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# Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Dispute Resolution at the International Criminal Court

Kate Kovarovic\*

*The entire legal profession . . . has become so mesmerized with the stimulation of the courtroom contest, that we tend to forget that we ought to be healers—healers of conflicts.*

Chief Justice Warren Burger\*\*

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## I. INTRODUCTION

Though its exact parameters are unclear, the field of international criminal law (ICL) typically extends to those perpetrators of crimes so heinous as to constitute an attack against the entire international community.<sup>1</sup> Historically the international community has responded to the conduct of such perpetrators by creating special tribunals to preside over their trials. Given the scope and nature of these crimes, these tribunals are created with the dual goals of achieving both peace in the existing conflict region and justice for the victims, as “[i]t is understood that no lasting peace can be achieved without justice . . . .”<sup>2</sup>

Two of the more prominent international criminal courts, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), initially barred the use of plea bargaining from their courtroom procedures after deeming the process to be inconsistent with these goals. This assertion by the ICTY and the ICTR (collectively the Tribunals) garnered widespread support throughout the international community, as many believed that “the gravity of the crimes within the jurisdiction of international criminal courts prohibits any negotiations with the alleged perpetrators.”<sup>3</sup> However,

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\*\* Warren E. Burger, Chief Justice, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

1. For example, the crimes of genocide, crimes against humanity, and war crimes.

2. Regina E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, 10 INT’L CRIM. L. REV. 739, 740 (2010) (referencing the frequently cited dissenting opinion of *Prosecutor v. Deronjić*, in which Judge Schomburg stated, “However, there is no peace without justice; there is no justice without truth, meaning the entire truth and nothing but the truth.”) [hereinafter Rauxloh’s *Negotiated History*]. See *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Dissenting Opinion of Judge Wolfgang Schomburg, ¶ 6 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004).

3. Regina E. Rauxloh, *Plea Bargaining in International Criminal Justice: Can the International Criminal Court Afford to Avoid Trials?*, 1 J. CRIM. JUST. RES. 1, 2 (2011), available at

both Tribunals quickly became overburdened by the unique challenges of hosting such trials to the extent their capacity to achieve both peace and justice was hindered.

As a result, both the ICTY and the ICTR restructured their courtroom processes to allow for the use of plea bargaining as an alternative method of dispute resolution. In doing so, the Tribunals highlighted the relatively similar goals between international adjudication and alternative dispute resolution (ADR), as both systems are “linked by common concerns, such as fairness, ensuring that participants have a voice in the dispute resolution process, and guaranteeing procedural justice.”<sup>4</sup> Thus while the Tribunals’ early “desire for voice, control, and procedural justice [often] manifested itself in the creation of trials,”<sup>5</sup> both came to demonstrate that these desires could be equally achieved through a closely regulated plea bargaining process.

However, the debate regarding the availability of plea bargaining was later renewed when the international community sought to replace conflict-based tribunals with a permanent criminal court. This led to the creation of the International Criminal Court (ICC) in 2002, which represented a permanent international court with jurisdiction over “the most serious crimes of concern to the international community as a whole.”<sup>6</sup> While at first the ICC made no definitive assertions regarding plea bargaining, the issue was briefly addressed in the text of the Court’s founding treaty, the Rome Statute. Article 65(5) of the Rome Statute holds: “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>7</sup> Accordingly, the Court neither explicitly allows nor forbids the use of plea bargaining; rather it simply reserves the Court’s right “not [to be] bound by such agreements.”<sup>8</sup>

Despite its reservations, the potential benefits of permitting plea bargains at the ICC far outweigh the potential costs. The histories of both the ICTY and the ICTR reveal the substantial advantages to incorporating plea bargaining into the international criminal adjudication process, suggesting that this methodology would be similarly beneficial at the ICC. Though the Tribunals lack continuity in their use of plea bargaining, the ICC must look only to the principles of ADR for guidance. The methodology of dispute systems design (DSD) provides a framework in which the ICC can devise a structure of dispute resolution centered on the plea bargaining process. Furthermore, given that plea bargaining functions as a form of negotiation, the ICC can utilize the principles of ADR to implement a high-functioning system consistent with the goals of both international adjudication and dispute resolution.

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[http://www.icjrc.org/yahoo\\_site\\_admin/assets/docs/RM291111\\_Final\\_Version\\_by\\_JCJR\\_for\\_Publication\\_11.43105037.pdf](http://www.icjrc.org/yahoo_site_admin/assets/docs/RM291111_Final_Version_by_JCJR_for_Publication_11.43105037.pdf) [hereinafter Rauxloh’s *Plea Bargaining*].

4. Andrea Kupfer Schneider, *Bargaining in the Shadow of International Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT’L L. & POL. 789, 790 (2009).

5. *Id.* at 797.

6. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute].

7. *Id.* art. 65(5).

8. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 19.

Thus this article serves to illustrate how the implementation of a plea bargaining process at the ICC would enable the Court to achieve both peace and justice. Part II begins by analyzing the history of plea bargaining in the international criminal arena, using the ICTY and the ICTR as models of the successful incorporation of plea bargaining into a court's adjudication process. Part III transfers these advantages to the ICC by examining how the plea bargaining process would advance the Court's goals of achieving peace and justice. Part IV moves from the theoretical to the practical by analyzing how the principles of ADR provide a framework for establishing a functional plea bargaining process at the ICC. Finally, Part V provides conclusive remarks about the role of plea bargaining in attaining peace and justice at the ICC.

## II. THE HISTORY OF PLEA BARGAINING IN INTERNATIONAL LAW

There is little debate regarding the importance of plea bargaining in the United States' (U.S.) criminal system,<sup>9</sup> as roughly 90% of such cases are "disposed of by a guilty plea secured through plea bargaining . . . [and such] high guilty plea rates are commonly believed necessary in order for the system to function."<sup>10</sup> However, the international community has long been reluctant to transfer this approach to its own legal systems. Opponents of the process argue that the very nature of ICL prohibits the use of plea bargaining, as the "crimes within the [Tribunals'] jurisdiction [a]re simply . . . too reprehensible to be bargained over."<sup>11</sup> Others believe that trials provide a better forum for victims' recovery, as "[i]n disputes focused on human rights, the creation of trials—both prosecutions dealing with war crimes and cases brought by individuals against their government for violations—gives voice to individuals."<sup>12</sup>

Such mentalities dominated the field of ICL during the formative years of early international criminal tribunals. Prompted by the violent conflicts in the former Yugoslavia and Rwanda during the early 1990s, the United Nations (UN) identified ad hoc criminal tribunals as the most effective legal forums in which perpetrators of gross atrocities could be brought to justice. These courts were designed with limited, conflict-based jurisdiction.

The first of these tribunals was the ICTY, created in 1993.<sup>13</sup> The Tribunal was initially resolute in its condemnation of plea bargaining as antithetical to its goals of peace and justice, and its judges asserted the inapplicability of plea bargaining before hearing their first case. In announcing its Rules of Procedure and Evidence (RPE), then-President Antonio Cassese explained the rationale of the Tribunal in rejecting the use of plea bargaining:

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9. Rauxloh's *Negotiated History*, *supra* note 2, at 741 ("[I]t is often claimed that a modern criminal justice system would collapse if it were not for the fact that the majority of trials are replaced by informal negotiations.").

10. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 19 (2002).

11. Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070, 1071 (2004).

12. Schneider, *supra* note 4, at 798.

13. S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808, at 2 (Feb. 22, 1993) [hereinafter ICTY Statute].

[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 . . . .<sup>14</sup>

In the years following this declaration the Tribunal increasingly struggled to manage its caseload given the growing involvement of the international community in arresting and transferring indictees.<sup>15</sup> The court was inundated with new cases but found that it was unprepared to host complete trials for all its defendants. Thus just seven years after Cassese's declaration, the ICTY changed course and "began to aggressively pursue plea bargains"<sup>16</sup> as a way to manage its docket.

