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**PLEA BARGAINING IN INTERNATIONAL CRIMINAL
COURTS:
DEALING WITH THE DEVIL?**

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ABSTRACT

This thesis examines the practice of plea bargaining in national and international criminal courts. Plea bargaining is a controversial practice at the national level and that controversy is escalated when dealing with the most serious crimes, such as genocide, that will be prosecuted in international criminal courts. There are arguments both for and against plea bargaining in national adversarial systems. Many of these arguments are also applicable in international criminal law and there will be further arguments for and against plea bargaining in international criminal courts that do not apply, or apply only to a lesser extent in national systems. A balance has to be struck between an efficient criminal justice system and a criminal justice system that achieves its aims of reconciliation, deterrence and punishment for perpetrators.

The practice of plea bargaining has been used at the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR). The experiences of these ad hoc tribunals in dealing with the practice must be taken into account in coalition with the theoretical arguments for and against plea bargaining to determine a best practice approach to plea bargaining in international criminal law that could be implemented at the International Criminal Court (hereinafter ICC) and in international criminal forums generally. Given the resource, time and financial limitations faced by international criminal courts plea bargaining is a practice that should be implemented to achieve the correct balance between efficiency and justice. It is acknowledged that the practice of plea bargaining is a controversial practice, even more so at the international level and as such there must be safeguards in place to ensure the practice is implemented in a credible manner that upholds public confidence in the system and achieves the strategic aims of the criminal justice system.

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DECLARATION

I declare that, except when explicit reference is made to the contributions of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution

Signature: _____

Name: _____

Date: _____

CHAPTER 1: INTRODUCTION

The traditional impression of the criminal justice process in an adversarial system has been for an independent prosecutor to prove an accused person guilty. Until such evidence is led, and the accused person proven guilty after a trial, they are considered to be innocent. If the accused person is found guilty either by a judge or jury they are then sentenced, that sentence being determined by the judge with reference to legislative guidelines. Modern adversarial criminal justice systems have, however, become dependent on the use of some form of plea bargaining in order to carry out their functions. For example, in the United States alone, statistics have indicated that approximately 95% of cases are resolved by use of plea bargaining.¹ Plea bargaining, a practice which attracts much controversy even at the national level, is now used in the criminal courts of many jurisdictions worldwide, including, as will be illustrated in this thesis, in international criminal forums.

Plea bargaining has been implemented at the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR) despite the increased levels of controversy faced when dealing with the most serious and grave crimes, such as crimes against humanity and genocide. It is evident from a review of the case law that there is no real consistency in the approach taken by the Trial Chamber to plea bargaining in these ad hoc international criminal tribunals.

With the International Criminal Court (hereinafter ICC) being formed as a permanent international criminal court, with a significant and growing caseload, it is necessary to consider the theoretical arguments for and against plea bargaining at both national and international levels to determine whether plea bargaining is a practice that should be widely implemented in international criminal courts. Many of the principles applicable to plea bargaining will apply at both the national and international level. Precedent from the ICTY and ICTR will be examined to consider whether plea bargaining, a practice generally coined from domestic western adversarial systems dealing with the demands of an overstretched criminal justice system and a significantly wider spectrum of crimes in terms of their severity, should be used when dealing with, for example, the gravest crimes against humanity and genocide in an international criminal court.

¹ Richard L. Lippke, *The Ethics of Plea Bargaining*, (2011), Oxford at p. 1

Drawing on the issues of principle and the examination of the practice of plea bargaining, it will be argued in this thesis that plea bargaining is a practice that is necessary to be implemented both at the national and international level. As a result of the practice of plea bargaining being particularly controversial at the international level, recommendations will be given as to what safeguards and guidelines should be in place for those who engage in the plea bargaining process in international criminal courts.

Chapter 2 will consider the meaning of plea bargaining, how this is defined and the theoretical arguments for and against plea bargaining at national levels with some reference to the western adversarial systems of North America, England and Wales and Scotland, where the practice of plea bargaining is commonly utilised in the criminal courts. Chapter 3 will examine the theoretical arguments for and against plea bargaining in international criminal courts and how these arguments differ from those offered in discussions about plea bargaining at the national level. Chapter 4 will look at whether the practice of plea bargaining is permissible at the ICTY and if so, the extent to which this practice has been used, the attitude of the Trial Chamber to this practice and how this links in with the theoretical arguments outlined in Chapter 3. Chapter 5 will consider the same matters as Chapter 4, however with reference to the ICTR. Chapter 6 will examine the practice of plea bargaining at the ICC, whether this is and should be permitted and will recommend a best practice approach to plea bargaining, with safeguards and guidelines for those dealing with the practice. Chapter 7 will conclude that plea bargaining in international criminal courts is permissible and is a necessary evil that should be approached, monitored and audited with caution.

CHAPTER 2: THE THEORETICAL ARGUMENTS FOR AND AGAINST PLEA BARGAINING AT THE NATIONAL LEVEL

Historically plea agreements were frowned upon in the English and Northern American common law systems² and courtroom trials regarded as ‘the safest test of justice.’³ However, even as long ago as 1968 Alschuler has averred that 90 percent of criminal convictions in the US were being achieved through guilty pleas as opposed to convictions after trial,⁴ and ‘[b]ehind this statistic lies the widespread practice of plea bargaining.’⁵ A 1992 survey of the 75 most populated counties in the U.S. revealed that 92 percent of all convictions in state courts were as a consequence of guilty pleas.⁶ In Scotland, the Crown Office and Procurator Fiscal Service (COPFS), the prosecuting authority, in the year 2014-2015, have reported that out of a total of 98,742 cases disposed of in court, 88,788 (just under 90%) were guilty pleas where no evidence was led at court.⁷ There is no statistical data available to confirm what percentage of these cases were resolved as a result of a plea bargain or whether the accused person pled guilty as libeled on the complaint or indictment against them. It has been argued that the reason for the significant growth of this practice has been as a result of ‘circumstance’ as opposed to ‘choice.’⁸ Prior to any substantive discussion on the practice of plea bargaining, it is necessary to consider what exactly the term means and how plea bargaining is legally defined.

2.1 The Definition of ‘Plea Bargaining’

The term plea bargaining is one which attracts different meanings worldwide and there is no standard universal definition. A broad and simple definition would be where an accused

² A.W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, *The University of Chicago Law Review*, (1968) Vol. 36, No. 1, pp. 50-112 at p. 51 citing, for example, ‘*Commonwealth v. Battis*, 1 Mass. 95 (1804); *United States v. Dixon*, 1 D.C. (1 Cranch) 414 (1807); F. Pulton, *De Pace Regis Et Regni* 184 (1615); 2 M. Hale, *Pleas of the Crown* 225 (1736); J. Archbold, *Pleading and Evidence in Criminal Cases* 73-4 (1st Am. ed. 1824)’

³ Alschuler *Ibid.* citing *Wight v. Rindskopf*, (1877) 43 Wis. 344 at p. 357

⁴ Alschuler *Ibid.* citing D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966) at p.3.

⁵ Alschuler *Ibid.*

⁶ D.D. Guidorizzi, *Should we really ban plea bargaining? The Core Concerns of Plea Bargaining Critics*, (1998) 47 Emory L. J. 753 at p. 753, quoting Bureau of Justice Statistics, *Felony Defendants in Large U.S. Counties, 1992* at p. 29 (‘for felony defendants over a one year period’).

⁷ COPFS website

<http://www.copfs.gov.uk/images/Documents/Statistics/Statistics%20on%20Case%20Processing%20Last%205%20Years%202010-15.pdf> last accessed 29 September 2015

⁸ Alschuler, *supra* note 2 at p.51

person is given an incentive to plead guilty by a promise, or at least a chance, that he will be ‘rewarded’ in a certain way.⁹ Black's Law Dictionary offers a definition of plea bargaining that refers to the accused person and the prosecutor as working ‘out a mutually satisfactory disposition of the case subject to court approval. It usually involves the accused person pleading guilty to a lesser offence or to only one or some of the counts of a multicount indictment in return for a lighter sentence than that possible for the graver charge’.¹⁰

Plea bargaining is, however, a practice that is more complex than Black’s definition suggests. For example, as Guidorizzi has pointed out, with reference to this definition, it is true that the accused person and the prosecutor work out a ‘mutually satisfactory disposition’, to the extent that the bargain must be voluntary and agreed to by both parties however there is no guarantee that the final disposal of the case (i.e. the sentence) is something that both parties will be mutually satisfied with.¹¹ Guidorizzi has also pointed out that the reference in Black’s definition to the disposition being subject to court approval indicates that the practice of Plea Bargaining is subject to judicial review, which, as will be discussed later in this chapter, is not always the case, particularly at the national level.¹²

The three types of plea bargaining used in western adversarial systems are charge, fact and sentence bargaining. In charge bargaining the accused person’s representative will negotiate with the prosecutor and an agreement will be reached that the accused person will plead guilty to either a less serious charge or a reduced number of charges. The accused person, by pleading guilty, foregoes their right to trial and the right to have the case against them proven in exchange for the hope of a lesser sentence than the accused person would have had imposed

⁹ These ways will be examined in greater depth in the course of this thesis. See also N. Vamos, ‘Please don’t call it “Plea Bargaining”, 2009, CLR, 617 at p. 618

¹⁰ Black’s Law Dictionary

¹¹ See D.D. Guidorizzi, Should we really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining’s Critics, (1998) 47 Emory L. J. 753 at p. 755. As Guidorizzi has pointed out there, the ability of both prosecutors and the accused to bargain may be impacted by, for example, concerns that the prosecutor may have about the admissibility of evidence, for example. The accused person may also be faced with overwhelming evidence against them meaning that they are in a weak bargaining position in comparison with the prosecutor, who will be in a more powerful position. These matters will be discussed in further detail in the discussion on the arguments for and against Plea Bargaining later in this chapter.

¹² *Ibid.* at p. 756 where Guidorizzi refers to ‘implicit’ plea bargaining where accused persons are faced with a more severe sentence if they choose to proceed to trial instead of pleading guilty and in which case there is no negotiation to be approved by the court. In these cases the concession is the likelihood of a less severe sentence for a guilty plea (although the legislation/guidelines on sentencing will vary depending on the jurisdiction and judges imposing sentences may have a wide discretion even where the accused person pleads guilty). In addition, as will be examined in further detail below, prosecutors can drop or vary charges and depending on the jurisdiction in which this occurs, the court is rarely required to approve this.

for a more serious charge or for all charges against them. For example, the accused person would plead guilty to culpable homicide (Scotland) or manslaughter (England) instead of murder, a negotiation that would take place between prosecutors and the accused person's solicitor.¹³ Another example of charge bargaining would be if the accused person is charged with ten charges, the prosecutor may accept a plea of not guilty to three of those charges and guilty to seven of them.

Fact bargaining refers to the process where prosecutors agree to narrate to the court an altered set of circumstances surrounding a particular crime, which is likely to provide mitigating circumstances to any sentence imposed. In sentence bargaining the accused person may offer a plea of guilty knowing what sentence will be passed, that there will be a reduction in sentence in comparison to what the sentence would have been on tendering the plea or on the basis that the prosecutor will recommend a particular sentence to the judge.

Plea bargaining is, for reasons that will be outlined in the course of this chapter and chapter 3, a controversial practice at both national and international levels. Many of the arguments for and against plea bargaining are applicable to the practice both at national and international level however, as chapter 3 will outline, there are matters at international level that make the practice even more controversial.

The remainder of this Chapter will list the arguments against and for plea bargaining at the national level. The main arguments against plea bargaining are that plea bargaining exerts too much pressure on accused persons to plead and condemns the innocent, that plea bargaining violates the human rights of accused persons, that plea bargaining affords too much discretion and power to the prosecutor and that plea bargaining results in sentences that do not reflect the gravity of the criminal conduct. The main arguments for plea bargaining are that the criminal justice system will operate far more efficiently than if every case had to proceed to trial, meaning that efficiency can still achieve justice and save precious time and money. The accused displays remorse in pleading guilty and this is likely to mean a lot to victims and witnesses, who are also spared the trauma of having to give evidence in court. This Chapter will outline and discuss these arguments in turn, starting with the arguments against plea bargaining.

¹³ See S Moody and J Tombs, *Prosecution in the Public Interest* (1982), chapter 6, 'The negotiation of guilty pleas,' which contains the only published account of charge bargaining and fact bargaining in Scots law.

2.2 The Arguments *against* Plea Bargaining at the National Level

2.2.1 Pressure to Plead and Condemnation of the Innocent

Critics of plea bargaining argue that the practice places too much pressure on accused persons to plead guilty, with the result that innocent persons plead guilty to avoid the risk of a harsher punishment.¹⁴ The widespread use of plea bargaining in the United States, for example, is in contrast with earlier precedent which relied upon previous case law on confessions, dismissing bargains that provided some kind of incentive to defendants and permitting the withdrawal of statements or guilty pleas by the defendants involved.¹⁵ Public confidence both dictates and requires a system where we can be sure that wrongful convictions emanating from guilty pleas are not tolerated and regarded as nothing less than unacceptable. In 1970 the United States Supreme Court supported this position in stating that:

‘It is critical that the moral force of the criminal law not be diluted by a standard of proof [or a procedure for conviction] that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.’¹⁶

It is correct that we must have confidence that a system is required that prevents condemnation of the innocent without the choice of adjudication or opportunity of some kind of trial procedure.¹⁷ We have the odd scenario under a number of legal systems that confessions offered in exchange for some kind of reward are regarded as inadmissible because they may provoke an innocent person to plead guilty to a crime that they did not commit whilst plea bargaining, which also offers some kind of reward in exchange for a guilty plea, is entirely permissible. It has been stated by Heupel that ‘[t]he justification for this difference is that a defendant who pleads guilty expressly admits his guilt in open court, where the voluntariness of

¹⁴ For a discussion on this matter see F. Leverick, *Sentence Discounting for Guilty Pleas: An Argument for Certainty Over Discretion* (2014) *Crim.L.R* Issue 5 338 at p. 340

¹⁵ See A.W. Alschuler, *Plea Bargaining and Its History*, (1979) 79 *Colum. L. Rev.* 1, 19-24 at p. 20

¹⁶ *In re Winship*, (1970) 397 US 358 at p. 364

¹⁷ John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, (1979) 78 *Mich. L. Rev.* 204. This article is against plea bargaining on the basis that it is condemnation without adjudication. See also Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, (2003) 88 *Cornell L. Rev.* 1412 at p. 1417. This article raises concerns that the innocent are coerced into pleading guilty.

the plea may be ensured, and consents to the entering of a judgment of conviction without a trial.¹⁸ It is difficult to see any practical distinction, particularly where the outcome of the acceptance of guilt would be the same.¹⁹

It is possible, however, to say that when a guilty plea is made in open court the person accepting their guilt will have the physical protection of the court, which may differ from a set of circumstances where, for example, a confession is induced by the police inflicting physical violence on a suspect. It has been stated that ‘a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape ... that no credit ought to be given.’²⁰ However, when a plea agreement is entered between an accused person and the prosecutor the accused person is clearly ‘hoping’ that they will receive a more lenient sentence and there comes an analogy with the ‘reward’ and subsequent lack of credibility in a bargained guilty plea. The mental fear endured by an accused person facing a longer prison sentence if they do not plead guilty is, arguably, in no practical way when considering the outcome different to, for example, the type of physical fear or pain that may be inflicted to induce a confession. However it should be acknowledged that the fear incurred during physical violence, for example, is distinguishable in that the person may genuinely fear for their life and the confession may be something that they make under pressure when they do not have the time to think about or reflect on the consequences.

Despite the guilty plea being submitted whilst the accused person is technically under the protection of the court, the risk that innocent persons will be induced to plead guilty through fear of a harsher sentence is still a real possibility. Surely acceptance of guilt by the perpetrator in the knowledge that they are doing so to have charges against them dropped (charge bargaining), a different factual picture presented in court from what their court papers initially indicated (fact bargaining) or a more lenient sentence (sentence bargaining) all in exchange for not requiring the evidence against them to be tested through a trial procedure, must be regarded as them receiving a ‘reward’ for accepting their guilt (whether they are in fact guilty or not). It is a very fine line distinction however the argument can be made that by the time a guilty plea

¹⁸ G. Heupel, Comparing Confessions and Plea Bargains: *United States v Robertson* and the Admissibility of a Defendants Incriminating Statements, (1980) 60 B.U. L. Rev. 368 at p. 371.

¹⁹ *Ibid.*

²⁰ This is taken from the 1783 English case of *Rex v Warrickshall*, found in L.E. Dervan and V.A. Edkins, The Innocent Defendant’s Dilemma: An innovative Empirical Study of Plea Bargaining’s Innocence Problem, (2013) 103 J. Crim. L. & Criminology 1 at p. 7 with reference to A.W. Alschuler, Plea Bargaining and Its History, (1979) 79 Colum. L. Rev. 1, 19-24

as a result of a bargain is being entered in court, the accused person is under the authority of the court and certain safeguards will have been passed by that time, for example, there must be sufficient evidence of the crime to bring the accused person to court in the first place.

An illustration of the dangers that plea bargaining risks innocent persons pleading guilty can be seen in the US Supreme Court case of *Bordenkircher v Hayes*²¹. This case also provides a good early example of how the plea bargaining process in the US can operate and the attitude that the court was starting to take to the practice, in terms of considering plea bargaining as a permissible practice. *Hayes*, who had two previous felony convictions, was indicted for forgery of a cheque for \$88.30, an offence punishable by two to ten years imprisonment. As part of a plea negotiations the prosecutor offered to recommend a sentence of five years imprisonment if *Hayes* tendered a guilty plea prior to the trial. If *Hayes* had not tendered a plea on the terms requested by the Prosecutor, this would have meant that he would be charged under the Kentucky Habitual Criminal Act and if convicted he would receive a mandatory life sentence. *Hayes* refused to plead guilty and was convicted following trial.

Hayes appealed to the Supreme Court on the basis that the prosecutor's actions were coercive, retaliatory and fundamentally unfair. His appeal was refused on the basis that no distinction could be drawn between an offer and a coercive 'threat.' There had been nothing stopping the prosecutor charging *Hayes* as a habitual offender in the first instance. The court did not dispute that the difference in sentence was as a result of the accused's right to test the evidence against him and stated that 'the imposition of such difficult choices is the inevitable and permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'²² For *Hayes*, in hindsight it seems logical than he plead guilty to a crime that he is innocent of rather than face the risk of life imprisonment if convicted after trial.

Hessick and Saujani have highlighted that there is a risk with plea bargaining that the system becomes 'an assembly line in which defendants are pressured, deprived of due process, and regarded as secondary to efficiency.'²³ Although there has been discussion of the plea

²¹ 434 US 357 (1978).

²² At 364.

²³ F. A. Hessick III and Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defence Counsel and the Judge*, 16 BYU J. Pub. L. 189, 2001-2002 at p. 197. Although Hessick and Saujani are correct to acknowledge the dangers where, essentially the human rights of the person accused of a crime are not upheld in order to ensure a system runs quickly and within budgetary requirements, the reasons behind any criminal justice system in general must be borne in mind in terms of ensuring that we are not living in an state

bargaining process in cases such as *Hayes*, plea bargaining has been described as an ‘unregulated’ industry.²⁴ The plea bargaining process in the United States, however, for example, has some degree of regulation in federal cases whereby ‘the judge who accepts the plea must be satisfied that there is a factual basis for it, advise the defendant whether the court is bound by the parties’ recommendations, decide whether to accept or reject the plea agreement, and ensure the proceedings are captured in a verbatim record to facilitate review.’²⁵ The main concern however of the courts, as laid down in the case of *Brady v United States*, is that ‘[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.’²⁶ Pleas induced by ‘force, threats or promises’ will not therefore necessarily render the plea involuntary and as a result the prosecutor has a broad discretion in terms of the negotiation of the plea.²⁷ The promise of a significant reduction in sentence from that which an accused person would face after trial does not render a plea involuntary.²⁸

As a result of the precedent set down by *Brady*, even the threat of the death penalty would not be sufficient to render a guilty plea involuntary.²⁹ It is then open to the innocent accused person to voluntarily admit guilt in order to avoid being tried, wrongly convicted and then receive a more severe sentence. If an innocent accused person was therefore threatened with the death penalty in a case where the evidence against them was minimal, they will be very unlikely to take the risk and essentially gamble with their life. It is sufficiently unfortunate that an innocent person would have to spend part of their life in prison for a crime that they did not

of anarchy, where victims have the right to those who have wronged them being brought to justice and those who commit crimes are aware of the consequences of doing so.

²⁴ See J.H. Blume & R. K. Helm, *The Unexonerated: Factually Innocent Defendants who Plead Guilty*, (2014-2015) 100 Cornell L. Rev. 157

²⁵ *Ibid.* at p. 165

²⁶ *Brady v. United States*, (1970) 397 U.S. 742 at 748 (1970) cited by Blume and Helm, *Ibid.* In *Brady*, the Court basically held that the threat of the death penalty could be used to induce a guilty plea as long as the plea was knowing and intelligent. 397 U.S. at pp. 747-748.

²⁷ Blume and Helm, *Ibid.* at pp. 165-166. Also, in *Bordenkircher v. Hayes*, (1978) 434 U.S. 357 at 363, ‘it was stated that acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.’

²⁸ See Blume and Helm, *Ibid.* who cite *Hayes*, 434 U.S. at pp 364-365, and acknowledges that *Hayes*, in theory, rejects ‘the suggestion that prosecutors cannot threaten a lengthy and serious criminal punishment that has not been applied, at least occasionally, to similarly situated defendants-meaning that a charge that would not have been brought originally could be threatened if a guilty plea was rejected.’

²⁹ Blume and Helm, *Ibid.*

commit but a worse scenario would be to lose their life as punishment for a crime they did not commit.

Some legal academics have portrayed a bleak picture of plea bargaining as a procedure for conviction that fails to ensure the public confidence in the system that the Supreme Court has viewed as so critical. For example, Professor Ellen Podgor has written in respect of plea bargaining in the United States, that '[o]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations.'³⁰ Academics and commentators have made reference to 'the innocence problem'³¹ which deals with concerns that a system of plea bargaining permits 'too many' wrongful convictions.³²

An innocent person being forced to plead guilty through fear of the consequences should they decide to 'run the risk' of proceeding to test the evidence against them at trial, is nothing short of a travesty and extreme miscarriage of justice.³³ No credible legal system can in any way permit this kind of practice in any organised or systemic manner and any system which openly *permits* wrongful convictions is fundamentally flawed. The concept of 'too many' wrongful convictions is concerning in itself because it can never be determined how many would be *okay*. One wrongful conviction is one too many.

However, it would be naive to profess that a system could be devised or already exists that would ensure in 100 percent of cases that no person is ever going to be wrongfully convicted. Some allowances must be made for human error when witnesses give evidence at a trial in terms of their reliability and it also has to be accepted that there is the possibility of incredible

³⁰ E. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game* (2010), 85 Chicago Kent Law Review 77; See also N. Vámos, 2009, Please don't call it "plea bargaining", (2009) *Crim. L.R.* 617; A. Tor, O. Gazal-Ayal and S.M. Garcia, Fairness and the willingness to accept plea bargain offers, (2010), *Journal of Empirical Legal Studies*, 7(1), 97-116

³¹ R. E. Scott and William J. Stunz, *Plea Bargaining as Contract*, (1992) 101 *Yale L.J.* 1909 at 1947, see also S. J. Schulhofer, *Plea Bargaining as Disaster*, (1992) 101 *Yale L.J.* 1979

³² See M. Young, *In Defence of Plea Bargaining's Possible Morality*, (2013-2014) 40 *Ohio N.U. L. Rev.* 251 at p. 257

³³ See R. Balko, *False Confessions, Please Plea Me*, *Reason Magazine* 08/2008, this article highlights a scenario where the defendant has felt in such a vulnerable position that he felt compelled to plead guilty. In this case, in December 2005, James Ochoa was wrongly convicted of a 'car jacking.' Ochoa pled guilty and served 16 months imprisonment but was cleared of this crime following DNA extraction from hair fibres left in the car matching the DNA of another male. The judge told Ochoa that 'should he insist on his constitutional right to a jury trial and should the jury find him guilty, the court would slap him with the maximum sentence the law allowed: life in prison.'

witnesses. Forensic evidence has also evolved over the years but has, in some cases, resulted in wrongful convictions as a result interpretation errors by scientists and fingerprint experts, for example.³⁴ Experts frequently disagree and often whether a person is convicted boils down to which expert's evidence that the judge or the jury prefer. All of these factors mean that there can never be a system that will ensure in every prosecution without fail that no person is ever wrongly convicted. However, any reliable legal system must ensure that safeguards are in place to minimise the risk of wrongful convictions and not encourage them. In assessing whether plea bargaining is a practice that encourages the innocent to plead guilty it is necessary to consider whether there is evidence of innocent persons pleading guilty as a result of a plea bargain.

