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Plea Bargaining at The Hague

Julian A. Cook, III[†]

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I. INTRODUCTION

It was March 31, 2001, and tension was mounting in Belgrade, the capital of Serbia.¹ Slobodan Milosevic, the former Yugoslavian president, had been indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY)² on an array of war crimes arising from the horrific atrocities that had produced thousands of deaths during the Balkan wars of the 1990s in Croatia, Bosnia, and the Serbian province of Kosovo.³ The United States had imposed a March 31, 2001, deadline upon the Yugoslavian government to arrest Milosevic so that he could be tried before the ICTY.⁴ Failure to comply with the deadline would result in the loss to Yugoslavia of

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1. See Powell Adds Stop in Serbia to Lightning Trip to Turkey, Belgium, AGENCE FRANCE-PRESSE, Apr. 1, 2003, available at 2003 WL 2768735.

2. The ICTY was created in 1993 and is located in The Hague, The Netherlands. See G.A. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 61 (2002).

3. See Prosecutor v. Milosevic, Amended Indictment, Case No. IT-02-54-T, paras. 32-45 (Int'l Criminal Tribunal for the Former Yugoslavia, Apr. 21, 2004), <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm>; Prosecutor v. Milosevic, First Amended Indictment, Case No. IT-02-54-T, paras. 34-83 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 23, 2002), <http://www.un.org/icty/indictment/english/mil-ai021023.htm>; Prosecutor v. Milosevic, Second Amended Indictment, Case No. IT-99-37-PT, paras. 62-68 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 29, 2001), <http://www.un.org/icty/indictment/english/mil-2ai011029e.htm>; *Slobodan Milosevic: Reversal of Fortune*, CNN.com, at <http://www.archives.cnn.com/2001/WORLD/europe/07/04/-milosevic.reversal/index.html> (Apr. 24, 2002).

4. See R. Jeffrey Smith, *Milosevic Is Arrested by Serb Police*, WASH. POST, Apr. 1, 2001, at A1, A25.

millions of dollars of economic aid from the United States as well as financial support from the World Bank and the International Monetary Fund.⁵ After two failed attempts by the Yugoslavian police to remove Milosevic forcibly from the residential villa⁶ where he had been residing since his removal from the presidency in September 2000,⁷ the Yugoslavian government was faced with a delicate quandary: how to appease American wishes yet maintain internal order.⁸ Milosevic and his loyalists, who were armed with anti-tank grenades and machine guns, seemed poised for a violent confrontation.⁹

Yet, to the surprise of many, during the early morning hours of April 1, 2001, Milosevic was arrested peacefully and without resistance.¹⁰ Though initially inclined to resist extradition to The Hague and to try Milosevic domestically,¹¹ Yugoslavian authorities eventually relented and permitted his transfer to the ICTY,¹² where his trial is still in progress.¹³ Milosevic, undoubtedly, is the main attraction at The Hague. Accused of more than sixty war crimes, the former president is alleged to have either directly ordered or encouraged the ethnic cleansing activities that resulted in countless deaths, rapes, and displacements sustained by Yugoslavia's Croat, Muslim, and ethnic Albanian populations.¹⁴ While the Milosevic trial is certainly the ICTY's most notorious, another controversial development has recently emerged that has

5. *Id.*; see also *Milosevic Arrested, Faces Trial*, NewsMax.com, at <http://newsmax.com/archives/articles/2001/3/30/204936.shtml> (Mar. 31, 2001).

6. Smith, *supra* note 4, at A25.

7. *Id.*

8. Despite a broad consensus in the government that the arrest should be carried out peacefully, several officials said they had become convinced on Saturday of the need to act quickly to enforce the arrest warrant. The officials expressed concern that Milosevic's strategy was to buy time and try to stoke political tensions that would impede his arrest. Officials also said they worried that radical military veterans loyal to Milosevic might converge on the scene, further complicating an arrest that foreign governments have said they expected Yugoslavia to achieve peacefully.

Id.

9. *Id.*

10. *See id.*

11. See Alex Todorovic, *Milosevic Is Arrested as Belgrade Rejoices*, Telegraph.co.uk, at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/03/31/wmil31.xml> (Mar. 31, 2001); see also Smith, *supra* note 4.

12. See Joseph Lelyveld, *The Defendant; Slobodan Milosevic's Trial, and the Debate Surrounding International Courts*, NEW YORKER, May 27, 2002, at 82 (noting that "the Serb government, which coexists with a federal Yugoslav Government, handed Milosevic over to the Tribunal"); Anthony Deutsch, *Milosevic Handed to Crimes Tribunal*, COLUMBIAN, June 29, 2001, at A1 (indicating that Milosevic was transferred to the ICTY on June 28, 2001).

13. *Case Against Milosevic Set to End*, CNN.com, at <http://www.cnn.com/2004/WORLD/europe/02/12/milosevic.trial.reut/> (Feb. 12, 2004) (stating that although the prosecution's case against Milosevic was set to end on February 19, 2004, the trial itself could last until 2006).

14. With respect to the Bosnian conflict, the indictment charges Milosevic with two counts of Genocide or Complicity in Genocide, ten counts of Crimes Against Humanity, eight counts of Grave Breaches of the Geneva Conventions, and nine counts of Violations of the Laws or Customs of War. See Prosecutor v. Milosevic, Amended Indictment, Case No. IT-02-54-T, *supra* note 3, paras. 32-45. Regarding the Croatian conflict, Milosevic is charged with nine counts of Grave Breaches of the Geneva Conventions, thirteen counts of Violations of the Laws or Customs of War, and ten counts of Crimes Against Humanity. See Prosecutor v. Milosevic, First Amended Indictment, Case No. IT-02-54-T, *supra* note 3, paras. 34-83. Finally, with respect to the Kosovo war, Milosevic is accused of four counts of Crimes Against Humanity and in a single count of Violations of the Laws or Customs of War. See Prosecutor v. Milosevic, Second Amended Indictment, Case No. IT-99-37-PT, *supra* note 3, paras. 62-68. See also *Slobodan Milosevic: Reversal of Fortune*, *supra* note 3.

rivalled the press generated by the man known to many as the “the butcher of the Balkans.”¹⁵

Plea bargaining has come to The Hague. Whatever its merits, the gravity of the alleged crimes in the Milosevic case strongly suggest that the likelihood Milosevic will avail himself of this new and highly contentious method of dispute resolution is slim at best. Though commonplace in the United States,¹⁶ the practice of resolving criminal matters through negotiated settlements (often resulting in more lenient punishments) is foreign to the ICTY. Noted for its “methodical if plodding trials,”¹⁷ the Hague Tribunal had received comparatively few guilty pleas in the years after the Tribunal’s inception in 1993. In fact, over the course of the Tribunal’s first ten years, only eight cases through May 2003 had been resolved through negotiated dispositions.¹⁸ However, in response to increasing external pressure to expedite its adjudication process from both the U.N. Security Council (which has insisted that no new indictments issue after 2004 and that all trials conclude in 2008) and the George W. Bush administration (which supplies approximately one-quarter of the Tribunal’s funding), the practice of plea bargaining has become a staple of ICTY activity.¹⁹ Since the middle of 2003, a “record number” of ICTY cases have been resolved via plea bargains.²⁰

Accompanying this development, however, has been vociferous criticism from an array of groups and individuals. Victims’ rights organizations, for example, have complained of comparative leniency, noting that since the institution of plea bargaining was introduced, many of the defendants who negotiated their guilt—including highly culpable Balkan leaders—have received more favorable sentences than their predecessors who had gone to trial.²¹ Even former ICTY Judge David Hunt, in an unusually acerbic dissenting opinion issued just prior to his departure from the bench in 2003, complained bitterly that the external pressures upon the Tribunal to expedite its work threaten to compromise defendant rights and, ultimately, the integrity of the court:

If the Tribunal is not given sufficient time and money to [try individuals accused of serious international war crimes] by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. . . . This

15. See *Slobodan Milosevic: Reversal of Fortune*, *supra* note 3.

16. See Carla Del Ponte, Four Years in The Hague: A Retrospective—and the Way Forward 9, at http://www.clingendael.nl/ngiz/lectures/delponte_2003.pdf (Oct. 2, 2003).

17. Marlise Simons, *Plea Deals Being Used To Clear Balkan War Tribunal’s Docket*, N.Y. TIMES, Nov. 18, 2003, at A1.

18. See Del Ponte, *supra* note 16, at 9.

19. See *id.*; see also *Faster Justice for the Balkans*, N.Y. TIMES, Nov. 28, 2003, at A30; Simons, *supra* note 17.

20. See Del Ponte, *supra* note 16, at 9; Simons, *supra* note 17 (indicating that an additional eight defendants had entered guilty pleas between May and November 2003); Michael P. Scharf, *Trading Justice for Efficiency*, 2 J. INT’L CRIM. JUST. 1070, 1074 (2004) (stating that “between 2001 and 2003, the Tribunal approved 12 plea bargains, clearing 40 per cent of the cases from its crowded docket”). Since the preparation of Professor Scharf’s article, at least three additional defendants have entered guilty pleas: Ranko Cestic, *see infra* note 76 (entering guilty plea to all twelve counts of an Amended Indictment on October 8, 2003); Miroslav Deronjic, *see infra* note 90 (entering guilty plea to Persecutions, a Crime against Humanity, on September 30, 2003); and Milan Babic, *see infra* notes 86-90 (entering guilty plea to Persecutions, a Crime against Humanity, in January 2004).

21. See Simons, *supra* note 17.

Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal's reputation.²²

In addition, some object to plea bargaining as a matter of principle. They contend that plea bargains simply should not extend to individuals accused of the egregious atrocities that typify Hague prosecutions.²³ While sentencing concessions may be an inextricable characteristic of the American plea bargaining system, critics insist that such practices are inappropriate for war crimes tribunals, such as the ICTY, which sentence individuals charged with mass torture and homicide.²⁴ It is also submitted that plea bargaining impedes the development of an accurate historical record. Naysayers in this camp contend that the adoption of a plea bargaining strategy at The Hague would inevitably deprive war victims of their primary platform from which to relate firsthand the realities of the Balkan carnage.²⁵

Proponents, on the other hand, cite several reasons why the advent of plea bargaining should be considered a welcome development. They argue that the negotiated plea deals accurately reflect each accused's true criminal responsibility; that the court's retention of sentencing discretion empowers the Tribunal to reject any and all sentencing recommendations suggested by the parties; and that the negotiated dispositions, which often contain cooperation agreements, enable the prosecution to obtain, and thus submit before the Tribunal, valuable testimonial evidence against more culpable Balkan war criminals.²⁶ They further discount claims that plea bargaining somehow compromises the creation of an accurate historical record. Given that many of the guilty pleas pertain to conduct that was fully explored and developed in earlier trials before the Tribunal, proponents insist that the historical record in many instances has already been created, and that additional testimony would merely be redundant.²⁷ They claim that negotiated settlements bring a sense of closure to the victims of war, reasoning that a defendant's admission of guilt carries with it not only a public acknowledgement of wrongdoing but also recognition of the horrific atrocities committed.²⁸ Finally, plea bargaining is viewed as a mechanism through which financial costs and witness inconvenience can be minimized, and the backlog of cases that have traditionally burdened the Tribunal can be lessened.²⁹

Despite the ongoing controversy, it is clear that plea bargaining has a permanent presence at The Hague. Forced to confront pressures from both the United Nations and the United States that threaten its continued existence, the

22. Prosecutor v. Milosevic, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief, Case No. IT-02-54-AR73.4, paras. 21-22 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 21, 2003), <http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm>.

23. See Del Ponte, *supra* note 16, at 9.

24. See Foster, *A Plea for Plea Bargains*, MILWAUKEE J. SENTINEL, Dec. 8, 2003, at A10; Combs, *supra* note 2, at 7.

25. See Del Ponte, *supra* note 16, at 9.

26. See *id.* at 10-11.

27. See *id.* at 10.

28. See *id.* at 11-12.

29. See *id.* at 10-11; see also Simons, *supra* note 17.

ICTY has little choice but to adopt a plea bargaining strategy. Given this reality and the consequential rapid rise in bargained-for dispositions, this Article will not revisit arguments regarding the merits and demerits of plea bargaining. Instead, it will focus its critique upon the efficacy of the Tribunal's guilty plea hearing practices, explaining why the ICTY's rush to adopt plea bargaining has, thus far, outpaced its readiness for the task. In so doing, this Article will detail the factors that underlie the ICTY's failure, and it will demonstrate why the Tribunal's adopted approaches do not meaningfully measure whether the guilty pleas tendered are free of undue coercive influences or are reflective of an informed choice. It will describe a plea hearing process that varies considerably from courtroom to courtroom due, in large part, to the illimitable discretion that the Tribunal rules afford ICTY judges. It will further detail how these rules interact with the conceptual and practical unfamiliarity of defendants and (in many instances) their attorneys with both plea bargaining and ICTY trial procedures. These defects not only produce guilty pleas that are of dubious validity but further threaten to undermine the integrity of the Tribunal.

