International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before :
Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar :
Mr Agwu U. OKALI

of : ctober 2000

Jean KAMBANDA
(Appelant)
v
THE PROSECUTOR
(Respondent)

Case No. ICTR 97-23-A

JUDGEMENT

Counsel for Jean KAMBANDA:
Mr Tjarda van der SPOEL
Mr Gerard PMF MOLS

Counsel for the Prosecutor :
Ms Carla DEL PONTE
Mr Solomon LOH
Mr Norman FARRELL
Mr Morris ANYAH
Mr Mathias MARCUSSEN

I. INTRODUCTION

A. Procedural Background

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of an appeal lodged by Mr. Jean KAMBANDA ("the Appellant") against the Judgement and Sentence pronounced in his case by Trial Chamber I of the Tribunal ("the Trial Chamber") on 4 September 1998 ("the Judgement").[1] The principal steps in the procedure thus far are outlined below.

2. On 1 May 1998 the Appellant pleaded guilty to the six counts contained in the indictment against him, namely, genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder) and crimes against humanity (extermination). This plea was accepted by the Trial Chamber. A pre-sentencing hearing was held on 3 September 1998 and the Judgement pronounced the following day. The Appellant was sentenced to life imprisonment.

3. On 7 September 1998 the Appellant filed a notice of appeal against sentence[2] containing four grounds of appeal. Upon receipt of the certified record of appeal he filed a supplementary notice of appeal seeking to add one ground.[3] Following a change of counsel, a second supplementary notice of appeal was filed, seeking to add three new grounds of appeal, which were not directed at the sentence but rather challenged the validity of his guilty plea.[4] This document states that the "Appellant now not only seeks revision of the entire sentence but (primarily) asks the Appeal Chamber to quash the guilty verdict and order a new trial".[5]

4. By Decision of 8 December 1999, the Appeals Chamber granted the Appellant leave to add to his notice of appeal the four supplementary grounds filed, and ordered him to file one consolidated notice of appeal listing all eight grounds together. This was duly filed on 8 February 2000, but included on its face a request for leave to add a further sub-ground of appeal. This request was granted by decision of 18 May 2000. The consolidated notice of appeal, including the additional sub-ground, henceforth referred to as the Consolidated Notice of Appeal.

5. On 7 March 2000 the President of the Appeals Chamber designated Judge Rafael Nieto-Navia as pre-hearing Judge in this matter, pursuant to Rule 108 *bis* of the Rules of Procedure and Evidence of the Tribunal ("the Rules"). Judge Nieto-Navia thereafter dealt with all procedural issues.

6. On 30 March 2000 the Appellant filed his brief in support of the Consolidated Notice of Appeal ("the Appellant's Brief"), along with a motion for admission of new

evidence ("the Motion for admission of new evidence").[6] The Motion for admission of new evidence sought to admit a number of documents relating to the three most recently-added grounds of appeal, those seeking to quash the guilty verdict, and to call seven witnesses before the Appeals Chamber. Following a number of submissions by the parties on this question, the Appeals Chamber decided to allow the Appellant to testify on the question of whether his guilty plea was voluntary, informed, unequivocal and based on sufficient facts for the crime and the accused's participation in it, but to dismiss the Motion for admission of new evidence in all other respects.[7]

7. The Prosecutor's brief in response was filed on 2 May 2000 ("the Prosecutor's Response")[8], and the Appellant's brief in reply on 16 May 2000 ("the Appellant's Reply")[9]. The hearing was scheduled to take place in Arusha from 27 to 30 June 2000.[10] On 25 June 2000, the Prosecutor filed a Motion for an order for information from the Registrar of the International Criminal Tribunal for the Former Yugoslavia ("the ICTY")[11], which was withdrawn during the hearing on 28 June 2000. After the close of filing hours on 26 June, the day before the hearing, the Prosecutor filed "The Prosecutor's Supplemental Respondent's Brief" running to several hundred pages with annexes. The Appeals Chamber has not made use of this supplementary material in its judgement.

8. The hearing took place from 27 to 28 June 2000 ("the Hearing"). After settling the duration of the hearing in consultation with the parties, the Chamber ruled that, in view of its decision on the Motion for admission of new evidence, only Kambanda's testimony relating to whether his guilty plea was voluntary, informed, unequivocal and based on factual elements likely to establish the crime would be permitted.[12]

9. The Judgement of the Appeals Chamber is hereby delivered.

B. The Notice of Appeal

10. The Consolidated Notice of Appeal lists the following "errors of law" committed by the Trial Chamber as grounds of appeal:

(1) failure to consider the denial of the right to be defended by a counsel of one's own choice;

(2) failure to consider the Appellant's unlawful detention outside the Detention Unit of the Tribunal;

(3) acceptance of the validity of the plea-agreement without a thorough investigation of whether the plea was voluntary and/or informed and/or unequivocal; and failure to satisfy itself that the guilty plea was based on sufficient facts for the crime and the 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;

(4) failure to apply the general principle of law that a plea of guilty as a mitigating factor carries with it a discount in sentence;

(5) failure to consider Article 23(1) and (2) of the Statute of the Tribunal and Rule 101(B) (ii) and (iii) of the Rules which require that mitigating circumstances, personal circumstances of the convict, the substantial co-operation of the convict with the Prosecutor and the general practice regarding prison sentence in the courts of Rwanda be taken into account in the determination of the sentence;

(6) failure to pronounce and impose a separate sentence for each count in the indictment, each count being a separate charge of an offence;

(7) the sentence is excessive;

(8) considering the non-explanation of the convict when asked whether he had anything to say before sentence as militating against any discount.

The Appellant also characterised ground (8) as an error of fact.

11. The Appellant's Brief asks the Appeals Chamber to quash the guilty verdict and order a new trial on the basis of grounds (1) to (3). Failing that, the Chamber is asked to revise the sentence on the basis of grounds (4) to (8).

II. FIRST GROUND OF APPEAL: THE RIGHT TO COUNSEL OF ONE'S OWN CHOOSING

A. Arguments of the Parties

12. The Appellant argues that the Trial Chamber erred in law by not taking into consideration the denial of Jean Kambanda's right to legal assistance of his own choosing. The Appellant alleges that on several occasions he requested that Mr. Scheers be assigned to represent him, requests which were turned down by the Registry, which instead assigned Mr. Inglis. In the Appellant's view, this refusal, which should have attracted sanctions by the Trial Chamber, violated his right to legal assistance by counsel of his own choosing and thereby constituted a violation of his right to a fair trial[13].

13. The Prosecutor considers that the Appellant waived his right to raise this issue before the Appeals Chamber, firstly because he explicitly accepted the Registry's assignment of Mr. Inglis to represent him and secondly because he did not state his objection to the choice of counsel before the Trial Chamber. Alternatively, the Prosecutor argues that an indigent accused does not in all cases have the right to counsel of his or her own choosing[14].

14. According to the Appellant, the waiver principle and the rule for legal assistance by counsel must be examined in the light of two circumstances peculiar to the instant case: firstly, the Appellant had in his view no real opportunity to raise his complaint before the Trial Chamber and, secondly, he did not receive adequate and effective legal assistance[15].

B. Discussion

15. The Appeals Chamber begin by recalling the factual and procedural context of Mr. Inglis' assignment to defend the Appellant.

16. Between 18 July 1997, the date of his arrest, and March 1998, the Appellant did not wish to be represented by counsel, reserving his right to such assistance until he expressly said that he felt it necessary[16]. On 11 August 1997, in a letter to the Registry, he declared that he wished to waive his right to be represented by counsel, which waiver he confirmed verbally during the Trial Chamber hearings on 14 August[17] and 16 September 1997[18]. On 18 October 1997, the Appellant submitted a document entitled "*Renonciation temporaire au droit à l'assistance d'un conseil de la défense*" (Temporary Waiver of My Right to Defence Counsel), in which he once again confirmed his waiver in writing[19].

17. On 5 March 1998, three letters were exchanged between the Registry and the Appellant. The Registry first of all proposed to the Appellant that it should appoint counsel to defend his interests[20]. The Appellant immediately replied that he wished to be represented by Mr. Scheers[21]. This request was instantly refused by the Registry in view of the disciplinary sanctions imposed on Mr. Scheers by the Tribunal's Trial Chamber I during 1996[22].

18. After a fresh exchange of letters between the Appellant and the Registry in which clarified and reaffirmed their positions, the Registry received a letter dated 20 March 1998 from the Appellant which stated that:

> Having learnt that Mr. Johan SCHEERS, by whom I had expressed my intention of being defended, has not been taken back onto the list of Counsel accredited to the Tribunal and taking into account the *curriculum vitae* of Mr. Oliver Michael INGLIS which has been sent to me, after studying it I have no objections to his representing me.[23]

19. On 25 March 1998, following a request by the Registry for him to state his position in a more positive manner, the Appellant sent the Registry a letter confirming his wish to receive legal assistance from Mr. Oliver Michael Inglis[24].

