

# Plea Bargaining and International Criminal Justice

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## I. INTRODUCTION

Over the last two decades, plea bargaining has spread beyond the countries where it originated—the United States and other common law jurisdictions—and has become a global phenomenon.<sup>1</sup> Plea bargaining is spreading rapidly to civil law countries that previously viewed the practice with skepticism. And it has now arrived at international criminal courts.<sup>2</sup>

While domestic plea bargaining is often limited to non-violent crimes,<sup>3</sup> the international courts allow sentence negotiations for even the most heinous offenses, including genocide and crimes against humanity.<sup>4</sup> Its use remains highly controversial, and debates about plea bargaining in international courts continue in court opinions and academic commentary: is it appropriate to offer

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\* Professor of Law, SMU Dedman School of Law. This article is an adapted version of Plea Bargaining, in INTERNATIONAL CRIMINAL PROCEDURE (Fausto Pocar & Linda Carter eds., 2013). The chapter and article also draw on my previous work in JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS (2009) and my collaboration with Thomas Weigend on Negotiated Justice, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (Göran Sluiter et al. eds., 2013). I thank Linda Carter for inviting me to take part in the Symposium and for her helpful edits on the earlier version of this piece.

1. Jenia Iontcheva Turner, *Plea Bargaining*, in INTERNATIONAL CRIMINAL PROCEDURE 35 (Fausto Pocar & Linda Carter eds., 2013).

2. *Id.*

3. JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 28 (2009) (Civil law countries are more likely to limit plea bargaining to non-violent crimes, although a few states in the United States have also imposed such restrictions).

4. Turner, *supra* note 1, at 35.

sentencing concessions to a defendant who pleads guilty to a heinous crime involving thousands of victims? How can the avoidance of a public trial be reconciled with some of the professed goals of international criminal law, including the goal of creating a more accurate historical record of the atrocities and that of providing victims with a voice in the process? Conversely, given the very limited resources and enforcement powers of international criminal courts, could these courts achieve any of their goals effectively without the use of plea bargaining?<sup>5</sup>

The guilty plea of Biljana Plavšić at the International Criminal Tribunal for the former Yugoslavia (ICTY) illustrates some of the potential pitfalls of plea bargaining in international crimes cases.<sup>6</sup> As co-president of the Serbian Republic in Bosnia and Herzegovina, Plavšić assisted in the campaign of ethnic cleansing against Bosnian Muslims and Croats, which resulted in the killing of more than 50,000 non-Serbs and the expulsion of many more.<sup>7</sup> She was indicted on two counts of genocide and six counts of crimes against humanity.<sup>8</sup> In return for her guilty plea to persecution as a crime against humanity, prosecutors dropped both genocide counts and five of the lesser crimes against humanity counts and recommended a sentence of 15 to 25 years of imprisonment.<sup>9</sup> Yet the Trial Chamber sentenced Plavšić to 11 years, noting that her guilty plea made a significant contribution to uncovering the truth about the crimes and promoting reconciliation in the region.<sup>10</sup> The court's leniency enraged Bosnian Muslims,<sup>11</sup> and their outrage was reignited when, just before her early release for "good behavior," Plavšić publicly renounced her admission of guilt and stated that she had pleaded guilty simply to get a break in her sentence.<sup>12</sup>

Plavšić's case was by no means the only one in which international prosecutors offered to drop serious charges and recommend a more lenient sentence to obtain a defendant's guilty plea.<sup>13</sup> Nor was it the only one in which defendants offered statements of remorse and the court rewarded them with leniency, but their sincerity and effect on reconciliation remained in question.<sup>14</sup> Plavšić's case was also one of several in which the defendant received significant

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5. *Id.* at 214.

6. Turner, *supra* note 1, at 35–36.

7. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 41 (ICTY Feb. 27, 2003) [hereinafter Plavšić, Sentencing Judgement].

8. Turner, *supra* note 1, at 35–36.

9. Plavšić, Sentencing Judgment, *supra* note 7, at ¶5.

10. *Id.* at ¶ 73.

11. NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 74 (2007).

12. Olivera Simic, *Bringing "Justice" Home? Bosnians, War Criminals, and the Interaction Between the Cosmopolitan and the Local*, 12 GERMAN L.J. 1388, 1400 (2011).

13. COMBS, *supra* note 11, at 74–76.

14. *Id.* at 78, 84–85.

sentencing or charging reductions even though he or she did not cooperate with the prosecution in other cases.<sup>15</sup>

Plavšić's guilty plea—and others like it—may help explain why international criminal courts have not fully embraced plea bargaining. Indeed, ICTY judges have on several occasions refused to follow the parties' sentence agreements and in some cases have attempted to place limits on charge bargaining.<sup>16</sup> While judges have recognized the potential of plea bargaining to contribute to truth-seeking and reconciliation (particularly when the defendant cooperates with the prosecution in other cases), they have also remained skeptical of guilty pleas that are rewarded for nothing more than their efficiency.<sup>17</sup>

This skepticism is based in part on the unique features of international criminal justice, especially the horrific nature of the crimes prosecuted and the emphasis on uncovering the truth about these crimes.<sup>18</sup> But the resistance to plea bargaining also relates to the blending of inquisitorial and adversarial approaches at the international courts.<sup>19</sup> The inquisitorial tradition of full and independent judicial inquiry into the facts of the case, which has influenced the procedures of international courts, helps explain why plea bargaining continues to remain controversial in that setting.<sup>20</sup>

This article highlights the different approaches to plea bargaining in civil law/inquisitorial and common law/adversarial systems and how the blending of these traditions has influenced plea bargaining at the international criminal courts. It ends with an overview of the debates concerning plea bargaining in international criminal procedure and some recommendations for making the practice more consistent with the goals of international criminal justice.

## II. PLEA BARGAINING AT THE NATIONAL LEVEL

### A. *Common Law Systems*

Plea bargaining has long been a staple of common law criminal justice systems.<sup>21</sup> In the United States, plea bargaining was practiced as early as the mid-19th century, and today more than 90% of convictions at the state and federal level result from guilty pleas.<sup>22</sup> Australia, Canada, Nigeria, New Zealand, South Africa, and the United Kingdom also use plea bargaining regularly.<sup>23</sup> In the

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15. *Id.* at 74–76, 99, 103–06.

16. *Id.* at 76–77, 81–83; TURNER, *supra* note 3, at 246.

17. COMBS, *supra* note 11, at 77.

18. TURNER, *supra* note 3.

19. *Id.*

20. *Id.*

21. Turner, *supra* note 1.

22. *Id.*

23. *Id.*

typical common law plea bargain, the defendant agrees to plead guilty and perhaps cooperate with the prosecution in other cases in return for reduced charges or the prosecutor's agreement to seek a lower sentence.<sup>24</sup>

Plea bargaining holds two important advantages that help explain its dominance in common law systems and its recent spread to new jurisdictions.<sup>25</sup> First, it conserves resources by allowing the parties to negotiate the outcome of a criminal case and eliminating the need for a full trial.<sup>26</sup> Second, in complex, multi-defendant cases, it helps prosecutors obtain critical insider information about criminal networks.<sup>27</sup> As crime becomes more sophisticated and transnational, and as it taxes more of the criminal justice system's resources, plea bargaining is increasingly seen as a tool for efficient and successful prosecutions.<sup>28</sup>

Despite its rising popularity, plea bargaining remains controversial in the countries where it originated, and commentators continue to call for reform or outright abolition of the practice.<sup>29</sup> Some are concerned that the plea discounts offered as part of bargaining are often so large that they could effectively coerce innocent defendants into pleading guilty.<sup>30</sup> Others argue that the unduly generous concessions of plea bargaining are unfair to victims and undercut the deterrent effect of sanctions.<sup>31</sup> Finally, plea bargains are criticized for interfering with the court's ability to uncover the truth.<sup>32</sup>

To reduce the dangers that a plea bargain may be unfair or factually inaccurate, common law jurisdictions introduced certain procedural safeguards.<sup>33</sup> For instance, in the United States, at the hearing where the defendant tenders a guilty plea, the court conducts an inquiry to ensure that the plea is voluntary, informed, and factually based.<sup>34</sup> If the parties agreed that the prosecutor will merely recommend a sentence, then the court may accept or reject that recommendation.<sup>35</sup> Even when the parties agree on a specific sentence, the court

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Stephen J. Schulhofer, *Plea Bargaining as a Disaster*, 101 YALE L.J. 1979 (1992); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial*, 50 U. CHI. L. REV. 931 (1983).

31. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) (currently known as CALIF. L. REV.); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

32. *E.g.*, Alschuler, *supra* note 31; Schulhofer, *supra* note 30.

