

## WHY SHOULD THE INTERNATIONAL CRIMINAL COURT ADOPT PLEA BARGAINING?

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### Abstract

Since its establishment in 2002, the International Criminal Court (ICC) has faced many obstacles in bringing the instigators and perpetrators of crimes to justice. Many solutions have been offered on solving these difficulties which are mainly legal, procedural and economical. One suggestion which has been made is the issue of plea bargaining. This procedure, which is controversial both in national and international level, has already been applied by other international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR). However, there is a danger that the misuse of plea bargaining by these international tribunals plants since of doubt on lawyers' minds. In this article, the author discusses the possibility of the ICC adopting plea bargaining system and its proceedings. In this regard, it will also consider the pros and cons of adopting a plea bargaining system in achieving justice for the victims of the world's most heinous atrocities.

**Keywords:** Plea bargaining, International Criminal Court, restorative justice, *Ad hoc* tribunals

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## ULUSLARARASI CEZA MAHKEMESİ UZLAŞMA KURUMUNU NEDEN KABUL ETMELİ?

### Özet

Uluslararası Ceza Mahkemesi, 2002’de kurulmasından bu yana failleri ve azmettirenleri adalet önüne getirmekte sorunlar yaşamakta. Özellikle hukuksal, usule ilişkin ve ekonomik içerikli bu sorunlara yönelik pek çok çözüm yöntemi tartışılmış bulunmaktadır. Uzlaşma kurumu da bu çözüm yöntemlerinden birisidir. Gerek iç hukukta gerekse uluslararası hukukta tartışmalı olan bu kurum, Eski Yugoslavya Uluslararası Ceza Mahkemesi ve Ruanda Uluslararası Ceza Mahkemesi gibi diğer uluslararası mahkemeler tarafından uygulanmaktadır. Öte yandan, uzlaşma kurumunun hatalı kullanımı hukukçuları kuşkuya sevk etmiştir. Bu makalede, Uluslararası Ceza Mahkemesinin uzlaşma kurumunu kabul etmesi ihtimali tartışılacaktır. Bu bağlamda, dünyanın en ağır ihlallerine karşı mağdurlara adalet sunulması bakımından kurumun olumlu ve olumsuz yönleri incelenecektir.

**Anahtar Sözcükler:** Uzlaşma, Uluslararası Ceza Mahkemesi, yapıcı adalet, ad hoc mahkemeler

### 1. Introduction

The international community has experienced many grave atrocities in the past. The Holocaust in the Second World War and the Rwandan Genocide are the only two vivid examples of such massive brutalities occurred in not so distant past. Although international actors failed to avoid these unacceptable events in the first place, they eventually responded to bring the perpetrators to justice by establishing special international criminal courts such as the Nuremberg and Tokyo Tribunals<sup>1</sup>. Today, 68 years after the Nuremberg experience, international criminal law has achieved many imponderable results such as conviction

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<sup>1</sup> See May, R. / Wierda, M. (1999) ‘Trends in international Criminal Evidence: Nuremberg, Tokyo, the Hague, and Arusha’, *Colombia Journal of Transnational Law*, 37(3), at 728.

of a former president<sup>2</sup>. However, the international criminal courts are still faced with serious criticism on many fronts such as expensiveness of the procedure. However, international lawyers have focused on their attention on possible options to make the ICC more effective and less costly<sup>3</sup>.

Today, the ICC in step with other international courts and tribunals is struggling to address problems specially related to the caseload and resources. Although the ICC has approximately 120 million euros budget annually.<sup>4</sup> The Court has completed only one trial since its establishment in 2002.<sup>5</sup> Therefore, millions of euros have been spent, while no palpable success has been achieved. It can be argued that the ICC needs a new approach which can alleviate the heavy workload of the Court. In this regard, plea bargaining could be used as a powerful method which should be adopted by the Court. *Ad hoc* tribunals have already adopted plea bargaining in the past. According to the records of the ICTY 20 out of 161 of the defendants entered guilty plea.<sup>6</sup> In other words, plea bargaining helped the ICTY to reduce more than 10% of its caseload. Thus, plea bargaining is an efficient alternative procedure which may work for the ICC as in the case of the ICTY. This paper aims to give convincing arguments to show that plea bargaining may affect the mechanism of the ICC in a positive manner. The first section will explain the background of plea bargaining in international criminal law. The second section would

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<sup>2</sup> *Prosecutor v. Charles Ghankay Taylor*, Judgement, ¶ 6890, Case No: SCSL-03-01-T, (18.05.2012).

<sup>3</sup> Friman, H. (2008) 'Cooperation with the International Criminal Court: Some Thoughts on Improvements under the Current Regime', in Politi, M. & Gioia, F. (eds.), *The International Criminal Court and National Jurisdictions*, Aldershot: Ashgate, at 93-103 & 93-94.

<sup>4</sup> Assembly of State Parties, 'Report of the Court on Impact of Measures to Bring the Level of the International Criminal Court's Budget for 2014 in Line with the Level of the 2013 Approved Budget', ICC-ASP/12/1, (27.01.2015).

<sup>5</sup> The Guardian (2012) 'Thomas Lubanga Sentenced to 14 Years for Congo War Crimes', [online] Available at: <[www.guardian.co.uk/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years](http://www.guardian.co.uk/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years)> (Accessed 07.02.2015).

<sup>6</sup> International Criminal Tribunal for former Yugoslavia (2013) 'Key Figures of the Cases', [online] Available at: <[www.icty.org/sections/TheCases/KeyFiguresoftheCases](http://www.icty.org/sections/TheCases/KeyFiguresoftheCases)> (Accessed 07.02.2015).

consider the main benefits of plea bargaining. Finally, this paper will consider the criticisms on plea bargaining and would recommend when plea bargaining mechanism should be utilized by the ICC.