20. On 27 March 1998, Mr. Inglis was accordingly assigned as counsel for the Appellant. The hearings on the merits of the case took place on 1 May 1998[25] and on 3 and 4 September 1998[26]. Four months elapsed between the two sets of hearings. On 11 September 1998, a week after Trial Chamber I had pronounced sentence and four days after Notice of Appeal against that sentence had been filed, the Appellant applied to have Mr. Inglis replaced.

21. In his statement to the Appeals Chamber, the Appellant explained that he had accepted Mr. Inglis as defence counsel solely because he had hoped to be defended by Mr. Scheers as co-counsel to Mr. Inglis and that, having realized that his wish to be defended by Mr. Scheers was not to be fulfilled, he had finally accepted Mr. Inglis as defence counsel[27].

22. The Appeals Chamber points out that the Appellant never raised the question of his choice of counsel before the Trial Chamber although he had the opportunity to do so on several occasions. Indeed, after the Plea Agreement had been signed on 29 April 1998 the Appellant appeared before the Trial Chamber on three occasions: firstly on 1 May 1998; secondly on 3 September 1998, four months later; and thirdly on 4 September 1998. At those three hearings on no occasion did the Appellant express dissatisfaction in respect of the counsel assigned to him[28]. Furthermore, he did the President of the Trial Chamber asked him if he was being assisted by counsel[29].

23. According to the Appellant, the Trial Chamber was perfectly aware of his situation inasmuch as it had in its possession two letters, dated 17 March 1998 and 6 April 1998, from Mr. Scheers to the President of the Tribunal[30]. Although no legal argument is given, the Appellant writes that the Trial Chamber should have raised the issue of counsel and therefore condemns alleged laxity on the part of the Judges[31]. The Appeals Chamber cannot accept that argument in that it calls into question the Trial Chamber's exercise of its discretion. Indeed, the Appeals Chamber of the ICTY recalled that discretion in the *Aleksovski* case:

> In the absence of any issue being raised by the Appellant, the Trial Chamber was not required to make further enquiries of the Respondent[32].

The responsibility for drawing the Trial Chamber's attention to what he considered to be a breach of the Tribunal's Statute and Rules lies with the Appellant, and the Trial Chamber must have the matter put before it, directly and in due form, in accordance with the appropriate procedure[33].

24. prescribed by Article 12 of the Directive on the Assignment of Defence Counsel[34].

25. The fact that the Appellant made no objection before the Trial Chamber to the Registry's decision means that, in the absence of special circumstances, he has waived his right to adduce the issue as a valid ground of appeal.[35] In the instant case, the Appeals Chamber adopts the conclusions of the ICTY Appeals Chamber in the *Tadić* case:

> The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo* […][36].

26. Similarly, in the *Kovačević* case, the ICTY Appeals Chamber responded to the question of whether the Prosecution had sought during the proceedings before the Trial Chamber to obtain an improper tactical advantage by ruling that

> In its Decision, the Trial Chamber did not mention any complaint by the accused that the prosecution was seeking a tactical advantage, and did not found its holding on that point. In the circumstances, this Chamber would not give effect to the allegation of the defence that an improper advantage was being sought by the prosecution[37].

27. The Appeals Chamber agrees with the position of the Human Rights Committee, established under the International Covenant on Civil and Political Rights, which in one of its findings affirms that

> [a Party] would not [be] allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial[38].

28. In the instant case, the Appellant considers that the waiver principle must be interpreted in the light of a special circumstance: his Counsel's incompetence[39]. The Appeals Chamber emphasizes firstly that in the Appellant's briefs and oral statements the problem of his counsel's inadequacy never figured as an argument, let alone an independent ground of appeal. The Appellant's allegations on this point are at the very least confused. It is true that in his statement the Appellant did cite, for example, the insufficient number of meetings with his counsel and the latter's lack of interest in and knowledge of the case file[40]. The Appeals Chamber nevertheless finds that the Appellant has not succeeded in showing his Counsel to be incompetent on the basis of solid arguments and relevant facts. Rather, the Chamber has before it documents proving that counsel for the Appellant carried out the functions of his office in the normal manner[41]. The Appeals Chamber therefore cannot accept the Appellant's allegations and concludes that he has not been able to demonstrate the existence of special circumstances capable of constituting an exception to the waiver principle.

29. Consequently, in the absence of any convincing explanation, the Appeals Chamber dismisses the first ground of appeal.

30. In any event, assuming that the Appeals Chamber had found this ground of appeal admissible, it is clear from the Appellant's case file that he enjoyed all his rights in respect of his defence.

31. Firstly, he was represented free of charge by assigned counsel when the Registry of the Tribunal assigned Mr. Inglis to represent him on 27 March 1998. On this point, the Appeals Chamber wishes to draw a distinction between two issues which the Appellant has indistinctly raised, to wit, the issue of indigence and the issue of the right to choose one's counsel.

32. With respect to the issue of indigence, during the 27 June 2000 hearing, the Appellant revealed to the Appeals Chamber that he was capable of bearing the financial burden of choosing Mr. Scheers[42], and recalled that the question of whether he lacked means had never really been asked[43]. At this stage, the Appeals Chamber can derive no conclusions from this revelation. The Appeals Chamber accepts that it evidently appeared much too late, and that the question of the Appellant's lack of means could have been raised, well prior to the hearings on appeal, before the Trial Chamber.

33. With respect to the right to choose one's counsel, the Appellant argues that he ought to have had the right to choose his counsel and that the violation of this right was a violation of his right to a fair trial[44]. The Appeals Chamber refers on this point to the reasoning of Trial Chamber I in the *Ntakirutimana* case[45] and concludes, in the light of

a textual and systematic interpretation of the provisions of the Statute and the Rules[46], read in conjunction with relevant decisions from the Human Rights Committee[47] and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[48] that the right to free legal assistance by counsel does not confer the right to choose one's counsel.

34. Lastly, the Appellant received effective representation.[49] As the Appeals Chamber has previously stated, incompetence on the part of counsel for the Appellant has not been substantiated.

III. SECOND GROUND OF APPEAL: UNLAWFUL DETENTION

A. Arguments of the Parties

35. with the Prosecutor[50], the Appellant was detained mainly in places other than the Tribunal Detention Unit. The parties agree that following his arrest on 18 July 1997 and his transfer to Arusha, the Appellant was initially held in a "very luxurious villa" for a period of approximately three weeks.[51] From 3 to 27 August 1997 he was detained in the Tribunal Detention Unit.[52] On 27 August 1997, the Appellant was transferred to the town of Dodoma, where he stayed (changing residences at least once) until 1 May 1998.[53] He was then transferred to the ICTY Detention Unit in The Hague.

36. The Appellant submits that the detention in Tanzania outside the Tribunal Detention Unit was unlawful. He argues that the Rules provide for detention in the Tribunal Detention Unit, and that this can only be varied by court order. Upon examination of the orders that have been made for his detention, all of which order his detention in the "detention facility of the Tribunal", he observes that no variation from the Rules was authorised and that his detention outside this facility was therefore unlawful.[54]

37. The Appellant further contends that his detention violated international human rights law, as the relevant places of detention were "unofficial". He cites a report of Amnesty International in support of his contention that according to international standards, detainees must be held in recognised places of detention.[55] The report states that this is "a most basic safeguard against arbitrary detention, 'disappearance', ill-treatment and being compelled to confess." The Appellant considers that this standard was not observed in his case. He concludes that his detention outside the Tribunal Detention Unit violated the Rules of the Tribunal and international human rights law, and that this renders inadmissible his statement and plea agreement.[56]

38. In the Prosecutor's Response, the Prosecutor claims that the Appellant has waived his right to argue this issue on appeal by failing to raise it before the Trial Chamber. She adds that the ground is not supported by facts currently in the record on appeal. Should these two objections fail, she submits that the ground is unfounded in substance. The Prosecutor asserts that the Rules and decisions of the Tribunal do not order detainees to be kept only in the Tribunal Detention Unit, and she further disputes the Appellant's

claim that there is a general international law principle whereby detainees should be held only in officially recognised places of detention.[57] Lastly she submits that the Appellant has failed to show that any prejudice has resulted from his place of detention.[58]

39. The Appellant replies in his written submissions that the waiver principle should not apply as he could not have been expected to be aware of his rights with respect to his place of detention, particularly since he was largely without legal assistance.[59] Under cross-examination at the Hearing, he introduced the argument that his place of detention contributed to an oppressive atmosphere which compelled him to sign the plea agreement.[60]

B. Discussion

40. The Appellant's argument that he was compelled to sign the plea agreement goes to the issue of whether the guilty plea was voluntary, which is disputed by the third ground of appeal, rather than whether his detention was unlawful *per se*, and is therefore addressed in the following section of this Judgement. Indeed, in view of the Chamber's oral ruling on the scope of the oral testimony to be given by the Appellant,[61] it is only in the context of the third ground of appeal that this testimony could be admitted by the Chamber.