This Article will commence, however, with a detailed review of the historical rise of plea bargaining at The Hague and will then conduct several case studies. Through this examination, the Article will expose the wide array of guilty plea acceptance procedures that have become a staple of judicial practice at The Hague, and explain why these variant methodologies inadequately gauge a defendant's knowledge and voluntariness. This review will further illuminate how certain judicial questioning techniques have contributed to this inadequacy by exploiting the vulnerable state of defendants who appear before the court. The Article will then discuss how defendants and many defense attorneys are further disadvantaged during the plea bargaining and guilty plea hearing processes, given their unfamiliarity with adjudicative and dispute resolution practices at The Hague. Finally, the Article will discuss the potentially damaging precedential consequences that the ICTY's plea practices will have for defendants who appear before the array of other international criminal tribunals that have also adopted plea bargaining. Thereafter, it will suggest some curative measures designed not only to bring greater structure and fairness to the ICTY guilty plea process but also to help ensure greater fairness of procedure in the years to come.

II. THE NEW PLEA BARGAINING STATUTE—EVOLUTION AND ANALYSIS

An individual charged with a criminal offense before the Tribunal is required to enter a plea of either guilty or not guilty within thirty days of his initial appearance.³⁰ Though the original version of the ICTY's Rules of Practice and Procedure made no allowance for a guilty plea option, the situation changed after the case of *Prosecutor v. Erdemovic*. In May 1996, Drazen Erdemovic was charged in a two-count indictment with Crimes Against Humanity and with Violation of the Laws or Customs of War for atrocities committed against Bosnian Muslims at a collective farm near

30. ICTY R. P. & EVID. 62(A)(iii).

Pilica.³¹ As a member of the Bosnian-Serb army, Erdemovic was accused of participating in the murder of hundreds of Bosnian Muslim men who had been transported to the farm by bus from Srebrenica.³² All of the Bosnian victims were shot as their backs were turned to Erdemovic and the other members of the Bosnian-Serb army.³³

At his initial appearance, Erdemovic entered a guilty plea to the first count of the indictment, Crimes Against Humanity,³⁴ and was subsequently sentenced to a term of ten years imprisonment.³⁵ On appeal, Erdemovic sought to have his sentence lessened, arguing, in part, that the trial chamber failed to consider adequately his claim that he had committed the homicides under duress.³⁶ Noting that it “finds nothing in the Statute or the Rules . . . which would confine its consideration of the appeal to the issues raised formally by the parties,” the Appeals Chamber decided, of its own volition, also to consider the validity of Erdemovic’s underlying guilty plea.³⁷ By a four to one vote, the Chamber found that the guilty plea entered by Erdemovic was not informed and ordered that Erdemovic be given the opportunity to plead anew.³⁸

The reasons underlying the Appeals Chamber’s decision were detailed in the Joint Separate Opinion of Judges Gabrielle Kirk McDonald and Lal Chand Vohrah.³⁹ McDonald, a former ICTY president, is a U.S. citizen and was a civil rights attorney in her home country prior to her appointment in 1979 to the U.S. District Court for the Southern District of Texas.⁴⁰ Upon reading the Separate Opinion, it can be surmised that Judge McDonald’s experiences on the federal bench greatly influenced her perceptions of the *Erdemovic* plea. As a federal district court judge, McDonald was required to follow the dictates of Rule 11 of the Federal Rules of Criminal Procedure whenever a defendant appeared before her seeking to enter a guilty plea. Rule 11 delineates an elaborate procedure for district courts to follow whenever they conduct a guilty plea hearing. In its current form, Rule 11 provides, in pertinent part:

(b) Considering and accepting a guilty or Nolo Contendere plea.

31. Prosecutor v. Erdemovic, Indictment, Case No. IT-96-22, paras. 9-16 (Int’l Criminal Tribunal for the Former Yugoslavia, May 29, 1996), <http://www.un.org/icty/indictment/english/erd-ii960529e.htm>.

32. *Id.* paras. 10, 12.

33. *Id.* para. 11.

34. *Id.* para. 16; Prosecutor v. Erdemovic, Plea Transcript, Case No. IT-96-22-PT, at 17, 24-26 (Int’l Criminal Tribunal for the Former Yugoslavia, May 31, 1996), <http://www.un.org/icty/transe22/960531ID.htm>.

35. See Prosecutor v. Erdemovic, Sentencing Judgment, Case No. IT-96-22-T, para. 111 (Int’l Criminal Tribunal for the Former Yugoslavia, Nov. 29, 1996), <http://www.un.org/icty/erdemovic-trial/judgement/erd-ts961129e.htm>.

36. See Prosecutor v. Erdemovic, Appeals Chamber Judgment, Case No. IT-96-22-A, paras. 9-11 (Int’l Criminal Tribunal for the Former Yugoslavia, Oct. 7, 1997), <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm>.

37. *Id.* para. 16.

38. *Id.*, Disposition, paras. 3, 5.

39. See Prosecutor v. Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A (Int’l Criminal Tribunal for the Former Yugoslavia, Oct. 7, 1997), <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm>.

40. See Richard May, *Gabrielle Kirk McDonald: A Biographical Note*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE: IN HONOUR OF GABRIELLE KIRK MCDONALD* 4-5 (Richard May et al. eds., 2001) (indicating that Judge McDonald retired from the federal bench in 1988).

- (1) Advising and questioning the defendant. Before the court accepts a plea of guilty or *nolo contendere* . . . the court must address the defendant personally in open court . . . [and] must inform the defendant of, and determine that the defendant understands, the following:
- ...
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
 - (C) the right to a jury trial;
 - (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
 - (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
 - (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or *nolo contendere*;
 - (G) the nature of each charge to which the defendant is pleading;
 - (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- ...
- (2) Ensuring that a plea is voluntary. Before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).
- (3) Determining the factual basis for a plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.⁴¹

Though directly referenced only twice,⁴² Rule 11's influence on the *Erdemovic* Joint Separate Opinion is clear. After generally observing that a valid plea must be entered voluntarily, knowingly, and unequivocally,⁴³ the court thereafter refined these general principles, giving definition and detail to the terms that would permeate the court's analysis. For a plea to be voluntary, for example, the court held that a defendant should have the mental capacity to comprehend the consequences associated with his guilt admission, and his plea must be free of undue "threats, inducements or promises."⁴⁴ A knowing

41. FED. R. CRIM. P. 11(b)(1), (2), (3).

42. See *Prosecutor v. Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, *supra* note 39, at n.13.

43. *Id.* para. 8.

44. *Id.* paras. 8, 10 (citing for authority *Brady v. United States*, 397 U.S. 742, 755 (1970)). [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

plea involves several factors: the defendant's cognizance of the various trial-related rights that are sacrificed; a comprehensive understanding of the nature of the charges, including knowledge of the elements of the respective offenses; an ability to distinguish between the charged offenses and "the consequences of pleading guilty to one rather than the other"; and an awareness of the associated penal consequences.⁴⁵ Each of these requirements is either a delineated part of Rule 11 or, at the very least, analogous to a provision therein.⁴⁶

In support of its finding that Erdemovic's plea was uninformed, the court was not persuaded that Erdemovic was aware of the various trial rights that he would necessarily sacrifice: namely, his right to a trial, his right to be presumed innocent, and his right to "assert his innocence and his lack of criminal responsibility."⁴⁷ The court further found that the trial court record did not indicate that Erdemovic comprehended the nature of the charges against him. Concluding that Erdemovic had "no idea" what the legal distinctions were between Crimes Against Humanity, to which he pled guilty,⁴⁸ and Violation of the Laws or Customs of War, the count which had been withdrawn,⁴⁹ the court surmised that Erdemovic was "probably even to this day, ignorant of the true nature of each of the two charges against him," given the failure on the part of the court and defense counsel to explain the distinctions.⁵⁰

Though *Erdemovic* did "not propose an exhaustive and definitive statement of the rights beyond what is strictly necessary for the disposal of this case,"⁵¹ the Appeals Chamber's decision nevertheless had lasting ramifications. Approximately one month after *Erdemovic* was decided, the ICTY added Rule 62 *bis* to its criminal procedure code.⁵² Enacted to guide the Tribunal with respect to the entry of guilty pleas, the rule currently provides:

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;

Id. para. 10 (internal citations omitted).

45. *Id.* paras. 8, 14-27.

46. See FED. R. CRIM. P. 11(b)(1), (2).

47. Prosecutor v. Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, *supra* note 39, para. 15.

48. *Id.* para. 18.

49. Prosecutor v. Erdemovic, Sentencing Judgment, Case No. IT-96-22, *supra* note 35, para. 3.

50. Prosecutor v. Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, *supra* note 39, paras. 17-18. Citing the colloquy between the presiding judge and Erdemovic, the appellate court found that the record

... established no more than that the Appellant was advised by his counsel regarding the Indictment before he entered his plea, that the Indictment was available to the Appellant in a language he understood, and that the Appellant understood that the Indictment charged him with two offences. There is no indication that the Appellant understood the nature of the charges.

Id. para. 18.

51. *Id.* para. 7.

52. ICTY R. P. & EVID. 62 *bis*.

- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.⁵³

In contrast to Rule 11 and the detailed review in *Erdemovic*, Rule 62 *bis* is remarkably bare-bones. Aside from its requirements that a defendant enter a guilty plea knowingly, voluntarily, and unequivocally, and that a factual basis exist to support the proffered plea, the rule did not adopt the more refined requirements detailed in either Rule 11 or *Erdemovic*. As a result, it provides no guidance whatsoever to the Trial Chamber as to how to make these respective determinations. Interestingly, Rule 62 *bis* is reminiscent of Rule 11 in its infancy. From its birth in 1944 until its radical reformation in 1975, Rule 11 had similarly skeletal requirements. When the Supreme Court in 1968 decided *Boykin v. Alabama*,⁵⁴ the statute simply provided:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.⁵⁵

At issue in *Boykin* was whether a defendant's guilty plea entered in Alabama state court could be considered valid when the underlying record failed to disclose any colloquy between the court and the defendant with respect to the plea.⁵⁶ After the Supreme Court held that a court could not presume a valid waiver of several federal constitutional rights "from a silent record,"⁵⁷ and that some "affirmative showing that it was intelligent and voluntary" was required,⁵⁸ Rule 11 was reconfigured in 1975 to provide the federal courts with detailed guidelines to follow whenever a guilty plea is proffered. The indefiniteness of the earlier versions of Rule 11 prompted Congress to implement significant curative measures in an effort to avoid a

53. *Id.* ICTY R. P. & EVID. 62 (vi) provides:

Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:

...

- (vi) in case of a plea of guilty:
 - if before the Trial Chamber, act in accordance with Rule 62 *bis*, or
 - if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 *bis*.

54. 395 U.S. 238 (1968).

55. FED. R. CRIM. P. 11 (1966).

56. *Boykin*, 395 U.S. at 239-44.

57. *Id.* at 243.

58. *Id.* at 242.

repeat of the problems presented in *Boykin* and to better ensure the entry of voluntary and knowing guilty pleas.

Rule 62 *bis* suffers from the same problems that plagued Rule 11 in 1968. Like the rudimentary version of Rule 11, Rule 62 *bis* is devoid of meaningful directives to guide the Tribunal judges. The vagueness of definition and the limitless discretion afforded Tribunal judges under the rule have produced a hodgepodge judicial approach to Rule 62 *bis* that has consistently failed to ascertain meaningfully whether the guilty pleas received have been entered knowingly, voluntarily, and unequivocally with an adequate factual basis.

The following case studies will illuminate this reality and reveal the widely divergent practices that have come to characterize ICTY practice. They will expose a process that is not only inconsistent and unpredictable but also threatens to undercut the laudable purpose that presumably underlies the enactment of Rule 62 *bis*—the protection of defendant rights during the guilty plea process.

