REVISITING THE USE OF PLEA BARGAINING IN INTERNATIONAL CRIMINAL TRIALS*

Abstract
This article seeks to examine the Concept of plea bargaining and its use in international criminal trials before international criminal courts and tribunals. The question sought to be answered by the author is whether the use of plea bargaining in international criminal trials is not at variance with the primary goal, mission and mandate of International criminal courts and tribunals. The primary goal, mission and mandate of international criminal courts and tribunal is to try and punish those responsible for perpetrating mass atrocity crimes without exception. The article found that the ICTY handed down several lenient sentences based on plea bargain agreements. It also found that the ICTR did same though in the case of the ICTR, the plea agreements did not lead to lenient sentences. The paper further found that the ICC has equally convicted one person based on plea bargaining. The article argues that the crimes that fall within the jurisdiction of these tribunals and court are serious crimes and heinous in nature and the use of plea bargaining in the trials of perpetrators violates the duty of the courts and tribunals to try and punish perpetrators and issue proportionate sentences for the crimes. The researcher adopted the doctrinal method. The article is divided into seven sections. Section 1 is the introduction. Section two provides explanation for the concept of plea bargaining. Section three deals with typologies of plea bargaining. Section four is on crimes that fall within the jurisdiction of these tribunals and courts. Section five focuses on the introduction and use of plea bargaining in International criminal trials. Section six highlights the effect of the use of plea bargaining in international criminal trials. The paper concludes in section seven by recommending the abolition of the use of plea bargaining in international criminal trials.

Keywords: Necessity, Revisiting, Plea Bargaining, International Criminal Trials

1. Introduction

The core or primary mandate of international criminal tribunals and courts is to try and punish all those responsible for the perpetration of mass atrocity crimes such as war crimes, genocide, crimes against humanity and crime of Aggression without exception. In other words, the sole purpose for creating these courts whether *ad hoc* or permanent is to bring perpetrators of mass atrocity crimes to account for their deeds. At the end of such trials, it is expected that the sentences issued must be proportionate to the crime committed. That is, the punishment must take cognizance of the moral gravity of the crime. The courts are created to end the culture of impunity where some perpetrators escape liability for their actions owing to the refusal of states to prosecute them domestically. The International Criminal Tribunal for Yugoslavia (ICTY) was the first to be established in 1990 following the conflict in the Balkans. This was followed by the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994. In 1998, the International Criminal Court (ICC) was established. The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were *ad hoc* International Criminal Tribunals established through resolutions of the United Nations Security Council. The ICC was established by a treaty. Originally, when the ICTY was established in 1990, plea bargaining was seen as incompatible with the purpose, mission and mandate of International War Crime Tribunals and as such no provision was made in its statutes or Rules of Procedure and Evidence(RPE). But sometimes in 1997, the Rules of Procedure and Evidence (RPE) of the ICTY was amended to include the use of plea bargaining and from there it found its way into the Rules of Procedure and evidence of the ICTR and the statute International Criminal Court (ICC).

The thrust of this paper is to examine the concept of plea bargaining and its use in International Criminal trials before international criminal Tribunals and courts. The paper argues that the use of plea bargaining in international criminal trials is at variance with the primary goal, mandate, mission and purpose for setting up these courts and therefore should be abolished.

2. The Concept and Evolution of Plea Bargaining

Conventionally under the common law adversarial model of criminal Justice, an independent prosecutor is saddled with the duty to prove an accused person guilty of the crime for which the person is being prosecuted. Until evidence showing that the accused committed the crime is led and the accused person is proven guilty following trial, such person is considered to be innocent. But if an accused person is found guilty, he or she is sentenced in accordance with prescribed sentencing guidelines. Modern adversarial criminal justice systems have however, become dependent on the use of some form of plea bargaining in other to carry out their functions.[1] Plea bargaining has long been a staple of common law criminal justice systems.[2] 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.[3] According to vogel, it was in the lower court of

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[1] RL Lippke, The Ethics of plea bargaining, (oxford university press 2011) P. 1
[2] JI Turner 'plea bargaining' in Fausto pocar and linda Carter (eds), *International criminal procedure*, 2013, P. 35
[3] *Ibid*

Boston USA that plea bargaining began to emerge during the 1830s and 1840s, where it was generally concentrated on offences against property and security of the person.[4]

Historically plea agreements were frowned upon in the English and Northern American common law systems [5]and courtroom trials regarded as 'the safest test of Justice'[6] However as far back as 1968, Alschular has averred that 90 percent of criminal conviction in the US were being achieved through guilty pleas as opposed to convictions after trial.[7] A survey conducted in 1992 of the 75 most populated counties in the US revealed that 92% of all convictions in state courts were a consequence of guilty pleas.[8] In Scotland, the crown office and Procurator Fiscal service (COPFS), the prosecuting authority, in the year 2014-2015, reported that out of a total of 98, 742 cases disposed of in court, 88, 788 (just under 90%) were guilty plea where no evidence was led in court.[9] 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.[10] Plea bargaining is spreading rapidly to civil law countries that previously viewed the practice with skepticism and it has now arrived at the international criminal court.[11]