33. Turner, *supra* note 1.

34. *Id.*

35. FED. R. CRIM. P. 11(c)(1)(B), (c)(3)(B) (The court must, however, advise the defendant that he would not be able to withdraw his guilty plea if the court rejects the recommendation).

may reject the agreement if it is inconsistent with the interests of justice.<sup>36</sup> In some common law jurisdictions, internal regulations also require prosecutors to consult with victims before entering into plea negotiations.<sup>37</sup>

But these safeguards do not go far enough in addressing the various concerns about plea bargaining.<sup>38</sup> Judges only become involved in the plea bargaining process after the negotiations have ended, by which time the parties have reached an agreement that they are unlikely to want to upset.<sup>39</sup> They may conceal inconvenient details about the nature of the plea negotiations or even present facts about the case that are inaccurate.<sup>40</sup> The court is unlikely to uncover these gaps and inaccuracies because it is almost entirely dependent on the parties for evidence in the case.<sup>41</sup> It is also unlikely to spot inadequate representation because of the limited exposure to defense counsel when the case ends in a guilty plea.<sup>42</sup> And since informed advice by counsel is critical to the defendant's ability to tender a knowing and voluntary guilty plea, the lack of oversight undermines the court's ability to ensure that a guilty plea is genuine and factually justified.<sup>43</sup> Further, judges themselves are usually interested in expediting cases and often hold perfunctory hearings that fail to probe meaningfully into the facts of the case or the voluntariness of the guilty plea.<sup>44</sup>

In the end, a strong case can be made that the procedural safeguards present in common law systems inadequately protect the fairness and accuracy of plea bargains.<sup>45</sup> This helps explain why plea bargaining, despite its prevalence in common law systems, remains deeply controversial.<sup>46</sup>

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36. See, e.g., *id.* at 11(c)(3)(C); see also *In re Morgan*, 506 F.3d 705, 711–12 (9th Cir. 2007); *Virgin Islands v. Walker*, 261 F.3d 370, 375 (3rd Cir. 2001).

37. Code for Crown Prosecutors—Draft for Public Consultation § 10.2 (Jan. 2009), available at [http://www.cps.gov.uk/consultations/Code\\_for\\_Crown\\_Prosecutors\\_%20draft\\_%20for\\_public\\_consultation.pdf](http://www.cps.gov.uk/consultations/Code_for_Crown_Prosecutors_%20draft_%20for_public_consultation.pdf) (on file with *The University of the Pacific Law Review*); U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-16.030 (citing Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256) (stating that United States Attorneys should make reasonable efforts to notify identified victims of, and consider victims' views about, any proposed or contemplated plea negotiations).

38. Turner, *supra* note 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See, e.g., Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1611 (2005); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiation: A Comparative View*, 54 AM. J. COMP. L. 199, 212–23 (2006).

45. Turner, *supra* note 1.

46. *Id.*

B. Civil Law Systems

Until the 1980s, civil law jurisdictions generally regarded plea bargaining as inimical to their traditions of criminal procedure. Plea bargaining was seen as inconsistent with the principle of mandatory prosecution and with the duty of the court to investigate the facts of the case independently.<sup>47</sup> The idea that the parties could resolve the case in an informal and consensual fashion starkly conflicted with the inquisitorial model of detailed judicial inquiry into the substantive truth.<sup>48</sup> From a practical standpoint, the lack of juries and more limited defense rights also made plea bargaining less necessary.<sup>49</sup>

Nonetheless, as civil law countries faced an increasing number of complex criminal cases and expanded defense rights, they also sought ways to conserve resources.<sup>50</sup> Modified forms of plea bargaining have gradually come to be accepted.<sup>51</sup> In Germany, practitioners and judges began informally negotiating cases in the 1980s, and the practice grew for several decades before it was formally authorized by legislation.<sup>52</sup> In other countries, such as Italy, France, Russia, and Spain, the legislature took the initiative and introduced limited forms of plea bargaining as part of broader criminal procedure reforms.<sup>53</sup>

Because of the tension between plea bargaining and the inquisitorial tradition, the type of bargaining introduced in civil law countries has been more restrained.<sup>54</sup> The civil law variant of plea bargaining usually applies only to relatively minor, nonviolent crimes.<sup>55</sup> Sentence reductions as part of a plea bargain are often capped, and concessions other than sentencing reductions, such as charge reductions or detention conditions, are typically prohibited.<sup>56</sup> Like their common law counterparts, civil law systems require that an admission of guilt be voluntary, informed, and factually based.<sup>57</sup> But civil law judges typically have better tools to ensure that this is the case.<sup>58</sup> They are often involved in the negotiations between the parties and can examine the terms of the bargain before

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47. *Id.*

48. See TURNER, *supra* note 3, at 75–76.

49. Turner, *supra* note 1.

50. *Id.*

51. *Id.*

52. *Id.*

53. *E.g.*, *id.* at 73, 142 (discussing Germany and Russia); Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 116 (Eric Luna & Marianne Wade eds., forthcoming 2012); Luca Marafioti, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 81 (Maximo Langer & Peter Tillers eds., 2008).

54. Turner, *supra* note 1.

55. *Id.*

56. Jenia Iontcheva Turner & Thomas Weigend, *Negotiated Justice*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1401 (Goran Sluiter et al. eds, 2013).

57. Turner, *supra* note 1, at 39.

58. *Id.*

they are final.<sup>59</sup> They have access to the entire investigative file in the case and can independently gather additional evidence if they have doubts about the facts underlying a plea agreement.<sup>60</sup> More generally, they have greater authority to oversee plea agreements, including agreements about the charges.<sup>61</sup>

Civil law systems also continue to favor confessions over guilty pleas.<sup>62</sup> In contrast to guilty pleas, confessions are typically more detailed and do not eliminate the trial process entirely.<sup>63</sup> Instead, courts receiving a confession are expected to continue the proceedings and review the evidence supporting the credibility of the confession.<sup>64</sup> This is consistent with the traditional commitment of continental systems to uncovering the precise truth of the case.<sup>65</sup> For the same reason, continental systems place a greater emphasis on ensuring that admissions of guilt rest on a solid factual basis.<sup>66</sup> Some countries even expressly prohibit in their constitutions a conviction based solely on the suspect's confession.<sup>67</sup> In addition, civil law countries provide for broader disclosure of evidence to the defendant before plea negotiations begin, and many require that a defendant consult with counsel before pleading guilty.<sup>68</sup>

In some civil law countries, victims' rights are also considered in the plea bargaining scheme.<sup>69</sup> Victims often take part in plea hearings, may be consulted before a court approves a plea agreement, and in some cases can veto a plea agreement.<sup>70</sup>

Although plea bargaining is being increasingly adopted by civil law jurisdictions, the practice is not yet universal.<sup>71</sup> A number of jurisdictions have opted for simplified trial procedures as an alternative or complement to plea bargaining.<sup>72</sup> Others, such as Japan, encourage confessions tacitly, by regularly rewarding such conduct with more lenient treatment.<sup>73</sup> In short, civil law

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59. *Id.*

60. *Id.*

61. *Id.* at 1404; Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 116, 128 (Erik Luna & Marianne L. Wade eds., 2012); Gwladys Gilliéron, *The Risks of Summary Proceedings, Plea Bargains, and Penal Orders in Producing Wrongful Convictions in the U.S. and Europe*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* 237, 250 (C. Ronald Huff & Martin Killias eds., 2013).

62. Turner, *supra* note 2, at 39.

63. *Id.*

64. Turner & Weigend, *supra* note 56, at 1402.

65. *Id.*

66. Turner, *supra* note 1, at 39.

67. TURNER, *supra* note 3, at 273.

68. Turner & Weigend, *supra* note 56, at 1402; TURNER, *supra* note 3, at 272.

69. Turner, *supra* note 1, at 39.

70. Turner & Weigend, *supra* note 56, at 1404 n. 191.

71. Turner, *supra* note 1, at 40.

72. TURNER, *supra* note 3, at Ch. 4 (discussing abbreviated procedures in China and Japan).

73. TURNER, *supra* note 3, at 171–98; David T. Johnson, *Plea Bargaining in Japan*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT* 140 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002). *Critics Hit*

countries continue to regard plea bargaining with greater skepticism than their common law counterparts.<sup>74</sup> This helps explain the somewhat more restrained form of plea bargaining adopted by international criminal courts, which combine features of both the civil law and common law models.<sup>75</sup>

### III. PLEA BARGAINING AT INTERNATIONAL CRIMINAL COURTS

#### A. *The Introduction of Plea Bargaining*

As plea bargaining began spreading to an increasing number of domestic jurisdictions in the 1990s, it was perhaps not surprising that it ultimately made its way to international criminal courts.<sup>76</sup> All such courts, with the exception of the Extraordinary Chambers in the Courts of Cambodia, provide for the possibility of plea bargaining.<sup>77</sup> But the introduction of plea bargaining was far from predetermined and remains controversial.<sup>78</sup> In fact, three of the courts that allow plea bargaining in their statutes—the International Criminal Court (ICC), the Special Court for Sierra Leone, and the Special Tribunal for Lebanon—have yet to resolve a case through plea bargaining.<sup>79</sup> And the two major international tribunals to use plea bargaining extensively—ICTY and the International Criminal Tribunal for Rwanda (ICTR)—have not accepted a negotiated guilty plea since 2007.<sup>80</sup>

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*Japan's New Plea Bargaining System, Say It Opens Door to False Testimony*, JAPAN TIMES (May 29, 2016), <http://www.japantimes.co.jp/news/2016/05/29/national/crime-legal/critics-hit-japans-new-plea-bargaining-system-say-opens-door-false-testimony/> (on file with *The University of the Pacific Law Review*) (Just this year, Japan adopted a limited version of plea bargaining, which allows prosecutors to reward defendants who provide information against other suspects).

74. Turner, *supra* note 1, at 40.

75. *Id.*

76. Turner, *supra* note 1, at 41.

77. Turner & Weigend, *supra* note 56, at 1395.

78. Turner, *supra* note 1, at 41.

79. *Id.*

80. ICTY Annual Report 2007, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2007\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2007_en.pdf) (on file with *The University of the Pacific Law Review*); ICTY Annual Report 2008, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2008\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2008_en.pdf) (on file with *The University of the Pacific Law Review*); ICTY Annual Report 2009, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2009\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2009_en.pdf) (on file with *The University of the Pacific Law Review*); ICTY Annual Report 2010, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2010\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2010_en.pdf) (on file with *The University of the Pacific Law Review*); ICTY Annual Report 2011, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual\\_report\\_2011\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2011_en.pdf) (on file with *The University of the Pacific Law Review*) (Although the ICTY and ICTR are in the process of completing their cases, this does not fully explain the lack of guilty pleas in the last five years. Since 2007, the ICTY has had 13 defendants who have moved into the pretrial stage and 20 more who were at different trial stages, but none of these defendants has pleaded guilty).