Young has stated that the question of how many innocent people have felt compelled to plead guilty through fear or finding themselves in a more undesirable position if they proceed to a trial and are then found guilty has, surprisingly, not formed a significant part of the plea bargaining debate.³⁵ In fact, there is evidence that 'factually innocent' defendants do plead guilty³⁶ and there are a number of documented examples of persons who have pled guilty in circumstances where they are innocent as, on balance, they have weighed up the risks and decided it would be better to plead guilty than face a significantly harsher sentence.³⁷

Whilst there is evidence of 'factually innocent' persons pleading guilty, there is an counter argument to this in that, in terms of the issue of the accused being under pressure to plead, the court should always ensure that any plea is voluntary. Plea bargains are generally negotiated through the accused person's solicitor and the prosecutor and therefore the accused

³⁴ See the website of The Innocence Project at

<http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science>

³⁵ M. Young, *supra* note 32 at p. 257 where he makes reference to the failure of Schulhofer, *supra* note 31 and Alschuler, *supra* note 2 to address the question of how many wrongful convictions are too many in the context of the plea bargaining debate. Young has also acknowledged the difficulty in quantifying how many wrongful convictions are too many where he poses the question of, 'where some wrongful convictions are inevitable in any merely human system of justice, what rate of wrongful conviction is sufficient to constitute per se systemic injustice?' This is an incredibly difficult question to provide any uncontroversial answer to. There will also be scenarios where a person is still convicted, having maintained their innocence and tested the evidence at trial. The truth behind these cases may never come to light. Perhaps more in depth research and attempts to collate and quantity data on wrongful convictions by the governments of countries where the practice is frequently used would assist in the discussion on whether innocent persons plead guilty through plea bargains.

³⁶ *Id.* See also BL Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011). This book examines the first 250 DNA exonerations in the US using the work of the Innocence Project (www.innocenceproject.org). 16 of the 250 involved pled guilty at p. 150.

³⁷ See J Brockman, "An offer you can't refuse: pleading guilty when innocent" (2010) 56 *Criminal Law Quarterly* 116, who provides a number of examples from Canadian practice.

person's representative should also always ensure that the plea is voluntary. It will always be open to the accused person to plead not guilty and test the evidence against them and that will be a choice that the accused has.

In considering the prevention of the innocent pleading guilty it is worthy to note that Schulhofer has recommended jury trials as being a safer system ensuring against wrongful convictions than the court accepting guilty pleas.³⁸ Realistically, in practical terms, it would never be possible to try every person charged with a crime by a jury. Jury trials take up a more significant amount of court time, which means accused persons would have to wait longer for their trial, victims would have to wait longer for justice and evidence may be forgotten by witnesses by the time they give evidence. In addition to time and resource implications there are also negatives associated with a jury in that there is a risk they may take inaccurate media coverage of a crime into account, they may apply their own prejudices towards witnesses, the evidence and the accused and they may fail to comprehend instructions that involve applying the facts to the law.³⁹

2.2.2 Plea Bargaining Violates the Human Rights of the Accused

Whether an accused person is guilty or not, as an accused person they have the right to have the prosecution prove the case against them beyond reasonable doubt. It must be considered whether plea bargaining puts too much pressure on the accused person to relinquish their rights to have the prosecution prove the case against them beyond reasonable doubt to obtain a potential reward. Article 6 of the European Convention on Human Rights includes the right to, *inter alia*, in any criminal charge against them, 'a fair and public hearing within a reasonable time by an independent and Impartial Tribunal established by Law.'⁴⁰ This article also includes the pronouncement that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law',⁴¹ and the right to 'examine or have examined' witnesses.⁴² When an accused person exchanges these rights for the promise of a

³⁸ Schulhofer, supra note 31 at pp. 1983-84

³⁹ A thorough analysis of the fairness of jury trials is outwith the scope of this thesis however for an in depth analysis of the fairness of jury trials see, C. Thomas, Are Juries Fair?, Ministry of Justice Research Series 1/10, February 2010 <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf> last accessed 10 December 2015

⁴⁰ Article 6(1), European Convention on Human Rights (hereinafter ECHR)

⁴¹ Article 6(2), ECHR

⁴² Article 6(3)(d) ECHR

more lenient sentence, for example, there must be safeguards in place to ensure that the accused person is not under undue pressure to forego their rights.

A case which illustrates the human rights concerns associated with putting too much pressure on accused persons to plead guilty is the extradition case of *McKinnon v United States of America*.⁴³ In this case, the practice of plea bargaining by US prosecutors was explored by the UK courts. Between 2001 and 2002 *McKinnon* allegedly hacked into 97 US Government and military computers from his home in England. He deleted data, resulting in significant disruption to US Army and Navy networks. He also threatened further disruption. He made admissions during the course of a police interview. The US authorities sought his extradition. *McKinnon* challenged his extradition and appealed to the House of Lords. The only issue left for determination by the House of Lords was whether the extradition proceedings should be abandoned as a result of the US prosecutors having engaged in earlier plea negotiations.

McKinnon had been offered a plea bargain deal that would mean he would be likely to receive a three or four year prison sentence if he consented to his extradition and agreed to a set of facts that had been presented by US prosecutors. If *McKinnon* refused to accept this plea bargain he was told he could expect a sentence of eight to ten years imprisonment for charges and facts that prosecutors would frame in the most serious way possible. *McKinnon* argued that the significant difference in relation to what he was being offered to forego what he had a lawful right to resulted in unlawful pressure. The court concluded that '[i]n one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here (as to the way the case would be put and the likely outcome) before it constituted unlawful pressure such as to vitiate the process (of extradition). So too would the predicted consequences of non-cooperation need to go significantly beyond what could properly be regarded as the defendant's just desserts on conviction for that to constitute unlawful pressure.'⁴⁴

It is clear from this that for the court to find that what is offered in a plea negotiation would amount to unlawful pressure to forego legal rights is a very high threshold. However it's not clear from this decision what exactly would have amounted to unlawful pressure, it is not

⁴³ 2008 UKHL 59

⁴⁴ *Id.* at para 38.

clear how 'generous' the prosecutor's offer would have to be, albeit this is something that would be difficult to quantify and would be required to be considered on a case specific basis. It is also noteworthy that the court did not reject the notion that a plea bargain could amount to unlawful pressure to relinquish your rights to have the prosecution prove the case against you. By implication, this suggests that the prosecutor's power in conducting plea bargains can be subject to some form of judicial review. Notwithstanding this, the high threshold places the Prosecutor in a position of power to conduct their negotiations with an accused person who is, for example, facing losing their liberty for a significant period of time and to that extent in a reasonably vulnerable negotiating position.

The undue pressure on the accused to plead argument and the argument that plea bargaining violates the accused person's human rights by causing them to relinquish their right to have the prosecution prove the case against them are two arguments that are clearly linked. There is a risk that by offering incentives to plead guilty that innocent persons may relinquish their right to have the prosecution prove the case against them. There are, however, safeguards to reduce this risk through the accused's access to a solicitor and the overseeing of the legal process by the judiciary. These parties in the legal process will also play a key role in monitoring the actions of the prosecutor in the plea bargaining process.

2.2.3 Plea Bargaining gives too much Discretion and Power to the Prosecutor

The prosecutor's power and discretion are topics that have amassed much controversy in the plea bargaining debate. The role played by the prosecutor in utilising plea negotiations has placed the prosecutor and their motivations under the spotlight. In entering into any plea bargains or agreements, prosecutors have a number of factors to take into consideration, including the nature of the charges, the accused's criminal record, the available evidence,⁴⁵ the quality of that evidence and the impact on the victim, both of the crime and consequences of

⁴⁵ A.W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, supra note 2 at pp. 59-60 has made reference to his interviewing of a number of prosecutors and stated, '[o]ccasionally I encountered prosecutors who were defensive about the guilty-plea system and who seemed unwilling to say anything that might lead to criticism. Even these prosecutors, however, were quick to note that the state of the evidence was a major consideration in bargaining. "Half a loaf is better than none" was their philosophy. It apparently never occurred to them that the role they had assumed of "protecting society" as vigorously as possible might be criticized.' It must however be stated, that although the prosecutor can and should come across as robust in terms of their protection of society, they must draw on their experience and what they can be realistic about in terms of the outcome of the trial. It does not protect society for the accused person to walk free entirely.

accepting a plea to less charges or a less serious charge.⁴⁶ All these factors can assist the prosecutor in terms of determining what negotiations they should be entering into and what they are best to accept, weighing up the likelihood of conviction after trial. In addition to the external factors that the prosecutor is required to take into account they also tend to approach their role with a number of different hats on.

Alschuler has described the prosecutor, in negotiating plea agreements as undertaking a number of different roles including that of ‘administrator,’ ‘advocate,’ ‘judge’ and ‘legislator.’⁴⁷ In the Prosecutor’s role as administrator, they have resources and efficiency, in terms of disposing cases to free up resources to prosecute the next, in mind.⁴⁸ With their advocate hat on the prosecutor may be keen to ‘win’ cases in order to secure a vast number of convictions per case that they decide to initiate proceedings for and ensure the maximum sentences are imposed.⁴⁹ They may see this as enhancing their own reputation and ensuring public confidence in them in enforcing justice. Part of this should be the inclusion of what the victim in a crime may think of the plea and what they want.

Although the prosecutor has a different role from the judge in any case, part of the prosecutor’s role is to be a judge, particularly when determining what to do with cases.⁵⁰ For example the prosecutor may choose, in deciding on an appropriate plea to accept, to take into account the personal circumstances of the accused person⁵¹ i.e. their living conditions, mental health and family difficulties they have faced etc. They also may take into account external factors, such as the time an accused person has already spent in custody for a particular crime. If the prosecutor decides to discreetly take on the role of legislator they may, for example, choose to drop charges because they believe the penalty is too harsh for the criminal conduct.⁵²

⁴⁶ See F.A. Hessick III and R.M. Saujani, Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel and the Judge (2001-2002) 16 BYU J. Pub. L. 189 at p.189

⁴⁷ A.W. Alschuler, *supra* note 2 at pp. 52-53

⁴⁸ *Ibid.* and at p. 55 Alschuler has quoted a Manhattan Prosecutor stating, ‘Our office keeps eight court-rooms extremely busy trying five per cent of the cases. If even ten per cent of the cases ended in a trial, the system would break down. We can’t afford to think very much about anything else.’

⁴⁹ Alschuler, *supra* note 2 at p. 53 and at p. 59 Alschuler has quoted a Chicago prosecutor stating, “When we have a weak case for any reason, we’ll reduce to almost anything rather than lose.”

⁵⁰ Alschuler *Ibid.*

⁵¹ Alschuler *Ibid.* at p. 53

⁵² Alschuler *Ibid.*

It may be considered that the prosecutor is, in circumstances where they decide to take on the role of legislator, going beyond their remit.

Many argue that the prosecutor, regardless of the 'hat' that they decide to wear, is in a position of overwhelming power with the ability to drop a case or accept any bargain that pleases them and as such can hold the fate of the accused person in their hands. It has been argued that the downside for the accused is that they have to deal with the prosecutor and cannot 'shop' for a better deal.⁵³ However, this is not entirely accurate because, in practice, where individual prosecutors have their own discretion in cases some may develop a reputation for being more 'soft' than others and may be targeted by an accused persons defence counsel. This may encourage a practice of prosecutor shopping. The prosecutor is, however, in the unfortunate position of being unable to 'shop' for a more reasonable accused person or defence counsel (as it is most likely that the prosecutor will actually negotiate with the accused person's counsel).

Prior to Human Rights legislation and advances in legislation on disclosure by the prosecutor of their case to the defence, the Prosecutor could then have been regarded as being in a much stronger position than the defence. The prosecutor knew exactly what evidence they had and could make an informed decision about the likelihood of the accused person being convicted in deciding where to set the bar in a plea negotiation. The disclosure obligations imposed on the Prosecutor places the accused person and their Counsel on a significantly more level playing field in terms of the negotiation process.

Although laws on disclosure in many Western jurisdictions have striven to ensure that the defence have equality of arms in preparing their defence, some are still of the view that the defence will not have the same resources and information available to them as the prosecution.⁵⁴ If however the defence have disclosure of the evidence against them then they are in a position to analyse the likelihood of conviction after trial vs accepting guilt as part of a negotiated plea. The defence will also have access to information that the prosecutor does not have access to. For example defence counsel will be able to examine the accused's defence by interviewing the accused himself and will be able to investigate this in full with the information from the prosecution. The prosecution will not necessarily have full information in relation to the

⁵³ J.F. Reinganum, Plea Bargaining and Prosecutorial Discretion, The American Economic Review, Vol. 78, No. 4 (1988), pp. 713-728 at p. 713

⁵⁴ *Id.* at p. 713

accused's defence and they have the high burden of proving the case beyond reasonable doubt. Disclosure ensures that the prosecutor cannot present any exaggerated view of the evidence or promote chances of likelihood of conviction beyond what they are, in the negotiation process, in order to secure a guilty plea. In any case it would be misconduct and inappropriate for the prosecutor to misrepresent the evidence and similarly they should not be engaging in the plea bargaining process with a view to securing any personal benefit.

Plea bargaining has been described by those who object to the morality of the practice as a 'tool for corruption.'⁵⁵ In considering whether plea bargaining can be considered such a tool it is necessary to consider how much discretion prosecutors have in determining plea bargains and how their discretion can be monitored to prevent corruption. There must also be a process in place to investigate any allegations of suspicious plea bargaining by prosecutors. In some jurisdictions guidelines have been put in place for prosecutors in order to assist them with how they should be exercising their discretion, for example, under the Code for Crown Prosecutors in England and Wales, in order to proceed with charges, there requires to be a 'realistic prospect of conviction'.⁵⁶

Of significance to the plea bargaining debate, the Code also states 'Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.'⁵⁷ This Code also states, 'Crown Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors must never accept a guilty plea just because it is convenient'.⁵⁸ These guidelines are in place to ensure that prosecutors do not take advantage of their discretion and to ensure that the plea is only accepted if the sentence can reflect the gravity of the conduct. This seeks to ensure that prosecutors do not have free reign to decide on any plea that pleases them. However, it is unclear whether the actions of Crown prosecutors, for

⁵⁵ A.W. Alschuler, *Plea Bargaining and Its History*, (1979) 79 Colum. L. Rev. 1, 19-24 at p. 24. Alschuler has advised that there is documentary evidence to suggest that in 1914 an attorney in New York had developed a common practice of standing 'out on the street in front of the Night Court' and would 'dicker away sentences in this form: \$300 for ten days, \$200 for twenty days, \$150 for thirty days.'

⁵⁶ See the CPS Code for Crown Prosecutors in England and Wales

https://www.cps.gov.uk/publications/code_for_crown_prosecutors/ last accessed 10 December 2015

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

example are monitored in order to ensure compliance with the Code. If there is no monitoring process, there is no way of knowing that the decisions by prosecutors are being checked and no way of ensuring then that corruption is being prevented.

Prosecutors should base their decisions on what the charges should be and what charges should be acceptable based on evidence that has been gathered, usually by the police or other investigators working for public authorities. It should not be the position that prosecutors are proceeding with crimes where they do not have sufficient evidence to prove that the person is guilty. They may take into account the weight of particular evidence and the volume of evidence in considering the 'risk' posed of running a case to trial and the likelihood of conviction. In reality, the situation where they would be bargaining with an accused in circumstances where it is clear that that person is not guilty is incredibly remote. At least, in most well developed criminal legal systems, it would be considered highly unethical and unprofessional for prosecutors to accept pleas of convenience.

If it becomes clear during the course of an investigation by the prosecutor that an accused person is in fact innocent, they should not then proceed to negotiate with the accused and they should discontinue proceedings against that person. If it is clear that an accused person is innocent the prosecutor should not be engaging in any plea negotiation with them, just to see if they can secure a conviction in the case. This is highly unethical and immoral. Hessick and Saujani have professed that the prosecutor offers the same plea to the guilty or the innocent irrespective of whether they are actually guilty or not.⁵⁹ This is an odd proposition to make given that the Prosecutor will, certainly in the vast majority of jurisdictions in the world, have no direct contact with those that they have accused of crimes and should never be at the stage where they are negotiating with someone who they know is innocent.

Hessick and Saujani have also maintained that the prosecutor is in a 'precarious position' because of his 'lack of information' and go as far as saying that the prosecutor 'prosecutes those who may be innocent because the prosecutor recognises his ignorance: he cannot let the guilty escape, and must depend on the system to indicate the innocent.'⁶⁰ They also cite Scott and

⁵⁹ Hessick and Saujani, *supra* note 23 at p. 198 with reference to R. E. Scott and William J. Stunz, *Supra* note 31

⁶⁰ Hessick and Saujani *Ibid.* Where they also make reference to the United States Supreme Court decision of *North Carolina v Alford*, 400 U.S. 25 (1970), where it was stated at p. 37, '[h]ere the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming

Stuntz⁶¹ in averring that prosecutors are more likely to be carrying out plea bargains with the innocent as ‘the prosecutor perceives innocence as a lack of evidence.’⁶² This completely ignores the fact that prosecutors are already working under the constraints of the law and that to, for example, indict an accused person there must be sufficient evidence to justify doing so.

The ‘innocence as lack of evidence’ theory assumes that persons accused of crimes are plucked from society with an insufficient basis for police and prosecutors doing so. Scott and Stuntz also aver that the prosecutor’s target is to ‘maximise net sentences over the population of defendants,’ as the prosecutor will incur ‘losses’ as a result of the innocent being acquitted because if the prosecutor had bargained with the same innocent party and secured a conviction and sentence, albeit a lesser one than they would have endured following a conviction after trial, then they would have achieved their target of ensuring maximum punishment/sentences in respect of whom they prosecute.⁶³ Again Scott and Stuntz make assumptions about the role and aims of the Prosecutor without sufficient justification for this. They paint a bleak picture of the prosecutor as an egotistical conviction seeking, sentence hungry target machine with the function of securing the harshest sentence possible regardless of truth, guilt and service of the real public interest in securing justice.⁶⁴

As outlined previously, there is a school of thought that the innocent accused person accepts the negotiated plea as the lesser of two evils.⁶⁵ The defence, who represent their clients’ interests, will have more information as to their client’s guilt or innocence than the prosecutor does. The defence are under an obligation to review the evidence that the prosecution have and analyse that with information provided to them by the accused person and any defence

evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term.’ In this case the Supreme Court apparently ‘condoned’ the concept of an innocent person weighing up their risks and prospects in entering a plea agreement and ultimately doing so in order to get a better deal than face the risk of being convicted and face a more harsh punishment. However, it was acknowledged that the judge was required to ‘scrutinise the evidence closely to find ‘a strong factual basis’ to support the defendant’s plea’.

⁶¹ Scott and Stuntz, *supra* note 31 at p. 1948

⁶² Hessick and Saujani, *supra* note 23 at p. 199

⁶³ Scott and Stuntz, *supra* note 31 at pp. 1947-1948

⁶⁴ See also Schulhofer, *supra* note 31 at p. 1983 where he has stated that ‘[t]his paradoxical conception of loss reveals one way that ‘efficiency’ and the ‘innocence problem’ are mis-specified in the Scott-Stuntz model. Litigating cases against innocents is indeed inefficient (if avoidable), but inability to impose punishment on innocents is not a loss for prosecutors or anyone else.’

⁶⁵ Hessick and Saujani, *supra* note 23 at p. 201

witnesses.⁶⁶ They are in a strong position to analyse whether, weighing up both the prosecution and defence evidence, their client is likely to be convicted. They must ensure that their client fully understands the plea, the proceedings and the consequences of pleading guilty.⁶⁷ It is their responsibility to ensure that any plea bargain entered is fully informed, in terms of their client consenting to the plea bargain.

The accused person's defence counsel are therefore in a position where they should be levelling the playing field between the power of the prosecutor and the accused. An accused person will place faith and dependence in the expert advice given to them by their defence counsel and as a result it is important that this is subject to some form of review as well as being able to review the actions of the prosecutor.⁶⁸ There are concerns that the interests of the clients and the interests of their defence solicitors or counsel may be variable and this may have an impact on the advice given on whether the accused person should plead guilty or not. The defence counsel may have a greater desire for their client to plead guilty for financial reasons. Taking a case to trial may not be financially lucrative in terms of the fee that they receive and the preparation work that they will require to do in proceeding to trial.⁶⁹

Defence solicitors and counsel may also have relationships with, for example, prosecutors and court officials and that may contribute to how quickly and efficiently they wish to resolve cases, in order to keep acquaintances 'on side.'⁷⁰ For the defence counsel there is always a risk with running a trial that their client will be convicted and face harsher punishment. This may cause the accused person's defence counsel anxiety that could lead to them encouraging their client to plead guilty. This anxiety can, however, occur on both sides if, for example, the prosecutor has a case where the evidence is very thin that they are not keen to run to trial, the accused persons defence Counsel has power to the extent that they will be

⁶⁶ For example, The American Bar Association standards warn defence attorneys that '[u]nder no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.' Standards For Criminal Justice, Standard 4-6.1(b). Standard 4-4.1 also states that '[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. Taken from Hessick III and Saujani, *Supra* note 23 at p. 218

⁶⁷ Hessick III and Saujani, *supra* note 23 at p. 201

⁶⁸ *Ibid.* at p. 207

⁶⁹ *Ibid.* at p. 208-209

⁷⁰ *Ibid.*

highlighting all the difficulties with the prosecution case and may, on this basis, pressure the prosecutor into accepting a plea that they are not particularly comfortable with.

There is also a moral dilemma faced by the defence counsel in considering whether to run a defence at trial as many are aware that their clients are ‘factually’ guilty.⁷¹ In any case, the accused person’s defence counsel should minimise the power imbalance between the accused person and the prosecutor by being able to point out flaws in the evidence and stress to the prosecutor that by running the case to trial there is always the possibility that the accused person may be acquitted. The prosecutor will have the dilemma of deciding whether to accept a plea and walk away with a conviction and punishment of some sort or face the risk of a guilty person being acquitted entirely.

In sum, there is a risk that plea bargaining affords too much discretion to the prosecutor and this may be used inappropriately. However, this is unlikely to happen as the prosecutor is unlikely to be corrupt or unprofessional, at least in the well-developed legal systems that the UK and US have, for example. The laws on disclosure and defence counsel are there to level the playing field, and often stress the risk to the prosecutor that they also face in taking a case to trial, in order to secure a ‘better deal’ for the accused person. This does however mean that there is a risk inherent in the plea bargaining process that the punishment imposed may not be truly reflective of the seriousness of the criminal conduct.

2.2.4 Plea Bargaining results in Sentences that fail to recognise the Gravity of the Criminal Conduct

It has been stated that the decision on sentencing can be regarded as ‘the symbolic keystone of the criminal justice system.’⁷² Punishment for a crime in the form of the sentence imposed is something that will be at the forefront of the accused person’s mind in determining what they should do in relation to charges that they are facing. They will want to know what ‘incentives’ or ‘deals’ will be available should they choose to relinquish their right to a trial and plead guilty, whether via sentence, charge or fact bargaining. The practice of sentence

⁷¹ See Alan Dershowitz, *The Best Defence* at 118 (1982); see also Andre A. Borgeas, Note, Necessary Adherence to Model Rule 1.2(b): Attorneys do not Endorse the Acts or Views of Their Clients by Virtue of Representation, 13 Geo. J. Legal Ethics 761,771 (2000), taken from F.A. Hessick III and R.M. Saujani, *Supra* note 23 at p. 211

⁷² A. Blumstein, J. Cohen, S. Martin and M. Tonry (eds.). (1983). *Research on sentencing: The search for reform* (Vols. 1-2) (National Academy Press, Washington, DC, 1983), at p. 1.

discounting involves the judge imposing a more lenient sentence for the accused pleading guilty, which is used as an incentive for pleading guilty.⁷³ The discount in sentence may be as a result of an early plea. Alternatively the accused person may indirectly receive a more lenient sentence than they would have done as a result of pleading to a less serious charge, a smaller number of charges or as a result of a factual narrative presented to the court that is less grave than the facts that would be presented at trial, for example.

Alschuler has criticised the practice of plea bargaining by stating that it,

[M]akes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings. In contested cases, it substitutes a regime of split-the-difference for a judicial determination of guilt or innocence and elevates a concept of partial guilt above the requirement that criminal responsibility be established beyond a reasonable doubt.⁷⁴

This quote overgeneralises and makes unfounded assumptions about what is involved in the practice of plea bargaining. Alschuler assumes that, the judiciary, in issuing sentences that have resulted from some form of plea bargaining do not take into account the conduct or characteristics of the accused, which may be only marginally different following a plea bargain, or not different at all if the plea has involved a charge bargain that does not change the factual narrative. These matters must still be taken into account for the judge to sentence the accused at all and guidelines for sentencing are often in place for judges at the national level.

