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RESEARCH ARTICLE

PLEA BARGAINING IN INTERNATIONAL CRIMINAL JUSTICE CAN THE INTERNATIONAL CRIMINAL COURT AFFORD TO AVOID TRIALS?

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ABSTRACT

This article discusses the question as to whether plea bargaining should be introduced in the International Criminal Court (ICC). It argues that although the different features and functions of international criminal law make practices such as plea arrangements ambiguous, there are circumstances in which this practice can make a valuable contribution. Plea bargaining should, however, be used only under very restrictive circumstances and not as a mere tool of efficiency. The first section discusses to what extent plea bargaining might support or undermine the special functions of the ICC. The second section makes suggestions as to when plea bargaining should be used at the Court.²

Keywords: International Criminal Law, International Criminal Court, Plea Bargaining, Criminal Procedure Law, Trial, ICC

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INTRODUCTION

Plea bargaining or comparable informal negotiations can be found today in a growing number of national criminal justice systems around the world although in each of them this practice is strongly debated.³ Practitioners claim that with ever growing crime rates and limited court resources, conducting a full criminal trial for every defendant would be impossible and that without plea bargaining the criminal justice system would collapse.⁴ Opponents on the other hand, criticize that defendants are pressured to give up basic due process rights, victims are excluded from the process, and criminals are rewarded for cooperation with the prosecution rather than being punished for the crimes they committed. In spite of the continuous criticisms in domestic criminal justice systems, plea bargaining has been used in both the UN ad hoc tribunals as well as in the hybrid courts such as the Special Court for Sierra Leone and the Iraqi Special Tribunal.⁵ It is often argued, however, that the nature of international criminal law is so different from domestic law that the use of plea bargaining is unjustifiable.⁶ Many feel that the gravity of the crimes within the jurisdiction of international criminal courts prohibits any negotiations with the alleged perpetrators.⁷ This article discusses the question as to whether plea bargaining should be introduced in the International Criminal Court (ICC). It argues that although the different features and functions of international criminal law make practices such as plea arrangements ambiguous, there are circumstances in which this practice can make a valuable contribution. Plea bargaining should, however, be used only under very restrictive circumstances and not as a mere tool of efficiency. The first section of this paper examines the particular characteristics of international criminal law and discusses to what extent plea bargaining might support or undermine the special functions of the Court. The second section makes suggestions as to when plea bargaining should be used at the ICC.

SPECIAL CHARACTERISTICS OF INTERNATIONAL CRIMINAL LAW

Given the very particular setting in which international criminal law operates it has to be considered very carefully to what extent national criminal law practices can be transplanted into international criminal law. International criminal law regularly needs to

³ Nancy Armoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, (59/1) *Vanderbilt Law Review* 2006, 69 at 148.

⁴ Darbyshire, Penny 2000 "The Mischief of Plea Bargaining and Sentencing Rewards" *Criminal Law Review* 895, at 896.

⁵ Michael P. Scharf, *Trading Justice for Efficiency*, 2 *Journal of International Criminal Justice* 2004, 1070 at 1071.

⁶ Statement by the President [of the ICTY] Made at a Briefing to Members of Diplomatic Missions, IT/29, 11 February 1994 quoted in Scharf *supra* note at 1073.

⁷ *Ibid.*

operate in a situation where a country or a region has been completely unsettled by armed conflict. Often crime has not just been a single act of deviant behaviour outside the rule of society but has become the rule itself, sanctioned and ordered by those in the most powerful positions in society, whether they are political, military, religious, or economic leaders. Victimisation of groups has become the standard; the rule of law has broken down and in most cases, the violent conflict between different groups is still ongoing.⁸ While both domestic and international systems strive for justice, deterrence, retribution and restoration, international criminal law has further aspirations. It aims for replacing impunity with accountability, breaking the cycle of ethnic violence and retribution, facilitating reconciliation, and bringing the guilty to justice in a fair trial and thus restoring the rule of law. Accordingly the court has to not only provide individual case justice but in addition contribute to the establishment of peace and reconciliation between the conflicting parties and support the reconstruction of the transitional society. Furthermore, the international criminal trial is expected to build an extensive and objective historical record that discloses “the way in which the people had been manipulated by their leaders into committing acts of savagery on a mass scale”⁹ so that the cycle of violence can be broken and repetition of the conflict avoided. In addition it is hoped that the condemnation of individuals, rather than political, ethical or racial groups, offer a political catharsis and help the new government to distant itself from the discredited past and reconstruct a new society.¹⁰ Another objective, which plays a growing role in domestic criminal procedures, but is even more important in the international arena as part of the peace process, is to provide a forum for the many victims. Victims need to be given a voice in the proceedings but also offered protection to be able to participate without putting themselves or their families into danger. In the long run the international criminal process is expected to promote human rights by developing and promoting criminal jurisdiction for human rights violations on the one hand and due process rights of the accused on the other. The remainder of this section will discuss what impact plea bargaining has on the special aims and aspects of international criminal justice.

Justice

The core function of international criminal courts is to provide justice. According to the preamble of the Rome Statute “the most serious crimes of concern to the international community as a whole must not go unpunished”¹¹ and the parties to the Rome Statute are “resolved to guarantee lasting respect for and enforcement of international justice”.¹² Although justice may take very different forms, there is no disagreement that the core of

⁸ UN Security Council Resolution 808 (1993) Preamble, para 9, UN Security Council Resolution 955 (1994) Preamble, para 7.

⁹ Scharf supra note 4, at 1072.

¹⁰ Ibid.

¹¹ Rome Statute preamble para 4.

¹² Ibid preamble para 11.

criminal justice is that a convicted offender receives a proportionate sentence¹³ and that the judgment reflects the committed crimes. Both aspects shall be discussed in turn. All major international treaties such as the four Geneva Conventions of 1949, the 1948 Genocide Convention, and the 1984 Torture Convention require proportionate punishment.¹⁴ The Rome Statute does not explicitly mention proportionate sentencing but assumes this principle as a disproportionate sentence is ground for appeal for both Prosecution and Defence.¹⁵ Moreover, the ICC's explicit goal to end impunity¹⁶ includes that the convicted perpetrator does not walk away with a significantly disproportionately low sentence. One of the major criticisms of plea bargaining is that a sentence reduction based on a plea agreement does not reflect the blameworthiness of the defendant and the severity of the crimes. Plea bargaining has the potential to prevent justice and thus to undermine the reason being for the ICC. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) pointed out in Nikolić:

“Unlike national criminal justice systems, which often must turn to plea agreements as a means to cope with heavy and seemingly endless caseloads, the Tribunal has a fixed mandate. It's very *raison d'être* is to have criminal proceedings, such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal conduct – not simply a portion thereof.”¹⁷

Obviously a perpetrator of gross atrocities can never receive a punishment which mirrors their crimes¹⁸ and the Court has to find a sentence within the sanction range of the Rome Statute.¹⁹ The question relevant for the discussion of plea bargaining is what factors must be taken into account when calculating a proportionate punishment. Although the list of relevant circumstances in Article 78 and Rule 145²⁰ is not exclusive it is clear that, except for the personal circumstances of the defendant, all factors refer to the commission of the crime itself and not to post factum behaviour. Neither the Rome Statute or the Rules of Procedure and Evidence state that admissions of guilt or cooperation with the Court are mitigating factors. On the other hand, most national criminal justice systems acknowledge that acts of reconciliation, cooperation with the

¹³ Article 76 para. Hereinafter all Articles referred to, are those of the Rome Statute unless otherwise stated.

