



PLEA BARGAINING — A NECESSARY TOOL FOR THE INTERNATIONAL CRIMINAL COURT PROSECUTOR

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Plea bargaining is spreading into an increasing number of countries in spite of criticisms of scholars around the world. The draw of plea bargaining is the notion that with ever-growing crime rates and limited court resources, conducting a full criminal trial for every defendant would be impossible. Practitioners even claim that without plea bargaining the criminal justice system would collapse. However, critics fear that criminals are rewarded for co-operation with the prosecution rather than being punished for their crimes, that victims are shut out from the process, and that defendants are unduly incited to give up basic due process rights.

Plea bargaining has also been applied in a number of international criminal tribunals¹ where it faced similar criticisms. Due to the very different nature of international criminal law, especially the gravity of crimes, it is often argued that any negotiations with the alleged perpetrators are unacceptable.² This article discusses whether the International Criminal Court (ICC) should follow the example of other international criminal tribunals and implement a plea bargaining policy.

International crimes are typically committed in the context of armed conflict where the country or region has been completely unsettled. Violence has not just

been a single act of deviant behaviour outside the rule of law 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. In all situations currently before the ICC, the violent conflict between the different groups is still continuing.

Plea bargaining can support the main goals of international criminal justice if used carefully.

Thus the ICC has objectives that go beyond those of domestic criminal

justice systems. It aspires to replace impunity with accountability, break the cycle of ethnic violence and retribution, empower victim groups, facilitate reconciliation, and restore the rule of law by bringing the guilty to justice in a fair trial. In addition, the international criminal trial is expected to build an extensive and objective historical record so that repetition of the conflict can be avoided. Furthermore it is hoped that the condemnation of individuals, rather than political, ethnic, or racial

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1. For example both the UN *ad hoc* tribunals for Yugoslavia and Rwanda, as well as in the hybrid courts such as the Special Court for Sierra Leone and the Iraqi Special Tribunal.

2. Statement by the president of the ICTY made at a Briefing to Members of Diplomatic Missions, IT/29, 11 February 1994 quoted in Michael P. Scharf, *Trading Justice for Efficiency*, 2 J. INT'L CRIM. JUST. 1070, at 1073 (2004).



Serbian political leader Biljana Plavšić (left) pleaded guilty to war crimes at the International Criminal Tribunal for the Former Yugoslavia. Plea bargaining frees the way to quick and uncontested convictions and sentences and an admission of guilt confirms that the prosecution was right to open the case. However, in Plavšić's case, victims welcomed her admission of guilt but were appalled by the dropping of genocide charges and the lenient sentence.

Far left: Pre-trial judges conducting a hearing at the International Criminal Court. AP PHOTO/PETER DEJONG

AP PHOTO/FRED ERNST, POOL

groups, opens the way to the reconstruction of a split society. The international criminal process is also expected to promote human rights by developing criminal jurisdiction for human rights violations on the one hand and due process rights of the accused on the other. In the face of these multifaceted functions of the ICC it has to be questioned to what extent plea bargaining can be brought in accordance with the Court's role.

Proportionate sentence

Each of the major international treaties such as the four Geneva Conventions (1949), the 1948 Genocide Convention, and the Torture Convention (1984) require proportionate punishment. The Statute of the ICC (Rome Statute) does not explicitly mention proportionate sentencing but a disproportionate sentence is ground for appeal for both prosecution and defense.³ Moreover, the aspiration to end impunity (as declared in the preamble) also means that any punishment is proportionate to the crime. One of the major criticisms of plea bargaining is that a sentence reduction based on a plea agreement reflects neither the severity of the committed violence or the blameworthiness of the convict.

Obviously it is impossible to find a punishment for a perpetrator of

mass atrocities that mirrors the crimes. The question is what criteria should be taken into consideration when finding a sentence that is just. The relevant sentencing factors are set out in Article 78 and Rule 145 of the Rules of Procedure and Evidence for the ICC. Except for the personal circumstances of the defendant, all criteria set out here refer to the commission of the crime itself and not to any *post factum* behaviour. While most national criminal justice systems acknowledge that acts of reconciliation, co-operation with the authorities, and in particular an admission of guilt are mitigating factors, neither the Rome Statute or the Rules of Procedure and Evidence introduce such a principle.