41. The Appeals Chamber has set out above the consequences which attend a failure to raise an issue before the Trial Chamber. As a matter of principle, where a party has failed to bring an issue to the attention of the court of first instance it is debarred from raising it on appeal. Exceptions to this rule will only be made where the particular circumstances of the case demand, for example because the matter could not realistically have been raised earlier. It is for the moving party to convince the court that such exceptional circumstances exist.

42. The Appellant appeared five times before the Tribunal in total: on 14 August 1997, 16 September 1997, 1 May 1998, 3 September 1998 and 4 September 1998. He pleaded guilty at the initial appearance on 1 May 1998. At no stage did he raise any objections to his place or conditions of detention.

43. The Appellant accepts the general principle of waiver outlined above. He argues in his written submissions that an exception should be made in this appeal because he was not aware of his rights during the proceedings at first instance, and could not therefore have been expected to complain of their violation. His lack of awareness is attributed to his being without counsel of his choice, and "in an isolated place of detention". [62]

44. When questioned during the Hearing on his failure to raise his concerns with regard to his conditions of detention, the Appellant put forward a different explanation, linking his failure to speak out with the allegedly oppressive situation in which he found himself. However, as the Prosecutor points out, on 1 May 1998 the Appellant knew he

was to leave Dodoma, in fact he was already on his way to The Hague. Although knowing that he had left Dodoma and that the situation in consequence had changed, the Appellant still failed to raise the issue with the Trial Chamber on 1 May. When asked why he did not raise the issue, the Appellant replied as follows:

> I knew that I was going to be transferred but it had not been effected, I didn't have the freedom to say what I thought otherwise I would have done it even in September because even in September I didn't do so if you recall.[63]

45. The Appeals Chamber is thus presented with two contradictory arguments. Either the Appellant was unaware of his rights and so did not raise the alleged violation of the same with the Trial Chamber, or he was aware of them but did not have "the freedom to say what [he] thought" because of his oppressive situation.

46. Both arguments must fail. The first argument amounts to the claim that the Appellant made no objection to the legality of his detention before the Trial Chamber because he lacked his chosen counsel. The Appellant was assisted by counsel, whose assignment he had accepted, from 27 March 1998. As has been established above in relation to the first ground of appeal, the Appeals Chamber considers that this assignment of counsel to the Appellant satisfied his right to legal assistance under Article 20 of the Statute and international human rights law. The Appellant cannot therefore rely upon inadequacy of legal assistance to explain his failure to raise concerns about the legality of his detention.

47. The second argument, which the Appeals Chamber prefers in the light of the Appellant's testimony, relies upon the oppression allegedly suffered by the Appellant throughout the period leading to his sentence. The Appeals Chamber takes seriously any allegation of pressure brought to bear upon persons accused before the Tribunal. However, the Appellant has not demonstrated that he suffered any such pressure. Vague suggestions of a lack of "freedom to say what I thought" are inadequate to substantiate a claim that the principle of waiver should not apply. In reaching this conclusion the Appeals Chamber is mindful of the education and professional experience of the Appellant, culminating in his position as Prime Minister of his country.

48. As the Appellant has failed to establish any reason for which he should exceptionally be allowed to raise the question of the legality of his detention for the first time on appeal, this ground of appeal is rejected.

IV. THIRD GROUND OF APPEAL: INVALIDITY OF THE GUILTY PLEA

A. Summary of the Issues

49. The issues raised by the Appellant as to the validity of the guilty plea can be divided into two parts. First, the Appellant asserts that the Trial Chamber committed an error of law in accepting the validity of the Plea Agreement, without investigating whether the plea was 1) voluntary, 2) informed and/or 3) unequivocal. Second, the Appellant asserts that the Trial Chamber committed an error of law in failing to ascertain

appropriately whether the guilty plea was based on sufficient facts for the crimes alleged and the accused's participation in them.[64]

50. The Appellant cites current Rule 62 of the Rules (Initial Appearance of Accused), which provides in paragraph (B), that if an accused pleads 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 independent indicia or of lack of any material disagreement between the parties about the facts of the case." Once the Trial Chamber is satisfied that these conditions are met, it may enter a finding of guilt.

51. The Prosecutor submits that these claims are untenable and that they imply that the Trial Chamber "abused its discretion" in accepting the guilty plea. It suggests that the Appellant misconstrues the appropriate standard of review because there is no abuse of discretion, and thus no error of law, as long as the Trial Chamber acts within the limits of its discretion. The Prosecutor submits that the Appellant failed to identify or describe any acts or decisions that amounted to an abuse of discretion, or to detail legal principles or standards supporting this position and identifying any resulting prejudice.[65]

52. Moreover, the Prosecutor asserts that in failing to raise these issues before the Trial Chamber, "the Appellant has waived any challenge to the validity of his guilty plea because he did not raise any objection, much less a timely one, to the Trial Chamber's acceptance of the guilty plea."[66] The Prosecutor recounts that the Appellant and his counsel entered a Plea Agreement with the Prosecutor on 29 April 1998, and when before the Trial Chamber on 1 May 1998, the Appellant acknowledged that he had signed the Plea Agreement, and further that four months later, at the pre-sentencing hearing on 3 September 1998, the Appellant again failed to challenge the validity of the guilty plea or the Plea Agreement. Consequently, "[f]or him to now allege an error on the Trial Chamber's part of (sic) when the Trial Chamber was never called upon to address this issue, explicates the propriety of applying the waiver principle to this ground of appeal."[67]

53. In his Reply, the Appellant asserts that the general rule of waiver is not applicable to his case and he refers the Appeals Chamber generally to the *Erdemović* case, stating simply that "the waiver principle was not an issue."[68]

54. The Appeals Chamber notes that waiver was not an issue in *Erdemović* because the Appeals Chamber determined that Appellant's counsel was not adequately informed and therefore he could not have informed properly his client.

55. The Appeals Chamber notes that the Appellant had several opportunities to raise any issues of fact on the basis of which he now alleges that his guilty plea was invalid, but failed to do so until after receiving a life sentence for the guilty plea. In the absence of a satisfactory explanation of his failure to raise the validity of the guilty plea in a timely manner before the Trial Chamber, the Appeals Chamber could find that the Appellant has waived his right to later assert that his guilty plea was invalid. However,

as this is the Chamber of last resort for the Appellant facing life imprisonment his plea, and as the issues raised in this case are of general importance to the work of the Tribunal, the Appeals Chamber deems it important to consider the question of the validity of the guilty plea.

B. Was the Guilty Plea Voluntary, Informed, and Unequivocal?

1. Was the Guilty Plea Voluntary?

a) Submissions of the Parties

56. As to whether the guilty plea was voluntary, the Appellant states: "Voluntariness involves two elements, firstly an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty. Secondly, the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction for sentence."[69]

57. The Appellant's sole argument that the plea was not voluntary is the following statement:

> As described in the facts and in Kambanda's statements, Kambanda was detained and questioned in an unofficial place of detention and during this detention signed the plea agreement while being deprived of chosen counsel. The consequences of this fact have been debated in chapter 4, appeal ground II.
>
> The situation of being deprived by chosen counsel and isolated in an unofficial place of detention means that Kambanda was forced by the circumstances to sign the plea agreement, in other words there was not a situation of "free will" in the sence (sic) that Kambanda could make his own choice.
>
> Seeing the above the Tribunal should have made more investigations.[70]

58. Under cross-examination at the Hearing, the Appellant stated that his place of detention contributed to an oppressive atmosphere that compelled him to sign the Plea Agreement[71] Thus he asserts that his guilty plea was not truly voluntary because he signed the Plea Agreement under conditions he found oppressive.

