



Journal of
Theoretical & Philosophical Criminology

July, 2015, 21-33

Is it pragmatism or an injustice to victims? The use of plea bargaining in the International Criminal Court.

Simeon P. Sungi, United States International University-Africa

This article examines the use of plea bargaining in international criminal trials through the lens of fundamental ethical principles of international law. Under the fundamental ethical principle theory, granting prosecutors and judges the flexibility of plea-bargaining in international criminal trials may not be in tandem with the stated goals of international criminal prosecutions of fighting impunity, demanding accountability on perpetrators, providing a platform for victims' rights and restoring peace and reconciliation in the community. Moreover, it may also undermine the pedagogical value of international criminal trials which is to create historical records of atrocities and providing voices to victims of international crimes.

Plea-bargaining, international criminal justice, human rights, fundamental ethical principles

I. INTRODUCTION

The international criminal justice system assumes the classical school approach to crime. It assumes that every human being has free will and is by nature hedonistic. Thus, punishment in this classicist approach demands that the offender suffers proportional punishment for the crime she or he has committed. This is the basic philosophical foundation on plea bargaining. Plea bargaining is a principle that is based on a market rationality theory. This theory embraces a *laissez-faire* ideology that emphasizes on enhancing personal autonomy. According to this theory, bargaining between a defendant and prosecutorial authorities is valuable because both sides consider themselves better off as a result of the transaction. For a prosecutor, a plea bargain enables him or her to obtain the maximum of deterrence with the minimum expenditure of scarce resources. For the defendant, he or she learns her or his fate early enough and embraces it. The defendant, it is assumed, is better off in this process because he or she is able to evaluate the risk of conviction; he or she can obtain a lesser sentence or conviction on lesser charges. Plea bargaining is therefore defined as an agreement made between the prosecuting attorney and the defendant, through his or her attorney which stipulates that the defendant will plead guilty to or not contest a fixed number of criminal charges in exchange for some sort of reduction in the number and/or seriousness of the original charges (Emmelman, 1996, p. 338).

However, plea bargaining may serve other purposes. For example it has been argued, plea bargaining serves a symbolic function, a normative endeavor, which is a joint assessment of the

incident, actions and character of the accused. It is an attempt made by the defendant to secure a reduced charge or guarantee sentence in exchange for his or her guilty plea (Feeley, 1979, p.463).

This classical school approach to plea bargaining in international criminal trials is the issue central to this essay. The effects of mass atrocity crimes have far more complicated realities than what the assumptions of plea bargaining in the classical school approach to crime may put forth. These complicated realities center on the victim(s) and society in general. As I have written elsewhere, individuals who commit mass atrocity crimes may not be necessarily rational and hedonistic. Case studies have shown that some perpetrators may be driven by economic and political factors, sociological aspects of power, psychological factors, and/or sociological factors in committing these crimes.¹ Therefore, disposing defendants using plea bargaining may not achieve the classical school of thought approach to crime and may not be fair, ironically to the perpetrators and victims of mass atrocity crimes. It may be argued that plea bargaining in the international criminal justice system is more of a utilitarian objective, which presupposes a market-oriented approach in punishment.

Fairness has been used to refer to the ability to make judgments that are not overly general but which are concrete and specific to a particular case. The question regarding the fairness of plea bargaining in the international criminal justice system arises because it involves persons who have no authority over one another, at least at the initial point in the criminal proceedings because of the doctrine of presumption of innocence since the prosecutor and defendant(s) engage in a joint activity of settling a case, which defines and determines the benefits and burden shared (Rawls, 1958). Thus, plea bargaining should be considered fair if none of the parties involved feel that by participating no party has been taken advantage of, or forced to give in claims which they do not regard as legitimate (*ibid*). Cesare Beccaria in his famous treatise "On Crimes and Punishment" observes what should be the justification of punishment. He states that punishment should not be harsh, but must be inevitable.² To this end, the fairness of plea bargaining in the international criminal justice system, not only becomes an question, but also demands asking whether it achieves the goals of international criminal trials of ending impunity and bringing peace and reconciliation in post-conflict societies.

The application of plea bargaining in the ICJS is an ardently debated issue, which this essay intends to engage in, albeit, attempting to ascertain the appropriateness of its use in international criminal trials through the lens of fundamental ethical principles of international law. The fundamental ethical principle theory enumerates norms of international law, which relate to the administration of international justice and human rights.³ The core assumptions of the theory include notions of unity and diversity. It holds that human beings are unified as members of one human family that respects one another's right to diversity of language, religion, culture, and individual freedom of thought, conscience, belief and expression (Lepard, 2010).