In considering whether plea bargaining results in sentences that fail to recognise the severity of criminal conduct, it is of assistance in the national context to consider the practice of sentence discounting for guilty pleas in the jurisdictions of Scotland and England where the plea bargaining is frequently practiced. For example, in Scotland, sentence discounting is governed by Section 196(1) and 196(1A) of the Criminal Procedure (Scotland) Act 1995 (hereinafter the 1995 Act). This section states:

⁷³ F. Leverick, Sentence Discounting for Guilty Pleas: A Question of Guidelines, 2004 *Edinburgh Law Review*, Vol. 16 at pp. 233-238 at p. 233

⁷⁴ A. W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, (1983) 50 *U. Chi. L. Rev.* 931 at 932

(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account—

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which that indication was given.

(1A) In passing sentence on an offender referred to in subsection (1) above, the court shall—

(a) state whether, having taken account of the matters mentioned in paragraphs (a) and (b) of that subsection, the sentence imposed in respect of the offence is different from that which the court would otherwise have imposed; and

(b) if it is not, state reasons why it is not.

The statute therefore very clearly sets down that it is possible to offer sentence discounts for guilty pleas. The undertone of the legislation suggests that discounts should be offered for guilty pleas as the legislation specifically states that, in circumstances where no sentence discount is given for an early plea, the court must state reasons why the sentence is not discounted. The legislation however falls silent on the question of the amount of discount to be given by the court. This has then fallen to the judiciary to establish.

In the case of *Spence v HM Advocate*⁷⁵ the court sought to establish guidance for the judiciary to supplement Section 196 and stated that ‘[t]he extent of the discount will be on a sliding scale ranging at its greatest from one third, or in exceptional circumstances possibly more, to nil . . .’⁷⁶ However, the Scottish courts have relatively recently recanted from the guidance set down in *Spence*. In *Gemmell v HM Advocate*,⁷⁷ the Lord justice-Clerk said that ‘the court’s discretion to allow a discount should be exercised sparingly and only for convincing reasons,’⁷⁸ and ‘the broad principle that, in general, the discount will be the greater the earlier

⁷⁵ *Spence v HMA* [2007] HCJAC 64: 2008 JC 174

⁷⁶ *Ibid.* at para. 14

⁷⁷ [2011] HCJAC 129

⁷⁸ *Ibid.* at para. 77

the plea is probably a sufficient statement of guidance for most purposes.’⁷⁹ In *Murray v HM Advocate*, the court ruled that there should be ‘no mandatory sliding scale’ and was of the view that any discount ‘was reserved to the discretion of the sentencer in every case.’⁸⁰ The particular judge, Lord Gill, who delivered the opinion in *Murray* seemed to be in favour of such an approach in order to instil public confidence in the justice system and ensure that large discounts are imposed only for those who deserve such a discount.⁸¹

It may be difficult to distinguish, for the judge who takes a plea from an accused person, between who ‘deserves’ to receive the reward of a discounted sentence for an early plea and who does not. Clearly a plea in mitigation following an accused person’s guilty plea will provide the court with a background, in terms of the accused person’s personal circumstances, difficulties that they have faced in life, information on health problems for the accused person and difficulties with family members. The wider discretion afforded to the judiciary by the decision in *Murray* leads to uncertainty that could deter an accused person from pleading guilty or entering any kind of plea bargain with the prosecutor. In Scotland, no process exists of sentence bargaining between the accused person and the Prosecutor. The prosecutor has no locus in determining the sentence to be imposed by the court, so despite engaging in a fact or charge bargain with the prosecutor, there will be real uncertainty on the part of the accused person as to whether they will achieve the ‘incentive’ they hope for in entering a guilty plea.

In contrast, the discount guidance for England and Wales is in line with the previous approach in Scotland and sets down that discounts given should range from one third to one tenth, depending on the stage in proceedings of the guilty plea.⁸² The Coroners and Justice Act 2009 states that the Court must ‘follow’ any relevant guidelines ‘unless the court is satisfied that it would be contrary to the interests of justice to do so.’⁸³ In the case of *R v Caley and others*⁸⁴ the court confirmed the sentencing guidelines by confirming that sentencing is determined on a

⁷⁹ *Ibid.* at para. 78

⁸⁰ *Murray v HM Advocate* [2013] HCJAC 3 at para. 24

⁸¹ See F. Leverick, *supra* note 14 at p. 342, citing *Gemmell v HM Advocate* [2011] HCJAC 129 at para. 74

⁸² See Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) (the *Definitive Guideline*) at p. 5

https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-_Revised_20071.pdf last accessed 10 December 2015

⁸³ Coroners and Justice Act 2009, Section 125(1)

⁸⁴ [2012] EWCA Crim 2821; 2012 WL 6728543

‘sliding scale depending on when the plea of guilty was indicated. The largest reduction is of about one third, and is to be accorded, under the well-established practice and the SGC Guideline, to defendants who indicate their plea of guilty at the ‘first reasonable opportunity.’⁸⁵ Thereafter the proportionate reduction diminishes. A plea of guilty at the door of the trial court will still attract some reduction, but it is likely to be of the order of one tenth.’⁸⁶ In considering whether a sentence discount means that the moral gravity of the crime is not accurately reflected, this material from Scotland and England and Wales sets out how much of a discount is likely to be given. Given the uncertainty of the new approach in Scotland, for example, it cannot necessarily follow that a judge will issue a sentence after a plea bargain where the moral gravity of the crime is not accurately reflected.

Critics of the plea bargaining process take issue with the accused receiving a sentence that is not reflective of the full gravity of their conduct. This argument assumes that the proper sentence imposed is the sentence given after trial and the case against the accused person proved beyond reasonable doubt. They assume that the sentence imposed after a guilty plea with a discount is therefore a lenient sentence. Deterrence is a key factor that the judiciary must take into account in issuing sentences as accused persons cannot be seen to, essentially, ‘get off’ with crimes.⁸⁷ In addition, where accused persons are not adequately punished there is a real issue that the criminal justice system may be failing to protect the public and as a result public confidence in the criminal justice system is lost.⁸⁸ This matter is less significant in circumstances where a guilty plea to a minor offence, reduces a sentence that is a fine from £150 to £100 however, the more serious the crime, the more controversial the practice and as such this issue will be discussed further in chapter 3 below.

If, however, the evidence does not quite stand up at trial then a guilty person would walk free without punishment at all. If plea bargaining in all forms were to be abolished from a criminal justice system, the system will become less efficient and this could also create loopholes for those wishing to evade justice. For example, cases may time bar as it may be impossible to fix trials for cases within statutory timescales with the result that the Prosecutor

⁸⁵ *Ibid.* at para 8

⁸⁶ This clearly gives more clarity than the newer approach in Scotland, which could deter accused persons from entering pleas as a result of the uncertainty.

⁸⁷ D.D Guidorizzi, *supra* note 6 at p. 771

⁸⁸ See *Gemmell v HM Advocate* *supra* note 81 at para. 76 and F. Leverick, *Sentence Discounting for Guilty Pleas: An Argument for Certainty Over Discretion* (2014) *Crim.L.R Issue* 5 338 at p. 341

would then have to select which crimes to prosecute. The human rights of accused persons may also be violated as they are entitled to a ‘fair and public hearing within a reasonable time.’⁸⁹ Plea bargaining assists in ensuring that only a minority of cases actually proceed to trial, meaning that the accused persons who wish to have the prosecutor prove the case against them beyond reasonable doubt are far more likely to have a fair and public hearing within a reasonable time. In addition, one of the main advantages of plea bargaining for victims and witnesses is quick resolution of their cases and closure for them. The following section will consider the arguments for plea bargaining at the national level in greater detail.

⁸⁹ Article 6(1), ECHR

Chapter 2.3 The Arguments for Plea Bargaining at National Level

There are a number of arguments for permitting plea bargaining at the national level.⁹⁰ If an accused person pleads guilty this results in efficiency for the court system and saves resources in the prosecutor's office in order that those preparing the cases can focus on the cases that will be trials. The accused also has the incentive of a promise or likelihood that he will receive a more lenient punishment. There is a strong argument that the accused pleading guilty indicates his remorse and that can mean a lot to victims. Guilty pleas avoid witnesses being inconvenienced by being required to come to court and give evidence, a daunting process for anyone. The matter being resolved more quickly is also of benefit to the accused and victims as they will not have the criminal proceedings hanging over them for a significant period of time.

2.3.1 Efficiency can still Achieve Justice: Saving Precious Time and Money

The US Supreme Court as long ago as 1971 has given a degree of backing to the necessity to ensure administration of justice in an efficient manner in stating:

‘The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.’⁹¹

The inconvenience of jury trials, for example, must be highlighted. Members of the public will be called from their daily lives to participate as jurors, it is their duty to do so, regardless of their will. The state will require to pay any loss of earnings and expenses for their travel, for example. This is all clearly in addition to the salaries, legal fees and cost of running courtrooms. The expenses of witnesses will also have to be paid, in addition to the personal inconvenience of them having to attend court.

It is clear that in the domestic context it is far more expensive for a trial to proceed than for a guilty plea to be dealt with by the court. For example the CPS has quoted that for an early

⁹⁰ F Leverick, *supra* note 14 at pp. 339-340

⁹¹ *Santabello v. New York*, 404 U.S. 257 (1971), taken from J. Kavanagh, *Plea Bargaining: The Prosecutor's Perspective* 6 Police L.Q. 5 1976-1977 at p. 8

plea in the Crown Court the cost to the CPS alone, as of 2009, was on average, £670, a plea following committal for trial was, on average, £1500 and a trial was, on average £3500.⁹² For COPFS in Scotland, in the year 2003-2004, the cost of a high court plea under Section 76 of the Criminal Procedure (Scotland) Act 1995 (which would be the earliest opportunity for the accused person to plead guilty) was £2611, a plea at a preliminary diet was £12,203, a plea at a trial diet was £13,339 and a plea at a trial diet where evidence has been led was £14,985.⁹³ At Sheriff and Jury level a Section 76 plea was £1876, a plea at a first/preliminary diet was £6933, a plea at a trial diet was £7341 and a plea at a trial diet where evidence was led was £9176.⁹⁴ At Sheriff summary level a plea at a pleading diet was £163, a plea at an intermediate diet was £367, a plea at a trial diet was £449 and a plea at the trial diet after evidence was led was £653.⁹⁵

In addition to the costs incurred by the prosecuting authority the costs to the court service must also be taken into account. For example, in Scotland, a study conducted of cases in 2003/2004 found that, on average, in the High Court a plea at a hearing under section 76 aforementioned was £324, a plea at preliminary hearing was £324 and a plea at trial diet was £324.⁹⁶ However the cost of a case concluded at trial, where evidence was led before a judge and a jury was £13,879 (including juror/reporting costs).⁹⁷ At Sheriff solemn level a plea at a first diet was £117, a plea at a first diet/section 76 diet with one adjournment for reports was £156, a plea at trial diet with one adjournment for reports was £195 and the cost of a case concluded at trial after evidence was led before a Sheriff and a Jury was £6,368 (with one adjournment for reports).⁹⁸ At Sheriff summary level (where the Sheriff is the judge and there is no jury) a plea at pleading diet was £78, a plea at a first diet/continued first diet with one adjournment for reports was £117, a plea at intermediate diet with one adjournment for reports was £156 and a plea at trial diet with one adjournment for reports was £234. The cost of a case concluded at summary trial level where evidence was led and case adjourned once for reports was £1,463.⁹⁹

⁹² These figures have been extracted from the website of the Crown Prosecution Service and were the rates as of 1 September 2009 http://www.cps.gov.uk/legal/a_to_c/costs/annex_1_-_scales_of_cost/ last accessed 11 December 2015

⁹³ Scottish Executive, Costs, Sentencing Profiles and the Scottish Criminal Justice System (2005) at p. 8 <http://www.gov.scot/Resource/Doc/69582/0017111.pdf> last accessed 11 December 2015

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at p. 7

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

These figures give an illustration of how the cost to both the prosecuting authority and the court service is far more significant if the accused proceeds to trial instead of entering a guilty plea. It is worthy of note that in any trial procedure there is always scope for a guilty person to be acquitted either during the trial or after trial. If this occurs then a lot of money will have been spent on the process for the accused merely to be acquitted. It would be more effective use of the resources of the prosecuting authority and the court service to focus on the real contentious cases that will be proceeding to trial and resolve as many cases as possible through pleas. Where prosecution and court resources are not used effectively and too many cases are taken to trial the prosecution service may not have the resources to prosecute the most serious and complex cases to the standard required. If guilty pleas and plea bargaining were to be abolished it is inevitable that delays would occur between the amount of time between a person being charged with a crime by the police and their trial. This will be highly undesirable for the accused who may have, for example, disciplinary proceedings in relation to their employment hanging over them pending the outcome of criminal proceedings.

For an accused person, it is obvious that the main benefit to them of engaging in a plea bargain is the incentive of some kind of reward for relinquishing their right to trial. This may suit the accused person because they can have proceedings against them concluded more quickly and it is likely they will obtain a more lenient sentence. Plea bargaining also benefits the accused person's solicitors/counsel as they are able to resolve cases quickly and then focus their time and resources, which, just like the prosecutor, will be limited, on cases where they believe, for example, that the innocent accused has a significant chance of acquittal.¹⁰⁰ In high profile cases adverse publicity against the accused person is something that they are likely to want to avoid and by pleading guilty the accused person may avoid, for example, daily updates in the media about their trial. It is also of real significance to the aims of the criminal justice system as a whole that a guilty plea may indicate remorse by the accused for their actions and as such can contribute toward their rehabilitation and achieving justice for victims.

¹⁰⁰ Alschuler, *The Defence Attorney's Role in Plea Bargaining*, (1975) 84 Yale L. 1179 at pp. 1206-1256 and Alschuler also highlighted at pp. 1180-1182 that the financial cost to the accused person will be less where they only have to pay for the services of their solicitor

2.3.2 Remorse, Acceptance and Justice for Victims

If an accused person in pleading guilty is showing remorse for their actions and this has benefits to the criminal justice system and victims overall then the showing of remorse by the accused is an advantage of plea bargaining as a result of this practice encouraging more guilty pleas. Bibas and Bierschbach have argued that the significance of an apology should be given more weight in the criminal justice system and that this is a factor that prosecutors should take into account in determining how best to proceed with cases.¹⁰¹ Presumably then remorse and apology could be factored into the plea bargaining process, to the extent that the prosecutor, in determining where the bar is set in a plea negotiation, would take into account the attitude of the accused and whether he is apologetic towards the victim.¹⁰²

However, in considering the advantages of plea bargaining specifically, remorse is something that can also be shown through a guilty plea that has not been the subject of any negotiation.¹⁰³ It may be argued that the bargaining and reward inherent in plea bargaining does not sit comfortably with remorse as the fact that an accused person has pled guilty does not necessarily indicate remorse, particularly where there is an incentive involved.¹⁰⁴ The accused person may be pleading guilty through a plea bargain to achieve a more lenient sentence alone and may not in fact be sorry.¹⁰⁵ Even if the accused person is sorry it is not clear why it should follow that the court should treat them more leniently as, for example, there is nothing necessarily to suggest that being sorry serves any deterrent effect.¹⁰⁶

However the victims views on whether remorse has been shown through a guilty plea and the impact of that plea and any remorse shown on them in coming to terms with a crime, even if this has been as a result of a negotiation, are of significance. Even if the accused does achieve a more lenient sentence through a plea bargain it cannot be assumed that he had only pled guilty for the incentive. It is entirely still possible that the accused person wishes to show

¹⁰¹ S Bibas & R.A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, (2004) 114 YALE L.J. 85 at pp 127-145, where they argue that there are other areas in the criminal justice system where remorse and apology could be incorporated.

¹⁰² M. Etienne and J.K. Robbennault, Apologies and Plea Bargaining (2007-2008) 91 Marq. L. Rev. 295 at p. 299

¹⁰³ See F. Leverick, Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland (2004) Edin L.R. Vol 8 pp. 360-388 at p. 370

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* at pp. 370-371

¹⁰⁶ *Ibid.*

remorse and avoid putting the victim through reliving the crime in giving evidence against them by pleading guilty.

2.3.3 Victims and Witnesses are spared the trauma of having to give Evidence

One of the main advantages of plea bargaining is that victims and witnesses are spared the trauma in having to face the accused and give evidence in court against them.¹⁰⁷ The more serious the crime, often the more anxious that victims and witnesses will be about giving evidence. Victims in cases, involving crimes of a serious sexual nature, for example will be anxious that during the course of giving evidence that they will feel that they are on trial and they have the additional anxiety that they will have to go through the ordeal of giving evidence without any guarantee of a conviction. In fact, if the accused person is acquitted after the victim has given evidence this can be damaging from the perspective that the victim may feel humiliated and that they have not been believed.

The benefit of witnesses not having to give evidence is less apparent in cases where, for example the witnesses involved are professional or police witnesses. It also must be borne in mind that some victims want their day in court to have their voices heard and face the person who has caused them suffering. The reality is that their day in court may be disappointing in circumstances where they do not get to tell their full story or face brutal cross examination.

There is clearly a risk inherent in any trial that the accused person will successfully test the prosecution evidence, be acquitted and walk free. If there are weak aspects of the evidence in respect of certain crimes then rather than put victims and witnesses through the trauma of giving evidence, for that evidence not to be believed or accepted, a risk assessment by the prosecutor may be to accept a plea to the crimes where the evidence is strong.¹⁰⁸ Some victims are filled with fear and dread of the court process and would prefer that responsibility is taken from them into the hands of prosecutors. This also eliminates the risk of retribution that they

¹⁰⁷ F Leverick, *supra* note 14 at p. 339

¹⁰⁸ See R. Henham, *Punishment and Process in International Criminal Trials* (Aldershot: Ashgate, 2005), at pp. 121-122 for discussion on the impact of plea bargaining on victims in the context of international courts, which will be discussed further in Chapter 3 below. See also R. Hodzik, *Living the legacy of mass atrocities: victims' perspectives on war crimes tribunals*, 2010 J.I.C.J. 114

may suffer for giving evidence.¹⁰⁹ Cases will also be dealt with more quickly where there is a plea resulting in more efficient justice for victims and the criminal justice process as a whole.

2.4 Summary of Chapter 2

It is clear from the arguments outlined that plea bargaining at the national level is a controversial practice, with opinions on the practice often splitting legal academics and practitioners. Whilst engaging in plea bargains has downsides in that the accused, including innocent accused persons, may be pressured into relinquishing their rights by pleading guilty, there are some safeguards in place to ensure that the plea is voluntary, for example the accused's solicitor being there to represent their interests and having access to the evidence that the prosecutor has through disclosure to ensure that the accused person is getting a 'fair deal.' This will also keep the prosecutor's power in check.

Given the high volumes of cases resolved by way of guilty pleas and plea bargains outlined earlier in this chapter it is clear that both in terms of time and resources, that the criminal justice systems discussed, that are heavily reliant on the prosecutor and defence engaging in plea bargaining, would grind to a halt. The amount of time it would take for accused persons to be brought to trial would be likely to violate their human rights in terms of a right to a trial within a reasonable time. Whilst there is an argument that plea bargaining results in sentences that do not account for the full gravity of the criminal conduct, a balance has to be struck in ensuring that the accused persons are punished, that the criminal justice system runs smoothly and that justice is achieved for victims, whilst avoiding distressing and lengthy court proceedings. It is necessary to achieve a balance between efficiency and justice and as long as this can be done the arguments for plea bargaining outshine those against. However, when dealing with the most serious of international crimes, such as crimes against humanity and genocide, both the arguments for and against plea bargaining are elevated to a more controversial level.

¹⁰⁹ R. Pati, The ICC and the case of Sudan's Omar Al Bashir: Is Plea Bargaining a Valid Option? (2008-2009) 15 U. C. Davis J. Int'l L. & Pol'y 265 at p. 320 and stressing that fear of retribution is particularly prominent in genocide cases where small communities have been affected where everyone tends to be known to each other; and referencing Prosecutor v. Plavšić, Case No. IT-00-39&40/I-S (these matters will be discussed further in Chapters 3 and 4 below); see also Michael Bohlander, *Plea-Bargaining before the ICTY*, Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald 151 at p. 161 (Richard May et al. eds., 001), cited by Pati.

CHAPTER 3: THE THEORETICAL ARGUMENTS FOR AND AGAINST PLEA BARGAINING AT THE INTERNATIONAL LEVEL

Theoretically many of the arguments that apply for and against plea bargaining at the national level apply equally at the international level. There are, however, further distinct elements when dealing with international plea bargaining that may elevate some of the arguments for and against the practice. As demonstrated in the course of Chapter 2, when negotiating plea agreements prosecutors have not only the evidence of guilt but also efficiency, budgets and resources in mind. It is clear that ‘bargaining’ when justice is involved attracts much controversy even when dealing with minor offences. Plea bargaining sits even less comfortably with impartial international justice, particularly when dealing with the gravest of international crimes.¹¹⁰ The following chapter will consider how the aforementioned arguments for and against plea bargaining apply at the international level and will also consider any arguments for and against plea bargaining that exist in isolation at the international level.

3.1 The Arguments *against* Plea Bargaining in International Courts

3.1.1 Pressure to Plead and Condemnation of the Innocent: The International Context

The pressure to plead and condemnation of the innocent arguments against plea bargaining outlined previously in the context of domestic law are applicable in the international criminal law context and are even more compelling given the serious nature of crimes being dealt with at the international level and the likelihood of lengthy prison sentences following conviction for serious international crimes. On the one hand the accused person may feel under even more pressure given the serious nature of the crimes being dealt with. A conviction for a charge of genocide, is undoubtedly going to attract a very lengthy sentence. When faced with a very lengthy sentence and even very lengthy trial process that could take years, the accused person may see any opportunity for a more lenient sentence as their least risky option, regardless of their guilt or innocence. On the other hand it must be considered whether genuinely factually innocent accused persons at the international level are going to be likely to plead guilty to such serious crimes as crimes against humanity and genocide that will inevitably attract a very

¹¹⁰ See R. Henham, *The Ethics of Plea Bargaining in International Criminal Trials*, *Liverpool Law Review* (2005), 26: 209-224 at p.1

lengthy custodial sentence. This is less of a concern at national level where more minor crimes are being bargained over, where the reduction in sentence is less significant and in some cases may only amount to a lesser financial penalty.

The stakes and sentences are higher in an international forum. On the one hand this may mean that the international accused will feel under pressure to plead to avoid spending the remainder of their life in prison, or, given the likelihood that they will still receive a lengthy prison sentence they may feel that they might as well run the case to trial in the hope of an acquittal. The evidence against the accused person will undoubtedly be a very significant part of the considerations of the accused person in deciding whether to engage in a plea bargain or not. The international accused person may wish to engage in a plea bargain to ensure that the full truth of their criminal conduct does not come out in evidence during the course of a trial, with the consequence of a more severe punishment.

As will be discussed further below, it has not been unheard of that accused persons at the ICTY have pled guilty to obtain a more lenient sentence and still maintained their innocence. This indicates that the too much pressure to plead and condemnation of the innocent arguments are still live issues in the international context. However, as will be discussed further in Chapters 4, 5 and 6 below, there are a number of checks required by the Statutes of the international courts discussed below, to be conducted by the Trial Chambers which ensure that the likelihood of a truly innocent person reaching the stage in international proceedings where they have the opportunity to plead guilty and have this plea accepted is very slim.

3.1.2 Plea Bargaining results in Sentences that fail to recognise the Gravity of the Criminal Conduct: The International Context

Chapter 2 set out in the domestic context the argument that plea bargaining runs the risk that the sentence imposed does not reflect the moral gravity of the crime, which might lead to a loss of public protection and of public confidence in the criminal justice system. This argument has even greater force in the international context, where some have argued that plea bargaining is inappropriate for serious international crimes such as genocide and other crimes against

Humanity.¹¹¹ Some have argued that a lesser sentence following a plea bargaining in the international criminal law context does not fit the moral gravity of the crime.¹¹² On the other hand some have argued that it is simply morally wrong and distasteful to ‘bargain’ over such serious crimes.¹¹³

In addressing the concerns of those who argue that leniency or ‘a reward’ should not be given when dealing with sentencing for such grave crimes, it is noteworthy that maximum sentence in an international criminal court that any person can obtain is to spend the rest of their life in prison. Multiple life sentences are nothing more than an acknowledgement of the severity of the crimes committed. As is often the case in the international criminal courts/tribunals, those being tried for crimes against humanity, genocide and war crimes involving mass fatalities should expect to receive a lengthy prison sentence whether their actions have resulted in the death of 100 or 100,000 persons. The perpetrator only has one life and often, by the time they are tried in the international criminal courts, they have a limited number of years to live. The lengthy process involved in international criminal courts has meant that some perpetrators have died before the communities who they have wronged have witnessed any justice.¹¹⁴ Subjecting victims to a lengthy justice process just because that feels morally correct for the sake of the perpetrator receiving, for example an 18 year sentence rather than a 16 year sentence should be regarded in the bigger picture as unnecessary.