59. The Prosecutor submits that the three pre-conditions for accepting a guilty plea were articulated in *Erdemović*, in which it was held that such plea, to be valid, must be voluntary, informed, and unequivocal. She agrees with the Appellant that a voluntary plea is one where the appellant is "mentally competent to understand the consequences of his actions when pleading guilty", and adds that the plea "must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence."[72]

60. The Prosecutor states that the competency of Appellant has never been raised, and that transcripts of the 1 May 1998 proceedings demonstrate that the Appellant stated that he pleaded guilty "consciously and voluntarily. No one forced me to do so."[73] She further observes that the Appellant's counsel stated at the 3 September 1998 pre-sentence

hearing that the Appellant's guilty plea was "genuine, conscious and voluntary. It was not a tactical move to gain any advantage."[74] Additionally, the Prosecutor notes that the Plea Agreement signed by the Appellant states that he was pleading guilty in order that the truth be told.[75]

b) Legal Findings

61. The Appeals Chamber holds that the conditions for accepting a plea agreement are firstly that the person pleading guilty must understand the consequence of his or her actions, and secondly that no pressure must have been brought to bear upon that person to sign the plea agreement. This position is reflected in the separate opinion of Judges McDonald and Vohrah in *Erdemović*, which stated that a voluntary plea requires two elements, namely that "an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty" and "the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentences."[76]

62. Nothing in the Appellant's pleadings indicates that the Appellant raised mental incompetency as an issue or indeed that he was mentally incompetent; there is further no assertion that he failed to understand the consequences of pleading guilty. The Appellant merely implies that he was depressed over being isolated while in detention. The Appeals Chamber considers that the Appellant, having served as Prime Minister of the country, would have been used to stressful situations during which time important decisions would have to be made. The Appeals Chamber finds this contention completely inadequate to support a claim that the Appellant was mentally incompetent and failed to understand the consequences of his actions in pleading guilty.

63. The Appeals Chamber further notes that the Appellant does not claim that he was in any way threatened or induced to plead guilty. If the Appellant pleaded guilty instead of going to trial in the hope of receiving a lighter sentence, he cannot claim that the plea was involuntary merely because he received a life-term after pleading guilty to several counts of genocide and crimes against humanity.

64. The Appeals Chamber finds no merit in the Appellant's claim that his guilty plea was involuntary and thus rejects this issue on appeal.

2. Was the Guilty Plea Informed?

a) Submissions of the Parties

65. As to whether the guilty plea was informed, the Appellant states that all common law jurisdictions require that a person pleading guilty "must understand the nature and consequences of his plea to what precisely he is pleading guilty".[77] He quotes the *Erdemović* case in which the view was expressed that:

essential to the validity of a plea of guilty is that the accused should fully understand what he is pleading to. This means that the appellant must understand:

(a) The nature of the charges against him and the consequences of pleading guilty generally; [and]

(b) The nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other.[78]

66. The Appellant further quotes Judge Cassese's separate and dissenting opinion in *Erdemović*, in which it was said that: "the guilty plea must be entered in full cognisance of its legal implications. To uphold a plea not entered knowingly and understandingly would distort justice; more specifically, it would mean jeopardising or vitiating the fundamental right of the accused in Article 21, paragraph 3 of the Statute to be presumed innocent until proved guilty according to the provisions of the [Tribunal's] Statute."[79]

67. The Appellant reasserts that he had ineffective assistance of counsel. He states that counsel assigned to the Appellant did not take affirmative action on his client's behalf, that in the space of two years counsel and accused "had only one hour's consultation", and that counsel "did not study the case completely nor did he investigations (sic) in order to evaluate the file and to inform Kambanda properly. In doing so, Kambanda did not plea guilty informed (sic), since he himself did not know the ins and outs of the charges brought against him, nor did he know the ins and outs of the guilty plea."[80]

68. The Appellant further asserts that "Kambanda was not only uninformed by counsel, but was also not informed by the Trial Chamber", apparently because the "Tribunal has neglected to warn Kambanda explicitely (sic) what the consequences, in terms of imprisonment, would be by pleading guilty" and "[i]t should have been made clear to the accused that by pleading guilty the only possible sentence would be life imprisonment and that a plea agreement would never mitigate the penalty seeing the gravity of the offences."[81]

69. The Appellant asserts that the Trial Chamber "should have inquired about the legal assistance provided to appellant" as the assistance was inadequate and the Trial Chamber should therefore have taken a more active role in investigating the adequacy of counsel.[82]

70. The Prosecutor agrees with the Appellant that the applicable standard for determining whether a plea is informed is that established in *Erdemović*, such that the accused must understand "the nature of the charges against him and the consequences of pleading guilty generally."[83] In referring to *Erdemović*, the Prosecutor asserts that there were clear indicia that counsel in that case "indicated that he did not understand the substantive law of the charged offences. Those errors indicated to the Appeals Chamber that defence counsel could not have properly explained to the accused, the nature of the charges against him."[84]

71. In distinguishing *Erdemović* from the present case, the Prosecutor asserts that the Appellant fails to point to any specific words or deeds that would demonstrate that his counsel was not properly informed or that he failed to properly inform the Appellant.[85]

72. As to whether the Trial Chamber properly informed the Appellant of the consequences of pleading guilty, the Prosecutor points to transcripts of the hearing in which the President asks the Appellant "Have you clearly understood the nature of the charges which have been brought against you, and have you clearly understood the consequences of your guilty plea?" to which the Appellant responds: "Mr. President, I have clearly understood all of the charges against me and I fully know the consequences of my guilty plea."[86]

73. The Prosecutor also submits that the Appellant's assertions that the Trial Chamber should have explicitly warned him about the imprisonment consequences of pleading guilty and inquired about his satisfaction with the assistance of counsel are "misplaced" and avers that the queries ventured by the Trial Chamber to Appellant as to whether he was adequately informed were sufficient.[87]

74. The Appellant replies by again reasserting that counsel was ineffective and stating that "it is clear that Mr. Inglis did not meet a competency falling within the range of competency demanded of attorneys in criminal cases."[88] He then submits that "[e]ven if there was any flagrant incompetency by defence-counsel in respect to the guilty plea, Kambanda had a defendable case and also for this reason the guilty plea has to be declared invalid."[89] The Appellant fails to provide any support for this assertion that the case was "defendable", which presumably means that he had a legal defence for his acts.

b) Legal Findings

75. The Appeals Chamber agrees with the parties that the standard for determining whether a guilty plea is informed is that articulated by Judges McDonald and Vohrah in *Erdemović* such that the accused must understand the nature of a guilty plea and the consequences of pleading guilty in general, the nature of the charges against him, and the distinction between any alternative charges and the consequences of pleading guilty to one rather than the other.[90]

76. Although the Appellant claims the Trial Chamber should have made it "clear to the accused that by pleading guilty the only possible sentence would be life imprisonment and that a plea agreement would never mitigate the penalty seeing the gravity of the offences",[91] the Appeals Chamber cannot accept this argument. The duty of a Trial Chamber to inform an accused person of the possible sentence is not to be mechanically discharged. The proceedings have to be read as a whole, inclusive of the submission of the parties. The transcripts show that both parties accepted that the imposition of a sentence of life imprisonment was a possibility. There being no dispute on the point, when the Appellant told the Trial Chamber, "I fully know the consequences of my guilty plea", he fell to be understood as acknowledging that possibility.

77. The Appellant has failed to identify any specific instances that would support a claim that the Appellant's counsel was uninformed about the nature of the charges and the consequences of pleading guilty, and that counsel had failed to inform properly the

Appellant. Indeed, in contrast to questioning by the Bench in *Erdemović*,[92] from the answers to which it was clear that Erdemović did not understand the nature of the charges against him and the consequences of pleading guilty, the Appellant in the current case clearly indicated to the Trial Chamber at his hearing that he was fully aware of both.

78. The Appeals Chamber finds no merit in the Appellant's claim that his guilty plea was uninformed.

3. Was the Guilty Plea Unequivocal?

a) Submissions of the Parties

79. As to the question of equivocation, the Appellant relies on the statement in *Erdemović* that this "requirement imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial."[93] He does not go on to explain how, if it does, the quoted passage applies to the present case. In other words, the Appellant does not claim to have raised, much less persisted in, an explanation of his actions that would amount to a legal defence. Therefore the relevance of citing this passage is unclear.

80. The Appellant then quotes the transcript of the hearing of 1 May 1998, where the President is recorded as asking the accused whether his guilty plea was equivocal, and then explaining "and what I mean by that is, are you aware of the fact that you can now (sic) longer raise any means of defence that would go against your guilty plea? Are you aware of that fact?"[94] The Appellant then asserts that "the president of the tribunal incorrectly explained the concept of not equivocal (sic). In other words if Kambanda would have raised any means of defence that would have meant that the guilty plea would be equivocal and not the other way around. The tribunal should have investigated the issue more thoroughly asking the accused if he had any defence against the six counts of the indictment."[95]

81. The Prosecutor notes that the Appellant alleges that his guilty plea was not unequivocal because the President erred when explaining the meaning of equivocal to him. The Prosecutor however "submits that a cursory review of the President's remarks confirm that he did explain the meaning of the term 'equivocal' to the Appellant."[96]

82. The Prosecutor further submits that because the "Appellant did not object, after the lapse of four months between his plea on 1 May 1998 and the sentencing hearing on 4 September 1998, [this] illustrates that his guilty plea was unequivocal."[97]

83. In his Reply, the Appellant claims that "he did not object, after the lapse of four months between his plea on 1 May 1998 and the sentencing hearing on 4 September 1998, due to lack of effective defence counsel. Therefore this does not illustrate as the prosecution suggests that his guilty plea was unequivocal."[98]

b) Legal Findings

84. The Appeals Chamber notes that, as articulated by Judges McDonald and Vohrah in the *Erdemović* case, "[w]hether a plea of guilty is equivocal must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law."[99] This Appeals Chamber agrees with this statement.