The questions that this essay attempts to address are; (i) whether it is ethical based on the fundamental ethical principle theory to offer sentencing concessions to a defendant who pleads guilty to international crimes? (ii) Does plea bargaining undermine the stated goals of the international criminal justice system of fighting impunity, demanding accountability on perpetrators, and restoring peace and reconciliation in the community. (iii) Does it also undermine the pedagogical value of international criminal trials which is to create historical records of atrocities and providing voices to victims of international crimes?

¹ Sungi, S. P. (2010). *The Forgotten Crimes: Criminology and the Study of International Crimes*. Ph.D. Qualifying Examination Thesis. Indiana University, Bloomington.

² Beccaria, C (2009). *On Crimes and Punishments*. Seven Treasures Publications.

³ This concept was developed by Brian D. Lepard. For a detailed discussion on the theory see Lepard, B.D. (2010). *Customary International Law: A New Theory with Practical Implications*. Cambridge University Press.

To respond to these questions, the essay proceeds in five parts. Part II discusses the historical background of plea bargaining with reference to the United States as a case study on how plea bargaining is used in national criminal justice systems (common law jurisdictions). The discussion about plea bargaining practices in common law jurisdictions is significant because the practice is a creature of common law or adversarial judicial systems and alien to civil law jurisdictions. Part III discusses the implications of fundamental ethical principles of international law for plea bargaining in the international criminal justice system with reference to the International Criminal Court (ICC). This part also discusses experiences from *ad hoc* criminal tribunals of Yugoslavia and Rwanda in their practicing in plea bargaining. Part IV assesses the fundamental ethical principle as it relates to plea bargaining practices in the ICC and attempts to answer the question whether national criminal court plea bargaining practices have been transferred in wholesale to international criminal courts, in order to ascertain whether it is a pragmatic policy or an injustice to victims of international crimes. Part V concludes this discussion and answers the question whether plea bargaining as practiced in the ICC satisfies the fundamental ethical principle of international law.

II. HISTORICAL BACKGROUND OF PLEA BARGAINING IN COMMON LAW JURISDICTIONS

Plea bargaining practices in criminal courts can be traced from Middlesex County in Massachusetts between the years 1780 – 1900. In his book *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, Fisher explains the genesis and continued growth of plea bargaining practices. Plea bargaining began to be used for prosecution of victimless crimes, for example, liquor-selling violations under the mandatory sentencing laws. The Middlesex County prosecutors devised a system whereby multiple charges for selling liquor without a license would be dropped to one charge, to which defendants would plead *nolo contendere* and be sentenced to a pre-determined fine and courts. Prosecutors could control the entire process, as Fisher calls it “an almost primordial instinct of the prosecutorial soul” (p.23). By the 1800s Middlesex County plea bargaining practice had “triumphed as a systemic regime” under mandatory sentencing statutes for liquor law violations but also for murder. Plea bargaining for a charge of murder that carried a death penalty, defendants were allowed to plead guilty to different charges for an exchange of sentence, such as, life sentence. Fisher states that this process was beneficial to prosecutors who at this time were part-time employees with their full-time private law practice, the more they were able to plea bargain, the more time they had to spend on their private cases that earned them a living. They were not interested in trial since, taking a case to trial meant a loss of revenue. Therefore 71% of all felony offenses ended in plea bargaining in which prosecutors accepted *nolle prosequi* pleas, placed the cases, “on file” and the defendants “on probation”, and judges never saw the charges, much less the evidence. Henceforth, plea bargaining in the form of guilty pleas that resulted to no trials undermined the judges’ job to determine facts of the crime and the defendant’s involvement and the power to pass sentences, their high professional duty that requires judgment and wisdom. Fisher states that judges did not object to this guilty-plea-driven system because it gave them relief from their civil cases caseloads, since it was easy for a judge to coerce a guilty plea in a criminal case, then inducing a settlement in a civil case (Fisher, 2003, p. 123). However, plea bargaining in national courts, as was in Middlesex County, was a procedure adopted specifically for reasons of reducing the docket’s caseload. Padgett (1985) states that plea bargaining practices were mostly determined by the docket’s case load. The increased court professionalism and length of jury trials, the increased participation of adversary lawyers and due process rights inhibited the ability of the official system to function expeditiously. The same reason is advanced by Ulmer et al. (2006) that organizational efficiency perspective favors plea bargaining to trials, because the former keep cases moving efficiently. The greater the caseload pressure, the more a court will rely on issues of costs and plea incentives (p. 638).