When the ICTY and ICTR were established in the early 1990s, neither their statutes nor their rules mentioned plea bargaining.<sup>81</sup> The drafters of the ICTY Rules of Procedure expressly rejected a proposal to allow offers of immunity to suspects who provide substantial cooperation to the prosecution.<sup>82</sup> Both testimonial immunity and plea bargaining were seen as inappropriate in the context of international criminal prosecution.<sup>83</sup>

Yet, the Statutes and Rules of the ICTY and ICTR did provide for guilty pleas, which was a stepping-stone to the introduction of plea bargaining.<sup>84</sup> The ICTY received its first guilty plea in May 1996, when Dražen Erdemović pled guilty to crimes against humanity for participating in the killing of hundreds of Bosnian Muslims from Srebrenica.<sup>85</sup> His initial guilty plea was apparently not induced by prosecutorial promises of lenient treatment.<sup>86</sup> But because he did not fully comprehend the consequences of his guilty plea, the ICTY Appeals Chamber concluded that the plea was uninformed and therefore invalid.<sup>87</sup> At the same time, in commenting on guilty pleas more broadly, the Appeals Chamber lauded the merits of plea bargaining and concluded that the practice could make a valuable contribution to international criminal justice.<sup>88</sup> Reassured of the acceptability of plea bargaining at the ICTY, Erdemović and the prosecution reached a plea agreement under which Erdemović would plead guilty to the lesser offense of war crimes and the prosecution would recommend a lower sentence to the court.<sup>89</sup> The ICTY found that Erdemović's second guilty plea was sufficiently informed.<sup>90</sup>

Once the ICTY Appeals Chamber displayed its approval of plea bargaining, the practice quickly gained a foothold.<sup>91</sup> In 2000, Stevan Todorović entered a guilty plea that was the product of a negotiated plea agreement.<sup>92</sup> Between 2001

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81. Turner, *supra* note 1, at 41.

82. Judge Antonio Cassese, President of the ICTY, *Statement Made at a Briefing to Members of Diplomatic Missions*, U.N. Doc. IT/29 (Feb. 11, 1994), *reprinted in AN INSIDER'S GUIDE TO THE ICTY* 649, 652 (Virginia Morris & Michael P. Scharf eds., 1995).

83. Turner, *supra* note 1, at 41.

84. ICTY R. P. & EVID., 19, 20, IT/32/REV. 49 (22 May 2013) (stating that “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 original Rule 62, common to the ICTY and ICTR Rules of Procedure, also provided that defendants enter a plea of guilty or not guilty at their initial appearance).

85. Turner, *supra* note 1, at 41–42.

86. COMBS, *supra* note 11, at 60.

87. Turner, *supra* note 1, at 42.

88. *Id.*

89. *Id.*

90. Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, Sentencing Judgement (ICTY Mar. 5, 1998) [hereinafter Erdemović, Sentencing Judgement].

91. Turner, *supra* note 1, at 42.

92. *Id.*

and 2003, thirteen more defendants did the same.<sup>93</sup> As of August 15, 2011, the ICTY convicted sixty-four defendants, twenty of whom pled guilty.<sup>94</sup> The ICTR accepted its first guilty plea from Jean Kambanda in 1998.<sup>95</sup> Between 1998 and August 2011, the tribunal convicted thirty-seven more defendants of international crimes, seven of whom pleaded guilty.<sup>96</sup>

The Rome Statute of the International Criminal Court was signed in 1998, just about the same time that the international criminal tribunals began accepting their first guilty pleas.<sup>97</sup> It provided for “proceedings on admission of guilt,” a term chosen over “guilty pleas” as a compromise between the civil law and common law traditions.<sup>98</sup> Despite the different phrasing, the statute still allows negotiations between the defendant and the prosecution about the disposition of the case.<sup>99</sup> Article 65(5) of the ICC Statute implicitly acknowledges the possibility of such negotiations by noting that “discussions” between the parties about the charges, the admission of guilt, or the sentence will not be binding on the court.<sup>100</sup>

Although the ICC has yet to accept an admission of guilt, it is expecting to receive one in August, when Ahmad al-Faqi al-Mahdi has said he would formally plead guilty to the war crime of “attacking buildings dedicated to religion and historic monuments.”<sup>101</sup> Whether this guilty plea will remain an aberration or prompt a thriving practice of plea bargaining remains to be seen. Some authors have expressed skepticism that bargaining would take hold at the ICC, given the broad authority of the court to reject agreements between the parties.<sup>102</sup> But

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93. *Id.*

94. ICTY, KEY FIGURES OF ICTY CASES (May 20, 2012), available at <http://www.icty.org/sections/TheCases/KeyFigures> (on file with *The University of the Pacific Law Review*) (The number of convicted defendants does not include those whose cases are being appealed).

95. Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, ¶ 3 (Sept. 4, 1998) [hereinafter Kambanda, Judgement and Sentence].

96. See *Status of Cases*, ICTR, <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last visited Aug. 15, 2011) (This number does not include a guilty plea by a former ICTR witness for giving false testimony to the Tribunal. Also, the number of convictions does not include seven convictions that are currently on appeal).

97. Turner, *supra* note 1, at 42.

98. Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHI-KENT J. INT'L & COMP. L. 1, 9–10 (2008).

99. Turner, *supra* note 1, at 42–43.

100. Rome Statute of the International Criminal Court art. 65(5), 17 July 1998, A/CONF.183/9.

101. *Malian Jihadi To Plead Guilty in ICC Cultural Destruction Trial*, THE GUARDIAN (May 24, 2016, 8:15 PM), <http://www.theguardian.com/law/2016/may/24/malian-jihadi-to-plead-guilty-forgiveness-icc-cultural-destruction-trial>.

102. See Turner & Weigend, *supra* note 56, at 1390–91; Sergey Vasiliev, *Ongwen at the ICC and the Possible 'Guilty Plea': A Response to Alex Whiting*, POST-CONFLICT JUSTICE (Feb. 16, 2015), <http://postconflictjustice.com/ongwen-at-the-icc-and-the-possible-guilty-plea-a-response-to-alex-whiting> (on file with *The University of the Pacific Law Review*) (expressing skepticism that a defendant such as Dominic Ongwen is likely to plead guilty, as well as broader concerns about the use of plea bargaining at the ICC).

others have argued that the court is not likely to be effective in accomplishing its goals unless it begins relying on plea bargains to some degree.<sup>103</sup>

### *B. Conditions for Valid Plea Agreements*

At all international criminal courts, a plea agreement typically consists of some variation of the following exchange: the defendant admits guilt and waives various trial rights in exchange for a reduction of the sentence or the charges.<sup>104</sup> The negotiations occur between the parties, typically before trial, and judges are not involved.<sup>105</sup>

The most common agreements concern sentencing, but agreements about the charges have also been reached a number of times at the ICTY and ICTR.<sup>106</sup> Charge bargains have been more controversial because of concerns that they may obscure the true facts of the case and the full extent of the defendant's culpability.<sup>107</sup> In a dissenting opinion, ICTY Judge Schomburg compared charge bargains to “de facto granting partial amnesty/impunity by the Prosecutor” and criticized them as conflicting with the Tribunals’ mission to avoid impunity, to establish the truth, and to promote peace and reconciliation.<sup>108</sup>

The Tribunals’ mild skepticism toward charge bargains is consistent with the civil law approach to this issue.<sup>109</sup> Charge bargains are typically disfavored in civil law systems.<sup>110</sup> They are viewed as inconsistent with the rule of mandatory prosecution that still prevails in many civil law countries, as well as with the court’s duty to establish to truth of the case.<sup>111</sup> Civil law judges usually have the authority to modify the charges brought by prosecutors, which undermines prosecutors’ ability to engage in charge bargains.<sup>112</sup>

Tribunal judges do not have the same power to recharacterize the charges, but they have ample authority to restrain charge bargains in other ways.<sup>113</sup> First,

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103. Regina E. Rauxloh, *Plea Bargaining—A Necessary Tool for the International Criminal Court Prosecutor*, 94 JUDICATURE 178, 184 (2011); Alex Whiting, *Encouraging the Acceptance of Guilty Pleas at the ICC*, POST-CONFLICT JUSTICE (Feb. 11, 2015), available at <http://postconflictjustice.com/encouraging-the-acceptance-of-guilty-pleas-at-the-icc> (on file with *The University of the Pacific Law Review*).

104. See, e.g., Prosecutor v. Blagojević, Case No. IT-02-60-PT, Joint Motion for Consideration of Amended Plea Agreement Between Momir Nikolic and the Office of the Prosecutor 2 (ICTY May 7, 2003); Plavšić, Sentencing Judgement, *supra* note 7, at ¶ 2.

105. Turner, *supra* note 1, at 43.

106. *Id.*

107. *Id.*

108. Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, ¶ 11 (ICTY Mar. 30, 2004); see also *id.* at ¶¶ 6–7.

109. Turner, *supra* note 1, at 43–44.

110. *Id.* at 44.