85. The Appeals Chamber notes that it is not alleged that the Appellant persisted in explaining his actions either during the time of entering his plea or at his sentencing hearing, nor did he raise any defences that would indicate that his plea was equivocal. The Appeals Chamber, in reviewing the transcripts, further notes that the Appellant did not offer any explanation of his actions when asked about his guilty plea and did not raise a defence.

86. The Appeals Chamber further notes that the Judgement then emphasises that despite the guilty plea and the Plea Agreement, the Chamber

> nevertheless, sought to verify the validity of the guilty plea. To this end, the Chamber asked the accused:
>
> i) if his guilty plea was entered voluntarily, in other words, if he did so freely and knowingly, without pressure, threats, or promises;
>
> ii) if he clearly understood the charges against him as well as the consequences of his guilty plea; and
>
> iii) if his guilty plea was unequivocal, in other words, if he was aware that the said plea could not be refuted by any line of defence.
>
> The accused replied in the affirmative to all these questions. On the strength of these answers, the Chamber delivered its decision from the bench.[100]

87. The Appeals Chamber considers that the Trial Chamber had several opportunities to question and observe the Appellant, and notes that it was satisfied that the Appellant's guilty plea was voluntary, informed, and unequivocal. The Appeals Chamber finds no merit in the Appellant's claim that his guilty plea was not unequivocal or that it was in any other way invalid.

C. Was There A Sufficient Factual Basis Supporting the Guilty Plea?

1. Submissions of the Parties

88. The Appellant notes that the current Rule 62(B)(iv) provides that the Trial Chamber must satisfy itself that the guilty plea "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." He then quotes from the Federal Rules of Civil Procedure and Criminal Pleadings and Practice in Canada which state, respectively, that "the court should not enter a judgement upon such

plea without making such inquiry as shall satisfy it that there is a factual basis for the plea" and that certain evidence should be available to the court "so that the trial judge may assess whether the plea should be accepted".[101]

89. The Prosecutor "submits that the Appellant's plea of guilty was occasioned by a sufficient factual basis"[102] and asserts that "the transcripts disclose that the Trial Chamber did not abuse its discretion in concluding that there was a sufficient factual basis for the Appellant's guilty plea. According to the Prosecutor, the Trial Chamber placed reliance on the 'factual and legal basis' surrounding the plea, including the Plea Agreement."[103] In particular, the Prosecutor submits that facts contained in the Plea Agreement and Indictment contain a sufficient factual basis for the guilty plea, "there was no disagreement – much less a *material* one – between the parties regarding the facts of the case."[104]

90. The Prosecutor refers to Section III of the Plea Agreement, entitled "Factual Basis", in which "the Appellant acknowledges that were the Prosecution to proceed with evidence, the facts and allegations set out in paragraphs 3.1 to 3.20 of the Indictment would be proven beyond a reasonable doubt. Additionally, the Appellant states that those facts are not disputed by him. A factual basis is then presented in paragraphs 18 through 40 of the Plea Agreement."[105] The Prosecutor then details some of the undisputed facts contained in the Plea Agreement, many of which "involve specific criminal acts that were undertaken by the Appellant as a principal perpetrator".[106]

91. The Prosecutor also refers to the *Jelisić* Judgement, in which an ICTY Trial Chamber observed that a guilty plea alone does not provide a sufficient basis for conviction of an accused for "it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime."[107] The Prosecutor asserts that in *Jelisić*, in accepting the accused's guilty plea, the Trial Chamber "considered that the Prosecution and Defence did not disagree on any of the facts" and "made frequent reference to a document called 'factual basis' in determining whether elements presented in the guilty plea were sufficient to establish the crimes charged."[108] The Prosecutor asserts that the Plea Agreement and Indictment contain sufficient facts to sustain the validity of the guilty plea.[109]

2. Legal Findings

92. The Appeals Chamber notes that the Indictment charging the Appellant with four counts of genocide and two counts of crimes against humanity was confirmed by Judge Ostrovsky on 16 October 1997, and that on 1 May 1998, during his initial appearance before Trial Chamber I, the Appellant pleaded guilty to the crimes alleged in the Indictment against him. The Appeals Chamber also notes that the Judgement provides: "After verifying the validity of his guilty plea, particularly in light of an agreement concluded between the Prosecutor, on the one hand, and the accused and his lawyer, on the other, an agreement which was signed by all parties, the Chamber entered a plea of guilty against the accused on all the counts in the indictment."[110]

93. The Appeals Chamber notes that there was no disagreement between the parties as to the facts of the case or as to the Appellant's participation in the crimes alleged in the Indictment and agreed to in the Plea Agreement. Thus the Appeals Chamber can not reasonably now find that there was no factual basis for concluding that the Appellant was responsible for the crimes charged in the Indictment and admitted by the Appellant in the Plea Agreement and in entering the guilty plea when both sides explicitly agreed to the facts of the case and the crimes alleged.

94. The Appeals Chamber finds no merit in the Appellant's contention that the Trial Chamber, in accepting his guilty plea, could not have been satisfied that there was sufficient evidence to indicate that the Appellant was guilty.

95. Finding no merit in the arguments set forth by the Appellant, the Appeals Chamber dismisses this ground of appeal.

V. FOURTH, FIFTH, sixth, SEVENTH AND EIGHTH GroundS of appeal: ERROR IN SENTENCING

A. Introduction

96. The Appellant has submitted as an "alternative" that should the Appeals Chamber deny his primary request to quash the guilty verdict and order a new trial, it should "set aside and revise the entire sentence" on five grounds (grounds 4, 5, 6, 7 and 8 of the Consolidated Notice of Appeal).[111] The Appellant puts forward no arguments in support of these grounds, in either the Appellant's Brief or the Appellant's Reply.[112] When given a further opportunity during the Hearing only one additional point was raised. The Appellant's counsel stated on behalf of the Appellant that, although the Appellant "did not want to make a point on sentencing", an important mitigating factor to be taken into account should be the Appellant's co-operation with the Prosecutor.[113] The Prosecutor maintains that in principle, because the Appellant has put forward no arguments in support, these grounds of appeal should be rejected without consideration of the merits.[114]

97. The Appeals Chamber notes that Rule 111 expressly states that "[a]n Appellant's brief shall contain all the argument and authorities." Although Rule 114 provides that "the Appeals Chamber may rule on… appeals based solely on the briefs of the parties", it also states that it can decide to hear the appeal in open court. It is intended that each party should advise the Appeals Chamber in full of all the arguments upon which wish to rely in relation to each ground of appeal, through both written filings and orally.

98. However, in the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced: *jura novit curia*. Since the Appeals Chamber is not dependent on the arguments of the parties, it must be open to the Chamber to consider an issue raised on appeal even in the absence of substantial argument. The principle that an appealing party should advance arguments

in support of his or her claim is therefore not absolute: it cannot be said that a claim *automatically* fails if no supporting arguments are presented.

99. In the current matter, the arguments having been raised by the Appellant in the Consolidated Notice of Appeal, the Appeals Chamber will exercise its discretion to consider whether the grounds have merit.

B. Sixth Ground of Appeal

100. In the Judgement, the Appellant was convicted of six counts relating to genocide and crimes against humanity, for which he was sentenced to a single sentence of life imprisonment for all of the counts. As set out in his Consolidated Notice of Appeal, the Appellant submits

> That the Trial Chamber erred in law in failing to pronounce and impose a separate sentence for each count in the indictment each count being a separate charge of an offence.

The Appellant submits that this ground is "self-explaining", but reserves the right to "add additional facts in support of the appeal grounds concerning sentencing if the primary request is not granted".[115] During the Hearing, counsel for the Appellant expressly stated that "Kambanda himself did not want to make a point on sentencing".[116]

101. In order to assess the legality of the use of global sentences, reference must be made to the following provisions of the Statute and the Rules:

The Statute

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

…

Article 23: Penalties

…

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

…

The Rules

Rule 101: Penalties

…

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

…

102. The Appeals Chamber notes that nothing in the Statute or Rules expressly states that a Chamber must impose a separate sentence for each count on which an accused is convicted. However, in view of the references in Rule 101(C) to "multiple sentences", and to "consecutively or concurrently", it may be argued that the Rules seem to assume that a separate sentence will be imposed for each count.