## 2. Plea Bargaining at the International Criminal Tribunals

Although there is no particular universally accepted definition of the term of “plea bargaining”, it can be defined as the prosecutor’s offer of sentencing privileges in return for the defendant’s entry of the guilty plea<sup>7</sup>. These concessions can differ case by case with regard to diverse circumstances. In general, two categories of plea bargaining are used in international criminal law<sup>8</sup>. The first is charge bargaining, where the prosecutor offers to dismiss some of the charges to a lesser one in exchange for a guilty plea<sup>9</sup>. The second is sentence bargaining, where the prosecutor recommends a reduced sentence to the court, if the accused were to plead guilty<sup>10</sup>. Moreover, the defendant may be promised other concessions such as special prison conditions or a safe haven for his family members. In *Rutaganira* case, the Prosecutor recommended that the accused serve his sentence in a European state as a concession for his cooperation<sup>11</sup>.

It is a fact that plea bargaining is one of the most controversial topics in criminal law<sup>12</sup>. The idea of deal-making between the prosecutor and the accused creates a moral dilemma<sup>13</sup>. Although, various

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<sup>7</sup> Combs, Nancy A. (2002) ‘Copping a Plea to Genocide: The Plea Bargaining of International Crimes’, *University of Pennsylvania Law Review*, 151(1), pp.1-157, at 4.

<sup>8</sup> Kovarovic, K. (2011) ‘Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Dispute Resolution at the International Criminal Court’, *Journal of Dispute Resolution*, 2011(2), pp.283-308, at 289.

<sup>9</sup> Rauxloh, Regina E. (2010) ‘Negotiated History: The Historical Record in International Law and Plea Bargaining’, *International Criminal Law Review*, 10(5), pp.739-770, at 741.

<sup>10</sup> Kovarovic, at 289.

<sup>11</sup> *Prosecutor v. Vincent Rutaganira*, Minutes of Proceedings, ¶ 1-C, Case No: ICTR-95-1C-T, (17.01.2005)

<sup>12</sup> *Generally see* Smith, Douglas A. (1986) ‘The Plea Bargaining Controversy’, *The Journal of Criminal Law & Criminology*, 77(3), pp.949-968.

<sup>13</sup> Pollock, Joycelyn M. (2010) *Ethical Dilemmas & Decisions in Criminal Justice*, Belmont: Wadsworth, at 16.

interpretations have made by international lawyers on plea bargaining, both opposing sides take the stand on mainly two arguments. Some believe that plea bargaining is an economic and fast way to deal with growing caseload because of the lack of resources and time for criminal tribunals<sup>14</sup>. On the other hand, opponents argue that plea bargaining sacrifices justice by rewarding the defendant for cooperation<sup>15</sup>.

Today, plea bargaining is a reality in international criminal law, while there are passionate arguments against it<sup>16</sup>. The idea of using plea bargaining at an international court had been resisted for a long time. The negotiating with the perpetrators of core crimes was considered inappropriate in terms of the aim of achieving international justice<sup>17</sup>. In 1994, the former President of the ICTY, Antonio Cassese clearly explained the rejection of plea bargaining:

*“[W]e always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying persons accused of the gravest of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.”*<sup>18</sup>

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<sup>14</sup> Damaska, M. (2004) ‘Negotiated Justice in International Criminal Courts’, *Journal of International Criminal Justice*, 2(4), pp.1018-1039, at 1028.

<sup>15</sup> Rauxloh, Regina E. (2011) ‘Plea Bargaining – A Necessary Tool for the International Criminal Court Procedure’, *Judicature*, 94(4), pp.178-185, at 178.

<sup>16</sup> Scharf, Michael P. (2004) ‘Trading Justice for Efficiency: Plea-Bargaining and International Tribunals’, *Journal of International Criminal Justice*, 2(4), pp.1070-1081, at 1070-1071.

<sup>17</sup> Turner, Jenia I. (2013), ‘Plea Bargaining’, in Carter, L. and Pocar, F. (eds.) *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*. Cheltenham: Edward Elgar Publishing, pp.34-65, at 41.

<sup>18</sup> Morris, V. / Scharf, Michael P. (1995) *An Insider Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*. Vol. II, New York: Irvington-on-Hudson, at 652.

However, in the following years in a complete turnaround from its previous policy, the ICTY changed its approach to plea bargaining<sup>19</sup>. In 2003, the ICTY started to pursue plea bargains because of the caseload and pressure from the United Nations<sup>20</sup>. To date, twenty defendants have entered guilty plea at the ICTY<sup>21</sup>. Moreover, the ICTR, the Special Court for Sierra Leone and the Iraqi Special Tribunal have applied plea bargaining mechanism<sup>22</sup>.

On the contrary, the situation has been different in the case of the ICC. Rome Statute does not include any definite statement on plea bargaining. Article 65(5) of the Rome Statute states: “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”<sup>23</sup>. Accordingly, the Statute is silent on whether the use of plea bargaining is allowed or prohibited<sup>24</sup>. It can be seen that the ICC has not followed the trend as in the case of its counterparts. In the following section, the paper will examine circumstances in which making plea bargaining could be considered as a desirable method.

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<sup>19</sup> Clark, Theresa M. (2003) ‘Transplant Justice?: The Efficacy of a Purely Common Law Concept in the International Criminal Forum’, (2003) 9 *Buffalo Human Rights Law Review* 75, footnote 108 citing suggestions made by the Government of the United States of America, rules and procedures and evidence for the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia.

<sup>20</sup> Cook, Julian A. (2005) ‘Plea Bargaining at the Hague’, *The Yale Journal of International Law*, 30(2), pp.473-50, at 475.