While two other defendants pled guilty before him,<sup>17</sup> it was Stevan Todorović who first engaged in the plea bargaining process at the ICTY. Todorović was indicted with four other defendants for committing atrocities including crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war.<sup>18</sup> Although all five defendants pled not guilty and prepared for trial, Todorović possessed a bargaining chip which the others did not, as he had allegedly been injured by North American Treaty Organization (NATO) forces during his detention and transport.<sup>19</sup> Thus

[w]hile the case was pending . . . Todorović and the prosecution negotiated a plea agreement. Pursuant to the plea agreement, Todorović pled guilty to one count of persecution as a crime against humanity, promised to testify against his co-defendants and in other proceedings . . . and

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14. Scharf, *supra* note 11, at 1073, IT/29 (citing a Statement by the President [of the ICTY] made at a Briefing to Members of Diplomatic Missions).

15. Rauxloh's *Negotiated History*, *supra* note 2, at 745 (explaining that during this time, the international community began offering financial incentives to Balkan authorities for transferring indictees to the Tribunal and the North Atlantic Treaty Organization [NATO] also agreed to arrest indictees).

16. Scharf, *supra* note 11, at 1073.

17. Dražen Erdemović entered the first guilty plea before the ICTY. Erdemović's case is unique in that the defendant was not being actively sought by the Tribunal when he voluntarily contacted the court and offered extensive assistance with its investigations. The Trial Chamber ultimately sentenced Erdemović to five years' imprisonment, while noting "the benefits that a guilty plea affords to the Tribunal . . ." Combs, *supra* note 10, at 114; *See* Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998). Goran Jelisić was the second defendant to plead guilty before the Tribunal, but "the case did not involve a plea bargain because Jelisić got nothing in return for his plea." Instead prosecutors told Jelisić that a guilty plea would not affect their decision to seek the harshest available sentence, and Jelisić was eventually sentenced to forty years' imprisonment. Combs, *supra* note 10 at 117; *See* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶124 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

18. Prosecutor v. Simić, Case No. IT-95-9-PT, Second Amended Indictment, ¶¶ 29-30, 34, 38, & 40-47 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 25 1999).

19. *See* Combs, *supra* note 10, at 118 ("Todorović pled not guilty to the counts and prepared, along with his co-defendant, for trial. Unlike his co-defendants, however, Todorović held a bargaining chip - the ability to embarrass NATO - that would assist him in obtaining sentencing concessions. Todorović had been captured by four bounty hunters while in his home . . . [and] was allegedly dealt a heavy blow to the head while being transported to Bosnia-Herzegovina and into the hands of the NATO forces deployed there.").

withdrew his motions challenging the legality of his arrest. The prosecution, for its part, withdrew the remaining twenty-six counts and agreed to recommend to the Trial Chamber a prison sentence of between five and twelve years. Both parties agreed not to appeal any sentence imposed by the Trial Chamber within that range, and both parties agreed that if either side did not fulfil its end of the bargain, the plea agreement would be dissolved and the case would proceed to trial. *Todorović* thus represents the first ICTY case to expressly feature plea bargaining.<sup>20</sup>

While the terms of this plea agreement certainly worked in the defendant's favor, it is also true that "Todorović took a risk."<sup>21</sup> The Trial Chamber was not obligated to accommodate these terms in sentencing the defendant, and Todorović could easily have received a sentence far outside the scope of this agreement.

In acknowledging the usefulness of plea bargaining in Todorović's case, the ICTY sought to better enable its prosecutors to utilize this practice in later cases, as well. Although the court's founding statute did not explicitly address the issue of plea bargaining, it did authorize the Tribunals' judges to adopt their own RPE.<sup>22</sup> In 1997 the ICTY attached a provision to its RPE relating to the practice of plea bargaining which read:

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

- (i) the guilty plea has been made voluntarily;
- (ii) the guilty plea is informed;
- (iii) the guilty plea is not equivocal; and
- (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.<sup>23</sup>

Upon the implementation of this provision plea bargaining became increasingly popular at the Tribunal and as of 2009 some twenty defendants had pled guilty before the ICTY, most of whom engaged the prosecutors in negotiations before entering their pleas.<sup>24</sup>

20. *Id.* at 119-20.

21. *Id.* at 142.

22. ICTY Statute, *supra* note 13, art. 15 ("The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.")

23. Rules of Procedure and Evidence, U.N. ICTY, U.N. Doc. IT/32/Rev. 45, Rule 62 *bis* (Dec. 8, 2010), available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev45\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf) [hereinafter ICTY RPE].

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

As the second ad hoc criminal tribunal created by the UN, the ICTR's<sup>25</sup> history with plea bargaining closely mimics that of the ICTY's. Despite its initial hesitation to incorporate the practice into its procedures, the Tribunal fell victim to similar constraints as the ICTY in managing its docket. Accordingly, the ICTR revised its rules and included as Rule 62(B):

(B) If an accused pleads guilty in accordance with Rule 62 (A)(v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:

(i) is made freely and voluntarily;

(ii) is an informed plea;

(iii) is unequivocal; and

(iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case. Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.<sup>26</sup>

Regardless of this provision, the ICTR struggled more than the ICTY to incorporate the practice of plea bargaining into its procedures.<sup>27</sup>

This is reflected in the Tribunal's history with defendants who have pled guilty. The first two defendants to have pled guilty before the ICTR, Jean Kambanda and Omar Serushago, voluntarily offered their cooperation to the court in anticipation of receiving sentencing leniency in return. However, the prosecutors in both cases informed the defendants that no concessions would be made despite their assistance.<sup>28</sup> Instead it was Georges Ruggiu, the third defendant to have pled guilty before the court, who prosecutors first engaged in plea negotiations.

As with Kambanda and Serushago, Ruggiu was told by prosecutors that they could make no guarantees about his final sentence.<sup>29</sup> However, prosecutors agreed to work with foreign authorities to ensure the safety of Ruggiu's family in ex-

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25. S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955, at 1 (Nov. 8, 1994).

26. Rules of Procedure and Evidence, U.N. ICTR, U.N. Doc. ITR/3/Rev. 1, Rule 62(B) (Mar. 14, 2008), available at <http://www.unictr.org/Portals/0/English/Legal/Evidance/English/080314.pdf> [hereinafter ICTR RPE].

27. Rauxloh's *Negotiated History*, *supra* note 2, at 742 (noting that the ICTR serves as "one of the very few examples where the Tribunal and the Prosecution have not succeeded in establishing plea bargaining as a widely used practice.")

28. In Kambanda's case, the plea agreement stated that "no agreements, understandings or promises" had been made with regards to his sentencing. Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 48 (Sept. 4, 1998). Furthermore, Serushago in his agreement acknowledged that "sentencing is at the entire discretion of the Trial Chamber," as the prosecution made no guarantees as to its sentencing recommendation. Combs, *supra* note 10, at 134 (citing Prosecutor v. Serushago, Case No. ICTR-98-37, Plea Agreement Between Omar Serushago and the Office of the Prosecutor, ¶ 40 (Dec. 4, 1998)).

29. Prosecutor v. Ruggiu, Case No. ICTR-97-32, Transcript, ¶¶ 10-12 (May 15, 2000) (recording Ruggiu's acknowledgement that he received no sentencing guarantees in exchange for his guilty plea).

change for his continued cooperation.<sup>30</sup> Such unprecedented collaboration between parties seemingly won the approval of the court. In issuing Ruggiu's sentencing judgment in June 2000, the Trial Chamber's "view of guilty pleas seem[ed] to have evolved"<sup>31</sup> as it asserted that guilty pleas would be met by sentencing discounts: "[I]t is good policy in criminal matters that some form of consideration be shown towards those who have confessed their guilty, in order to encourage other suspects and perpetrators of crimes to come forward."<sup>32</sup>

As both the ICTY and the ICTR have "[come] to endorse plea bargaining,"<sup>33</sup> they have also helped to determine the meaning of the term in the context of ICL. While there is not one universally accepted definition of "plea bargaining," the practice as embodied by these two Tribunals refers to the negotiation process whereby a prosecutor makes certain concessions in exchange for a defendant's guilty plea.<sup>34</sup> In the context of ICL, plea bargaining often falls into one of two categories. The first is charge bargaining, where a prosecutor offers to drop certain charges if the defendant will plead guilty to the remaining ones.<sup>35</sup> The second is sentence bargaining, where the prosecutor offers to recommend a more lenient sentence in exchange for the defendant's guilty plea.<sup>36</sup>

In utilizing such practices, the Tribunals drastically modified the methodologies of international criminal courts. Upon their creation, the UN asserted that the ICTY and the ICTR possessed critical differences from their domestic counterparts:

Chief among these differences is the purpose they were designed to serve. Rather than focusing on the traditional objectives of criminal law (retribution, prevention, rehabilitation and deterrence), the Security Council stipulated that the major purpose of the ad hoc international criminal courts was to contribute to the restoration and maintenance of peace and the rule of law in [the conflict regions].<sup>37</sup>

Nevertheless, many international scholars found the Tribunals as originally designed "to bear more affinity to adversarial systems."<sup>38</sup> However, "amendments to

30. See Combs, *supra* note 10, at 138 n. 642 (referencing Prosecutor v. Ruggiu, Case No. ICTR-97-32-DP, Plea Agreement Between Georges Ruggiu and the Office of the Prosecutor, ¶ 226 (May 12, 2000)).