103. The Appeals Chamber finds in this regard that the Statute is sufficiently liberally worded to allow for a single sentence to be imposed. Whether or not this practice is adopted is within the discretion of the Chamber. The Appeals Chamber upholds the argument of the Prosecution that a Chamber is not prevented from imposing a global sentence in respect of all counts for which an accused has been found guilty.[117]

104. In support of the view that a Chamber has such discretion, past practice of both this Tribunal and the ICTY may be examined. In *Akayesu*, while pronouncing multiple sentences, Trial Chamber I clearly interpreted the Rules to allow the Tribunal to

impose either a single sentence for all the counts or multiple sentences, with the understanding that in the case of the latter, the Tribunal shall decide whether such sentences should be served consecutively or concurrently.[118]

105. In *Rutaganda*, the Prosecutor framed the choice between imposing a single sentence or multiple sentences as a discretionary one, her submissions reading: "with regard to the issue of multiple sentences which *could* be imposed on Rutaganda as envisaged by Rule 101(C) of the Rules…".[119] The Chamber implicitly accepted this submission in exercising its discretion and imposing a single sentence for all the counts on which the accused was found guilty, despite the Prosecutor's request that separate sentences be handed down for each conviction.

106. The practice of imposing a single sentence for convictions on multiple counts was also adopted by Trial Chamber I in *Musema[120]* and *Serushago[121]*.

107. Before the ICTY the practice has been less common, restricted to date to global sentences handed down by Trial Chamber I in *Jelisić[122]* and in *Blaškić*. In paragraph 805 of the *Blaškić* judgement[123] it was stated that

The Trial Chamber is of the view that the provisions of Rule 101 of the Rules do not preclude the passing of a single sentence for several crimes.

108. In addition, the Appeals Chamber notes that the practice of handing down a single sentence for multiple convictions was adopted by the International Military Tribunal at Nuremberg.[124]

109. It is thus apparent that it is within the discretion of the Trial Chamber to impose either a single sentence or multiple sentences for convictions on multiple counts. However, the question arises, in what circumstances is it appropriate for a Chamber to exercise its discretion to impose a single sentence.

110. On this point, the Appeals Chamber notes that with respect to the particular circumstances of the *Blaškić* case, ICTY Trial Chamber I stated that

> the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span … In light of this overall consistency, the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty.

This followed similar reasoning in the *Jelisić* case.[125]

111. The Appeals Chamber agrees with the approach adopted in the *Blaškić* case: where the crimes ascribed to an accused, regardless of their characterisation, form part of a single set of crimes committed in a given geographic region during a specific time period, it is appropriate for a single sentence to be imposed for all convictions, if the Trial Chamber so decides. The issue is whether this case falls within such parameters.

112. The Appellant pleaded guilty to six counts under Article 2 (Genocide) and Article 3 (Crimes against humanity) of the Statute, for which he was subsequently convicted. These acts were carried out in Rwanda during a specific time period (1994) and formed part of a single set of crimes related to the widespread and systematic attack against the Tutsi civilian population of Rwanda, the purpose of which was to kill them. The Appeals Chamber finds that this was therefore a case in which it was appropriate to impose a single sentence for the multiple convictions.

113. Finding no merit in the Appellant's arguments, the Appeals Chamber dismisses this ground of appeal.

C. Fourth, Fifth, Seventh and Eighth Grounds of Appeal

114. The main issue raised by the Appellant in the fourth, fifth, seventh and eighth grounds of appeal is that the Trial Chamber erred in law in failing to properly take certain mitigating circumstances into account. As a result the sentence imposed by the Trial Chamber was excessive. The Appellant submits that the Trial Chamber erred in failing to consider that his plea of guilty as a mitigating factor carries a discount in sentence; failing to take into account both his personal circumstances and his substantial co-operation with the Prosecutor (both in the past and in the future[126]); and failing to take into account the general practice regarding prison sentences in the courts of Rwanda in the determination of sentence. In addition, he submits that the Trial Chamber erred in law and on the facts in taking into account the non-explanation of the Appellant when asked if he had anything to say himself in mitigation before sentence.

115. For the Appellant's appeal to succeed on these grounds, he must show that the Trial Chamber abused its discretion, so invalidating the sentence. The sentence must be shown to be outside the discretionary framework provided by the Statute and the Rules.

116. The Appeals Chamber notes that a Trial Chamber is required as a matter of law, under both the Statute and the Rules, to take account of mitigating circumstances and the general practice regarding prison sentences in Rwanda. Therefore if it fails to do so, it commits an error of law. Article 23 provides *inter alia,* that "[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda"[127] and that in imposing sentence it "should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."[128] Rule 101(B) provides:

> In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:
>
> (i) Any aggravating circumstances;
>
> (ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
>
> (iii) The general practice regarding prison sentences in the courts of Rwanda:
>
> (iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

117. Rule 101(B) is expressed in the imperative in that the Trial Chamber "shall take into account" the factors listed and therefore if it does not, it will commit an error of law. Whether or not this would invalidate the decision is of course another question.

118. In the Judgement the Trial Chamber considered both the Appellant's guilty plea on each count on the indictment, together with the Plea Agreement,[129] wherein the Appellant made full admissions of all the relevant facts alleged in the indictment and his involvement as Prime Minister. He "acknowledge[d] that…he as Prime Minister, instigated, aided and abetted the *Prefets, Bourgmestres*, and members of the population to commit massacres and killings of civilians, in particular Tutsi and moderate Hutu."[130] The Trial Chamber noted the gravity of the crimes in question and found as an aggravating factor the fact that the Appellant abused his position of authority and trust of the civilian population when he, as Prime Minister, was responsible for maintaining peace and security.[131] It considered the factors put forward by the Appellant in mitigation: plea of guilty; remorse, which the Appellant claimed was evident from the act of pleading guilty; and cooperation with the Prosecutor.[132] Nevertheless, it found that the Appellant had "offered no explanation for his voluntary participation in the genocide; nor [had] he expressed contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber, during the [pre-sentencing] hearing of 3 September 1998."[133]

119. Weighing up the submissions of both parties, in particular regarding the Appellant's past and future cooperation with the Prosecutor, the fact that the guilty plea would encourage others to come forward and recognize their responsibilities and that it was in itself a mitigating circumstance, the Trial Chamber nevertheless determined that, in view of the "intrinsic gravity" of the crimes and the Appellant's position of authority,[134] "the aggravating circumstances surrounding the crimes…negate the mitigating circumstances, especially since [the Appellant] occupied a high ministerial post, at the time he committed the said crimes."[135] The Appellant was therefore sentenced *"à la peine d'emprisonnement à vie,"* (translated in the English text, as "life imprisonment").[136]

120. The Judgement illustrates that the Trial Chamber clearly considered the mitigating factors put forward by both the Appellant and the Prosecutor, the principle that a guilty plea as part of this mitigation carries with it a reduction in sentence and the general practice regarding prison sentences in the courts of Rwanda. The Trial Chamber acknowledged that the Prosecutor had asked the Trial Chamber "to regard as a significant mitigating factor, not only the substantial co-operation so far extended, but also the future co-operation…" of the Appellant.[137] It noted the early guilty plea of the Appellant and the fact that both the Appellant and the Prosecutor

> urged the Chamber to interpret [the Appellant's] guilty pleas as a signal of his remorse, repentance and acceptance of responsibility for his actions. The Chamber is mindful that remorse is not the only reasonable inference that can be drawn from a guilty plea; nevertheless it accepts that most national jurisdictions consider admissions of guilt as matters properly to be considered in mitigation of punishment.[138]

121. In addition, with regard to consideration of the general practice regarding prison sentences in the courts of Rwanda, the Trial Chamber analysed this issue at some length in paragraphs 18-25 and having reviewed the scale of sentences applicable in Rwanda, properly concluded that "the reference to this practice can be used for guidance, but is not binding."[139]

122. The Appeals Chamber therefore finds that the Trial Chamber clearly considered each of the above factors put forward by the Appellant in mitigation in reaching its decision and as required in the Statute and Rules and therefore to this extent did not commit an error of law.

123. However, the second question is whether the Trial Chamber properly took these factors into account. This turns on the question of the weight attached by the Trial Chamber to the mitigating factors. As the Prosecutor submits, "the Appellant's Brief does not appear to argue that the Trial Chamber failed to recognize this as a mitigating circumstance, but rather, that the Trial Chamber failed to give this mitigating circumstance sufficient weight."[140]

124. The weight to be attached to mitigating circumstances is a matter of discretion for the Trial Chamber and unless the Appellant succeeds in showing that the Trial Chamber abused its discretion, resulting in a sentence outside the discretionary framework provided by the Statute and the Rules, these grounds of appeal will fail.

