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ORIGINAL SCIENTIFIC ARTICLE

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BEYOND GUILTY PLEAS: THE PROCEDURALIZATION OF NEGOTIATED JUSTICE IN INTERNATIONAL CRIMINAL TRIBUNALS

***Abstract**: Negotiated justice was first codified within the UN Ad Hoc Tribunals, where a consistent body of case law was developed. In contrast, plea-bargaining and guilty pleas were substantially denied in the earlier Nuremberg and Tokyo trials. The paper examines the theoretical and practical development of plea bargaining, tracing the proceduralization of negotiated justice in international criminal tribunals, which has ultimately resulted in the ICC's abbreviated proceedings on an admission of guilt – a hybrid model incorporating features from civil law and common law systems, representing a compromise of Anglo-Saxon and European legal traditions. The paper also shows that at the ICC, the use of plea bargaining has reached an impasse, primarily due to two factors: its extremely limited application – reflected in only a single case to date – and unclear norms regarding the accused's rights as well as the length of the proceedings.*

Key words: ICC, International Criminal Court, International Criminal Procedure, Nuremberg Trials, United Nations Tribunals, Guilty Pleas, International Criminal Law, Comparative Criminal Procedure.

1. Introduction

In the field of criminal justice, "plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction."[1] Moreover, "plea bargaining involves negotiations between the defendant (through an attorney in the standard case) and the prosecutor as to the conditions under which the defendant will enter a guilty plea."[2] These concessions, or conditions, "may relate to the sentence imposed by the

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1 Alschuler, A., 1979, Plea Bargaining and Its History, *Columbia Law Review*, Vol. 79, No. 1, p. 1.

2 Kipnis, K., 1976, Criminal Justice and the Negotiated Plea, *Ethics*, Vol. 86, No. 2, p. 93.

court or recommended by the prosecutor, the offense charged, or a variety of other circumstances,"[3] therefore "plea bargains bring about an enormous punishment-maximizing effect."[4] Historically, "plea bargaining was unknown during most of the history of the common law"[5], and significant evidence of its practice in either England or America does not appear until the nineteenth century[6]. As observed, "In modern times, plea bargaining has become the primary procedure through which we dispose of the vast proportion of cases of serious crime."[7] However, this practice is relatively new in international criminal law, with the first plea bargaining dating back to May 1996.[8] As of 1998, the ICC Rome Statute[9] has introduced unique mechanisms for negotiated justice related to international crimes. Referred to as "proceedings on an admission of guilt", in Article 65 of the ICC Rome Statute, this procedure represents a unique approach to plea-bargaining in international criminal law. Unlike domestic criminal justice systems, the ICC's process reflects a hybrid model, blending elements of Anglo-Saxon and European legal traditions into a hybrid model incorporating features from both the common law and civil law systems. Negotiated justice in international criminal proceedings can be traced back to the United Nations ad hoc tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). These tribunals established the first consistent body of case law on plea-bargaining in cases of international crimes, creating an important foundation for the ICC's later approach. On the other hand, the post-World War II international military tribunals at Nuremberg and Tokyo rejected the idea of introducing plea-bargaining in their statutes.

2. The Post-World War II Tribunals

> "No charity can disguise the fact that the forces which these defendants represent, the forces that would advantage and delight in their acquittal, are the darkest and most sinister forces in society-dictatorship and

3 Alschuler, A., 1979, p. 3.

4 Howe, S. W., 2005, The Value of Plea Bargaining, *Oklahoma Law Review*, Vol. 58, No. 4, p. 605. See, also, Langbein, J. H., 1979, Understanding the Short History of Plea Bargaining, *Law and Society Review*, Vol. 13, No. 2, p. 261, who essentially explains how plea bargaining became institutionalized as a standard feature of American urban criminal courts in the late 19th century.

5 Langbein, J. H., 1979, p. 261.

6 *Ibid*.

7 *Ibid*.

8 Turner, J. I., 2017, Plea Bargaining and International Criminal Justice, *The University of the Pacific Law Review*, Vol. 48, p. 229.

9 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9*, 17 July 1998.

> oppression, malevolence and passion, militarism and lawlessness. [...] This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors."[10]

With these words, the Chief Counsel for the United States at the International Military Tribunal (IMT), Robert H. Jackson, delivered the opening statement at the first Nuremberg trial. It was almost unimaginable that a Nazi high-ranking leader defendant could be permitted to negotiate a sentence for such heinous crimes. And indeed, it was not allowed. Articles 24(a) and (b) of the Nuremberg Statute, contained in the London Agreement[11] of 8 August 1945, only allowed a defendant to plead guilty or not guilty, without any opportunity to negotiate the sentence.

Similarly, plea bargaining was excluded at the International Military Tribunal for the Far East (IMTFE).[12] Article 13(a), concerning the admissibility of evidence, allowed the defendant to make only spontaneous statement, while Article 15(b) largely mirrored the provisions of the Nuremberg Statute, permitting a guilty plea but making no mention of the possibility of negotiating the sentence or the charges. Both norms were included in Section IV of the respective charters, which addresses the powers of the tribunal and the conduct of the trial, as opposed to Section III, which pertains to the fair trial rights of the accused.