¹⁴ The Four Geneva Conventions and the Torture Convention speak of “effective penalties”.

¹⁵ Articles 81(2)(a), 83(3).

¹⁶ Preamble para 5.

¹⁷ Prosecutor v Momir Nikolić, Sentencing Judgement, Case No. IT-02-60/1-S (Dec. 2, 2003) para 67.

¹⁸ For different theories of penalties in international law see Ralph Henham, “The Philosophical Foundations of International Sentencing” 1 *Journal of International Criminal Justice* 2003, 64.

¹⁹ Article 77. There is no death penalty in the Rome Statute. The maximum sentence is life imprisonment.

²⁰ Rules of Procedure and Evidence for the ICC.

authorities and in particular an admission of guilt are mitigating factors. There is no indication that the relevant international conventions intended to change these generally practiced principles. Moreover, some argue that plea bargaining does not prevent proportionate sentencing because the Court always has the discretion to reject too lenient sentences agreed between Prosecution and Defence. Any promise made by the Prosecution to the Defence is not binding for the Court.²¹ However, this is a very formalistic argument as it does not consider the practical informal pressure on the Court to encourage the practice of plea bargaining in the long run. If the Court repeatedly disregarded sentence recommendations agreed by the parties, future defendants would be discouraged from entering into plea negotiations.

One practice of plea bargaining which is most contested for undermining the principles of justice is charge bargaining. Charge bargaining means that the Prosecution offers to drop some charges if the defendant pleads guilty to the remaining ones. Thus the defendant is not brought to justice for a number of crimes for which the prosecution had good evidence and subsequently not sentenced justly for all the crimes committed. In Nikolić the Trial Chamber expressed this concern:

“If the Prosecutor makes a plea agreement such that the totality of an individual’s criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions may arise as to whether justice is in fact being done.”²²

Judge Schomburg also voiced strong disapproval of selective indictments when he criticized that in Deronjić “already the series of indictments, including the Second Amended Indictment, arbitrarily present facts, selected from the context of a larger criminal plan and, for unknown reasons, limited to one day and to the village of Glogova only.”²³ One has to acknowledge that the ICTY attempted to reflect the “totality of an individual’s criminal conduct” in their sentence.²⁴ However, this policy is questionable on two accounts. First, what the ICTY proposes is that the sentence should reflect even those charges which have been with-drawn. Of course due to the presumption of innocence the Trial Chamber has no basis to reflect any ‘criminal conduct’ which has not been proven beyond reasonable doubt at trial. Secondly, it is not only the length of the sentence that is important for justice but also the criminal label. Even if a defendant is sentenced for the same number of years, it makes a huge difference whether they are convicted for one account of persecution or several accounts of genocide for example.

²¹ Julian A. Cook, Plea Bargaining at The Hague, 30 *Yale Journal for International Law* 2005, 473, at 476. The parties can make only sentence recommendations to the Court.

²² Prosecutor v Momir Nikolić, Sentencing Judgement, Case No. IT-02-60/1-S (Dec. 2, 2003) para 65.

²³ Prosecutor v. Deronjić, Sentencing Judgement , Case No. IT-02-61-S, (March 30, 2004) Dissenting Opinion of Judge Wolfgang Schomburg para 4.

²⁴ Prosecutor v Momir Nikolić , Sentencing Judgement , Case No. IT-02-60/1-S (Dec. 2, 2003) para 65.

Not only the sentence but also the judgment and its inherent condemnation by the international community are essential parts of justice. Moreover, as some writers point out, not to prosecute an act of genocide for reasons of efficiency violates the Genocide Convention. Petrig states: "To sacrifice a count of genocide for judicial economy seems incompatible with the spirit of this international treaty [i.e. Genocide Convention]".²⁵

To summarise, one has to notice that plea bargaining indeed bears the risk of awarding defendants unduly for their post facto behaviour and leads to convictions that neither label the crimes committed accurately nor punish them proportionately. On the other hand, victims need to realise that every trial bears the risk that even a guilty person might be acquitted because the Prosecution could not prove their case. In international criminal law where – as will be shown later – investigation is extremely difficult and this risk cannot be underestimated. In this sense, plea bargaining which secures an admission of guilt is in the interest of justice because a conviction of only a few charges and a reduced sentence might be preferable to an acquittal after trial. Furthermore, speaking in the context of the South African Truth and Reconciliation Commissions, Schabas states that "[the] confession itself, irrespective of any eventual criminal sanction, is seen as an important source of justice for victims."²⁶

Peace and Reconciliation

As mentioned before a central function of international criminal justice is not only to bring perpetrators to justice but also to make a contribution to peace and reconciliation. Both UN ad hoc tribunals were established by the Security Council under Chapter VII of the UN Charter, as mechanisms of international peace and security. Also the preamble of the Rome Statute establishing the ICC notes that "such grave crimes threaten peace, security and well-being of the world".²⁷ Plea bargaining has the potential to further peace and reconciliation between the conflicting parties because of the resulting admission of guilt by the perpetrator. In *Plavšić*, the ICTY declared "Mrs. Plavšić's plea of guilty and acceptance of responsibility represents an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation."²⁸ Not only the admission of responsibility but also the public acknowledgement of the victims' suffering can be of immeasurable value for reconciliation. During the war, Plavšić had publicly announced that Bosnian Serbs "were in danger of genocide at the hands of Bosnian Muslims and Croats"²⁹ but now

²⁵ Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals- With a Focus on the Plea-Bargaining Practice of the ICTY and the Legal Framework of the ICC*, 2008 (8) *Chicago-Kent Journal of Inter-national and Comparative Law* 1, at 18.

²⁶ William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 *Criminal Law Forum* 1996, 523 at 539.

²⁷ Para 3.

²⁸ *Prosecutor v. Biljana Plavšić, Sentencing Judgement, Case No. IT-00-39&40/1* (Feb 27, 2003) para 67.

²⁹ Nancy Armoury Combs, *Prosecutor v. Plavšić, Case No. IT-00-39&40/ 1-S. Sentencing Judgment*, 97 *American Journal for International Law* 929 (2003) at 931.

acknowledged the innocence of the victims. The same is true for the defendant's expression of remorse especially when it comes from a former leader. In Nikolić, the Trial Chamber declared that through "the acknowledgment of the crimes committed and the recognition of one's own role in the suffering of others, a guilty plea may be more meaningful and significant than a finding of guilt by a trial chamber to the victims and survivors."³⁰ On the other hand, one could argue that the victims deserve these concessions without the defendant being rewarded for them. Moreover, the defendant's admission of guilt will contribute little to peace and reconciliation if it does not convey sincerity. Plavšić's admission of responsibility and acknowledgement of the victims' innocence was for many Serbs no reason to reconsider the causes of the conflict. They rather saw her statement as an act of betrayal of her beliefs in return for generous benefits by the court.³¹ At the same time the victims who welcomed Plavšić's admission were appalled by the dropping of the genocide charges and especially the lenient sentence.³² Other agreed concessions, too, can undermine the reconciliatory effect of the confession, like in the case of Plavšić who was sent to a Swedish prison which offered inmates access to sauna, gym, solarium, massage room, and horse-riding paddock.³³

Since plea bargaining incites an admission of guilt, it can make a valuable contribution to peace and reconciliation in some cases. However, whether this is true will depend on the circumstances in each case and cannot be claimed as a general rule. The impact of each plea bargain for peace and reconciliation needs to be evaluated individually.