On the other hand, some argue that plea bargaining does not automatically mean undue low sentences. The Court always has the discretion to reject sentences deemed too lenient because a promise made by the prosecution to the defense is not binding on the Court. However, this is a very formal argument, which does not take into account the informal pressure on the Court to encourage the practice of plea bargaining in the long run. Experience at the International Criminal Tribunal for Rwanda (ICTR) has shown that if a court repeatedly disregards sentence recommendations agreed by the parties, future defendants will be discouraged from entering into plea

negotiations.

One practice of plea bargaining, which is particularly criticised for undermining the principles of justice, is charge bargaining. This is a form of plea bargaining where the prosecution drops some of the charges, with the condition that the defendant will plead guilty to the remaining ones. Thus the offender will not face a trial for a number of crimes for which the prosecution had good evidence and a chance to gain a conviction.

In the *ad hoc* tribunals charges of genocide have been frequently dropped for a guilty plea of crimes against humanity. Regardless of the length of the imprisonment, whether a defendant is convicted for one account of persecution or several accounts of genocide, it is decisive not only for an accurate historical record but also for the question of justice. It is not only the length of the sentence but also the judgement and its inherent condemnation by the international community that make them essential parts of justice. Moreover, not to prosecute an act of genocide for reasons of efficiency violates the Genocide Convention.

Plea bargaining indeed bears the risk of reducing the sentence unduly in exchange for cooperation after the crime and leads to convictions that neither label the crimes committed accurately nor punish them proportionately. Nevertheless, does

3. Articles 81(2)(a), 83(3) Rome Statute.

plea bargaining have the potential to serve justice? One must not forget that every trial carries the risk that a factually guilty person might be acquitted because the prosecution could not prove its case. In international criminal law, where investigation is extremely difficult, this possibility cannot be underestimated. Plea bargaining does, however, secure an admission of guilt and a conviction for just some of the charges, so a reduced sentence might be preferable to a complete acquittal after a full trial.

Legitimacy

The second problem with plea bargaining is that it might have implications for the legitimacy of the ICC itself. Unlike national criminal courts, each of the international criminal courts and tribunals has been subjected to attacks on their legitimacy. From Nuremberg to Arusha claims of victors' justice were heard at every tribunal. The ICC, which even has potential jurisdiction over nationals of non-member states, is facing the same allegations. As a court that is not an organ of the United Nations and that can count only two permanent members of the Security Council among its member states, the ICC still has to prove its legitimacy. Therefore it needs to demonstrate that it is able to provide justice through fair trials, whose correctness is beyond doubt.

Plea bargaining on the other hand avoids the trial with all its procedural safeguards and thus could give the impression that the Court prefers quick case disposals by negotiating with perpetrators rather than fulfilling its mandate. Moreover, if the ICC uses principles of complementarity⁴ and insists on investigating cases by claiming that the national state is unable or unwilling to prosecute, any case disposed of without a trial by plea bargaining could severely damage the Court's claim of admissibility.

On the other hand, considering the immense costs of the ICC, the Court has to deliver results. In spite of the presumption of innocence

enshrined in the Rome Statute, the Court's success will not only be measured by the fairness of its trials but also by its number of convictions. Plea bargaining frees the way to quick and uncontested convictions and sentences. Furthermore, an admission of guilt confirms that the prosecution was right to open the case and that the defendant deserves the sentence imposed. Hence, every defendant who shows remorse and co-operation demonstrates that he or she accepts the Court and its rulings.

In the case of Serbian political leader Biljana Plavšić the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted that "by surrendering and pleading guilty, Mrs. Plavšić is also sending a powerful message about the legitimacy of the International Tribunal and its functions."⁵ Thus, although plea bargaining carries the risk of undermining the Court's reputation if it evokes a picture of unfair backdoor dealing, it has the potential of raising the Court's legitimacy by facilitating more convictions and exhibiting major perpetrators acknowledging the Court

Peace and reconciliation

Besides bringing offenders to justice, another central function of international criminal justice is to support peace and reconciliation. Plea bargaining can contribute to this aim too because, in addition to the admission of responsibility, the defendant's expression of remorse is a source for healing. Moreover, the public acknowledgement of the victims' suffering can be of immeasurable value for ongoing peace efforts. Conversely, one could hold that the victims deserve these concessions by the perpetrators of immeasurable suffering without the defendant being offered a sentence reward.