31. Combs, *supra* note 10, at 138.

32. Prosecutor v. Ruggiu, Case No. ICTR-97-31-I, Judgment and Sentence, ¶ 55 (June 1, 2000).

33. Combs, *supra* note 10, at 145.

34. Scharf, *supra* note 11, at 1070 ("[T]he practice may encompass negotiation over reduction of sentence, dropping some or all of the charges or reducing the charges in return for admitting guilty, conceding certain facts, foregoing an appeal or providing cooperation in another criminal case."); see also Combs, *supra* note 10, at 4 ("[T]he term most typically refers to the prosecutor's offer of some form of sentencing concessions in exchange for the defendant's guilty plea.")

35. See Rauxloh's *Plea Bargaining*, *supra* note 3, at 5 ("Charge bargaining means that the Prosecution offers to drop some charges if the defendant pleads guilty to the remaining ones."); see also Scharf, *supra* note 11, at 1074 (referring to one case before the ICTY in which "the plea-bargains included the dropping of charges in return for the guilty plea (charge bargaining).")

36. See Scharf, *supra* note 11, at 1074 ("Initially, plea-bargains before the two ad hoc international Tribunals involved promises by the prosecutor to recommend a more lenient sentence in exchange for a guilty plea and substantial cooperation provided by the defendant (sentence bargaining).")

37. *Id.* at 1072.

38. Combs, *supra* note 10, at 70.



the rules . . . [then] tilted the balance in the other direction,”<sup>39</sup> as the Tribunals began adopting more “non-adversarial features in an effort to simplify and expedite proceedings.”<sup>40</sup> Among these added non-adversarial features was that of plea bargaining.

The integration of this non-adversarial approach has greatly benefited the Tribunals, as plea bargaining better manages the resources of the courts and thus extends their judicial reach to a greater number of perpetrators. As a result, the Tribunals’ dual goals of promoting peace and justice have been greatly facilitated by their use of plea bargaining. Despite evidence to this point, the ICC has yet to adopt similar practices as the ICTY and the ICTR. However, the ICC is increasingly facing similar challenges to those that first compelled the ICTY and the ICTR to allow for the practice of plea bargaining.

### III. THE BENEFITS TO PLEA BARGAINING AT THE INTERNATIONAL CRIMINAL COURT

The confinement of the ICTY and the ICTR to specific regional conflicts eventually compelled the international community to create a permanent judicial forum. That forum was the ICC, which represents the first permanent, treaty-based international criminal court. Although the Court has yet to take a definitive stance on the use of plea bargaining, it has impliedly rejected the application of this doctrine to its own cases through prosecutors’ refusal to engage in the process. However, the histories of the ICTY and the ICTR reveal that “[t]he Tribunals . . . have a functional need for alternative methods of case disposition,”<sup>41</sup> and that one of the more effective methods of such case disposition is that of plea bargaining.

Despite the ICC’s failure to engage in negotiations thus far, the Rome Statute neither explicitly requires nor forbids plea bargaining in its cases. Instead, Rule 65 acknowledges that plea agreements may exist between prosecutors and defense attorneys but relieves the Court from the duty to abide by such agreements:

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;

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39. *Id.*

40. *Id.* at 71.

41. *Id.* at 102.

(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 . . .

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.<sup>42</sup>

Accordingly, the ICC currently possesses the capacity to engage in plea bargaining with its defendants. Given that this process is compliant with the express purposes of ICL and benefits the Court's ability to achieve both peace and justice, the plea bargaining process should be made available on a voluntary basis at the ICC.

### A. *The Purposes of International Criminal Law*

While there are similarities between the two systems, the founding principles of domestic criminal law cannot be so easily transplanted into the international forum:

International criminal law regularly needs to operate in a situation where a country or a region has been completely unsettled by armed conflict. Often crime has not just been a single act of deviant behaviour outside the rule of society but has become the rule itself, sanctioned and ordered by those in the most powerful positions in society, whether they are political, military, religious, or economic leaders. Victimisation of groups has become the standard; the rule of law has broken down and in most cases, the violent conflict . . . is still ongoing.<sup>43</sup>

Thus despite the similarities between domestic and international criminal law,<sup>44</sup> ICL is designed to accomplish several unique goals, as well.

These goals have been isolated by academic Regina Rauxloh, who asserts that international criminal law seeks primarily to:

- (1) Replace impunity with accountability;
- (2) break the internal cycle of ethnic violence;
- (3) facilitate reconciliation; and
- (4) bring perpetrators to justice in a fair trial, thus restoring the rule of law.<sup>45</sup>

42. Rome Statute, *supra* note 6, art. 65.

43. Rauxloh's *Plea Bargaining*, *supra* note 3, at 2-3.

44. *Id.* at 3 (“[B]oth domestic and international systems strive for justice, deterrence, retribution and restoration . . .”).

45. *Id.* (“[ICL] aims for replacing impunity with accountability, breaking the cycle of ethnic violence and retribution, facilitating reconciliation, and bringing the guilty to justice in a fair trial and thus restoring the rule of law.”).

Rauxloh further suggests that to achieve these goals, the ICL system must:

- (1) Balance individual justice with the general establishment of peace and reconciliation by supporting the reconstruction of the affected society;
- (2) create an extensive and objective historical record of the atrocities committed;
- (3) emphasize liability of individual perpetrators rather than entire political, ethnic, or racial groups to better aid the reconstruction of society; and
- (4) provide a forum for victims.<sup>46</sup>

Ultimately these goals derive from the dual purposes of international criminal tribunals to achieve both peace and justice.

### *B. The Promotion of International Criminal Law Through Plea Bargaining*

Critics of plea bargaining in international tribunals argue that the process detracts from the goals of peace and justice. However, a more thorough analysis reveals that the use of plea bargaining in ICL actually promotes these goals and accordingly benefits the entire system.

#### *1. Plea Bargaining Preserves Judicial Resources*

Trials presiding over breaches of ICL are “inherently complicated, lengthy and costly.”<sup>47</sup> This is due largely to the complexity of proving that such crimes as genocide, war crimes, and crimes against humanity have occurred. Establishing both the existence of such crimes and the defendant’s participation in those crimes “requires the introduction of hundreds of exhibits and the testimony of dozens of both eye witnesses and expert witnesses.”<sup>48</sup> Trial participants—including witnesses, defendants, and court staff—must all be offered appropriate security, and all of their transportation and communication needs must be addressed. As such, hearings must often be translated to a number of languages which requires interpreters, translators and adequate technological equipment for all members of the

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46. *Id.* (“Accordingly the court has to not only provide individual case justice but in addition contribute to the establishment of peace and reconciliation between the conflicting parties and support the reconstruction of the transitional society. Furthermore, the international criminal trial is expected to build an extensive and objective historical record that discloses ‘the way in which the people had been manipulated by their leaders into committing acts of savagery on a mass scale’ so that the cycle of violence can be broken and repetition of the conflict avoided. In addition it is hoped that the condemnation of individuals, rather than political, ethical or racial groups, offer a political catharsis and help the new government to distan[ce] itself from the discredited past and reconstruct a new society. Another objective, which plays a growing role in domestic criminal procedures, but is even more important in the international arena as part of the peace process, is to provide a forum for the many victims. Victims need to be given a voice in the proceedings but also offered protection to be able to participate without putting themselves or their families into danger.”)