The rewarding of guilty pleas with a more lenient sentence may cause outcry in the communities that have suffered as a result of mass atrocities. This may be detrimental for reconciliation, which is often cited as one of the main arguments for plea bargaining. This argument will be revisited in chapters 4 and 5 below where consideration will be given to the sentences and ‘rewards’ that have been handed down at the ICTY and ICTY following guilty pleas. Another reason for these communities being unhappy with guilty pleas is that they may not feel that the full truth and picture of their suffering has been accurately recorded.

¹¹¹ See W. Pizzi, *Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals*, (2006) 2 *International Commentary on Evidence*, Issue 1, Article 4; J. De Hemptinne, *The Creation of Investigating Chambers at the ICC*, (2007) 5 *Journal of International Criminal Justice* 402-418

¹¹² See D. Radosavljevic, *Restorative Justice under the ICC Penalty Regime*, 2008 L.P.I.C.T. 7(2), 235-255

¹¹³ See Julian A. Cook, *Plea Bargaining at the Hague*, 30 *YALE J. INT'L L.* 473 at p. 476 (2005)

¹¹⁴ See, for example, ICTY case of *Prosecutor v Slobodan Milosevic* case no. IT-02-54

3.1.3 Plea Bargaining can result in the failure of the court to Realise the Full Truth and Distorts the Historical Record

There is also a further argument against plea bargaining that can be made specifically in the international context, which is that plea bargaining might distort the accuracy of the historical record. It is important that any criminal court has, as part of its remit, an aim of establishing what the truth is in terms of whether or not a crime has been committed. It has been stated that ‘it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing Process...’¹¹⁵ Pursuing and establishing the truth is therefore particularly important in the context of dealing with international criminal courts where whole communities have suffered as a result of ethnic and religious hatreds. A significant reason for the formation of the ad hoc international criminal tribunals, ICTY and the ICTR was, in addition to the punishment of those responsible for the gravest of crimes, to discover the truth. If we know the truth about what has happened and caused a mass atrocity, for example, then we can take steps to deter and prevent this happening again in the future.

However, it must be considered whether a criminal prosecution and trial can and should ever be the mechanism for establishing the truth and a creating a thorough accurate historical record. If it cannot and should not, then one of the main arguments against plea bargaining in an international criminal court is inherently weak. There are inevitable limitations involved in using an international criminal court to establish an accurate historical record. Historians are generally those responsible for studying and collating events in the past.¹¹⁶ Lawyers do not tend to be trained or qualified in recounting historical matters, nor is it common practice for historians to provide expert testimony.¹¹⁷ The jurisdiction of the ad hoc international tribunals has been restricted to certain periods of time and geographical areas, meaning that a full picture of the conflict outwith the time periods and locations, or the whole truth, is not something that is realistically achievable in any case at those tribunals.¹¹⁸

¹¹⁵ U.S. Representative Mrs Albright statement 25 May 1993 UN SCOR, 48 h session, 3217 meeting UN Doc. S/PV3217, taken from R.E. Rauxloh, *History: The Historical Record in International Criminal Law and Plea Bargaining* (2010) ICLR 10 pp. 737-770 at p. 737

¹¹⁶ Richard J. Evans, 'History, Memory, and the Law: The Historian as Expert Witness' 41/3 *History and Theory* (2002) pp. 326-345, taken from R. E. Rauxloh, *Ibid.* at p. 742

¹¹⁷ *Ibid.*

¹¹⁸ Rauxloh, *Ibid.* at p. 742, however she acknowledges that the ICC covers a wider jurisdiction (after 1 July 2002). The jurisdiction and significance in association with plea bargaining will be examined further in chapter 6 below in the context of the International Criminal Court.

Resource implications at the ICTR and ICTY, for example, mean that Prosecutors are only in a position to select the most senior level officials to prosecute. A full picture of the crimes committed and the perpetrators is never going to be possible from the perspective of the international tribunals, where only a minority, albeit the most influential, of perpetrators will be prosecuted. However, the importance of bringing the most influential and senior perpetrators responsible for the most serious violations of international humanitarian law to justice cannot be underestimated and clearly contributes to building some historical record of conflicts.

As a result of the selective nature of the prosecutions, examination has been conducted as to whether truth commissions are in a better position to paint a more comprehensive picture of the conflicts than the tribunals that have been commissioned to deal with the prosecution of those responsible for such conflicts.¹¹⁹ However, truth commissions are not likely to be able to obtain the same formality and evidence to the standard that an international court could achieve. In order to establish the elements required for genocide, war crimes and crimes against humanity, for example ‘the presence of an international or non-international armed conflict, a widespread or systematic attack directed against any civilian population or intent to destroy part of a group,’ there must be evidence led by the prosecutor in the trial that will paint a ‘widespread’ picture of the circumstances giving rise to the crimes on the indictment as opposed to just the conduct of the individuals on trial.¹²⁰ Rauxloh has pointed out that ‘the fact-finding of an individual case might very well include evidence of the larger context of the conflict including the operation of the regime and general policies, co-operation between different agencies, the role of the media, the involvement of army and police etc.’¹²¹

However, Rauxloh has also acknowledged that there may be limitations in terms of what evidence can be led in the course of a criminal trial where, for example, evidence is deemed to be inadmissible.¹²² She also pointed out that, unlike in most common law adversarial systems, the Rome Statute of the ICC, for example, makes no reference to the exclusion of hearsay evidence.¹²³ Hearsay evidence in itself can however be dangerous if being relied upon to create an accurate historical record.¹²⁴ Where evidence comes from a secondary source the court has

¹¹⁹ R.E. Rauxloh, *Ibid.* at p. 743

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.* at p. 744 with reference to W. Schabas, *International Criminal Court* (Cambridge University Press, Cambridge 2007), 3rd ed. At p. 294

¹²⁴ *Ibid.*

less of an ability test the evidence than where the primary witness has also given evidence and the defence has had the opportunity to test the primary evidence through cross examination.

If the Office of the Prosecutor is able to resolve more cases by way of a negotiated plea then it will free up more resources to prosecute more cases and the ability to deal with more cases may in fact be a welcome contribution in support of the uncovering the truth. Plea bargaining in itself does not necessarily distort the historical record. There is clearly a balancing of interests to be conducted and it should be borne in mind that there are different types of plea negotiations. It is possible that an accurate factual picture/historical record can still be presented to the court in cases of charge bargaining. Petrig has however opposed the use of even charge bargaining in the international criminal law forum by stating:

‘...even in cases where the factual basis underlying the conduct charged is not reduced by a plea agreement, the importance of the legal qualification of this conduct should not be underestimated. Not only might the stigma attached to genocide (the crime of crime) be greater compared to a conviction for war crimes or crimes against humanity, but dropping the genocide charge might also erroneously be perceived as an admission by the Prosecutor that this crime did not take place and, hence, ultimately facilitate denial.’¹²⁵

In this quotation, Petrig makes a fair point that, in terms of the historical record, even if prosecutor still narrates a full factual picture to the court there is still a possibility that the gravity of what has happened may be downplayed by the prosecutor’s acceptance of a plea of not guilty to genocide. It is however important to remember that the prosecutor’s remit is to prosecute the person charged with the crimes that they are dealing with before the court. It does not necessarily follow that the historical record will be distorted as the court is dealing with legal concepts and because the prosecutor decides to accept particular charges against a particular accused person, this does not necessarily mean acceptance that a genocide did not happen. What it means is that the evidence may not have been strong enough for the prosecutor to feel

¹²⁵ See Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals: With a Focus on the Plea-Bargaining of the ICTY and the Legal Framework of The ICC*, (2008) 8 Chi.-Kent J. Int’l & Comp. L.1, 6 at p. 15. Petrig also argues that negotiating out a genocide charge cannot be reconciled with the underlying purpose of the Genocide convention. Many commentators have also dismissed plea bargaining on the basis that you cannot negotiate international justice for financial reasons. See also Michael P. Scharf, *Trading Justice for Efficiency, Plea-Bargaining and International Tribunals*, (2004) 2 J. Int’l Crim. Just. 1070 at pp.1073-74

compelled to proceed with a case to the trial stage when they can avoid that risk in negotiating a plea where the same factual picture will be presented to the court. If the prosecutor has, however engaged in a charge bargain, this may mean that a more lenient sentence is passed, despite the same facts being presented to the court.

This section has covered three of the main arguments against plea bargaining in the international criminal law context. Although there is still a risk that innocent persons will plead guilty, this is minimal given that it is unlikely that truly factually innocent persons would plead guilty to such serious crimes. It is highly unlikely that the case would even get to the stage in international law where the accused can plead guilty if there was not sufficient evidence pointing to their guilt. Although the innocent pleading guilty argument is not the strongest in the international criminal law context, there is merit in the arguments that plea bargaining may lead to sentences that do not reflect the gravity of the crime and can distort the historical record. These arguments do have even more weight internationally as a result of how serious the crimes are and the high expectations to create a record of what has happened associated with international criminal courts, these arguments have to be balanced against the arguments for plea bargaining, which will be considered in the following section.

3.2 The Arguments for Plea Bargaining in International Courts

3.2.1 Efficiency can still Achieve International Justice: Saving Precious Time and Money

As outlined in Chapter 2, financial savings and time efficiency are two of the main justifications for and advantages of using the plea bargaining process at the national level. This applies similarly as a justification for the practice of plea bargaining in international criminal law. The ad hoc tribunals of the ICTY and ICTR and the International Criminal Court are certainly not immune to the financial and resource restraints encountered at the national level. In addition to the cost of the lengthy court process when trials are being conducted, there is also a very lengthy and expensive investigation going on in the background. The scale of an investigation in an international criminal court is so great it cannot be compared to domestic investigations.

In an international criminal investigation there will be financial hurdles, human resource implications, geographical implications and reliance on the cooperation of States parties. These are all factors that would contribute significantly to the slowing down of any investigation. Pati

has outlined some of the significant additional ‘obstacles’ faced by the international criminal Prosecutor, in comparison with prosecutors at a domestic level, in that they require ‘to investigate mass crimes involving numerous victims and potential witnesses, crimes that span a number of years, sometimes long before the court was established, and crimes that occurred in places far away from the Courts’ locations, and for reasons based on historical facts and cultural differences that are unfamiliar to most of the Courts’ actors. Pressure increases with the notoriety of the players. Concerns also increase for equal access to justice, as well as ending impunity.’¹²⁶

When all these ‘obstacles’ are taken into account, it is clear that plea bargains will be a more convenient solution than going down an expensive trial process for the prosecutor. The prosecutor will then be able to focus on prosecuting a more significant number of perpetrators and consequently will be in a stronger position to build a more widespread historical record. In addition, if an accused person pleads guilty and their plea is in line with the evidence that the prosecutor holds there is less dubiety over whether the facts presented to the court are accurate. Matters at trial can often boil down to one person’s account against the others. Admission of guilt by the perpetrator gives an insight into what was happening in their mind.

3.2.2 Remorse/Reconciliation, Acceptance and Restorative Justice for Victims

Chapter 2 discussed the argument that a plea agreement gives the opportunity for the accused person to express acceptance of responsibility and remorse to the victim. This argument has even more force in the international context where the crimes involved are so much more serious. Jorgensen has stated ‘[a]n acknowledgement of guilt is arguably more significant for reconciliation than a finding of guilt’¹²⁷ and ‘it may be stated tentatively that the guilty plea has come of age, which represents a triumph for pragmatism.’¹²⁸ Given the scale of the atrocities that international courts or tribunals will encounter, fostering restorative justice and reconciliation are very important factors in international criminal law. However, there is a danger that accused persons then throw this back in the faces of those who they have wronged

¹²⁶ R. Pati, *supra*. note 109 at p. 288

¹²⁷ N.H.B Jorgensen, *The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea*, (2002), LJIL at p. 406; See also B.N. McGonigle, *Two for the price of one: attempts by the Extraordinary Chambers in the Courts in Cambodia to combine retributive and restorative Justice Principles*, 2009 L.J.I.L. 127

¹²⁸ *Ibid* at p. 407, Jorgensen also acknowledged that there is a requirement for clarity and consistency in the sentences handed down at international level.

by admitting that they only pled guilty as part of a plea negotiation to attract a lenient sentence.¹²⁹ This can do more harm for reconciliation than if the case had to be proved against them in a trial.

Many have questioned whether a Court is really best placed to foster reconciliation when mass atrocities have occurred, particularly where this has been as a result of ‘negotiated’ justice in the form of a plea agreement. It is difficult, if not impossible, to fully ensure that the rights of victims and witnesses in international forums and the full communities that have been destroyed by mass atrocities are met and to ensure that they will feel fully that they have had justice restored by any sentence.¹³⁰ It will be even more difficult to ensure that victims of mass atrocities feel that justice is restored by a sentence that has been imposed as a result of an incentivized plea agreement.¹³¹ The interests of the victims, witnesses and communities involved are generally going to be at odds with the interests of accused persons, whose main concern is likely to be obtaining the most lenient sentence possible. There may be scenarios where the accused persons are remorseful and wish to receive a sentence that will satisfy the communities wronged that justice has been done. If a plea is submitted with an apology it is more likely to foster reconciliation than victims and witnesses being subjected to an adversarial trial procedure.

3.2.3 Victims and Witnesses are spared the trauma of having to give Evidence in International Criminal Courts

In Chapter 2, the advantages of plea bargaining for victims and witnesses were discussed. These advantages apply to an even greater extent in the international context. The Office of the Prosecutor of the ICTY confirmed, in January 2010, that its estimate of the ‘wartime death toll’ as a result of the war in Bosnia and Herzegovina, between 1992 and 1995 totalled 104,732

¹²⁹ Chapter 4 provides an example of this happening in the discussion of the ICTY case of *Prosecutor v Plavšić* Case No-IT-00-30&40/I-S

¹³⁰ R. Henman has argued that the incorporation of restorative justice principles into an international forum would require a review on the rules on evidence and basis for sentencing, in *Towards Restorative Sentencing in International Criminal Trials*, Int. C.L.L. 2009, 9(5), 809-832; see also R. Hodzik, *Living the legacy of mass atrocities: victims’ perspectives on war crimes tribunals*, 2010 J.I.C.J. 114

¹³¹ See R. Henham, *supra*. note 110 at p. 214 and See M. Findlay and R. Henham, *Transforming International Criminal Justice: retributive and restorative justice in the trial process* (Cullompton: Willan Publishing, 2005).

persons, 59.8% of which consisted of military personnel and 40.2% civilians.¹³² Although there have been varying estimates of the death toll as a result of the Rwandan Genocide between 7 April 1994 to mid-July 1994, the ICTR has estimated the death toll to be between 800,000 to 1,000,000 persons.¹³³ Ewald has stated, ‘international criminal justice is one of the most powerful instruments for officially ‘identifying’ LSV [large scale victimization], and for prompting the collective memory of mass suffering.’¹³⁴ Given the large scale death toll resulting from the wars and genocide that international criminal courts and the ad hoc tribunals have to address there is, and quite rightfully should be, huge expectations for justice from the victims and witnesses who have suffered.

Clearly those who have lost their lives as a consequence of these wars will not be able to provide evidence at the trial about what happened to them or give any opinion on whether plea bargaining still achieves justice for them. However, in considering who should be considered a victim of the crimes that fall under the jurisdiction of the ICTY, ICTR, ICC and any other international criminal law forums, this has to be considered in a wider context. Victims should be interpreted widely to include not only those who have been murdered, physically assaulted and sexually assaulted, but also the families, friends and communities of those who lost their lives or suffered as a consequence of the wars that fall within the mandate of the relevant international criminal law forum.

Victims and witnesses at the international level may be required to travel to a foreign country and give evidence, reliving horrific and traumatic events in front of those responsible for such atrocities. They may also face brutal cross examination, a factor which may cause significant anxiety for victims and witnesses. If cases can be resolved by guilty pleas and plea bargains, then victims and witnesses will be spared the traumatic experience of giving evidence before the tribunal. Often victims and witnesses fear reprisals from those who they give evidence against. They may feel protected whilst they are giving evidence but worry about the

¹³² C. Garbett, *The Legal Representation of the Civilian and Military Casualties of Contemporary Conflicts: Unlawful Victimisation, its Victims and their Visibility at the ICTY*, *The International Journal of Human Rights*, (2012) Vol. 16, No. 7, 1059–1077 at p. 1059

¹³³ See website of the United Nations International Criminal Tribunal for Rwanda <http://www.unictr.org/en/genocide>, last accessed 21 April 2014

¹³⁴ Uwe Ewald, ‘Large-Scale Victimisation and the Jurisprudence of the ICTY – Victimological Issues’, in *Large-Scale Victimisation as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post-Conflict Societies*, ed. Uwe Ewald and Ksenija Turkovic (Netherlands: IOS Press, 2006) at p. 172.

consequences when the return to their own country. For these witnesses a plea bargain takes responsibility out of their hands and into the hand of the prosecuting authorities.

On the other hand, as in the domestic context, victims and witnesses may wish to have their voices heard and give evidence against those who have wronged them. But just as is the case in the domestic context, this may not happen at trial in the way that the witness hopes. For example, an elderly witness from Kosovo, Sadik Janiuzi, who had travelled to The Hague to give evidence before the ICTY in the trial of Slobodan Milosevic explicitly expressed his surprise at not being given the opportunity to speak up about the full events of what he had witnessed.¹³⁵ He came to the court prepared to give evidence about the murder of in excess of 100 men in his village, or so he thought.¹³⁶ At the conclusion of his evidence he clearly felt compelled to state, '[y]ou haven't asked about what I went through at the Izbica massacre.'¹³⁷

In order to 'expedite' the trial the judges restricted the prosecutor to asking a limited number of questions and read summaries of the statements of Mr Janiuzi into the written record.¹³⁸ Having only told part of his story, Milosevic was permitted to cross examine Mr Janiuzi.¹³⁹ Mr Janiuzi, had no rights to tell his full story as he had anticipated. Victims and witnesses will therefore only be able to give whatever evidence the prosecutor decides to lead or whatever the judges permit, even in circumstances where the witnesses have wished to tell their full story. If witnesses feel short changed after going through the trauma of giving evidence, this is a worse scenario than if a guilty plea had been accepted through a plea bargain. At least then the witness would have had the benefit of not having to give evidence and face traumatic cross examination.

The victims and witnesses are the most important persons in the international criminal law process. The ICTY have acknowledged on their website that:

'[t]he success of trials held before the Tribunal depends greatly on the willingness of witnesses to come to the Tribunal to testify. Witnesses help to establish the facts of crimes with which the accused are charged, thus contributing to the process which

¹³⁵ N. Paterson, *Silencing Victims in International Criminal Courts: Neglecting a Solemn Obligation*, (2003) 4 *Geo. J. Int'l Aff.* 95 at p. 95

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

establishes the responsibility of the accused and creates a historical record of what happened during the conflicts in the former Yugoslavia.¹⁴⁰

In order to examine whether guilty pleas through plea bargains/agreements in international criminal law serve to achieve justice for victims and witnesses it is helpful to consider what rights, if any, they have to participate in the plea bargaining process. The only reference to Victims and witnesses in the Statute of the ICTY is Article 22, which specifies that there should be provision in the rules of Procedure and Evidence of the ICTY ‘for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity’.¹⁴¹ Rule 75 of the ICTY Rules of Procedure and Evidence outlines the measures for protection that are available for witnesses.¹⁴² Although some provision is therefore made for the protection of victims and witnesses, both the ICTY Statute and Rules of Procedure and Evidence are silent in terms of what rights, if any, are to be afforded to victims and witnesses in relation to their participation in proceedings.¹⁴³ A very similar provision to Article 22 is present in Article 21 of the ICTR Statute¹⁴⁴ and in relation to the ICTR Rules of Procedure and Evidence, there is also no mention of the rights of victims and witnesses.¹⁴⁵ It has been argued that, until relatively recently ‘the

¹⁴⁰ See the Website of the International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/158> last accessed 23 April 2015. The website goes on to detail information on support available to witnesses and victims and also has information on the responsibility of witnesses, however falls silent on what rights the witnesses have.

¹⁴¹ Article 22, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter Statute of the ICTY)

¹⁴² Rule 75, Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc IT/32 (1993) (hereinafter ICTY Rules of Procedure and Evidence)

¹⁴³ See P.G.Cassell, N.J. Mitchell and B.J. Edwards, Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act before Criminal Charges are Filed 104 J. Crim. L. & Criminology 59 2014 which considers, in the context of United States Federal Law, the rights of victims and at which stage in the criminal justice process that the rights should attach. This article is supportive of victims being treated fairly, their rights being extended to the investigation process and for them having a right to confer with prosecutors from an early stage in the criminal justice process.

¹⁴⁴ Article 21, Statute of The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, UN Doc S/RES/955 Annex 1994 (hereinafter ICTR Statute)

¹⁴⁵ Rules of Procedure and Evidence, International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 U.N. Doc. ITR/3/REV.1 (1995) (hereinafter ICTR Rules of Procedure and Evidence) Rule 69 Provides for the Protection of Victims and Witnesses; Rule 75

rights and interests' of victims and witnesses in international criminal courts had been 'overlooked.'¹⁴⁶

It is clear, from the silence of both the statutes of the ICTR and ICTY and their rules of procedure and evidence that victims and witnesses have no right to have a say in the Plea Agreement process. Advocates of victims' rights have, however, argued for them to play a meaningful role in the plea bargaining process.¹⁴⁷ Certainly in relation to the ICTY and ICTR, although the Prosecutor may decide to take into account the views of the victim in determining an appropriate plea agreement, they are not under any obligation to do so. It is incredibly difficult at international level, when dealing with large scale massacres for example, for the Prosecutor even to be in a position to take into account the views of witnesses about how they feel about giving evidence and to take into account the views of the families of the deceased if a not guilty plea is being accepted in relation to the murder or killing of their loved one.

Unfortunately the prosecutors are dealing with the murder of thousands. The views of victims, witnesses, families of deceased persons may vary in terms of their attitude to a Plea Agreement that involves potentially thousands of victims and witnesses and this may be very difficult for the Prosecutor to reconcile.¹⁴⁸ However, it is necessary to recall that although sparing the witnesses the trauma of having to give evidence is often cited as an argument for plea bargaining, both nationally and internationally, there are some victims and witnesses who do not want to be spared the opportunity of their day in court and their active participation in proceedings, even if that is just to be asked their view on a particular plea offer. If the prosecutor is aware of what is going on in the mind of the victim they will be better able to assess what plea is appropriate. Guilty pleas in the international law context have often been cited argued as a good way of obtaining an insight into the mind of the perpetrator.

3.2.4 An Insight into the Mind of the Perpetrators

Provides for Measures for the Protection of Victims and Witnesses and Rule 106 provides for Compensation to Victims.

¹⁴⁶ L. Zegveld, Victims' Reparations Claims and International Criminal Courts: Incompatible Values? 8 J. Int'l Crim. Just. 79 2010 at p. 79

¹⁴⁷ See M.M. O'Hear, Plea Bargaining and Victims: From Consultation to Guidelines 91 Marq. L. Rev. 323 2007-2008; M. Manikis, Recognising Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime, 58 Crim. L.Q. 411 2011-2012

¹⁴⁸ See J.N.Clark, Plea Bargaining at the ICTY: guilty pleas and reconciliation, 2009 E.J.I.L. 415 for a discussion on how/whether pleas are a satisfactory result for victims

It has been stated that plea agreements can provide an invaluable insight into the truth by providing the views of the perpetrators.¹⁴⁹ Gaining an insight into the mind of the perpetrator is of significance in dealing with crimes against humanity and of more importance than, in general, most crimes dealt with by national courts. What better insight can there be in examining the reasons behind the mass atrocities being dealt with by war crimes tribunals as a measure for preventing similar events occurring in the future than to look into the mind of the perpetrator. Often, when accused persons in international criminal law forums plead guilty they issue guilty plea statements that will provide some kind of explanation as to why they committed the crime that they did.¹⁵⁰ However, what must be borne in mind is that these tribunals are dealing with those who have committed the gravest of crimes, therefore it must be questioned whether their credibility really be something that can be relied upon in going some way to creating a historical record and understanding the real reasons behind their motives. This matter will be examined further in Chapter 4 below with reference to precedent at the ICTY.