111. *Id.*

112. E.g., Turner, *supra* note 1, at 105–06.

113. Int’l Criminal Court, Regulations of the Court, U.N. Doc. ICC-BD/01-03-11 Reg. 55 (May 26, 2004) (At the ICC, under the controversial Regulation 55, judges to have the authority to change “the legal

and most obviously, plea agreements—including agreements concerning the charges—are not binding on the court.<sup>114</sup> Second, after the pretrial chamber or judge initially confirms the charges, the prosecutor cannot unilaterally withdraw or alter them without the court's consent.<sup>115</sup> Finally, because judges at the international criminal courts have broad sentencing discretion, they can thwart a charge agreement by imposing a sentence that they believe is more commensurate with the defendant's blameworthiness.<sup>116</sup> For all these reasons, some have argued that charge bargains at the international criminal tribunals are not likely to be effective.<sup>117</sup>

Bargaining at the ICTY and ICTR has also involved concessions other than, on the one hand, guilty pleas and, on the other, reductions of the sentence or charges. A common and well-accepted item of exchange is a commitment by the defendant to cooperate with the prosecution in other proceedings. Such cooperation is expressly envisioned as a mitigating factor by the ICTY and ICTR Rules pertaining to sentencing.<sup>118</sup> Although the prosecution has great influence in ensuring that substantial cooperation will be credited by the court, international courts will assess the value of the cooperation independently and may depart from the prosecutor's recommendations on the issue.<sup>119</sup> This is consistent with the civil law influence on the Tribunals and with the greater responsibility and authority of judges to investigate and determine the facts of the case.<sup>120</sup>

Other concessions that have been exchanged are not specifically authorized by the Tribunals' Statutes or Rules. These include: withdrawal of defense motions,<sup>121</sup> waivers of appeal,<sup>122</sup> dropping certain factual allegations,<sup>123</sup>

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characterization of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 or 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges." This appears to give ICC judges somewhat greater control over charge bargains than Tribunal judges had).

114. ICTY R. P. & EVID. 62*ter*; Int'l Crim. Trib. for Rwanda Rules of Procedure and Evidence (ICTR RPE), R. P. & EVID. 62,62*bis* [hereinafter ICTR].

115. Turner, *supra* note 1, at 44.

116. *Id.*

117. Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentencing Discounts*, 59 VAND. L. REV. 69, 79 (2006).

118. ICTY R. P. & EVID. 101(B)(ii); ICTR R. P. & EVID. 101(B)(ii).

119. Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgement, ¶ 126 (ICTY July 5, 2001); *see also* Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, ¶ 96 (ICTY Mar. 8, 2006) [hereinafter Momir Nikolić, Judgement on Sentencing Appeal].

120. Turner, *supra* note 1, at 44.

121. *E.g.*, Prosecutor v. Todorović, Case No. IT-95-9/1-S, Sentencing Judgement, ¶ 6 (ICTY July 31, 2001) [hereinafter Todorović, Sentencing Judgement].

122. *E.g.*, Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, ¶ 15 (ICTY Dec. 10, 2003) [hereinafter Obrenović, Sentencing Judgement].

123. *E.g.*, Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, ¶ 61 (ICTY Dec. 2, 2003) [hereinafter Momir Nikolić, Sentencing Judgement].

recommendations as to imprisonment location,<sup>124</sup> and promises not to refer a case to national authorities.<sup>125</sup> Courts have not always been able to deliver on some of the prosecutorial promises on that list, which has led to skepticism among defendants about the usefulness and fairness of plea bargaining.<sup>126</sup>

Plea agreements at the Tribunals must be in writing and must be disclosed to the court in a public session. At all three international criminal courts discussed here, agreements are not binding on the court.<sup>127</sup> Instead, the court will review the agreements, to ensure that they are voluntary<sup>128</sup> and fair<sup>129</sup> and to verify that they are consistent with the “interests of justice,” including the interests of victims.<sup>130</sup> Placing the ultimate authority to review and approve the agreement with the court is consistent with both civil and common law approaches to plea bargaining.

To ascertain whether an agreement is consistent with the interests of justice, international criminal courts may call victims to testify at the plea hearing or at the sentencing hearing following the guilty plea. The ICTY and ICTR have not relied on victim testimony when reviewing plea agreements, but the ICC Statute specifically allows the court to involve victims in the proceedings on admission of guilt.<sup>131</sup>

When faced with an agreement that it believes may not be consistent with the interests of justice, an ICC trial chamber has two options. It may refer the case to proceed under the ordinary trial procedure.<sup>132</sup> Alternatively, if it believes 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, [it] may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses. . . .”<sup>133</sup> This “additional evidence” procedure reduces the efficiency of plea bargaining, but it arguably helps protect the interests of the international community and of victims in compiling a detailed and accurate record of the

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124. Prosecutor v. Bisengimana, Case No. ICTR-00-60, Judgement and Sentence, ¶ 187 (ICTY Apr. 13, 2006); Prosecutor v. Nzabirinda, Case No. ICTR-01-77, Judgement and Sentence, ¶ 97 (ICTY Feb. 23, 2007) [hereinafter Nzabirinda, Judgement and Sentence].

125. Nzabirinda, Judgement and Sentence, *supra* note 124, at ¶¶ 42-46; Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Decision on the Prosecution’s Motion to Withdraw the Motion Under Rule 11bis (ICTY May 8, 2007).

126. Nancy Amoury Combs, *Obtaining Guilty Pleas for International Crimes: Prosecutorial Difficulties, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 58–59 (Eric Luna & Marianne Wade eds., 2012).

127. Rome Statute of the International Criminal Court art. 65(5), 17 July 1998, A/CONF.183/9; ICTY R. P. & EVID., 62*ter*; ICTR R. P. & EVID., 62*bis*.

128. Todorović, Sentencing Judgement, *supra* note 121, at ¶ 16.

129. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 49.

130. *E.g.*, Obrenović, Sentencing Judgement, *supra* note 122, at ¶ 19.

131. Rome Statute of the International Criminal Court art. 65(4), 17 July 1998, A/CONF.183/9; *see also id.* art. 68(3) (“Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”).

132. *Id.* at art. 65(4)(b).

133. *Id.* at art. 65(4)(a).

crimes. It also reflects the influence of the civil law approach, which emphasizes the duty of the court to fully investigate and document the facts of the case.

### C. Conditions for Valid Guilty Pleas

In choosing to forego a trial, a defendant waives a number of other important rights—the right to be presumed innocent until guilt is established beyond a reasonable doubt, the right to confront and cross-examine adverse witnesses, the right to compel witnesses to appear on his behalf, and the right to testify or to remain silent at trial. The decision to waive these rights is a momentous one, and the court must ensure that it is made freely and knowingly.

At all international criminal courts, therefore, judges must examine the validity of guilty pleas. At the ICTY and ICTR, a guilty plea must be voluntary, informed, unequivocal, and based on sufficient factual basis to be accepted.<sup>134</sup> At the ICC, the requirements are generally the same, with several notable exceptions discussed later in this article. The inquiry into the defendant's admission of guilt to ensure that it is informed, voluntary, and factually based is consistent with both the civil law and common law approaches to this question. It also supports the Tribunals' goals to provide fair trials and serve as a criminal procedure model for national systems.

ICTY and ICTR case law has elaborated on the meaning of some of the requirements for a valid guilty plea. ICTY and ICTR Rules do not provide a definition of "voluntariness."<sup>135</sup> But in *Prosecutor v. Erdemović*, the Appeals Chamber explained that for a guilty plea to be voluntary, the accused must be "mentally fit to understand the consequences of pleading guilty" and must not be "affected by any threats, inducements or promises."<sup>136</sup> A defendant is deemed to be mentally fit and competent to plead guilty when he is able "to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, i.e. to make his or her defence."<sup>137</sup> Being "merely depressed over being isolated while in detention," for example, is not sufficient to render a defendant incompetent to plead guilty.<sup>138</sup>

In general, the threshold for an involuntary guilty plea cannot be met simply by pointing to ordinary pressures attendant to the criminal process. For example, when an ICTY trial chamber suggested to a defendant that it might reject his

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134. ICTY R. P. & EVID., 62*bis*; ICTR R. P. & EVID., 62(B)(iii).

135. *Id.*

136. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 8 (ICTY Oct. 7, 1997) [hereinafter *Erdemović*, Joint Separate Opinion of McDonald and Vohrah].

137. *Prosecutor v. Stanisić*, Case No. IT-03-69, Decision on Stanisić Defence's Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes, ¶ 9 (ICTY Apr. 27, 2006); *see also Erdemović*, Joint Separate Opinion of McDonald and Vohrah, *supra* note 136, at ¶¶ 10–12.

138. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-A, Judgement, ¶ 62 (Oct. 19, 2000) [hereinafter *Kambanda*, Judgement].

guilty plea to lesser charges because it did not appear to be factually based, this did not render involuntary his subsequent guilty plea to more serious charges.<sup>139</sup> Similarly, a guilty plea was found voluntary even though the defendant was isolated in detention and consulted only with assigned defense counsel, rather than a counsel of his choice, before pleading guilty.<sup>140</sup> The same ruling held that when the defendant pled guilty in the hope that he would avoid life imprisonment, but this was not explicitly stated in the plea agreement, and he was later sentenced to a life term by the court, the guilty plea was still voluntary.<sup>141</sup> Finally, if a defendant affirms in the plea agreement or at the plea hearing that he is pleading guilty of his own free will, he will generally have difficulty later showing that his plea was coerced.<sup>142</sup>

This raises the question whether international criminal courts will consider a guilty plea to be involuntary if it is submitted under the threat of a much more severe sentence upon conviction at trial. In common law systems such as the United States, such a scenario does not render a guilty plea involuntary.<sup>143</sup> Yet in some civil law jurisdictions, such as Germany, threats of a disproportionately harsher sentence upon conviction at trial would invalidate a subsequent admission of guilt.<sup>144</sup>

Although both civil law and common law systems require that guilty pleas be voluntary, their definitions of voluntariness differ somewhat. Common law countries tend to treat defendants as autonomous agents who are able to decide for themselves whether to accept a particular plea bargain, even if the difference between a guilty plea and a conviction after trial is extraordinary. By contrast, civil law countries tend to take a more paternalistic approach and limit the types of bargains that can be offered to defendants. In Italy, France, Russia, and Germany, for example, plea bargains are limited (as a matter of law or practice) to relatively minor crimes carrying a lower sentence.<sup>145</sup> A number of civil law

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139. *Prosecutor v. Babić*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, ¶¶ 8–12 (ICTY July 18, 2005) [hereinafter *Babić*, Judgement on Sentencing Appeal].