The term plea bargaining like many other legal concepts is one which attracts different meanings. Anna Petrig[12] asserts that providing an accurate and comprehensive definition of plea-bargaining is virtually an impossible task given its multitudinous forms of appearance. The learned author posit that the practice most commonly consists of a negotiation between the accused and prosecution – without the participation of a judge competent to decide the case on its merits – resulting in a plea agreement.[13] The accused either concedes certain facts or admits guilt thus waiving the possibility of being acquitted. The accused also gives up the benefit of having the state bear the burden of proof to establish the accused's guilt at trial. In return, the prosecutor may reduce or modify the charges (charge bargaining), the sentence (sentence bargaining, or both.[14] Plea bargaining is a system of an accused pleading guilty to the charges of an indictment usually following negotiation between the prosecution and the defense as to the charges and in some circumstances, the sentence.[15] It is the practice of negotiating an agreement between the prosecution and the defence whereby the defendant pleads guilty to a lesser offence or (in the case of multiple offences) to one or more of the offences charged in exchange for a more lenient sentencing, recommendations, a specific sentence, or a dismissal of other charges.[16] Plea bargaining refers to the practice of resolving criminal charges against a criminal defendant through negotiations and by agreement between the prosecutor and a suspect or an accused.[17] The eventual product of plea negotiations is the settlement of the criminal case through the admission of guilt in the form of a guilty plea. Plea bargaining with a suspect may occur at the pre-indictment stage or with an accused during the post-indictment stage.[18]

The use of guilty plea is more typical of common law systems where, amongst other functions, it is intended to facilitate a more efficient administration of justice, although civil law systems may contain rules relating to confessions given before or during the trial process.[19] Broadly speaking, there are two types of legal systems, common law and civil law regimes. Countries that utilize common law, such as the UK, USA, Canada, Australia and New Zealand, apply the adversarial system. Under this, courts do not seek the truth in the sense of actively mounting a general investigation, but only decide if the evidence that the defence and prosecution lawyers produce is sufficient to prove beyond a reasonable doubt that the defendant is guilty. They are ideally neutral umpires holding the ring between rival advocates.[20] These countries adopt and or employ plea bargaining as a way to get through their large case loads. In contrast, Civil law countries, such as France

[4] M Vogel, *Coercion to Compromise: Plea Bargaining, the Courts and the Marking of Political Authority,* (oxford: oxford university press 2007) P. 93

[5] AW Alschuler, 'The prosecutor's Role in Plea bargaining', *The university of Chicago law Review*, (1968) vol. 36, No. 11 P. 51 citing for example, *Commonwealth v Battis*, 1 Mass 95 (1804); *United States v Dixen*, 1 D.C (1 Crunch) 414 (1807)

[6]*Ibid* citing *wright v Rindskopk*, (1817) 43 WIS. 344 at P. 357.

[7] *Ibid* citing D. Newman, Conviction: The Determination of circuit or innocence without trial (1966) at P. 3.

[8] *Ibid*

[9] DD Guidorizzi, 'Should we really ban plea bargaining? The core concern of plea bargaining critics' (1998) 47 *Emory Law Journal*. P. 753, quoting Bureau of Justice statistics, Felony Defendants in large US counties, 1992 at P. 29

[10] *Ibid*

[11]*Ibid*

[12]A Petrig, 'Negotiated Justice and the goals of International Council Tribunal with a focus on the plea –bargaining practice of the ICTY and the legal Framework of the ICC', 8 *Chi-Kent. Journal of International and Comparative* law. P.4

[13] *Ibid*

[14]*Ibid* P.5

[15]S Williams, 'The completion strategy of the ICTY and the ICTR' in Micheal Bolander(ed), *International Criminal Justice, A critical analysis of institutions and procedures* (Cameron May 2011) P. 217

[16] Plea bargaining, Definition, Types, History and facts. Available at http://www.britannica.com. Accessed 26/3/2023

[17] M Harmon 'Plea Bargaining: The uninvited Guest at the International Criminal Tribunal for the former Yugoslavia' in Jose Doria *et al* (eds), *The legal regime of the ICC: Essays in Honour of Prof. I. P. Blishchenko*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, P. 163

[18]*Ibid*

[19] H Bosly, Admission of Guilt before the ICC and in Continental Systems' (2004) 2 *Journal of International Criminal Justice P. 1040*

[20] A Cassese, *International criminal law,* oxford; oxford university press, (2003) P. 373, see also N. A. Combs, 'Copping a Plea to Genocide: the plea bargain to international crimes, *university of pennsylvannia Law Review*, P. 151

and Italy, use the inquisitorial system. In this system, it is an official's task to actively collect the evidence that goes towards establishing the guilt or innocence of the accused. In this instance, it is the courts that play an active role in telling the truth.[21] In common law jurisdictions, particularly in the United States, where the practice of plea bargaining as a manner of resolving cases is an essential component of the criminal justice system, the practice of plea bargaining is a judicially sanctioned practice.[22] In common law jurisdiction, the role of judges in the search for the truth tends to be passive, whereas the role of judges in countries that follow the civil inquisitorial model of justice is considerably more active with judges routinely questioning witnesses and as required, seeking additional evidence and requesting the attendance of additional witnesses.[23] A defendant's admission of guilt in civil law jurisdictions is not determinative on the issue of criminal culpability but merely part of the evidence that will be considered by the court in its ultimate determination of the case.[24] Even with the admission of guilt, the prosecution is still obliged to present its case to the court and the court may absolve an accused of criminal responsibility notwithstanding his/her admission of guilt.[25]

International criminal tribunals combine elements of both legal traditions in trials. It is a hybrid of both systems although the structure of trials is heavily skewed towards the adversarial model than the civil law inquisitorial tradition. The preference of the tribunals towards the adversarial model is understandable. 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 principles of mandatory prosecution and with the duty of the court to investigate the facts of the case independently.[26] 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.[27] Because of the tension between plea bargaining and the inquisitorial tradition, the type of bargaining introduced in civil law countries has been more restrained.[28]

3. Typologies of Plea Bargaining

Basically, there are three types of plea bargaining. The various types involve sentence reduction but the reductions are achieved in very different ways.