What is more, the defendant's admission of guilt will have little meaning if it does not convey sincerity. Plavšić's admission of responsibility and acknowledgement of the victims' innocence at the ICTY was for many Serbs no reason to reassess

the conflict. Many saw her statement as an act of betrayal of her beliefs in return for the offers by the Tribunal.⁶ At the same time, the victims who welcomed Plavšić's admission were appalled by the dropping of the genocide charges and the lenient sentence.⁷ Moreover, further concessions offended the victims and thus undermined the reconciliatory effect of the confession.⁸ On top of that, any possible healing was lost after Plavšić redacted her confession as soon as she was released from prison in 2009.

Plea bargaining has the potential to make a valuable contribution to peace and reconciliation but whether this opportunity materializes will depend on the circumstances in each case and cannot be claimed as a general rule. The ICC will need to make sure that the impact of each plea bargain for peace and reconciliation is evaluated individually.

Victims

The ICC is commended for its innovative improvement of the role of the victim. Prosecution, Pre-trial Chamber, and Trial Chamber are required by the Rome Statute to consider the views and concerns of the victims at all stages.⁹ This understanding of the central role of the victim in international criminal justice must not be undermined by a misuse of plea bargaining. The question of what impact plea bargaining has on the interest of the victims is however ambiguous. An agreement between defense and prosecution

4. Articles 17 and 18 Rome Statute.

5. *Prosecutor v. Biljana Plavšić*, Sentencing Judgement, Case No. IT-00-39&40/1, (Feb, 27, 2003) para 76.

6. Alissa J. Rubin, *Former Serb Leader's Admission of Guilt Alienates Compatriots*, Los Angeles Times, Dec. 16, 2002, at A4.

7. A. Kebo (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&f&co=166268&apc_state=henitri2003 (last visited July 2010).

8. Plavšić was sent to a Swedish prison that offered inmates access to sauna, gym, solarium, massage room, and, horse-riding paddock. 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 June 2009).

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

might have very diverse effects on different victims.

One of the most important advantages is that an admission of guilt saves victims the ordeal of testifying. A trial at an international court means that the witness usually has to travel a long way from home to a foreign country. Moreover, testifying might put the safety of the witnesses and their families at risk. Most importantly, testimony, especially if under cross-examination, might mean the witness has to re-live the trauma of victimization.¹⁰

Not every victim, however, perceives the trial as an encumbrance. Active participation in the procedures and the opportunity to tell their story can, on the contrary, constitute a significant healing factor. However, the avoidance of trial through plea bargaining deprives victims of a forum to share their history with the international community. Moreover, the public exposure of the perpetrator at trial is part of the satisfaction brought to the victims and an important part of the justice process. It seems unacceptable to take this away from victims in order to shorten the procedure.

On the other hand, the defendant's admission of guilt and acknowledgement of the victims' suffering induced by a plea agreement might help victims in their healing process. Further, many victims might wish for a quick conviction after a confession, rather than a judgement after years of trial and appeal procedures. Additionally, since plea bargaining saves time and resources spent on trials, more offenders can be brought to justice, which again is in the interest of the victims.¹¹

10. *Prosecutor v. Plavšić* Feb 27, 2003 Sentencing Judgement para 68.

11. 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*, 8 CHL-KENT J. INT'L AND COMP. L. 1, at 22 (2008).

12. Sanja Kutnjak Ivković and John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice*, 40 LAW & SOC'Y REV. 369, at 396 (2006).

13. Article 77 Rome Statute.

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

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

The crucial downside for victims is the possible restriction of charges and the sentence reduction entailed in the bargain. Those who committed the most heinous atrocities are shown leniency for co-operating with the Court rather than being severely punished. For example, empirical research in Sarajevo shows that in spite of a common view that trials take too long, only 6 percent of the respondents approved of plea bargaining.¹²

With no death penalty and life sentence as an exception,¹³ the sentence range of the ICC is already perceived by some as too low and further reductions would disappoint many of the victims who had hoped the ICC would bring justice. When deciding whether to accept an admission of guilt according to Article 65 (4) the Trial Chamber can either request further witness testimonies 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 should evaluate in each case what impact an agreement would have for the victims.