<sup>21</sup> International Criminal Tribunal for the former Yugoslavia (2015) ‘Guilty Pleas’, [online] Available at: <[www.icty.org/sections/TheCases/GuiltyPleas](http://www.icty.org/sections/TheCases/GuiltyPleas)> (Accessed 07.02.2015)

<sup>22</sup> For example, *Kargbo* entered a guilty plea at a preliminary hearing, *Independent Counsel v. Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu and Brima Bazzy Kamara*, Sentencing Judgement in Contempt Proceedings, ¶ 76, Case No: SCSL-2011-02-T, (11.10.2012).

<sup>23</sup> Rome Statute of the International Criminal Court, U.N. Doc A/CONF 183/9, (17.07.1998).

<sup>24</sup> Kovarovic, ‘Pleading for Justice’, *op. cit.*, at 284.

### 3. Benefits of Plea Bargaining

#### 3.1. Saving From Resources

All of the international tribunals face with the same chronic diseases; slowness and costliness<sup>25</sup>. International courts have been criticised on the basis of the fact that they are expensive and time-consuming<sup>26</sup>. Firstly, the critique on the pace of trial seems valid since even a single case would take months<sup>27</sup>. However, it should not be forgotten that international courts have been established to deal with the most serious offences such as genocide and war crimes. The brutal nature of these crimes creates challenging obstacles since in most cases thousands of people are victimized. For instance, according to the report of the UN Secretary-General approximately 800,000 people were killed during the Rwandan Genocide, between April and July 1994<sup>28</sup>. Thus, prosecuting serious crimes which affect a large number of people renders enormous costs and wasted years<sup>29</sup>. One of the main problems is that the international criminal tribunals are normally located far away from where crimes were committed. As a result, the transfer of witnesses and gathering of evidence for the courts are dilatory tasks<sup>30</sup>. Moreover, there is the added responsibility of translated submissions to the ICC to other languages which involves extra personnel and technological now-how<sup>31</sup>.

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<sup>25</sup> Combs, Nancy A. (2007) *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, California: Stanford University Press, at 31.

<sup>26</sup> Scharf, 'Trading Justice for Efficiency', *op. cit.*, at 1077.

<sup>27</sup> For instance, *Lubanga* case has taken 8 years from arrest through appeal. Even the evidentiary phase took almost 30 months. *Prosecutor v. Thomas Lubanga Dyilo*, Case Information Sheet, Case No: ICC-01/04-01/06, (15.12.2014).

<sup>28</sup> U.N. Secretary-General, 'Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda', U.N. Doc S/1999/1257, (16.12.1999).

<sup>29</sup> The ICTY's *Blaskic* trial lasted around 2 years and featured 158 witnesses and 1,300 exhibits. Moreover, French version of the transcripts runs more than 18,300 pages. *Prosecutor v. Tihomir Blaskic*, Judgement, ¶ 19, Case No: IT-95-14-T, (03.03.2000).

<sup>30</sup> See memorandum of understanding between the UN and the ICC concerning cooperation between the UN's organisation mission in the Democratic Republic of Congo (MONUC) and the ICC, 08.11.2005, available at: <www.icc-cpi.int> (Accessed 07.02.2015).

<sup>31</sup> Kovarovic, 'Pleading for Justice', *op. cit.*, at 292.

The Court also must cover the costs of witnesses and make arrangements for the security before, during, and after the Court.

The obstacles caused by heavy workload are just one side of the coin. Another point is that millions of euros have been spent by the ICC for bringing justice to the victims of international crimes. It is fair to say that the main reason for the above mentioned difficulties trigger greater costs in the case of the ICC. By adopting a different approach to the ICTY and ICTR which were concerned with a single jurisdiction, the ICC may exercise its jurisdiction globally<sup>32</sup>. Thus, the ICC needs to have capable translators and field-office staff from different cultures since it works on variety of cases at different parts of the world<sup>33</sup>. Therefore, inevitably obstacles related to finance and time would emerge in order to conduct a full trial. This is in light of the fact that a significant part of the budget of the ICC is allocated to trial-related expenses every year<sup>34</sup>. According to the ICC budget in 2013, which amounted to 115 million euros, in other words 90% of the budget was allocated to the judicial operations<sup>35</sup>. Thus, it is submitted that plea bargaining should be considered as a solution to these negations because of its fast-track nature<sup>36</sup>. Similarly, in *Plavsic* case, the Trial Chamber of ICTY emphasized that plea bargaining is an advantageous method which may prevent exorbitant and long trials<sup>37</sup>. An average plea bargaining process is relatively quick in comparison to full-trials. In *Rajic* case, the defendant was sentenced on 8 May 2006, seven months after his indictment<sup>38</sup>. Accordingly, by doing so, the ICTY prevented incurring heavy costs of a full trial.

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<sup>32</sup> Rome Statute, article 12.

<sup>33</sup> Combs, *Guilty Pleas*, *op. Cit.*, at 33.

<sup>34</sup> Kovarovic, 'Pleading for Justice', *op. cit.*, at 293.

<sup>35</sup> See International Criminal Court, "The Court Today" (29 June 2013) <[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-10-ENG.pdf)> (Accessed 07.02.2015).

<sup>36</sup> Rauxloh's *Plea Bargaining - A Necessary Tool*, *op. cit.*, at 182.

<sup>37</sup> *Prosecutor v. Biljana Plavsic*, Sentencing Judgment, ¶ 66, Case No: IT-00-39&40/1-S, (27.02.2003).

<sup>38</sup> *Prosecutor v. Ivica Rajic*, Sentencing Judgement, ¶ 8, Case No: IT-95-12-S, (08.05.2006).



