 6(3) of the Statute for his active engagement in the management of RTLM prior to 6 April 1994, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM (*The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR 99-52, Judgement (TC), 3 December 2003, para. 973) and extermination as a crime against humanity under Article 3(b), pursuant to Article 6(3) of the Statute of the Tribunal for RTLM broadcasts in 1994 that caused the killing of Tutsi civilians (*Barayagwiza*, Judgement (TC), para. 1064). The Trial Chamber considered that the appropriate sentence for Barayagwiza, in light of all the counts on which he was convicted, was imprisonment for the remainder of his life (*Barayagwiza*, Judgement (TC), para 1106). However due to the violation of Barayagwiza's rights, the Trial Chamber reduced the sentence to 35 years imprisonment in respect of all the counts on which he was convicted (*Barayagwiza*, Judgement (TC), para 1107). Alfred Musema was sentenced to a single sentence of life imprisonment for the counts of genocide, extermination as a crime against humanity pursuant to Articles 6(1) and 6(3) of the Statute (*Musema*, Judgement (TC), para 951).

[49]Jean Kambanda entered a guilty plea and was sentenced to life imprisonment for, *inter alia*, extermination as a crime against humanity pursuant to both Articles 6(1) and 6(3) of the Statute (*Kambanda*, Judgement (TC), para. 40, Verdict). Paul Bisengimana was sentenced to 15 years imprisonment after having pleaded guilty to aiding and abetting extermination as a crime against humanity (*Bisengimana*, Judgement (TC), para. 203). Omar Serushago was also sentenced to 15 years imprisonment after having pleaded guilty to genocide, murder, extermination and torture as crimes against humanity (*Prosecutor v. Serushago*, ICTR-98-39-S, Sentence (TC), 5 February 1999, Disposition). The Trial Chamber considered many mitigating factors in determining the sentence of Serushago, including his family circumstances and the fact that he helped some Tutsi to avoid capture (*Serushago*, Sentence (TC), paras. 31-35). Vincent Rutaganira was sentenced to six years imprisonment after having pleaded guilty to complicity by omission in extermination as a crime against humanity (*Rutaganira*, Judgement (TC).

***THE PROSECUTOR v. OMAR SERUSHAGO* ICTR-98-39-S, Dated: 5 February 1999.**

The accused[50] voluntarily surrendered him to the authorities of the detention center. The accused pleaded guilty for four of the five amended indictments filed against him, namely, genocide, crime against humanity (extermination), crime against humanity (murder), crime against humanity (torture), and pleaded not guilty for crime against humanity (rape). After the verification of the guilty plea agreement and confirmed the understanding about the consequences of guilty plea, the Chamber satisfied on the basis of sufficient facts, for the crimes charged and the validity of the guilty plea. The trial chamber to determine the scale of sentence of the accused found guilty for the crime listed in the Statues, for invoking the applicable laws in this case, they referred the judgments of *The Prosecutor v. Jean Paul Akayesu* and *The Prosecutor v. Jean Kambanda* for imposing sentence for the relevant offences.

The accused also acknowledged his participation and of the event of wide spread and systematic killing of Tutsi with discriminatory grounds in Gisenyi *prefecture* between April and July 1994, to exterminate them by way of causing injury to the members of the group including women and children in the places where they sought refuge. The accused acknowledged political leaders, local authorities and militiamen, leaders of CDR, for Gisenyi, ordered the participants to kill all the RPF "accomplices" and all the Tutsi, by distributing weapons and grenades to the militiamen who were present. Omar Serushago acknowledges that as from 7 April 1994, the massacres of the Tutsi population and the killing of numerous Hutu political opponents were perpetrated in Gisenyi and in other localities throughout the territory of Rwanda. Omar Serushago admits that in Gisenyi prefecture the groups of militiamen most involved in the massacres were among others, and him. He admitted that he supervise the roadblocks located at the edge of Gisenyi border, searched for and identify and select the Tutsi, and order the militiaman members to take them to 'Commune Rouge' and execute them and this order was followed by them. He admits