Defendants

There can be no international criminal justice unless the international criminal trial is a fair trial. Only if a conviction is reached under the strict rules of evidence and observance of defendants' rights can the judgment earn any legitimacy. If one function of international criminal law is to promote human rights the Court cannot leave the accused of international defendants' without rights such as the right to fair trial, the right to a public hearing, the right to examine or have examined witnesses on their behalf, the right not to be compelled to testify against themselves and most of all the right to be

³⁰ Prosecutor v. Nikolić, Sentencing Judgment, Case No. IT-02-60/1-S, (Dec. 2, 2003) para 72.

³¹ Alissa J. Rubin, Former Serb Leader's Admission of Guilt Alienates Compatriots, L.A. TIMES, Dec. 16, 2002, at A4.

³² Kebo, A. (2003, February, 24-28). Regional report: Plavšić sentence divides Bosnia. Institute for War and Peace Reporting's Tribunal Update, 302 accessible at http://www.iwpr.net/?p=tri&s=f&o=166268&apc_state=henitri2003 last visited October 2009.

³³ Patrick McLoughlin, Jail with "human touch" may await Bosnia's Plavšić, REUTERS, June 6, 2003 available at <http://www.freerepublic.com/focus/f-news/924094/posts> (last visited October 2009).

presumed innocent until proven guilty.³⁴ Since the core of plea bargaining is that a full trial is avoided, the defendant in effect loses all these rights. However, in the eyes of the defendants the advantages of an agreement with the Prosecution often outweigh the loss of rights. If they feel that there is a realistic risk of conviction the chance of a withdrawal of the most serious charges and the expectation of a generous sentence concession must seem compelling. In addition, the defendant does not have to face the shame and indignity of a public trial, especially the examination and cross-examination of victims.

Research in the United States showed that the higher the possibility of a hung jury or an acquittal is the greater sentence discount the Prosecution will offer. The promise of a significant sentence reduction puts of course considerable pressure on the defendant to avoid the risk of a trial.³⁵ For the layperson it is very difficult to evaluate the Prosecution's case and to calculate the risk of a conviction after trial. Thus it is fair to assume that a number of defendants who were formally innocent, i.e. the Prosecution would not have been able to prove them guilty beyond reasonable doubt, have entered into a plea agreement in domestic courts. The question arises whether this could also be the case at the ICC. Considering the manifold evidential problems of international prosecutions and the very high standard of defendants' right in the Rome Statute, the Office of the Prosecution (OTP) could be tempted to offer high sentence discounts and the defendant could feel pressured into an agreement even though they would have a good chance of an acquittal. Thus, through plea bargaining some defendants might be pressured to give up their fair trial rights.

The second problem that plea bargaining creates for the defendant, is the risk that the agreement falls apart once they have admitted guilt and the promised sentence reduction is not granted. The Prosecution can only recommend a sentence to the Trial Chamber but the Court is not bound by recommendation or the agreement. Only a full admission of guilt with an expression of remorse will convince the Court that a significantly low sentence can be justified. The defendant has to fear that the Court does not accept the guilty plea as a sufficient sign of remorse and as a mitigating circumstance. It is therefore important for the defendant that "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."³⁶ This might discourage the defendant from claiming all their rights or to appeal against interim court decisions. Even in a case of charge bargaining the defendant is not offered much certainty. The judges at the ICC have very broad sentencing discretion³⁷, and can, even if some of the charges are withdrawn, pass a severe sentence for the remaining

³⁴ Article 14 of the International Covenant on Civil and Political Rights, 16 Dec. 1966, 99 U.N.T.S. 171.

³⁵ Cook *supra* note 21, at 489.

³⁶ *Ibid.* at 491.

³⁷ Rome Statute Articles 76(1), 77, 78(1).

charges. Indeed in *Nikolić*³⁸ the Trial Chamber pointed out that the sentence must “accurately reflect the actual conduct and crime committed” rather than the content of the agreement. The defendant who has fulfilled their part of the deal has no security that they will receive anything in return. Rather the defendant will find it very hard to retract an admission of guilt once it is made.³⁹ If an admission of guilt is withdrawn, the case will be remitted to a different Trial Chamber according to Art 65(4)(b) but since there are only seven judges at the Trial Division it will be difficult for the defendant to feel that the new Chamber will not be influenced by the earlier admission of guilt.⁴⁰ Thus, defendants who are offered a deal are put under considerable pressure to take a significant risk whereas the Prosecution has nothing to lose. This situation contravenes the principle of fair trial.

The ICTY attempted to limit the risk of loss of procedural safeguards by introducing Rule 62bis in the ICTY Rules of Procedure and Evidence. This Rule provides the minimum requirements under which the Trial Chamber can accept a guilty plea. According to this provision the Trial Chamber has to satisfy itself that:

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accuser’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.

However, as has been shown elsewhere, the ICTY has taken a very formalistic view on this provision and rarely examines in any detail whether the requirements are met before accepting the guilty plea.⁴¹ One could argue that the defendant is safeguarded by the presence of their counsel. However, often defendants distrust international defence lawyers and prefer national counsel who has sometimes no experience in international criminal law. They might not be aware of all the procedural rights and elements needed to be proven before the international criminal court.⁴² For example, in *Erdemović* the Appeal Chamber pointed out that the defence counsel “neither understood the concept of a guilty plea nor comprehended the nature of the charges

³⁸ Prosecutor v Momir Nikolić, Sentencing Judgment, Case No. IT-02-60/1-S (Dec. 2, 2003) para 65.

³⁹ For example in the case of Dragoljub Kunarac before the ICTY the Trial Chamber and the parties agreed that the requirements of rule 62bis had not been met, and the case proceeded to trial on a presumption of innocence. Prosecutor v. Kunarac, Kovac, Vukovic, (Case No. IT-96-23-I) Transcript (ICTY Trial Chamber II, March 13, 1998) at 44.

⁴⁰ The ICC has at the moment eighteen judges in total.

⁴¹ Rauxloh, *Negotiated History - The Historical Record in International Criminal Law and Plea Bargaining*, forthcoming.

⁴² For a summary of the criminal procedure under the Yugoslavian Code of Criminal Procedure 1985 see Cook *supra* note 21, at 497.

against the client".⁴³ Further, if the defence counsel comes from a system which does not apply plea bargaining they might not be familiar with this practice. However the admission criteria for defence lawyers at the ICC are much stricter⁴⁴ than before the ICTY.⁴⁵ What is more important, Rule 62bis sets out a judicial test and the Court's duty to protect the defendant from any undue pressure or submitting an uninformed admission of guilt cannot be delegated to defence counsel.

A third disadvantage of plea bargaining from the defendant's viewpoint is that it leads to unequal treatment of perpetrators who have committed comparable crimes. Defendants who can offer further cooperation with the Prosecution because they can submit valuable information against other accused are in a much better negotiation position than those who have not. "Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement."⁴⁶ Thus similar crimes might be sentenced very unequally.