140. *Kambanda*, Judgement, *supra* note 139, at ¶¶ 57, 64.

141. *Id.* at ¶ 63.

142. *Babić*, Judgement on Sentencing Appeal, *supra* note 139, at ¶¶ 8–12; *Kambanda*, Judgement, *supra* note 139, at ¶¶ 57, 64.

143. See *Brady v. United States*, 397 U.S. 742 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

144. Bundesgerichtshof [BGH] [Federal Court of Justice] GSSt 1/04, Mar. 3, 2005 (Ger.) (“It is unlawful to pressure the accused into a confession by threatening him with an inappropriately severe sentence or by promising him advantages not provided for by the law, to promise the accused a more lenient sentence in exchange for waiving his right to appeal. . . .”) [hereinafter *BGH*]; BGH 4 StR 84/04, Urteil v. 16.9.2004 (Ger.) (reversing judgment and ordering new trial of defendant who was threatened with pretrial detention if he refused to confess and persisted in filing motions to subpoena witnesses located abroad); BGH StR 411/04, Beschluss v. 12.1.2005 (Ger.) (holding that a proposed plea discount of about 50%, from a sentence of 6–7 years to a sentence of 3 years and 6 months, was unlawful, because it was an unwarranted reward for a confession and might unduly coerce a defendant into confessing); BGH StV 2004, 470 (5 StR 579/03) (Ger.) (holding that a two-thirds discount, from 6 years to 2 years, is unlawful because it may coerce a defendant to plead guilty).

145. *Turner & Weigend*, *supra* note 56, at 1401; *TURNER*, *supra* note 3, at 75.

countries also limit the sentencing discount that can be offered to induce defendants to waive their right to trial.<sup>146</sup> So far, the international tribunals appear to have approached voluntariness along the lines of the common law model, but it is still possible that future international courts, particularly the ICC, will take the approach of civil law jurisdictions and view voluntariness as a more demanding requirement.

One indication that the ICC may take this approach is that it already requires consultation with defense counsel to ensure that admissions of guilt are voluntary.<sup>147</sup> No such requirement exists at the ICTY and ICTR or in common law jurisdictions, where defendants can waive their right to counsel before pleading guilty.<sup>148</sup> Instead, the ICC approach is instead consistent with that of civil law jurisdictions, which limit the ability of defendants to represent themselves in certain cases where self-representation is unlikely to be in the defendants' best interests.<sup>149</sup>

For the guilty plea to be valid, it must also be informed. The ICTY Appeals Chamber has explained that this means that "the accused must understand the nature of the charges against him and the consequences of pleading guilty to them."<sup>150</sup> The ICC statute uses similar language in describing the requirement.<sup>151</sup> As the ICTY has elaborated, the court must ensure that the defendant understands the key elements of the crime to which he is pleading guilty<sup>152</sup> and appreciates the differences between alternative charges.<sup>153</sup> In *Prosecutor v. Erdemović*, the ICTY Appeals Chamber invalidated a guilty plea to crimes against humanity because the defendant had not been adequately informed that a crime against

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146. Turner & Weigend, *supra* note 56, at 1401.

147. Rome Statute of the International Criminal Court art. 65(1)(b), 17 July 1998, A/CONF.183/9 (requiring that an admission of guilt be made "voluntarily . . . after sufficient consultation with defence counsel").

148. *E.g.*, *Iowa v. Tovar*, 541 U.S. 77 (2004); *R v. Hardy*, 79 ALTA. L.R. (2d) 211 (Alta. Q.B., Dec. 14, 1990).

149. Turner & Weigend, *supra* note 56, at 1402.

150. Erdemović, Joint Separate Opinion of McDonald and Vohrah, *supra* note 136, at ¶ 8(b). Although the quote is from a Separate Opinion, at least four judges concurred in this description of the standard for determining whether a guilty plea is informed. Judge Li disagreed with the conclusion that Erdemović's guilty plea was uninformed, but it was not clear whether he disagreed with the legal standard itself. *Prosecutor v. Erdemović*, Case. No. IT-96-22, Separate and Dissenting Opinion of Judge Li (ICTY Oct. 7, 1997).

151. Rome Statute of the International Criminal Court art. 65(1), 17 July 1998, A/CONF.183/9 (" . . . the Trial Chamber shall determine whether: (a) The accused understands the nature and consequences of the admission of guilt").

152. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 12. (The trial chamber "may inquire into the accused's understanding of the elements of the crime or crimes to which he has pled guilty to ensure that his understanding of the requirements of the crime reflects his actual conduct and participation as well as his state of mind or intent when he committed the crime").

153. Erdemović, Joint Separate Opinion of McDonald and Vohrah, *supra* note 136, at ¶ 14 (explaining that defendant must understand "the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other").



humanity is a more serious crime than war crimes (with which he was also charged) and that it carries a more serious punishment.<sup>154</sup>

The court must also ensure that the defendant understands the rights he is waiving by pleading guilty.<sup>155</sup> As noted earlier, these include the right to require the prosecution to prove the charges beyond a reasonable doubt at a public trial, the right to prepare a defense against these charges, the right to be tried without undue delay, the right to confront adverse witnesses and obtain defense witnesses, and the right not to be compelled to testify against oneself.<sup>156</sup> It is now standard practice for plea agreements at the ICTY and ICTR to list the rights that defendants are waiving.

The court must also confirm that the defendant understands that the agreement is not binding on the court, and that the defendant may receive a sentence up to the maximum available at the international criminal courts—life imprisonment. Trial chambers often do admonish defendants of these potential consequences, but have not done so consistently.<sup>157</sup> If a defendant affirms that he understands the charges and the sentencing consequences of the charges, this is likely to be sufficient to show that the guilty plea is informed.<sup>158</sup>

International courts have not addressed the question of whether the defendant must be given access to all evidence material to his defense before a guilty plea. In the United States, the Supreme Court has held that a guilty plea may be informed even when the prosecution did not disclose evidence that could be used to impeach some of its witnesses.<sup>159</sup> But in other common law jurisdictions, defendants receive such information,<sup>160</sup> and in civil law jurisdictions, defendants receive *all* material evidence in the case against them before they have to make a decision whether to admit guilt and waive trial.<sup>161</sup>

International criminal courts have generally required broader pre-plea disclosure by the prosecution, at least of exculpatory evidence and certain other evidence material to the defense. The courts' rules already require the

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154. *Id.* at ¶ 26–27.

155. *Id.* at ¶ 15.

156. These waivers are commonly included in written plea agreements between the prosecution and the defense. *E.g.*, Prosecutor v. Deronjić, Case No. IT-02-61-PT, Plea Agreement, ¶ 13 (ICTY Sept. 29, 2003).

157. Julian A. Cook, III, *Plea Bargaining at The Hague*, 30 YALE J. INT'L L. 473, 501 (2005) (criticizing ICTY plea colloquy procedures as inadequate and arguing that judges ought to ask more questions and provide more information to defendants to ensure that guilty pleas are voluntary and knowing).

158. Kambanda, Judgement, *supra* note 138, at ¶ 72; Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentencing Judgement, ¶ 6-8, 35 (Feb. 5, 1999).

159. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

160. *E.g.*, New Zealand Criminal Disclosure Act 2008, No. 38 § 12; New South Wales Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001, No. 7, §§ 47C-47E; Criminal Procedure and Investigations Act 1996 (Eng.) § 3, *as amended by* Criminal Justice Act 2003 (Eng.); *R v. DPP ex parte Lee* [1999] 2 All ER 737; *R v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (Can. S.C.C.).

161. TURNER, *supra* note 3, at 116, 152.

prosecution to disclose exculpatory evidence “as soon as practicable”<sup>162</sup> and to allow the defense to inspect documents, books, and other tangible objects which are material to its case.<sup>163</sup> At the ICC, Pre-Trial Chambers have gone further and demanded that the prosecution disclose at least the “bulk” and in some cases the “totality” of exculpatory evidence before the charges are confirmed.<sup>164</sup> Although the international courts have not fully adopted the civil law approach of providing all evidence in the investigative file to defendants before they admit guilt, they have adopted relatively rigorous pre-plea disclosure rules, consistent with the goal of uncovering the truth and providing an accurate record of the crimes.

The ICTY and ICTR have also adopted the requirement, imported from common law jurisdictions such as the United Kingdom and Malaysia, that the guilty plea must not be equivocal.<sup>165</sup> As the ICTY Appeals Chamber explained, this means that the guilty plea “must not be accompanied by words amounting to a defense contradicting an admission of criminal responsibility.”<sup>166</sup> In determining whether a plea is equivocal, the court may examine whether the plea was qualified by statements that appear to present a legal defense to the crime.<sup>167</sup> The court may specifically question the defendant as to his intention to raise any defenses, such as duress or insanity.<sup>168</sup> This requirement is consistent with international human rights law and helps protect innocent defendants from pleading guilty.<sup>169</sup>

The guilty plea must also rest on a sufficient factual basis. At the ICTY and ICTR, the court must verify that “there is a sufficient factual basis . . . either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case.”<sup>170</sup> In other words, the court can establish factual basis resting solely on the parties’ agreement. This rule effectively allows the parties to engage in “fact bargaining,” whereby they could agree to a set of

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162. Rome Statute of the International Criminal Court art. 67(2), 17 July 1998, A/CONF.183/9; ICTY R. P. & EVID., 68.