[50] He was a prominent member of the *Interahamwe* and of his local Prefecture of Gisenyi. His family background made this possible. His father was a close associate of the late President Habyarimana. Consequently, contact with President Habyrimana came easily and naturally to the accused. When the *Interahamwe* militia was formed, Omar Serushago became a member, upon his father's reference. Owing to his family's strong connections with President
Habyarimana, the accused rose in stature within the *Interahamwe*. Although holding no official position within the *Interahamwe*, he was, nevertheless, a *de facto* leader of that militia. As a result, he was feared and respected among the local population in Gisenyi, where he lived. He enjoyed many privileges and wielded considerable power there.

that as one of the leader of *interahamwe* he could take decision and gave order to his subordinates to operate under him. The militiamen committed massacres of the Tutsi population and moderate Hutus in Gisenyi prefecture with his knowledge and at his instigation.

Omar Serushago acknowledges that on 20th April 1994, orders abduction about twenty Tutsi who had found refuge at the house of Bishop Aloys Bigirumwani in Gisenyi, took them to a place known as "Commune Rouge" (Commune Rubavu) and executed them and admitted the same nature of events during end of April, 1994, in Gisenyi, along with his younger brother and bodyguard. He further admitted various events committed by him, during different time and place, which attracts the elements of genocide and crime against humanity. Omar Serushago declares that between 7 April and July 1994, many people were massacred in Gisenyi Prefecture and throughout Rwanda and that the majority of the victims were killed solely because they were Tutsi or appeared to be Tutsi. He further declares that the other victims, namely moderate Hutu, were killed because they were considered Tutsi accomplices, were linked to them through marriage or were opposed to the extremist Hutu ideology.

Omar Serushago further declares that from 7 April 1994 to July 1994, most of the massacres were perpetrated with the instigation, participation, assistance and encouragement of political leaders, civilian authorities, military personnel, gendarmes and Hutu militiamen. Omar Serushago declares that Military 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". Omar Serushago further declares that without the assistance and complicity of the local and national civil and military authorities, the principal massacres would not have occurred.

JUDGMENT AND FACTS RELATED TO SENTENCE:

AGGRAVATING CIRCUMSTANCES:

Crime of Genocide: The accused was charged with the crime which was extremely graver in nature I,e. Genocide, which already pointed out by the chamber. The accused directly

participated in the said crime by way of murdering four Tutsi and encouraged other militiamen those who are under his to kill thirty three Tutsi.

INDIVIDUAL RESPONSIBILITY: The accused found guilty for the commission of the offence as he played a leading role as leader of CDR. He was responsible as he enjoyed the superior authority in his region, his participation in the meetings which ultimately decided the fate of the Tutsi. As a de facto leader of *interehamwe* in Gisenyi *prefecture*, the militiamen followed his orders, and executed several victims under his order, involved in road blocks, murdered several Tutsi civilians. Above the all the man factor was he committed the crime knowingly and premeditated.

MITIGATING CIRCUMSTANCES:

The accused co-operated with the Prosecution even before his arrest. This helps the prosecution to carry out Nairobi-Kigali operation, which was the outcome of arresting several high ranking persons suspected to be involved in the crimes punishable under the Statute. The most remarkable mitigating circumstances for the accused is that, he helped the prosecution by way of standing as prosecution witness for other cases. He voluntarily surrendered before the tribunal before indicating him as an offender in the case and knowing the consequences of his surrender. The other mitigating circumstances are guilty plea, family background, assistances provided to the potential Tutsi victims.The individual circumstances considered as mitigating factor. The accused is the father of six children, and aged about 37 years old.He publicly expressed his remorse openly. His apologies to the victims of the crimes and entire people Rwanda and appealed for the national reconciliation considered for valid mitigating circumstances.

VERDICT:

The Chamber after considering the aggravating and mitigating circumstances and endorsed the opinion of the Trial Chamber of ICTR and ICTY and Nuremberg Tribunal, they stressed the decision and jurisprudence evolved in *The Prosecutor v. Drazen Erdemovic*, regarding appreciation of mitigating factors which was clearly discussed in it. In the case, the Trial chamber gives due regards to the accused for his voluntary surrender, guilty plea, genuine remorse, contribution to the national contribution. From the above circumstances, the Chamber opinioned that there was exceptional mitigating circumstances in his case and to award clemency to him. He was awarded with 15 years of imprisonment to all the crimes he charged with.