Charge Bargaining

Charge bargaining involves the defendant pleading guilty to a lesser offence than the original charge or than the most serious of the charges.[29] In charge bargaining the accused person's representative will negotiate with the prosecutor and an agreement will be reached that the accused person will plead guilty to either a less serious charge or a reduced number of charges. The accused person by pleading guilty, forgoes his/her right to trial and the right to have the case against him/her proven in exchange for the hope of a lesser sentence than the accused person would have had imposed for a more serious charge or for all charges against him or her.[30] For example, the prosecutor might forgo a murder charge in exchange for a plea of guilty to manslaughter. Charge bargaining commonly takes two forms. The first is where the defendant is charged with two or more crimes. In this case, the persecutor may drop one or more of the charges in return for a guilty plea for the remaining. The second situation is where the defendant has been charged with a serious offence. In this case prosecution might drop the charged in exchange for a guilty plea to a less serious offence.[31]

Fact bargaining

Fact bargaining is the least common type of plea negotiation. It involves the defendant changing his or her plea from not guilty to guilty on the reliance that the prosecution will present facts of the case in a less incriminating light. This is advantageous to the prosecutors as they obtain guilty plea without having to take the risk of a full trial. Presumably, the defendant would also benefit from a reduced sentence in exchange for the guilty pleas. The defendant will also benefit from this kind of a bargaining if they are actually guilty of a serious crime.[32]

Sentence bargaining

Sentence bargaining involves the parties agreeing to a particular sentence in exchange for a guilty plea. The defendant might be able to avoid a more severe punishment by pleading guilty with a sentence already agreed to.[33] In this case, the

[21] *Ibid*. P. 373, see also, S. Zappala, *Human Rights in International Criminal Proceedings*, oxford; oxford university press (2003) P. 15
[22] The United States Supreme Court recognized the legitimacy of plea bargaining in the case of *Santobello v. New York*, 404 U.S. 257 (1971)
[23] M Harmon, (n 17)
[24] *Ibid*
[25] *Ibid*
[26] JI Tuner, (n2)
[27] *Ibid*
[28] *Ibid*
[29] M Schwartzbach, 'what are the different kinds of plea bargaining' Available at https://www.nolo.com accessed 2/1/2023
[30] N Karens 'Plea Bargaining in international criminal courts: Dealing with the Devil' unp. LLM Dissertation, University of Glasgow, 2016, P. 12
[31] S Pal, 'Issues and controversies surrounding the use of plea bargaining in international criminal Tribunals' unp. PhD Thesis, University of Central Lancashire, 2013, P. 55
[32] *Ibid*
[33] Stahl & PC Hidir, 'Three common types of plea bargaining' Available at <https://www.stahl.law.com accessed 2/1/2023.

defendant pleads in exchange for the prosecutor's stipulation that certain facts led to the conviction. The omitted facts would have increased the sentence because of the sentencing guidelines.[34]

4. Crimes that falls within the jurisdiction of International Criminal courts and Tribunals

International criminal justice provides an accountability mechanism for the crimes of the most serious concern to the international community.[35] These crimes include War Crimes, Genocide, Crimes against Humanity and the crime of Aggression. The legal instruments of international criminal courts and tribunals lay down the subject –matter jurisdiction over these core international crimes.[36]

War Crimes

The inspiration to protect humanity from the scourge of war dates back to the ancient times. However, it was not until the nineteenth century that the International Community undertook considerable efforts to make war more humane in relation to the warring parties and civilian population in the aftermath of the battle of *solferino* fought between the Austrian and French – Sardinian armies in 1859.[37] Violations of the laws and customs of war take their roots in International humanitarian law that declares that certain behaviour in the course of an armed conflict, whether international or non – international are absolutely impermissible, such as killing of civilians, outrages upon personal dignity, inhuman treatments etc.[38] War crimes are serious violations of customary or treaty rules belonging to the corpus of International Humanitarian law of armed conflict (IHL).[39] A war crime is a serious violation of the laws and customs applicable in armed conflict (also known as international Humanitarian Law) which gives rise to individual criminal responsibility under international law.[40]

The Appeal chamber of the ICTY stated in *Prosecutor v. Dusko Tadic*[41] that: (1) War crimes must consist of 'a serious infringement' of an International rule, that is to say, it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim; (ii) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; and (iii) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. War Crimes are serious violations of the International Humanitarian law of armed conflict- a vast body of substantive rules comprising what are traditionally called the law of 'The Hague' and the law of Geneva.[42] The traditional rules and customs of war are concerned only with armed conflict between states.[43] They are found in the four Geneva Convention and the Additional protocol 1 which deals with International armed conflicts.

However, common Article 3 to the Geneva Conventions prohibits certain serious violations of Human Rights and Human dignity in armed conflicts not of an international character. The 1977 Additional protocol II to the Geneva Conventions amplifies and strengthens common Article 3 for the protection of victims of non – international armed conflicts. Thus, the purport of common Article 3 and Additional protocol II is to extend the principles applicable in international wars to non – international armed conflicts.[44] However, the ICC statute contains the first and only comprehensive codification of war crimes as at today.[45] The statute in an elaborate fashion, tries to capture all Acts and Omissions characterized as war crimes in contemporary international law.