Costs of Proceedings

The driving factor for the introduction and development of plea bargaining in the ICTY were the great benefits it had on saving resources. It is often claimed that the ICTY had no real choice to refuse such an efficient practice given the pressure from the UN and the United States to expedite proceedings.⁴⁷ Meron even goes so far as saying that the ICTY could not afford to try all defendants.⁴⁸ An international criminal trial is not only much lengthier than a national trial but also much more expensive. Court staff, defendants and witnesses have to be offered appropriate security, international infrastructure such as international transport, and communication needs to be provided.⁴⁹ Hearings need to be simultaneously interpreted and the documents translated into a number of languages which requires not only interpreters and translators but also the newest IT technology for the Defence and Prosecution teams, the judges, the clerks, the defendant and the witness. In order to ensure transparency, especially for the public in the involved countries (so far all in Africa), filming, recording and broadcasting equipment is needed.⁵⁰ Scharf estimates that on average a trial before the ICTY or ICTR costs about \$50 billion and take over a year.⁵¹ Plea bargaining offers a way to avoid a full length trial and thus contributes considerably to save

⁴³ Ibid. at 499.

⁴⁴ Rule 22(1) of the ICC Rules of Procedure and Evidence and Regulation 67 of the Regulations of the Court.

⁴⁵ Rule 44 (A)(i) ICTY Rules of Evidence and Procedure.

⁴⁶ Prosecutor v. Momir Nikolić, Sentencing Judgment, Case No. IT-02-60/1-S (Dec. 2, 2003) para 66.

⁴⁷ Cook supra note 21, at 477.

⁴⁸ Scharf supra note 4, at 1076 footnote 25

⁴⁹ Prosecutor v. Erdemovic, (Case No. IT-96-22-A) Separate and Dissenting Opinion of Judge Cassese, (7 Oct. 1997) para 8.

⁵⁰ ICTY and ICC hearings can be watched live on the internet.

⁵¹ Scharf supra note 4, at 1076 footnote 30.

resources. The twelve plea agreements made at the ICTY between 2001 and 2003 helped to clear 40% of the caseload⁵² and according to a senior Prosecution official “[facilitating] guilty pleas certainly makes sense for a management standpoint”.⁵³ In a number of cases both the Trial Chambers and the Appeal Chamber⁵⁴ praised the “substantial saving of international time and resources”⁵⁵ caused by a guilty plea, especially that “it saves considerable resources for, amongst others, investigations, counsel fees, and the general conduct of the trial”.⁵⁶ In addition, plea bargaining encourages defendants to provide valuable evidence in other cases which will free up further resources spent on investigation. Resources saved can be directed to more complicated, contested cases and thus help to protect innocent defendants. However, the Trial Chamber in Nikolić distanced itself from these considerations and opposed the idea that efficiency should be the primary concern:

“While it appreciates this saving of Tribunal resources, the Trial Chamber finds that in cases of this magnitude, where the Tribunal has been entrusted by the United Nations Security Council – and by extension, the international community as a whole – to bring justice to the former Yugoslavia through criminal proceedings that are fair, in accordance with international human rights standards, and accord due regard to the rights of the accused and the interests of victims, the saving of resources cannot be given undue consideration or importance.”⁵⁷

These points are persuasive as it is doubtful whether financial reasons alone are sufficient to legitimize plea bargaining. Clark voices the disquiet of many:

“Even recognizing the substantial administrative benefits of timely guilty pleas and the encouraging effect their use in mitigation may have on other accused or suspected individuals to come forward, the author nonetheless struggles to justify what is essentially an allowance of administrative concerns to mitigate the punishment of those convicted for the most heinous crimes known to human-kind!”⁵⁸

⁵² Ibid. at 1074.

⁵³ Marlise Simons, Plea Deals Being Used to Clear Balkan War Tribunal’s Docket, *The New York Times*, November 18, 2003.

⁵⁴ Prosecutor v. Erdemović Appeal Judgement, Case IT-96-22, (Oct. 7, 1997) Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 2.

⁵⁵ Prosecutor v. Plavšić, Sentencing Judgement, Case IT-00-39 & 40/1 (Feb 27, 2003) para 73.

⁵⁶ Prosecutor v Predrag Banović, Sentencing Judgement, Case No. IT-02-65/1-S (Oct. 28, 2003) para 66, 68.

⁵⁷ Prosecutor v Momir Nikolić Sentencing Judgement, Case No. IT-02-60/1-S (Dec. 2, 2003) para 67.

⁵⁸ Theresa Marie Clark, Transplant Justice?: The Efficacy of a Purely Common Law Concept in the International Criminal Forum, 9 *Buffalo Human Rights Law Review* 2003, 75, at 109.

It cannot be justified to curtail the rights of the defendant to a fair trial as well as the interests of the victims of a full sentence in order to serve the practical interests of the Court. If one argues that money saved at the courts would be better spent on the victims directly, it has to be kept in mind that so far neither the UN nor any member state has ever diverted money from their budget for court contributions to the victims' support. Unfortunately, it will only be a question of time before the ICC has to face similar resource and caseload problems as the ICTY. Damaska⁵⁹ suggested that the ICC will not be as overworked as the ad hoc tribunals because of the principle of complementarity,⁶⁰ the absence of temporal limits as it is a permanent court, and evidentiary problems because of the "reduced power of the Court to obtain documentary evidence from implicated governments"⁶¹ who can refuse to submit evidence under the claim of national security.⁶² However, seeing how busy the Court is already with only one trial having commenced and looking at the rapid increase of indictments, the ICC can be expected to be overburdened quite soon. Of course, unlike the UN ad hoc tribunals, the ICC is a permanent court and thus does not have to fear the pressure of a completion order. Nevertheless the Court is dependent on the funding of the State Assembly⁶³ who will put pressure on the Court to work efficiently. This pressure might be even more compelling than the defendant's right to an expedient hearing. There was never a doubt how costly international criminal tribunals and courts would be even if the actual costs and length might have exceeded the worst fears. However, since the international community has decided that rather than providing this money for reconstruction it should be spent on fair trials, it cannot be justified to save resources by avoiding these very same trials. It is true that principles of justice have to be balanced against the available resources, and the Rome Statute has prescribed a number of selection criteria, which in effect limit the scope of justice. This limited scope of justice should not be diminished even further because of efficiency considerations. Expediency alone is not a valid reason to offer sentence reductions. Nor is plea bargaining a valid tool to reduce an overburdening case load.

Victims

The question of whether plea bargaining is in the interest of the victims is an ambiguous one. The same agreement between Defence and Prosecution might have very different impacts on different victims. The advantage most often quoted is that an admission of guilt spares victims the ordeal of a trial. A trial means that the witness has to travel a long way from home to a foreign country to testify and moreover, testifying at court might put the safety of the witness and their families at risk. Most importantly, at trial the victims might have to relive the trauma when giving testimony, in particular during

⁵⁹ Mirjan Damaska, *Negotiated Justice in International Criminal Courts* 2004 (2) *Journal of International Criminal Justice* 1018 at 1036.

⁶⁰ Whereas both the ICTY and the ICTR operate under the principle of primacy.

⁶¹ Damaska *supra* note 59.

⁶² Article 72.