***THE PROSECUTOR V. GEORGES RUGGIU,* Case No: ICTR-97-32-T, Dated 1 June 2000**

The accused Georges Ruggiu[51] who was a foreigner got convicted by the tribunal for the crimes under the Statute. He was arrested by way of formal request given by the prosecutor to the tribunal and the warrant of arrest has been issued to the authorities of Republic of Kenya, detained in UN Detention Facility in Arusha. Initially he pleaded not guilty for all the indictments against him, but after the amended indictment has filled he pleaded guilty. He was charged with, Direct and Public incitements to commit genocide[52] and crime against humanity (persecution)[53]. After verified the validity of the guilty plea by the tribunal according to the Rules and procedures of the tribunal and confirmed about the accused's knowledge about the consequences of the guilty plea, the Chamber proceeded further. This case gave a wider interpretation about the crime of persecution and direct and public incitement to commit genocide by way of considering the various judgment passed by the ICTR, ICTY, IMT and the contributions of International Law Commission. The decision passed in *The Prosecutor v. Jean Paul Akayesu,* the Chamber elaborately discussed about the crime of Art 2(3)(c) , as " *the mens rea required for this crime lies in the intent to directly prompt or provoke another to commit genocide",*[54] i.e the person must possess specific intention to commit genocide to destroy the group in whole or in part . In the same case, they interpreted the Convention on Prevention and Punishment of crime of Genocide, by referring that the drafted purposely made this action as specific crime because of its critical role in planning genocide. They mentioned the statements of the delegates from USSR that "*It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really*

[51]The accused was a social worker who worked for the Belgian Social Security Administration. On a voluntary basis, he assisted people in need. He became interested in Rwanda and the Rwandan people in 1990 when he met Rwandan students, who were his neighbors in Belgium. He was one of the founders and an active member of the "*Groupe de réflexion rwando-belge*" which published several articles about the Arusha Accords and the Rwandan political situation. In early 1993, he became radically opposed to the Rwandan Patriotic Front ("RPF") and more supportive of the political regime in Rwanda In November 1993, the accused left Belgium to settle in Rwanda, start a family and work for the National Revolutionary Movement for Development ("MRND"). His employment at the *Radio Television Libre des Milles Collines*("RTLM") was facilitated by President Habyarimana who used his influence with Ferdinand Nahimana, the Director of RTLM, the government radio station participated in major political debates.

[52]Art.2 (3)(c) of the statute.

[53] Art.3 (h) of the Statute.

[54]*The Prosecutor v. Georges Ruggiu*, ICTR-97-32-I, Page 2, Para 15. Available at www.ictr.org/cases

responsible for the atrocities committed." The Chamber also referred the Rwandan Penal code which provides that direct and public incitement is a form of complicity. The code define "Accomplice", as A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such action, without prejudice regarding the penalties to be applicable to those who incite others to commit offences, even where such incitement fails to produce results". The Chamber also quoted the explanation given by the International Law Commission regarding Direct and Public Incitement as "public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television." To add more weight age to the crime of direct and public incitement to commit genocide, in *Akayesu* case, the Chamber quoted the decision from IMT land mark case on *Hate Propaganda- Julius Stericher*[55], in which the Nuremberg tribunal gave a clear view about the crime as "*Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes as defined by the Charter, and constitutes a Crime against Humanity*".

In this case, the Tribunal also took the assistance of ICTY and its jurisprudence over the said crime. In *The Prosecutor v. Dusko Tadic*[56] case, in which, the element of *mens rea* for the said crime has been dealt. It was held that, "the requisite *mens rea* for crimes against humanity appears to be the *intent* to commit the underlying offence, combined with the *knowledge* of the broader context in which that offence occurs". In *The Prosecutor v. clement Kayeshima* case before the ICTR, it was held that the perpetrators must knowingly commits crimes against humanity in the sense that he must understand the overall context of his act. The Tribunal also

[55]Streicher was a school teacher in Nuremberg leader of a party which was formed by him. The Chief policy of the Party is Anti-Semitism. In 1922 he handed his party to Hitler. The entire propaganda which Streicher carried out against the Jews throughout the year was through his magazine *'Der Stuermer'*. He was the editor and publisher of the newspaper. To read the further details about the involvement of Streicher refer www.jewishvirtuallibrary.org accessed on 17.1.18.