Defendants

Since one major function of international criminal law is to promote human rights, the ICC must pay high respect to international defendants' 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 presumed innocent until proven guilty.¹⁴ The core of plea bargaining is however the avoidance of a full trial, which means that the defendant loses all these rights. Nevertheless, the advantages of an agreement with the prosecution often outweigh the loss of rights in the eyes of defendants. If a defendant assumes that there is a realistic chance of conviction, the possibility of a withdrawal of the most serious charges and the promise of a considerable sentence concession must be

compelling. In addition, plea bargaining spares the defendant the shame and indignity of a public trial, including examination and cross-examination.

At the same time, the prospect of a significant sentence reduction means considerable pressure for the defendant to agree to the offer. As a layperson it is very difficult if not impossible to evaluate the strength of the prosecution's case, to calculate the risk of a conviction after trial, and to estimate the length of a possible sentence. Thus it is more than likely that in domestic courts formally innocent defendants, where the prosecution would not have been able to prove guilt beyond reasonable doubt, have entered into a plea agreement and thus discarded a high chance of acquittal. The question arises whether this could also happen at the ICC. Considering the manifold evidential problems of international prosecutions and the very high standard of defendants' rights in the Rome Statute, the prosecution could be tempted to offer high sentence discounts to induce an admission of guilt in an otherwise weak case. Through this pressure plea bargaining could deprive some defendants of their fair trial rights.

Another danger for defendants is the risk that the promised sentence reduction is not awarded. The prosecution can only recommend a sentence to the Trial Chamber but the Court is bound neither by recommendation nor the agreement. A full admission of guilt with an expression of remorse might convince the Court that a significantly low sentence can be justified but the defendant has to fear that the Court will not accept the admission as a sufficient sign of compunction and as a mitigating circumstance. Even in a case of charge bargaining, the defendant is not offered much certainty. Similar to the *ad hoc* tribunals, the judges at the ICC have very broad sentencing discretion¹⁵ and can, even if some of the charges are withdrawn, pass a severe sentence for the remaining charges.

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 demeanour.”¹⁶ Consequently, defendants might not dare to claim all their rights or appeal against interim court decisions. Again this would mean that the practice of plea bargaining indirectly deprived defendants of their due process rights.

At the same time, defendants will find it very hard to retract an admission of guilt once it is made.¹⁷ In the instance of a redaction, the case will be remitted to a different Trial Chamber¹⁸ but since there are only seven judges at the Trial Division it will be difficult for the defendant not to suspect bias of the new Chamber.¹⁹ Thus, defendants who are offered a deal are expected to take a significant risk whereas the prosecution has nothing to lose. This situation refutes the principle of fair trial.

The ICTY introduced procedural safeguards based on legal instruments of the United States, which is often called the cradle of plea bargaining. Rule 62*bis* in the ICTY Rules of Procedure and Evidence provides for the minimum requirements under which the Tribunal can accept a guilty plea. The Trial Chamber has to satisfy itself that the guilty plea has been made voluntarily, is informed and not equivocal, and that there is a sufficient factual basis for the crime and the participation of the accused in it. However, as has been shown elsewhere, the Tribunal rarely examines these requirements in any detail.²⁰

It is therefore questionable whether a similar provision for the ICC could sufficiently protect the defendant. It could be argued that the defendant is safeguarded against misuse of plea bargaining by the defense counsel. However, experience in the *ad hoc* tribunals (the ICTY and ICTR) has shown that frequently defendants distrust international defense lawyers and prefer national counsel who have often little or no experience in international criminal procedures.

Further, if the defense counsel comes from a system that does not apply plea bargaining they might not be familiar with this practice at all. Considering the far reaching consequences of an agreement this lack of experience can be fatal. In the case of Bosnian soldier Drazen Erdemovi the defense counsel allegedly “neither understood the concept of a guilty plea nor comprehended the nature of the charges against the client”.²¹ However, Rule 62*bis* and Article 65 Rome Statute set out a judicial test. Thus it is the Court’s duty to protect the defendant from any undue pressure or submitting an uninformed admission of guilt. The ICC should therefore not delegate such a duty to a defense lawyer, no matter how experienced the counsel is.