A. *Biljana Plavsic—the Bosnian-Serb “Iron Lady”*⁵⁹

Unquestionably, the most notorious individual who has entered a guilty plea before the Tribunal to date has been Biljana Plavsic. Born in Bosnia and Herzegovina in 1930, Plavsic was an academic who did not pursue a political career until 1990, when she became a member of the Serbian Democratic Party (SDS).⁶⁰ She quickly ascended to a leadership position within the SDS and soon began to wield significant influence within the Bosnian-Serb leadership.⁶¹ With Bosnia and Herzegovina on the cusp of declaring its independence in the early 1990s, Plavsic played a prominent role in furthering the leadership’s objective of creating a greater Serbia.⁶² During the Serbian-Bosnian hostilities, Plavsic, along with Bosnian-Serb leaders Radovan Karadzic and Momcilo Krajisnik,⁶³ vigorously pursued a policy of purging Bosnian Muslims and Croats, among other non-Serb populations, from Bosnian territories.⁶⁴

Though “[s]he did not participate with Milosevic, Karadzic, Krajisnik and others in its conception and planning and had a lesser role in its

59. See *Trial of Top Bosnian Serb Genocide Suspect Postponed*, AGENCE FRANCE-PRESSE, May 8, 2003, available at 2003 WL 2798182.

60. Prosecutor v. Plavsic, Sentencing Judgment, Case No. IT-00-39 & 40/1, para. 10 (Int’l Criminal Tribunal for the Former Yugoslavia, Feb. 27, 2003), <http://www.un.org/icty/plavsic/trialc-judgement/index.htm>.

61. *Id.*

62. *Id.* paras. 10-11.

63. *Id.* para. 14 (noting that Karadzic and Krajisnik were “the two pre-eminent and controlling figures in the SDS and the Bosnian Serb government,” and that “they exercised primary power and control over the Bosnian Serb structures [I]t was primarily they who met with and provided direction to municipal and regional leaders who were responsible for carrying out the objective of ethnic separation by force.” (quoting Prosecutor v. Plavsic, Factual Basis for Plea of Guilty, Case No. IT-00-39 & 40/1, Sept. 30, 2002, para. 16).

64. *Biljana Plavsic: Serbian Iron Lady*, BBC News, at <http://news.bbc.co.uk/1/hi/world-europe/1108604.stm> (Feb. 27, 2003).

execution,”⁶⁵ Plavsic nevertheless supported and furthered the campaign through her high position of leadership within the Bosnian-Serb hierarchy. Whether through her public statements justifying the employment of force against non-Serb populations, or her invitations to neighboring Serbia to aid the Bosnian-Serbs’ ethnic cleansing campaign, Plavsic’s actions further encouraged the ethnic cleansing activities that permeated the Serbian-Bosnian conflict.⁶⁶ As a result of this design, thousands of non-Serbs died in municipalities, in detention, and “while performing forced labour and being used as human shields during combat operations.”⁶⁷ Moreover, numerous cultural and religious structures were destroyed, and non-Serb Bosnians were deported and subjected to subhuman living conditions.⁶⁸ Approximately a year after the cessation of hostilities that accompanied the 1995 signing of the Dayton Peace Accords,⁶⁹ Plavsic took office as president of the Republika Srpska, the Serbian portion of the newly partitioned Bosnian territory. She served in this capacity until 1998.⁷⁰

Originally indicted by The Hague Tribunal in April 2000 on an array of charges arising out of the Serbian-Bosnian conflict,⁷¹ Plavsic surprised many when, at age 72, she entered a guilty plea to a single count of Persecutions, a Crime Against Humanity, in October 2002.⁷² Aside from the notoriety that necessarily accompanied the guilty plea of such a high-ranking official, a review of her guilty plea hearing transcript reveals a colloquy that is astonishingly devoid of meaningful judicial examination. Without reading, summarizing, or otherwise informing the defendant of virtually any essential aspect of the plea agreement, the Trial Chamber found that the Rule 62 *bis* standards were satisfied based exclusively on the following limited exchange:

JUDGE MAY: The Rules of the Tribunal require that the Trial Chamber is satisfied that a plea of guilty has been made voluntarily, that it is informed and not equivocal, and that there is a sufficient factual basis for the crime and the participation of the accused in it. Mrs. Plavsic, in the plea agreement which we have read, you have signed a declaration that you entered into the agreement freely and voluntarily, understanding its terms, and having been advised by your lawyers. You have also signed a statement to the same effect in which is added that the plea is informed and unequivocal. Do you confirm that those declarations are correct?

65. Prosecutor v. Plavsic, Sentencing Judgment, Case No. IT-00-39 & 40/1, *supra* note 60, para. 13.

66. *Id.* para. 14.

67. *Id.* paras. 15-16.

68. *See id.*

69. See Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT’L L.J. 789, 796-97 (1997).

70. See Neil Tweedie, *Witnesses Are Offered Protection*, DAILY TELEGRAPH, Feb. 13, 2002, available at 2002 WL 12303642.

71. Prosecutor v. Plavsic, Indictment, Case No. IT-00-40-I (Int’l Criminal Tribunal for the Former Yugoslavia, Apr. 3, 2000), <http://www.un.org/icty/indictment/english/pla-ii000407e.htm>. An Amended Consolidated Indictment was confirmed on March 7, 2002. Prosecutor v. Plavsic, Amended Consolidated Indictment, Case No. IT-00-39 & 40-PT (Int’l Criminal Tribunal for the Former Yugoslavia, Mar. 7, 2002), <http://www.un.org/icty/indictment/english/kra-cai020307e.htm>.

72. Prosecutor v. Plavsic, Sentencing Judgment, Case No. IT-00-39 & 40/1, *supra* note 60, para. 5. She was sentenced to eleven years of imprisonment. *Id.* para. 134; see also *Trial of Top Bosnian Serb Genocide Suspect Postponed*, *supra* note 59.

THE ACCUSED PLAVSIC: [Interpretation] I do.⁷³

Just as the *Boykin* colloquy was devoid of any affirmative indication that the defendant had entered his guilty plea knowingly and voluntarily, the *Plavsic* record is largely indistinguishable. "I do" constitute two of only ten words uttered by the defendant during the entire guilty plea hearing—and the only two that addressed any of the factors relevant to Rule 62 *bis*.⁷⁴ As the above-cited colloquy indicates, the court acknowledged that Plavsic's plea agreement declared that she was fully informed and that the agreement was entered into voluntarily and unequivocally. The question that followed, however, was ambiguous. Whether the court was asking Plavsic to affirm that the declarations were true at the time the plea agreement was signed or to affirm that they were true at the time of the hearing is less than clear. Irrespective of this ambiguity, what is clear is that the court attempted no additional inquiry whatsoever of the defendant. Questions were not asked that would either illuminate the singular question that was posed or address any other relevant aspects of the defendant's mental and volitional state. For example, no inquiry was made to ascertain whether the plea was unduly influenced by threats, promises, or inducements; whether Plavsic was aware of the elements required to prove a charge of Crimes Against Humanity; whether she could discern the differences between the respective charges in the indictment; whether she was aware of the maximum penalty attendant to that charge to which she pled; whether she was aware of any of the multitude of rights that she would forfeit by virtue of her decision to enter a guilty plea; or whether she agreed with the purported factual basis in support of the plea.⁷⁵

The conspicuous parallels between the colloquies in *Boykin* and *Plavsic* are the direct byproducts of the textual indefiniteness that characterized the former Rule 11 and that currently exists in Rule 62 *bis*. Empowered with boundless discretion, the *Plavsic* Chamber conducted a superficial examination, devoid of meaningful inquiry or an attempt to inform the defendant of the plea agreement's terms and consequences. The following case, *Prosecutor v. Cesic*, serves as an additional indicator of the inadequate judicial methodologies that have come to characterize Chamber practice. Although arguably an improvement upon the *Boykin*-like practice that could be discerned in the *Plavsic* colloquy, *Cesic* is notable for its omission of a number of factors highly relevant to an adequate assessment of the standards delineated in Rule 62 *bis*.

73. *Prosecutor v. Plavsic*, Plea Transcript, Case No. IT-00-39 & 40-PT, at 338 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 2, 2002), <http://www.un.org/icty/transe3940/021002ED.htm>.

74. *Id.* At the commencement of the hearing, the court asked Plavsic, "[C]an you hear me?" Plavsic replied, "Yes, I can hear you." *Id.* at 337. When asked how she wished to plead to the charge of Crime Against Humanity, Plavsic responded, "I plead guilty." *Id.* at 338.

75. By pleading guilty, a defendant necessarily sacrifices the right to a trial, ICTY R. P. & EVID. 62(A)(v); the right to present witnesses on the defendant's behalf and to cross-examine those called by the prosecution, ICTY R. P. & EVID. 85(A) & (B); the right to have the prosecution prove the defendant's guilt beyond a reasonable doubt, ICTY R. P. & EVID. 87(A); and the right not to make any statement that might be incriminating, ICTY R. P. & EVID. 90(E).

B. Ranko Cestic

As a member of the intervention platoon, a special police unit affiliated with the Bosnian-Serb police force, Ranko Cestic shot and killed several Muslim detainees, beat another to death, and forced at gunpoint two Muslim brothers to perform sexual acts upon each other.⁷⁶ For this conduct, Cestic was indicted on six counts of Crimes Against Humanity (five counts for Murder and one for Sexual Assault) and six counts of Violations of the Laws or Customs of War (five counts for Murder and one count for Sexual Assault).⁷⁷ He pled guilty to all twelve counts in October 2003 and was subsequently sentenced to eighteen years imprisonment.⁷⁸

After Cestic acknowledged during the Rule 62 *bis* hearing that he had signed the plea agreement,⁷⁹ the court proceeded to summarize the document's terms. The court informed the defendant of his agreement to plead guilty to all twelve counts of the indictment and of the prosecution's promise to submit a non-binding sentencing recommendation of thirteen to eighteen years, prior to providing a lengthy description of the facts in support of the plea.⁸⁰ Thereafter, the court asked Cestic only two questions relevant to the Rule 62 *bis* inquiry: first, whether the defendant understood that the court was not bound by the prosecution's sentencing recommendation,⁸¹ and second, whether the defendant had entered into the plea agreement voluntarily, and not on account of undue force or threats.⁸² To both questions, Cestic responded affirmatively.⁸³

No other questions relevant to Rule 62 *bis* were asked. Although the record reflects judicial declarations with respect to the trial rights forfeited, the supporting factual basis, and the absence of external agreements,⁸⁴ not a single question was posed to Cestic regarding any of these matters. Even worse, there was neither any judicial mention nor any dialogue regarding the maximum possible sentence, the elements of the respective charges, or the requirement that a defendant's guilt be proven beyond a reasonable doubt. In the end, the *Cestic* colloquy is completely devoid of evidence that Cestic agreed with the factual basis, understood any of the rights sacrificed, acknowledged the absence of external agreements, was aware of the maximum possible sentence, or was familiar with the nature of the charges to which he was

76. Prosecutor v. Cestic, Plea Agreement, Case No. IT-95-10/1-PT, paras. 4-7 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 8, 2003), <http://www.un.org/icty/cesic/ces-plea03108-e.htm>; *id.* annex A, paras. 3-19; Prosecutor v. Cestic, Plea Transcript, Case No. IT-95-10/1-PT, at 64-67 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 8, 2003), <http://www.un.org/icty/transe10-1/031008MH.htm>.

77. Prosecutor v. Cestic, Plea Agreement, Case No. IT-95-10/1-PT, *supra* note 76, para. 3.

78. Prosecutor v. Cestic, Sentencing Judgment, Case No. IT-95-10/1-5, para. 111 (Int'l Criminal Tribunal for the Former Yugoslavia, Mar. 11, 2004), <http://www.un.org/icty/cesic/trialc/-judgement/index.htm>.

79. Prosecutor v. Cestic, Plea Transcript, Case No. IT-95-10/1-PT, *supra* note 76, at 63.

80. *Id.* at 64-67.

81. *Id.* at 70.

82. *Id.* at 71-72.

83. *Id.* at 70-72. Between the respective questions, the court also stated on the record that by pleading guilty, the defendant was waiving his right to a public trial, his right to be present at his trial, his right to examine witnesses, and his right not to be compelled to testify against himself. *Id.* at 71.

84. *Id.* at 64-67, 70-72.

pleading guilty. These inquiries, deemed so critical to the Rule 62 *bis* process by the court in *Erdemovic*, were wholly ignored by the Chamber in *Cesic*.