125. The Appeals Chamber notes that the crimes for which the Appellant was convicted were of the most serious nature. A sentence imposed should reflect the inherent gravity of the criminal conduct. The Appeals Chamber of the ICTY has observed that "[c]onsideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence."[141] In sentencing the Appellant, the Trial Chamber found that

(v) the crimes for which Jean Kambanda is responsible carry an intrinsic gravity, and their widespread, atrocious and systematic character is particularly shocking to the human conscience;

(vi) Jean Kambanda committed the crimes knowingly and with premeditation;

(vii) and, moreover, Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust.[142]

126. In this case, the Trial Chamber balanced the mitigating factors against the aggravating factors and concluded that "the aggravating circumstances surrounding the crimes negate the mitigating circumstances[143][144] The Appeals Chamber considers that this sentence falls within the discretionary framework provided by the Statute and the Rules, and so sees no reason to disturb the decision of the Trial Chamber.

THE APPEALS CHAMBER

UNANIMOUSLY

Done in English and French, the French text being authoritative.

Claude Jorda Presiding	Lal Chand Vohrah	Mohamed Shahabuddeen

Rafael Nieto-Navia	Fausto Pocar

Done this nineteenth day of October 2000
t The Hague,

[**Seal of the Tribunal**]

[1] "Sentence", *The Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Tr. Ch. I, 4 September 1998.

[2] "Notice of Appeal against Sentence of Trial Chamber I Art. 24 of Statute and Rule 108(A) of the Rules".

[3] "Supplementary Notice of Appeal against Sentence of Trial Chamber I Art. 24 of Statute and Rule 108(A) of the Rules", filed on 25 September 1998.

[4] "Second Supplementary Notice of Appeal", filed on 24 November 1999.

[5] *Ibid.*, page 2.

[6] "Motion for Admission of New Evidence on Appeal pursuant to Rules 115 of the Rules of Procedure and Evidence".

[7] "Decision on the Appellant's Motion for Admission of New Evidence", 13 June 2000.

[8] "Prosecution's Response to Jean Kambanda's Provisional Appellant's Brief of 30 March 2000".

[9] "Reply to the Prosecutor's Response on the Appellant's Brief of 2 May 2000".

[10] "Order (date of hearing and Appellant's Appeal Books)", 2 June 2000.

[11] "Prosecution Motion under Rules 54 and 117 for an Order for Information from the Registrar of the ICTY Concerning the Detention of Kambanda".

Appellant's Reply, paras 8 to 20.

[16]On 22 July 1997, he stated in a letter to the Registry that: "When in future I express the desire for counsel, I wish to be defended or represented either by Mr. Johan Scheers or by a criminal lawyer who is a specialist in common law and is French-speaking" [translation from French]

[17]The hearing of 14 August 1997 involved the Trial Chamber's examination of the Prosecution Motion seeking an Order to extend the suspect Jean Kambanda's provisional detention under Rule 40 bis. Transcript, 14 August 1997, p. 5.

[18]The hearing of 16 September 1997 concerned the Prosecution Motion seeking an Order for an additional extension of provisional detention under Rule 40 bis. Transcript, 16 September 1997, p. 6.

[19]Letter dated 18 October 1997 from Jean Kambanda to the Registry, in "Registry's Reply to Appellant's Brief", 29 June 1999, Annex 1.

[20]Letter dated 5 March 1998 from Jean-Pelé Fomété to Jean Kambanda, in op. cit. *supra*, Annex 2a.

[21]Letter dated 5 March 1998 from Jean Kambanda to Jean-Pelé Fomété, ., Annex 2b.

[22] Letter dated 5 March 1998 from Jean-Pelé Fomété to Jean Kambanda, ., Annex 2c.

[23]"*Ayant appris que Maître Johan SCHEERS, par lequel j'avais exprimé mon intention d'être défendu, qu'il n'est pas repris sur la liste des conseils accrédités auprès du Tribunal et compte tenu du curriculum vitae de Maître Olivier Michael INGLIS que m'a été envoyé, après mon analyse, je n'ai pas objection à ce qu'il puisse assurer ma défense*". In letter dated 20 March 1998 from Jean Kambanda to Jean-Pelé Fomété, ., Annex 2g.

[24]

Date of Mr. Kambanda's initial appearance.

[26]The 3 September and 4 September 1998 hearings were the pre-sentencing and sentencing hearings pursuant to Rule 100.

[27] Appellant's Reply, para. 15; Transcript, 27 June 2000, p. 33.

[28] Transcript, 1 May 1998; Transcript, 3 September 1998; Transcript, 4 September 1998.

[29]"[…] I would like to ask the accused: "Do you now have the assistance of a counsel?", and Mr. Kambanda answered "Yes, Mr. President". See Transcript, 1 May 1998, p. 20.

[30]Appellant's Brief, para. 15; Transcript, 27 June 2000, p. 154.

[31]Transcript, 27 June 2000, p. 47.

[32]"Decision on the Prosecutor's Appeal Concerning the Admissibility of Evidence", *The Prosecutor v. Aleksovski*, Case No. IT-94-1-A, App. Ch., 16 February 1999, para. 19.

[33]On this point, see in particular "Judgement", *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-IT, Tr. Ch. II, 21 May 1999, para. 64.

[34]"Article 12: Remedy Against a Decision Not to Assign Counsel

(A)The suspect whose request for assignment of Counsel has been denied may seek the President's review of the decision of the Registrar. The President may either confirm the Registrar's decision or decide that a Counsel should be assigned.
(B) The accused whose request for assignment of Counsel for his initial appearance has been denied, may make a motion to the Trial Chamber before which he is due to appear for immediate review of the Registrar's decision. The Trial Chamber may either confirm the Registrar's decision or decide that a Counsel should be assigned.
(C) After the initial appearance of the accused, an objection to the denial of his request for the assignment of Counsel shall take the form of a preliminary motion by him before the Trial Chamber not later than 60 days after his first appearance and, in any event, before the hearing on the merits."

See "Judgement", *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, App. Ch.

[36]"Judgement", *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, App. Ch., 15 July 1999, para. 55.

[37]"Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24-AR73, App. Ch., 2 July 1998, para. 33.

[38]*Albert Berry v. Jamaica*, Comm. No. 330/1998, 26 April 1994, UN doc. CCPR/C/50/D/330/1998, para. 11.6. See also *Glenford Campbell v. Jamaica*, Comm. No. 248/1997, 30 March 1992.

[39]Appellant's Reply, para. 12.

[40] Transcript, 27 June 2000, pp. 36 (last line), 37, 38, 39, 43, 94 and 164; Transcript, 28 June 2000, pp. 9, 28 and 29.

[41] The Plea Agreement, signed by the Appellant, states in its paragraph 48 that: "I, Jean Kambanda, have read and carefully reviewed every part of this plea agreement with my Counsel, Oliver Michael Inglis. Mr. Inglis has advised me of my rights, of possible defences, and of the consequences of entering into this agreement […]" Moreover, the Appellant recognized in his statement that Mr. Inglis had performed his role in respect of transmitting documents addressed to Jean Kambanda (in that instance, two letters relating to his guilty plea). Transcript, 27 June 2000, p. 156.

[42]Transcript, 28 June 2000, p. 168.

[43] Appellant's Reply, para. 20.

[44] Appellant's Brief, paras. 17 21

[45] "Decision on the Motions of the Accused for Replacement of Assigned Counsel", *The Prosecutor v. Gérard Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, 11 June 1997, p. 2 *et seq*.

[46]Textual analysis of subparagraph (d) of paragraph 4 of Article 20 of the Statute shows that the choice of assigned defence counsel is made, in any event, by an authority, not the accused. This Article must be Rule 45 of the Rules and Article 13 of the Directive on the Assignment of Defence Counsel, whereby the Registrar is the person authorized to make the choice. The Registrar therefore has no other obligation than to assign counsel whose name appears on the list of counsel who may be assigned and is not bound by the wishes of an indigent accused.

[47] According to the Human Rights Committee, "article 14, paragraph 3 (d) [of the International Convention on Civil and Political Rights] does not entitle the accused to choose counsel provided to him free of charge". *Osbourne Wright and Eric Harvey v. Jamaica*, Comm. No. 459/1991, 8 November 1995, UN Doc. CCPR/C/50/D/330/1988, para. 11.6.