⁶³ Article 115 (a).

cross-examination.⁶⁴ Not all victims, however, perceive the trial as a burden. In contrast, the active participation in the procedures can have a very important healing and restoring effect on victims who are given the opportunity to tell their story. The avoidance of trial deprives victims of a platform to let their voice be heard and to share their history with the international community. Clarke notes that “especially in the context of mass atrocities, the criminal trials also serve as an official venue for the acknowledgement of the victims’ injuries”.⁶⁵ And Petrig emphasizes that “the mere act of reconceptualising oneself as a participant of a criminal trial and possibly even as the holder of rights can offer a sense of empowerment.”⁶⁶ The Rome Statute is very innovative in this respect as it requires the Prosecution, the Pre-trial Chamber and the Trial Chamber to consider the views and concerns of the victims at all stages.⁶⁷ Moreover, while no sentence is high enough to do justice to the crimes committed⁶⁸ the public exposure at trial is part of the satisfaction brought to the victims and an important part of the justice process. It seems insupportable to take this away from the victims due to efficiency considerations. Another advantage of plea bargaining for the victims is that the defendant’s admission of guilt might help victims in their healing process. In his address to the Security Council the then President of the ICTY stated in 2003: “In some cases, a forthright and specific acknowledgement of guilt may offer victims as much, or even more, consolation than would a conviction following repeated protestations of innocence.”⁶⁹ In addition, some victims might prefer a quick conviction after a confession, rather than one after years of trial and appeal procedures. Further, as time is saved on trials more defendants can be brought to justice, which again is in the interest of the victims.⁷⁰ Obviously, victims also benefit from the contribution a guilty plea might have on peace and reconciliation mentioned above.

The crucial downside for victims is the withdrawal of charges and the sentence reduction that result from the agreement. Perpetrators of the most heinous crimes are rewarded for cooperation with the court rather than punished for their actions during the conflict. Not surprisingly victim groups reacted with outrage to the extensive use of plea

⁶⁴ Prosecutor v. Plavšić, Sentencing Judgement, Case IT-00-39 & 40/1 (Feb 27, 2003) para 68.

⁶⁵ Clark supra note 58, at 103.

⁶⁶ Petrig supra note 25, at 23.

⁶⁷ See Articles 15 (3), 19(3), 53 (1) (c), 54(1)(b), 65 (4)(a), 75(1).

⁶⁸ The ICC does not provide for the death penalty. The highest sentence which is life imprisonment can only be imposed “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person” (Article 77(1)(b) Rome Statute).

⁶⁹ Theodor Meron, Address to the United Nations Security Council (Oct. 3, 2003), reprinted in Press Release, ICTY, Address of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Oct. 10, 2003), available at <http://www.un.org/icty/pressreal/2003/p790-e.htm> (last visited October 2009).

⁷⁰ Petrig supra note 25, at 22.

agreements and the sub-sequent comparably low sentences in the ICTY.⁷¹ Watson holds that “overall, the development of plea-bargaining at the ICTY has been a good thing [that] has not resulted in outrageously lenient sentences”⁷² but this opinion is not shared by many victims.⁷³ A study of two surveys in Sarajevo shows that although there is a common perception that trials take too long, only 6% of the respondents approved of plea bargaining.⁷⁴ One voice declared “The trials in The Hague are becoming a farce! They are bargaining like [they are] in the market”.⁷⁵ The sentence range of the ICC is already perceived by some as too low, as the Rome Statute does not provide for the death sentence and even life imprisonment is only given in exceptional circumstances.⁷⁶ Further reductions will disappoint many of the victims who had hoped the ICC will bring justice.

Plea bargaining cannot be considered generally as only beneficial or only disadvantageous for the victims. Each case needs to be considered on its own merits. When deciding whether to accept an admission of guilt the ICC has the tools to give victims a voice. According to Article 65 (4) the Trial Chamber can either request further witness testimony from the Prosecutor or even decide to conduct a full trial. Following from the spirit of this provision when considering the possibility of engaging in plea negotiations, the Prosecution too should evaluate in each case what impact an agreement would have for the different victims.

Legitimacy

The extensive use of plea bargaining has not only implications for the defendants and the victims but for also for the legitimacy of the international criminal procedure and the courts and tribunals themselves. Unlike national criminal courts which are usually accepted in their country, each of the international criminal courts and tribunals so far experienced attacks on their legitimacy. The claim of victors’ justice was heard in every international criminal court from the IMT to the ICTR. Having been established outside the society where the crime has been committed, their right to judge is denied. The ICC will face the same accusations, especially in cases which are referred by the Security Council to the Court. Being a treaty based court with only two permanent members of the Security Council being a member to the Rome Statute; the ICC still has to prove its legitimacy. The Court’s judgments can only be accepted if it manages to provide justice through fair trials whose correctness is beyond doubt and to apply correct procedures, not only to restore the rule of law in the war-torn country but also to set an example for the development of international human rights. This latter point not only requires

⁷¹ Simons supra note 53. 2003 For a piece of empirical research in the perception of the ICTY see Sanja Kutnjak Ivković and John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice*, 2006 (40/2) *Law & Society Review* 369.

⁷² Ibid.

⁷³ See below, section II.5.

⁷⁴ Ivkovic/Hagan supra note 71 at 396.

⁷⁵ Ibid.

⁷⁶ Article 77.

developing human rights of the victims by defining, clarifying and developing criminal offences,⁷⁷ but also the rights of the defendants. Only if the Court applies the rights and procedures it is advocating, can it earn legitimacy. Plea bargaining, which avoids the trial with all its procedural safeguards, could give the impression that the Court prefers to quickly dispose of cases by negotiating with perpetrators rather than fulfilling its mandate.

On the other hand, the ICC, like all international criminal courts and tribunals, has to show that it is worth the immense resources which are pulled into justice rather than, for example, reconstruction of war-torn societies. Although the court operates under the presumption of innocence, its success is not only measured by the fairness of its trials but also by the number of convictions. Only if it manages to bring a fair number of perpetrators to justice, will it be judged to have 'delivered the goods'. Plea bargaining frees the way to quick uncontested convictions. Moreover, the defendant agrees that the Prosecution was right to open the case against them and that they deserve the sentence imposed by the Court. If the defendant shows remorse and cooperation they also imply that they accept the Court and its rulings. An admission of guilt acknowledges that the Prosecution was right investigating the crime and prosecuting the accused and that the Court has the right to convict and to punish them. Thus an admission of guilt is an acknowledgement of the legitimacy of the Court. It is also an indirect recognition that setting up the international tribunal in the first place or, in the case of the ICC, the referral of a particular situation to the ICC was justified. Simons mentions that confessions at the ICTY made "the tribunal more acceptable in Serbia and Croatia, where many people regard the court as bias".⁷⁸ When in 2003, after seven cases of plea agreements, the ICTY took the opportunity in Nikolić "to examine the question of whether plea agreements are appropriate in cases involving serious violations of international humanitarian law brought before this Tribunal",⁷⁹ the court held that resource savings alone are not enough to justify plea bargaining. However, beside several other benefits of plea bargaining the court found that guilty pleas would serve the credibility and thus legitimacy of the ICTY itself:

"Denial of the commission of the crime may no longer be an option for those who have convinced themselves that the Tribunal is biased or that its judgments are based on weak or even false evidence."⁸⁰

⁷⁷ For example the exemplary development of sexual offences in the ICTR and ICTY. See KD Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan tribunals: Current Issues* (1999) 93 *American Journal for International Law* 97.

⁷⁸ Simons *supra* note 53.

⁷⁹ *Prosecutor v. Nikolić, Sentencing Judgement, Case No. IT-02-60/1-S, (Dec. 2, 2003)* para 70 para 57.

⁸⁰ *Prosecutor v. Nikolić, Sentencing Judgement, Case No. IT-02-60/1-S, (Dec. 2, 2003)* para 70.