Genocide

Genocide has been described as the ultimate crime.[46] Genocide is generally considered one of the worst moral crimes a Government (meaning any ruling authority, including that of a guerilla group, a quasi-state, a soviet, a terrorist organization or an occupation authority) can commit against its citizens or those it controls.[47] Being as old as humanity, the crime of genocide was not called its proper name until 1944. It was often termed 'Mass Murder'[48] The term 'genocide' was coined by Raphael Lemkin, a polish Jewish lawyer in his famous book 'Axis Rule in occupied Europe' in 1944.[49] The term purposefully invented by the author – succinctly succeeded to connote something evil in its scope. The word derives from

[34]S Gill 'Concept of plea bargaining under criminal code procedure' Avaliable at <https://www.legalserviceindia.com, accessed 2/1/2023
[35]I Marchuk, *The fundamental concept of crime in International Criminal Law, A comparative law Analysis,* Springer Heidelberg New York Dordrecht London, 2014, P. 70.
[36]Articles 2-5, ICTY Statute, Articles 2-4, ICTR Statute, Articles 2-4 SCSL Statute and Article 5, ICC Statute.
[37] I Marchuk, (n 35) P.72
[38] *Ibid*
[39] A Cassese, *International Criminal Law*, 2nd edn. (oxford university press, 2008) P. 82
[40] R Cryer *et al*, *An introduction to International Criminal Law and procedure*, 2nd edn (Cambridge university press, 2011) P. 267
[41] *Prosecutor v. Dusko Tadic* (Interlocutory Appeal), IT – 94 – 1 – AR72 OF 2/10/95
[42]A Cassese, (n39) P. 82
[43]M O Unegbu, *From Nuremberg Charter to Rome Statute: International Humanitarian Law*, (Snaap Press Nig. Ltd, Enugu, 2005) P. 191
[44]*Ibid*
[45]Article 8 (2) of the ICC Statute
[46]P Akhavan, 'Enforcement of the Genocide Convention: A challenge to civilization' (1995) *8 Harvard Human Rights Journals,* P. 229.
[47]See RJ Rummel, "Genocide" Available at http://www.lawac.edu/pwerhills/Genocide, ENCY. HTM, Accessed 4/1/2023
[48]I Marchuk, (n 35) P. 87
[49]Lemkin, (2005) (originally published in 1944), P. 79

Greek '*genos*' meaning (race or tribe) and Latin '*cide*' meaning (to kill) and literally means 'killing of a race'.[50] Lemkin defines the crime of genocide as 'the destruction of a nation or of an ethnic group' that entails the existence of 'a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves'[51]

The United Nations General Assembly on December 9, 1948 adopted the convention on the prevention and punishment of the crime of genocide, which entered into force on January 12, 1951. The principal propelling cause that compelled the convention was the extermination of millions of Jews and members of other national ethnic and religious groups during the Nazi holocaust.[52] The convention defines genocide as involving intent to destroy in whole or in part, a national, ethnical, racial or religious groups, such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. The convention provides that persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.[53] The convention classifies genocide as a crime under international law irrespective of whether it is committed in time of war or in time of peace and the contracting parties undertake to prevent and punish.[54] The convention is probably the most important of all convention.[55]

Crimes against Humanity

The historical origin of crimes against humanity trace back to world war I.[56] The mass killings of Armenians committed with the instigation and support of the Young Turk Government were widely condemned by the Allied powers as 'Crimes against civilization and humanity' in the 1919 Report of the commission on the responsibilities of the Authors of war and on the Enforcement of penalties for the violations of the laws and customs of war.[57] A crime against humanity is one of several specific offences – such as murder, extermination, deportation, or rape committed as part of a widespread or systematic attack on a civilian population and at least one of the relevant actors involved in the commission of the crime must know that the offence forms part of such an attack.[58] It is these circumstances and knowledge which elevate an otherwise 'ordinary' offence to the level of an international crime.[59] The concept of crimes against humanity was first articulated as an international offence in Article 6 (c) of the charter of the Nuremberg Tribunal in 1945.[60] The provision states as follows:

> Crimes against humanity namely: murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with any other crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Under general international law, crimes against humanity cover action that share a set of common features. First, they are particularly odious offences in that they constitute a series of attack on human dignity or a grave humiliation or degradation of one or more persons.[61] That is why many concepts underlying this category of crimes derive from or overlap with those of fundamental rights.[62] Indeed, while international criminal law concerning war crimes largely derives from or is closely associated with International Humanitarian Law, International Criminal Law concerning Crimes against Humanity is to a large extent founded upon International Human Rights law. They constitute inhuman acts of extra – ordinary magnitude and savagery.[63]

The Crime of Aggression

Aggression was first considered as an International Crime of individuals in 1945 when the London Agreement was adopted. The first international trial for aggression under the name of 'crimes against peace' was before the Nuremberg Military Tribunal following the Second World War[64] In December 1974, the United Nation General Assembly adopted a resolution defining the crime of Aggression. The resolution states that 'Aggression is the use of armed force by a state against the

[50]I Marchuk, (n 35) P. 87
[51]Lemkin, (n.49), P. 79
[52]Article II of the Genocide Convention
[53]Article IV of the Genocide Convention
[54]Article I of the Genocide Convention
[55]GA Res 260 A, 3 UNGAOR, UN DOC A/810 (1948)
[56] CM Bassiouni, *Crimes Against Humanity in International Criminal law*, 2nd edn, Kluwer law international, The Hague, 1999
[57] I Marchuk, (n 35), P. 82
[58]G Boas, *etal*, *International Criminal law practitioner library series, volume II*, Cambridge university press, 2009, P16
[59]*Ibid*
[60]Article 6 (c) of the charter of the Nuremberg Tribunal
[61]A Cassese, (n 39) P. 98
[62]Like Right to life, to the dignity of Human Person, to liberty, to fair hearing etc
[63]U.U. Chukwumaeze, 'International Criminal Justice: Recent Developments in International Humanitarian Law' Unpubl. PhD Thesis, Abia State University Uturu, (2009), P. 365.
[64]Article 6 (a) of the IMT charter

sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the charter of the United Nations.[65]