163. Rome Statute of the International Criminal Court art. 77, 17 July 1998, A/CONF.183/9; ICTY R. P. & EVID., 66.

164. See INTERNATIONAL BAR ASSOCIATION, FAIRNESS AT THE INTERNATIONAL CRIMINAL COURT 22 (2011) (discussing cases).

165. Erdemović, Joint Separate Opinion of McDonald and Vohrah, *supra* note 136, at ¶¶ 28–30.

166. *Id.* at ¶ 8 (italics added) (Judge Stephen and Judge Liu also joined this part of the opinion. Judge Cassese filed a Separate Opinion in *Erdemović*. He turned to international law for guidance and similarly concluded that the guilty plea must be voluntary, informed, and unequivocal to be valid. But he noted further that the guilty plea must be supported by facts to be accepted by the court).

167. *Id.* at ¶ 31.

168. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 52; see also Prosecutor v. Banović, Case No. IT-02-65/1-S, Sentencing Judgement, ¶ 17 (ICTY Oct. 28, 2003) [hereinafter Banović, Sentencing Judgement].

169. See Kwiatkowska v. Italy, no. 52868/99, Eur. Ct. H.R. (Nov. 30, 2000); Prosecutor v. Erdemović, Case. No. IT-96-22, Separate and Dissenting Opinion of Judge Cassese, ¶ 11 (ICTY Oct. 7, 1997).

170. ICTY R. P. & EVID., 62*bis*(iv); ICTR R. P. & EVID., 62(B)(iv).

facts different from the real facts of the case. In practice, trial chambers have usually conducted an independent inquiry into the facts and have required that evidence other than the parties' agreement support the guilty plea.<sup>171</sup> Nonetheless, the ICTY and ICTR have recognized that a factual basis inquiry "do[es] not call for the same scrutiny of facts by a Chamber as in a trial situation where the Prosecutor has the usual burden of proof."<sup>172</sup>

At the ICC, the Statute provides that the factual basis for the plea cannot be based simply on an agreement between the parties about the facts. Instead, the court is expected to review the charging documents, the parties' agreement, any materials presented by the prosecutor which supplement the charges and which the accused accepts, and any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.<sup>173</sup> Judges may call on the prosecutor to present additional evidence if they believe "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."<sup>174</sup>

The ICC requirement that admissions of guilt be accompanied by a more complete presentation of the facts appears to be influenced by the civil law approach, which attaches great importance to uncovering the precise truth in criminal cases and creating an authoritative record of events.<sup>175</sup> Although the more probing inquiry may undermine, to some degree, the efficiency of plea bargaining, it advances the court's goal of revealing the truth about massive and systemic international crimes. Given the special significance of transparency and truth-seeking in international crimes cases, the ICC has arguably struck a more appropriate balance in this respect than its predecessor international courts.

#### *D. Sentencing Consequences of Guilty Pleas*

The international criminal courts' rules and statutes make no mention of the sentencing consequences of a guilty plea. But judges have generally accepted that if plea bargaining is to continue, defendants must receive a more lenient sentence in return for admitting their guilt. In most plea-bargained cases, therefore, judges

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171. Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY: Purpose, Effects, and Propriety*, 3 J. INT'L CRIM. JUST. 671 (2005); see also Prosecutor v. Deronjić, Case No. IT-02-61-A, Judgement, ¶¶ 16–19 (ICTY July 20, 2005); Prosecutor v. Mrda, Case No. IT-02-59-S, Sentencing Judgement (ICTY Mar. 31, 2004); Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 52.

172. See e.g., Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-T, ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts Rule 94(B) of the Rules of Procedure and Evidence, ¶ 26 (ICTR Nov. 22, 2001).

173. Rome Statute of the International Criminal Court art. 65(1)(c), 17 July 1998, A/CONF.183/9.

174. *Id.* at art. 65(4).

175. See, e.g., Elisabetta Grande, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 146–47 (John Jackson et al. eds., 2008); Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 167–73 (2003).

followed the parties' agreement and reduced the defendant's sentence accordingly.

Courts have not articulated a consistent justification for the sentence reductions awarded to defendants who plead guilty. At the domestic level, guilty pleas are typically rewarded because of their practical benefits in conserving resources of the criminal justice system. This rationale for crediting guilty pleas is also mentioned at the international level,<sup>176</sup> but is not given as a primary reason for plea-related sentencing reductions.<sup>177</sup> More frequently, guilty pleas are described as deserving of credit because they advance other key goals of international criminal courts: helping to establish the truth,<sup>178</sup> encouraging other perpetrators to come forward and accept responsibility,<sup>179</sup> and contributing to reconciliation in war-torn societies by showing the defendant's remorse and contrition.<sup>180</sup> It should be noted, however, that not all decisions have embraced each of these rationales for guilty pleas. Some courts have held that international courts should not be awarding sentencing reductions merely for efficiency purposes,<sup>181</sup> that a guilty plea is not necessarily an indication of contrition,<sup>182</sup> and that the contribution of guilty pleas to the discovery of the truth is not always positive.<sup>183</sup>

ICTY and ICTR defendants who have pleaded guilty have received, on average, less than a 30% sentencing discount.<sup>184</sup> This is smaller than the typical discount for guilty pleas in several major national legal systems.<sup>185</sup> The

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176. See, e.g., Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgement, ¶ 234 (ICTY Mar. 30, 2004) [hereinafter Deronjić, Sentencing Judgement]. The contribution of guilty pleas to the efficient operation of the courts is credited as cooperation by the defendant, which is explicitly contemplated by the courts' statutes as a mitigating factor. See Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgement, ¶ 84 (ICTY Oct. 17, 2002).

177. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶¶ 67, 151; Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, ¶ 51 (ICTY Feb. 4, 2005) [hereinafter Dragan Nikolić, Judgement on Sentencing Appeal].

178. E.g., Banović, Sentencing Judgement, *supra* note 168, at ¶ 68.

179. E.g., Dragan Nikolić, Judgement on Sentencing Appeal, *supra* note 177, at ¶ 55–56.

180. *Id.*; Deronjić, Sentencing Judgement, *supra* note 176, at ¶ 236; Plavšić, Sentencing Judgement, *supra* note 8, at ¶ 76.

181. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 67.

182. E.g., Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 127 (ICTY Dec. 14, 1999) (In *Kambanda*, the Trial Chamber considered the guilty plea as a mitigating factor, but it also found that Kambanda had “offered no explanation for his voluntary participation in the genocide; nor [had] he expressed contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber, during the pre-sentencing] hearing of 3 September 1998”); Kambanda, Judgement and Sentence, *supra* note 96, at ¶ 51. This was given as one of the reasons why, ultimately, Kambanda was sentenced to life imprisonment (the highest possible sentence), despite his guilty plea. Kambanda, Judgement, *supra* note 138, at ¶ 118.

183. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 60–62.

184. See Barbora Hola, et al., *International Sentencing Facts and Figures*, 9 JICJ 411, 434 (2011).

185. See SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA 5–6 (2007), available at [http://sentencingcouncil.judiciary.gov.uk/docs/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-\\_Revised\\_2007.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-_Revised_2007.pdf) (on file with *The University of the Pacific Law Review*) (England, Italy, and Russia, for example, set a discount of about one-third of either the expected or the maximum sentence or the statutory

differential also varies from defendant to defendant, and it has increased over time.

#### IV. THE DEBATE OVER PLEA BARGAINING AT INTERNATIONAL CRIMINAL COURTS

Plea bargaining remains more controversial and less common at the international level than at the national level. Several reasons account for the skepticism toward plea bargaining in international criminal courts. First, the granting of concessions to defendants accused of international crimes is perceived as unseemly given the heinousness and large scale of the crimes in question. Plea bargaining is seen to dilute the moral message that international courts aim to send—that the international community is outraged and will bring to justice those responsible for the crimes committed. Second, plea bargaining is viewed as interfering with the goal of uncovering the truth about international crimes. Finally, plea bargaining is said to disrespect victims' interests in a public trial and in a sentence proportionate to the defendant's blameworthiness. Advocates of the practice counter that plea bargaining is not inherently at odds with the goals of international criminal justice and, that if properly structured and administered, a limited form of plea bargaining may provide important benefits to international criminal courts.

The merits of the first major objection to plea bargaining—that it is unfit to use in the heinous crimes that international courts handle—depends heavily on the steepness of the plea discount. If negotiations lead to a sentence of a mere few years imprisonment for a crime against humanity or genocide, the system will have failed. A sentence that is disproportionately low would conflict with the retributive goal of imposing on the offender the punishment he deserves and expressing commensurate outrage at his actions.<sup>186</sup> Overly lenient dispositions resulting from plea bargains would also reduce the deterrent effect of international criminal justice, which depends on the swiftness, likelihood, and severity of punishment.<sup>187</sup> International criminal courts already face difficulties on all three scores: they are neither swift nor very successful in apprehending and

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maximum for the charged offense); Nicola Boari & Gianluca Fiorentini, *An Economic Analysis of Plea Bargaining: The Incentives of the Parties in a Mixed Penal System*, 21 INT'L REV. L. & ECON. 213, 216 (2001); UGOLOVNO-PROTSESSUAL'NYI KODEKS ROSSIISKOI FEDERATSII [UPK RF] [Criminal Procedure Code] § 316(7) (Russ.). In the United States, where courts place no limits on plea discounts, discounts are often significantly larger. See, e.g., Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1261 (2008).