The Trial Chamber in *Plavšić* explicitly values that “by surrendering and pleading guilty, Mrs. Plavšić is also sending a powerful message about the legitimacy of the International Tribunal and its functions”.⁸¹ Those defendants who accuse the Court of bias and victors’ justice do not enter agreements. One of the reasons that there are so few plea agreements at the ICTR is that the defendants deny impartiality of the court because no member of the RPF has been charged.⁸² Thus, although plea bargaining threatens the legitimacy of the Court if used in a way that evokes a picture of unfair backdoor dealing, if used properly plea bargaining can support the Court’s reputation by facilitating more convictions as well as the acknowledgement of the Court by the most serious defendants.

Access to Evidence

When discussing the use of plea bargaining in international criminal law the arguably most important feature is the very different kind of investigation compared to domestic crimes. There are three major aspects which distinguish international from domestic crime: the scale and nature of the crime, the Prosecution’s dependency on State co-operation and the difficulties to link the crime to high-profile offenders.

First of all, the sheer number of acts committed makes every criminal investigation extremely difficult. There are often great many perpetrators who participated in the atrocities and the number of alleged victims and potential witnesses can run into tens of thousands. In many of the current armed conflicts perpetrators are victims themselves, for example child soldiers who have been forced to join one of the parties of the armed conflict. The scale of the atrocities require examining such a volume of forensic evidence, witness experts statements and relevant documents that it cannot be compared with a normal national case of violent crime.⁸³ On top of this, the investigation has to be conducted in large parts in countries where infrastructure and security might still be severely interrupted by the former or still on-going conflict. Safety is not guaranteed for staff or potential witnesses. The latter might be unwilling to travel to The Hague not only for security risks for themselves as well as their families at home but also because of the prospect of traumatising of reliving the violent experience and cross-examination. Further logistic problems are caused by the need for interpreters during the interrogations and translations of the relevant documents.⁸⁴ The fact that investigations will take so much time means that witnesses will become less reliable the more time passes since the crime was committed. In particular child soldiers who are asked to testify against commanders about words spoken when they were half the age they are now might find it difficult to convince the Court of the accuracy of their memories.

⁸¹ Prosecutor v. Plavšić, Sentencing Judgement, Case IT-00-39 & 40/1 (Feb 27, 2003) para 76.

⁸² Combs supra note 2 at 118.

⁸³ If at all the scale of the evidence that needs to be scanned and examined makes a comparison with white collar crime more appropriate.

⁸⁴ Prosecutor v. Erdemović, Case No. IT-96-22-A, (Oct. 7, 1997) (Separate and Dissenting Opinion of Judge Cassese) para 8.

Even more difficult for the investigation is the fact that the ICC has no investigation force comparable to national police forces and is dependent on State cooperation. Whether the Prosecutor needs office space, local police officers and interpreters for taking witness statements, access to official documents and archives or simply visas to enter the country⁸⁵ the OTP needs national state assistance.⁸⁶ Moreover, unlike national courts the ICC does not have subpoena powers and thus depends on state cooperation to get access to suspects and witnesses. To secure state cooperation is particularly difficult because every international criminal investigation is highly politically sensitive. Due to the principle of complementarity the ICC will hear only cases where the relevant State is unable or unwilling to prosecute itself.⁸⁷ If a case is not able or willing to prosecute itself the question arises to what extent the State is able or willing to cooperate with the OTP. Member States of the Rome Statute are obliged to provide full cooperation to the ICC⁸⁸ but other than referring the case to the State Assembly⁸⁹ there is no mechanism to enforce this rule. If the relevant state is not a member of the Rome Statute and the case was referred to the ICC by the Security Council⁹⁰, it would be assumed that the referral resolution would compel all States to cooperate with the ICC. Unfortunately experience shows that the Security Council does not pursue this way. When the Security Council referred the situation in Darfur to the ICC⁹¹ it recognised “that States not party to the Rome Statute have no obligation under the Statute” and only “urged” non-member States to cooperate fully⁹² rather than using its power to order full cooperation with the ICC. Thus, when deciding how to conduct the investigation the Prosecution needs to take into consideration the interest of each State whose cooperation they are dependent on.

The third major difficulty for the investigation arises from the fact that the ICC focuses on those offenders who bear the greatest responsibility for the gravest crimes. The Court targets defendants in the political, military or economic leadership rather than the trigger-pullers of low or middle rank. These people rarely commit the crimes themselves but rather plan and order the attacks. Unlike the “meticulous recordkeeping that made Nazi war crimes relatively easy to prove”⁹³ high rank perpetrators today are

⁸⁵ For an example where opposition of the national government threatened the international prosecution see the Rwandan opposition to the ICTR in 2002. Erik Møse, *Main Achievements of the ICTR (2005)* 3 *Journal for International Criminal Justice* 920, at 939-940.

⁸⁶ Petrig *supra* note 25, at 26.

⁸⁷ Article 17(1)(a).

⁸⁸ Article 86.

⁸⁹ Article 87(7).

⁹⁰ Article 13(b).

⁹¹ UN SC Resolution 1593(2005).

⁹² UN SC Resolution 1593(2005) para 2.

⁹³ Terry Coonan, *Prosecuting And Defending Violations Of Genocide And Humanitarian Law: The International Tribunal For The Former Yugoslavia 1994*, *American Society of International Law Proceedings* 239, at 248.

not so careless as to leave a paper trail of their orders.⁹⁴ The survivors can often only testify against the foot soldiers who have victimised them but not the commander who gave the orders or the political leader who master-minded the atrocity. Thus, one of the most difficult tasks of the Prosecution is to link the crime to the defendant. Often only the testimony of co-defendants can prove the responsibility of those in highest command position. However, former followers are often reluctant to testify against their earlier superiors.⁹⁵ It is here where plea bargaining proves to be most helpful and indeed necessary. With the offer of sentence reduction to some defendants, the Prosecution can obtain insider information and testimony against higher-ranking and more culpable defendants:

“As is often highlighted by the Prosecution, guilty pleas can substantially assist in its investigations and presentation of evidence at trials of other accused, including high ranking accused. The Trial Chamber recognises and appreciates the assistance that can be given and the knowledge that can be gained by all organs of the Tribunal from having persons who may have “inside” information testify in other proceedings.”⁹⁶

Because of the difficulties inherent in international criminal investigation and the limits that the political sensitivity of the cases and dependency on state cooperation puts on the prosecution, often the only way to secure a conviction is to get testimony from co-defendants. Thus a plea bargain which includes an offer of cooperation with the Prosecution is often the only way to gain witness statements against high profile defendants. Although justice is traded in the individual case because where a guilty offender is awarded a reduced sentence, looking at the whole picture more justice is achieved because otherwise unavailable evidence against the most serious offenders is gained. In this respect international prosecution can learn from national experience. Coonan explains that “[o]ur experience with organized crime convinced us that such tools as plea bargains and offers of immunity would help the prosecutor get the “big fish” more easily and effectively.”⁹⁷ Thus, it is argued that plea bargaining is needed as a tool of gaining evidence to overcome the inherent difficulties of international criminal law but not as a tool of efficiency.

PLEA BARGAINING IN THE ICC

The question of the procedural consequences of a declaration of guilt by the defendant was much debated at the Rome Conference. In civil law countries a confession is usually only a form of evidence but has no procedural consequences, whereas the guilty plea in common law countries concludes the trial. The Rome Statute tried to formulate a compromise by avoiding both terms and introducing the possibility of an

⁹⁴ Ibid.