To be considered valid, a guilty plea must first, be made voluntarily, and second, it must not have been a result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence. It also must guarantee that the sentence will be reduced or lessened, otherwise a defendant(s) have no reason to accept the plea. These requirements were laid out by the Supreme Court of the United States (SCOTUS) in *Brady v. United States* (1970).⁴ The SCOTUS stated that:

“A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).”

A year later, the SCOTUS confirmed its support of plea bargaining in *Santobello v. New York* (1971).⁵ The SCOTUS emphasized the need of plea bargaining as an essential part of the criminal trial and should be encouraged. The SCOTUS added that the prosecution’s failure to keep its promise made under a plea agreement amounted to an injustice to the accused.

Albeit, in passing, it is reasonable to reflect on how the plea bargaining process is employed as a strategic tool used by prosecutors to secure convictions. Statistics show that almost 90 percent of cases in federal court would be end up being disposed of by using plea bargains.⁶ Prosecutors would use plea or charge bargains as a cohesive strategy to gain a conviction. Defendants would be given a binary choice of either pleading guilty to a crime and be guaranteed a lesser sentence or go to trial, in which if found guilty suffer a much more severe sentence.

III.FUNDAMENTAL ETHICAL PRINCIPLES IMPLICATIONS ON PLEA BARGAINING IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

The Preamble to the Rome Statute of the International Criminal Court (ICC), 1998 states *inter alia* that it is mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, recognizes that such grave crimes threaten the peace, security and well-being of the world, affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, and determines to put an end to impunity for the perpetrators and thus contribute to the prevention of such crimes. Statutes of the two *ad hoc* international criminal tribunals of the former Yugoslavia (ICTY)⁷ and Rwanda (ICTR)⁸ echo the Rome Statute’s preamble that signifies the importance of prosecuting the perpetrators of international crimes of genocide, crimes against humanity and war crimes. While the ICTY and ICTR were established by the United Nations (UN) with specific jurisdictions and mandates, the ICC is a permanent international criminal court.

The fundamental ethical principles theory traces its source from international human rights agreements. These norms are also enshrined in the Rome Statute of the ICC. Fundamental ethical principles relevant to plea bargaining are; (a) the equality of all human beings, (b) universal human rights and universal human duties to respect human rights, (c) individual moral responsibility for criminal behavior, (d) the reformative, deterrent and protective purposes of punishment of criminal

⁴ 397 U.S. 742 (1970)

⁵ 404 U.S. 260 (1971)

⁶ See Devers, L. (2011). Plea and Charge Bargaining: Research Summary. Bureau of Justice Assistance, U.S. Department of Justice at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (Last visited January 20, 2015)

⁷ See Article 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) 1993.

⁸ See Article 1 of the Statute of the International Criminal Tribunal of Rwanda (ICTR) 1994.

behavior. In the following paragraphs, I will discuss each one of these norms as fundamental ethical principles and how they related to plea bargaining in the ICJS.

A. Equality of all human beings

Equality of all human beings is a norm of international customary law that embodies the fundamental ethical principles theory. Article 1 of the Universal Declaration of Human Rights (UDHR), 1948, states that “all human beings are born free and equal dignity and rights. They are endowed with reason and conscience and should act towards one-another in a spirit of brotherhood”. The UDHR provision therefore, emphasizes equality before the law. Plea agreements, in general, undermine this principle of equality before the law. A conviction that results from a guilty plea denies the defendant the right of a public trial. A public trial affords the opportunity for the presentation of testimony and documentary evidence, the opportunity for the defendant to confront his or her accusers and contradict their testimony. The absence of a trial because of a guilty plea, therefore, defeats the goal of international criminal trials of creating an accurate historical record of atrocities, which serves as a pedagogical instrument for humanity.