Plea bargaining can also assist international courts and tribunals for other objectives. It is a fact that achieving justice is not the only task of the international courts. These intuitions are expected to achieve other goals such as easing the misery of mass victimization. Although, international justice in the past was not seen more than exercise of victor's justice, today victims' interest is an essential task of the international criminal justice<sup>39</sup>. In this sense, the ICC Trust Fund was established to provide support and redress for the victims and survivors of major crimes<sup>40</sup>. However, the Fund is largely considered as a disappointment because of the lack of sufficient resources<sup>41</sup>. In this respect, plea bargaining can help other purposes by saving money and time. By doing so, the court will have enough resources to spend more time on listening to the victims' voices, which would have far reaching effect on the ventilation of grievances of the sufferer of international crimes<sup>42</sup>.

### 3.2. Obtaining Evidence

Another problem facing the International Criminal Court is obtaining evidence. Some scholars are of the opinion that the matter of evidence before the ICC is a significant factor in its development as an effective judicial institution.<sup>43</sup> In addition to the locational difficulties mentioned above, the ICC also faces other obstacles. First of all, the absence of enforcement capacity denies the ICC to sustain an effective investigation and prosecution process.<sup>44</sup> The courts need genuine

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<sup>39</sup> Fischer, Peter G. (2003) 'The Victims' Trust Fund of the International Criminal Court – Formation of a Functional Reparations Scheme', *Emory International Law Review*, 17(1), pp.187-240, at 192.

<sup>40</sup> Ibid.

<sup>41</sup> Damaska, M. (2009) 'The International Criminal Court between Aspiration and Achievement', *University of California Los Angeles Journal of International Law and Foreign Affairs*, 14(1), pp.19-36, at 31. The critiques seem righteous since only less than 1% of the ICC Budget in 2013 reserved for the Trust Fund.

<sup>42</sup> Khan, S. Ahmed (2007) *Right of Victims Reparation by International Criminal Court*, New Delhi: APH Publishing, at 1.

<sup>43</sup> Gray, Kevin R. (2004) 'Evidence before the ICC', in D. McGoldrick, D. (ed.), *The Permanent International Court*, Portland: Hart Publishing, pp.287-314, at 287.

<sup>44</sup> Rothe, D. / Meernik, J. David / Ingadottir, T. (2013) *The Realities of the International Justice System*, Martinus Nijhoff, at 154.

cooperation of states in order to ascertain necessary evidence. The lack of cooperation extends the proceedings and cause the violation of the defendant's right to speedy trial<sup>45</sup>. Secondly, the prosecution has difficulties in linking the offense to high ranking individuals regarding the alleged crimes committed. There is no doubt that the International Criminal Court was set up to prosecute main individuals responsible for international crimes. Moreover, in recent years it has had to address the issue of atrocities committed in the course of non-international armed conflict<sup>46</sup>. On the other hand, more often than not, these defendants usually do not leave any trace of their crimes<sup>47</sup>. Thirdly, the international courts and tribunals operate in complex circumstances where conflicts are still going on. Thus, in certain circumstances, due to security considerations it creates a considerable challenge to maintain a large scaled investigation<sup>48</sup>.

It could be argued that the plea bargaining process is a convenient way for the ICC to access the necessary information relatively easy. As mentioned above, it has been used by the ICTR and the ICTY to ascertain vital information. It is fair to say that the *ad hoc* tribunals had the desired outcomes<sup>49</sup>. Many defendants shared their knowledge on other offences in exchange for various concessions. Moreover, in some cases, the offenders even accepted to testify for the prosecution of others as in the case of *Vincent Rutaganira*<sup>50</sup>. Thus, these tribunals accessed information more easily than a long process that it would normally take. In *Kambanda* case,

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<sup>45</sup> Gray, 'Evidence before the ICC', *op. cit.*, at 287-288.

<sup>46</sup> Dinstein, Y. (2014) *Non-International Armed Conflicts in International Law*, Cambridge U.P., at 177.

<sup>47</sup> Rauxloh's *Plea Bargaining*, *op. cit.*, at 183.

<sup>48</sup> Rauxloh, Regina E. (2011) 'Plea Bargaining in International Criminal Justice - Can the International Criminal Court Afford to Avoid Trials?', *The Journal of Criminal Justice Research*, 1(2), pp.1-20, at 16.

<sup>49</sup> Jackson, D., Tolly, M. & Volcansek, M., *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms: Essays on Cross-Cultural Encounter*, State University of New York Press, 2010, p. 76.

<sup>50</sup> *Prosecutor v. Vincent Rutaganira*, Minutes of Proceedings, ¶ 42, Case No: ICTR-95-1C-T, (17.01.2005).

the Prosecutor of the ICTR confirmed that the defendant had provided invaluable information for the Prosecution of others<sup>51</sup>. It can be seen that plea bargaining gives a clear message to the international community that no offender can escape prosecution since even the high-ranking officials are aware that the prosecutor may eventually track them down too. The situation in Darfur is a case in point, the President of the Republic of Sudan, *Omar Hassan Ahmad Al Bashir* was alleged to be responsible for crimes against humanity, war crimes and genocide<sup>52</sup>. Today, the evidence against *Al Bashir* is kept secret by the Prosecutor of the ICC. However, Pati believes that if there is a chance for Al-Bashir to escape from prosecution, a possibility of a full trial might be too risky<sup>53</sup>.

The positive effect of plea bargaining on evidence has been elaborated above. On the other hand, the negotiation between the prosecutor and the defence is a sensitive process. The judges and the Prosecutor at the ICC should be aware of mistakes of *ad hoc* tribunals in the past. In *Kambanda* case, the defendant was sentenced to life imprisonment in defiance of his full cooperation with the ICTR<sup>54</sup>. This decision is completely incompatible with the plea bargaining practice<sup>55</sup>. It could be argued that a court which denies the possibility of sentence reduction cannot convince other perpetrators to step forward. Thus, the ICC should be aware of the necessity of encouraging all responsible individuals, otherwise plea bargaining will be seen as an ineffective method of carrying out justice.