186. Prosecutor v. Bralo, Case No. IT-95-1-S, Sentencing Judgement, ¶ 22 (ICTY Dec. 7, 2005) [hereinafter Bralo, Sentencing Judgement]; see also Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, ¶ 185 (ICTY Mar. 24, 2000) ("An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.")

187. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010).

prosecuting suspects, and their baseline sentences are, by many estimates, too low. Reducing these sentences further as part of plea bargaining dilutes a deterrent effect that is already in question.

Plea bargains that result in sentences that are not excessively lenient, however, can at least increase the swiftness and the likelihood of punishment. One way they do so is by allowing prosecutors to obtain convictions in the face of evidentiary difficulties. International prosecutors encounter enormous challenges in gathering evidence. The crimes committed are often systemic, widespread, and complex. Investigations tend to take place in territories plagued by violent conflict or other security risks, and national authorities are often unwilling or unable to help ICC investigators. Witnesses, too, are frequently afraid to testify. Given these difficulties, prosecutors may legitimately prefer a plea bargain resulting in a lower sentence to the risk of an acquittal after trial of a defendant whom they believe to be guilty. Plea bargaining can also provide prosecutors with indispensable, inside knowledge that helps them succeed in other cases against more culpable, high-level offenders.<sup>188</sup>

More broadly, plea bargaining frees up resources that can be used to prosecute a greater number of offenders. Given the high costs, complexity, and length of international trials, this is an important practical consideration. Although efficiency, in and of itself, is not ordinarily viewed as a point of emphasis in international criminal justice,<sup>189</sup> it is a means to achieving the broader goal of punishing and deterring international crimes. The ICTY has expressly recognized this point:

Substantial human and practical benefits flow from a plea of guilty, particularly one tendered at an early stage in the proceedings. Victims and witnesses who have already suffered enormous psychological and physical harm are not required to travel to the Hague to recount their experiences in court, and potentially re-live their trauma. In addition, scarce legal, judicial and financial resources that would otherwise be expended in preparing for and conducting a lengthy and expensive trial may be redeployed in the interests of securing the wider objectives of the Tribunal.<sup>190</sup>

A recent study of the pace of ICTR and ICTY cases shows that cases resolved by guilty pleas take, on average, half as long as cases resolved by

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188. Mark Harmon, *Plea Bargaining: The Uninvited Guest at the International Criminal Tribunal for the Former Yugoslavia*, in *THE LEGAL REGIME OF THE ICC: ESSAYS IN HONOUR OF PROF. I.P. BLISHCHENKO* 163, 171–77 (José Doria et al. eds., 2009).

189. *E.g.*, Dragan Nikolić, *Judgement on Sentencing Appeal*, *supra* note 177, at ¶ 51; Momir Nikolić, *Judgement on Sentencing Appeal*, *supra* note 119, at ¶ 67.

190. Bralo, *Sentencing Judgement*, *supra* note 186, at ¶ 64.

trial.<sup>191</sup> The International Criminal Court has recently been considering ways to expedite its proceedings, and plea bargaining can help accomplish that goal.<sup>192</sup> By freeing up resources to investigate and prosecute more defendants, plea bargaining increases the swiftness and likelihood of punishment. According to a number of studies, the likelihood and immediacy of punishment are in fact more influential deterrent factors than the severity of punishment.<sup>193</sup> And although plea bargaining may result in more lenient, and thus, less proportionate punishments than full trials do, it ensures at least some level of retribution for a great number of persons who would otherwise evade punishment altogether.<sup>194</sup>

A second major objection is that plea bargaining undermines the educative function of international criminal law. International criminal trials are said to serve the important purpose of reinforcing the rule of law. They send the message that atrocities, even when committed by those in power, will not be ignored and will be judged. Because of this emphasis on the rule of law, advocates of international criminal justice often find truth commissions or various civil or informal legal mechanisms of dealing with atrocities to be inadequate.<sup>195</sup> Plea bargaining is similarly seen by some to dilute the moral message that international criminal courts send.

It is true that bargaining does not offer the same educational effect as a trial. Its abbreviated inquiries into the facts and the lack of witness testimonies deprive the national and international communities of a powerful and dramatic reminder of the value of the rule of law. Nonetheless, by producing a conviction, a plea bargain still reinforces the basic notion that the rule of law reaches those most responsible for international crimes, even when they are high political and military leaders. And when formerly powerful leaders admit guilt before the Tribunals, they “send[] a powerful message about the legitimacy” of the tribunals and their functions.<sup>196</sup>

International criminal courts have also stressed the importance of protecting the rights and interests of victims. This emphasis on victims’ interests likely reflects, at least in part, the influence of the civil law approach to criminal justice, in which victims have stronger rights of participation in criminal cases. But it is also influenced by human rights jurisprudence, which emphasizes the right of

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191. Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT’L. L. 79 (2009).

192. See, e.g., Expert Initiative Report on Promoting Effectiveness at the International Criminal Court (May 2014); Sergey Vasiliev, *The Structure and Management of International Criminal Trials*, Guest Lecture, ICC Office of the Prosecutor, Mar. 26, 2015.

193. Paternoster, *supra* note 187, at 821.

194. See COMBS, *supra* note 11, at 129–30.

195. Cf. Momir Nikolić, *Judgement on Sentencing Appeal*, *supra* note 119, at ¶ 67 (“[The Tribunal’s] very *raison d’être* is to have criminal proceedings such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal conduct—not simply a portion thereof.”).

196. Plavšić, *Sentencing Judgement*, *supra* note 7, at ¶ 76.

victims of human rights atrocities to receive full judicial remedies for the wrongs done to them.<sup>197</sup>

Trials at international courts are said to serve survivors of the crimes by helping them and their communities achieve a sense of closure. One author has called them “an enormous national psychodrama, psychotherapy on a nationwide scale.”<sup>198</sup> Trials provide a forum for victims to tell their stories and to have the wrongs done to them formally acknowledged.<sup>199</sup> Against this background, plea bargaining seems an unpalatable alternative from a victim’s perspective—it shortcuts the trial proceedings and the healing function they may provide for victims, and it reduces the punishment imposed on offenders.<sup>200</sup>

But advocates of plea bargaining note that the tension between victims’ interests and plea bargaining is not always so strong. First, international criminal courts can allow victims to participate in plea hearings and express their views on proposed plea bargains. The ICC legal framework already includes some provisions allowing for greater victim participation at the proceedings on admission of guilt.<sup>201</sup> Courts can also encourage the types of guilty pleas that are more likely to be valuable to victims—unequivocal, detailed, and accompanied by genuine and voluntary expressions of remorse.<sup>202</sup> Moreover, at least in the eyes of some victims, avoiding trial testimony may be a benefit. A plea bargain spares these victims the inconvenience of traveling to another country to testify, the concern about their and their family’s safety, and the ordeal of facing the defendant, reliving the trauma they experienced, and possibly having their credibility questioned during cross-examination.<sup>203</sup> Plea bargains also benefit all victims by ensuring a speedier completion of the proceedings and facilitating any compensation claims they may have, and thus allowing them to move forward with their lives.<sup>204</sup>

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197. See Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925 (2008); Sonja Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008).

198. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 471 (1995) (quoting French historian Emmanuel Le Roy Ladurie).

199. *Developments in the Law: The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1970–71 (2001).

200. Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT’L L. 415, 431 (2009).

201. See Nancy Amoury Combs, *Obtaining Guilty Pleas for International Crimes: Prosecutorial Difficulties*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 335–36 (Eric Luna & Marianne Wade eds., 2012).

202. Cf. Plavšić, *Sentencing Judgement*, *supra* note 7, ¶ 77 (citing expert’s opinion that such admissions of guilt are more likely to provide closure for victims); Clark, *supra* note 200, at 433 (“[G]uilty pleas are more likely to promote reconciliation when defendants do not simply express remorse but also demonstrate through their actions that they are genuinely sorry for what they have done, for example, by revealing where the remains of their victims are buried.”); Turner & Weigend, *supra* note 1, at 1411–12.

203. See, e.g., Momir Nikolić, *Sentencing Judgement*, *supra* note 123, at ¶ 150; Kambanda, *Judgement and Sentence*, *supra* note 95, at ¶ 54.

204. See Turner & Weigend, *supra* note 56, at 1412.



In addition to protecting victims' interests, international criminal courts also aim to promote peace and reconciliation in the region where the crimes took place. This is a goal that is unique to criminal trials at the international level and was used to justify the creation of modern international criminal tribunals.<sup>205</sup> By locating individual responsibility for crimes, international criminal trials aim to end accusations targeted at entire groups and thus break a cycle of conflict.<sup>206</sup>

Proponents of plea bargaining argue that guilty pleas can also contribute to this goal of international criminal justice. When defendants plead guilty, they accept individual responsibility for their actions and help reveal the truth in relation to the crimes charged. By helping establish the truth, guilty pleas contribute to the healing and reconciliation process.<sup>207</sup> The expression of remorse that typically accompanies a guilty plea also promotes reconciliation.<sup>208</sup> As a witness commented on the guilty plea of Miroslav Deronjić, "The Bosnian Muslims in the community that I have spoken to, felt relieved because he admitted his guilt. This is a positive thing and can heal the wounds of the community provided that he is punished adequately."<sup>209</sup>

But the effect of guilty pleas on reconciliation is not straightforward. When pleas are accompanied by significant sentencing discounts, they are controversial among victims and often stir further resentment rather than reconciliation.<sup>210</sup> Even when accompanied by statements of remorse, such guilty pleas are often seen as disingenuous and motivated purely by the sentencing reductions. For guilty pleas to have a positive effect on reconciliation, they may have to be accompanied by remorseful actions, not just by mere statements, in order to receive a sizable sentencing discount. Courts may choose to grant such

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205. See, e.g., Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶¶ 58–60, 82.