B. Universal human rights and universal duties to respect human rights

Essentially, the Rome Statute embodies the idea of universal human rights and duties to respect human rights. The norms embodied in universal human rights and respect to human rights is also considered norms of customary international law. The ICC was established as a court of last resort to try perpetrators of crimes that shock the conscious of humanity and to make sure that these crimes do not go unpunished, in order to enhance respect for human rights globally. Since the ICC is a court of last resort, deference is given to domestic (national) criminal courts to try individuals who are alleged to commit international crimes. The Preamble of the Rome Statute restates that “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” (Preamble of the Rome Statute, 1998). If a domestic court is unable or unwilling to prosecute that is when the ICC intervenes.

C. Individual moral responsibility for criminal behavior

The Rome Statute holds accountable individuals who commit crimes within the ICC’s jurisdiction. In practice, the ICC targets individuals who are most responsible for mass atrocity crimes. The ICC is determined to put an end to impunity so as to make sure that it contributes to the prevention of international crimes. Presently, the ICC docket has 21 individuals whom are accused of committing international crimes.⁹

D. Reformation and deterrence as purposes of punishment

For moral and ethical reasons, criminal law constructs justifications for imposing criminal penalties. Criminal convictions should carry a stigma and moral condemnation, which is geared at affecting the individual’s reputation, status in society, personal relations, and/or professional career. Reformation and deterrence are among goals for criminal punishment that are endorsed by states in international treaties and declarations.

Does Article 65 of the Rome Statute reflect the above assumptions under the fundamental ethical principle theory?

⁹ See http://icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx (Last visited April 6, 2014).

IV. THE ASSESSMENT OF FUNDAMENTAL ETHICAL PRINCIPLES IN PLEA BARGAINING PRACTICE WITHIN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

Article 65 of the Rome Statute and Rule 139¹⁰ of the ICC rules of procedure and evidence govern proceedings on admission of guilt (aka plea bargaining). The Article provides:

“1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8(a), the Trial Chamber shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

- (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
- (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.”

The plain reading of both the substantive and procedural law governing plea bargaining in the ICC shows that there has been some borrowing of common law plea bargaining requirements.¹¹ While plea bargaining in national courts does not require an active participation of the judge, judges have an active role in plea bargaining processes in the ICC. As stipulated under national criminal law, the judge must satisfy him/herself that the defendant who decides to plead guilty understands that nature and consequences of his or her admission of guilt. The judge also has to satisfy him/herself that the admission was made voluntarily after defendant’s sufficient consultation with his or her attorney.

¹⁰ The rule provides for the procedure the Trial Chamber must follow in deciding an admission of guilt. It provides, “(1) After having proceeded in accordance with article 65, paragraph 1, the Trial Chamber, in order to decide whether to proceed in accordance with article 65, paragraph 4, may invite the views of the Prosecutor and the defence. (2) The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record.”

¹¹ Cf *Brady*, supra note 6.

However, the provisions of the ICC on plea bargaining further include numerous safeguards, which reflect the assumptions provided under the fundamental ethical principle theory. There is a requirement for the active participation of victims in admitting a defendant's guilty plea. Sub article 4 clearly states that in the interests of justice and specifically those interests of victims, before a guilty plea is admitted, the prosecutor may provide additional evidence regarding the case, together with plea bargaining discussions between the prosecutor and the defence counsel regarding the defendant's admission of guilt. This provision dramatically departs from national criminal court's procedure on plea bargaining, which is a significant step in assuring that plea bargaining in the ICC do not just reflect the market rationality views, that trial courts should act as assembly lines in reducing the court's caseload, but most importantly the realization that the interests of justice is guaranteed. Article 65 acknowledges and creates a distinction between ordinary crimes (street crimes) and crimes of crimes (international crimes) in the process of admitting the defendant's guilty plea. It takes note of the heinous nature and the importance of adjudicating on international crimes, while observing the interests of victims.

What is the plea bargaining practice in the *Ad Hoc* criminal tribunals of Yugoslavia and Rwanda?

Plea bargaining at the ICTY

The aftermath of the civil war that broke out in the Socialist Federal Republic of Yugoslavia in 1991 and the subsequent secessions of her former republics of Croatia and Slovenia and the power struggle between the Serbs, Croats, and Muslims in Bosnia-Herzegovina left approximately 200,000 deaths, approximately 20,000 rapes and forced displacement of more than two million people (Morris & Scharf, 1995). The United Nations Security Council thereafter determined that the events that transpired in Yugoslavia amounted to a threat to international peace and security and established the ICTY to prosecute those who committed the crimes in the territory.