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<sup>51</sup> *Prosecutor v. Jean Kambanda*, Judgement and Sentence, ¶ 47, Case No: ICTR 97-23-S, (04.09.1998).

<sup>52</sup> *Prosecutor v. Omar Hasan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, p.7 and 8 Case No: ICC-02/05-01/09, (04.03.2009).

<sup>53</sup> Pati, R. (2009) 'The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option?', *U.C. Davis Journal of International Law & Policy*, 15(2), pp.265-327, at 324.

<sup>54</sup> *Prosecutor v. Jean Kambanda*, ¶ 62.

<sup>55</sup> Combs, *Guilty Pleas*, *op. Cit.*, at 92.

### 3.3. Victims' Interest

Every international crime committed leaves a scar which is impossible to completely erase, insomuch that these crimes change even the judicial system of states as in the case of *Gacaca Courts* in Rwanda<sup>56</sup>. More importantly, many individuals' lives are affected without the possibility of any redress, so that the victims of serious offences must be paid particular importance by the international courts and tribunals. In this respect, the courts must take decisions according to the facts of a present case whether a full trial is necessary or not in terms of victims' favour. It should be kept in mind that a full trial is not always the best way to serve victims' interest<sup>57</sup>. Sometimes other methods such as plea bargaining can avoid the possible negative effects of full trials such as re-traumatizing of victims<sup>58</sup>. Moreover, survivors may achieve justice upon finally offenders accept their responsibility by entering a guilty plea. The acknowledgement of consequences of heinous offences by the perpetrators may eventually provide justice and redress for the victims better than punishing an individual responsible who shows no remorse<sup>59</sup>.

It is worth noting that the International courts and tribunals were set up to mainly focus on perpetrators since the main idea is that the offender needs protection in terms of maintaining a fair trial<sup>60</sup>. Although the defendant has universal attention, victims of mass crimes are mostly

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<sup>56</sup> Generally see Clark, P. (2010) *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, Cambridge: Cambridge University Press.

<sup>57</sup> Guilty plea may be an effective way to open the door of restorative justice. Survivors can take part in proceedings and desirable information may be heard from offenders. Combs's *Guilty Pleas*, at 154.

<sup>58</sup> *Prosecutor v. Biljana Plavsic*, ¶ 68.

<sup>59</sup> The former Liberian president Charles Taylor sentenced to 50 years in prison by the Special court for Sierra Leone. However, the former president has never accepted his guilt. The Defence submitted that the evidence as whole, including all the surrounding circumstances, fails to establish a Joint criminal enterprise, as charged or at all, and that the Accused had nothing to do with and was not even aware of the crimes he is charged with. *Prosecutor v. Charles Ghankay Taylor*, ¶ 6890.

<sup>60</sup> Cryer, R. / Friman, H. / Robinson, D. / Wilmshurst, E. (2010) *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, at 478.

ignored by the international community<sup>61</sup>. However, the approach by the international justice system must be changed and the interest of victims should be at the forefront of any judicial system<sup>62</sup>. This is in light of the fact that survivors of mass crimes would need protection and support for their suffering<sup>63</sup>. Therefore, it is submitted that plea bargaining could play a crucial role to fulfil this goal. Acknowledgment of guilt by offenders can create public awareness, especially, confession of high-ranking officials before the whole world is important to demonstrate the suffering caused by international crimes. Similarly, Damaska notes that taking responsibility of international crimes by high-ranking officials has a purifier effect on victims of such crimes<sup>64</sup>. For instance, *Jean Kambanda*, the former Prime Minister of Rwanda, pleaded guilty to genocide and crimes against humanity; therefore, Rwandan genocide was formally accepted by the former prime minister of Rwanda<sup>65</sup>.

It could be argued that the ICC can benefit from plea bargaining in order to expose victims' sorrow. However, the application of plea bargaining by the ICC for every case may result in exploitation of the process at the expense of victims' forgiveness. The deep remorse of the defendant is crucial to achieve an effective justice. The permanent international court must be convinced that the defendant actually regrets his inhumane acts, otherwise plea bargaining may cause distress to victims instead of achieving true justice. It is the belief of the present

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<sup>61</sup> Kristjánsdóttir, E. (2009) 'International Mass Claims Processes and the ICC Trust Fund for Victims', in Ferstan, C., Goetz, M. and Stephens, A. (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Boston: Martinus Nijhoff, pp.167-195, at 173.

<sup>62</sup> In this sense, new measures proposed such as restitution, compensation and rehabilitation. Cryer / Friman / Robinson / Wilmshurst, *An Introduction to International Criminal Law and Procedure*, *op. cit.*, at 490.

<sup>63</sup> Koskenniemi, M. (2002) 'Between Impunity and Show Trials', *Max Planck Yearbook of United Nations Law*, 6(1), pp.1-35, at 10.

<sup>64</sup> Damaska's *Negotiated Justice*, *op. cit.*, at 1037.

<sup>65</sup> *Prosecutor v. Jean Kambanda*, ¶ 3.

author that justice not only has to be done but must be seen to be done<sup>66</sup>. In *Plavsic* case, the defendant pleaded guilty for crimes against humanity<sup>67</sup>. The ICTY Trial Chamber sentenced *Plavsic* to eleven years imprisonment<sup>68</sup>. The conviction of a high-ranking official such as *Plavsic* has to be considered as a success. On the other hand, *Plavsic* stated while serving her sentence at Sweden:

*“I sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges. If I hadn't, the trial would have lasted three, three and-a-half years. Considering my age that wasn't an option.”*<sup>69</sup>

It can be seen that the defendant used plea bargaining to get a reduction in her sentence, while she was not sorry for her acts. In this respect, the ICC should deeply examine the remorse of the accused. It must be kept in mind that plea bargaining is the key point for reconciliation between victims and offenders, and a statement of remorse is a crucial step for creating unity among the parties involved<sup>70</sup>. So that, the misuse of plea bargaining may erase its entire positive effect on victims and sabotage the impending peace.