47. Scharf, *supra* note 11, at 1077.

48. *Id.*

defense and prosecution teams, court employees including judges and clerks, defendants, and witnesses.<sup>49</sup> Proceedings must also be broadcast, which requires further sophisticated equipment allowing for the filming, recording, and playback of hearings.

As a result, trials at the ICTY and the ICTR generally take over one full year to complete, and can cost upwards of \$50 million.<sup>50</sup> This estimate does not include the time spent gathering evidence and preparing for trial, nor does it include the time spent on sentencing appeals. As the ICC is a fairly new legal body, a similarly detailed trial profile is not yet available. However, one can reasonably expect that its trial lengths and costs are comparable to, if not greater than, those of previous tribunals.

This presumption is supported by the ICC's budget, which in 2010 totaled €103,607,900<sup>51</sup> (approximately \$137,327,000).<sup>52</sup> The majority of this money was earmarked for trial-related costs:

- €10,669,800 (approximately \$14,142,300) was allotted to the Judiciary (comprised of the Pre-Trial, Trial, and Appeals Divisions);
- €26,598,000 (approximately \$35,254,300) was allotted to the Office of the Prosecutor;
- €61,611,400 (approximately \$81,662,800) was allotted to the Registry (which is responsible for non-judicial aspects of the Court, including duties related to defense, victims and witnesses, outreach, and detention).<sup>53</sup>

Thus, trial-related costs in 2010 consumed roughly 95% of the ICC's yearly budget. That same year, however, the ICC presided over just three active trials: those of Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo appearing in a joint trial, and Jean-Pierre Bemba Gombo.<sup>54</sup> By December 2010, two of these trials had extended beyond one full year.<sup>55</sup>

Yet a "guilty plea before the beginning of the trial obviates the need for victims and witnesses to give evidence and may save considerable time, effort and

49. Rauxloh's *Plea Bargaining*, *supra* note 3, at 10.

50. Scharf, *supra* note 11, at 1076.

51. Assembly of State Parties Res. ICC-ASP/9/Res. 4, Programme budget for 2011, the Working Capital Fund for 2011, *Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2011 and the Contingency Fund*, 9th Sess. (Dec. 10, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf) [hereinafter ICC Budget 2010].

52. The ICC Budget 2010 report was released on December 10, 2010. According to OANDA (<http://www.oanda.com/>), the foreign exchange rate on that day valued €1.32545 for every one U.S. dollar [USD] (every USD amount included here was calculated by the author using the exchange rate, available at <http://www.oanda.com/currency/converter> (last visited Sept. 28, 2011)).

53. ICC Budget 2010, *supra* note 51, at 30.

54. Lubanga's trial commenced on January 26, 2009, Katanga and Ngudjolo's trial commenced on November 24, 2009, and Bemba's trial commenced on November 22, 2010. All trials continued through the 2010 year. See generally INT'L CRIM. CT., SITUATIONS AND CASES: ALL CASES (2011), available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>.

55. *Id.*

resources.”<sup>56</sup> Plea bargaining thus provides a legitimate alternative to trials that would otherwise become incredibly lengthy and costly. The time freed by a plea bargain can then be used to extend the Court’s reach to a greater number of perpetrators through new investigations and trials, and the conserved resources can be diverted to equally as beneficial tasks such as investigations and counsel fees.

Furthermore, the resources preserved through plea bargaining can be used to fund the reparation of victims. Rauxloh is correct in noting that “so far neither the UN nor any member state [of the ICC] has ever diverted money from their budget for court contributions to the victims’ support.”<sup>57</sup> Yet Rauxloh speaks with unwarranted certainty because this history does not preclude the diversion of funds to victim reparations. Instead there exists an immense need for such funding, as in 2010 only €1,205,200 (approximately \$1,597,430) of the ICC’s budget was designated to the Secretariat of the Trust Fund for Victims.<sup>58</sup> Given that atrocities such as crimes against humanity or genocide often affect hundreds of thousands of victims, this limited sum is obviously insufficient. Plea bargaining would thus enable the Court to better provide for the needs of these victims related to such issues as healthcare and relocation costs.

The use of plea bargaining in one case might also help the Court to preserve its resources in a second case: “As is often highlighted by the Prosecution, guilty pleas can substantially assist in its investigations and presentation of evidence at trials of other accused . . . [as the accused may be willing to offer their assistance and knowledge to] testify in other proceedings.”<sup>59</sup> Often the accused agrees to testify in other cases or provide extensive interviews, obviating the need for the Court to pursue other witnesses or investigations. As a result, “more justice is achieved because otherwise unavailable evidence against the most serious offenders is gained.”<sup>60</sup>

## 2. *Plea Bargaining Enhances the Court’s Judicial Reach to a Greater Number of Perpetrators*

As discussed above, the preservation of resources can be used by the Court to extend its judicial reach to a greater number of perpetrators. The history of the ICTY reveals the capacity of plea bargaining to clear a court’s docket, as the “twelve plea agreements made at the ICTY between 2001 and 2003 helped to clear 40% of [its] caseload . . . .”<sup>61</sup> The time freed by plea bargains can then be used by the Court to pursue and try other perpetrators who might otherwise have escaped prosecution. While the ICC is a permanent court and is thus not under the same time constraints as ad hoc tribunals, it can still “be expected [that the ICC will] be overburdened quite soon.”<sup>62</sup> Given the “link between guilty pleas and the

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56. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 66 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

57. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 12.

58. ICC Budget 2010, *supra* note 51, at 30.

59. Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgment, ¶ 71 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003).

60. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 18.

61. *Id.* at 11.

62. *Id.* at 12.

expeditiousness with which cases are dealt with,”<sup>63</sup> plea bargains are a viable option for helping the ICC to manage its caseload.

This will also allow the ICC to operate beyond its current “big-fish” approach “of only investigating and prosecuting the planners or instigators of the atrocities,”<sup>64</sup> thereby eliminating the mentality of immunity which is common amongst low-level perpetrators, who feel safe “return[ing] to their villages and assum[ing] positions of power.”<sup>65</sup> Instead the ICC would serve as a forum for justice of perpetrators at all levels, thus eradicating the hierarchy of crimes and conveying that no perpetrator’s actions will be deemed so insignificant as to escape prosecution.

This message will be instrumental in helping the ICC to foster a sense of peace both in conflict areas and amongst the victims themselves. It is argued that a “few convictions, by themselves, do not necessarily change the sentiments of the populations regarding the violations, or even directly help the victims.”<sup>66</sup> Yet, the ICC’s unrelenting pursuit of all perpetrators would allow affected communities to rebuild upon a foundation of peace and justice. Victims would no longer be forced to live amongst their tormenters, nor with the fear that further atrocities may be committed. Instead, victims would be better able to trust in their neighbors and in the international community’s prioritization of seeking justice for their suffering.

### *3. Plea Bargaining Serves the Interests of the Victims*

It was the needs of victims that dictated the dual goals of peace and justice for international criminal tribunals, as the mere attainment of “[p]eace without justice . . . does not seem to provide a long-term solution.”<sup>67</sup>

With regards to justice, often victims most desire “a true accounting of the violations and some kind of prosecutions or acknowledgment from that time.”<sup>68</sup> The plea bargaining process provides victims with such acknowledgement, not only from the Courts but also from the perpetrators themselves: “When defendants plead guilty they thereby accept responsibility for their actions . . . .”<sup>69</sup> This is perhaps a more meaningful experience than that provided by a guilty verdict, as the perpetrator is personally acknowledging his or her role in the atrocities rather than claiming innocence or attempting to justify his or her actions. This was certainly the sentiment expressed by victim Emir Suljagić, who said of the guilty pleas entered by Dragan Obrenović and Momir Nikolić: “[T]he confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgement I have been looking for these past eight years’.”<sup>70</sup>

These acknowledgements are also instrumental to fostering a sense of peace, as judges at the ICTY have “made a positive link between guilty pleas and recon-

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63. Clark, *supra* note 24, at 419.

64. Schneider, *supra* note 4, at 807.

65. *Id.*

66. *Id.* at 803.

67. *Id.*

68. *Id.* at 804.