Initially, plea bargaining in the ICTY was considered as unnecessary procedural devise (Combs, 2006). Several reasons may be cited as the ICTY's reasons for not embracing plea bargaining as a tool of disposing of cases. First, there were few defendants in the court's docket and hence the prosecutors had less pressure to expedite proceedings, second, most of the prosecutors came from civil law jurisdictions where plea bargaining practices were not widely used, and third, the magnitude of international crimes of genocide, crimes against humanity, and war crimes seemed wholly inappropriate to use plea bargaining to dispose of the same. However, this trend was short lived. The members of the U.N. Security Council increased pressure for the ICTY to dispose of cases in a speedy manner raising budget constraints and the imposed court's mandate of completing all hearings by 2010. The court had to comply with these demands and adopted Rule 62 to its Rule of Evidence and Procedure to introduce plea bargaining in the courts rules. Rule 62 provides that when the defendants are brought to a Trial Chamber for initial appearance the Trial Chamber shall call upon them "to enter a plea of guilty or not guilty on each count". After the introduction of plea bargaining in the ICTY, defendants were willing to plead guilty when they were able to bargain for and receive relatively lenient sentences in exchange for their guilty pleas. In the first nine years of the ICTY existence, only seven defendants pleaded guilty. Of the nine defendants who took plea bargaining, the two *Erdemovic*¹² and *Jelusic*¹³ did not negotiate with the prosecution for a reduced sentence, while the remaining did but only two of them, *Todorovic*¹⁴ and *Simic*¹⁵ received a reduce sentence in exchange to their pleas. Let me discuss in some detail some of these cases I refer

¹² Case no. IT-96-22

¹³ Case no. IT-95-10

¹⁴ Case no. IT-95-9/1

¹⁵ Case no. IT-95-9/2

above. In *Prosecutor v. Erdemovic*¹⁶ the defendant was charged with one count of a crime against humanity and in alternative, one count of a violation of the laws or customs of war. In his initial appearance before the Trial Chamber, Erdemovic pleaded guilty to the crime against humanity count, which the chamber accepted and dismissed the alternative war crime count, and sentenced him to ten years imprisonment. The trial chamber in their judgment put forth conditions for the defendants to plead guilty: (i) guilty plea must be voluntary, (ii) must be informed and unequivocal. Other conditions included, authorizing prosecutors to enter into plea agreements wherein the prosecution agrees to amend the indictment, to submit that a specific sentence or sentencing range is appropriate or to decline to oppose the defendants sentencing request. The rules of procedure and evidence further provided that the plea agreement will not be binding on the trial chamber (Rule 62 ter). However, in *Prosecutor v. Nikolić*¹⁷ the Trial Chamber seemed to caution itself on the use of plea bargaining practices for international crimes in paragraph 65 of the sentencing judgment:

“[a]lthough it may seem appropriate to ‘negotiate’ a charge of attempted murder to a charge of aggravated assault, any ‘negotiations’ on a charge of genocide or crimes against humanity must be carefully considered and be entered into for good cause. Once a charge of genocide has been confirmed, it should not simply be bargained away because when a prosecutor makes a plea agreement such that the totality of an individual criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offenses committed by the accused, questions will inevitably arise as to whether justice is in fact being done.”

Another serious problem that the ICTY experienced with plea bargaining is sentencing disparities. In *Prosecutor v. Češić*¹⁸ the defendant admitted to killing ten people and to forcing two brothers to perform fellatio on one another at the same camp where Jelisic was the *de facto* commander. Jelisic who also admitted to killing the same number of people by pleading guilty did not receive a lesser sentence as an exchange of his plea. He received a sentence of forty years in prison, while Češić was sentenced to eighteen years in prison. Despite the completion strategy¹⁹ guilty pleas at the ICTY have dropped because of outcries from the victims and victim groups that plea bargaining encouraged too lenient sentences compared to the crimes committed (just dessert). For example, the BBC Worldwide Monitoring of October 29, 2003 ran a story titled “Bosnian Women’s Association Calls Serb Camp Guard Sentence ‘Insult’” reporting the view of Bosnian victims that one of the defendants sentence to eight years in prison constituted “shamefully small punishment”. The departure of the ICTY’s Chief of Prosecutions section, Michael Johnson, who is a citizen of the United States is also seen as the effect of the diminished interest in plea bargaining. Johnson was a strong supporter of plea bargaining and facilitated many of the 2003 plea agreements (Combs, 2006, p.10). Some other cited factors include the rest of the defendants’ view of plea bargaining as an exchange for leniency. As discussed herein, the sentences imposed to Nikolic was considered a stiff sentence and his guilty plea did not seem to give him any sentence discount for which he bargained.