It has been pointed out that the 1974 definition was intended to serve as a guide for the Security Council in determining acts of aggression and therefore did not precisely elaborate under what particular circumstances an individual would incur personal liability as a result. It did however strongly suggest that the criminality of aggression is to be sought at the level of state action.[66] In 2010, the Assembly of state parties to the Rome Statute of the ICC finally agreed on a definition of the crime of aggression after years of deliberations.[67] The Kampala Amendments to the Rome Statute defined the crime of aggression thus:

> Crimes of Aggression' for the purpose of the statute, means the planning, preparation, initiation or execution, by a person in position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale constitutes a manifest violation of the charter of the United Nations.[68]

By this amendment, the ICC now has jurisdiction for the crime of aggression over member states that have ratified or accepted the amendment. It will however not have jurisdiction over ICC member states or their nationals that have not ratified or accepted the amendment in the case of self-referral or *Proprio motu* investigation.[69]

5. The Introduction and use of plea bargaining in International Criminal Trials

At the inception of the ICTY, the concept of plea bargaining as a method of case resolution was rejected as being inimical to the practice of international criminal law, and regulations relating to such agreements were not included in the Tribunal's Rules of procedure and evidence.[70] Invariably, it was not necessary and drafters of the RPE did not see any reason for including it in the RPE. No wonder Cassese, the then President of the ICTY in his first annual report to the UN about the work of the ICTY stated that: '… the granting of immunity and the practice of plea bargaining find no place in the rules.'[71] Plea bargaining was declared inconsistent with the Tribunal's purpose and functions and this accounts for the subject of plea agreements not being addressed in early version of the Tribunal's procedure rules.[72] In 1997 the Tribunal's Rules of procedure and evidence were amended to incorporate a procedure to be applied when an accused pleads guilty.[73] In December 2001, a further rule was adopted to regulate the use of plea – bargain agreements made between the prosecution and the Defence.[74] Rule 62 *bis* provides as follows: 'If an accused pleads guilty in accordance with Rule 62 (VI) or request to change his or her plea to guilty and the trial chamber is satisfied that:

(i) the guilty plea has been made voluntarily
(ii) the guilty plea is informed
(iii) the guilty plea is not equivocal; and
(iv) there is sufficient factual basis for the crime and the accused's participation in it, either on the basis of independence indicia or on lack of any material disagreement between the parties about the facts of the case, the trial chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentence hearing.

The above rule clarifies that the accused person can enter a guilty plea before the ICTY, provided that the aforementioned criteria are fulfilled.

The first case to be handled by way of guilty plea at the ICTY was that of *Prosecutor v. Erdemovic*.[75] The accused person in that case Drazen Erdemovic was a solider in the 10th sabotage Detachment of the Bosnian Serb Army (VRS), operating north – west of Zvorhik municipality of Bosnia and Herzegovina. On or about 16 July 1995, Erdemovic participated as part of a firing squad in the shooting and killing of hundreds of unarmed Bosnian Muslim men from Srebrenica, a town located in Eastern Bosnia and Herzegovina. He personally killed about 70 people. On 31 May 1996, he pleaded guilty to murder as a Crime against Humanity and on 29 November 1996, he was sentenced to 10 years imprisonment. On 14 January, 1998 on appeal he changed his guilty plea to murder as a violation of the laws or customs of war. He was then sentenced to five (5) years imprisonment for violation of laws of war.[76]

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[65] General Assembly Resolution 3314 (XXIX) December 14, 1974
[66] C Antonopoulos, 'Whatever happened to the Crime against Peace?' (2001) *6 Journal of Conflict and Security Law* P 39
[67] See J Veroff, 'Reconciling the Crime of Aggression and Complementarity: unaddressed Tensions and a way forward' *Yale law journal*, Vol 125, Number 3, (2015-2016) PP 560 – 795
[68] Art *8 bis (1)* of the ICC Statue, Inserted by Resolution Rc/Res. 6 of 11 June 2010
[69] 'The Crime of Aggression' Available at http://www.coalition for the ICC.org/explore/ICC-Crimes/crime-aggression, accessed 20 January, 2023
[70] M Harmon, (n17) p 166
[71] Annual Report of the International Tribunal for the prosecution of persons responsible for serious violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342, 29 August 1994, Para 74.
[72] See MP Scharf, 'Trading Justice for efficiency' *2 Journal of International Justice* (2004), 1070 – 1081
[73] Rule 62 *bis.* A similar provision is contained in Rule 62 (B) of the ICTR RPE
[74] Rule 62 *ter.* A similar provision is contained in Rule 62 *bis* of the ICTR RPE
[75] *Prosecutor v Erdemovic* (case No IT – 96 – 22 – T)
[76] Drazen Erdemovic, available at https://www.ICTY.org>cis, accessed 4/3/2023

What is particularly interesting about this case is the fact that after the accused had been sentenced to 10 years imprisonment by the trial chamber based on the accused guilty plea to the first charge of murder as a crime against humanity, the appeals chamber held that the Tribunal should not have accepted the guilty plea on the grounds that it was not informed. The Appeal chamber remitted the case to another Trial Chamber where Erdemovic was given the opportunity to re-plead.[77] In giving their judgement, the Appeals chamber laid down three important safeguards that must be present before a guilty plea can be accepted. They are:

a. It is necessary that a plea is voluntary and as such must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promise.[78]
b. That a plea is informed, meaning that the accused will understand the nature of the charges against him and the consequences of pleading guilty.[79]
c. The plea must be unequivocal, hence it must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.