3.3 Chapter 3 Summary

This chapter has considered the arguments against and for plea bargaining in the international criminal law context. In sum, the main arguments against international plea bargaining are that the innocent may feel undue pressure to plead guilty, that plea bargaining results in sentences that fail to recognise the gravity of the criminal conduct and that historical record will be distorted. The latter 2 arguments have to be given some strength and credibility however these are, on balance, outweighed by the arguments for international plea bargaining that efficiency can still achieve justice, that plea bargaining fosters remorse, reconciliation and provides for an insight into the mind of the perpetrator that can go some way to preventing further atrocities in the future. Additionally, international plea bargaining also prevents witnesses from having to travel to another country and re-live traumatic events in their evidence.

Justice, morality and the interests of those who have been wronged may not be at the forefront of the minds of those who are in international criminal courts with growing workloads,

¹⁴⁹ Tieger and Shin, *Plea Agreements in the ICTY: Purpose, Effects and Propriety*, 3 J Int'l Criminal Justice (2005) 671.

¹⁵⁰ See, for example, the discussion in Chapter 4 below in relation to the case of the *Prosecutor v Plavsic*, case no. IT-00-30&40/1-S, where *Plavsic* submitted a statement along with her guilty plea (albeit she recanted this after sentencing)

financial restraints, resource issues and pressure to have cases concluded. For those prosecuting these crimes a plea agreement will be an attractive option as they have a guaranteed conviction and can move on to preparing their next case. Realistically, due to the scale of the mass atrocities being prosecuted at the international level, it will not be possible to satisfy every single victim who has suffered as a result of crimes that fall under the jurisdiction of international criminal law. Full satisfaction with the outcome of international criminal law for communities who have suffered so significantly is a very high burden to meet and achieving restorative justice for such mass atrocities is no easy task for the prosecutor. As Pati has said, '[m]ending the wounds of such conflicts will last longer than the life of a set of Prosecutions.'¹⁵¹

Although there has been opposition from academic commentators to plea bargaining, particularly where genocide is involved, it is not possible to ignore the financial costs, resource limitations and geographical issues of conducting criminal investigations and trials at the international level. Human lifespans mean that there is only so much time to try those accused of international crimes. Plea bargaining ensures that convictions happen expeditiously and this frees up resources to ensure that as many perpetrators as possible are investigated and prosecuted. The more investigations and prosecutions instigated then the more widespread of a historical record can be built. Those who argue that plea bargaining is not an acceptable practice in crimes as serious as those being dealt with by the international criminal courts or tribunals, mainly because it is a practice that promotes discounts and inconsistent and 'lenient' sentences, fail to take into account that there will at least be a conviction that will mean a lot to victims and witnesses.

The worst scenario is where a person is acquitted after trial or where there is insufficient resources to even get the investigation off the ground in the first instance. Surely the latter position cannot be preferable to victims in pursuit of justice. This chapter has confirmed that plea bargaining is a practice that should be implemented in international criminal law. Chapters 4 and 5 will examine whether the practice of plea bargaining is permissible at the ICTY and ICTR and, if so, the approach that prosecutors, the defence and Trial Chambers have taken to the practice.

¹⁵¹ R. Pati, *supra*. note 109 at p. 324

CHAPTER 4: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND PLEA BARGAINING

4.1 Establishment of the ICTY and its Procedures and Practices for Guilty Pleas

The ICTY is an Ad hoc international criminal tribunal composed to facilitate the prosecution of those responsible for perpetrating serious violations of International Humanitarian Law in the territory of the former Yugoslavia since 1 January 1991. In 1991 War ensued in the Socialist Federal Republic of Yugoslavia as a result of many of the constituent republics seeking independence. The ICTY was formed in pursuance of UN Security Council Resolution 827 of 25 May 1993¹⁵² in terms of Chapter VII of the UN Charter when the UN determined that the situation threatened international peace and security. The crimes over which the ICTY has jurisdiction are outlined in Articles 2-5 of the Statute of the tribunal.¹⁵³ The onus rests with the prosecutor to investigate allegations of the crimes outlined in Articles 2-5 and bring prosecutions before the tribunal.¹⁵⁴ The prosecutor has wide powers in relation to the investigation of crimes including the power to question suspects, witnesses and victims, to collect evidence and to conduct on-site investigations.¹⁵⁵ In executing these powers it is open to the prosecutor to seek the assistance of the authorities of any state, who are under a general obligation to co-operate.¹⁵⁶

If, during the course of their investigation the prosecutor concludes that there is a prima facie case they will prepare an indictment containing a concise statement of the facts relevant to the case and the crime or crimes with which the accused is charged under the statute.¹⁵⁷ This will be sent to a trial judge for confirmation.¹⁵⁸ The judge of the Trial Chamber will review the indictment and if satisfied that a prima facie case has been established by the Prosecutor, she/he shall confirm the indictment.¹⁵⁹ Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons and any other orders as may be required for the conduct of the trial.¹⁶⁰

¹⁵² UN DocS/RES/827 (1993)

¹⁵³ Statute of the ICTY

¹⁵⁴ Articles 16 and 18, Statute of the ICTY

¹⁵⁵ *Ibid.* at Article 18(2)

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at Article 18(4)

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* at Article 19(1)

¹⁶⁰ *Ibid.* at Article 19(2)

The prosecutor also possesses the authority to amend the indictment in the following circumstances:

- (i) At any time prior to its confirmation;
- (ii) Thereafter with leave of the judge who has confirmed the indictment; or
- (iii) After the commencement of the presentation of the evidence only with the leave of the Trial Chamber hearing the case.¹⁶¹

At the ICTY, there must already have been sufficient evidence to indict the accused person at the time where the court has confirmed the indictment. It is of significance that the prosecutor can amend the indictment before confirmation. This may allow for the indictment to be amended by the prosecutor before it is placed before the Trial Chamber if there are early discussions between the prosecutor and the defence about a guilty plea. This could have a bearing on the charges that the prosecutor drafts in the first place to be confirmed by the Trial Chamber.

Over the course of the initial years of the ICTY plea bargaining did not feature on the agenda of the prosecutors and was generally viewed as ‘unnecessary’ due to the small number of accused persons actually being tried in the early years.¹⁶² It has been suggested that prosecutors originating from jurisdictions with a civil law system felt uncomfortable negotiating with defendants when dealing with such grave crimes and viewed such negotiation as being ‘inappropriate’.¹⁶³ However an increasing case load and pressure on prosecutors to clear the backlog led to a shift in attitude toward plea bargaining at the ICTY.¹⁶⁴

The ICTY Statute is silent on the matter of guilty pleas other than with reference to the entering of a plea in Article 20(3), where it is stated, ‘The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.’ One interpretation of the silence of the ICTY Statute on guilty pleas could be that those drafting the Statute failed to envisage and provide for the situation where an accused person accepts their guilt, particularly in circumstances where they are facing the most

¹⁶¹ ICTY Rules of Procedure and Evidence, Rule 50(A)

¹⁶² N.A. Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, (2006) 59 Vand. L. Rev. 69 at p. 84

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

serious of crimes, for example, genocide. There is, as such, no reference to plea bargaining or negotiations in the ICTY Statute. In determining whether this silence was deliberate on the part of the legislators, in terms of them taking the view that plea negotiations or bargaining is not a suitable practice in International Criminal courts, a statement on 11 February 1994 by the ICTY's first President, Antonio Cassese is noteworthy where he states:

‘[W]e always have to keep in mind that this tribunal is not a municipal criminal court but one that is charged with trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.’¹⁶⁵

It is not clear however whether Cassese was referring to the fact that immunity for prosecution for these crimes entirely should never be granted or whether he is referring to the fact that charges for such crimes should not be dropped in exchange for less serious crimes. In any case this statement does give an indication of great reluctance to drop any charges involving crimes of the nature listed by Cassese. As the following section will indicate, guilty pleas and plea bargaining did subsequently happen in the cases being dealt with by the ICTY.

4.2 Chronological analysis of significant cases involving Guilty Pleas and Plea

Bargaining at the ICTY

Although the ICTY Statute does not detail the requirements of entering a guilty plea, in 1997, Rule 62 *bis* of the Tribunal's Rules of Procedure and Evidence was enacted and provides the perquisites that must be fulfilled for a conviction to be entered following a plea of guilty.¹⁶⁶ Rule 62 *bis* provides:

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

¹⁶⁵ Statement made by the President made at a Briefing to Members of Diplomatic Missions, IT/29, 11 February 1994 cited in V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) Vol 2 (Irvington-on-Hudson, New York Transnational Publishers Inc.) 649 at p. 652

¹⁶⁶ This Rule was enacted during the Fourteenth Plenary Session of 20 October 1997 and 12 November 1997, IT/32/Rev.12 however this Rule was later amended, with the last amendment being at the Twenty-fifth Plenary Session of 13 December 2001, IT/32/Rev.22

- (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 accused's participation in it, either on the basis of independence indicia or on lack of any material disagreement between the parties about the facts of the case, the trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentence hearing.

4.2.1 Rule 62bis cases

This rule clarifies the permissibility of accused persons entering guilty pleas before the ICTY, albeit providing that the aforementioned criterion are fulfilled. *Drazen Erdemović*¹⁶⁷ tendered the first guilty plea before the ICTY on 31 May 1996 (prior to the enactment of Rule 62bis). This initial plea was not the product of a plea negotiation, but this did set a precedent that guilty pleas were permissible at the ICTY. In *Erdemović's* case, he provided the Office of the Prosecutor (OTP) with invaluable information that greatly assisted them in their investigations and pursuit of the truth. In the *Erdemović* judgment the judges stated that 'discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.'¹⁶⁸ The Prosecutor maintained that his co-operation 'was and continues to be voluntary and unconditional' and that no 'promise had been given by his Office to the accused in exchange for his co-operation'.¹⁶⁹

Erdemović pled guilty to murder as a crime against humanity and was sentenced to 10 years imprisonment. The Trial Chamber affirmed, in respect of his plea to murder as a crime against humanity, that any guilty plea must be 'voluntary' when it stated, that:

'It follows from the above that the guilty plea must be voluntary, that is to say not obtained by threats, inducements or promises. A guilty plea implies that the accused relinquishes his right to a proper trial, namely to proceedings in which he is presumed

¹⁶⁷ Case no. IT-96-22-T

¹⁶⁸ *Erdemović Ibid.* at para. 21

¹⁶⁹ *Erdemović Ibid.* at para. 99

innocent until his guilt is proved beyond a reasonable doubt and in which he would be entitled to examination and cross-examination of witnesses as well as all the judicial safeguards laid down in Article 21 of the Statute.^{170]} Therefore, such a waiver of a fundamental right must of necessity be free and voluntary'.¹⁷¹

This is an interesting case as the prosecution expressly said that no promise had been given in exchange for co-operation and the Trial Chamber seem to have chosen similar terminology to that used by the US courts when they had initially examined the constitutionality of plea bargaining. The court was not dealing with a plea bargain in *Erdemović* however their statement leaves it unclear whether they would take the same approach as the US court i.e. that pleas must not be induced by force, threats or promises, except the types of promises involved in a plea agreement. *Erdemović* subsequently appealed against the sentencing judgment against him on the basis that his guilty plea was, essentially, invalid.¹⁷² The Appeals Chamber held that his plea was not informed and remitted the case to another Trial Chamber where *Erdemović* was to be given the opportunity to re-plead.¹⁷³ In giving their judgment, the Appeals Chamber laid down three pre-requisites as a safeguard before a guilty plea can be accepted:

1. It is necessary that a plea is voluntary and as such must be made by an accused who is 'mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises,'¹⁷⁴
2. That a plea is informed, meaning that the accused will 'understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty,'¹⁷⁵ and
3. The plea must be unequivocal, hence 'it must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.'¹⁷⁶

When the case went back before the Trial Chamber *Erdemović* changed his plea to guilty to murder as a violation of the laws and customs of war.¹⁷⁷ Interestingly, this was as a result of

¹⁷⁰ Article 21 of the Statute of the ICTY sets down the rights of the accused

¹⁷¹ *Erdemović*, supra. note 167 at para. 10

¹⁷² *Erdemović* Appeals Chamber judgement, case no. IT-96-22-A

¹⁷³ *Ibid.* at para. 20

¹⁷⁴ *Erdemović*, IT-96-22-A, Separate Opinion of Judge McDonald and Judge Vohrah at para. 8

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Prosecutor v Erdemović* case no. IT-96-22-Tbis

a plea agreement. In that case reference is made to the terms of the plea agreement where it is stated, *inter alia*, that '[t]he accused's plea was based on his guilt and his acknowledgement of full responsibility for the actions with which he is charged;' and '[t]he parties agreed on the factual basis of the allegations against the accused and, in particular the fact that there was duress.'¹⁷⁸ The plea agreement also recommended that seven years imprisonment would be an appropriate sentence considering the mitigating circumstances.¹⁷⁹ The Prosecutor agreed not to proceed with the alternative count of a crime against humanity.¹⁸⁰ The Trial Chamber in this judgement acknowledged that this was the first case where a plea agreement had been presented to the ICTY and stated:

'Plea bargain agreements are common in certain jurisdictions of the world. There is no provision for such agreements in the Statute and Rules of Procedure and Evidence of the International Tribunal . . . The parties themselves acknowledge that the plea agreement has no binding effect on this Chamber . . . Whilst in no way bound by this agreement, the Trial Chamber has taken it into careful consideration in determining the sentence to be imposed upon the accused.'¹⁸¹

Erdemović was sentenced to five years imprisonment.¹⁸² This case demonstrates a real willingness on the part of the judges to take into account plea agreements and in fact the sentence imposed was two years less than what the prosecutor had recommended. This sentence could have been to encourage other accused persons to co-operate and could be said that that this showed that there may be a real incentive to plead in terms of the sentence issued. However, it is noteworthy that the sentence ultimately imposed for a different charge than the one *Erdemović* had initially pled to was halved following the case involving the plea agreement. Victims of the crimes involved may certainly have felt that justice was not carried out following the plea agreement in this case. Opponents of plea bargaining in international criminal law would be likely to argue that this plea bargain resulted in a sentence that did not reflect the gravity of the criminal conduct. Murder as a violation of the laws and customs of war and a sentence of only 5 years imprisonment could be considered lenient.

¹⁷⁸ *Ibid.* at para. 18

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* at para. 19

¹⁸² *Ibid.* at para. 23

Following the initial guilty plea in *Erdemović*, the second plea to be tendered at the ICTY was on 29 October 1998 (this time following Rule 62 *bis*) in the case of the *Prosecutor v Jelisić*.¹⁸³ The prosecution did not enter into any form of plea agreement in respect of this case and in fact made clear to the defendant that they would be recommending life imprisonment irrespective of his guilty plea. Notwithstanding the indications by the OTP, *Jelisić* still decided to plead guilty in the hope that his sentence would be reduced. *Jelisić* pleaded guilty to 31 out of the 32 charges on the indictment against him. The only charge to which he pled not guilty was a genocide charge. The Trial Chamber acquitted him of that charge on the basis of insufficient evidence. *Jelisić* was ultimately sentenced to 40 years imprisonment.

As was acknowledged by the Trial Chamber, that although they ‘considered the accused’s guilty plea out of principle’,¹⁸⁴ this appears to have been given no or limited weight in handing down a sentence of such length. This sentence could potentially have deterred other accused persons from pleading guilty on the basis that, if they are going to receive such a lengthy sentence, they might as well run the case to trial. The Trial Chamber in *Jelisić* were perhaps making clear that guilty pleas can still result in sentences that reflect the full moral gravity of the conduct of the accused. In reality, as the following case of *Todorović* illustrates, the *Jelisić* sentence did not deter other accused persons from pleading guilty. This may have been as a result of the increasing willingness of the OTP to enter into plea agreements.

The next guilty plea at the ICTY arising from the practice of plea bargaining following *Erdemović* happened in the case of *Stevan Todorović*.¹⁸⁵ *Todorović* was the third case to resolve by way of guilty plea at the ICTY. *Todorović* received a significant discount in sentence however suspicious factors surrounding his arrest may have played a key role in negotiations between *Todorović* and prosecutors. This case may support the theory of critics of plea bargaining that too much power and discretion is given to the prosecutor. During the course of the Bosnian conflict *Todorović* was appointed as Police Chief of Bosanski Samac and was charged with, between the period of April 1992 and December 1993, ‘persecutions on political, racial and religious grounds, deportation, murder, inhumane acts, rape and torture (crimes against humanity); unlawful deportation or transfer, willful killing, willfully causing great

¹⁸³ *Prosecutor v Jelisić* Case No. IT-95-10-PT

¹⁸⁴ *Ibid.* at para. 127

¹⁸⁵ Case No IT-95-9/1

suffering and torture or inhuman treatment (grave breaches of the Geneva Conventions); and murder, cruel treatment, humiliating and degrading treatment and torture (violations of the laws or customs of war).¹⁸⁶

The legality of his arrest was brought into question when *Todorović* alleged that he was abducted and handed over to stabilization forces in Bosnia-Herzegovina.¹⁸⁷ Part of the plea agreement was that all pending motions and challenges to the legality of the arrest would be dropped.¹⁸⁸ It is clear that the OTP was keen to avoid having any damaging and embarrassing information surrounding *Todorović's* arrest being released. Prosecutors accepted a plea to one of the 27 charges on the indictment, namely persecution.¹⁸⁹ Prosecutors were keen at the sentencing hearing to point out that had *Todorović* been convicted after trial their estimate was that his sentence would have been a period of imprisonment of fifteen to twenty years or more. *Todorović's* defence team and prosecutors agreed to recommend a sentence ranging between five to twelve years.¹⁹⁰ *Todorović* was ultimately sentenced to 10 years imprisonment, with the Trial Chamber again affirming that they are not bound by the terms of any plea agreement between the prosecution and defence.

This sentence, in line with the recommendations in the plea agreement, was potentially a message for the future and promotion of an incentive to plead guilty for future accused persons. The length of the sentence recommended of between 5 and 12 years is still a significant custodial sentence and therefore it would be unlikely that an accused person who is truly innocent is going to accept guilt to avoid a more substantial sentence. It is also important to note that the judges noticed that *Todorović* had shown remorse for his actions and treated this as mitigating circumstances.¹⁹¹ This is a perhaps an acknowledgement that guilty pleas and remorse can help to achieve reconciliation in relation to the atrocities that *Todorović* has pled guilty to. It must be said though that this is speculation as there is no actual evidence to suggest that *Todorović's* plea has had a positive reconciliatory impact in the communities affected by his conduct. More research needs to be undertaken to examine the actual impact of remorse and reconciliation on

¹⁸⁶ *Prosecutor v Stevan Todorović* Case no. IT-95-9-S at para. 3

¹⁸⁷ *Ibid.* at para. 2

¹⁸⁸ *Ibid.* at para. 4

¹⁸⁹ *Ibid.* at paras 8 and 17

¹⁹⁰ *Ibid.* at paras 11 and 117

¹⁹¹ *Ibid.* at paras 90-92

victims and communities following guilty pleas to determine whether the theories are supported by evidence.

Another case which demonstrates that the ICTY Trial Chamber was beginning to indicate that there would be sentencing ‘rewards’ for guilty pleas is *Prosecutor v Dusko Sikirica, Damir Dosen and Dragon Kolundzija*.¹⁹² In this case all three were accused of failing to take reasonable steps to prevent atrocities whilst in control of the Keratem Camp. The allegations went so far as to accuse them of active involvement in such atrocities. All three pled guilty despite the trial having reached the stage where the OTP had closed their case. There was no plea agreement between the OTP and the accused persons and no agreement to give evidence against the co-accused.

Of significance, the Trial Chamber still considered ‘that the primary factor to be considered in mitigation of *Dusko Sikirica*’s sentence is his decision to enter a guilty plea, although it will also take into account his expression of remorse.’¹⁹³ Even in circumstances where the OTP have led the evidence and witnesses had already been inconvenienced, the Trial Chamber was still willing to issue a more lenient sentence, viewing a guilty plea as being an indication of remorse and mitigating factor. It is clear from these cases that plea bargaining and guilty pleas were becoming a recognised practice at the ICTY and this was solidified in a revision of the ICTY rules of procedure and evidence.

4.2.2 Post Rule 62^{ter} cases

By December 2001, the aforementioned six accused persons at the ICTY had either pled guilty or had engaged in the practice of plea bargaining with the prosecution. As a consequence of the emerging practice of plea bargaining, Rule 62 *ter* was added to the Tribunal’s Rules of Procedure and Evidence in December 2001. Rule 62 *ter* provides that:

(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

(i) apply to amend the indictment accordingly;

¹⁹² *Prosecutor v Sikirica* Case No. IT-95-8

¹⁹³ *Ibid.* at para. 148

(ii) submit that a specific sentence or sentencing range is appropriate;

(iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph A.

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62(vi), or requests to change his or her plea to guilty.

Enactment of this rule shows a real indication of support for the practice of plea bargaining and the approach taken in this rule mirrors the precedent set in the aforementioned three cases, namely an acceptance of plea bargaining with a retention by the Trial Chamber of their powers to the extent that any plea agreement is not binding on them.

The following case of *Prosecutor v Biljana Plavšić* provides an illustration of one of the first cases where there was a plea agreement since the enactment of the aforementioned Rule. This is also a case where one of the most significant fears of both proponents and critics of pleas was ultimately realised. *Plavšić*, co-President of the Serbian Republic of Bosnia and Herzegovina, was a key player in the Bosnian Serbs' ethnic cleansing campaign and had 'disregarded reports of widespread ethnic cleansing and publicly rationalised and justified it'.¹⁹⁴ Initially the indictment contained charges alleging 'genocide, complicity in genocide and the following crimes against humanity; namely persecutions, extermination and killing, deportation and inhumane acts'.¹⁹⁵ *Plavšić* stated, in September 2002, in support of her motion to change her plea of not guilty:

'To achieve any reconciliation or lasting peace in BH, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility – regardless of their ethnic group. This acknowledgement is an essential first step'.¹⁹⁶

¹⁹⁴ *Prosecutor v Plavšić* Case no. IT-00-30&40/1-S at para. 18

¹⁹⁵ *Ibid.* at para. 2

¹⁹⁶ Statement by Biljana Plavšić in Support of her Motion for Change of Plea pursuant to Rule 62bis, 30 September 2002 at para.19

Plavšić pled guilty in October 2002 to persecution as a crime against humanity and the remainder of the charges against her were dismissed.¹⁹⁷ The prosecution had submitted that an appropriate sentence would be one of not less than 15 years imprisonment and not more than 15 years imprisonment. She was sentenced to 11 years imprisonment.¹⁹⁸

The prosecution had deemed *Plavšić*'s guilty plea as 'an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation'.¹⁹⁹ The Trial Chamber seems to have given weight to the testimony of Dr Alex Boraine who provided evidence in support of her guilty plea.²⁰⁰ His position was that the remorse shown by *Plavšić* was instrumental in the process of reconciliation. The Trial Chamber seemed to agree with this approach and stated 'that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs will promote reconciliation . . . the guilty plea of Mrs *Plavšić* and her acknowledgement of responsibility, particularly in the light of her former position as President of Republike Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as whole.'²⁰¹ The Trial Chamber also made clear that they would 'give significant weight to the plea of guilty by the accused, as well as her accompanying expressed remorse and positive impact on the reconciliatory process as a mitigating factor'.²⁰²

This seems, to some extent, to be at odds with former Trial Attorney at the ICTY, Minna Schrag's position that in the course of Dr Boraine's testimony the judge repeatedly questioned him as to whether there was any 'concrete' or 'statistical evidence' to provide authority for the proposition that 'acknowledgement of guilt and responsibility is the first step towards reconciliation' and he could not provide any such evidence.²⁰³ What is meant by 'significant weight to the plea of guilty' remains unclear as there was no indication of what *Plavšić*'s

¹⁹⁷ *Plavšić* supra. note 194 at para. 5

¹⁹⁸ *Ibid.* at para 134

¹⁹⁹ *Plavšić* - Prosecution's Brief on the Sentencing at para. 25 (Nov 25 2002), taken from Combs, supra note 162 at p. 93

²⁰⁰ *Plavšić* supra note 194 at para.s 77-79 and 124

²⁰¹ *Plavšić* supra. note 194 at para. 80

²⁰² *Plavšić* supra. note 194 at para. 81

²⁰³ Minna Schrag, Public Hearing of the Prosecutor, 17-18 June 2001, taken from S. Pal, *Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals*, March 2013 available at [http://clok.uclan.ac.uk/8511/1/Pal%20Shivani%20Final%20e-Thesis%20\(Master%20Copy\).pdf](http://clok.uclan.ac.uk/8511/1/Pal%20Shivani%20Final%20e-Thesis%20(Master%20Copy).pdf)

sentence would have been had she not entered a guilty plea.²⁰⁴ Given that *Plavšić* was 72 years of age at the time of sentencing, it may have been that a forty year sentence of imprisonment would have been ineffective in view of average human life expectancy.