¹⁶ Ibid. note 3

¹⁷ Case no. IT-02-56

¹⁸ Case no. IT-95-10/1

¹⁹ The completion strategy is a term that signifies that winding down of cases and prosecutions in the ad hoc criminal tribunals of ICTY and ICTR. As I have pointed in this paper, these two courts were established for a specific mandate, to try the perpetrators of the conflicts in the former Yugoslavia and Rwanda with specific dates. See the ICTY completion strategy at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2009_en.pdf (Last visited April 23, 2012)

Let me now discuss plea bargaining practices in the International Criminal Tribunal for Rwanda (ICTR) a court that was established in 1995 to try the perpetrators of the Rwanda civil war.

Plea bargaining at the ICTR

The genesis of the 1994 Rwanda conflict can be traced minutes after a missile shot down the plane that was carrying the Rwandan President Habyarimana. At that moment the Rwandan government elites set in motion a long-planned program to eliminate political rivals of the late president and his supporters, mostly Tutsis and moderate Hutus. They targeted civilians who were branded “supporters” of the Rwanda Patriotic Front (RPF) a guerilla force, comprised of mainly Tutsi refugees, who were fighting to overthrow the government. The organizers of this campaign intended to eliminate the Tutsi ethnic group to the maximum number. The organizers used modern means of communication to order people throughout the country to hunt down and kill Tutsis. They promised that there would come a day when children would have to look at pictures in books to know what a Tutsi looked like, because all would have been killed. By the time the RPF had defeated the Hutu government, approximately 1 million people, mostly women and children, had been killed and many more left with scars that would take time to heal, resulting from widespread rapes, other sexual assaults and mass murders.

Combs (2007) writes that the early days of the ICTR, prosecutors did not take advantage of plea bargaining as an incentive for the defendants to plead guilty. Another significant factor that discouraged prosecutors to induce defendants to plead guilty was most ICTR defendants viewed the conflict in their country as to have not risen to the level of genocide and hence withdrawal of genocide charges would have been most desired, contrary to what the current government of Rwanda and the international community viewed the violence in Rwanda as genocide. Any attempt to withdrawal genocide charges to any defendant would have therefore generated negative publicity for this tribunal.

The first ICTR guilty plea was that of Jean Kambanda²⁰, a former prime minister of the interim government in 1994. Since the Kambanda guilty plea came so early in the life of the tribunal it was seen as a powerful example for other defendants to follow. Despite his guilty plea, the prosecutor recommended the harshest sentence – life imprisonment. Kambanda pleaded guilty to genocide and crimes against humanity because of his active distribution of arms and ammunition and setting up roadblocks to capture Tutsis, while using the media to broadcast and incite the massacres. He was arrested in Kenya in July of 1997 and in April 1998 he entered a plea guilty and waived his rights to trial. *Kambanda* cooperated with the prosecutors with a belief that he would receive a light sentence. Although the Trial Chamber acknowledged that *Kambanda's* guilty plea constituted a mitigating factor, it concluded that the heinous nature of the crimes he committed “negate[d] the mitigating circumstances”.²¹

The second plea of guilt came from *Serushago*²² who pleaded guilty to genocide and crimes against humanity in December of 1998. His decision to plea bargain was not influenced by Kambanda since it was made before the decision in the case was handed down. It was alleged that Serushago supervised a roadblocks for detaining Tutsis and thereafter killing them. He admitted killing four people as a small militiamen commander. His surrender to the ICTR prosecutors in April of 1997 raises speculations that he was paid \$ 5000 so that he can also provide information on the high ranking individuals who participated in the massacres including Jean Kambanda and Georges

²⁰ Case no. ICTR-97-23.

²¹ Kambanda judgment, paragraph 62.

²² *Prosecutor v. Serushago*, Case no. ICTR-98-39-S, Sentence p.25(February 5, 1999)

Ruggiu.²³ Although no written concessions were made to Serushago for his guilty plea, the prosecution did provide him some consideration for his plea during the sentencing phase of the trial. A twenty-five-year sentence was recommended to reflect his guilty plea and cooperation but the Trial Chamber imposed a fifteen years sentence, one of the lenient sentences pronounced by the ICTR.