A third disadvantage of plea bargaining from the defendant’s standpoint is that this practice results in different treatment of offenders who have committed comparable crimes. Those defendants who can offer cooperation, especially valuable information against other defendants, can benefit from concessions that offenders of similar crimes cannot. Thus similar crimes might be sentenced unequally. However, this was more of a problem for the *ad hoc* tribunals who were dealing with defendants of low as well as of high responsibility. It is unlikely that the ICC will face the same dilemma as it will be restricted to a small number of defendants accused of carrying the most responsibility for the most serious crimes.

Costs of proceedings

The major advantages of plea bargaining for courts are the immense savings in terms of time and resources, as it offers a way to avoid a full-length trial. For example, when the ICTY was under considerable pressure from the UN and the United States to expedite proceedings, it could hardly afford to reject such an efficient practice.²²

An international criminal trial is on average not only much lengthier than national proceedings but likewise much more costly. International

infrastructure for transport and communication as well as security measures for witnesses, defendants, and court staff is needed. All documents need to be translated and hearings simultaneously interpreted into a number of languages. The Court not only needs highly qualified interpreters and translators but also the newest IT technology in the courtroom for the defense and prosecution teams, the judges, the clerks, the defendant, and the witnesses. On top of this filming, recording, and broadcasting equipment is needed to facilitate transparency and access for the public. In addition to avoiding a full trial, plea bargaining also contributes to cost saving because it encourages defendants to provide valuable evidence in other cases, which frees up further resources for investigation.

Unfortunately, it will only be a question of time before the ICC has to face similar resource and caseload problems as the ICTY. One would be forgiven for thinking that the ICC will not be as overworked as the *ad hoc* tribunals because they do not have a fixed mandate and thus do not face the same pressure of a completion order as the UN courts did.

Furthermore, unlike the *ad hoc* tribunals, the ICC is restricted to deal with only those defendants suspected of the most responsibility rather than low-level offenders. In addition, the principle of complementarity enables national states to prosecute international criminals and therefore, it is hoped, lighten the burden of the ICC. However, considering how occupied the ICC already is now with only one trial, it

16. Julian A. Cook, *Plea Bargaining at the Hague*, 30 YALE J. FOR INT’L L. 473, at 491 (2005).

17. For example in the case of Dragoljub Kunarac before the ICTY the Trial Chamber and the parties agreed that the requirements of rule 62*bis* 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.

18. Article 65(4)(b) Rome Statute.

19. The ICC has at the moment 18 judges in total.

20. Regina Raukloh, *Negotiated History—The Historical Record in International Criminal Law and Plea Bargaining*, 10 INT’L CRIM. L. REV. 739 (2010).

21. Cook *supra* n. 16, at 499.

22. *Id.* at 477.

can be expected to be overburdened in the not too distant future. Further, although the ICC does not have a fixed mandate its funding derives from the State Assembly who will press the Court to work most efficiently.

When considering the establishment of international criminal tribunals there was no doubt that international criminal procedures would be immensely costly even if the actual costs and length might have exceeded the worst fears. Nevertheless the international community has decided to spend these resources on providing for fair trials and not, for instance, use the money to rebuild the war torn society. For this reason it cannot be justified to save resources by avoiding these very same trials. In view of available resources the Rome Statute is already setting out a number of case selection criteria, which in effect limit the scope of justice. Justice should not however be diminished further simply for efficiency. The Court has to be clear that expediency alone is not a valid reason to offer sentence reductions. Nor is plea bargaining a valid tool to reduce an overburdening case load.

Access to evidence

The most compelling incentive for plea bargaining for the ICC is arguably the difficulties of international criminal investigations compared with national procedures. With regards to the investigation, international crime differs from domestic crime in three principal facets: the scale of the violence, the prosecution's dependency on state co-operation, and the difficulties of linking the crime to high-profile offenders.