#### **4. The Cases against Plea Bargaining**

##### **4.1. Sacrifice of Justice**

Plea bargaining is a very controversial topic on national and international level as noted above<sup>71</sup>. Some of the critics differ due to the discrepancy between those areas. For instance, necessity of historical record poses a major problem on the international level. However, plea

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<sup>66</sup> See Lord Clyde (2004) ‘Justice Seen to be Done’, in Hoskins, M. and Robinson, W. (eds.), *A True European: Essays for Judge David Edward*, Portland: Hart Publishing, at 21-30.

<sup>67</sup> *Prosecutor v. Biljana Plavsic*, ¶ 5.

<sup>68</sup> *Prosecutor v. Biljana Plavsic*, ¶ 132.

<sup>69</sup> Goldberg, Daniel U. (2009) ‘Bosnian War Criminal: I Did Nothing Wrong’, (The Local: Sweden’s News in English, 26.01.2009), [online] Available at: <[www.thelocal.se/17162/20090126#.UUr82BxOU\\_k](http://www.thelocal.se/17162/20090126#.UUr82BxOU_k)> (Accessed 07.02.2015).

<sup>70</sup> Combs, *Guilty Pleas*, *op. Cit.*, at 138.

<sup>71</sup> *Ibid*, at 5-6.

bargaining is criticized in terms of both national and international level on the basis that justice is ultimately sacrificed<sup>72</sup>. These critics are quite severe in the case of international justice. Henham has stated that plea bargaining is morally wrong, because it does not serve a legitimate purpose<sup>73</sup>. It has been argued that the international criminal courts and tribunals undermine the purpose of prosecuting major crimes by applying plea bargaining.<sup>74</sup> Therefore, victims may be frustrated when these intuitions use plea bargaining for serious crimes<sup>75</sup>. It is a fact that people are sensitive to making reduction on international crimes, since victims would be very sensitive in relation to reduction of charges in relation to these crimes. Today, it is interesting to point out that most of the continental legislators still oppose the idea of plea bargaining for serious offences nationally and interracially<sup>76</sup>. It is worth noting that the idea of plea bargaining mechanism is a very Anglo-Saxon concept practised by states such as the USA and the United Kingdom<sup>77</sup>. Therefore, it is fair to say that plea bargaining may cause furore even in the case of some national jurisdictions.

It is clear that plea bargaining has the potential to impair the principle of justice, especially in the case of charge bargaining since the prosecution offers to drop some of the charges in exchange for a guilty plea, so that the offender is never found responsible for a number of crimes committed<sup>78</sup>. There is no doubt that such an arrangement may be

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<sup>72</sup> Bassiouni, M. Cherif (1996) 'Searching for Peace and Achieving Justice: the Need for Accountability', *Law and Contemporary Problems*, 59(4), pp.9-28, at 27.

<sup>73</sup> Henham, R. (2005) 'The Ethics of Plea Bargaining in International Criminal Trials', *Liverpool Law Review*, 26(3), pp.209-224, at 210.

<sup>74</sup> Safferling, C. (2012) *International Criminal Procedure*, Oxford: Oxford University Press, at 439.

<sup>75</sup> As one South African perpetrator commented, "[t]he victims' lawyer says we must talk to them, but it is difficult . . . because every time we say we're sorry, they shake their heads and say they don't accept it." Krog, A. (2000) *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*, New York: Three River Press, at 117.

<sup>76</sup> Damaska's *Negotiated Justice*, *op. cit.*, at 1025.

<sup>77</sup> Combs, *Guilty Pleas*, *op. Cit.*, at 127.

<sup>78</sup> Rauxloh's *Plea Bargaining in International Criminal Justice*, *op. cit.*, at 5.

incomprehensible in terms of expectation of justice by the victims. On the other hand, plea bargaining should not be considered as a kind of amnesty. The accused who has pleaded guilty still has to face conviction for his other offences. The punishment of the defendant is not the only way to bring justice. The number of offenders who were prosecuted by the international courts and tribunals is the real indicator of the justice achieved. In this respect, plea bargaining is an effective way to lead to prosecution of others responsible. Similarly, Pati points out that more offenders may be exposed to the use of plea bargaining in the future<sup>79</sup>. As mentioned above, the international courts can access new evidence with the assistance of the defendant, thus the prosecution may use the evidence to track down other offenders<sup>80</sup>. In *Todorovic* case, the defendant agreed to testify in the case against his co-accused and in any other proceedings which was requested by the Prosecutor<sup>81</sup>.

In addition, it is significant to point out that plea bargaining may contribute to justice in other ways. Firstly, plea bargaining may reduce the possibility of acquittal of the defendant when the prosecution does not have enough information. Rauxloh has noted that the Prosecutor of the ICC may use plea bargaining in weak cases, because the high standards of defendant's rights in the Rome Statute makes it hard to prove the guilt of the accused.<sup>82</sup> Secondly, as stated above, time saving nature of plea bargaining may help the ICC to allocate its budget to deal with other crimes. The court has been criticised on many occasions in the past that the Prosecutor does not investigate crimes of both sides of a conflict<sup>83</sup>. Thus, the ICC can prevent these criticisms by using plea bargaining in

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<sup>79</sup> Pati, 'The ICC and the Case of Sudan's Omar Al Bashir', *op. cit.*, at 323.

<sup>80</sup> *Prosecutor v. Momir Nikolic*, Sentencing Judgement, ¶ 71, Case No: IT-02-60-1-S, (02.12.2003).

<sup>81</sup> *Prosecutor v. Stevan Todorovic*, Sentencing Judgement, ¶ 84, Case No: IT-95-9/1-S, (31.07.2001).