Georges Ruggiu a Belgian citizen got interested in Rwanda's politics in the 1990s and decided to move to Rwanda where he joined *Radio Television Libre des Mille Collines* ("RTLM") in the spring of 2004. RTLM was accused to broadcasting hate speech that encouraged Hutus to kill Tutsis and moderate Hutu politicians and civilians.²⁴ Again as it happened to Kambanda and Serushago, the prosecution made no concessions regarding Ruggiu guilty plea, despite Ruggiu's lawyers attempt to get firmer sentence guarantees. During sentencing, however, the prosecution recommended a reduced sentence of twenty years imprisonment; even though they had threatened to recommend a maximum sentence of life imprisonment had Ruggiu had gone to trial. The Trial Chamber sentenced him to a twelve years imprisonment, a sentence that was agreed to by the prosecution. The Rwanda government was critical about the sentence as it was perceived as a lenient sentence, while the ICTR's Chief Prosecutor applauded it as "a good gesture for other accused who would wish to plead guilty and accept responsibility for their crimes."²⁵ Although this is how plea bargaining works, this essay argues that the assumption that the defendant is rational, has free will and engages in a hedonistic calculus before engaging in criminal activity, a classical assumption about criminals, does not take to consideration the nature of international crimes. International crimes are committed in a collective basis and not always would defendants engage in them in their free will. Although this is speculative, but one can reasonably assume that since Ruggiu was a foreigner at the time when genocide was being committed. He perhaps sided with the perpetrator's ideological framework or the dominant perspective, perhaps to save his own life. This fact, therefore, would negate the classical school assumptions of criminal behavior.

Most defendants in these trials wanted genocide charges to be dropped since they perceived the massacres to have not reached the genocidal level and were most interested not to be convicted of genocide. The ICTR and the international community on the other hand gave the massacres the genocidal label and were determined to convict the perpetrators with genocide. Nine years after the establishment of the Tribunal; just eight cases have been disposed of by guilty pleas. With the pressure from the U.N. Security Council to complete trials according to the U.N. completion strategy,²⁶ the ICTR prosecutors have began using plea bargaining in a deliberate and systematic way to encourage defendants to plead guilty. If one compares this with the same process in national courts (as referred in the U.S.) one sees no difference on how plea bargaining processes are used in both systems, although one system – the international criminal justice system adjudicates on the most serious crimes committed against mankind.

Rutaganira's case ²⁷ is seen by many as the proper application of plea bargaining procedure unlike the prior cases where plea bargaining was used to induce the defendants to plead guilty by

²³ Id. p.32; See also Press Release, ICTR, Rwanda: First Non-Rwandese Suspect Arrested, ICTR/INFO-9-2-062 (July 23, 1997) reporting the arrest of Georges Ruggiu; Press Release, ICTR, Rwanda: Top Figures of Former Regime Arrested, ICTR/INFO-9-2-61 (July 18, 1997) reporting Kambanda's arrest.

²⁴ *Prosecutor v. Ruggiu*, Case no. ICTR-97-32-1, Judgment and Sentence, at pp. 42, 44(iv)-(v). See also Prunier, G.1996. *The Rwanda Crisis: History of a Genocide*, p. 200, where he reports that the radio station RTLM poured out a torrent of propoganda, mixing constant harping on the old themes of majority democracy, fears of Tutsi feudalism enslavement and ambiguous call to action.

²⁵ Hirondelle News Agency, June 1, 2000, titled Rwanda Unhappy with Ruggiu Sentence, at <http://www.hirondellenews.com/content/view/6555/179> (Last visited May 28, 2012)

²⁶ Id. note 10.