A process characterized by such selective inclusions and exclusions is difficult to harmonize with the spirit that supposedly underlies Rule 62 *bis*. Admittedly, the *Cesic* court's approach to determining compliance with Rule 62 *bis* was preferable to that adopted by the court in *Plavsic*. Although each court relied on brief confirmatory statements as the basis for finding that Rule 62 *bis* had been satisfied, the *Cesic* court, unlike the Chamber in *Plavsic*, at least mentioned some of the terms of the plea agreement during its guilty plea colloquy. Yet by failing to even mention several other critical factors, let alone explore the defendant's acumen and perspective with respect to these matters, the court engaged in a process that was random, incomplete, and neglectful of the Rule 62 *bis* safeguards.⁸⁵

85. *Prosecutor v. Mrdja* is another case that is characterized by such selective inclusions and exclusions. As a member of the Bosnian-Serb Intervention Squad, Darko Mrdja directly participated in the mass slaughter of non-Serb civilians from the Bosnian municipality of Prijedor. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, para. 10 (Int'l Criminal Tribunal for the Former Yugoslavia, Mar. 31, 2004), <http://www.un.org/icty/mrdja/trialc/judgement/index.htm>; *Prosecutor v. Mrdja*, Amended Indictment, Case No. IT-02-59, paras. 1, 3, 14 (Int'l Criminal Tribunal for the Former Yugoslavia, Aug. 4, 2003), <http://www.un.org/icty/indictment/english/mrd-ai030804e.htm>. In 1992, during the Serbian-Bosnian conflict, non-Serb prisoners (primarily Muslims and Croats) who had been detained at various facilities within Prijedor were transported by bus to Koricanske Stijene. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra*, para. 10; *Prosecutor v. Mrdja*, Amended Indictment, Case No. IT-02-59, *supra*, paras. 1, 6, 8-12. Mrdja, who assisted in the transportation and was present during the ride, was among the officers who directed the prisoners to depart from the bus before escorting them to the edge of a cliff and ordering them to lower their heads and kneel. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra*, para. 10; *Prosecutor v. Mrdja*, Amended Indictment, Case No. IT-02-59, *supra*, paras. 9-10, 13. Thereafter, Mrdja and other members of the Intervention Squad shot to death more than two hundred individuals. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra*, para. 4; *Prosecutor v. Mrdja*, Amended Indictment, Case No. IT-02-59, *supra*, para. 14. Twelve of the prisoners survived the massacre. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra*, para. 10; *Prosecutor v. Mrdja*, Amended Indictment, Case No. IT-02-59, *supra*, para. 16. In July 2003, Mrdja pled guilty to counts two and three of the Amended Indictment, which charged him with Murder, a Violation of the Laws or Customs of War, and with Inhumane Acts (Attempted Murder), a Crime Against Humanity. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra*, para. 4; *Prosecutor v. Mrdja*, Amended Indictment, Case No. IT-02-59, *supra*, para. 17. He was sentenced in March 2004 to seventeen years imprisonment. *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra*, para. 129.

After confirming during the guilty plea hearing that Mrdja had signed the agreement, the court proceeded to summarize the document. The court informed Mrdja of the facts in support of the plea, that the agreement provided that the defendant would enter guilty pleas to counts two and three of the indictment, that a joint non-binding sentencing recommendation of fifteen to twenty years would be submitted to the court, that there were no external agreements or promises, and that by entering a guilty plea Mrdja was forgoing his right to defend himself, to call and examine witnesses, and to remain silent. *Prosecutor v. Mrdja*, Plea Transcript, Case No. IT-02-59, at 81-86 (Int'l Criminal Tribunal for the Former Yugoslavia, July 24, 2003), <http://www.un.org/icty/transe59/030724ME.htm> (stating to Mrdja that he would "mention just a few" of the rights that he would be forfeiting pursuant to his guilty plea). The long summary was incessant, with the court never pausing to inquire whether Mrdja agreed with the court's most recent factual and consequential characterizations. Only at the end of this extended narration did the court ask the defendant its only question with respect to his understanding of the agreement. *Id.* at 86 (noting that the Chambers asked Mrdja the following during the plea hearing: "I went through the plea agreement on the main lines. Is there anything that is not clear to you in respect of this agreement? Is there anything you would like to say adding to this agreement between you and the Office of the Prosecution?"). "Your Honour, everything is clear to me," is Mrdja's sole statement upon which the court ultimately based its assessment that the requirements of Rule 62 *bis* were satisfied. *Id.* at 86.

Though the plea colloquy makes clear that the plea agreement was judicially described, and that the defendant provided a global affirmation of understanding, there was no judicial mention or inquiry

As exemplified in *Plavsic* and *Cesic*, the indeterminacy of Rule 62 *bis* has resulted in an inconsistent and unpredictable methodology that has consistently failed to produce meaningful inquiry guided by the requirements that underlie the rule. The questions posed have been selective, while those omitted altogether have been significant. Despite these shortcomings, however, the Tribunal has invariably found that the Rule 62 *bis* requirements have been satisfied. The following case, *Prosecution v. Babic*, is illustrative of yet another interesting approach to assessing the Rule 62 *bis* safeguards. Though *Babic* shares many of the infirmities that plagued the colloquies in *Plavsic* and *Cesic*, the case is highlighted here because it exemplifies another set of commonly observed problems that are altogether different from those discussed previously.

C. *Milan Babic*

During his service as president of the Serbian National Council, president of the Serbian Democratic Party in Croatia, and president and prime minister of Krajina, a Serbian autonomous region within Croatia, Milan Babic actively participated in and furthered the efforts of the Serbian and Bosnian-Serb leadership to create a greater Serbia through the expulsion of Croatian and other non-Serb populations from various Croatian territories.⁸⁶ Through speeches, policy meetings with high-ranking Serbian and Bosnian-Serb officials, the provision of weapons to Serbs within Croatia, and the provision of staffing and financial assistance to Serb military structures, Babic provided meaningful assistance in support of this objective.⁸⁷ Although Babic advocated methods different from those ultimately employed and was unaware of the extent of the atrocities that were being committed, the ethnic cleansing activities that formed the basis of the indictment against him were, nevertheless, a foreseeable consequence of his actions.⁸⁸

In January 2004, Babic entered a plea of guilty to the first count of the indictment—Persecutions, a Crime Against Humanity.⁸⁹ In contrast to the plea colloquies previously discussed, Babic's transcript reveals that the Chamber mentioned on the record virtually all the factors relevant to a Rule 62 *bis* inquiry. In essence, the court read the entire plea agreement into the record, necessarily informing the defendant of the charge to which Babic had agreed to plead guilty, the sentencing maximum, the prosecution's non-binding

whatsoever with respect to several other critical factors relevant to Rule 62 *bis*. For example, the record is devoid of any mention of or dialogue regarding the existence of undue threats or inducements, Mrdja's knowledge of the distinctive elements of the respective offenses, his awareness of the court's authority to impose a life sentence, or his understanding that by pleading guilty he necessarily sacrificed his right to have the prosecution prove his guilt beyond a reasonable doubt.

86. *Prosecutor v. Babic*, Plea Agreement, Case No. IT-03-72-I, Tab 1, Factual Statement, paras. 4-9, 11-34 (Int'l Criminal Tribunal for the Former Yugoslavia, Jan. 22, 2004), http://www.un.org/icty/babic/trialc/plea_fact.htm.

87. *Id.* paras. 17, 33.

88. *Id.* paras. 17, 34.

89. *Id.* para. 2. On June 29, 2004, Babic was sentenced to a term of thirteen years imprisonment. *Prosecutor v. Babic*, Sentencing Judgment, Case No. IT-03-72-S, para. 102 (Int'l Criminal Tribunal for the Former Yugoslavia, June 29, 2004), <http://www.un.org/icty/babic/trialc/-judgement/index.htm>.

sentencing recommendation, the factual basis in support of the plea, the respective rights necessarily waived, and the agreement's declaration that the plea was entered voluntarily and free of undue threats, inducements, and external promises.⁹⁰ Upon the conclusion of this process, the Chamber inquired whether Babic was aware of the consequences of his agreement to plead guilty. Babic responded simply, "Your Honour, I am aware."⁹¹

The Court deemed Babic's global affirmation sufficient indication that the requirements of Rule 62 *bis* had been satisfied. Although he was never asked to affirm his concurrence until the very end of the court's lengthy recitation, some might forgive such judicial neglect in light of the apparent opportunity afforded Babic upon the conclusion of the process to voice any reservations.⁹²

When assessing the adequacy of any guilty plea procedure, however, the context in which the guilty pleas are tendered must always be remembered. It is this context that influences, and too often infects, the legitimacy of any plea. It is critical to keep in mind that every defendant who appears before the Tribunal is afforded the right to have his guilt proven beyond a reasonable doubt.⁹³ Whether guilty in fact, or legally or factually innocent, each defendant possesses this right. Whether a defendant ultimately elects to exercise the right or to pursue a negotiated disposition, facts must be proven with sufficient certainty to establish the defendant's guilt of the crime alleged. It is not enough that the defendant is guilty of some crime. Instead, there must be a sufficient nexus between the actions of the defendant and each element of the crime he is alleged to have committed. Absent the establishment of this nexus, the defendant is, at a minimum, legally innocent.

Indeed, the plight of the innocent defendant is central to the ongoing debate in the United States over the propriety of plea bargaining. While proponents of the practice contend that contractual freedom to engage in plea bargaining grants the litigating parties greater latitude to achieve optimal

90. In addition, there was some discussion about the nature of the charge. *Prosecutor v. Babic*, Plea Transcript, Case No. IT-03-72-I, at 29-45 (Int'l Criminal Tribunal for the Former Yugoslavia, Jan. 27, 2004), <http://www.un.org/icty/transe72/040127IA.htm>. A similar process was followed in *Prosecutor v. Deronjic*. During the Serbian-Bosnian hostilities, Miroslav Deronjic, as president of the Bratunac Crisis Staff, held a position of authority that he used to further the objective of the Bosnian-Serb leadership to create Serbian ethnic territories within Bosnia and Herzegovina. *Prosecutor v. Deronjic*, Factual Basis, Case No. IT-02-61-PT, paras. 2, 4, 8-47 (Int'l Criminal Tribunal for the Former Yugoslavia, Sept. 29, 2003), <http://www.un.org/icty/deronjic/trialc/plea/facts-030923-e.htm>. In pursuit of this objective, Deronjic assisted in efforts to displace the sizeable Muslim community within the Bratunac Municipality, including the town of Glogova, and to convert the area into a Serbian ethnic territory. *Id.* para. 13. Raids authorized by Deronjic on the town of Glogova resulted in the destruction of innumerable Muslim occupied residences, the murder of approximately sixty-five Bosnian-Muslim residents, and the displacement of countless Bosnian-Muslims from their villages. *Id.* paras. 18-44. On September 30, 2003, Deronjic entered a guilty plea to Persecutions, a Crime Against Humanity. *Prosecutor v. Deronjic*, Plea Transcript, Case No. IT-03-72-I, at 82-83 (Trial Chamber, Int'l Criminal Tribunal for the Former Yugoslavia, Sept. 30, 2003), <http://www.un.org/icty/transe61/030930IT.htm>. Thereafter, in an approach somewhat similar to that adopted by the court in *Babic*, the Chambers had the Registrar read the entire plea agreement into the record. *Id.* at 37.

91. *Prosecutor v. Babic*, Plea Transcript, Case No. IT-03-72-I, *supra* note 90, at 44-45.

92. The transcription of the court's summarization of the plea agreement was fifteen pages long. *Id.* at 29-45.

93. ICTY R. P. & EVID. 87(A).

resolutions,⁹⁴ and that plea bargaining increases efficiency, in an otherwise overburdened criminal justice system,⁹⁵ critics insist that such arguments improperly discount the impact of the practice upon the innocent defendant.⁹⁶ Confronted with a choice between the harsher sentence that typically accompanies a conviction at trial, and the lesser sentence that can be negotiated via a plea bargain, the innocent defendant will often pursue the latter path.⁹⁷ As stated by Professor Albert Alschuler, this selection is often the direct byproduct not of rational thought and the free exercise of discretion, but of prosecutorial tactics designed to extract a confession from defendants under duress:

[A] plea negotiation system that merely vectored the risks of litigation would leave the benefits and risks of litigation in balance from the defendant's perspective; it might therefore yield a guilty-plea rate of about fifty percent. Guilty-plea rates in America are substantially higher, and one reason is that prosecutors are not content merely to vector the risks of litigation. For a variety of reasons including the pressure of their caseloads, they usually would rather not try their cases. Accordingly, they tailor their offers not to balance but to overbalance a defendant's chances of acquittal. As Professor Welsh S. White reported:

. . . New York prosecutors often reduce their sentence recommendations by at least fifty percent if they believe there is a fifty percent chance of a hung jury, and by a great deal more if they believe that there is a fifty percent chance of acquittal. If the chances of acquittal are greater, the practice in both offices [Philadelphia and New York] is to offer at least proportionally higher concessions.