206. Prosecutor v. Blaškić, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, ¶ 154 (ICTY July 18, 1997).

207. E.g., Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgement, ¶¶ 68–70 (ICTY June 29, 2004); Prosecutor v. Mrđa, Case No. IT-02-59-S, Sentencing Judgement, ¶ 79 (ICTY Mar. 31, 2004); Plavšić, Sentencing Judgement, *supra* note 7, at ¶ 77.

208. Plavšić, Sentencing Judgement, *supra* note 7, at ¶¶ 75–77; Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 72 ("Through the acknowledgment of the crimes committed and the recognition of one's own role in the suffering of others, a guilty plea may be more meaningful and significant than a finding of guilt by a trial chamber to the victims and survivors. . . . [A]n admission of guilt from a person perceived as "the enemy" may serve as an opening for dialogue and reconciliation between different groups. When an admission of guilt is coupled with a sincere expression of remorse, a significant opportunity for reconciliation may be created.")

209. Deronjić, Sentencing Judgement, *supra* note 176, at ¶ 238; see also Obrenović, Sentencing Judgement, *supra* note 122, at ¶ 112 (quoting statement from a Bosnian Muslim from Srebrenica that "the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995"); Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 147 (quoting mayor of Srebrenica as saying, "Only by recognizing and admitting the real and whole truth about the crime of July 1995 and other crimes in BH can trust be rebuilt among the citizens of BH.")

210. Deronjić, Sentencing Judgement, *supra* note 177, at ¶¶ 238–39; Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgement, ¶ 245 (ICTY Dec. 18, 2003) [hereinafter Dragan Nikolić, Sentencing Judgement]; Clark, *supra* note 200, at 431–33.

sentencing reductions only when the defendant has taken reparative steps beyond a guilty plea—by surrendering voluntarily, cooperating with the prosecution in other cases, revealing information beyond that already known to the prosecution, or taking other conciliatory actions toward victims.<sup>211</sup> International courts may also have to conduct more active outreach work in victim communities to explain the justifications for plea bargains.<sup>212</sup>

International criminal courts have also committed to providing fair trials and following procedures that can serve as a model for criminal justice systems around the world. Advocates of plea bargaining argue that the practice is consistent with international human rights law because of the procedural safeguards that international courts have introduced to ensure that a guilty plea is voluntary, informed, and factually based.<sup>213</sup> Critics counter that courts have not sufficiently addressed the problem that guilty pleas may be coerced through excessive sentencing discounts and that defendants do not always receive sufficient information to waive their rights to trial knowingly and intelligently.<sup>214</sup> Defendants may also suffer unfairness when they plead guilty with the expectation of receiving a sentence reduction, but the court refuses to follow the parties' agreement as to the sentence.<sup>215</sup> Since the court is not bound by the agreement, a defendant who pleads guilty is effectively throwing himself at the mercy of the judges. And although defendants receive notice before they plead guilty, that the agreement is not binding on the court, this does not entirely eliminate the underlying fairness concern.

Finally, plea bargaining has a complicated relationship to the goal of establishing an accurate record of international crimes. International criminal tribunals have recognized that guilty pleas contribute to the establishment of the truth. Indeed, this is one of the reasons for the substantial weight that guilty pleas carry in mitigation.<sup>216</sup> When defendants plead guilty, they may reveal inside information that would otherwise not surface during a trial—for example, how a leadership structure worked or why certain crimes were committed. By accepting responsibility, defendants can also help prevent inaccurate revisionist accounts of history.<sup>217</sup> Once political and military leaders admit their guilt openly in court, “[d]enial of the commission of the crime may no longer be an option for those

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211. *Cf.* Clark, *supra* note 200, at 433.

212. *Id.*

213. Human rights jurisprudence generally affirms the legality of plea bargains, as long as the waiver of trial is voluntary, unequivocal, and informed. *Kwiatkowska v. Italy*, no. 52868/99, Eur. Ct. H.R. (Nov. 30, 2000); *Deweert v. Belgium*, no. 6903/75, §§ 50-54, Eur. Ct. H.R. (Feb. 27, 1980) (holding the defendant's waiver of his trial rights involuntary when the prosecutor had threatened the defendant with a heavy fine and with closing down his business if he chose a trial instead of accepting the settlement offered by the prosecution).

214. *See, e.g.*, Cook, *supra* note 157.

215. *Cf.* Rauxloh, *supra* note 103, at 181.

216. *See* Tieger & Shin, *supra* note 171, at 671.

217. *See, e.g.*, Deronjić, Sentencing Judgement, *supra* note 176, at ¶¶ 257–60.

who have convinced themselves that the Tribunal is biased or that its judgements [sic] are based on weak or even false evidence.”<sup>218</sup>

Prosecutors and courts must nonetheless remain aware of the risk that plea bargains could undermine the goal of compiling a precise record by omitting facts and failing to test them rigorously through an adversarial procedure. It is always possible that “[n]either the public, nor the judges themselves [will] come closer to know the truth beyond what is accepted in the plea agreement.”<sup>219</sup> Charge bargains are especially problematic in this respect:

If the Prosecutor makes a plea agreement such that the totality of an individual’s criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of offenses committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record.<sup>220</sup>

As the *Momir Nikolić* Trial Chamber emphasized, it is especially important for international courts to supervise charge bargains and ensure that important facts are not omitted or distorted in the effort to resolve a case consensually.<sup>221</sup> The stricter oversight of charge bargains is consistent with civil law approaches to criminal procedure, and more importantly, with the international criminal courts’ goal to establish the truth and provide an accurate record of the crimes.

In summary, the propriety of plea bargaining at international criminal courts continues to be debated and depends greatly on the form that the practice takes. Certain types of plea bargains may interfere with victims’ interests and with the truth-seeking, retributive, and deterrent goals of the courts. Others may advance these goals, or at the very least avoid conflicting with them. To maximize the value of plea bargains, courts must consider their design carefully.

In this respect, the ICC Statute is an advancement over the ICTY and ICTR Rules on plea bargaining. The ICC Statute emphasizes the importance of gathering ample facts to support an admission of guilt and the duty of judges to review the facts independently. This approach strengthens the historical record that plea bargains produce and enhances the fairness of plea bargaining to defendants and victims. The ICC expressly entrusts judges with the responsibility of ensuring that plea bargains are consistent with the interests of justice and of victims. It also provides for the possibility of victim participation at the proceedings on admission of guilt, and allows them to make their views on

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218. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 70.

219. Dragan Nikolić, Sentencing Judgement, *supra* note 177, at ¶ 122.

220. Momir Nikolić, Sentencing Judgement, *supra* note 123, at ¶ 66.

221. *Id.* at ¶¶ 64–65.

particular plea bargains known. Finally, the ICC provides that an admission of guilt may be tendered only after consultation with defense counsel, thus increasing the likelihood that the admission will be voluntary and informed.

The ICC's approach to plea bargaining therefore has great potential to advance the court's broader goals. As noted earlier, the court is set to receive its first guilty plea later this year from Ahmad al-Faqi al-Mahdi, to the war crime of "attacking buildings dedicated to religion and historic monuments."<sup>222</sup> The defendant is expected to admit openly to his crimes and to express remorse for them. The court's approach to this guilty plea will set an important precedent for the future course of plea bargaining at the ICC.

As the ICC considers the place that plea bargaining can have in its proceedings, it ought to consider other critical questions concerning guilty pleas that have arisen at the international criminal tribunals and in some domestic systems. For example, the ICC may wish to elaborate on the voluntariness standard and furnish examples of the kinds of pressure that may render a guilty plea involuntary. It is important to resolve whether threats of substantially greater punishment or promises of extraordinary lenient sentences might render guilty pleas involuntary. If the answer is yes, then the ICC ought to take steps to prevent such involuntary pleas (for example, by setting a fixed ceiling on plea discounts and by strictly supervising charge bargains).

It would also be helpful for the ICC to apply a presumption that defendants have to accept responsibility for their actions in order to receive a sentencing reduction. Guilty pleas should be unequivocal to be valid, as the Rules of the ICTY and ICTR provide. In addition, before awarding any significant sentencing discounts, ICC judges may require evidence of remorse that goes beyond mere statements and includes actions that suggest contrition. Such a requirement can help ensure that guilty pleas, even when accompanied by significant sentencing discounts, still contribute to reconciliation in the region affected by the crimes in question.

Finally, judges ought to actively use the tools provided by the ICC Statute and call for additional presentation of evidence when reviewing admissions of guilt. This practice would enhance the contribution of admissions of guilt to the discovery of the truth and the presentation of an accurate record, which remains a central goal of international criminal courts. Considering approaches such as these should encourage policymakers to rethink the role of plea bargaining in international criminal law and design procedures that are fair, efficient, and consistent with the goals of international criminal justice.

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222. *Malian Jihadi To Plead Guilty in ICC Cultural Destruction Trial*, THE GUARDIAN (May 24, 2016, 8:15 PM), <http://www.theguardian.com/law/2016/may/24/malian-jihadi-to-plead-guilty-forgiveness-icc-cultural-destruction-trial>.