It is imperative to note that on this second charge, even though the prosecutor and the defence had negotiated a reduced prison term of seven years which is very mild for the crime of murder of over 70 persons, the trial court reduced it the more by merely sentencing Erdemovic to five years imprisonment. This is indeed not commensurate at all with the offence committed which is quite grievous but the accused secured this very lenient sentence for himself owing to the plea agreement. This case was followed by others such as *prosecutor v Jellisic,*[80] *Prosecutor v Todorovic*,[81] *Prosecutor v. Biljana Plasvic*[82] etc. The safeguards for the acceptance of a guilty plea that were articulated by the Appeals chamber in the Erdemovic case were later codified in the amendments to the RPE.[83]

Taking a cue from the ICTY, the International Criminal Tribunal for Rwanda (ICTR) also amended its Rule of Procedure to allow for the practice of plea bargaining at the tribunal.
Modelled after Rule 62 *bis* of the ICTY Rules of procedure and evidence, Rule 62 (6) of the ICTY Rules of procedure and evidence, Rule 62 (B) of the ICTR Rules of procedure and evidence provides that the trial chamber shall satisfy itself that the guilty plea:

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

The use of plea bargaining at the ICTR started with the case of Jean- Paul Kambanda. Kambanda was the prime minister of the interim government in Rwanda, which was established after the death of the then President Habyarimana. Jean – Paul Kambanda was charged with one count of genocide, one count of conspiracy to commit genocide, one count of direct and public incitement to commit genocide, one count of complicity in genocide, one count of crimes against humanity (murder) and one count of crimes against humanity extermination.[84] Jean – Paul Kambanda, at the first appearance before the tribunal on 1 May 1998, pled guilty to all the crimes for which he was charged. In that case, the prosecutor had entered a plea agreement with the defence. Following the plea agreement, Kambanda anticipated and or expected a far more lenient sentence. The defence counsel provided submissions to the chamber seeking only 2 years of imprisonment because of the plea agreement although the prosecutor recommended life imprisonment. However, the trial chamber lived up to its bidding by sentencing him to life imprisonment in line with the recommendation of the prosecutor. The court accepted that guilty plea has its advantages but that these were not proportionate taking account of the circumstances of the crime committed, thus:

(a) The crimes for which Jean Kambanda is responsible carry an intrinsic gravity and their widespread, precocious and systematic character is particularly shocking to human conscience.
(b) Jean Kambanda committed the crimes knowingly and with premeditations, and;
(c) Moreover, Jean Kambanda, as prime minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust.[85]

[77] *Erdemovic* Appeal's chamber judgement, Case No. IT – 96 – 22 – A
[78] *Ibid*
[79] *Ibid*
[80] *Prosecuto*r v *Jellisic* (Case No: IT – 95 – 10 – PT)
[81] *Prosecutor* v. *Todorovic* (case No. IT – 95 – 9/1)
[82] *Prosecutor v Biljama plasvic* (Case No: IT – 00 – 40 – 1)
[83] M Harmon, (n 17), P 167
[84] See *prosecutor v. Kambanda* (Case No: ICTR – 97 – 23 – s at para 3)
[85] *Prosecutor v Kambanda,* Transcript (3 September 1998) P 33, para 62

The court in Kambanda was dealing with the most serious crimes committed by any prominent figure. It is difficult to see how they would have had any alternative than to issue life sentence.[86] If there was ever going to be a case where life sentence is appropriate, then Kambanda is it. Although it was clear that Kambanda had cooperated with the prosecution, this was not sufficient for him to be rewarded in relation to any sentence discount.[87]

The next plea to be tendered before the ICTR was the case of *Prosecutor v. Omar Serushago*.[88] The guilty plea was tendered on 14 December 1998. Although Serushago was not on the list of suspects wanted for war crimes by the Rwanda authorities, he surrendered himself. He was a low-level leader in command of a group called *Interahamwe* (the Itutu lead militia) in the Gisenyi prefecture. He was charged with five counts of genocide; murder; torture; extermination and rape. Omar Serushago pled guilty to the first four charges but not the fifth, rape, and the prosecution dropped that one. Plea bargaining was also adopted in the Case of *Prosecutor v. Bisengimana*.[89] The guilty plea in this case was brought about by an aggressive use of charge bargaining. The original indictment against the accused consists of thirteen charges of genocide, crimes against humanity and war crimes. It was alleged that the defendant was not only personally active in committing these crimes but also was responsible for encouraging others to do the same, that is, to commit the same crimes. As part of plea negotiation, the indictment was revised and a second one was prepared containing only five charges but they nonetheless still reflected the amount of the defendant's involvement in committing the crime alleged. After the revision of the indictment, the parties entered into a further plea negotiation wherein the prosecutor greed to accept guilty pleas to two count out of the five count charges. It was further agreed that the prosecutor would seek acquittals for the other three charges, which included genocide and rape.

On 7 December 2005, the accused pled guilty to counts of murder and extermination as crimes against humanity. Along with this, the prosecution agreed to recommend a sentence of between twelve and fourteen years, as well as supporting the accused request that he serve his sentence in a European prison. The withdrawal and dismissal of the genocide charge sparked outrage in Rwanda, with the Rwandan government insisting that the only circumstances in which genocide charges should be dropped are when 'it would be difficult to prove beyond a reasonable doubt that the particular accused person played a part in the preparation of genocide.[90] The chamber sentenced him to 15 years imprisonment. It is imperative to state emphatically that had Bisengimana not entered this plea negotiation and had been found guilty of genocide, definitely, his sentence would have been life imprisonment which is of course commensurate and proportionate to the crimes he committed.