This process seems well-designed to produce the conviction of innocent defendants.⁹⁸

The pervasiveness of such prosecutorial strategies in the United States and at The Hague, as well as their impact upon individual defendants, can be debated *ad infinitum*. Office policies and individual tendencies are largely non-quantifiable factors that would necessarily underlie any purported measurement of the frequency and impact of such practices. Whatever the true gauge, however, it can scarcely be denied that duress has a virulent presence

94. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1918-35 (1992).

95. See *Harman v. Mohn*, 683 F.2d 834, 836-37 (4th Cir. 1982):

Without plea bargains the state and federal criminal courts would collapse under the burden of cases waiting the time consuming jury selection and trial. The Supreme Court approved plea bargaining in *Santobello v. New York*, 404 U.S. 257 (1971) . . . and found it to be "an essential component" of the criminal process and that it should be encouraged when properly administered.

96. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983).

97. See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2069-70 (2000):

[O]ther scholars have applied contract theory itself in arguing for the abolition of "any bargained-for allocation of criminal punishment." For example, Albert Alschuler cited familiar contracts and economics concepts of duress and externalities in arguing that "pretty pictures of well-informed parties striking a rational balance of litigation risks miss an important part of what invariably happens when a system of plea bargaining moves from abstraction to reality." Rather, as noted by Donald Gifford, "[d]efendants are coerced into pleading guilty because they face the risk of far more severe penalties if tried and convicted than if sentenced after a guilty plea."

98. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714-15 (1981) (citations omitted).

at The Hague. Unlike the standard U.S. criminal trial, each defendant who appears before the Hague Tribunal must ultimately make a harrowing choice—a choice between exercising his right to trial, which can result in a possible life sentence,⁹⁹ or pursuing an out-of-court disposition, which can virtually guarantee one's eventual freedom. As evidenced by the sentences imposed in *Erdemovic*, *Cesic*, and *Babic*, among several other negotiated cases at The Hague, the substantial rewards that typically accompany a guilty plea can be quite alluring, even to the innocent defendant.¹⁰⁰

99. See, e.g., *Prosecutor v. Stakic*, Case Information Sheet, Case No. IT-97-24 (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), <http://www.un.org/icty/glance/stakic.htm> (indicating that Stakic was sentenced to life imprisonment). Several other ICTY cases have resulted in dispositions that are virtually life sentences. *Prosecutor v. Galic*, Case Information Sheet, Case No. IT-98-29-I (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), <http://www.un.org/icty/glance/galic.htm> (indicating that Galic was sixty years of age when convicted; he was sentenced to twenty years of imprisonment); *Prosecutor v. Jelusic*, Case Information Sheet, Case No. IT-95-10 (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), <http://www.un.org/icty/glance/jelusic.htm> (indicating that Jelusic was thirty-one years of age when convicted; he was sentenced to forty years of imprisonment); *Prosecutor v. Krstic*, Case Information Sheet, Case No. IT-98-33 (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), <http://www.un.org/icty/glance/krstic.htm> (indicating that Krstic was fifty-three years of age when convicted; after appeal, he was sentenced to thirty-five years of imprisonment); *Prosecutor v. Naletilic*, Case Information Sheet, Case No. IT-98-34 (Int'l Criminal Tribunal for the Former Yugoslavia, June 22, 2004), <http://www.un.org/icty/glance/naletilic.htm> (indicating that Naletilic was fifty-six years of age when convicted; he was sentenced to twenty years of imprisonment). In addition, as of October 2003, life sentences had been imposed on at least five individuals at the International Criminal Tribunal for Rwanda (ICTR). See Del Ponte, *supra* note 16, at 4.

100. Though Plavsic was seventy-two at the time she pled guilty and was sentenced to an eleven-year term, see *Prosecutor v. Plavsic*, Case Information Sheet, Case No. IT-00-39 & 40/1 (Int'l Criminal Tribunal for the Former Yugoslavia, June 22, 2004), <http://www.un.org/icty/glance/plavsic.htm>, Erdemovic, Cesic, and Babic were considerably younger—twenty-five, thirty-nine, and forty-seven, respectively—and they negotiated dispositions that will likely result in their release during their middle-age and upper middle-age years. See *Prosecutor v. Erdemovic*, Case Information Sheet, Case No. IT-96-22 (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), <http://www.un.org/icty/glance/erdemovic.htm> (imposing a ten-year sentence); *Prosecutor v. Cesic*, Sentencing Judgment, Case No. IT-95-10/1-5, *supra* note 78, paras. 4, 6, 111. (imposing an eighteen-year sentence); *Prosecutor v. Babic*, Sentencing Judgment, Case No. IT-03-72-S, *supra* note 89, paras. 1, 6-11, 102 (imposing a thirteen-year sentence). In addition, comparable resolutions virtually assuring release during the defendant's middle-age and upper middle-age years have been extended to several other defendants who have negotiated their guilt since the institution of the practice. See *Prosecutor v. Mrdja*, Sentencing Judgment, Case No. IT-02-59, *supra* note 85, paras. 5, 19, 129 (indicating that Mrdja was thirty-six years old when he entered his guilty plea and was sentenced to seventeen years of imprisonment); *Prosecutor v. Sikirica*, Case Information Sheet, Case No. IT-95-8 (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), www.un.org/icty/glance/sikirica.htm (indicating (1) that Sikirica was thirty-seven years of age when he pled guilty and was sentenced to fifteen years of imprisonment; (2) that Dosen was thirty-four years of age when he pled guilty and was sentenced to five years of imprisonment; and (3) that Kolundzija was forty-one years of age when he pled guilty and was sentenced to three years of imprisonment); *Prosecutor v. Todorovic*, Case Information Sheet, Case No. IT-95-9/1 (Int'l Criminal Tribunal for the Former Yugoslavia, June 23, 2004), www.un.org/icty/glance/todorovic.htm (indicating that Todorovic was forty-two when he entered his guilty plea and was sentenced to ten years of imprisonment); *Prosecutor v. Deronjic*, Sentencing Judgment, Case No. IT-02-61-S, paras. 5, 18-19, 228 (Int'l Criminal Tribunal for the Former Yugoslavia, Mar. 30, 2004), <http://www.un.org/icty/deronjic/trialc/judgement/index.htm> (indicating that Deronjic was forty-nine years of age when he pled guilty and was sentenced to ten years of imprisonment); *Prosecutor v. Obrenovic*, Sentencing Judgment, Case No. IT-02-60/12-S, paras. 1, 12, 156 (Int'l Criminal Tribunal for the Former Yugoslavia, Dec. 10, 2003), <http://www.un.org/icty/obrenovic/trialc/judgement/index.htm> (indicating that Obrenovic was forty when he entered his guilty plea and was sentenced to seventeen years of imprisonment); *Prosecutor v. Banovic*, Sentencing Judgment, Case No. IT-02-65/1-S, paras. 1, 9, 96 (Int'l Criminal Tribunal for the Former Yugoslavia, Oct. 28, 2003), <http://www.un.org/icty/banovic65-1/trialc/judgement/ban-sj031028e.htm> (indicating that Banovic was thirty-three years of age when he entered his guilty plea and was sentenced to eight years of imprisonment); *Prosecutor v.*

Defendants in such a quandary who elect to pursue a negotiation strategy understand that its ultimate success depends on two variables: first, they must facilitate an agreement with the prosecution; and second, they must persuade the court to impose a sentence within the desired sentencing range. It is therefore imperative that when a defendant appears before the court, he displays those personal qualities that will help alleviate any lingering judicial concerns. One way such qualities can be demonstrated is through a defendant's personal statement to the court during his change of plea or at sentencing. Through such a statement, a defendant has the opportunity to appear contrite and to express his deep regret for his criminal conduct. Consider the following statement by Babic at the conclusion of his Rule 62 *bis* hearing:

I come before this Tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs. Innocent people were persecuted; innocent people were evicted forcibly from their houses; and innocent people were killed

The regret that I feel is the pain that I have to live for the rest of my life. These crimes and my participation therein can never be justified. I'm speechless when I have to express the depth of my remorse for what I have done and for the effect that my sins have had on the others. I can only hope that by expressing the truth, by admitting to my guilt, and expressing the remorse can serve as an example to those who still mistakenly believe that such inhumane acts can ever be justified

I hope that the remorse that I expressed will make it easier for the others to bear their pain and suffering. I have come to understand that enmity and division can never make it easier for us to live. I have come to understand that our—the fact that we all belong to the same human race is more important than any differences, and I have come to understand that only through friendship and confidence we can live together in peace and friendship, and thus make it possible for our children to live in a better world

And lastly, I place myself at the full disposal of this Tribunal and international justice. Thank you very much.¹⁰¹

Whether such expressions are truly heartfelt will forever be a matter for speculation. Yet regardless of the defendant's state of repentance, it is an indisputable fact that a primary objective of such personal statements is to persuade the court to impose a favorable sentence. Indeed, throughout the entire guilty plea and sentencing processes, the defendants who appear before the Tribunal are generally cognizant of the Chamber's authority to disregard any sentencing recommendations and to impose a life sentence. Thus, a defendant in such delicate circumstances will deftly refrain from exhibiting any conduct that could possibly be construed adversely. At all times, he will proceed cautiously, careful to approach the court with reverence, to exhibit remorse, and to display a deferential, respectful, and compliant demeanor.

Sikirica, Dosen, and Kolundzija, Sentencing Judgment, Case No. IT-95-8-PT, paras. 224, 235, 239 (Int'l Criminal Tribunal for the Former Yugoslavia, Nov. 13, 2001), http://www.un.org/icty/sikirica-judgement/index_2.htm; cf. Prosecutor v. Nikolic, Sentencing Judgment, Case No. IT-02-60/1-S, paras. 1, 12, 183 (Int'l Criminal Tribunal for the Former Yugoslavia, Dec. 2, 2003), <http://www.un.org/icty-mnikolic/trialc/judgement/index.htm> (indicating that Nikolic was forty-eight years of age when he entered his guilty plea and was sentenced to twenty-seven years of imprisonment).

101. Prosecutor v. Babic, Plea Transcript, Case No. IT-03-72-1, *supra* note 90, at 57-58.

This observation explains why the approach adopted by the Chamber in *Babic* is so seriously flawed. By essentially reading the plea agreement into the record and making a single inquiry into the defendant's understanding of the agreement in its entirety, the court took full advantage of *Babic's* hopeful state. With a defendant fully inclined to appear cooperative and deferential, and fully disinclined to appear inquisitorial or confrontational, the court's cursory examination of *Babic* hardly suffices as a legitimate barometer of the defendant's acumen regarding the plea decision. Like the Chamber in *Plavsic* and *Cesic*, the *Babic* court made virtually no attempt to delve deeper to ascertain the depth of the defendant's understanding. With so much at stake, the inconsistent and cursory approaches routinely employed by the respective Chambers are simply an inadequate means for ascertaining compliance with the standards delineated in Rule 62 *bis*.

The inadequacies of such Chamber practices become even more pronounced when the questioning techniques used in Rule 62 *bis* proceedings are considered. In contrast to the plethora of detailed evidentiary rules that regulate the trial interrogation of witnesses in the U.S. federal courts,¹⁰² the Chambers are afforded a more general regulatory authority. For example, hearsay is generally admissible,¹⁰³ and there is no specific proscription against the employment of either leading or compound questions. Instead, ICTY procedural rules require only that relevant evidence is admitted and that the Chambers ensure that the trial process proceeds efficiently.¹⁰⁴

Leading questions, traditionally defined as questions that suggest the desired response,¹⁰⁵ and compound questions, which pose more than one query,¹⁰⁶ are either circumscribed or prohibited outright in U.S. federal courts.¹⁰⁷ Whether leading questions are permitted is often contingent upon the degree of empathy between the witness and the examiner.¹⁰⁸ The greater

102. FED. R. EVID. 607-15, 701-06, 801-07.

103. See Combs, *supra* note 2, at 77.

104. See *supra* note 102; ICTY R. P. & EVID. 89, 90(f).

105. See *United States v. Durham*, 319 F.2d 590, 592 (4th Cir. 1963) (indicating that "a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory").

106. See 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 611.16 (5th ed. 2001).

107. U.S. federal courts generally permit leading questions on cross-examination and restrict such questions on direct examination. FED. R. EVID. 611(c); 2 GRAHAM, *supra* note 106, §§ 611.15-22 (indicating that compound questions are an objectionable question form).

108. Rule 611(c) of the Federal Rules of Evidence provides:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

FED. R. EVID. 611(c). The advisory comments to Rule 611(c) provide:

The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters.