[56] The Prosecutor v. Dusko Tadic IT-94-1-T

considered the judgment of ICTY n the case *The Prosecutor v. Zoran Kupreskic*[57] for the appreciation of the elements of the crime of persecution as crime against humanity. In this case it was held and summarized the elements as (i) those elements required for all crimes against humanity under the Statute, ii) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article iii) discriminatory grounds." Based on the above discussion about the indictment of direct and public Incitement to commit genocide and Crime against humanity (persecution), the Chamber satisfied that the accused's (Ruggiu) acceptance over his commission of the crime has prima facie evidence. acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.

ACKNOWLEDGED FACTS BY THE ACCUSED:

The accused admitted the following offences committed by him. He admitted that all broadcasts were directed towards rallying the population against the "enemy". RTLM broadcasts generally referred to those considered to be RPF allies *as RPF "accomplices".* The accused acknowledges that the widespread use of the term "*Inyenzi*" conferred the de facto meaning of "persons to be killed". Within the context of the civil war in 1994, the term "*Inyenzi*"[58] became synonymous with the term "*Tutsi*". He also admits that during one broadcast he said that the 1959 revolution ought to be completed in order to preserve its achievements. The accused admits various hate propaganda broadcasts in the RTLM and discriminatory statements broadcasted in the same. The accused admits that he broadcast discriminatory and threatening remarks over the radio against the political stance adopted by the Belgian government in Rwanda and the behavior of UNAMIR, especially the Belgian contingent. The accused waged a media war against the Belgians over the RTLM to attack the international policy adopted by the Belgian government towards Rwanda. The accused admits that between 8 and 13 April 1994, he was informed of large-scale infiltration of RPF members into Gikondo. To alert the RTLM Editorin- chief, Gaspard Gahigi , who lived in Gikondo, he broadcast a warning to the Gikondo population about

[57] The Prosecutor v. zoran Kupreskic IT-95-16

the presence of the infiltrators. Gaspard Gahigi subsequently explained to the accused that many persons, including women and children, were killed as a result of the broadcast. The accused acknowledges that he, like other RTLM broadcasters, intermittently played songs, with the intent of encouraging the population to fight the enemy. One such song is entitled "Naanga Abakwtie", which means, "I do not like the Hutu." The accused admits that on 1 June 1994, he congratulated the *Interahamwe* and *gendarmes* of Gitega and Muhima for capturing a 50 Bromville Mark machine gun, made in the United States of America, from the "enemy". The accused admits that RTLM broadcasters, managerial and editorial staff bears full responsibility for the 1994 massacre of Tutsis and Hutu opposition party members. The accused was fully aware of the mass persecutions of the civilian population and the Belgian contingent on political or ethnic grounds.

AGGRAVATING AND MITIGATING CIRCUMSTANCES:

The offence committed by the accused considered to be the graver in nature. The media, particularly RTLM radio, was a key tool used by extremists within the political parties to mobilize and incite the population to commit the massacres. RTLM had a large audience in Rwanda and became an effective propaganda instrument. The accused, who was a journalist and broadcaster with the RTLM, played a crucial role in the incitement of ethnic hatred and violence, which RTLM vigorously pursued. In his broadcasts at the RTLM, he encouraged setting up roadblocks and congratulated perpetrators of massacres of the Tutsis at these roadblocks. The accused called upon the population, particularly the military and the *Interahamwe* militia, to finish off the 1959 revolution. His broadcasts incited massacres of the Tutsi population. The accused became aware that the broadcasts from the RTLM radio station were contributing to the massacres perpetrated against Tutsis. Yet the accused made a deliberate choice to remain in Rwanda and to continue his employment with the RTLM. The accused's radio programmes incited hatred against Tutsis, Hutu political opponents and Belgians.