Article 65(5) of the Rome statute is the provision dealing with negotiation and agreement under the ICC regime. The provision stipulates that any plea agreement is binding on the accused and the prosecutor. Such agreements do not bind any other organ of the ICC, especially the trial and appeal chambers, or any national or international jurisdiction unless that organ or jurisdiction is a party to the deal.[91] It is no gainsaying that from Article 65(5) one can deduce that plea bargaining is not expressly permitted or prohibited by the Rome statute. So, the prosecutor will find it difficult to secure a plea agreement since it is not binding on the court.

On 12 November 2020, the office of the prosecutor (OTP) of the ICC released its guidelines for Agreements regarding admission of guilt. The document represents the most recent rule on a long and bumpy road headed towards the consolidation of negotiated justice in international criminal law.[92] The guidelines are rooted in the practice of the international criminal tribunal for Yugoslavia (ICTY) and the international criminal tribunal for Rwanda (ICTR) when dealing with guilty pleas.[93] The only case involving a plea agreement that has come before the ICC is that of Ahmad Al Fagi Almahdi. On 18 September, 2015, the court issued an arrest warrant for Ahmad Al-Fagi Al-Mahdi (also known as Abu- Tourab) a member of the Ansar Dine, Tuareg Islamist militia in North Africa. The arrest warrant alleged that from about 30 June, 2012, to 10 July, 2012, in Timbuktu, Al- mahdi committed the war crime of intentionally directing attacks against historical monuments or buildings dedicated to religion.[94] Al- mahdi was surrendered to the court by the Government of Niger on 26 September, 2015. His trial commenced on 22 August 2015 and he pleaded guilty to charges of destroying nine mausoleums and a mosque. The court sentenced Al- mahdi to nine years imprisonment for the destruction of cultural world heritage in the Mahan city of Timbuktu.[95]

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[86] N Karen, 'Plea bargaining in International criminal courts: dealing with the Devil' Unp. LLM Dissertation, University of Glasgow, 2016, P 80

[87] *Ibid*

[88] *Prosecutor v Omar Serushago*, (case no: ICTR – 98 – 39- 1)

[89] *Prosecutor v Bisengimana*, (Case No: ICTR – 2000 – 60 – 1)

[90] ICTR and Rwanda argue over plea Bargains, Hirondelle News Agency, April 2006, available at http://allafrice.com/stories/2006 04 24 0291.html. Accessed 4/1/2023

[91] Article 65(5) of the Rome Statue

[92] B.O. Biazatti, 'The ICC Prosecutor Releases Guidelines for Agreements Regarding Admission of Guilt' available at http://www.ejitalk.org.accessed 4 January, 2023

[93] *Ibid*

[94] See Wikipedia, the free Encyclopedia, List of people indicted by the International Criminal Court: http://en.wikipedia.org/wiki/international criminal court accessed 4 January, 2023

[95] *Ibid*

6. Effects of the use of plea bargaining in International Criminal Trials

Proponents of the use of plea bargaining in International Criminal Trials argue that the benefit derived from the use of plea bargaining in the criminal justice system is enormous. The most persuasive utilitarian justification for favouring the use of plea bargaining is that of efficiency. Through the use of plea bargaining, the workload of these courts and tribunals are reduced, simplicity, speed and efficiency of the criminal Justice system is promoted. The use of guilty plea is intended to facilitate a more efficient administration of justice. As laudable as this justification is, the negative effect of the use of plea bargaining in International Criminal trials outweigh its justification. The negative effects of the use of plea bargaining in international criminal trials are as follows:

Handing down of sentences that fail to recognize the gravity of criminal conduct and not proportionate with the crime committed.

The use of guilty plea in international criminal trials is at variance with the mission and mandate of these courts. The primary mandate of International Criminal Tribunals is to try and punish those responsible for the perpetration of mass atrocity crimes. These classes of crimes are grievous and heinous in nature. Punishment issued at the end of such trials ought to be proportionate to the crime committed. Sentences issued ought to reflect the moral gravity of the crime. When sentences imposed after trials does not reflect the moral gravity of the crime it leads to public outcry and loss of Public confidence in the criminal justice system. It means that the sentence did not take cognizance of the serious nature of the crime. Mass atrocity crimes are crimes that are heinous in nature and it is only by awarding sentences that take into cognizance the moral gravity of the crime that can deter future perpetrators of such crime. It is imperative to note that even national procedural laws reflect the principle that the more serious the crimes allegedly committed, the more appropriate it is for the perpetrators to be subject to imposed rather than negotiated justice, and in most cases of the most serious crimes, they do not allow bargained outcomes at all.[96]

Plea bargaining undermines the truth seeking function of the courts

Plea bargaining undermines the truth seeking function of the courts as it entirely eliminates the opportunity for the victims to offer their testimony. In proceedings in front of the ICTY, plea agreements have frequently been used under the assumption that a guilty plea is always important for the purpose of establishing the truth in relation to a crime.[97] The ICTY has determined that a guilty plea contributes directly to one fundamental objective of international tribunal; namely: it's truth finding function in relation to a crime.[98] Guilty pleas are an acknowledgement of the events that occurred and an acceptance of guilt by the accused of those events.[99] It is actually very difficult to find truth in these assertions. How can plea bargaining help in establishing the truth when the plea bargaining process eliminates the opportunity for the victim or survivor to offer testimony and tell his or her own story. Victims and survivors are completely short out of the process and this cannot in anyway guarantee a fair trial that will succeed in unravelling the truth. It is a fact that trials provide a forum for victims to tell their stories and to have the wrongs done to them formally acknowledged. 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.[100] Suffice to say that the ICC legal framework already includes some provisions allowing for greater victim participation at the proceedings on admission of guilt.[101]

Guilty pleas do not promote reconciliation.