69. Clark, *supra* note 24, at 428.

70. *Id.* at 429 (citing Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, ¶ 112 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003)).

ciliation.”<sup>71</sup> Guilty pleas have “considerable potential to bring closure to victims and enable them to forgive,”<sup>72</sup> as they allow for “deep-seated resentments—key obstacles to reconciliation—[to be] removed and [for] people on different sides of the divide [to] feel that a clean slate has been provided for.”<sup>73</sup> With the closure provided by guilty pleas, victims are better able to heal and rebuild.

Guilty pleas not only provide victims with the acknowledgement of their suffering they so often desire, but they also spare victims the trauma of trial:

The advantage most often quoted is that an admission of guilt spares the victims the ordeal of a trial. A trial means that the witness has to travel a long way from home to a foreign country to testify and moreover, testifying at court might put the safety of the witness and their families at risk. Most importantly, at trial the victims might have to relive the trauma when giving testimony . . . .<sup>74</sup>

While some victims prefer to testify at trial, this is not sufficient justification for the total elimination of plea bargaining in international tribunals. Instead these victims may be given the opportunity to share their story in other forums, such as truth and reconciliation commissions. This would accordingly spare other victims the trauma of testifying at trial.

### C. A Rebuttal to Critics of Plea Bargaining

Despite the growing use of plea bargaining before international criminal tribunals, there exists a vocal community of critics who oppose the integration of this process with ICL. These critics most frequently assert that plea bargaining in the context of ICL is unable to attain the tribunals’ dual goals of peace and justice. However valid these arguments may seem at first, greater reflection reveals their multiple flaws. Accordingly, these critics have failed to provide sufficient justification for the elimination of plea bargaining at the ICC.

#### 1. Plea Bargaining is the Best Option for Assisting the Court to Manage its Overburdened Docket

The Tribunals have long sought alternative methods for managing their judicial workloads. The ICTY first withdrew its indictments against several low-level officials, and then requested the addition of twenty-seven ad litem judges to assist the eleven judges assigned to the Tribunal.<sup>75</sup> The Tribunal later “implemented procedural elements found in continental systems in an effort to make [its] pro-

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71. *Id.* at 423.

72. Combs, *supra* note 10, at 150.

73. Kingsley Chiedu Moghalu, *Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 216 (Ramesh Chandra Thakur & Peter Malcontent eds., 2004).

74. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 12.

75. Scharf, *supra* note 11, at 1076-77.

ceedings quicker and more efficient.”<sup>76</sup> The ICTR employed similar methods to address its growing caseload, first attempting to “combine related cases . . . [by filing] joint indictments and motions for joinder of defendants to consolidate several indictments into a single trial,”<sup>77</sup> and later dropping indictments against junior officials and adopting amendments to its RPE which mimicked continental systems.<sup>78</sup>

While these tactics likely helped the Tribunals to manage their dockets, “none of these reforms, however efficacious, can compare to the dispatch with which a guilty plea disposes of a case . . . .”<sup>79</sup> International criminal trials instead remain incredibly lengthy, costly, and taxing on the courts. Yet the plea bargaining process significantly relieves the Tribunals of such pressures by eliminating the need to host full trials for each defendant. This frees a considerable portion of the Tribunals’ resources and thus extends their judicial reach to a greater number of alleged perpetrators. While some argue that plea bargaining does not truly secure justice,

victims need to realize that every trial bears the risk that even a guilty person might be acquitted because the Prosecution could not prove their case. In international criminal law . . . investigation is extremely difficult and this risk cannot be underestimated. In this sense, plea bargaining which secures an admission of guilt is in the interest of justice because a conviction of only a few charges and a reduced sentence might be preferable to an acquittal after trial.<sup>80</sup>

Thus plea bargaining ensures greater accountability for global atrocities and provides victims with a platform for recovery and peace. As such, critics of plea bargaining should acknowledge the wisdom of the Tribunals in endorsing plea bargaining as a highly effective method of managing overburdened trial dockets.

## 2. *Plea Bargaining Does Not Impair the Historical Record of an Atrocity*

International criminal tribunals are meant to uncover the truth about global atrocities<sup>81</sup> and to “generate a comprehensive record of the nature and extent of [such atrocities] . . . .”<sup>82</sup> Critics argue that plea bargaining can be detrimental to these functions, as “plea-bargaining that results in the dropping of charges has the effect of editing out the full factual basis upon which a conviction rests and thus has the potential to distort the historic record generated by the Tribunal[s].”<sup>83</sup>

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76. *Id.* at 1077.

77. Combs, *supra* note 10, at 93.

78. *Id.* at 94.

79. *Id.* at 143.

80. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 6.

81. See Prosecutor v. Dražen Erdemović, Case No. IT-96-22-*Tbis*, Second Sentencing Judgment, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998) (asserting that “[d]iscovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation . . .”).

82. Scharf, *supra* note 11, at 1079.

83. *Id.* at 1081; see also Combs, *supra* note 10, at 146 (“Because charge bargaining virtually always distorts the factual basis upon which a conviction rests, its use would severely undermine [the Tribunals’ purpose of providing a historical record].”).



However, plea bargaining can be incredibly beneficial to the creation of a truthful record. In pleading guilty, defendants both acknowledge that certain atrocities occurred and also their own involvement in promoting such violence. This is hugely important to advancing the goals of peace and justice, as “the truth cannot have a positive effect *unless it is acknowledged*.”<sup>84</sup> Take for example the Plavšić case before the ICTY: “[N]ot only did Plavšić plead guilty to the charge of persecution, but she also admitted the facts surrounding the charge in a five-page document that was appended to the plea agreement.”<sup>85</sup> Such admissions are of great value, as the global community and former victims are more likely to believe a historical record formed from such willing admissions than those formed from the trial transcripts of defendants asserting their innocence.<sup>86</sup>

Such admissions further benefit the creation of a historical record by providing insights that the global community might otherwise have missed: “[P]lea agreements can generate a contribution to the historical record of inestimable value—the indispensable perspective of the perpetrator.”<sup>87</sup> Defendants thus offer victims not only their own admission of guilt, but also an understanding of their motivations and why such atrocities were committed. In doing so, defendants are also “undercut[ting] the ability of future revisionists to distort empirically what happened”<sup>88</sup> by creating an official record of their admissions.

Some may argue that such records are less beneficial than the thousands of pages often produced by international criminal trials.<sup>89</sup> Yet this argument disregards that

[e]ven if the documentation accompanying plea agreements lacks the details of a full trial record, the efficiency of the plea agreement process results in a greater number of completed cases and, therefore, more additions to the historical record. Plea agreements can therefore make up in breadth what they may lack in depth.<sup>90</sup>

Accordingly, plea bargaining offers unique benefits to the process of creating a historical record that even full trials are incapable of offering.

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84. Clark, *supra* note 24, at 426.

85. Scharf, *supra* note 11, at 1079.

86. *Id.* (analyzing public response to the Nuremberg trials and finding “[t]hus, from the perspective of developing a generally accepted historic record, a plea-bargain may be more effective than a judgment developed via a full international trial in the face of the denials of the defendant.”).

87. Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY: Purpose, Effects and Propriety*, 3 J. INT’L CRIM. JUST. 666, 671 (2005).

88. Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgment, ¶ 260 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004).

89. See Rauxloh’s *Negotiated History*, *supra* note 2, at 752 (“Biljana Plavšić, when pleading guilty, did not reveal any new facts but merely confirmed the statement the Prosecutor had submitted in a short five-page document. In comparison, a judgment (sic) of the ICTY tends to comprise several hundreds of pages and trial transcripts run into tens of thousands of pages in addition to witness statements, official documents and other evidence.”).