The statement of *Plavšić* referred to previously indicated that she assumed responsibility for her actions and during the course of that statement she invited others to ‘examine themselves and their own conduct’.²⁰⁵ For perpetrators to stand up, make a formal statement expressing remorse and accepting the wrongfulness of their actions, there is a real recognition to the victims and families of victims that what they did was wrong and they now accept that they are going to have to undergo the consequences and punishment that follows. However it may also be argued that the victims deserve such recognition and acknowledgement without the inevitable consequence that the perpetrator issuing the statement expects something in return for such an admission.²⁰⁶ Caution must be taken where there may be a manipulative motive behind statements such as *Plavšić*’s that could be aimed toward attracting a lenient sentence, without any true underlying feelings of remorse.

Despite *Plavšić*’s acceptance of responsibility, victims were horrified that genocide charges against her were dropped and at the lenient sentence imposed.²⁰⁷ Any hopes for *Plavšić*’s statement further contributing to the reconciliation process were crushed when, following her release in 2009, *Plavšić* recanted on her confession. She told a Swedish magazine that her guilty plea was a ‘ploy’ to have the genocide charges against her dropped and apparently stated that she had ‘sacrificed herself,’ had ‘done nothing wrong’ and said ‘I pleaded guilty to crimes against humanity so I could bargain for the other charges. If I hadn’t, the trial would have lasted three, three and a half years. Considering my age, that wasn’t an option.’²⁰⁸ If

²⁰⁴ This is in contrast with the position in Scotland outlined previously whereby the Judge must advise the court what the discount being granted is. This requirement helps to ensure that those who plead guilty know what the consequences would have been. This is possibly more relevant in a domestic context however as a preventative measure. It is less likely that persons facing charges at the ICTY will serve their sentence, come out of prison and commit further war crimes, both given their age and the fact that the unrest is likely to be over by the time of their release.

²⁰⁵ Statement by Biljana Plavšić in Support of her Motion for Change of Plea pursuant to Rule 62 bis, 30 September 2002 at para. 19.

²⁰⁶ R.E. Rauxloh, Plea Bargaining – A necessary tool for the International Criminal Court Prosecutor, (2010-2011) 94 *Judicature* 178 at p. 180

²⁰⁷ A. Kebo Regional report: *Plavšić* sentence divides Bosnia. Institute of War and Peace Reporting (2003) accessible at <https://iwpr.net/global-voices/regional-report-plavsic-sentence-divides-bosnia> last accessed 4 January 2016

²⁰⁸ UPI January 27, 2009

http://www.upi.com/Top_News/2009/01/27/Jailed-Plavšić_-recants-Hague-confession/68351233070199/ last accessed 10 January 2015

Plavšić is truly innocent then this statement clearly validates concerns that critics of plea bargaining have that the process condemns the innocent and puts too much pressure on them to plead. However, this is clearly just *Plavšić's* position and not the position of the OTP who indicted her and the Trial Chamber who accepted her plea, who were clearly satisfied with the evidence and facts presented to them in support of *Plavšić's* guilty plea.

Plavšić's case illustrates clearly that one of the stated advantages of plea agreements, that they allow the accused to acknowledge their guilt, does not always transpire in practice. Had the OTP been required to prove the charges against her, *Plavšić* would not have been in a position to continue to deny her guilt or if she did victims would have had some comfort in knowing that she had been tried and found guilty. Her comments only assist in painting a bleak picture in the quest of the ICTY to achieve reconciliation and an accurate historical record. Where accused persons, such as *Plavšić*, play the system of plea bargaining in order to ensure that they attract a more lenient sentence, with more favourable conditions, this makes a mockery of the work of international criminal courts in achieving reconciliation and places a question mark over the historical record held by the tribunal.

A different type of statement submitted with a guilty plea is that of *Darko Mrđa*, a former member of the special Serbian police in Bosnia who stated, 'in the beginning of the 1990s, things changed abruptly. Radio, television, press, everything was full of threats against Serbs and against Muslims, depending on whose media it was ... Believing that we were faced with the same threat as Jasenovac in the past, I responded to the mobilizationYour Honours, I hope you will believe me. I did not commit this because I wanted to commit this or I enjoyed this. I did not hate these people I did it because I was ordered to do so.'²⁰⁹

This statement demonstrates the vulnerable position that the perpetrator is in at the time a statement like this is made, where the accused person is essentially begging for leniency. Caution must be taken when examining the veracity of such a statement by the Trial Chamber as there is always the possibility that the accused person is manipulating how they really feel to achieve a more lenient sentence. *Plavšić's* statement accepted responsibility however *Mrđa's* basically said that he was made to do it. This has a less remorseful undertone to it and may not

²⁰⁹ Statement of Darko Mrđa (22 Oct. 2003), Case Information Sheet, 'Vlasić Mountain' case no IT-02-59, taken from J.N. Clark, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation, EJIL, Vol. 20 no 2 at pp. 424-425

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go as far in fostering reconciliation to a statement that actually indicates responsibility and remorse. In any case, statements by accused persons must be treated with caution.

In contrast to the aforementioned cases which generally indicated only support and acceptance of guilty pleas by the ICTY, the following case is an example of the ICTY Judiciary sending a message that they are still keen to maintain their authority post Rule 62 *ter*. This case indicated both acceptance of and ‘discomfort’ with the practice of plea bargaining.²¹⁰ In the *Prosecutor v Momir Nikolić*,²¹¹ *Nikolić* was a military officer who had played a key role in the executions at Srebrenica. He was appointed as the Assistant Commander and Chief of Security and Intelligence of the Bratunac Brigade of the VRS in November 1992, and held this position until the cessation of the war.²¹² The original indictment charged *Nikolić* with six counts namely, genocide, extermination as a crime against humanity, murder as a crime against humanity, murder as a violation of the laws or customs of war and persecutions on political, racial and religious grounds, as a crime against humanity.²¹³

At a hearing on the consideration of a plea agreement the Trial Chamber accepted a guilty plea to persecutions, a crime against Humanity on the basis that the OTP would move to dismiss the remainder of the charges.²¹⁴ On 8 May 2003 all remaining charges were dismissed. As part of the plea agreement *Nikolić* agreed to ‘co-operate with and to provide truthful and complete information to the Office of the Prosecutor whenever requested’, including meeting with the Prosecution whenever necessary, testifying truthfully in the trial of his former co-accused under the same indictment, and ‘in any other trial, hearings or other proceedings before the Tribunal as requested by the Prosecution’.²¹⁵ This is a rather significant demand on *Nikolić* and it is likely he would expect a degree of leniency in return, whether he was entitled to leniency is, however, another matter.

The prosecution agreed to, *inter alia*, recommend a sentence of 15 to 20 years imprisonment and that *Nikolić’s* time already spent in custody be recognised.²¹⁶ If OTP’s reasoning behind this agreement was to further their investigations by obtaining information

²¹⁰ R.E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, ICLR 10 (2010) 739-770 at p. 748

²¹¹ Case No IT-02-60

²¹² *Prosecutor v Momir Nikolić*, Case no. IT-02-60/1-S at para. 2

²¹³ Initial indictment at para.s 21-43 referred to *Ibid.* at para. 3

²¹⁴ *Momir Nikolić*, *Ibid* at para. 8 with reference to the Plea Hearing of 7 May 2003

²¹⁵ Amended Plea Agreement, para. 9 referred to in *Momir Nikolić Ibid.* at para 17

²¹⁶ Amended Plea Agreement, para. 4 referred to in *Momir Nikolić Ibid.* at para. 19

from *Nikolić*, they must remember that they are dealing with a person who has admitted to a crime against humanity. *Nikolić* may not be their most credible witness to rely on in other cases. There is a strong possibility that the accused person will say what the OTP want to her for their own interests in being treated as leniently as possible.

The Trial Chamber in *Momir Nikolić* discussed whether plea bargaining is appropriate in cases involving serious violations of international humanitarian law. They acknowledged that the aim of the ICTY was to achieve justice by punishing those responsible for serious crimes, acknowledge the victims who have suffered at their hands, to prevent further atrocities, to restore and maintain peace and to build an accurate historical record.²¹⁷ The Trial Chamber acknowledged both the arguments for and against plea bargaining at the international level.²¹⁸ This is a welcome discussion in the judgement as it shows that the ICTY judiciary were aware of the academic and theoretical arguments for and against plea bargaining and were actively taking these into account in practice.

In relation to the arguments against plea bargaining they noted the factual record with a guilty plea may not be as detailed as it would have been if evidence had been led²¹⁹ and that where factual allegations are removed there will be a question mark over whether they were unfounded or simply a bargaining tool.²²⁰ This is a valid point as it is unlikely that the OTP would publish sensitive information about their reason for accepting pleas and discussions with the defence where they are not required to do so. The Trial Chamber also stated that a confirmed genocide charge should not be ‘simply bargained away’.²²¹ This was a clear indication to the OTP that in conducting plea negotiations they would have to have a basis that could justify why they were willing to ‘drop’ such serious crimes. Given the serious nature of, for example, genocide, being able to properly justify the decision to withdraw such a charge is not too onerous an expectation on the OTP.

It was noted that the tribunal has a responsibility to ensure that all are treated equally before the law and, for example, an accused person who has committed more serious crimes should not be treated more leniently simply because they are more valuable to the OTP in terms

²¹⁷ *Momir Nikolić Ibid.* at paras 59-61

²¹⁸ *Momir Nikolić Ibid.* at paras 57-73

²¹⁹ *Momir Nikolić Ibid.* at para. 61

²²⁰ *Momir Nikolić Ibid.* at para. 63

²²¹ *Momir Nikolić Ibid.* at para. 65

of the information that they can assist them with.²²² This is another noteworthy point raised by the tribunal and acknowledgement of this point may have served as a reminder to prosecutors that they have to ensure that they are not too quick to bargain with those who seem to hold a lot of valuable information. If those persons are seen to be treated more leniently a situation could arise where other accused persons provide false information to the OTP in the hope of some sort of reward.

The Trial Chamber noted that, in contrast with the ‘endless’ caseload of national criminal justice systems that the Tribunal has a fixed mandate and saving time and resources should not be the main reason for promoting guilty pleas through plea agreements.²²³ This is an interesting point as it is true that the ICTY has a fixed mandate, however such tribunals are notorious for taking longer to wind down than the initially thought. It is significant that this sentencing judgement was given in December 2003. Had the judges known that the ICTY would still be carrying out their mandate in 2016, they may not have been so quick to mention this point. It is also worthy of note that not all courts dealing with grave violations of international criminal law will have a fixed mandate. For example, the ICC, which will be discussed in Chapter 6 below, does not have a fixed mandate.

The Trial Chamber also acknowledged some of the arguments for guilty pleas. For example, the accused person is found guilty and punished, which is fulfilling a ‘fundamental purpose’ of the Tribunal.²²⁴ Acknowledgement was also given to the fact that the accused person could not deny that they were guilty.²²⁵ Though, again, had the judges been able to see into the future and hear *Plavšić* recant on her confession, they may have been less likely to make the assertion that the accused person who has pled guilty could not deny that they were guilty. Weight was also given to the benefits to the prosecutor of using information from the accused/their guilty plea in securing evidence against ‘high ranking accused’.²²⁶ Although the OTP see this as a positive factor, for the reasons outlined previously, this must be treated with caution.

²²² *Momir Nikolić Ibid.* at para. 66

²²³ *Momir Nikolić Ibid.* at para. 67

²²⁴ *Momir Nikolić Ibid.* at para. 69

²²⁵ *Momir Nikolić Ibid.* at para. 70

²²⁶ *Momir Nikolić Ibid.* at para. 71

The Trial Chamber also said that guilty pleas can contribute to peace and reconciliation in the former Yugoslavia, particularly where remorse is shown.²²⁷ This matter has been discussed previously in this thesis and is one of the main arguments for plea bargaining in international criminal law. It is also of note that the Trial Chamber mentioned that the Prosecution may consider calling witnesses to testify at the sentencing hearing in order to give a more complete or detailed picture of the events in question.²²⁸ This is distinct from the practice at sentencing diets in the national systems discussed earlier in this thesis. The Trial Chamber have highlighted a very important point here as the fact that witnesses may be able to still give their evidence in court may mean that despite the guilty plea they still have their day in court to confront the accused. This is often cited as one of the counter arguments to the advantage that plea bargaining spares victims the trauma of having to give evidence. Although, in practice it is unlikely that the OTP or the Trial Chamber would wish to hear significant volumes of evidence from witnesses at the sentencing hearing when the matters are accepted by the accused and narrated to the court by the OTP.

Overall in *Momir Nikolić* the Trial Chamber made clear that there was ‘no doubt that plea agreements are permissible under the Statute and Rules of the Tribunal’²²⁹ and ‘that, on balance, guilty pleas pursuant to plea agreements may further the work – and the mandate – of the Tribunal’.²³⁰ The Trial Chamber, however, issued a warning to the OTP in stating that ‘in cases where charges are withdrawn, extreme caution must be urged’ and ‘any negotiations on a charge of genocide or crimes against humanity must be carefully considered and be entered into for good cause’.²³¹ This was a reminder to the OTP not to get too carried away with what they are bargaining for, ensuring that the OTP were aware that their discretion was being monitored.

Nikolić is an example of a case where the practice of charge bargaining was carried out whilst ensuring that the same factual picture was presented to the court as would have been presented if the accused had pled guilty to all the charges on the indictment. It seems that it is on this basis that the Trial Chamber were content to accept the guilty plea. This is presumably because the historical record of what factually occurred would remain intact and the Trial

²²⁷ *Momir Nikolić Ibid* at para. 72

²²⁸ *Momir Nikolić Ibid.* at para. 70 (in the footnotes)

²²⁹ *Momir Nikolić Ibid.* at para. 57.

²³⁰ *Momir Nikolić Ibid.* at para. 73

²³¹ *Momir Nikolić Ibid.* at para. 65

Chamber noted that, ‘the factual basis upon which the remaining charge of persecutions is based can be found to reflect the totality of *Momir Nikolić*’s criminal conduct.’²³²

The *Momir Nikolić* decision indicates that the Trial Chamber view important tasks of the ICTY to be fact finding and discovering the truth. Plea agreements, where the bargain has not been as a result in a variation of the available evidence, but rather as a result of policy in searching for a more efficient and resource friendly way in which to run court proceedings, it seems would be unlikely to be expressly authorised by the Trial Chamber. The Trial Chamber also reiterated in *Nikolić* that whilst the prosecution and defence have the autonomy to enter into plea agreements, the Trial Chamber retains the ultimate authority over both the process and the proceedings.²³³ Despite the prosecutor’s recommendation of 15 to 20 years imprisonment in *Momir Nikolić*, the Trial Chamber sentenced him to 27 years, stating that ‘the testimony of Momir Nikolić was evasive [. . .] and an indication that his willingness to co-operate does not translate into being fully forthcoming in relation to all the events, given his position and knowledge’.²³⁴ Perhaps this was to send a message to the OTP and the defence that justice could not be bargained for and, given the gravity of the crimes being dealt with by the tribunal, a lengthy custodial sentence is likely to follow, particularly where the accused person is not forthcoming with the full truth.

The Trial Chamber in the case of *Momir Nikolić* was also at pains to identify a distinction between the types of plea agreements being conducted at the ICTY and plea bargaining at national level.²³⁵ They drew this distinction mainly based on sentencing by drawing an analogy with the national prosecutor accepting a plea of guilty to manslaughter when the accused person has been indicted for murder.²³⁶ They distinguished this scenario by emphasising that where this occurred the actions of the Prosecutor would undoubtedly have an impact on the sentence imposed, given that the sentence imposed for manslaughter in, certainly at least most jurisdictions, will be less than that for murder.²³⁷ They stated that this obligation to impose a lower sentence is not applicable in the case of the tribunal, who have discretion to impose their own sentencing based on the criminal conduct of the perpetrator.²³⁸ The Trial Chamber appear

²³² *Momir Nikolić Ibid.* at para. 51

²³³ *Momir Nikolić Ibid.* at para. 49

²³⁴ *Momir Nikolić Ibid.* at para. 156

²³⁵ *Momir Nikolić Ibid.* at para. 56

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

to be indicating that they have wide sentencing discretion regardless of what charges the prosecutor wishes to drop.

It is noteworthy however that that *Momir Nikolić's* former co-accused, *Obrenovic* had received a prosecutorial recommendation of fifteen to twenty years and was sentenced to 17 years on 10 December 2003.²³⁹ Further, *Momir Nikolić* appealed his sentence and in 2006 had his sentence reduced, by the Appeal Chamber, to 20 years (which would have been in line with the Prosecutor's original 15 to 20 year recommendation).²⁴⁰ Credit was also given for his time served, as had originally been recommended by the Prosecutor. Perhaps, the Appeal Chamber were beginning to note a reduction in the guilty plea rate at the ICTY and the consequences of this on a temporary ad hoc tribunal.

The case of *Prosecutor v Dragan Nikolić* is also a case that is perhaps representative of a shift in attitude of the ICTY Trial Chamber to the prosecutor's recommendations in plea agreements. *Dragan Nikolić* was a Serbian commander of the Susica camp in Eastern Bosnia and Herzegovina between June and September 1992, a notorious camp where rape, murder and assaults were rife. *Dragan Nikolić* entered into a plea agreement with prosecutors and accepted individual criminal responsibility for the murder of nine men, the facilitation of multiple rapes and sexual assaults and the torture of five men. Prosecutors agreed to recommend a sentence of 15 years imprisonment, however *Nikolić* was sentenced to 23 years with the Trial Chamber stating that the 'brutality, the number of crimes committed and the underlying intention to humiliate and degrade would render a sentence such as [the prosecution] recommendation unjust.'²⁴¹ However the Trial Chamber made an effort to salvage the prosecutors' plight in obtaining pleas in the future by declaring that the sentence would have been life but for mitigating factors, including the guilty plea.²⁴²

Another post Rule 67 *ter* case where the Trial Chamber did not sentence in line with the prosecutor's recommendation is *Prosecutor v Milan Babić*. *Babić* was charged on indictment with persecution, murder, cruel treatment, wanton destruction of villages or devastation not justified by military necessity and destruction or wilful damage to institutions dedicated to

²³⁹ *Prosecutor v Dragan Obrenovic* IT-02-60/2-S

²⁴⁰ *Momir Nikolić* case no. IT-02-60/1-A at para. 135. It is of significance that the Appeal Chamber noted that the Trial Chamber had made mistakes in considering the extent of *Nikolić's* co-operation with the prosecution.

²⁴¹ *Prosecutor v Dragan Nikolić*, case no. IT-94-2-S, at para. 281

²⁴² *Ibid.* at para. 280

education or religion, between August 1991 and February 1992.²⁴³ On 27 January 2004, as part of a plea agreement *Babić* pled guilty to persecution on political, racial and religious grounds, a crime against humanity punishable under Article 5(h) and 7(1) of the Statute of the Tribunal, for participating as a co-perpetrator in a JCE.²⁴⁴

As part of the plea agreement the Prosecutor recommended a maximum 11 year sentence of imprisonment however the Trial Chamber sentenced *Babić* to 13 years imprisonment finding that ‘the recommendation made by the Prosecution of a sentence of imprisonment of no more than 11 years would not do justice in view of the applicable sentencing principles and the gravity of *Babić*’s crime taking account of the aggravating and mitigating circumstances.’²⁴⁵ Again the Trial Chamber are expressing their disagreement with the sentence recommendation of the prosecutor. It may have been that the prosecutor, under pressure to complete their mandate and with growing caseloads felt compelled to recommend more lenient sentences in order to secure a plea and avoid the drain on their resources of a lengthy trial process.

Writing in 2006, Combs noted that since 2003 there had been a marked decrease in the number of guilty pleas at the ICTY. Combs has argued the reasons for this are threefold.²⁴⁶ The first reason is that there had been wide criticism by Victims’ Rights groups and commentators on sentences being too lenient given the gravity of the crimes committed.²⁴⁷ The second reason was that in March 2004 the ICTY’s Chief of Prosecutions, Michael Johnson departed from his post at the ICTY.²⁴⁸ He had been a strong advocate of plea bargaining and the acceptance of this at the ICTY.²⁴⁹ Thirdly, and more significantly, as a result of the limited weight (if any) given by the Trial Chamber in the cases of *Momir Nikolić*, *Dragan Nikolić* and *Milan Babić*, to the recommendations of the Prosecutor.²⁵⁰

Where the Trial Chamber does not sentence consistently with the recommendations of the prosecutor, this will send out a message to the defence that it may not be worth entering a plea agreement. Combs’ point has been borne out that, in the last 10 years there have been very

²⁴³ *Prosecutor v Milan Babić*, case no. IT-03-72-S at para. 4

²⁴⁴ *Ibid.* at para. 10

²⁴⁵ *Ibid.* at para. 101

²⁴⁶ Combs, *supra* at note 162 at pp. 99-100

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

few plea agreements entered into at the ICTY. To date, 20 plea agreements have been reached at the ICTY.²⁵¹ There are ongoing proceedings for 12 accused persons and proceedings have been concluded for 149 accused.²⁵² 80 persons have been sentenced, 18 acquitted, 13 referred to a national jurisdiction, 36 have had their indictments withdrawn or are deceased and 2 are due to have a re-trial conducted by the Mechanism for International Criminal Tribunals.²⁵³ A quarter of persons sentenced therefore pled guilty through a plea agreement. This is by no means near the proportion of cases resolved at the national level, however given that the court is dealing with the most serious of crimes, this is still a reasonable number of guilty pleas. It is clear that had these cases taken a year to prosecute at trial, which is a very conservative estimate of time that the trial would take, that the ICTY would have been under huge pressure to have all of these cases concluded. The amount of time that victims will have been required to wait for justice would also have been significantly longer. As the case law of the ICTY has illustrated, the crime that the accused persons generally wish to have bargained out is the crime of genocide, a crime so serious it has been described as the ‘crime of crimes.’²⁵⁴

4.3 Conclusion to Chapter 4

This Chapter has confirmed that plea bargaining is a practice that has been implemented at the ICTY and has led to some sentence reductions as a result. However, as the cases of *Momir Nikolić*, *Dragan Nikolić* and *Milan Babić* have illustrated the ICTY Trial Chamber has not always been willing to sentence in line with the prosecutors recommendations in a plea agreement. The ICTY cases that have resolved by plea agreement have meant that justice has been achieved in an efficient manner, with victims having seen a significant number of perpetrators sentenced. Rules 62*bis* and 62*ter* demonstrate an acceptance of plea bargaining whilst ensuring that the safeguards contained within the rules are followed. In addition the ICTY Trial Chamber has shown a real willingness to uphold plea agreements, particularly where they do not distort the factual historical record. This demonstrates that plea bargaining, in an international criminal law forum, cautiously monitored to ensure appropriate sentences are still

²⁵¹ This information has been taken from the Official website of the ICTY at <http://www.icty.org/sections/TheCases/GuiltyPleas>, last accessed 30 August 2015

²⁵² See website of the ICTY at <http://www.icty.org/en/cases/key-figures-cases> last accessed 5 January 2016

²⁵³ *Ibid.*

²⁵⁴ See W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2000) Cambridge University Press at p. 1

imposed, can achieve efficiency, justice and go some way to building an accurate historical record.

CHAPTER 5: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND PLEA BARGAINING

5.1 Establishment of the ICTR and Plea Bargaining at the ICTR

The International Criminal Tribunal for Rwanda was established with the mandate for the prosecution of persons responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and for Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. As with the ICTY, the ICTR is an ad hoc International Criminal Tribunal set up under Chapter VII of the UN Charter pursuant to Security Council Resolution 955 (1994).²⁵⁵ The prosecutor is responsible for the prosecution and investigation of crimes under the jurisdiction of the ICTY.²⁵⁶ The rules used by the ICTY have been adapted accordingly for use by the ICTR, for example, the rules in relation to the initiation of proceedings and amendment of the indictment mirror those outlined previously in relation to the ICTY.²⁵⁷

Following the example of the ICTY, the ICTR also amended its rules of procedure to allow for the practice of plea bargaining to legitimately take place. Modelled on Rule 62 *bis* of the ICTY rules of procedure and evidence, Rule 62(B) of the ICTR rules of procedure and evidence provides that the Trial Chamber shall satisfy itself that the guilty plea:

- (i) is made freely and voluntarily;
- (ii) is an informed plea;
- (iii) is unequivocal; and
- (iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.

Rule 62 *bis* of the ICTR Rules of procedure and evidence deals with the Plea Agreement procedure and is modelled on Rule 62 *ter* of the rules of procedure and evidence of the ICTY. It states:

²⁵⁵ UN Doc S/RES/955 (1994);

²⁵⁶ Article 15 Statute of the ICTR

²⁵⁷ Articles 17 and 18, Statute of the ICTR and the ICTR Rules of Procedure of Evidence, Rule 47(E) and (F) and Rules 50-51

- (A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
- (i) apply to amend the indictment accordingly;
 - (ii) submit that a specific sentence or sentencing range is appropriate;
 - (iii) not oppose a request by the accused for a particular sentence or sentencing range;
- (B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).
- (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62(A)(v), or requests to change his or her plea to guilty.