⁹⁵ For example Biljana Plavšić who refused to testify against Slobodan Milošević

⁹⁶ Prosecutor v. Nikolić, Sentencing Judgment, Case No. IT-02-60/1-S, (Dec. 2, 2003) para 71.

⁹⁷ Coonan supra note 93.

admission of guilt.⁹⁸ Like the guilty plea an admission of guilt means the conclusion of the trial.⁹⁹ However, as in in civil law countries, the Trial Chamber has to make sure that the admission of guilt is supported by the facts of the case¹⁰⁰ otherwise the Chamber has to request a more complete presentation of the facts.¹⁰¹ Article 65 follows the example of Rule 62bis of the ICTY RPE and Rule 62(v) of ICTR RPE. The Trial Chamber must ensure that the defendant made his admission of guilt voluntarily and with an understanding of the nature and consequences of the admission.¹⁰² Petrig argues that Article 65(4) has the potential to balance the interests of “encouraging and rewarding plea agreements and the victim’s interests”¹⁰³ as it allows the court to require evidence or even a trial if it finds necessary. However, the question is whether the court uses these procedures as they take up time and resources and might also discourage plea agreements. Like in the ad hoc tribunals the Trial Chamber has to proceed to trial if the elements of Article 65(1) are not met. The admission of guilt is then deemed not to have been made and the defendant presumed innocent.¹⁰⁴

Article 65(5) does not explicitly allow or forbid plea bargaining. While on the one hand, it acknowledges settlements between Prosecution and Defence, it emphasized that the Court is not bound by such agreements. Petrig argues that Article 65(5) is necessary because the “simple fact that in some countries practicing plea-bargaining, the courts are not bound by the plea-agreement does not mean that this will automatically be the practice of international criminal courts.”¹⁰⁵ Schabas on the other hand holds that this provision is superfluous¹⁰⁶ because in no system is the court ever bound by the prosecution’s recommendation. Otherwise, the court would have lost its essential judging function. However, some countries have the rule that the court is bound by agreements if it was part of the settlement unless new circumstances arise.¹⁰⁷

The question will be how the Court will choose to apply their discretion to follow the parties’ agreements or not. If the Trial Chambers decide to generally disregard agreements between Prosecution and Defence, the parties will not be able to develop a relationship of trust and plea bargaining will not develop as a general practice. Combs has shown that only a few cases, where the Trial Chamber does exceed the

⁹⁸ Article 65.

⁹⁹ Article 65(2).

¹⁰⁰ Article 65(1)(c).

¹⁰¹ According to Article 65(4) the Trial Chamber may order summary proceedings where the Prosecution can present additional evidence or order a full trial.

¹⁰² Article 65(1)(a), (b).

¹⁰³ Petrig supra note 25, at 10.

¹⁰⁴ Article 65(3).

¹⁰⁵ Petrig supra note 25, at 10.

¹⁰⁶ William Schabas, *International Criminal Court* (Cambridge: Cambridge University Press) 2007, 3rd ed. at 293.

¹⁰⁷ §257c(4) German Criminal Procedure Code.

recommendation, can lead to a considerable drop in guilty pleas.¹⁰⁸ If however the Court is known to usually follow the agreements unless new circumstances arise, plea bargaining can thrive. The admission of guilt is not explicitly mentioned in the Rome Statute or the Rules of Evidence and Procedure as a mitigating factor but it can be presumed that the sentencing court will acknowledge it, as such, since a confession in all criminal justice systems is regarded as favourable act by the defendant that deserves some reward.¹⁰⁹ Thus the Court can justify sentence reductions on the base of the admission of guilt as a mitigating factor.

Considering that the Rome Statute invites or at least does not hinder plea bargaining and the manifold advantages that such practice has, it is assumed that the ICC will very soon start applying this practice as soon as it has more cases to deal with. Another factor which supports this prediction is the fact that an increasing number of court staff of the ICC will come from the ICTY where plea bargaining is used regularly. Since the completion strategy was put in place, staff from the ICTY tried to get jobs at the ICC. In the same way the practice of plea bargaining was brought from the US officials to the ICTY, we will soon have a high number of officials who bring the practice from the ICTY to the ICC. Plea bargaining is a practice that operates in a certain culture. When the defence counsel in Dragan Nikolić felt that the Prosecutor had submitted a sentencing brief that was not within the expectations of the agreement, he warned that this: “will be noted by those whose duty it is to advise on the issue of making a Plea Agreement with the Prosecutor.”¹¹⁰ This shows that the plea agreements are based on trust and that a perceived abuse of this trust might threaten the whole culture and influence future behaviour:

“Yet, regardless of the validity of the justifications for its adoption, now that plea-bargaining has been employed by the ad hoc Tribunals, the precedent will undoubtedly prompt the permanent international criminal court and hybrid tribunals to adopt the practice as well.”¹¹¹

The driving spirit behind the development of international criminal law is the aim to end impunity and bring the most responsible perpetrators before trial. Thus at first sight it is astonishing to see that international criminal courts and tribunals should decide to dispose of this trial once they have achieved the difficult tasks of bringing a defendant before court. Plea bargaining seems to “compromise the goals of international criminal justice, namely the duty to prosecute, the principle of just desert, the establishment of a

¹⁰⁸ Combs supra note 2, at 99-100. See for example Prosecutor v. Babić, Case No. IT-03-72-A, Transcript of Appeals Proceedings (Apr. 25, 2005) pages 34, 35.

¹⁰⁹ Prosecutor v Dragan Nikolic, Sentencing Judgment, Case No. IT-94-2-S, (Dec. 18, 2003) para 227.

¹¹⁰ Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Appellant's Brief in Reply to the Prosecution Respondent's Brief (Aug. 25, 2004) page 5, cited in Combs supra note 2, at 99.

¹¹¹ Scharf supra note 4, at 1080.

historical record, and the realisation of the victim's interests."¹¹² However, this paper has shown that many of the characteristic aspects and goals of the international criminal trial are so difficult to achieve that the use of plea bargaining can be helpful and even necessary. Yet the serious disadvantages of plea bargaining, such as the risk to defendants, victims' interests, and the Court's legitimacy, make it essential that plea bargaining is only used under very limited circumstances. This section proposes that the ICC should use plea bargaining only under very limited circumstances.

PROPOSALS

It was shown in the previous section that international criminal justice is distinguished from national criminal justice by its different aims and by its difficulties of investigation. These special circumstances, rather than reasons of efficiency, justify the use of plea bargaining. I therefore argue that plea bargaining should be allowed only if (a) the plea bargain leads to the defendant offering new evidence or contribute to reconciliation, and (b) if high standard of safeguards can be enforced.

New Evidence and Reconciliation

The most important situation in which plea bargaining should be used is when the bargain helps to get otherwise unavailable evidence against high profile offenders. As was seen above for those perpetrators targeted by the ICC, i.e. those bearing most responsibility, it is most difficult to get evidence against. Thus considering the difficulties of international criminal investigations, the Prosecutor should use plea bargaining as a tool to extract further evidence against high ranking defendants who could otherwise hide behind the power hierarchy. In a case like *Rutaganira*, where the agreement included that there would be no further cooperation with the Prosecution,¹¹³ plea bargaining should not be used. Secondly, plea bargaining should be used in situations where it can encourage defendants to provide facts which are an essential addition to the historical record and which otherwise might be lost to the public record. Lastly, a plea bargain should be considered when it encourages an otherwise unavailable admission of guilt which is essential for reconciliation. Of course it is very difficult to establish any criteria on how to evaluate whether an admission of guilt facilitates reconciliation, and to what extent. As was shown earlier, the guilty plea of Biljana Plavšić, for example, was received with very mixed reactions. It will be for the Court to develop, through experience, the relevant criteria and indicators to make such evaluation.