90. Tieger & Shin, *supra* note 87, at 671.

### 3. *Plea Bargaining Does Not Sacrifice Justice*

There are also those who argue that the concessions made by a prosecutor during plea bargaining sacrifice the achievement of justice in cases of ICL: “If the Prosecutor makes a plea agreement such that the totality of an individual’s criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions may arise as to whether justice is in fact being done.”<sup>91</sup> As evidence these critics point to the leniency seen in such cases as that of Plavšić, whose genocide charges were dropped and who was ultimately sent to serve her sentence in a Swedish prison “which offered inmates access to [a] sauna, gym, solarium, massage room, and horse-riding paddock.”<sup>92</sup>

Yet this argument disregards the critical role of international condemnation in securing justice for victims, as a defendant’s sentence is equally as important as the Tribunals’ acknowledgement of atrocities and the perpetrators’ roles therein. While plea bargaining might reduce the severity of a defendant’s sentence, it does not override the public condemnation of the court, particularly as judges at the international tribunals frequently issue opinions to accompany their admission of guilty pleas. Accordingly, “[n]ot only the sentence but also the judgment and its inherent condemnation by the international community are essential parts of justice.”<sup>93</sup>

Furthermore, the withdrawal of certain charges does not necessarily represent the Court’s willingness to ignore certain crimes as committed by the defendant. As shown by the Todorović case, “[a]lthough on the surface, the withdrawal of twenty-six of the twenty-seven counts would seem a substantial prosecutorial concession, in fact, it had limited significance because the one count to which Todorović pled guilty encompassed the offenses contained in the other twenty-six counts.”<sup>94</sup> Accordingly, Todorović’s guilty plea to one charge of persecution as a crime against humanity embodied his admission of guilt to all allegations originally contained in twenty-seven separate counts.

Critics also discount the fact that prosecutors must work within the sentencing confines established by the Tribunal. The sentencing range of the ICC is “already perceived by some as too low,”<sup>95</sup> as the Rome Statute does not provide for the death penalty and only allows life imprisonment to be assigned in exceptional circumstances.<sup>96</sup> While these restrictions are lenient on their own, they also place

91. Nikolić, Case No. IT-02-60/1-S (Dec. 2, 2003).

92. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 7 (citing Patrick McLoughlin, *Jail With “Human Touch” May Await Bosnia’s Plavsic*, REUTERS, June 6, 2003, available at <http://www.freerepublic.com/focus/f-news/924094/posts> (last visited on May 29, 2011)).

93. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 6.

94. Combs, *supra* note 10, at 120.

95. Rauxloh’s *Plea Bargaining*, *supra* note 3, at 14.

96. Article 77 of the Rome Statute reads:

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
  - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:

stringent limits on the capacity of a prosecutor to bargain with a defendant. The appeal for most defendants in seeking a plea bargain is the hope of securing a more lenient sentence. When the sentencing maximum is fairly minimal, prosecutors are thus forced to reduce a defendant's sentence even further. Thus the critique that prosecutors offer unjustly lax sentences is misdirected because the problem of leniency stems from the Rome Statute itself and not the improperly gracious nature of the Court in addressing guilty pleas.

There is one final party who is often overlooked in arguments pertaining to plea bargaining and justice: the defendant. International tribunals seek to attain both peace and justice, yet they do not seek justice on behalf of only one party. Instead, to maintain the integrity of the judicial process, these courts must ensure that fairness and justice is achieved for all parties including defendants. The plea bargaining process is one such method of extending justice to those defendants who, for example, are innocent but unable or unwilling to endure the great lengths and cost of a trial, or who are unsure that they will attain justice during trial: "[T]he choice is between permitting innocents to plead under the most favorable circumstances possible and forcing them to trial, where they risk vastly greater punishment."<sup>97</sup> Plea bargaining thus allows defendants to have a more active voice in determining the outcome of their case and in protecting the fairness of their judicial process. As such, plea bargaining does not hinder the pursuit of justice by the courts, and instead offers unique benefits to the courts in securing justice for all parties.

#### IV. FITTING THE PLEA BARGAINING PROCESS TO THE INTERNATIONAL CRIMINAL COURT'S FRAMEWORK

The ICTY and the ICTR have demonstrated that plea bargaining would offer a "valuable contribution"<sup>98</sup> to the ICC's success in securing peace and justice. Yet the histories of these Tribunals also convey the lack of definitive standards with regards to the exercise of plea bargaining in ICL. Rather than work towards an established set of principles, each Tribunal has instead "developed forms of plea bargaining that reflect their unique procedural amalgam, institutional structure, and wide-ranging goals."<sup>99</sup> However, the implementation of plea bargaining before the ICC necessitates a different approach, since "if a court decides to develop the practice of plea [bargaining] it has to establish some long-term strategy."<sup>100</sup>

The ICTY and the ICTR offer little guidance in this regard, as the needs of these ad hoc tribunals vary from those of the permanent ICC. However, the nature of plea bargaining suggests that its implementation at the ICC may instead be guided by another area of the law. Given that plea bargaining constitutes a form of

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(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Rome Statute, *supra* note 6, art. 77.

97. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2013 (1992).

98. Rauxloh's *Plea Bargaining*, *supra* note 3, at 2.

99. Combs, *supra* note 10, at 154.

100. Rauxloh's *Negotiated History*, *supra* note 2, at 763.

negotiation, the ICC should thus look to the principles of ADR in devising its internal plea bargaining structure. The principles of ADR provide an appropriate reference point for the ICC, as “plea bargaining advances the goal of conflict resolution”<sup>101</sup> in such a way as to “[allow] the parties to resolve a criminal prosecution in a way that best meets their needs . . . .”<sup>102</sup>

As such, efforts to implement plea bargaining at the ICC should be guided by the principles of ADR. The doctrine of DSD will first help the ICC to plot its primary goals for an internal plea bargaining system. The Court should then examine the core principles of ADR to determine what qualities of the domestic structure translate to its own international system. Such an analysis will foster a better understanding of the function of plea bargaining in the context of ICL, and inform the creation of a system that combines the unique roles and objectives of ADR with those of the ICC.

### A. *Dispute System Design*

In undertaking the adoption of its plea bargaining system the ICC should first look to the principles of DSD, which provide a method “by which to measure the success or effectiveness of any system created to resolve disputes.”<sup>103</sup> Plea bargaining serves as an alternative method of resolving disputes to full trials. As such, the ICC should craft its plea bargaining system around the goals of DSD to ensure that its finalized structure is as functional as possible.

In evaluating its plea bargaining structure against the principles of DSD, the ICC should ask the following questions:

1. *Why was the system established?* In other words, what is the specific purpose of the proposed system, and does the system further those purposes?<sup>104</sup>
2. *Who gets to participate in the system/who has rights?* In making this analysis, DSD principles call for “the structure [to] strive for inclusiveness, broad coverage of the conflict issues, and depth of jurisdiction.”<sup>105</sup>
3. *Does the system reflect the community for which it is being established?* Accordingly, the system should “vest control over decisions in those most interested and affected by those decisions.”<sup>106</sup>
4. *Does the system reflect the lessons of past experience?*<sup>107</sup>

In applying these questions to the context of the ICC, some provide more obvious guidance than others. For instance, the proposed plea bargaining process at the

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101. Combs, *supra* note 10, at 56.

102. *Id.*

103. Schneider, *supra* note 4, at 799.

104. *Id.* (“[T]he first question to ask is why the system was established. This question helps to identify the system’s specific purpose or purposes. In answering this question as regards international adjudication, one must address whether consensual dispute resolution furthers that purpose.”).

105. *Id.*

106. *Id.*

107. *Id.* (“A final principal of DSD [is] learning from experience . . . .”).

ICC should serve to achieve “an end to the violence, justice for the victims, and perhaps even reconciliation . . . .”<sup>108</sup> Similarly, the ICC’s existence as an international criminal tribunal inherently designates the Court’s judges, prosecutors, defendants, and defense counsel as participants who may engage in the plea bargaining process and have rights as such.

However, the ICC’s specific goals with regards to the third and fourth questions cannot be so easily presumed. For example, the ICC cannot be said to represent just one specific community because it was designed to represent multiple networks including the international legal community and multiple communities of victims. This gives rise to an important question regarding the participation of victims in plea bargaining. The third query of DSD implies that a plea bargaining system should be designed such that control is vested in those most interested in and affected by the Court’s decisions. Victims arguably represent the community most interested in and affected by the sentencing of defendants, and Article 68 of the Rome Statute provides for their voices to be heard during proceedings:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.<sup>109</sup>

Thus in utilizing the guidance of DSD, the ICC must determine to what extent the provisions of Rule 68 should be integrated into a plea bargaining system.