²⁷ Case no. ICTR-95-1C

the prosecutor providing specific concessions in exchange of his guilty plea. Rutaganira's case is therefore distinguished from *Kambanda*, *Serushago* and *Riggio* cases on procedural plea bargaining in the ICTR. *Rutaganira* was a low-level government official serving as *conseiller* of *Mubuga* sector for 14 years. He was charged with one count of aiding and abetting extermination, a crime against humanity for failure to protect the massacres of Tutsis that took place at the church in his jurisdiction. The plea agreement clearly set aside and withdrew the other charged counts of genocide, crimes against humanity and war crimes. The prosecution also agreed to recommend a sentence of between six and eight years imprisonment and that he would serve his sentence either in a European country or the Kingdom of Swaziland in Southern Africa.²⁸ The *Rutaganira* case also raises some interesting facts about the agreement itself. It seems that the prosecution did not have any supporting evidence to successfully convict him of genocide, crimes against humanity and war crimes from the testimony provided from the witnesses who testified during the sentencing hearings. Some witnesses testified that *Rutaganira* and his wife took an active role in hiding Tutsis during the massacres, which put their own lives in danger if the Tutsis were revealed.²⁹ There was testimony that after the conflict had ended, *Rutaganira's* wife returned to *Mubuga* and was appointed Deputy Mayor for Women's Development (Combs, 2006, p.15). All this testimony showed that there existed weak links between the church killings and *Rutaganira's* planning and implementation of the massacres. The prosecution saw this as evidentiary insufficiencies that could not pass the evidentiary standard for conviction in a criminal case – beyond a reasonable doubt. The Trial Chamber acceded to the prosecution's recommendations and taking to account various mitigating factors, including his guilty plea, his voluntary surrender, the assistance he provided to some victims, his passive participation on the massacres and his expression of remorse and sentenced him to six years imprisonment.

V. CONCLUSION

This essay discusses plea bargaining in the context of an umbrella term that includes charge bargaining, where the prosecution agrees to drop more serious charges in return for a guilty plea; fact bargaining, a situation where the prosecution agrees to present a less serious version of the facts of a case in return of a guilty plea; or a sentence bargaining, which involves prior agreements with the judge where there has been some indication of a reduction of sentence should the defendant waive his or her trial rights. Since the main goal of international criminal justice is to putting an end to impunity for those who perpetrate gross breaches of international law and contributing to peace and reconciliation, plea bargaining practice contradicts these moral obligations. However, plea bargaining procedures as enumerated under article 65 and rule 139 of the ICC Statute and Rules of Procedure and Evidence safeguard the interests of justice and makes sure that the interests of the victims are placed in the forefront before a guilty plea is accepted. International criminal trials are thus transformative in nature, whose primary function is to provide the means of reconciling the ideology of morality of punishment for victims and the international community in general (Henham, 2005).

Critics of plea bargaining practices argue that it goes contrary to the basic principles of justice, that is, due process rights, since they deny the court the opportunity to test the evidence in open court, to give full expression to the totality of criminality through the imposition of a penal sanction that fits the seriousness of the crime charged and the culpability of the defendant. For

²⁸ Id. See Judgment and Sentence of March 14, 2005.

²⁹ Id. at 15-16

international criminal trials, plea bargaining seriously compromises the symbolic nature of the procedure and the denunciation of past breaches of international criminal law because the punishment imposed is not proportional to the totality of the offender's criminal conduct. These concerns were at the heart of Judge Schomburg dissenting opinion in the case of *Deronjic*.³⁰ Deronjic was sentenced to ten years imprisonment for persecutions, which is a crime against humanity, based on a plea agreement which included selective facts that did not reflect the defendant's criminal participation in a larger premeditated plan of ethnic cleansing of a high ranking perpetrator. Judge Schomburg dissenting opinion stated that guilty pleas should not be capable of derogating from the gravity of a crime,³¹ adding that the fact that "no victim or person has given the opportunity to address the Trial Chamber in person ..." amounts to the ICTY's failure to fulfill its mandate of adhering to the fundamental principle that a perpetrator deserved a sentence proportionate to the gravity of the crime and that the mitigating effect of post-crime conduct should be strictly limited.

Article 65 of the Rome Statute embodies a pragmatic school of thought regarding plea bargaining. While adopting plea bargaining, a creature of national criminal courts those from the common law tradition, the Rome Statute has taken the practice much further by making sure it safeguards the interest of justice. These safeguards are clearly in line with the core assumptions of the fundamental ethical principles under international customary law. Although article 65 of the Rome Statute, which governs plea bargaining in the ICC, is based on the "market-oriented" approach, it does not allow legal procedures *sui generis* to be determined by inner-party agreements. This would be to undermine the general goal of both the victims and the international community of a transparent international criminal justice system, which is a public interest goal.

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³⁰ *Prosecutor v. Deronjic*, case no. IT-02-61-S, Trial Chamber, Sentencing Judgment, March 30, 2004.

³¹ *Id.* paragraph 14 (a, b)

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