FED. R. EVID. 611(c) cmt.; see also 81 AM. JUR. 2D *Witnesses* § 820 (2004):

Whether leading questions should be permitted in cross-examination where it appears that the witness is friendly to the cross-examiner's cause has usually been held within the discretion of the trial court. Beyond this, however, or perhaps because of this principle of discretion, the results in the cases have been diverse. On the one hand, it has been pointed

the empathy, the more likely it is the question will be prohibited. During direct examinations, it is often thought that the witness, who shares the same litigative interests as the examiner, is strongly disinclined to contest the suggestions proffered by the examiner. In such circumstances, it is deemed preferable to prohibit the leading question and receive the witness's testimony free of the examiner's influences.¹⁰⁹ Conversely, on cross-examination, when greater antipathy is characteristically present, leading questions are less likely to be deemed objectionable.¹¹⁰ In such situations, the witness has greater incentives to contest the leads proffered by the examiner, thus defusing the dangers otherwise associated with leading queries. Finally, compound questions are prohibited irrespective of any empathy issues given the inherent confusion that necessarily accompanies questions that require multiple responses.¹¹¹

Although the above-described rules are largely restricted to the trial context,¹¹² the principles that underlie them are informative in the guilty plea arena as well. In the guilty plea setting, the Chamber-defendant relationship is analogous to that between the direct examiner and the witness. In each instance, the witness has a strong inclination to follow the leads of the questioner, given that each views his examiner as a means to an end. The direct-examination witness who desires a criminal conviction will view the prosecuting attorney as a conduit through which a conviction can be obtained. Similarly, the defendant during a guilty plea hearing views the judge as a conduit through which a lesser sentence can be imposed. Neither witness is inclined to disrupt the progression of events so long as the witness believes the overriding objective is being achieved.

When the Chamber in *Babic* virtually read the entire plea agreement and then asked the defendant whether he comprehended its terms, the court essentially asked a leading and compound question that was more egregious

out that the reason for the rule permitting leading questions to an adverse witness on cross-examination is the assumed hostility of such witness to the cross-examiner's cause. Hence, it has been held that where an adverse witness is shown to be friendly toward or biased in favor of the cross-examiner the reason for the rule ceases to exist and leading questions may not be used in examining such witness.

109. See Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 NOTRE DAME L. REV. 597, 616-17 (2002):

Indeed, the restrictive and permissive distinctions identified in Rule 611 are not the byproduct of arbitrary classifications, but stem from sound rationales. With respect to direct examination, concerns about witness susceptibility underlie the general prohibition. The empathy typically existent between the direct examiner and witness necessarily subjects the witness to the leads of the examiner. Their shared litigative interests heighten the risk that a witness, rather than testify of his own accord, will simply defer to the leading or suggestive questions posed by the examiner.

110. See *id.* at 617 ("The litigative discord that characterizes most cross-examining relationships renders it unlikely that a witness will be susceptible to the leads of the examiner. Unlike direct examination, the witness during cross-examination regards the examiner as an adversary—as an individual who seeks to impede his litigative interests.").

111. See 2 GRAHAM, *supra* note 106, § 611.16.

112. See FED. R. EVID. 1101(b) ("These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.").

than anything imaginable in a U.S. trial court setting. Consider the following excerpt:

JUDGE ORIE: Finally, the plea agreement says that you voluntarily entered into this agreement, and therefore if you would plead guilty, that it would be a voluntary plea; that no threats were made to you to induce you to enter this guilty plea; and that no other promises have been given to you apart from the ones mentioned in the plea agreement. You have signed this plea agreement. May I ask you further whether you fully understood what your commitments are? *It has been confirmed already by your signature and by Defence counsel*, but the Chamber would like to hear from yourself as well whether you are fully aware of what you signed to and what the consequences may be.¹¹³

This passage constitutes a mere fraction of a virtually uninterrupted judicial description of a plea agreement that easily exceeds ten transcribed pages.¹¹⁴ That single paragraph addressed the critical issue of voluntariness, as well as related sub-issues pertaining to threats and promises external to the agreement. Aside from the acquiescent atmosphere that generally characterizes plea agreement colloquies, the sentence italicized above further highlights the leading nature of the question posed by the Chamber. The judge plainly informs Babic, just prior to obtaining his response, that the defendant's affirmative understanding regarding the entirety of the plea agreement has been previously confirmed by his counsel as well as by his signature on the document. Thus, immediately preceding the court's single question, the court suggests the desired response when it informs Babic that two separate sources indicate that the defendant entered into the agreement knowingly, voluntarily, and unequivocally and that a supporting factual basis exists.

Unfortunately, the employment of such inquisitorial tactics has been a staple of guilty plea hearing practice at the ICTY. Leading and compound Chamber questions, followed by decorative monosyllabic responses, pass as meaningful inquiry pursuant to Rule 62 *bis*.¹¹⁵ Nevertheless, supporters might dismiss such perceived inadequacies, arguing that any such deficiencies are appreciably mitigated, if not cured altogether, by the presence of counsel. They might claim that it would be reasonable to presume that defendants who benefited from the assistance of counsel throughout the litigative process should be presumed to have been informed of the various ramifications associated with pleading guilty. The following Section addresses this contention and explains why such a presumption is not warranted.

113. Prosecutor v. Babic, Plea Transcript, Case No. IT-03-72-I, *supra* note 101, at 44-45 (emphasis added).

114. *Id.* at 29-30, 32-45.

115. Consider the following exchange during the *Cesic* plea hearing. After the court essentially read the entire plea agreement into the record, the Chambers posed the following leading and compound question with respect to the defendant's voluntariness:

JUDGE ORIE: Yes. As far as the entering into this agreement from your own free will.

Mr. Cesic, you could confirm that this is how you came to this plea agreement?

Voluntarily, not being forced or threatened or in whatever way?

THE ACCUSED: [Interpretation] Yes, Your Honour.

Prosecutor v. Cesic, Plea Transcript, Case No. IT-95-10/1-PT, *supra* note 76, at 71-72.

III. PRESENCE OF DEFENSE COUNSEL

Whether to enforce one's trial right or to pursue a negotiated disposition is arguably the most important decision a defendant must make during the criminal litigation process. When making this critical choice, it is essential that the defendant be fully cognizant of the consequences associated with each alternative. Like a marketplace buyer who risks a sub-optimal return if he makes an investment decision based on incomplete information, the defendant similarly assumes substantial risk whenever the election between trial and a plea disposition rests, in part, on ignorance of the true value of each strategic option. Thus, an optimal selection in this context is wholly dependent upon a defendant's sufficient appreciation of the value of each commodity. For example, when weighing the merits of an out-of-court strategy, the defendant must be sufficiently familiar with the various trial-related rights, the maximum penalty, the likelihood of the court's imposing a favorable sentence, the elements of the charged offenses, and the facts that supposedly support those charges. In addition, the defendant must assure himself that the election of this option is voluntary—free of undue threats or inducements.

In the United States, a defendant is rarely deemed better positioned to make such assessments without the assistance of counsel. Although the issue of competency to waive one's right to counsel and, subsequently, one's right to trial stands separate from the question of the wisdom of pursuing such paths, the Supreme Court in *Iowa v. Tovar* recently reiterated the normative principle that defendants contemplating such conjunctive steps should be advised of the substantive benefits associated with the retention of counsel.¹¹⁶ In discussing the courts' role in this context, the Supreme Court noted that defendants "should be made aware of the dangers and disadvantages of self-representation"¹¹⁷ and that the "pitfalls of proceeding to trial without counsel . . . must be 'rigorous[ly] conveyed.'"¹¹⁸ Referencing an array of complex trial procedures and evidentiary rules, the Court observed that in a trial setting, "even the most gifted layman" could benefit from the specialized skills and acumen of trained legal counsel.¹¹⁹

Given such complexity of process, it is certainly reasonable to presume that counsel trained in criminal law are better equipped to gauge the merits and demerits of the various disposition alternatives confronting a defendant. This observation is especially valid in the international criminal arena, where the litigation of highly complex international criminal norms is standard fare. Comprehending and distinguishing among the norms commonly tried before the Hague Tribunal—Grave Breaches of the Geneva Conventions, Violations of the Law or Customs of War, Genocide, and Crimes Against Humanity—and understanding the Tribunal's evolving mixture of inquisitorial and adversarial adjudicative processes are but some of the skills necessary to effectively gauge any strategic decision.

116. *Iowa v. Tovar*, 541 U.S. 77 (2004).

117. *Id.* at 89 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

118. *Id.* (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988)).

119. *Id.* (quoting *Patterson*, 487 U.S. at 299 n.13).

Admittedly, the presence of skilled counsel in this context could ameliorate many of the procedural ills that currently plague the Tribunal's plea hearing process. After all, an attorney learned in international criminal law would presumably be well equipped to render the kind of sound informational and tactical advice that could assuage the above-identified procedural deficiencies. The Hague reflects a different reality, however; in this court, the affirmative impact of counsel's presence is limited at best, and is certainly not worthy of a curative presumption that defenders of the process might advance.

While the ICTY allows every defendant who appears before the Tribunal to be represented by counsel,¹²⁰ the benchmark qualifications to practice before the court have never been particularly stringent. Until August 2004, for example, an attorney was authorized to practice before the Tribunal provided only that he was admitted to practice and had "reasonable experience in criminal and/or international law."¹²¹ Moreover, the comparatively generous compensation received by many appointed counsel fails to mitigate this problem. If a defendant is unable to afford an attorney—and most defendants at The Hague claim indigence—the ICTY will provide one without cost.¹²² Most defense attorneys come from the Balkan states and are compensated at rates that typically exceed what they receive from their home

120. See Directive No. 1/94 on Assignment of Defence Counsel, Aug. 4, 2004, art. 5, at <http://www.un.org/icty/basic/counsel/IT073-rev10-e.htm> [hereinafter Directive on Assignment of Defence Counsel]:

Without prejudice to the right of an accused to conduct his own defense: i. a suspect who is to be questioned by the Prosecutor during an investigation; ii. an accused upon whom personal service of the indictment has been effected; and iii. any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis*; shall have the right to be assisted by counsel.

See also *infra* note 159 and accompanying text.

121. Until August 2004, Article 14(A) of Directive No. 1/94 on Assignment of Defence Counsel provided:

Any person may be assigned as counsel to an accused if the Registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45 (B) of the Rules. A person is eligible for admission to the list if:

- i. he is admitted to the practice of law in a State, or is a university professor of law;
- ii. he has not been found guilty in relevant disciplinary proceedings against him where he is admitted to the practice of law or a university professor, and has not been found guilty in relevant criminal proceedings against him;
- iii. he speaks one of the two working languages of the Tribunal, except if the interests of justice do not require this;
- iv. he possesses reasonable experience in criminal and/or international law;
- v. he agrees to be assigned as counsel by the Tribunal to represent any indigent suspect or accused;
- vi. he is or is about to become a member of an association of counsel practising at the Tribunal.

Directive No. 1/94 on Assignment of Defence Counsel, July 28, 1994, art. 14, at <http://www.un.org/icty/basic/counsel/IT073-rev9-e.htm>. Article 14 was thereafter amended and now requires, *inter alia*, that an attorney have "at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings." Directive on Assignment of Defence Counsel, *supra* note 120, art. 14.

122. *Id.* art. 6(A) ("Suspects or accused who lack the means to remunerate counsel shall be entitled to assignment of counsel paid for by the Tribunal."); see also Patricia Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day to Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 103 (2001).

country.¹²³ Thus, in contrast to the practices that unfortunately characterize indigent representation in the United States,¹²⁴ appointed attorneys at The Hague are all too willing to spend countless hours with their clients.¹²⁵ At first blush, this fact might seem to suggest that the representation quality problems that plague indigent defense in the United States might be less prevalent at the ICTY. Further examination, however, reveals that this is not the case.