Furthermore, the ICC must undertake an initial analysis of the ICTY’s and the ICTR’s past plea bargaining efforts. In doing so, the Court can identify which successes of the Tribunals can be transferred to its own system and what lessons can be taken from the Tribunals’ past failures. Accordingly, the principles of DSD provide the ICC with an early roadmap for identifying those “integrated and creative processes”<sup>110</sup> that will best “provide multiple remedies and meet the goals of victims, societies, and the international community.”<sup>111</sup>

### *B. Participants as Negotiators*

Once the ICC has utilized the principles of DSD to plot its overall goals for an internal plea bargaining system, the Court should add greater definition to the structure of this system using the principles of ADR. This will be particularly useful to the ICC in asserting the methodologies of its prosecutors in their engagement of plea bargaining.

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108. *Id.*

109. Rome Statute, *supra* note 6, art. 68(3).

110. Schneider, *supra* note 4, at 822.

111. *Id.*

“Negotiation” is the process whereby two or more parties explore potential options for resolving a conflict or dispute without the assistance of an impartial supervising party.<sup>112</sup> Plea bargaining is one such method in representing a “negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor . . . .”<sup>113</sup> Thus, the ICC should use the principles of negotiation as markers for its employees’ methodologies as they engage in plea bargaining with defense counsel.

There are three predominant approaches to negotiation: the competitive bargaining approach,<sup>114</sup> the cooperative bargaining approach,<sup>115</sup> and the integrative bargaining approach.<sup>116</sup> The integrative bargaining approach is the most applicable to bargaining at the ICC, as it primarily frames negotiations as an opportunity for mutual gain. In doing so, negotiators utilize objective criteria, create conditions of mutual gain, and emphasize the importance of exchanging information between parties and group problem-solving.<sup>117</sup>

Combining such methodology with its “roots in international relations,”<sup>118</sup> integrative bargaining thus provides an appropriate framework for a plea bargaining system that unites the “analogous goals [of ICL and ADR] increased voice, procedural justice, and fairness . . . .”<sup>119</sup> Although it has been argued that integrative bargaining is less effective when parties’ interests are inherently opposed such as in cases of plea bargaining,<sup>120</sup> the opportunity for mutual gain is exponentially

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112. See DAVID SPENCER & MICHAEL BROGAN, *MEDIATION LAW AND PRACTICE* 9 (2006) (“Negotiation is the process whereby two or more parties work through their conflict or dispute . . . with a view to coming to some agreement, or settlement, about that conflict or dispute.”); AM. BAR ASS’N, SEC. OF DISP. RESOL., *WHAT YOU NEED TO KNOW ABOUT DISPUTE RESOLUTION: THE GUIDE TO DISPUTE RESOLUTION PROCESSES* (2006), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/draftbrochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/draftbrochure.authcheckdam.pdf) (“Negotiation is a voluntary and usually informal process in which parties identify issues of concern, explore options for the resolution of the issues, and search for a mutually acceptable agreement to resolve the issues raised. The disputing parties may be represented by attorneys in negotiation. Negotiation is different from mediation in that there is no neutral individual to assist the parties negotiate.”).

113. BLACK’S LAW DICTIONARY 1270 (9th ed. 2009).

114. The competitive bargaining approach, also known as the adversarial, distributive, or position approach, refers to “a negotiator who is primarily concerned with ‘winning’ the negotiation,” who is more likely to engage in negative tactics, and who is less likely to show interest in the other side’s point of view. CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 93 (2d ed. 2011) [hereinafter *DISPUTE RESOLUTION*].

115. The cooperative bargaining approach, also known as the accommodating or “soft” approach, “focuses on relationships and on working with the other side.”

116. The integrative bargaining approach, also known as the collaborative or principled approach, occurs to a negotiation “in which the negotiator is interested in doing well for herself and her client and in working with the other side to meet that party’s interests. Some call this the ‘joint gain’ model of negotiation.”

117. TANYA ALFREDSON & AZETA CUNGU’, *FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, NEGOTIATION THEORY AND PRACTICE: A REVIEW OF THE LITERATURE* (Jan. 2008), available at [http://www.fao.org/docs/up/easypol/550/4-5\\_Negotiation\\_background\\_paper\\_179EN.pdf](http://www.fao.org/docs/up/easypol/550/4-5_Negotiation_background_paper_179EN.pdf).

118. *Id.*

119. Schneider, *supra* note 4, at 821-22. Schneider also asserts that a court-connected ADR system would be unsuccessful unless settlements are “based on [the] core values of justice and equality.” *Id.* at 818.

120. See Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 56-57 (1985) (“[Integrative bargaining] is less useful when the parties disagree on

higher in cases of ICL, where all parties are likely concerned with securing an outcome that encourages peace and rehabilitation in affected regions.

Accordingly, parties to plea bargaining at the ICC should be guided by the principles of integrative bargaining. These parties will thus represent “principled negotiator[s]” who work towards a final outcome that satisfies the needs of all parties. As such, these principled negotiators will operate according to four key strategies, as outlined by Professors Roger Fisher and William Ury:

- “People: Separate the people from the problem.
- Interests: Focus on interests, not positions.
- Options: Generate a variety of possibilities before deciding what to do.
- Criteria: Insist that the result be based on some objective standard.”<sup>121</sup>

Under these strategies, principled negotiators will “attempt to separate the interpersonal relationship between the negotiators from the merits of the problem or conflict”<sup>122</sup> while promoting the “free exchange of information between the negotiators so that each party’s motives, goals, and values are understood and appreciated.”<sup>123</sup> With regards to the fourth strategy, Fisher and Ury have further defined an “objective criteria when the parties’ interests seem to directly conflict and no mutually advantageous solution appears to be available.”<sup>124</sup> In these situations, negotiators should “[f]rame each issue as a joint search for objective criteria . . . [r]eason and be open to reason as to which standards are most appropriate and how they should be applied . . . and [n]ever yield to pressure, only to principle.”<sup>125</sup> Given the known success of integrative bargaining in attaining similar goals to those of the ICC, the Court should train its prosecutors to primarily engage in such methods when conducting plea negotiations with defense counsel.

### C. The Principles of Alternative Dispute Resolution

The goal of both international adjudication and ADR “is to find a procedurally just process that can produce satisfactory results.”<sup>126</sup> This shared goal enables the ICC to transfer several aspects of negotiation to its own adjudication-based framework. In adopting certain methods of negotiation, the Court will thus ensure the procedural justice of its final plea bargaining structure.

In crafting its internal bargaining structure, the ICC should first seek to emulate ADR’s dual emphasis on restorative and retributive justice. A superficial comparison suggests that these two theories pose a direct challenge to one another, as restorative justice emphasizes the healing of victims and repairing of

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only a single issue and the parties’ interests are inherently opposed. Examples of such situations that present direct conflicts include . . . plea bargaining.”)

121. *Id.* at 55 (referencing ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 11 (1981)).

122. *Id.*

123. Gifford, *supra* note 120, at 55.

124. *Id.* at 57.

125. *Id.* (referencing Fisher and Ury, *supra* note 121, at 91).

126. Schneider, *supra* note 4, at 796.

harm caused<sup>127</sup> while retributive justice emphasizes the punishment of alleged perpetrators.<sup>128</sup> However, the fluidity of ADR enables negotiators to achieve an outcome that simultaneously represents both strands of justice, as “the major outcome of restorative justice is reflected in mutual acceptance of and compliance with the negotiated reparation agreement,”<sup>129</sup> while the outcome of retributive justice rests more with the symbolic punishment of a violator of international norms and values.<sup>130</sup> These theories draw a distinct parallel to the ICC’s primary goals of achieving peace and justice, and their subsequent outcomes mirror the Court’s presumed motives for implementing plea bargaining. Thus in moving forward, the ICC should adopt the ADR tenet that restorative and retributive justice can be equally represented and attained during negotiations.