<sup>82</sup> Rauxloh's *Plea Bargaining*, at 181.

<sup>83</sup> Schabas, William A. (2012) 'The International Criminal Court: Struggling to Find its Way', in Cassese, A. (ed.) *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press, pp.250-261, at 258.



which the Prosecutor could be allocated more time and funding to investigate and prosecute other violations.

#### **4.2. Damage to Credibility of the ICC?**

Plea bargaining is also criticised on the basis that it may harm the reliability of the ICC in the eyes of the international community. Damaska claims that absence of full trials may be manipulated by certain individuals against achieving international justice.<sup>84</sup> Furthermore, some of the other critics specifically focus on the ICC in this regard<sup>85</sup>. The international criminal tribunals have different approaches on jurisdiction: *Ad hoc* tribunals have primacy over national courts; in contrast, the ICC adopted complementarity principle<sup>86</sup>. According to this, the ICC can exercise its jurisdiction only if domestic courts were unwilling or unable to prosecute<sup>87</sup>. It can be seen that the ICC does not have jurisdiction on core crimes unless unwillingness or inability of national authorities is clearly apparent.<sup>88</sup> According to Rauxloh the victims may feel that the ICC does not perform its duty by negotiating with the defendants, because the Court took the case in the first place with asserting the fact that national authorities were unable or unwilling to try responsible individuals<sup>89</sup>.

The criticism meted out by international lawyers is comprehensible, since the aforementioned international criminal tribunals sometimes refused a full trial, although they were established to prosecute grave breaches of international criminal law in the first place<sup>90</sup>. However, it should not be forgotten that in some occasions plea bargaining with the

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<sup>84</sup> Damaska's *Negotiated Justice*, at 1031.

<sup>85</sup> Mendes, E., *Peace and Justice at the International Criminal Court: A Court of Last Resort*, Edward Elgar Publishing, 2011, p. 25.

<sup>86</sup> Generally see Stahn, C. & M.M. El Zeidy (eds.), (2014) *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge U.P.

<sup>87</sup> Rome Statute, article 17.

<sup>88</sup> Struett, M.J., (2008) *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, Palgrave Macmillan, at 174.

<sup>89</sup> Rauxloh's *Plea Bargaining, op. cit.*, at 180.

<sup>90</sup> Y. Shany, (2014) *Assessing the Effectiveness of International Courts*, Oxford U.P., at 233.

defendant is necessary for the prosecution due to lack of evidence. The reduction of sentence of the defendant is hard to take since no punishment would be sufficient in the eyes of the victims<sup>91</sup>. On the other hand, a possible lenient sentence may be more desirable than a complete acquittal. Another point is that the reliability of the ICC is actually affected when the Court fails to track down and prosecute offenders. One of the best examples of this is the case of *Joseph Kony*, leader of the Lord's Resistance Army. So far, the ICC has not been able to capture *Kony* in spite of the fact that an arrest warrant was issued in 2005<sup>92</sup>. In fact, currently the ICC has no specific information on *Kony* and his whereabouts<sup>93</sup>. Bringing offenders such as *Kony* before the ICC would be the best way for the Court to increase its credibility in the eyes of the public. It is submitted that plea bargaining in particular case may play a crucial role for bringing him to justice and provide redress for his victims. Through this approach, the ICC can ascertain new information on *Kony* and his organisation. The ICTR adopted this approach in the case of *Kambanda*, who was one of the most important figures of the Rwandan Genocide in order to prosecute him<sup>94</sup>. To sum up, the present author is the opinion that the ICC can solve this embarrassing dilemma by adopting plea bargaining mechanism. Moreover, the ICC would be considered as an effective and functioning institution upon prosecuting major criminals such as *Kony*.

### 4.3. The Importance of Historical Records

As alluded to earlier, the international criminal courts are expected to achieve more than one goal not just achieving the justice, but

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<sup>91</sup> Combs, *Guilty Pleas*, *op. cit.*, at 133.

<sup>92</sup> *Prosecutor v. Joseph Kony*, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Warrant of Arrest for Joseph Kony, ¶ 48, Case No: ICC-02/04-01/05, (27.09.2005).

<sup>93</sup> The Guardian (2014) 'Joseph Kony is Hiding Out on Sudan Border, Report Claims', [online] Available at: <[www.theguardian.com/world/2014/nov/06/joseph-kony-hiding-sudan-border-report-lra](http://www.theguardian.com/world/2014/nov/06/joseph-kony-hiding-sudan-border-report-lra)> (Accessed 07.02.2015).

<sup>94</sup> *Prosecutor v. Jean Kambanda*, ¶ 62.

reconciliation and providing redress to victims of major crimes<sup>95</sup>. Moreover, historical records are of crucial importance to uncover the truth about international crimes. Since there is no reconciliation without truth, the international courts have to create a historical record, by doing so the findings of international courts will challenge the attrition of time.<sup>96</sup> The Nuremberg Tribunals demonstrated the power and necessity of historical records<sup>97</sup>. The discovery of the truth at Nuremberg made it impossible for anybody to deny the fact that the Holocaust had ever taken place<sup>98</sup>. This crucial benefit of historical record cause severe criticism on the issue of plea bargaining. Some scholars believe that plea bargaining may undermine the purpose of the international criminal courts and tribunals in order to compile historical records<sup>99</sup>. The idea is that by accessing the truth the international criminal courts would diminish the sorrow of violent history.

The truth is sometimes more important than prosecuting offenders<sup>100</sup>. The victims of mass crimes yearn to know what actually took place during the conflict. The truth and reconciliation commissions and courts such as *Gacaca* are reflections of this notion. However, plea bargaining would not be an absolute obstacle for the purpose of uncovering the historical records. In fact, plea bargaining can provide too much information in the same manner as a full trial. A case in point is *Obrenovic* case in which the defendant outlined the atrocities which

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<sup>95</sup> Moffett, L. (2014) *Justice for Victims before the International Criminal Court*, Abingdon: Routledge, at 12; Cryer / Friman / Robinson / Wilmschurst, at 30-36.