The defense attorneys and their clients who arrive at The Hague confront adjudicative procedures very different from those with which they are familiar. In contrast to the plea negotiation practices that now prevail at The Hague, government bargaining over an individual's guilt has never been a part of the criminal justice culture of the former Yugoslavia.¹²⁶ Moreover, the trial processes adopted in the former Yugoslavia vary considerably from those followed at the Tribunal. Unlike the ICTY, which mirrors in many respects the U.S. adversarial model,¹²⁷ the former Yugoslavia adopted a more inquisitorial system.¹²⁸ Predominant throughout continental Europe,¹²⁹ the inquisitorial approach can be broadly characterized as a process that features a greater judicial role than that customarily associated with the more attorney-dominated adversarial system.¹³⁰ In the inquisitorial structure, the judge, as opposed to the attorneys, is the principal witness examiner, with the prosecuting and defense attorneys assigned a much more circumscribed role.¹³¹ The evidentiary rules also tend to be more permissive.¹³² The defendant, though possessed of the right not to testify, rarely exercises this right given the adverse inference that the court is entitled to draw.¹³³

Yugoslavia generally followed this model in its 1985 Code of Criminal Procedure.¹³⁴ After the charging instrument was read, the presiding judge would proceed to interrogate the defendant.¹³⁵ When the presiding judge had completed his questioning, the other members of the judicial panel would then pose additional questions.¹³⁶ Thereafter, the prosecution and defense attorneys

123. Wald, *supra* note 122, at 103-04.

124. See Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 908-10 (2004).

125. See Anthony D'Amato, *Defending a Person Charged with Genocide*, 1 CHI. J. INT'L L. 459, 465 (2000).

126. Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 288 (2001) (noting that during the sentencing phase, the ICTY considers a defendant's cooperation with the prosecution as a mitigating factor, and that this practice "is quite different from the judicial practice in the former Yugoslavia, which neither allowed plea-bargaining nor rewarded cooperation with the prosecution").

127. See Combs, *supra* note 2, at 6-7.

128. See *infra* notes 134-141 and accompanying text.

129. See Combs, *supra* note 2, at 7.

130. See *id.* at 31-31.

131. See *id.* at 30-32.

132. See *id.* at 33-34:

Continental evidentiary rules are extremely relaxed and simple 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. Consequently, Continental trials admit most hearsay.

133. See *id.* at 35-36.

134. CODE OF CRIM. PROC. (Yugoslavia), arts. 315.1, 2 (1985).

135. *Id.* art. 316.1.

136. The defendant could elect not to testify. *Id.* arts. 316.5, 317.2.

would examine the defendant, but only if the court granted permission to do so.¹³⁷ If there were additional defendants, the same process would be repeated. When the questioning of all the defendants had been completed, the court would receive other evidence.¹³⁸ The receipt of additional testimonial evidence would follow the same progression outlined above, with judicial approval required prior to any questions by the litigating parties.¹³⁹ After all the evidence had been received, the prosecutor, the defense attorney, and the defendant were entitled to address the court and present a closing statement.¹⁴⁰ The panel would then deliberate and render a verdict.¹⁴¹

Yugoslavia's code of criminal procedure was later adopted by the succeeding states in the years after the federation's disintegration.¹⁴² Despite some recent changes, the trial procedure described above remains largely intact in the Balkan region.¹⁴³ Given this fact, the criminal justice procedures common to the Yugoslavian states since the Josip Tito era deviate noticeably from the measures currently employed at The Hague. As a result, many defense attorneys come to the Tribunal under-equipped to represent their clients effectively given their unfamiliarity with the processes of the court. Confronted with a largely foreign trial and dispute-resolution system, many attorneys proceed to litigate cases involving serious violations of international law with neither the knowledge nor the skills necessary to perform their assigned tasks adequately.

Indeed, various commentators have expressed such sentiments. Anthony D'Amato, professor at the Northwestern University School of Law and a former defense attorney at The Hague, made the following observations:

The Yugoslav lawyers did not seem well prepared for trial; they did not initiate motions on behalf of their clients (with the exception of many complaints about conditions in detention centers); and their briefs did not reflect (in my opinion) much comprehension about the relevant substantive rules of international humanitarian law. So far, the decisional record at the ICTY indicates that nearly all accused persons who have achieved any success (either in acquittals, or getting charges dropped, or obtaining lighter

137. *Id.* art. 318.1.

138. *Id.* arts. 322.1, 2.

139. *Id.* art. 327.1.

140. *Id.* art. 339. Article 342 elaborated upon the closing argument phase:

- (1) In his speech, the defense counsel or the accused shall present the arguments of the defense and comment on the statements made by the prosecutor and the injured person.
- (2) Following his counsel, the accused is entitled to argue and declare whether he approves of the arguments advanced by his counsel and supplement his presentation.
- (3) The prosecutor and the injured person shall have the right to respond to the defense, and the defense counsel and the accused the right to rejoin.
- (4) The accused shall always have the last word.

Id. art. 342.

141. *Id.* arts. 344, 345, 347, 350.

142. *See* Telephone Interview with Dragomir Modrusan, Attorney at Law, Modrusan Law Office (Aug. 4, 2004) [hereinafter Interview with Dragomir Modrusan]. Modrusan is an attorney who has practiced law in Croatia for over thirty years and who has litigated criminal cases as part of a broader legal practice.

143. *See* Marilyn Justman Kaman, *To Live and Work in Kosovo*, 18 WTR CRIM. JUST. 5, 8 (2004) (discussing the trial process in Kosovo). *But cf.* Interview with Dragomir Modrusan, *supra* note 142 (indicating that in the late 1990s, Croatia adopted a criminal trial process that is increasingly adversarial in approach).

sentences) have been represented by attorneys from the United Kingdom, the Netherlands, Canada, and the United States.¹⁴⁴

Moreover, other observers have noted that “very few” defense attorneys from the more inquisitorial judicial systems are skilled at cross-examination,¹⁴⁵ and that the many Balkan-trained counsel seem “painfully awkward and unfocused on just what they are trying to accomplish.”¹⁴⁶ Such comparative ineptitude is hardly surprising in light of the professional inexperience that, unfortunately, characterizes too many of the practicing counsel who appear before the Tribunal. As noted by Michael G. Karnavas:

The complexity of the legal principles found in the Statute and Rules of the ICTY is not beyond the ken of the criminal defense lawyer. Understanding of the Byzantine structure of the UN, and the legal theories and historical evolution of international law, customs, philosophies, quasi-precedents, etc., does, however, require extensive knowledge of public international law

These points are mentioned because the list of attorneys on the defense panel come from different legal traditions. Some have little or no criminal defense experience, let alone knowledge of public international law. This poses a problem. The accused, if he/she qualifies, is given a list of attorney names from which to choose his/her counsel. The qualification required for defense counsel is minimal Given the high caliber of and screening process for the prosecution team, one must question the low qualifications for defense counsel.¹⁴⁷

This lack of comprehension naturally trickles down to the clients whom the attorneys are assigned to represent. This was precisely the problem in *Erdemovic*. As noted, the Appeals Chamber granted Erdemovic the opportunity to plead anew given the court’s finding that his guilty plea was not informed.¹⁴⁸ In reaching this conclusion, the court focused much of its attention on Erdemovic’s counsel, observing that the defense attorney neither understood the concept of a guilty plea nor comprehended the nature of the charges against his client. Citing to portions of the defendant’s initial appearance,¹⁴⁹ sentencing,¹⁵⁰ and appellate hearing transcripts,¹⁵¹ the court

144. D’Amato, *supra* note 125, at 465.

145. Michael G. Karnavas, *The International Criminal Tribunal*, THE CHAMPION, Dec. 1996, <http://www.criminaljustice.org/CHAMPION/ARTICLES/96dec01.htm>. Karnavas is a former public defender at the state and federal level, and, for a brief period, represented a defendant before the ICTR.

146. Wald, *supra* note 122, at 104:

Understandably, the bulk of defense counsel are Balkan-trained lawyers and are typically not experienced at cross-examination. Some are quick learners, but others are painfully awkward and unfocused on just what they are trying to accomplish. They sometimes argue with or even criticize the witnesses. They also go off on tangents that are not always relevant to the case. The Tribunal is now operating training courses for appointed lawyers, but, candidly, it is not easy to acculturate lawyers in a wholly new legal system in a few days of lectures or even simulated exercises. As an American judge, I frankly find many ICTY defense cross-examinations painfully unhelpful to my own judgement.

147. Karnavas, *supra* note 145; see also Michael G. Karnavas, *Rwanda’s Quest for Justice: National and International Efforts and Challenges*, THE CHAMPION, May 1997, <http://www.nacd.org/CHAMPION/ARTICLES/97may01.htm>.

148. See Prosecutor v. Erdemovic, Appeals Chamber Judgment, Case No. IT-96-22-A, *supra* note 36, § 4 (Disposition), paras. 3, 5.

149. See Prosecutor v. Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, *supra* note 39, para. 17.

150. Citing to Erdemovic’s sentencing hearing, the court made the following observations:

found that Erdemovic's plea was infirm given his counsel's miscomprehensions, as well as the failure on the part of the Trial Chamber and defense counsel to "adequately explain[] to him" the nature of the charges.¹⁵² Patricia M. Wald, former ICTY judge and U.S. Appeals Court

Moreover, it appears to us that defence counsel consistently advanced arguments contradicting the admission of guilt and criminal responsibility implicit in a guilty plea. If the defence had truly understood the nature of a guilty plea, it would not have persisted in its arguments which were obviously at odds with such a plea. In his closing submissions during the Sentencing Hearing, defence counsel urged that the uncorroborated evidence of the Appellant alone was insufficient to ground a conviction. He argued:

Erdemovic's plea of guilty and the explanation given by his counsel must be confirmed so that a Court can reach an objective and legally acceptable judgement beyond any doubt. My intention was not to challenge Erdemovic's plea on his behalf. However, according to the principle *in dubio prop reo*, certain questions arose yesterday [I]f there is any shade of doubt in that answer to that question, then the decision of the Court should go in favour of the accused Erdemovic, because regardless of his plea of guilty, if his statement is not corroborated, the alleged crime cannot be proved and the criminal responsibility cannot be established.

From his foregoing statement, defence counsel did not seem to appreciate that a guilty plea had finally decided the issue of conviction or acquittal. Defence counsel was apparently advancing arguments asserting insufficiency of evidence to convict the Appellant and urging for an acquittal during a sentencing hearing after the Appellant had pleaded guilty. Indeed, the Trial Chamber did nothing to dissuade defence counsel from this course of action since it merely said that if the Appellant were to plead guilty, "the trial will continue, but completely differently," and that he would have the opportunity to explain attenuating circumstances. This intricate issue as to whether the defence asserted arguments contradicting a guilty plea is dealt with further when we come to consider the question as to whether the Appellant's plea was equivocal or not. However, it is clear to us thus far that the Appellant did not understand the true nature and consequences of making a guilty plea.

Id. para. 16.

151. Citing the transcript before the Appeals Chambers, the court noted: There is no indication that the Appellant understood the nature of the charges. Indeed, there is every indication that the Appellant had no idea what a war crime or a crime against humanity was in terms of the legal requirements of either of these two offences. Our conclusion is supported by what seems to have been some misapprehension on the part of defence counsel himself as to the nature of the charges. When questioned by the President of the International Tribunal during the hearing of 26 May 1997 as to the elements of a war crime, the following exchange took place:

MR. BABIC: We did not have the option of war crime, because the elements—all the elements of the criminal offence of the war crime were not present. So we discussed that.

PRESIDENT CASSESE: Sorry. May I ask you—I did not understand you correctly. You said that some elements of war crimes were not present. Which elements of war crimes were not present?

MR. BABIC: Yes.

PRESIDENT CASSESE: Which ones?

MR. BABIC: The presence of the civilian population is not an element of the war crime; it is an element of the crime against humanity.

PRESIDENT CASSESE: Do you mean to say that in an armed conflict, whatever its classification, whether it is classified as internal or international, the killing of civilians may not be regarded as a war crime? I mean, if you go through the case law of—

MR. BABIC: During combat operations, yes, during combat operations.

PRESIDENT CASSESE: All right. Thank you.

Defence counsel's statements would indicate a lack of understanding of the offence of a war crime. We, therefore, hold that the Appellant did not understand the nature of the charges he was facing nor the charge to which he pleaded guilty.

Id. para. 18.

152. *Id.*

judge for the District of Columbia, echoed this general sentiment, asserting a view sympathetic to that ultimately expressed in *Erdemovic*. Within a wider contextual discussion of the ICTY and the political tensions in the Balkans, Judge Wald noted that the defendants who appear before the Tribunal frequently “do not really understand” the legal arguments they observe and, as a result, “they resort to ‘firing’ their counsel in open court, giving the counsel counterproductive instructions, or insisting on telling their stories at strategically inopportune times.”¹⁵³ After recognizing that a knowledgeable defense attorney “is the *sine qua non* of a fair trial,” Judge Wald noted that many Hague observers insist that incompetence underlies many of the problems commonly associated with defense counsel representation.¹⁵⁴

Without question, the extent of attorney readiness and competence largely dictates a defendant’s comprehension level. Too often characterized by an inadequate understanding of international humanitarian law, relative inexperience with international criminal litigation, and a lack of familiarity with the Tribunal’s trial and dispute-resolution procedures, it is difficult to accept the proposition that an attorney, when presented with a proffered plea disposition, should be presumed to have rendered sound information and advice to his client with respect to the various ramifications associated with the plea. Rather, logic declares that an attorney, who is unlearned in the complexities of the law and uncertain of the processes of the court, is unlikely to explain thoroughly, accurately, and effectively to his client the array of consequences attendant to a proposed plea disposition, let alone the merits and demerits of such an option.