Procedural justice in ADR is also ensured through the use of model codes of conduct.<sup>131</sup> These codes govern the conduct of counsel in the execution of their professional duties, and regulate such matters as a lawyer’s truthfulness in statements to others<sup>132</sup> and his or her competence in representing clients.<sup>133</sup> The ICC should similarly adopt this tool of ADR by drafting its own guidelines regarding the conduct of negotiators appearing before the Court, and further include a written set of procedures regarding its plea bargaining process. In crafting its own code of conduct the ICC can ensure that all negotiators remain aware of, and compliant with, its uniform set of standards. By also crafting a written set of plea bargaining procedures, the ICC can better protect its unique functions and goals as an international criminal tribunal while directly addressing the challenges of plea bargaining in ICL.<sup>134</sup>

The ICC may also benefit from the constructions of ADR that are related to matters others than procedural justice. For example, many methods of ADR are designed to facilitate victim participation, as “[d]ispute resolution offers parties at least a perception of substantive control through the ability to speak for them-

127. See BLACK’S LAW DICTIONARY, *supra* note 113, at 1248 (defining restorative justice as “[a]n alternative . . . sanction that focuses on repairing the harm done, meeting the victim’s needs, and holding the offender responsible . . .”).

128. See Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 41 (2008) (“Retributive justice is related to justice as vengeance or punishment . . .”).

129. RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION—INTERNATIONAL RESEARCH PERSPECTIVES 2 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

130. *Id.* at 319 (arguing the “retributive paradigm focuses on the violation of *norms and values*. This retributive approach follows a breach of penal law . . . such a consideration is incidental to a justice system that essentially has a symbolic character aimed at the whole of society.”).

131. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf); MODEL RULES OF PROF’L CONDUCT (2002), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html).

132. See MODEL RULES OF PROF’L CONDUCT, *supra* note 131, R. 4.1 (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”).

133. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 131, R. 4.

134. For example, the ICC could draft procedures related to such issues as language barriers amongst negotiators or the performance of negotiations with counsel located abroad.



selves and be heard in a respectful manner.”<sup>135</sup> While the degree of victim participation may vary given the method of ADR they are pursuing and the individual facts of their case, the majority of methods grant victims a voice within the system. Such an approach aligns with the victim-centric tone of ICL.

This emphasis on victim participation has not always translated to the plea bargaining processes of international criminal tribunals, however. Instead, victims often remain uninformed about the guilty pleas entered by defendants, or are only informed about the status of defendants from their regions.<sup>136</sup> To prevent such errors from damaging its own plea bargaining system, the ICC should look to the methods employed under ADR to ensure proper victim participation and adopt them to suit the needs of the Court. While it is unrealistic to presume that the ICC could involve all victims in its plea negotiations, there are certainly options for keeping victim participation as intact as possible, such as the inclusion of victim advocates in plea negotiations who may represent the victims’ voice and serve as the liaison between the victims and the Court.

The ICC may also look to the interactions of domestic courts and ADR for guidance on proper procedural safeguards. Rule 11 of the Federal Rules of Criminal Procedure (FRCP) dictates the criteria for a domestic court’s acceptance of a guilty plea.<sup>137</sup> These criteria are closely mimicked by the bargaining guidelines established by the ICTY<sup>138</sup> and the ICTR.<sup>139</sup> The ICC should adopt similar guidelines into its own RPE, thus protecting the integrity of all guilty pleas accepted by the Court by assuring that all pleas are voluntary, informed, unequivocal, and based in fact.

Mimicking the division of power enforced by both domestic and international courts may further protect the integrity of the ICC’s plea bargaining process. There is a clear division of power in U.S. court systems, as prosecutors engage in plea negotiations and determine the provisions thereof, but judges have final ap-

135. Schneider, *supra* note 4, at 791.

136. Clark, *supra* note 24, at 432 (“What is more, while [victims] often knew about the guilty plea of a defendant from their own area, the interviewees were completely uninformed about other such pleas . . .”). One such example is that of Dušan Fuštar, who was indicted by the ICTY in 1995 and transferred to the State ICT of Bosnia and Herzegovina [Court of BiH] in May 2006. Shortly after his transfer, Fuštar entered plea negotiations with the prosecutor at the Court of BiH. In April 2008, Fuštar was sentenced to nine years’ imprisonment based upon his guilty plea. Yet, it was not until July 2008 that the prosecutor traveled to the city of Prijedor to speak to victims about Fuštar’s plea agreement. *Id.* at 435-36.

137. FED. R. CRIM. P. 11(b)(2)–(b)(3) (holding that a court cannot accept a defendant’s guilty plea unless (1) the plea was entered voluntarily; and (2) a factual basis exists for the guilty plea).

138. During the trial of *Prosecutor v. Erdemović*, the ICTY asserted that guilty pleas could only be accepted if the plea was entered into voluntarily, knowingly, and unequivocally. See Rauxloh’s *Negotiated History*, *supra* note 2, at 756 (referencing *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997)); See also *id.* at Joint Separate Opinion of Judge McDonald and Judge Vohrah ¶¶ 8, 10.

139. Article 62(B) of the ICTR RPE holds:

If an accused pleads guilty in accordance with Rule 62 (A)(v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:

- (i) is made freely and voluntarily;
- (ii) is an informed plea;
- (iii) is unequivocal; and
- (iv) is based on sufficient facts for the crime and accused’s participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case. ICTR RPE, *supra* note 26, art. 62(b).

proval of guilty pleas and sentencing terms. Both the ICTY<sup>140</sup> and the ICTR<sup>141</sup> adopted similar methods regarding this division of power, as prosecutors engage in plea negotiations but Trial Chambers “are completely excluded from the plea-bargaining process, and render the final determination about the appropriateness of the plea, in particular whether certain charges may be withdrawn, and on the sentence to be served, taking into account the nature of the plea.”<sup>142</sup> The ICC would benefit from exercising a similar division of power, which serves as an internal system of checks and balances so that no one party can exercise unfettered discretion over defendants’ pleas.

Finally, the ICC should examine the methods of enforcement utilized upon the conclusion of ADR proceedings:

In the United States, we are generally quite sure that the law will be enforced. So, even when we use ADR, we know that we are bargaining in the shadow of a longstanding body of law we can count on. As we create international systems, we need to think carefully about the underlying legal structures, the law, and how it is implemented.<sup>143</sup>

As such, domestic courts have recognized their unparalleled capacity to support the outcomes of ADR processes. Thus the ICC must move forward with a similar understanding, as the Court would lose both credibility and authority within the international community if it were to implement a plea bargaining system that it could not later enforce.

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140. Rule 62*ter* of the ICTY’s RPE holds:

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

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

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

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty. ICTY RPE, *supra* note 23, art. 62*ter* (Dec. 8, 2010).

141. Rule 62*bis* of the ICTR’s RPE similarly holds:

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

- (i) apply to amend the indictment accordingly;
- (ii) submit that a specific sentence or sentencing range is appropriate;
- (iii) not oppose a request by the accused for a particular sentence or sentencing range.

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

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty. ICTR RPE, *supra* note 26, art. 62*bis*.

142. Rodney Dixon & Alexis Demirdjian, *Advising Defendants about Guilty Pleas before International Courts*, 3 J. INT’L CRIM. JUST. 680, 683 (2005).

143. Schneider, *supra* note 4, at 818.

## V. CONCLUSION

No one can deny that international criminal tribunals face tremendous challenges in securing both peace and justice for victims. The sad reality is that these challenges have long enabled perpetrators of “[a]trocities that we would . . . label genocide or crimes against humanity [to go] virtually [un]punished . . . .”<sup>144</sup> Yet critics of plea bargaining seek to eliminate one of the few tools made available to the courts in their pursuit of peace and justice.

These critics need look no further than the ICTY and the ICTR for evidence speaking to the value of plea bargaining in achieving these goals. Thus as the ICC continues adding definition to its RPE, it should disregard the voices of such critics and instead grant deference to the experience of such tribunals as the ICTY and the ICTR. In doing so, the ICC should craft a series of regulations regarding the plea bargaining process as applied to its own trials.

In crafting such regulations the ICC should turn to the principles of ADR for guidance, as plea bargaining constitutes a form of negotiation and thus falls under the purview of ADR. A thoughtful comparison of ADR and ICL reveals extensive similarities in their guiding principles. Such a comparison will help to illuminate the meaning of “plea bargaining” in the context of ICL and further assist the ICC in creating a functional system for accomplishing peace and justice.

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144. Combs, *supra* note 10, at 154.