MITIGATING CIRCUMSTANCES:

Guilty plea raised by the accused has played a vital mitigating factor as already dealt in the *Erdemovic* case and it clearly established that it is the discretionary powers of the tribunal to award the actual or the lesser punishment. Accused co-operation with the prosecution, absence of criminal record etc are considered to be the mitigating factors. Apart from the co-operation of the accused the most notable mitigating circumstances in this case was, the accused is the first person in the ICTR detainee to plead guilty and he admits that genocide had been committed against the Tutsi community in Rwanda.

REPENTANCE:

The accused during questioning on several occasion expressed his regret and remorse. He even stated that "*in Rwanda I lost everything, including my honor"*. The defence Counsel stressed the sincerity of the accused and indicated the significant change in the accused's attitude by providing assistance to the Tutsi victims. On several occasions, Ruggiu has expressed the hope that his guilty plea will somehow help alleviate, however slightly, the suffering of the victims or their families. The accused wishes to do all in his power to legitimate the "status"

SENTENCE:

As already discussed the tribunal has to consider the Rwandan practice of prison sentencing but the Rwandan would not have the biding effect on ICTR. Here the crime committed by the accused considered to be serious in nature according to the Rwandan Organic law and falls under the 2nd category. If any of the offence falls under this category under the Rwandan Law based on the confession, the sentence for a confession and a guilty plea made by offenders in Category Two, prior to prosecution, is imprisonment for 7 to 11 years (Art. 15(a)), and for a confession and a guilty plea, after prosecution, imprisonment for 12 to 15 years (Art. 16(a))[59]. Having weighed all the circumstances of the case, the Trial Chamber is of the opinion that circumstances of the accused operate as mitigatory factors to warrant some clemency. Mitigation of punishment in no way reduces the gravity of the crime or the guilty verdict against a convicted person. The accused was sentenced to undergo the sentence of 12 years for the direct and public incitement to commit genocide and 12 years of imprisonment for crime against humanity (persecution) to run concurrently.

[59] Refer 'The Prosecutor v. Omar Serushago'.

FALSE GUILTY PLEA:

After accepting the crime committed by the accused by way pleaded guilty, there are some cases which went for appeal to the appellate chamber by way of challenging the sentence imposed by the trial chamber[60]. The chamber before accepting the guilty plea sought to verify its validity. In this regard the chamber questions the accused like;

(a) Whether the guilty entered voluntarily, freely without any pressure or threats;

(ii) Whether the accused clearly understood the consequences of the guilty plea and it must be unequivocal that is could not be refuted in future;

Only after confirming the accused willingness in entering into guilty plea, the Chamber accepts it.

VICTMILOGICAL VIEW OF GUILTY PLEA: REMORSE AND REPENTENCE

The Chamber always notes that the guilty plea should be a mitigating factor if it assists the administration of justice and in the process of national reconciliation in Rwanda. By pleading guilty, the accused sets an example to other accused to come forward and acknowledge their involvement in the conflict happened in Rwanda. The Prosecution of the Chamber should satisfy that there was some degree of remorse for the indictment, acknowledge for his full responsibility, and satisfied that only the full truth can restore the national unity and foster reconciliation in Rwanda. The Chamber fells that guilty plea may constitute the proof of honesty of the perpetrators. They endorsed the judgments in *Erdemovic* and *Ruggiu* cases for publicly regret for the crime committed by them to the victims of the conflict.

[60] P v. Jean Kambanda

CONCLUSION:

From the above discussed substances it s clear that either the national Criminal Justice System or the International Criminal Law, it always speaks about the valid distribution of human rights. The newly developed concepts like Guilty Plea, Plea Bargaining gave space for the victims. The Jurisprudence evolved from the works and contributions of ICTR linked the object of the establishment of ICTR and Guilty Plea. The reconciliation, restoration and national unity can be achieved through this work. The space for the victim in participating in the judicial process and deciding the remedy and approaching the justice will be achieved through the phases of guilty plea etc.,. The invoking of victimological concept in Indian Criminal Justice Administration will reduce the over burden of the judiciary, speedy remedy for the victim and reformation for the wrong doers.