Proponents of the use of plea bargaining in International Criminal trials argue that guilty plea contributes to the healing and reconciliation process. Through the acknowledgement 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 the finding of guilt by a trial chamber to the victims and survivors. An 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.[102] But this argument is debatable because the effect of guilty pleas on reconciliation is not straight forward. When pleas are accompanied by significant sentencing discounts, they are controversial among victims and stir further resentment than reconciliation.[103] Even when accompanied by statements of remorse, such guilty pleas are often seen as disingenuous and motivated purely by the sentencing reductions.

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[96] M Damaska, Negotiated Justice in International Criminal Courts, *2 Journal of the International Criminal Justice* (2004) Pgs. 1018-1024

[97] Prosecutor v. Stevan Todorovic, *(Case No. 15 – 95 – 9/1) sentencing judgement, 31 July 2001, Para 81*

[98] *Prosecutor v Stevan Todorovic, Supra*

[99] R Henham, 'Plea – bargaining and the legitimacy of International Trial justice: Some observations on the Dragon Nikolic Sentencing Judgement; (2005) *5 ICLR 601*

[100] J.N Clark, 'Plea Bargaining at the ICTY: Guilty pleas and Reconciliation; *20 European Journal of International Law.* (2009), 415 – 431

[101] N.A Combs, 'Obtaining guilty pleas for International Crimes: Prosecutorial difficulties', in Eric Luna and Marianne Wade (eds), *The prosecutor in Transnational Perspective*, pp. 335-336

[102] *See prosecutor v. plasvic* case No: IT – 00 – 39 &49, 1 - 5 Sentencing Judgement 41 (ICTY Feb 27, 2003), see also *Prosecutor v. Momir Nikolic*, Case No: IT – 02 – 60/`-5, sentencing judgement 61 (ICTY Dec. 2 2003)

[103] *See Prosecutor v. Dragon Nikolic*, Case No. IT - 94 – 2 – A, Judgement on sentencing Appeal, 51 (ICTY Feb 4, 2005)

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 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 towards victims.[104]

Plea bargaining violates the court's duty to prosecute

To put an end to the impunity of perpetrators of war crimes, genocide and crimes against humanity through effective prosecution is the paramount goal of every International Criminal Tribunal.[105] Crimes prosecuted by International Criminal Courts belong to the most reprehensible forms of criminality. The extraordinary evil they incarnate affects the desirability of plea bargaining before international instances in a negative way.[106] The duty of these courts to prosecute heinous crimes is clearly recognized in international law. The 1948 Genocide Convention requires prosecution and effective penalties for the crime of genocide.[107] In cases where the prosecutor indicts a person for genocide, approving a plea agreement and dropping this grave charge simply to expedite the caseload seems incompatible with the duty to prosecute.[108] Indictments for crime such as genocide are not issued out of the blue. Once an individual is indicted for a crime such as genocide and a *prima facie* case is established. Article 4 and 5 demands it prosecution and punishment. To sacrifice a count of genocide for judicial economy is clearly incompatible with the spirit of the convention. Similarly, the four Geneva Conventions oblige the High contracting parties to prosecute grave breaches of the convention and to enact effective penal sanctions.[109] In the same vein, customary international law also requires the investigation and prosecution of war crimes.[110]

7. Conclusion and Recommendation

The introduction of plea bargaining or guilty – plea in proceedings before international criminal Tribunals has posed serious challenge to the realization of the mandate and mission of the courts. There is no provision in the statutes of the ICTY and ICTR on the use of plea bargaining. There is also no such provision in the ICC statute. Article 65 of the ICC statute does not mention the possibility of plea agreement explicitly.[111] Plea bargaining found its way into the practice of these courts through their Rules of Procedure and Evidence (RPE) drafted by judges to ease the workload of the courts. The non-inclusion of any provision on plea bargaining in the statutes of these courts is a deliberate attempt by the drafters to exclude the use of such. This is because the crimes that fall within the jurisdiction of these Courts and Tribunals are weighty and plea bargain agreements violate the duty to prosecute these weighty crimes and issue proportionate sentences and this is clearly at variance with the mandates of the courts. Now that the *ad hoc* tribunals are no more and the remaining cases before them transferred to the residual mechanism for international tribunals, leaving the ICC as the torch-bearer for the cause of International criminal justice, this paper recommends the complete abolition of the use of plea bargaining in its practice. That way, the mandate and mission of the court will be fully realized and actualized.

[104] J.N Clark, (n 100) P. 433
[105] A Petrig, (n 12) P. 16
[106] *Ibid*
[107] See the convention on the prevention and punishment of the crime of genocide, 1948
[108] MP Sharf, Trading Justice for Efficiency, Plea – Bargaining and International Tribunals, 2 *Journal of International Criminal Justice, (2004)*, P. 1075
[109] Art 49 Geneva Convention I, Article 50 Geneva Convention II, Art. 129 GC III, Art. 146 GC IV
[110] J Henckaerts and L Doswald – Beck, *Customary International Law,* Vol. I: (2005) PP. 607 – 611
[111] L Burens, 'Plea Bargaining in International Tribunals, the End of Truth seeking in International Courts? Available at http://www.zis-online.com/fiat/articles/2013 accessed 3/1/2023