Despite the aforementioned provision for plea agreements, this practice has not been utilised at the ICTR to the extent it was at the ICTY. This could be as a result of differences in the nature of the crimes dealt with by the tribunals, for example the majority of cases at the ICTR include genocide charges, potentially leading to a greater discomfort amongst prosecutors and the judiciary in entering and upholding plea agreements. Nevertheless, there have been cases involving plea agreements at the ICTR and these will be outlined in chronological order.

5.2 Significant cases involving Plea Agreements at the ICTR in Chronological Order

In the case of *Jean Kambanda*, the OTP entered a plea agreement with the defence. This first plea agreement at the ICTY may however have set a precedent destroying any incentive for defendants to plead guilty. The former Prime Minister *Jean-Paul Kambanda*,²⁵⁸ at the earliest available opportunity and first appearance on 1 May 1998, pled guilty to all the crimes to which he was charged, namely one count of genocide, one count of conspiracy to commit genocide, one count of direct and public incitement to commit genocide, one count of complicity in genocide, one count of crimes against humanity (murder) and one count of crimes against humanity (extermination).²⁵⁹

²⁵⁸ Case no. ICTR 97-23-S

²⁵⁹ *Prosecutor v. Kambanda* case no. ICTR-97-23-S at para. 3.

Kambanda assisted the Prosecution from the outset²⁶⁰ and gave 90 hours of evidence that was described as ‘invaluable information’²⁶¹ in the demise of other leaders. This assistance stemmed from a written plea agreement between *Kambanda* and the Prosecutor providing that ‘no agreements, understandings or promises have been made between the parties with respect to sentence which, it is acknowledged, is at the discretion of the Trial Chamber.’²⁶² Notwithstanding this agreement it seems that *Kambanda* anticipated a far more lenient sentence than the sentence he received, particularly as his Counsel provided submissions to the Chamber seeking only 2 years imprisonment.²⁶³ This is in stark contrast with the life sentence passed down to him by the Trial Chamber, which was in line with the recommendation by the prosecutor.²⁶⁴ The Court accepted that there were advantages of a guilty plea however it stated that these were not proportionate when taking account of the circumstances, namely

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

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

(iii) moreover, Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust’.²⁶⁵

The Trial Chamber in *Kambanda*, in sentencing him to life imprisonment, could have deterred further accused persons from entering pleas on the basis that they feel they might as well run the case to trial. If they take the chance of proceeding to trial there is a hope of acquittal if the outcome of a guilty plea anyway is going to be life imprisonment anyway. However, there are factors associated with the *Kambanda* case specifically that may have meant that the Trial Chamber simply had no choice but to issue any sentence other than life imprisonment. It could be that in *Kambanda*, the accused’s very high profile position meant that a message of deterrence had to be sent out that no one is exempt from punishment, particularly where such serious crimes as genocide and crimes against humanity are involved. If the Prime Minister of Rwanda escaped

²⁶⁰ See *Prosecutor v. Rutaganira* case no. ICTR-95-1C-I Minutes of Proceedings at para. 42

²⁶¹ *Kambanda* supra. note 260 at para. 47.

²⁶² *Ibid.* at para 48

²⁶³ *Prosecutor v. Kambanda* case no. ICTR-97-23-I Transcript (3 September 1998) at p. 33

²⁶⁴ *Kambanda* supra note 260 at para. 62.

²⁶⁵ *Ibid.* at para. 61(B) (v)-(vii)

justice with only a very lenient sentence this could have a negative impact on deterrence and reconciliation. Such a prominent figure being treated with leniency is not going to sit well with the communities who have suffered as a result of such grave crimes. If those communities feel that justice has been realised they may feel more able to put the mass atrocities behind them peacefully. It is also significant in considering the sentence that *Kambanda* pled to a variety of charges, including the crime of genocide.

The court in *Kambanda* was dealing with the most serious crimes committed by a very prominent figure. It is difficult to see how they had any alternative than to issue a life sentence. If there was ever going to be a case where a life sentence is appropriate then *Kambanda* is it. Although it was clear that *Kambanda* had cooperated with the prosecution, this was not sufficient for him to be ‘rewarded’ in relation to any sentence discount. The prosecutor had recommended life imprisonment and had not given any promises about the sentence in the plea agreement. Perhaps this was an indication from the prosecutor that although they are willing to enter plea agreements there are some cases where the magnitude of the crime means that no accused person should be rewarded, regardless of their guilty plea. The recommendation by the defence that *Kambanda’s* prison sentence should not exceed two years is not necessarily consistent with remorse and acceptance of the gravity of his crimes. Although *Kambanda* illustrates the initial reluctance of the trial Chamber to embrace the practice of plea bargaining the subsequent cases of *Serushago*, *Ruggiu*, *Bisengimana* and *Rutaganira*, examined in further detail below, demonstrate a different approach to plea agreements and sentencing.

The next plea to be tendered before the ICTR was on 14 December 1998 in the case of *Prosecutor v Omar Serushago*.²⁶⁶ *Serushago* was not on the radar of the Rwandan authorities when seeking out war criminals, however he came forward to ICTR Prosecutors in April 1997. He was a low-level leader in command of a group called the Interahamwe, (the Hutu lead militia) who provided significant information that led to the arrest of a number of high level ICTR defendants including *Kambanda* and *Ruggiu* (discussed below). The initial indictment contained charges of genocide, murder, torture, extermination and rape.

²⁶⁶ Case no. ICTR-98-39-I

Serushago entered into a Plea Agreement with the OTP and pled guilty to all charges except rape, which was withdrawn by prosecutors. However, in contrast with the majority of plea agreements at the ICTY there was no promise by the prosecution and the plea agreement stipulated that the sentencing ‘is at the entire discretion of the Trial Chamber’.²⁶⁷ The Prosecution did however acknowledge to the Trial Chamber that *Serushago* had provided ‘valuable information’ and they acknowledged his significant co-operation (as they had done in *Kambanda*) in recommending a sentence of 25 years imprisonment. This was the first time at the ICTY that the Prosecutor had made a recommendation of anything less than life.²⁶⁸ Ultimately the Trial Chamber imposed a sentence of 15 years imprisonment.²⁶⁹ This case illustrated, following *Kambanda* that there was hope for a ‘reward’ of leniency for accused persons who tender a plea before the Trial Chamber. This should have set a precedent that a guilty plea and co-operation have a real possibility of attracting a more lenient sentence. A similar approach was taken by the Trial Chamber in sentencing in the next plea at the ICTR in the case of the *Prosecutor v Georges Ruggiu*.

Georges Ruggiu is a Belgian citizen who developed an interest in Rwandan politics. He developed a professional relationship with Rwandan President Habyarimana and became involved in political debates in Rwanda. He moved to Rwanda in 1993 where he commenced employment as a journalist and broadcaster for Radio Television Libre des Mille Collines (RTLM). In the course of the Spring of 1994 *Ruggiu* and a number of other broadcasters from RTLM aired broadcasts inciting the murder of the Tutsi population.²⁷⁰ *Ruggiu* initially pled not guilty however then alleged that as a result of ‘reflection’ he realised his ‘moral responsibility’ to accept responsibility in pleading guilty to ‘direct and public incitement to commit genocide.’²⁷¹

There was no undertaking in the Prosecutor’s plea agreement in respect of what sentence recommendation would be made however the Prosecutor ultimately recommended a sentence

²⁶⁷ *Prosecutor v Serushago*, case no. ICTR-98-37, Plea Agreement between *Omar Serushago* and the Office of the Prosecutor (4 December 1998) at para. 40

²⁶⁸ See N.A. Combs, *supra* note 162 at p. 107 with reference to *Prosecutor v Kambanda*; *Prosecutor v Akayesu*, Case no. ICTR 96-4-T and *Prosecutor v Kayishema & Ruzindana*, Case no. ICTR 95-1-T

²⁶⁹ *Prosecutor v Serushago*, Case No. ICTR 98-39-S, Sentence, Verdict (5 February 1999)

²⁷⁰ *Prosecutor v Georges Ruggiu* Case No ICTR-97-32-I at para.s 42, 44 and 50

²⁷¹ *Prosecutor v Ruggiu*, ICTR-97-32-I, Transcript at 56-59; Plea Agreement between *Georges Ruggiu* and the Office of the Prosecutor at para.s 2 and 4; *Prosecutor v Ruggiu* Case No ICTR-97-32-DP (12 May 2000), all referred to by N.A. Combs, *Supra* note 162 at p. 109

of 20 years imprisonment. This was the most lenient sentence that ICTR Prosecutors had recommended and they expressly stated that had the accused proceeded to trial the sentence recommendation would have been life imprisonment.²⁷²

Prosecutors were clearly sending a message that there is a potential reward of a recommendation of a more lenient sentence for accused persons who pled guilty. The Trial Chamber went on to praise *Ruggui* by effectively thanking him for ‘sparing the Tribunal a lengthy investigation and trial’²⁷³ and for ‘acknowledging his mistakes.’²⁷⁴ Despite the 20 year recommendation by Prosecutors *Ruggui* was sentenced to only 12 years imprisonment. Interestingly, this was described by the ICTR Chief of Prosecutions as ‘a good gesture for other accused who would wish to plead guilty and accept responsibility for their crimes’.²⁷⁵ In making this statement he was clearly promoting plea agreements as being a permissible and desirable practice at the ICTR. The *Ruggui* case provides an acknowledgement of some of the theoretical advantages to plea bargaining, as Trial Chamber thanked the accused for effectively saving court time and resources and for showing remorse in accepting responsibility. The support to plea agreements by the OTP and Trial Chamber continued in the following case of the *Prosecutor v Rutaganira*.

Between 1980 and 1994 *Vincent Rutaganira* was ‘conseiller’ of the Mubuga sector, Gishyita Commune, Kibuye Prefecture. The charges against *Rutaganira* stemmed from a church massacre of Tutsi persons. Between 4000 and 5000 Tutsi persons were murdered during a 3 day massacre in 1994. *Rutaganira* was alleged to have, whilst acting along with others, ordered the attack on the church and had actively taken part in the murders. *Rutaganira* was charged on the indictment with genocide, extermination as a crime against humanity, murder as a crime against humanity and inhumane acts as a crime against humanity.

In February 2002 *Rutaganira* voluntarily surrendered himself after having been at large since 1996 when he was originally indicted. In his plea agreement he denied ordering the attack on the Church and denied active participation in the murders. He admitted his awareness of

²⁷² *Ruggui* Transcript at pp. 188 and 190 referred to by N.A. Combs, supra note 162 at p. 107

²⁷³ *Prosecutor v Ruggui* supra note 272 at para 53.

²⁷⁴ *Ibid.* at para 55

²⁷⁵ *Rwanda Unhappy with Ruggui Sentence*, Hirondele News Agency, June 1 2000 available at <http://www.hirondellenews.com/ict-rwanda/372-trials-ended/ruggiu-georges/17498-en-en-rwanda-unhappy-with-ruggiu-sentence65496549> last accessed 4 January 2016 as referred to by N.A. Combs, supra note 162 at p. 110

Tutsi civilians having gathered in the Church, that he was aware that assailants were gathering near the church before the attack took place, and that ‘despite the fact that he was conseiller of Mubuga secteur he failed to protect the Tutsi who had sought refuge.’²⁷⁶ *Rutaganira* pled guilty on 8 December 2004 to aiding and abetting extermination as a crime against humanity, on the basis of his omissions to act. The Prosecutor asked the court that he be acquitted in respect of the other charges because there was insufficient evidence for them. The trial chamber agreed to do this.

As part of the plea agreement Prosecutors had agreed to recommend between six and eight years imprisonment. *Rutaganira* was ultimately sentenced to six years imprisonment, the shortest sentence ever handed down by the ICTR. It is of assistance that the OTP asked for the accused to be acquitted on the other charges specifically due to there being insufficient evidence as this avoided one of the concerns that the ICTY in the *Nikolić* judgement referred to previously, about lack of clarity as to whether the events had actually happened or were just a bargaining tool. However, in the following case, the Trial Chamber refused to acquit the accused on the charges that the prosecutor had moved to withdraw and dismiss on the basis that the prosecution had failed to justify their motion.

The case of the *Prosecutor v Bisengimana* is represents an example of charge bargaining where the full factual picture can be said to have been amended as a result of the plea bargain that the accused ultimately pled guilty to. The original indictment comprised of thirteen charges of genocide, crimes against humanity and war crimes. Not only was *Bisengimana* accused of being personally responsible in the commission of this criminal conduct but also was responsible for encouraging the participation of others. As part of a plea negotiation a further indictment was prepared with five charges, however the charges were still a representation of the full factual picture of *Bisengimana’s* criminal conduct. Further plea negotiations led to the Prosecutor agreeing to accept guilty pleas to two out of the five charges and the prosecutor would agree to seek acquittals for the other three charges, which included crimes as serious as genocide and rape. On 7 December 2005, the accused pled guilty to counts of murder and extermination as crimes against humanity. The Chamber granted the Prosecution motion for withdrawal and

²⁷⁶ *Prosecutor v Rutaganira*, case no. ICTR-95-1C-T, Transcript at pp. 10-11

dismissal of the remaining counts but denied the Prosecution request for acquittal on these counts because the Prosecution had failed to justify its motion on this point.²⁷⁷

The Prosecutor also agreed to recommend a sentence of between twelve and fourteen years in addition to supporting *Bisengimana*'s request that he be permitted to serve his sentence in a European prison. The withdrawal and dismissal of the genocide charge sparked outrage in Rwanda, with the Rwandan government insisting that the only circumstances in which genocide charges should be dropped are when 'it would be difficult to prove beyond a reasonable doubt the role that the particular accused person played in the preparation of the genocide'.²⁷⁸ The Chamber sentenced *Bisengimana* to 15 years imprisonment.²⁷⁹ It is likely that had *Bisengimana* not entered this plea negotiation and had been found guilty of genocide, that such a crime after trial would have attracted a sentence of life imprisonment. The Trial Chamber did not comply with the sentence recommendations by the prosecutor however the difference was only that of one year. It is significant that in the course of the sentencing judgement the Trial Chamber did not discuss the totality of the criminal conduct by the accused. One of the three charges bargained out, for example, was for the crime of rape.

When the Trial Chamber were considering the factual picture in sentencing there was no mention of the accused having been involved in the crime of rape. It is not clear whether the charges were bargained away to secure a conviction or whether there were evidential difficulties in proceeding with them. This lack of clarity may not be beneficial in terms of fostering reconciliation as victims may feel that the accused is 'getting off' with something. Albeit this has to be balanced with the remorse that might be implied by a guilty plea and the avoidance of witnesses being inconvenienced to give evidence. The Trial Chamber still allowed the plea to be entered and thereby appears to be taking a more relaxed approach to plea bargaining than the Trial Chamber of the ICTY. Despite this approach only a very limited number of cases at the ICTR resolved by way of a plea.

²⁷⁷ *Prosecutor v Paul Bisengimana* (judgement and sentence), case No. ICTR 00-60-T at para. 12 with reference to Transcript of 7 December 2005 at pp. 12-13 and 17-18

²⁷⁸ ICTR and Rwanda argue over Plea Bargains, Hironelle News Agency, April 2006, available at <http://allafrica.com/stories/200604240291.html> last accessed 4 January 2016

²⁷⁹ *Prosecutor v Paul Bisengimana*, supra. note 278 at para. 203

To date 93 individuals have been indicted to the ICTR.²⁸⁰ 61 persons have been sentenced, 14 have been acquitted, 10 referred to national jurisdictions for trial, three accused persons have died during or prior to trial, three fugitives have been referred to the MICT (mechanism for international criminal tribunals) and two indictments were withdrawn before trial.²⁸¹ The last trial judgment issued by the ICTR was on 20 December 2012.²⁸² The only remaining work at the Tribunal is with the Appeals Chamber.²⁸³ The majority of the work of the tribunal had been concluded by 2005 and of the 61 accused persons sentenced the total number of these cases resolved by plea agreement is only eight.²⁸⁴ This is only 13%, which is a stark reduction in comparison with the guilty plea rate mentioned previously at the national level. The ICTY has had more significant success with plea agreements, with the percentage of those sentenced that resolved their case through a plea agreement being 25%.

5.3 Conclusion to Chapter 5

There has been no research into why the guilty plea rate is at a low percentage for the ICTR or the ICTY in comparison with national levels. It is clear that the practice has been permitted at the ICTR and there have been some sentence reductions as a result. There may well have been discussions in relation to plea agreements between the OTP and the defence and they may have been unable to reach a suitable agreement, for example. It may have been the OTP refused to bargain in relation to the crime of genocide in some cases or where the plea agreement would have the effect of the historical record being distorted. The lower percentage of guilty pleas could have been because the accused knew that they were facing a lengthy prison sentence even if they did plead guilty and as such decided that the 'reward' they would get in sentence discount would not be sufficient to offset the possibility of acquittal after trial. The accused persons may genuinely be innocent or believe that they are innocent. They may have received legal advice not to plead guilty on the basis of an assessment by their defence team of the prosecution evidence against them.

²⁸⁰ This information has been obtained from the website of the ICTR at <http://www.unicttr.org/en/tribunal>, last accessed 30 August 2015

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* Also, for a discussion on the failure of plea bargaining to achieve results see N. Garoupa and F.H. Stephen, Why Plea-Bargaining fails to achieve results in so many criminal justice systems: a new framework for assessment Maastricht J. 2008, 15(3), 323-358

The guilty pleas as a result of plea agreements at the ICTY have, overall, had a positive impact. They have achieved more speedy and efficient justice, whilst the court still ensured that sentences reflected the moral gravity of the crimes committed, for example in the *Kambanda* case. The *Ruggui* case demonstrated that the court felt that remorse, reconciliation and the saving of court time were factors that should be applauded. However, the *Bisengimana* case is illustrative of the real difficulties that can occur in terms of the damage that can be done to public confidence in the international criminal legal system when charges as serious as genocide are dropped as part of a plea agreement. This is the reason why plea bargaining in international forums must be treated cautiously and safeguards, for example the criterion in Rule 62bis and monitoring by the Trial Chamber, to ensure that too much discretion is not awarded to the prosecutor, must be implemented. With the formation of a permanent international criminal court, it is necessary to consider whether the practice of plea bargaining is legally permissible at the International Criminal Court and if so, what safeguards should be in place to minimise the risk of controversy that the practice can bring.

CHAPTER 6:
LOOKING TO THE FUTURE OF INTERNATIONAL PLEA BARGAINING AND
THE INTERNATIONAL CRIMINAL COURT

6.1 The International Criminal Court

The International Criminal Court (ICC) was enacted to deal with ‘unimaginable atrocities that deeply shock the conscience of humanity’ and has been tasked with the ‘prevention of heinous crimes from interfering with the ‘peace security and well-being of the world’.²⁸⁵ The ICC was established by the Rome Statute of the International Criminal Court which entered into force on 1 July 2002. Unlike the ad hoc ICTY and ICTR, which have geographical and time limitations on their jurisdiction, the ICC has jurisdiction over persons accused of committing one or more of the crimes outlined in the Statute i.e. genocide, crimes against humanity, war crimes and aggression.²⁸⁶

Unlike the ICTY and ICTR, who can overrule national systems in deciding to prosecute a suspect, the ICC is ‘complementary to national criminal jurisdictions’,²⁸⁷ limited to prosecuting in circumstances where the state party is ‘unable’ or shows an ‘unwillingness’ to prosecute.²⁸⁸ A further distinction between the ad hoc tribunals and the ICC, used to appeal to states considering whether to sign up to the Rome Statute is the principle of ‘*nullum crimen sine lege*’ which has a literal meaning of ‘there is no crime without a law’. To explain, the Rome Statute states that ‘[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.’²⁸⁹ The Rome Statute therefore does not have retrospective effect. The ICC consists of the Office of the Prosecutor, the Presidency, the Registry and the Divisions (Pre-Trial Division, Trial Division, and Appeals Division).²⁹⁰ Prosecution of cases before the ICC is the

²⁸⁵ Rome Statute of the International Criminal Court preamble 3, July 17, 1998, U.N. Doc.

A/CONF. 183/9, 2187 U.N.T.S. 90.

²⁸⁶ Article 5, Rome Statute of the ICC

²⁸⁷ Article 1, Rome Statute of the ICC

²⁸⁸ Articles 1 and 17, Rome Statute of the ICC

²⁸⁹ Article 22, Rome Statute of the ICC

²⁹⁰ Article 34, Rome Statute of the ICC

responsibility of the Prosecutor. Like the ad hoc tribunals, the procedure at the ICC is a combination of common law and civil law systems.²⁹¹

The ICC is currently investigating situations in the Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur, Sudan, Kenya, Libya, the Ivory Coast and Mali.²⁹² The ICC have preliminary examinations ongoing in Afghanistan, Columbia, Nigeria, Georgia, Guinea, Honduras, Iraq, Ukraine and Palestine.²⁹³ To date there have been no guilty pleas at the ICC. Very few cases have got to the stage where this would even be an option. The court has had 23 cases in 9 situations brought before it.²⁹⁴ Given that so few cases at the ICC have reached the stage where plea bargaining would be an option it is beneficial to consider whether plea bargaining is a practice that would be legally permissible at the ICC.

6.2 Is Plea Bargaining Permitted at the ICC?

Article 65 of the Rome Statute, which will be considered further in section 6.4 below, governs proceedings on an admission of guilt. Of particular relevance in considering whether plea bargaining is legally permissible at the ICC, Article 65(5) of the Rome Statute states that 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’.²⁹⁵ It is clear therefore from Article 65 that plea bargaining between the prosecutor and the defence is not expressly permitted or prohibited by the Rome Statute. However, the inability of the prosecutor to ensure a plea agreement is binding on the court could make the task of securing a plea agreement more difficult. It is worth recalling here that defense counsel in the ICTY case of *Dragan Nikolić* felt that the plea agreement had not been honoured as a result of the Trial Chamber not following the sentence recommendation of the prosecutor and warned that this

²⁹¹ See Schabas supra note 123 at p. 143 where he states that ‘[a]lthough much of the procedure of the Court is a hybrid of different judicial systems, it seems clear that there is a definite tilt towards the common law approach of an adversarial trial hearing. However, the exact colouring that the Court may take will ultimately be determined by its judges.’

²⁹² This information has been taken from the website of the ICC at http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx, last accessed 31 August 2015

²⁹³ *Ibid.*

²⁹⁴ Website of the ICC https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx last accessed 2 January 2016

²⁹⁵ Article 65(5), Rome Statute of the ICC

‘will be noted by those whose duty it is to advise on the issue of making a Plea Agreement with the Prosecutor’.²⁹⁶

It is noteworthy that there were still plea agreements reached subsequent to the *Dragan Nikolić* case.²⁹⁷ However it is always possible to speculate that, as a result of the unwillingness of the Trial Chamber to sentence in line with the recommendations of the Prosecutor, there may have been fewer pleas before the ICTY than otherwise would have been the case. If the Trial Chamber were to set a precedent where they fail to honour plea agreements made by the prosecutor it is likely that the defence will not take the risk of entering into such agreements. This section has established that there is nothing legally to prohibit the prosecution and defence entering into plea agreements at the ICC. The following section will consider whether plea agreements should be permitted at the ICC.

6.3 Should Plea Bargaining be permitted at the ICC?

The international Criminal Court and ad hoc tribunals discussed previously, for example, have to select who they prosecute. The ad hoc tribunals are time limited and have to aim to execute their mandate within limited timescales.²⁹⁸ The reality is that their resources are limited and they have had to select the most senior level officials to prosecute. This is an important reason for utilising the practice of plea bargaining to achieve an efficient outcome. Although the ICC does not face the same time limitations as the ad hoc tribunals, the ICC also has resource limitations that have to be managed to strike the correct balance between efficiency and achieving justice.

As of 30 October 2015, of the 23 cases brought before the ICC only 6 were at the trial stage and only 2 at the reparations stage.²⁹⁹ Despite the Rome Statute entering into force on 1 July 2002, only 2 persons who have been brought before the court, *Thomas Lubanga Dyilo* and

²⁹⁶ *Prosecutor v Dragan Nikolić* Case No IT-94-2-A, Appellants Brief in Reply to the Prosecution Respondent’s Brief (25 August 2004), 5, cited in N.A. Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts* (2006) at p. 99

²⁹⁷ See the website of the ICTY <http://www.icty.org/en/cases/guilty-pleas> last accessed 5 January 2016

²⁹⁸ See S.C. Res. 827, 2, U.N. Doc. S/RES/827 (May 25, 1993). Although the resolution does not identify the date that the tribunal must be wound down and concluded by, it is clear that a completion strategy must be in place.