IV. RECOMMENDATIONS

The function of the ICTY is not to ensure that defendants pursue the most advantageous strategy. Rather, it is the Chamber’s obligation to ensure that its adjudicative processes satisfy due process expectations. Within the context of Rule 62 *bis*, therefore, it is incumbent upon the ICTY to make certain that the defendant who enters a guilty plea is sufficiently informed of the attendant consequences and is not motivated by undue influences. As this Article details, the problems associated with the guilty plea hearing process at The Hague are rooted in the indefiniteness of Rule 62 *bis*. Accordingly, any serious reform of the Rule 62 *bis* process must seek to harmonize inconsistent judicial approaches by providing substantive guidelines for the Trial Chamber to follow whenever a guilty plea is tendered. The guidelines delineated in *Erdemovic* and, more particularly, Rule 11 of the U.S. Federal Rules of Criminal Procedure provide a useful starting point—useful because the detailed criteria listed therein comprise the informational and volitional components essential to a valid guilty plea. Rule 11’s exhaustive delineation of assessment criteria measuring the full range of factors underlying a defendant’s plea decision—his comprehension level of the various

153. Wald, *supra* note 122, at 106.

154. *See id.* at 102 (noting that “some commentators say there are even more profound problems with defense counsel, involving issues of competence, integrity and accessibility to the evidence and witnesses they need in order to play on a level field with the prosecution.”).

constitutional (trial) rights forfeited, the sentencing ramifications, and the pertinent charges; the voluntary nature of his plea decision, including whether his decision was unduly motivated by force, threats, or external promises; and the existence of a supportive factual basis—encapsulates the guiding principles necessary to gauge accurately the comprehension and volitional state of a defendant contemplating a change of plea. Although the United States and the ICTY share common problems with respect to guilty plea procedure,¹⁵⁵ Rule 11 nevertheless provides an excellent framework with which to assess the validity of a defendant's guilty plea.

First, Rule 62 *bis* should be amended to require explicitly that the Chamber ensures during the change of plea process that the defendant is informed of, and adequately understands, the various rights and consequences associated with a plea of guilty. Specifically, the Chamber must make certain that the defendant knows of the various trial rights that he is forfeiting, of the Chamber's authority to ignore any sentencing recommendations and impose a life sentence, of the elements of the offense(s) to which he is pleading guilty, and of the factual basis in support of those charges. The court should also ensure that the defendant is entering his guilty plea voluntarily, and that the plea change is not unduly influenced by threats or inducements.¹⁵⁶ Although it is unnecessary for the Chamber to inform the defendant of each of these components specifically, it is essential that the defendant be examined with respect to these factors and that the Tribunal satisfy itself regarding the defendant's awareness and familiarity with the process.

In addition, and of equal significance, the Chamber must require that defendants personally detail their knowledge and awareness of each of these items, beyond the monosyllabic responses that too often characterize current Rule 62 *bis* practice. To better ensure the protection of defendants' due process interests, the Tribunal must, in turn, require that the defendants demonstrate on the record awareness of the items detailed in the amended rule. When conducting this inquiry, the Chamber must be instructed to prohibit or, at a minimum, greatly limit the employment of leading and compound questions.¹⁵⁷ As detailed earlier in this Article, the monosyllabic responses that invariably follow such questions are of limited probative value given the context in which the questions are posed. Demanding a more robust explanation from defendants regarding their understanding of the plea agreement and related voluntariness issues will avoid judicial recitation of the

155. See *supra* notes 93-115 and accompanying text.

156. Each of these rights and consequences should be included within the statutory text. Thus, the amended rule should require that the court examine the defendant with respect to the following: the defendant's right to be presumed innocent and to have his guilt proven beyond a reasonable doubt; his right to call witnesses on his behalf; his right to examine the witnesses against him; his right to be tried without undue delay; and his right not to be compelled to be a witness against himself. In addition, the court should ensure that the defendant is aware of and understands the maximum imprisonment term (life); the elements of offense(s) to which he is pleading guilty; and the facts in support of the plea. Finally, the court must be satisfied that the plea was entered into voluntarily and was not the product of undue threats or inducements.

157. Consistent with this suggestion, the Chamber must refrain from providing elaborate plea agreement summaries and factual descriptions. Rather, the court should examine the defendant regarding such matters and require that the defendant sufficiently demonstrate comprehension of the agreement, concurrence with the factual basis, and the voluntary nature of the decision to plead guilty.

agreement and enhance the ability of judges to ascertain a defendant's mental and volitional state. Admittedly, the adoption of such an approach will likely elongate the Rule 62 *bis* process. However, considerations of fairness and due process demand such a practice, especially given language barriers and the unfamiliarity of defendants and many defense attorneys with the ICTY's trial and plea bargaining processes.¹⁵⁸

Finally, the ICTY must fortify its standards for the assignment of defense counsel. In an apparent response to the identified ills associated with indigent representation at The Hague, the ICTY recently enacted more stringent representational standards, including a requirement that defense counsel possess a minimum of seven years of relevant criminal litigative experience and "a demonstrated competence in criminal law and/or international criminal law/international humanitarian law/international human rights law."¹⁵⁹ Although an improvement upon the more generous standards that had been in place since the Tribunal's inception, the revised standards nevertheless constitute an ineffective response to the ongoing issue of inadequate representation. Given the complexity of international litigation, at least some international criminal litigation experience or otherwise demonstrated competence in the field must become a prerequisite to practice before the Tribunal. It should also be required that counsel have a demonstrated knowledge of adversarial-style plea bargaining, including the negotiation practices and procedures routinely employed at The Hague. By mandating such relevant experience and familiarity, the Tribunal would ensure that defendants benefit from counsel capable of vigorously and effectively representing their interests at trial, of adequately assessing the strengths and weaknesses associated with a trial strategy, and of ascertaining and communicating the advantages, disadvantages, and consequences associated with the pursuit of a proffered plea disposition.

If implemented, the suggested reforms will bring greater clarity, consistency, and substance to a deeply flawed and infirm Rule 62 *bis* process. As evidenced by the enactment of Rule 62 *bis* after the Appeals Chamber's decision in *Erdemovic*, the ICTY has the demonstrated capability to adapt new rules swiftly to accommodate perceived structural demands. With the clock ticking away, however, and the close of the Tribunal's business just a few years away, the ICTY must implement the necessary reforms before the lights are turned out at the Tribunal—and on the defendants—in or around 2008.

V. CONCLUSION

The horrific atrocities of the Balkan wars bordered on the unthinkable. Widespread killings, displacements, sexual assaults, and physical destruction characterized a series of conflicts that defy both logic and basic human respect. With loved ones killed and families forever destroyed, the ethnic tensions that predated the Balkan conflicts are likely to persist. Each

158. Moreover, any increase in time is small in comparison to the time that would have been expended had the case been litigated.

159. See Directive on Assignment of Defence Counsel, *supra* note 120, art. 14.

defendant convicted at the Tribunal represents a sad element of this most unfortunate human tragedy.

Although few predictions can be made with certainty, it can safely be assumed that the case of *Prosecutor v. Milosevic* will not culminate in a plea bargain. Yet for those defendants whose dispositions are finalized in such fashion, it remains the duty—and, indeed, the calling—of a judicial body to ensure that justice is rendered. Part of that duty involves the adoption of procedures ensuring that every defendant—the innocent and the guilty alike—has his or her case decided fairly and impartially. Anything less would necessarily impair the integrity of an entity holding itself out as a court of justice.

Indeed, the ramifications attendant to such practices are likely to extend far beyond the walls of the ICTY. The ICTR, the Special Court for Sierra Leone (SCSL), the Ad-Hoc Human Rights Court for East Timor, and the recently created International Criminal Court (ICC) all make specific allowances for plea bargaining. It is expected that the Iraqi Special Tribunal will also employ this method of dispute resolution.¹⁶⁰ Like Rule 62 *bis*, each of the guilty plea statutes adopted by these tribunals only skeletally delineates the factors relevant to the determination of a validly entered guilty plea. A representative example is Article 65.1 of the Rome Statute of the ICC, which rather generally provides:

Where the accused makes an admission of guilt pursuant to article 64, paragraph 8:

1. The Trial Chamber shall determine whether:
 - (a) The accused understands the nature and consequences of the admission of guilt;
 - (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
 - (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.¹⁶¹

The Court for East Timor, the ICTR, and the SCSL all have statutory language that mirrors that of either Article 65.1 or Rule 62 *bis*. Like the ICTY rule, both the ICTR and SCSL statutes simply require that a court, prior to

160. See Scharf, *supra* note 20, at 1071; *Iraq Will Find Catharsis in the Trial of Saddam*, DAILY TELEGRAPH, July 2, 2004, available at 2004 WL 82003672 (noting that the prosecutors at the Iraqi Tribunal are “hoping that plea bargaining will induce some of [Saddam Hussein’s] henchmen . . . to turn against him.”).

161. Rome Statute of the International Criminal Court, July 17, 1998, art. 65.1, U.N. Doc. 32/A/CONF. 183/9, reprinted in 37 I.L.M. 999, 1039 (1998).

accepting a guilty plea, satisfy itself that the plea was entered “freely and voluntarily,” that the plea is informed and unequivocal, and that there is a supporting factual basis.¹⁶² Like Article 65.1, the Court for East Timor merely requires a judicial determination that the accused comprehends the “nature and consequences of the admission of guilt,” that the guilty plea is entered voluntarily, and that there is a supporting factual basis.¹⁶³

Given this uniform vagueness of statutory definition, each of these international criminal tribunals is vulnerable to the same type of widespread plea hearing irregularities that currently plague the ICTY. In fact, this likelihood is enormously enhanced given the plethora of ICTY precedents. Questions regarding the legitimacy of defendant challenges to guilty pleas will forever be assessed against the backdrop of a wealth of Tribunal Chamber practices that have been inconsistent in application, substantively incomplete, and reflective of an institutional preference for facial appearances of propriety over individual due process.

Since *Erdemovic* and the enactment of Rule 62 *bis*, and with the business of the ICTY coming to a close in 2008, reform of the Tribunal’s

162. The ICTR guilty plea statute provides:
- (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.
- ICTR R. P. & EVID. 62. The SCSL guilty plea statute provides:
- (A) If an accused pleads guilty in accordance with Rule 61(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;
 - iv. is based on sufficient facts for the crime and accused’s participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.
- SCSL R. P. & EVID. 62.
163. The East Timor guilty plea statute reads, in pertinent part:
Where the accused makes an admission of guilt in any proceedings before the Investigating Judge, or before a different judge or panel at any time before a final decision in the case, the court or judge before whom the admission is made shall determine whether:
- (a) The accused understands the nature and consequences of the admission of guilt;
 - (b) The admission is voluntarily made by the accused after sufficient consultation with defense counsel; and
 - (c) The admission of guilt is supported by the facts of the case that are contained in:
 1. The charges as alleged in the indictment and admitted by the accused;
 2. Any materials presented by the prosecutor which support the indictment and which the accused accepts; and
 3. Any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.

Section 29A.1 of the UNTAET Regulation 2000/30 on the Transitional Rules of Criminal Procedure, available at <http://www.un.org/peace/etimor/untaetR/reg200030.pdf>.

patently flawed guilty plea hearing practices seems to have become an interest subsidiary to other institutional concerns. Yet with the ICC and the larger world community looking on, it is essential that the ICTY reverse this course and adopt plea procedures that are fair not only in appearance but also in fact. With the credibility of the ICTY already in tatters among segments of the Balkan population,¹⁶⁴ the Tribunal must not continue to employ plea procedures that may further damage its already frayed reputation, tarnish its standing in the larger world, and serve as an unfortunate precedent for future international criminal courts. By amending Rule 62 *bis* in the manner suggested, the ICTY can take a meaningful step toward refashioning a guilty plea procedure very much in need of reform. Fair processes benefit everybody: the innocent, the guilty, and the observing public. Hopefully, in the near future, the world will witness a perceptible ICTY effort to put fairness of procedure ahead of a rush to convict.

164. See Wald, *supra* note 122, at 106.