[48] Article 6, subparagraph 3. C. of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") guarantees three rights, which may be exercised on mutually exclusive bases: to defend oneself in person or through legal assistance of one's own choosing or, if one has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.evelopments in the exercise of these rights in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert (eds.) *La Convention Européenne des Droits de l'Homme, Commentaire article par article*, (Economica, Paris, 1999) pp. 274-275. According to the Convention bodies, the right to legal assistance of one's own choosing is not absolute (*X v. United Kingdom*, Eur. Comm. H.R., Judgement of 9 October 1978, Application No. 8295/78; *Croissant v. Germany*, Eur. Ct. H.R., Judgement (Merits) of 25 September 1992, Application No. 13611/88, Series A, no. 237-B, para. 29). It particularly does not apply when legal assistance is free. Indeed, Article 6 (3) (c) does not guarantee the right to choose the defence counsel who will be assigned by the court, nor does it guarantee the right to be consulted on the choice of the defence counsel to be assigned *(X v. Federal Republic of Germany*, Decision of 6 July 1976, Application No. 6946/75 and *F v. Switzerland, Eur. Comm. H.R.*, Decision of 9 May 1989, Application No. 12152/86). In

any event, the authority responsible for appointing counsel has broad discretionary powers: "[the right to counsel of one's own choosing] is necessarily subject to certain limitations where free legal aid is concerned and also where […]. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice." (*Croissant v. Germany*, op. cit. *supra*, para. 29).

[49]The effectiveness of representation by assigned counsel must indeed be ensured. According to the European Commission for Human Rights, it is up to the authorities responsible for providing free legal assistance and assigning defence counsel to make sure that that counsel can defend the accused effectively *(F v. Switzerland*, op. cit. *supra*).

[51] Appellant's Brief, para. 6. Transcript, 27 June 2000, page 24 line 5.

[52] Appellant's Brief, para. 6. Transcript, 27 June 2000, page 24 line 15.

[53] Appellant's Brief, para. 6. Transcript, 27 June 2000, page 25 lines 2-10.

[54] Appellant's Brief, paras. 23-34.

[55] Appellant's Book of Authorities, Document A13.

[56] Appellant's Brief, para. 36.

[57] Prosecutor's Response, para. 4.56 ff.

[58] Prosecutor's Response, para. 4.85.

[59] Appellant's Reply, para. 22.

[60] Transcript, 27 June 2000, pages 87-89.

[61] Transcript, 27 June 2000, page 12.

[62] Appellant's Reply, para. 22.

[63] Transcript, 27 June 2000, page 136, line 22 – page 137, line 2.

[64] Appellant's Brief, p. 12 ff.

[65] Prosecutor's Response, paras. 4.89-4.91.

[66]Prosecutor's Response, para. 4.92.

[67]Prosecutor's Response, paras. 4.93-4.94.

[68]Appellant's Reply, paras. 16 & 24.

[69] Appellant's Brief, at para. 39.

[70]*Ibid*. at para. 41.

[71] Transcript, 27 June 2000, pp. 87-89.

[72] Prosecutor's Response, at paras. 4.98-4.99, and "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", *The Prosecutor v. Dražen Erdemović*, Case No.: IT-96-22-A, App. Ch., 7 October 1997, paras. 8-9.

[73]Prosecutor's Response, paras. 4.100-4.101, Transcript 1 May 1998, p. 26, lines 15-24.

[74] *Ibid.* at para. 4.103, Transcript, 3 September 1998, p. 26, lines 12-19.

[75] *Ibid.* at para. 4.104, Plea Agreement, paras. 2 and 4.

[76] "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", *Erdemović*, para. 10.

[77]Appellant's Brief, para. 42, inter alia *Erdemović*, "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", para. 14.

[78]*Ibid*. para. 45, generally *Erdemović*, "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah".

[79]*Erdemović*, "Separate and Dissenting Opinion of Judge Cassese", para. 10.

[80]*Ibid*., paras. 48-50.

[81]*Ibid*., para. 51, and quoting passages of the Transcript of 3 September 1998, p. 35.

[82]*Ibid*., paras. 53-56.

[83]Prosecutor's Response, para. 4.110, citing , "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", para. 14, Appellant's Brief, para. 45.

[84]*Ibid*. para. 4.111, citing *Erdemović*, "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", paras. 16-19.

[85]*Ibid*. paras. 4.112-4.113.

[86]*Ibid*., para. 4.115, quoting transcript of 1 May 1998, pp. 26 & 27.

[87]*Ibid*., paras. 4.117-4.119.

[88]Appellant's Reply, para. 27.

[89]*Ibid*., para. 29.

[90] "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", *Erdemović*, paras. 14-19.

[91]Appellant's Brief, para. 51, and quoting passages of the Transcript of 3 September 1998, p. 35.

[92]For example, "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah" *Erdemović*, explicitly notes at para. 16 that the guilty plea may not have been informed because when asked by the Trial Chamber whether he understood the consequences of pleading guilty, the appellant in that case gave an unsatisfactory answer, and further that the trial transcript indicated that defence counsel failed to understand truly the nature of a guilty plea

[93]Appellant's Brief, para. 58, quoting *Erdemović*, para. 29.

[94]*Ibid.*, para. 59, quoting transcript p. 72.

[95]*Ibid.*, para. 59.

[96]Prosecutor's Response, paras. 4.120-4.122.

[97]*Ibid.*, para. 4.123.

[98]Appellant's Reply, para. 31.

[99]*Erdemović*, "Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah", para. 31.

[100]Judgement, paras. 6 and 7.

[101]Appellant's Brief, paras. 60-62.

[102]Prosecutor's Response, para. 4.127.

[103]*Ibid*., para. 4.133.

[104] *Ibid.*, para. 4.134 (emphasis in original).

[105] *Ibid.*, para. 4.138.

[106] *Ibid.*, paras. 4.139-4.140.

[107] *Ibid.*, para. 4.141, quoting "Judgement", *The Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Tr. Ch. I, 14 December 1999, at para. 25.

[108] *Ibid.*, para. 4.141, citing *Jelisić* at para. 11 and fn 9.

[109] *Ibid.*, para. 4.142.

[110]Judgement, para. 4.

[111] Appellant's Brief, p. 22.

[112] In the Appellant's Reply, the Appellant states that he "repeats his remarks as made in the appellant's brief and reserves all rights to add additional facts in support of the appeal grounds concerning sentencing if the primary request concerning appeal grounds 1-3 is not granted" (para. 34).

[113] Transcript, 28 June 2000, p. 41.

[114] Prosecutor’s Response, paras. 4.144, 4.161, 4.165, 4.167-4.169, 4.171 and Transcript, 28 June 2000, pp. 149-152.

[115] Appellant’s Brief,at para. 63.

[116] Transcript, 28 June 2000, p. 41.

[117] Prosecutor’s Response, at para. 4.164.

[118] "Sentence", *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, T. Ch. I, 2 October 1998, para. 41.

[119] "Judgement and Sentence", *The Prosecutor v Georges Anderson Nderubumve Rutaganda*, Case No. ICTR-96-3-T, T. Ch. I, 6 December 1999 at para. 463 (emphasis added).

[120] "Judgement and Sentence", *The Prosecutor v Alfred Musema*, Case No. ICTR-96-13-T, T. Ch. , 27 January 2000, p.285.

[121] "Sentence", *The Prosecutor v Omar Serushago*, Case No. ICTR-98-39-S, T. Ch. I, 5 February 2000, at p.15.

Judgement", *The Prosecutor v.*

[123] "Judgement", *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, T. Ch. I, 3 March 2000.

"Judgement", *The Prosecutor v. Goran Jelisi}*, Case No. IT-95-10-T, T. Ch. I, 14 December 1999, para. 137.

[126] Transcript, 28 June 2000, p. 41.

[127] Article 23(1).

[128] Article 23(2).

[129] See above for further details regarding the Plea Agreement.

[130] Judgement, para. 39.

[131] Judgement, paras. 42-44.

[132] Judgement, para. 46.

[133] Judgement, para. 51.

[134] Judgement, para. 61.

[135] Judgement, para. 62.

[136] Judgement, Verdict.

[137] Judgement, para. 47.

[138] Judgement, para. 52.

[139] Judgement, para. 23, referring to aTrial Chamber decision in the case of *Prosecutor v. Dražen Erdemović*, 1 November 1996. See also the Appeals Chamber decision in Judgement in Sentencing Appeals, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A and IT-94-1-A*bis*, A.Ch., 26 January 2000,para. 21 and Reasons for Judgement, *Omar Serushago v. the Prosecutor*, Case No. ICTR-98-39-A, A.Ch., 6 April 2000, para. 30.

[140] Prosecutor's Response, para. 4.152. The Prosecutor makes this submission in relation to the fourth ground of appeal, but the Appeals Chamber finds that this applies in general to this case.

[141] Judgement, *Prosecutor v. Zlatko Aleksovski*, Case No, IT-95-14/1-A, A.Ch., 24 March 2000, para.182. Also citing, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, para. 1225 and Judgement, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, para. 852.

[142] Judgement, para. 61.

[143] Judgement, para. 62.

Statute). It is also *always* subject to possible reductions if provided under the applicable law in this State and if the President of the Tribunal