In order to avoid the necessity to extend plea bargaining to other situations for reasons of efficiency, the ICC should be very strict on its selection criteria for cases to make sure that it does not indict more suspects than it can afford to provide a full trial for if these are brought before court. The OTP should avoid the situation of the ICTY and the ICTR where not only the leaders of the atrocities were charged, but also comparably minor

¹¹² Petrig supra note 25, at 4.

¹¹³ Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Transcript at 29 (Jan. 17, 2005) cited in Combs supra note 2, at 112.

perpetrators. The ICC has to remember that its mandate is not to solve the armed conflict and provide justice for all involved parties, but rather encourage national courts to do so.¹¹⁴ Secondly, the Court should review to what extent it can use evidence from earlier cases to establish general aspects, such as the existence of an armed conflict of an attack against a civilian population. Experience of the ICTY where the same expert witnesses were asked to give the same evidence at different trials¹¹⁵ should be avoided.¹¹⁶ A third way to overcome investigation problems without plea bargaining is to put more pressure on state cooperation. The international community has been proved to be able to put considerable pressure on national states to cooperate. One of the most prominent examples was in 2001 when the US imposed a deadline on Yugoslavia to arrest Slobodan Milosevic, who had been indicted by the ICTY and threatened not only to withhold financial support from the IMF and the World Bank, but also millions of US dollars in direct economic aid.¹¹⁷ Unfortunately, the UN Security Council gave the wrong message in Resolution 1593 when it failed to use the opportunity to force non-member States to offer full cooperation with the Court.

High Standard of Safeguards

If the ICC decides to use plea bargaining, it is essential that this practice does not in any way undermine the rule of law by infringing on the rights of the defendant. This can only be assured if the Trial Chamber examines the requirements of Article 65 very carefully. It is most important that the Court requires not only whether the admission of guilt was made voluntarily but that the defendant is aware in detail of what rights they are giving up. I suggest that a Rule should be added to the Rules of Procedure and Evidence which requires the Court to inform the defendant about the consequences of an admission of guilt and that they are not bound to an earlier agreement with the Prosecution. Further, the Rome Statute does not regulate the participation of the Trial Chamber in any agreements. If the Chamber has indicated certain consequences in case of an admission of guilt, it should be bound unless new circumstances, for example, new evidence of aggravating factors, should arise, in order not to violate the right to fair trial. Examining the elements of Article 65 thoroughly and informing the defendant about the consequences of the admission of guilt will inevitably prolong the hearing but both are unavoidable in order to ensure the validity of the admission of guilt and safe legitimacy of the practice of plea bargaining at the ICC. Besides, compared to a full trial, the Court has still saved a substantial amount of time.

¹¹⁴ Scharf supra note 4, at 1080.

¹¹⁵ D.A. Mundis, 'Improving the Operation and Functioning of the International Criminal Tribunals', 94 *American Journal for International Law* (2000) at 759, 775.

¹¹⁶ Scharf supra note 4, at 1077.

¹¹⁷ Paul R Williams and Karina M. Waller, *Coercive Appeasement: The Flawed International Response to the Serbian Rogue Regime*, 36 *New England Law Review* 2002, 825-889 at 888.

CONCLUSIONS

When looking at the spread of plea bargaining and the gradual replacement of trials at national systems, it seems that there are two factors which first of all encourage and maybe even necessitate plea bargaining as a standard practice. One is the growing number of crimes themselves, on the other hand, is the growing complexity of criminal procedures often as a reflection of increased defendants rights and victim participation. The ICC has to deal with both phenomena. Unfortunately, there is, at present, no shortage of suited armed conflicts where a multitude of crimes are committed to a vast number of victims, numerous primary and secondary perpetrators. At the same time, the ICC offers an extended catalogue of defendant's rights often exceeding the minimum standard of international human rights. On top of this, the ICC is one of the most innovative courts in respect to victim participation. Thus, each of the potentially huge number of cases might require several years of trial and appeal procedure. Even if the OTP reduced the Prosecution to a small number of offences for a handful of suspects, it is easy to foresee that the Court will not be able to deal with these cases fast enough to serve the interests of victims, the interests of justice, and the defendant's right to an expedient trial.¹¹⁸ However, the appropriate response to this problem is increased funding of the ICC with possibly appointing more judges and prosecutors as well as increasing pressure on national states to deal with these atrocities in municipal or hybrid courts.¹¹⁹

The thought that the ICC follows the examples of the United States where the vast majority of cases are dealt with using plea bargaining rather than a full trial is, for international criminal law, frightening and possibly will alienate both victims and States already opposing the Court. It is much more beneficial to have a handful of full trials than a high number of quick convictions which are not considered legitimate. A string of acquittals would either shed bad light on the prosecution who apparently got innocent defendants or was unable to provide sufficient evidence and/or the Rome Statute who offers too many legal loopholes. Thus, whereas occasional acquittals demonstrate the impartiality of the ICC and rule of law, too many acquittals seriously undermine the Court. Likewise, long trial and appeal procedures which drag on for many years will disillusion victims as well as the general public. The most important cases, for example, the case of a high political figure, would ideally end in a conviction after a trial. After having establishing a historical record of the conflict and proving the leader's involvement beyond reasonable doubt, an appropriate sentence would not only serve justice, but would also demonstrate legitimacy of the ICC. Thus, in a semi-ideal world¹²⁰ there would be a number of high-profile perpetrators who would be found guilty after the

¹¹⁸ International Covenant on Civil and Political Rights, 16 Dec. 1966, 99 U.N.T.S. 171. Article 14(3.3).

¹¹⁹ For example the Special Court for Sierra Leone, the Serious Crimes Panels in the District Court of Dili in East Timor, the Extraordinary Chambers in the Courts of Cambodia, and the so-called Regulation 64 panels in the courts of Kosovo.

¹²⁰ In an ideal world there would be of course no armed conflicts and atrocities at all and thus no need for the ICC.

contested facts were established beyond reasonable doubt at trial and sentenced accordingly. There might be a small number of acquittals on legal grounds showing that the court is impartial and upholding the rule of law above anything. There would be a larger numbers of guilty pleas where defendants acknowledge the suffering of victims and take responsibility for their contribution and even cooperate with the OTP in order to get evidence against the most responsible criminals. Because of their cooperation, which helps to convict those most responsible, and because they save the time and money of a full-blown trial, these offenders are offered some (but not excessive) leniency which means a sentence reduction. The time and resources saved through their cooperation and their early plea would enable the Court to prosecute a larger number of defendants without burdening the international community with increased costs.

The danger of plea bargaining is that reasons of efficiency will outweigh other considerations. The author, therefore, holds strongly that the judges should restrict sentence discounts due to plea agreements on the mentioned situations under strict safeguards. The working pressure of a close-knit network will be high, but both the OTP and the Court need to remember that not only the public interest but also the legitimacy of the ICC depends on their handling of plea agreements and sentence discounts. Since every case the ICC will hear will be highly politically sensitive, a loss of legitimacy and a feeling that the court is bypassing its mandate cannot be afforded.

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