<sup>96</sup> Cassese, A. (2011) 'Reflections of International Criminal Justice', *Journal of International Criminal Justice*, 9(1), pp.271-275, at 273.

<sup>97</sup> Funk, T.M. (2010) *Victims' Rights and Advocacy at the International Criminal Court*, Oxford U.P., p. 128.

<sup>98</sup> Meltzer, Bernard D. (1996) 'War Crimes: The Nuremberg Trial and The Tribunal for the Former Yugoslavia', *Valparaiso University Law Review*, 30(3), pp.895-912, at 902.

<sup>99</sup> Combs, *Copping a Plea to Genocide*, *op. cit.*, at 146.

<sup>100</sup> In *Nikolic* case, mother of two of the victims said: "I would just like to ask Dragan to tell me where [my sons] are, in which mass grave, so that their mother could give them a dignified funeral. I want to give them a proper burial, and then I can go away myself." *Prosecutor v. Dragan Nikolic*, Transcript, Case No. IT-94-2-S, (03.11.2003), at 247.

occurred between 1995 and 1998 at great length to the tribunal<sup>101</sup>. Moreover, the ICTY obtained a detailed record of crimes, while the Tribunal sacrificed a full trial by resorting to plea bargaining mechanism. In addition, plea bargaining may be used even if the defendant does not provide the required information regarding the alleged offences, if the court has already attained elaborate information. Rauxloh defends this stand point by saying:

*“If the historical facts of a certain situation have been already established in an earlier case and the present case would not offer much new information, the value of an additional trial in this respect is questionable. In such a case a brief admission of guilt to facts already established does not hinder the historical record effect of the court procedures in total.”*<sup>102</sup>

In this respect, the ICC can take advantage from plea bargaining on such conditions that especially charge bargaining should be adopted more limited. Often the use of charge bargaining may cover mass violations unintentionally. Charge bargaining should be included in negotiations only if the situation at hand has been clearly understood.

Another controversial point in relation to plea bargaining is the fact that the amount of records used would rather be sparse. Some scholars believe that plea bargaining cannot obtain enough information in contrast to a full trial<sup>103</sup>. Most famous example is that of *Plavsic*, which admitted the facts of the case in a five-page document<sup>104</sup>. However, it is the opinion of the present author that it is unfair to compare plea bargaining with a full trial. A full trial normally take month if not years, hence an ordinary final decision contains hundreds of pages of submissions and evidence. Plea bargaining can reduce this process, because it is an effective way to decrease the caseload. Therefore, it is submitted that the

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<sup>101</sup> *Prosecutor v. Dragan Obrenovic*, Statement of Facts as set out by Dragan Obrenovic, Case No: IT-02-60-T, (20.05.2003).

<sup>102</sup> Rauxloh's *Negotiated Justice*, *op. Cit.*, at 754.

<sup>103</sup> Scharf, 'Trading Justice for Efficiency', *op. Cit.*, at 1080.

<sup>104</sup> *Id.* at 1079.

international criminal courts may have time and resources to judge more offenders by using plea bargaining. Therefore, admissions of offenders who had pleaded guilty can create a historical record<sup>105</sup>.

## 5. Conclusion

Nowadays, international courts are expected to achieve many goals on behalf of the international community than ever before. Moreover, achieving justice is not the only task of these courts, but finding the truth and redress for the victims are also expected by the international community. There is no denying that the International Criminal Court faces tremendous challenges in securing justice and peace for victims. As it has been argued, the *ad hoc* tribunals started to make use of plea bargaining in response to practical requirements, negotiated justice was considered as the only way to deal with the growing case-load of the said tribunals and expectation by the international community to complete their task in a reasonable time. This paper has argued that by adopting plea bargaining the ICC can achieve justice as well as saving much needed time and funding for other prosecutions. However, the complex nature of international atrocities makes it difficult to investigate and prosecute these crimes. Many of mass crimes create thousands of victims and millions of people are affected by these violations. The main challenge is that the ICC, like other international criminal tribunals, has to deal with these cases without any enforcement power. Therefore, the ICC needs active assistance of member states without which it would not be able to achieve justice.

International lawyers mainly focus their criticism on expensiveness and slowness of the ICC procedures. These critics need look no further than to the *ad hoc* tribunals such as ICTY and ICTR which achieved their ultimate goal of justice and redress for the victims of crimes through the process of plea bargaining. In this respect, the option of plea bargaining is a reasonable alternative to alleviate these issues in relation to the ICC too.

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<sup>105</sup> Tieger, A. / Shin, M. (2005) 'Plea Agreement in the ICTY: Purpose, Effects and Propriety', *Journal of International Criminal Justice*, 3(3), pp.666-679, at 671.

As submitted above, the active usage of plea bargaining may reduce case-load and save resources at the same time. Hence, the Court may have more time and money to achieve other goals. On the other hand, it is crucial to heed the criticism on plea bargaining.

There is no question that in the case of adoption of plea bargaining, the judges and the Prosecutor at the ICC would examine each case carefully and on its merit whether or not plea bargaining could be utilized. However, it has to be admitted that the arbitrary usage of plea bargaining may impair the positive effect and the general goal of establishing historical records. Moreover, the Court should be convinced of the defendant regret and remorse for his/her criminal conduct. Additionally, plea bargaining should be used only under very restrictive circumstances, and not if there is any possibility of the truth being compromised or concealed. Therefore, the ICC should follow the footsteps of its international predecessors. There is no doubt that the ICC must learn from the experience of the previous criminal tribunals and may even have a new provision which allows plea bargaining inserted into the Rome Statute.

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