The huge number of acts committed in the context of international crime renders every criminal

investigation extremely complex. Typically, there are numerous perpetrators and the number of victims and possible witnesses can run into tens of thousands. The magnitude of the mayhem requires examining an immense volume of forensic evidence, witness testimony, expert witness statements, and relevant documents. Most of the investigative work has to be carried out in countries where the conflict might be on-going and security for investigators and witnesses uncertain.

What is more, in war torn regions communication and transport infrastructures are often seriously interrupted even after the conflict has ended. The need for interpreters during the interrogations and translations of the relevant documents pose further logistic difficulties. Another problem is the length of the investigation, which means witnesses become less reliable. Child soldier witnesses are, for example, asked to recall words spoken to them when they were half the age they are now.

What is even more problematic in international investigation is the ICC's lack of an investigation force comparable to national police forces. This means the prosecution is dependent on state co-operation for a number of different aspects ranging from providing office space, local police officers and interpreters for taking witness statements, to access to official documents and archives or just visas to enter the country. Moreover, the Court needs state assistance to get access to both witnesses and suspects because unlike national courts the ICC does not have subpoena powers. This badly needed co-operation of the state might not be forthcoming as every international criminal investigation is politically sensitive.

According to the principle of complementarity only cases where the relevant state is unable or unwilling to prosecute itself are investigated by the ICC.²³ In such a case it is questionable whether the same state would be able or willing to provide the necessary support to the prosecution. Member states of the ICC are

under the obligation to fully co-operate with the Court²⁴ but there is no effective enforcement mechanism in place to ensure such co-operation.²⁵ In the case where the relevant state is not a member state but the United Nations Security Council referred the situation to the Court, the referral resolution should compel all states to co-operate with the ICC.²⁶ Regrettably, so far the Security Council has not pursued this avenue. In its referral of the situation in Darfur to the Court²⁷ in 2005 the Security Council acknowledged "that States not party to the Rome Statute have no obligation under the Statute" and "urged" non-member States to co-operate fully.²⁸ State co-operation of both member states and non-member states is therefore in practice mainly voluntary.

Finally, the third major difficulty for the prosecution stems from the ICC targeting only those perpetrators who carry the greatest responsibility for the crimes. This means rather than dealing with offenders of low- or middle-rank, ICC defendants will come from the military, political, or economic leadership. These defendants are prosecuted mainly not for crimes they have committed as principals but for planning and ordering the mass atrocities. Since high-rank officials usually do not leave a paper-trail of their orders, one of the biggest problems for the prosecution is to prove the link between defendant and the crime. The victims can usually only identify the trigger-pullers not the commander who masterminded the attack. Therefore, often it is only a co-defendant in a similarly high position in the chain of command who has eye-witnessed the commander issuing orders and can testify against him or her.

It is in this situation where plea bargaining can play a crucial role in accessing the only available evidence by inducing co-defendants to testify against their former leaders. Where defendants hold the key to sufficient evidence against the most responsible perpetrator, plea bargaining might be the only way to avoid an acquittal

23. Article 17(1)(a) Rome Statute.

24. Article 86 Rome Statute.

25. According Article 87(7) Rome Statute the matter can be referred to the State Assembly but this body has no enforcement power against state parties.

26. Article 13(b) Rome Statute.

27. UN SC Resolution 1593(2005).

28. UN SC Resolution 1593(2005) para 2.

on grounds of lack of proof. Although justice is reduced because a guilty offender is awarded a reduced sentence, overall more justice is gained because an otherwise weak case against the most responsible offender is strengthened. Because of the intrinsic difficulties of investigations of international crime set out above, the situation where the key evidence against the central defendant can only be gained through a co-offender might arise more often than anticipated. Thus, it is argued here that plea bargaining is needed not as a means of efficiency but as a tool of gaining evidence to overcome the inherent difficulties of international criminal law.

Plea bargaining in the ICC

It has been shown that plea bargaining has a significant impact on the major themes of international criminal law such as justice, legitimacy of the Court, peace and reconciliation, the role of victims, the rights of the defendant, the costs of the proceedings, and access to evidence. Thus any use of plea bargaining by the ICC has to be carefully balanced with these interests.