²⁹⁹ Website of the ICC

https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx, last accessed 3 January 2016

Germain Katanga, have actually been sentenced for the crimes committed by them.³⁰⁰ In *Lubanga Dyilo*'s case, the warrant for his arrest was first issued by the Trial Chamber on 10 February 2006.³⁰¹ He was initially sentenced on 10 July 2012 and, following an appeal, the verdict and sentence against him was confirmed by the appeals Chamber on 1 December 2014.³⁰² This is an astonishing 9 years for victims to wait for justice to be served. In *Katanga*'s case, the prosecution first applied for the warrant for his arrest on 25 June 2007.³⁰³ He was sentenced on 23 May 2014, an incredible 7 years later.³⁰⁴

The geography and the very serious nature of crimes that the ICC deal with mean that the investigations are large and widespread. The reality is that the ICC is complementary to national systems and does not have the resources to investigate and prosecute every person who has committed every crime that has fallen under its jurisdiction. It has previously been suggested that the maximum number of cases involving 'mass atrocities' that the ICC will be able to prosecute at any given time is only six.³⁰⁵ The resources of the ICC are not infinite and it is clear that the Office of the Prosecutor will have to be selective in what situations to investigate and who to prosecute. The task of the prosecutor in having to select who and where to investigate, as a result of resource limitations, is a controversial practice in itself. However, this is a task that is entrusted to the prosecutor by the Rome Statute.³⁰⁶ Undoubtedly, victims and witnesses of mass atrocities will feel cheated and that they have not received the full truth and justice that they require where there is any selective process in operation in the first instance.

The small number of cases that the ICC can deal with at a time taken with amount of time it has taken thus far for any justice to be served at the ICC is gravely concerning. Implementation of plea bargaining at the ICC with safeguards, whilst for the reasons outlined

³⁰⁰ See *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (sentenced to 14 years imprisonment) and *Prosecutor v Germain Katanga* ICC-01/04-01/07 (sentenced to 12 years imprisonment)

³⁰¹ Website of the ICC

https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx

³⁰² *Ibid.*

³⁰³ Website of the ICC

https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx

³⁰⁴ *Ibid.*

³⁰⁵ N.A. Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* 57-90 (Stanford Univ. Press 2007) at p. 2

³⁰⁶ Article 53, Rome Statute of the ICC, governs the Initiation of an Investigation

in the chapter 3.1 is not the perfect solution, goes a long way to striking the balance between efficiency and justice at the ICC that is much required.

Chapter 6.4 Safeguards, Concerns and Recommendations for the approach to be taken by the International Criminal Court to Plea Bargaining

The ICC has a very difficult and multifunctional role whereby it must secure justice for the deceased and victims, find the truth and paint an accurate historical record whilst, at the same time, conduct and prosecute in a time efficient and effective manner, with limited resources. This section will examine what safeguards already exist to ensure that credible plea agreements could be implemented and enforced and will recommend further safeguards to ensure proper implementation of the practice of plea bargaining.

6.4.1 Safeguards in the Rome Statute of the ICC

In terms of pursuing the truth the Rome Statute sets out safeguards to help ensure that the truth is discovered as far as possible in respect of the particular investigation. The Prosecutor must ensure that the investigation is thorough, complete and examines ‘incriminating and exonerating circumstances equally.’³⁰⁷ In doing this, the Prosecutor is seeking to obtain the truth and their investigation should go as far as possible to achieving this. The Prosecutor will then have a clear picture of what the evidence should be and this may assist in informing that on what plea agreement they could negotiate.

Proceedings on an admission of guilt are also governed by the Trial Chamber under Article 65 of the Rome Statute as already outlined. Where any accused makes an admission of guilt the Trial Chamber must ensure that he ‘understands the nature and consequences of the admission of guilt’.³⁰⁸ The admission must be ‘voluntarily made by the accused after sufficient consultation with defence counsel’.³⁰⁹ The Trial Chamber must also ensure that the ‘admission of guilt is supported by the facts of the case that are contained in: (i) The charges brought by the Prosecutor and admitted by the accused; (ii) Any materials presented by the Prosecutor which

³⁰⁷ See Article 54(1)(a) of the Rome Statute of the ICC and see W. A. Schabas, *An Introduction to the International Criminal Court* (Cambridge Univ. Press 2d ed. 2004) at p. 126

³⁰⁸ Article 65(1)(a) Rome Statute of the ICC

³⁰⁹ Article 65(1)(b) Rome Statute of the ICC

supplement the charges and which the accused accepts; and (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused'.³¹⁰

The aforementioned safeguards set down by Article 65 ensure that there is a basis for the charges that the accused is pleading to, that the accused understands his actions in pleading guilty and what he is pleading to. It is also important to note that he has the protection of having had the advice of his own legal representative prior to pleading guilty. Article 65(5) specifically excludes the possibility that Plea Agreements are binding on the Trial Chamber and as a result ensures that the actions of the prosecutor are sufficiently monitored to ensure that the prosecutor does not abuse their power. The charges will also have to have been confirmed by the Trial Chamber and there will have had to be sufficient evidence for doing so.³¹¹ This again ensures that the prosecutor does not bring any erroneous excess charges against the accused as a bargaining tool or a way of exerting undue pressure on the accused person to either negotiate over the charges or face more charges. This also removes the possibility of the prosecutor being in a position to threaten extreme sentences should accused persons not enter a particular plea agreement.³¹² Sentencing will still be in the hands of the court regardless of the recommendations of the prosecutor.

The preamble of the Rome Statute of the International Criminal Court (ICC) states that, 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.'³¹³ This emphasises the importance of the victims and it is fundamental that their views are at least taken into consideration by the prosecutor in determining an appropriate plea agreement. Of particular note, Article 65(4) of the Rome Statute permits the inclusion of victims/witnesses in the process even where the accused has pled guilty. Article 65(4) states that if 'the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall

³¹⁰ Article 65(1)(c) Rome Statute of the ICC

³¹¹ Article 61(7) Rome Statute of the ICC

³¹² See N. Padfield, *Shining the torch on plea-bargaining*, (2009) Cambridge Law Journal at p. 11

³¹³ Rome Statute of the ICC preamble, July 17, 1998, 2187 U.N.T.S. 90, this is in contrast to the Statutes of the ICTY and ICTR which fail to give the rights of victims and witnesses any kind of specific priority, or even real recognition.

consider the admission of guilt as not having been made and may remit the case to another Trial Chamber'. Perhaps this is an indication of a modern attitude to acknowledging the importance of victims' rights in the process by the drafters of the Rome Statute. Article 65(4), on the one hand eliminates one of the main advantages of plea bargaining, namely that the victims and witnesses will not have to face the ordeal of having to give evidence. On the other hand, it creates an opportunity for those who wish to have their day in court and face those who have wronged them. These are matters that will be in the hands of the Trial Chamber following a guilty plea and it remains to be seen how the Trial Chamber will deal with Article 65(4).

The aforementioned safeguards contained within the Rome Statute mean that the Prosecutor does not and should not have unfeigned discretion to do what they wish. The ICC, akin to the ICTY and ICTR, in terms of the procedure used, is adversarial, like the criminal procedure in Scotland, England and the United States to begin with, but the courts also retain powers akin to the inquisitorial system as a safeguard.³¹⁴ Schabas has stated that '[a]lthough much of the procedure of the Court is a hybrid of different judicial systems, it seems clear that there is a definite tilt towards the common law approach of an adversarial trial hearing. However, the exact colouring that the Court may take will ultimately be determined by its judges.'³¹⁵ The Trial Chamber, in exercising the aforementioned monitoring powers afforded to them by the Rome Statute, should however bear in mind that it the prosecutor who has full knowledge of the investigation and the evidence. It would be wise of the Trial Chamber to ensure that they take into account any recommendations by the prosecutor and place sufficient reliance on them.³¹⁶

6.4.2 Practical Concerns/Comments Associated with Plea Bargaining at the ICC

The investigations of Office of the Prosecutor at the ICC have come under the spotlight in discussions on international forums.³¹⁷ Part V of the Rome Statute governs the investigation and prosecution. Article 53 of the Rome Statute deals with the initiation of an investigation. Article 53(1) states that:

³¹⁴ For example see the Articles 58, 61 and 65 of the Rome Statute of the ICC

³¹⁵ W. A. Schabas, *Supra* note 123 at p. 143

³¹⁶ See R. Henman, *Punishment and the Role of the Prosecutor in International Criminal Trials*, 2008 *Crim. L.F.* 395; See also K.A. Rodman, *Is Peace in the interests of Justice? The case for broad prosecutorial discretion at the International Criminal Court*, 2009 *L.J.I.L.* 99

³¹⁷ D. Groome, *No witness, no case: An Assessment of the Conduct and Quality of ICC Investigations*, *Penn State Journal of Law and International Affairs*, (2014-2015) 3 *Penn St. J.L. & Int'l Aff.* 1 at p.1

‘The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.’

Article 53(2) outlines very similar circumstances under which the Prosecutor may not proceed further with a prosecution after the investigation stage. Articles 53(1)(c) and 53(2)(c) appear to entrust the prosecutor with relatively wide discretion in respect of the criminal investigation and proceedings. It is odd that the prosecutor is granted discretion in relation to whether to initiate investigations in the first instance, yet has no ability to bind the court in relation to a plea agreement that involves for example, dropping a small portion of the accused person’s conduct. However, any decision taken by the prosecutor under Article 53 is subject to review by the Pre-Trial Chamber.³¹⁸

The OTP of the ICC has developed a practice whereby a reasonably short period of time is spent investigating cases before a warrant is issued.³¹⁹ This has had the result of cases still being in their investigative stage when proceedings are commenced.³²⁰ It must however be acknowledged that conducting an investigation into crimes against humanity is not a task on any small scale. The resources required to be deployed to fully investigate these matters in very short time-scales would require to be immense and it is therefore clear why it is often the case that the investigation is still ongoing when proceedings commence.³²¹ Groome has highlighted some of the additional difficulties that prosecutors in an international forum can face, for

³¹⁸ Rome Statute of the ICC, Article 53(3)(b),

³¹⁹ D. Groome, *supra* note 317 at p. 7

³²⁰ *Ibid*

³²¹ *Ibid* at pp. 7-9

example witnesses being located a significant distance from the investigators, the requirement to obtain the consent of the relevant authorities in order to interview those witnesses and the fact that the witnesses may have relocated.³²² There is no doubt that prosecutors will feel under pressure to have persons suspected of heinous crimes brought before the court and no longer be at large to commit further crimes. Once an investigation has been conducted, there will still generally be follow up work to be done once the evidence is considered as a whole in order for a case to be fully prepared for a trial.³²³

The practical problem is however that if proceedings commence whilst the investigation is still only in the early stages, it will be difficult for the accused and their Counsel to fully weigh up and consider the evidence against them in order to determine whether they should be entering a plea agreement. If the accused does not know what the evidence against him is and the strength of that evidence then their Counsel will be unable to make an informed decision in advising them on whether to plead guilty or not. In addition, it is a requirement that the Pre-Trial Chamber must confirm the charges and in doing so they must be satisfied that there is sufficient evidence to believe that the accused person committed the crimes that they are charged with.³²⁴ There is no mechanism in the Rome Statute where the accused person can plead guilty at the confirmation stage or before this stage. The prosecutor will therefore, despite any early negotiations with the defence about a plea agreement, still have to prepare the case to a sufficient standard to ensure that the charges will be confirmed. This is a time consuming task with little merit where there is early indication that the accused person wishes to plead guilty and there will be no trial that the evidence will require to be presented at.

It is of real concern in the plight for securing efficient justice that Article 64(8)(a) of the Rome Statute states that ‘at the commencement of the trial’ the Trial Chamber will afford the accused ‘the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.’³²⁵ Vasiliev has noted that ‘the ICC practice has varied, with some Trial Chambers (erroneously, in my view) soliciting a plea at the first status conference rather than when opening

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ Article 61, Rome Statute of the ICC, in particular Article 61(7)

³²⁵ This concern has been highlighted by S. Vasiliev, Ongwen at the ICC and the Possible Guilty Plea: A Response to Alex Whiting, 15 February 2015, available on the website for the Centre for International Criminal Justice at <http://cicj.org/2015/02/ongwen-at-the-icc-and-the-possible-guilty-plea-a-response-to-alex-whiting/> last accessed 3 January 2016

the trial, an admission can under no circumstances be made prior to the confirmation of charges and committal of the person to trial.³²⁶ Prior to the charges being confirmed, the accused does not have ‘formally defined and judicially certified charges’ and as such cannot plead guilty.³²⁷ This does not however prevent the prosecution and defence engaging in discussions about what the charges should be and what charges the accused person would be willing to plead guilty to. However, the prosecution face a real practical difficulty, where, if the accused can only enter his plea at the commencement of the trial then if that plea is not accepted by the Trial Chamber, the prosecutor is going to have to be in a position to start the trial. As such they will have to have a fully prepared case, just in case. This means, if the accused’s plea is accepted, a lot of wasted work in the OTP.

These matters represents practical difficulties that could make the entering plea agreements at the ICC very difficult. The following section details recommendations for a credible approach to plea bargaining at the ICC which would also eliminate some of the practical difficulties outlined.

6.4.3 Recommendations for Best Practice approach to Plea Agreements at the ICC

Trust is given to the prosecutor in the respect that they must determine what situations to investigate and prosecute in the first instance. That same trust should be instilled in them in deciding the appropriate outcome in conducting plea negotiations. The Prosecutor has the overwhelming responsibility of ensuring, when bringing to trial the crime of genocide, for example, that they prove this crime beyond reasonable doubt and ensure that they are able to prove the ‘specific intent’ for this crime.³²⁸ This is not an easy task and, if, for example, after the trial the accused is convicted of murder instead of genocide, a lot of court time and expense will have been consumed for the same outcome. Deciding what pleas to negotiate is a risk assessment that the Prosecutor must be entrusted to conduct, particularly as there are already safeguards in the Rome Statute which have been discussed that ensure that plea bargaining is monitored by the Trial Chamber.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ R. Pati, *supra*. note 109 at p. 320

Whiting has argued that plea bargaining is a practice that should be welcomed at the ICC. He has recommended that in order to ensure that plea agreements are given the recognition and credibility required by the judiciary it is necessary for the Office of the Prosecutor to implement a policy that will ensure confidence in the process and ‘predictability’.³²⁹ He has very persuasively argued that there should be ‘discretion’ for individual cases but also ‘guidelines’ that apply in all cases.³³⁰ Whiting has proposed that the Policy should include, in sum, the following:

1. Recognition that there are some cases where plea agreements will not be appropriate, for example because the perpetrator is too prominent a figure, blameworthy for their particular conduct or notorious;³³¹
2. That a plea agreement should encapsulate ‘the essential criminality of the accused and is supported by the facts’;³³²
3. That the Office of the prosecutor should determine whether there are any particular charges that they would not drop where there is sufficient evidence to support the charge;³³³
4. That the prosecutor has to make reasonable sentence recommendations with specified justifications that balance an ‘incentive to plead’ whilst maintaining credibility with the Trial Chamber that the sentence is truly reflective of the severity of the conduct;³³⁴
5. That the Prosecutor should demand cooperation from the accused in the absence of any ‘compelling’ reasons for not seeking such cooperation and a significant sentence discount should only be granted in circumstances where the truth is offered;³³⁵
6. That there should be ‘a procedure whereby the agreement is revoked, and the discount reconsidered, if the accused fails to adhere to an agreement to provide truthful information to the Court’;³³⁶

³²⁹ A. Whiting, Encouraging the Acceptance of Guilty Pleas at the ICC, 11 February 2015, Post Conflict Justice website at <http://postconflictjustice.com/encouraging-the-acceptance-of-guilty-pleas-at-the-icc/>

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

7. That there should be ‘a procedure of consulting with the victims and their representatives and other interested parties before reaching an agreement’, though their views would not be ‘binding’ on the prosecutor;³³⁷
8. That the prosecutor should be ‘transparent’ and provide factors that were taken into consideration in reaching a plea agreement and any recommendations arising therefrom;³³⁸

Recommendations one to four are welcome and sensible contributions to a credible plea agreement implementation policy and should be taken on board by policymakers at the ICC. Recommendation number one is in line with the approach taken by the ICTR in the *Kambanda* case where the Trial Chamber felt that nothing short of life Imprisonment would be sufficient for such a prominent figure. This safeguards against the concerns that plea bargaining results in sentences that are not fully reflective of the moral gravity of the conduct. In relation to recommendation number two, the case law of the ICTY and ICTY clearly illustrates that the Trial Chamber were far more comfortable in accepting plea agreements that dropped charges where the accused person was still pleading guilty to the entire factual picture and thereby ensuring that they are minimising any distortion to a historical record. These recommendations are therefore in line with precedent set down by the ad hoc tribunals.

Recommendation number three makes sense in theory however the wording of a policy that would bind the prosecution to never dropping a particular charge where evidence supports it would be difficult and undesirable without any exceptions. The obvious charge that this would apply to is genocide, with genocide being the most serious of crimes and as experience at the ICTY and ICTR has shown, this is the charge that no one wants to plead to. If the prosecutor were to impose a blanket ban on dropping genocide charges, this may be too restrictive to encourage plea agreements. There could however be such a prohibition on dropping genocide charges except in circumstances where there the prosecutor has compelling reasons for doing so, for example. Recommendation four would ensure that the prosecutor fully applies their mind to balancing the need to achieve a sentence that ensures justice is served whilst gives the accused person some kind of incentive to plead.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

Recommendations five and six are more dangerous in that they fail to take into account that the ICC will be dealing with those responsible for the most serious of international crimes. It may be considered optimistic to take the accounts of the accused persons as credible sources, particularly where there is some form of gain for them. This can be linked back to the argument that although a guilty plea may be an expression of remorse on the one hand, on the other it could be nothing more than a mechanism to obtain a more lenient sentence. The ability to revoke an agreement is also of concern in that this could be off putting for those considering entering a plea agreement. One of the benefits of them doing so is that they attain certainty in relation to what they will be convicted of. In addition, it will not be legally permissible for a discount to be revoked, where for example, the accused recants their account after they have served their sentence, like in the case of *Plavšić*. The demand for co-operation for some kind of reward, if implemented in a policy should be treated with extreme caution. This may be seen as putting too much pressure on the innocent to plead if the reward offered for co-operation is significant. It would be safer to leave reference to such matters out of any policy and consider them on a case by case basis in the terms of a plea agreement.

Recommendations seven and eight should be implemented in a plea agreement implementation policy. The views of the victims are important but they should not be determinative. The prosecutor is the person who is legally qualified and does not have the same emotional interest in a case as witnesses and victims. The prosecutor is therefore in a better position to be entrusted to make an informed decision on whether to enter into a plea agreement and what the terms of that plea agreement should be. To ensure both public and judicial confidence in any plea bargaining system and prevent corruption it fundamental that the prosecutor is as transparent in their decision making as possible, with the qualification that they will be unable to divulge information in certain circumstances, for example where the safety of the public or evidence would be compromised.

In addition to the above recommendations it is also recommended that the Rome Statute/ICC Rules of Procedure and Evidence be reformed to allow for a guilty plea to be entered in advance of the Trial stage. The mechanism for this could be a petition to the court for a hearing on a plea agreement and draft charges that have been prepared following discussions between the prosecutor and the defence. This will allow for more efficient justice for victims whilst ensuring the best use is made of resources in the office of the prosecutor. This will also

allow the prosecutor to focus their efforts on cases that are going to be trials where evidence is led.

A consultation process involving prosecutors, defence counsel, the judiciary and legal academics that would involve contributions on what would amount to a credible plea implementation policy would be beneficial in order that views from all involved in the process can be taken into account. To sum up, a well thought out plea agreement implementation policy that would address the concerns against plea bargaining in the international context as far as possible along with some legislative reforms to allow earlier pleas at the ICC would go a long way to achieving the necessary balance between efficiency and justice.

6.5 Summary of Chapter 6

The ICC has to do the best it can with the resources it has and as a result, although plea bargaining is not a perfect solution, the positives of the practice outweigh the negatives and it is a practice that can allow for the balancing of competing interests. The ICC should adopt the practice of plea bargaining provided an appropriate assessment of the evidence and risk, taking into account the time and resource implications is conducted by the Prosecutor and the safeguards outlined in the Rome Statute adhered to. A balance has to be struck between retributive and restorative justice principles in terms of undertaking fact finding missions for victims in pursuit of the truth and the prosecution of criminals in an efficient and effective manner. The aim of the court should be to balance the interests of those involved as well as possible and ensure there are as many correct convictions. A correct balance requires to be struck as it is inevitable that the scale of these mass atrocities mean that it will, in reality, be impossible to prosecute every crime, particularly bearing in mind the selective nature of the Prosecutor's role referred to previously and the maximum number of trials that the ICC can run at any time being estimated at 6. Provided the correct safeguards and policies are imposed to ensure the plea bargaining process at the ICC is given credibility, this is a practice that should be welcomed.

CHAPTER 7

CONCLUSION: PLEA BARGAINING IN INTERNATIONAL CRIMINAL COURTS:

DEALING WITH THE DEVIL . . . A NECESSARY EVIL

It is acknowledged that the practice of plea bargaining is a controversial practice both in national and international criminal law. There are arguments against the practice at the international level which also apply nationally, for example that plea bargaining puts too much pressure on accused persons to plead guilty even where they are innocent, that plea bargaining fails to recognise the gravity of the criminal conduct and that plea bargaining can distort the historical record that international criminal courts aim to achieve. As this thesis has outlined, these arguments against plea bargaining do have credibility however they can be managed by those negotiating plea agreements doing so cautiously. The judiciary monitoring the practice of plea agreements in international criminal courts should ensure that reasonable sentences are still imposed to reflect the conduct but also giving acknowledgement in the form of a reward for the plea.

There is clearly a delicate balance that requires to be struck. The issues are not straightforward and there is no perfect solution. It is also part of the remit of the Trial Chamber to ensure that the historical record remains intact to some extent and to ensure that the prosecutor does not abuse their discretion in negotiating inappropriate plea agreements. In any case, in the international criminal courts examined, plea agreements are not binding on the Trial Chamber and this is a safeguard to protect against the argument that plea bargaining affords too much power to the prosecutor.

Realistically, as national systems have demonstrated, plea bargaining is a practice that can be used in order to achieve efficient justice whilst often enabling victims to see the accused person showing remorse for their actions, whilst sparing them from the trauma of having to give evidence. As many of the judges in the ICTR and ICTY have indicated, guilty pleas can foster reconciliation in communities who have suffered significantly at the hands of the perpetrator.

To date plea bargaining is not a practice that has been used by practitioners at the ICC. The case law of the ICTY and ICTR make clear that there is a place for the practice of plea

bargaining in international criminal law. The practice has been used in these ad hoc tribunals and as a result more victims will have seen justice far more quickly than they would have done if there had to be a lengthy trial process. This has also meant that less victims and witnesses will have had to go through the often dangerous and stressful process of giving evidence. In any plea bargain, national or international, the prosecutor has a decision to make and must balance, often competing interests. It is impossible that one court with limited resources and limited funding can prosecute everyone who is responsible for international crimes where their own states are unwilling or unable to do so. The resources in the OTP of the ICC simply cannot stretch to investigating every situation that potentially falls within the jurisdiction of the ICC. The OTP must, however, make the best of the resources that they have.

The nature of the Prosecutor's role requires them to be selective in what situation and who to prosecute. If all involved in the criminal justice plea bargaining process engage in the practice this will free up resources to ensure more cases are investigated and prosecuted. This will lead to a wider scale historical record of international crimes worldwide. The victims may never been happy with sentences imposed as it is often the case that nothing will compensate for their suffering. However a conviction for serious crimes, such as crimes against humanity at all is better validation to them than the crime against them not being investigated or prosecuted at all, which may happen if the resources in the OTP are used up preparing and conducting lengthy and expensive trials. There is also the risk that must be weighed up of victims going through the traumatic process of reliving the crime in evidence and then the accused person being acquitted. It is a matter of balance and risk assessment.

Plea bargaining in international criminal law is a practice that can achieve the correct balance between efficiency and justice. However, as this thesis has discussed, it is a practice that comes with tensions and controversy, particularly when dealing with crimes as serious as the crimes that fall within the jurisdiction of international criminal courts. The practice of plea bargaining should be implemented at the International Criminal Court provided the safeguards laid down in the Rome Statute of the ICC are adhered to, that the Trial Chamber oversee and monitor the prosecutor's conduct in engaging in plea agreements and that the OTP develop, after wide consultation, a consistent credible policy that they will apply in cases where they seek to enter into a plea agreement with the defence. Plea bargaining is a necessary evil in international criminal courts that should be conducted with caution.

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