One question that was long debated at the Rome Conference was what consequence a declaration of guilt should have. While in civil law systems a confession is a piece of evidence without procedural consequences as such, in common law countries the trial is concluded in case of a guilty plea. A compromise was found, avoiding the terms 'confession' and 'guilty plea' and instead introducing the 'admission of guilt' in Article 65. As in common law the admission of guilt means the trial is concluded.²⁹ Leaning on the model of civil law however, the Court has to examine whether the admission is sustained by the facts of the case³⁰ and otherwise request a more complete presentation of the facts.³¹ Article 65(5) neither allows nor forbids plea bargaining explicitly.³² On the one hand it acknowledges settlements between prosecution and defense and on the other it emphasizes that the Court is not bound by such agreements.

Since plea bargaining is neither prescribed nor forbidden it remains to be seen how the Court will choose to apply their discretion to honour the parties' agreements. If the Trial Chambers were to develop a practice of discounting agreements between defense and prosecution it would be impossible to develop a relationship of trust in the long run and plea bargaining could not develop into a general practice. The defense counsel in Dragan Nikoli's case felt that the prosecutor had not honoured the agreement and 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."³³

If on the other hand the ICC became known to generally respect the agreements, plea bargaining would thrive. Since the Rome Statute invites or at least does not hinder plea bargaining and, considering the manifold advantages that were set out above, the ICC might start using plea bargaining once it has more cases to cope with. This prediction is supported by the fact that with the completion of the ICTY many court staff will move from that Tribunal, where plea bargaining was used on a regular basis, to the ICC.

Should the ICC use plea bargaining?

Once the ICC has achieved the difficult tasks of bringing a defendant before the Court, it seems not only contradictory but against the very essence of the Court to dispose of this very trial through plea bargaining. However, in the face of the very different goals and circumstances of international criminal justice compared to domestic procedures the use of plea bargaining might be not only helpful but even necessary. Nevertheless, plea bargaining poses some serious disadvantages, such as the risk to defendants, victims' interests, and the Court's legitimacy. Thus it is vital that plea bargaining is only used in those circumstances that can justify the circumvention of a trial. Plea

bargaining should be allowed only if a) the plea bargain leads to the defendant offering new evidence or contributes to reconciliation and b) if high standards of safeguards can be enforced.

When is plea bargaining justified?

It is submitted here that there are only three functions that justify the use of plea bargaining at the ICC. First, considering the difficulties of international criminal investigations, the prosecutor should use plea bargaining as a tool to gain otherwise unavailable evidence against high-ranking defendants who could otherwise hide behind the power hierarchy. Second, the use of plea bargaining is justified where it can encourage defendants to submit previously unknown facts that are an essential addition to the historical record and that otherwise might be lost to public knowledge. Finally, a plea bargain should be considered as a tool of reconciliation when it incites an admission of guilt, expression of remorse, and acknowledgment of the victims' suffering. The ICC will need to develop relevant criteria and indicators to make such evaluation over the years based on experience and in cooperation with different stakeholders.

In order to be able to restrict the use of plea bargaining to these three circumstances the ICC has to be careful to avoid a situation where the need for efficiency makes trials less favourable than plea arrangements. The Court should therefore be very strict on its case selection criteria and ensure that it only indicts as many suspects as it can afford to provide a full trial. Unlike the *ad hoc* tribunals

29. Article 65(2) Rome Statute.

30. Article 65(1)(c) Rome Statute.

31. The Trial Chamber may order summary proceedings where the prosecution can present additional evidence or order a full trial (Article 65(4) Rome Statute.

32. Article 65 (5) reads: "Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."

33. *Prosecutor v. Dragan Nikoli*, Case No. IT-94-2-A, Appellant's Brief in Reply to the Prosecution Respondent's Brief (Aug. 25, 2004) page 5, cited in Nancy Armoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, at 99 (2006).

the ICC should focus on leaders only.

The Court has to remember that its mandate is not to provide justice for all involved parties. This is still the role of the national courts. Secondly, in order to establish general elements such as the existence of an attack against a civilian population or an armed conflict, the Trial Chambers should consider saving time and resources by using evidence from previous cases. The Court should avoid situations like in the ICTY where some expert witnesses were asked to give the same evidence at different trials.³⁴

In addition, the need for using plea bargaining to overcome evidential problems should be diminished by improving state cooperation. Experience shows that the international community is able to put considerable pressure on national states to co-operate if there is political will.³⁵ Both the United Nations as well as involved states must be aware of the impact their co-operation or lack thereof will have on the procedures of the ICC.

High standard of safeguards. If the ICC decides to use plea bargaining, it has to warrant that the rule of law is not undermined. The Court can only safeguard the rights of the defendant if it examines all the requirements of Article 65 thoroughly. Article 65 requires the Trial Chamber to ensure that the admission was made voluntarily and with an understanding of the nature and consequences of the admission.³⁶ If the elements of Article 65(1) are not met, the Trial Chamber has to proceed to trial and the admission of guilt is deemed not to have been made.³⁷

Learning from the experience of the *ad hoc* tribunals, it has to be asked whether the Trial Chambers

34. D.A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AJIL 759, 775 (2000).

35. For example, in 2001 the U.S. threatened Yugoslavia to withhold financial support from the IMF and the World Bank and millions of U.S. dollars in direct economic assistance if Slobodan Milosevic, who had been indicted by the ICTY, was not arrested.

36. This provision is based on Rule 62bis of the ICTY RPE and Rule 62(v) of ICTR RPE.

37. Article 65(3) Rome Statute.

will apply the safeguards of Article 65 with sufficient endeavour since they take up time and resources and might also discourage plea agreements. The Court must not only ascertain that the admission of guilt was made voluntarily but in addition that the defendant understands in full detail the extent of the rights they are surrendering. A provision should be added to the Rules of Procedure and Evidence that requires the Trial Chamber to inform the defendant explicitly about the consequences of an admission of guilt and the fact that the Court is bound to an earlier agreement with the prosecution. This clarification has to be issued by the Court and must not be left to defense counsel.

Furthermore, so far the Rome Statute does not address any participation of the Trial Chamber in any negotiations. If there was involvement and the Chamber has indicated certain consequences in case of an admission of guilt the Court should be bound by this indication unless new circumstances, for example new evidence of aggravating factors, should arise. Carefully examining the requirements of Article 65 and fully informing the defendant mean prolonging the hearing and reducing the timesaving effect of the plea bargain. Compared to a full trial, however, this procedure will still have saved a substantial amount of time. More importantly, both are indispensable safeguards to protect the defendant as well as the legitimacy of the practice of plea bargaining at the ICC.

Conclusions

Ideally, the factually guilty high-profile offender would be convicted and given an appropriate sentence after a full trial in which a historical record of the conflict had been established and the leader's involvement proven beyond reasonable doubt. Like most national criminal justice systems, the ICC will without doubt be very overworked in the near future. Too many armed conflicts are fought around the world with too many crimes committed by

numerous perpetrators who are attacking a vast number of victims.

At the same time, the Rome Statute exceeds the minimum standard of international human rights and provides for a range of defendants' as well as victims' rights. It can be expected that each case will take several years of trial and appeal procedures, which will disillusion victims as well as the general public. This is mainly a resource issue that needs to be addressed by increased funding and possibly the appointment of more judges and prosecutors. Additionally, more pressure should be put on national states to deal with these atrocities in municipal courts. The ICC must make sure it limits its cases to a number it can afford to try.

As has been shown, plea bargaining can support the main goals of international criminal justice if used carefully. The danger is that the need for efficiency will overshadow other values. It is therefore argued here that it is vital for the ICC, when developing a practice of plea bargaining, to restrict sentence discounts due to plea agreements under strict safeguards.

The working pressure of a close-knit network will be immensely high on both judges and prosecutors, but the Court must not forget that not only the interests of defendants, victims, and the public but also the legitimacy of the ICC depends on their exercise of plea agreements and sentence discounts. An ICC that used plea bargaining excessively and disposed of too many trials because of plea bargaining would alienate both victims and states already opposing the Court. A few full trials serve justice better than a high number of quick convictions that are not considered legitimate. The ICC has no power other than its legitimacy, and loss of legitimacy and a feeling that the Court is bypassing its mandate cannot be afforded. ❧

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