Not surprisingly, the outcome of both the Nuremberg and Tokyo trials was that none of the defendants pleaded guilty. However, one trait of procedural development can be observed in the Tokyo Trial, which took place just a year after Nuremberg. Although both Statutes denied the possibility of negotiating the sentence, the Tokyo Statute, under Article 15(c), allowed the defendant to make a "concise opening statement," in contrast to Nuremberg where no such opportunity was granted. An example from Nuremberg is the case of Hermann Göring, as attested by the original trial records of 21 November 1945. In this case, the IMT President, the British judge, Lord Justice Geoffrey Lawrence, immediately stopped the defendant from making any statement and only invited him to plead guilty or not guilty.

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10 Chief Counsel for the United States at the International Military Tribunal (IMT), Robert H. Jackson, in opening statement before the IMT, 21 November 1945, *Trial of the Major War Criminals before the International Military Tribunal, Vol. II. Proceedings: 11/14/1945-11/30/1945*. Nuremberg: IMT, 1947, pp. 98–102.

11 UN, Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, *United Nations – Treaty Series*, Vol. 82, No. 251, p. 298.

12 The Tokyo Statute was adopted on 19 January 1946, through a "special proclamation" of Supreme Commander of the Allied Forces, General Douglas MacArthur (UN Treaties and Other International Acts Series 1589).

> *"THE PRESIDENT: I will now call upon the defendants to plead guilty or not guilty to the charges against them.*
>
> *"HERMANN WILHELM GOERING: Before I answer the question of the Tribunal whether or not I am guilty...*
>
> *"THE PRESIDENT: I informed the Court that defendants were not entitled to make a statement. You must plead guilty or not guilty."*[13]

What emerges from a comparison between the Statutes of the IMT and IMTFE is the notion of a harsh justice toward the major war criminals brought before these courts, specifically a concept of a "just and prompt trial and punishment," as stated in Article 1 of the Nuremberg Charter, with no room for negotiated justice, which was considered a procedural escape. While this approach would likely be considered unfair today, it was deemed appropriate for the time. As other authors observed, "the Nuremberg and Tokyo trials were supposed to usher in an era of accountability for international crimes."[14] Furthermore, it has been noted that "Nuremberg, especially in its condemnation of aggressive war, focused not only on the offenses of these defendants but also on establishing a precedent designed to punish and to deter aggression in the future."[15] In this context, permitting a defendant to negotiate their sentence would have suggested the possibility of "evading" justice even in cases of international crimes. Additionally, these trials played a crucial role in establishing a historical record of the atrocities committed by the defendants. In other words, "there was hope that the legacy of Nuremberg would be the institutionalization of a judicial response to atrocities committed by anyone, anywhere around the globe."[16] In the end, "the trial record surely serves as a corrective of such fantastic revisionism"[17].

If any trait of procedural evolution can be identified from Nuremberg to Tokyo, it is the possibility of entering a "concise opening statement". This marked a very small step toward the changes that would characterize the subsequent international criminal tribunals – the ICTY and the ICTR.

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13 International Military Tribunal, 1947, *Trial of the Major War Criminals before the International Military Tribunal (1945), Vol. II. Proceedings: 11/14/1945–11/30/1945.* Nuremberg, IMT, p. 97.

14 Combs, N. A., 2002, Copping a Plea to Genocide: The Plea Bargaining of International Crimes, *University of Pennsylvania Law Review*, Vol. 151, No. 1, p. 155.

15 Beltzer, B. D., 1996, War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia, *Valparaiso University Law Review*, Vol. 30, No. 3, p. 904.

16 Scharf, M. P., 1997, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, Durham, Carolina Academic Press, p. xiii.

17 "The evidence of the Holocaust was so strong in 1945 that I doubt that anyone then foresaw the so-called Auschwitz lie – the recent denials that the Holocaust actually happened. The trial record surely serves as a corrective of such fantastic revisionism" (Beltzer, B. D., 1996, p. 902).

3. The UN *Ad Hoc* Tribunals

Almost 50 years after the establishment of the International Military Tribunals of Nuremberg and Tokyo, plea bargaining emerged as an accepted practice and procedural mechanism. This development occurred with the creation of the ad hoc tribunals established by the United Nations, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY), founded by UN Security Council Resolution 827 in 1993[18], and the International Criminal Tribunal for Rwanda (ICTR), established by UN Security Council Resolution 955 in 1994[19].

The ICTY and ICTR statutes and their Rules of Procedure and Evidence (RPE) initially allowed only the possibility of entering a guilty plea, without specifying the procedure or codifying its consequences – similarly to the IMT and the IMTFE in Nuremberg and Tokyo, respectively. However, the emergence of early jurisprudence from the ICTY and subsequent amendments to the Rules of Procedure and Evidence paved the way for a significant use of plea bargaining and its development in practice.

3.1. ETHICAL IMPLICATION AND INITIAL CONCERNS

The perspective of applying plea bargaining in an international criminal trial initially caused significant concern. As stated by former ICTY President Antonio Cassese:

> *"[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 possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts."*[20]

However, as observed by Scharf, "while the judges of the ICTY initially determined that plea-bargaining would be incompatible with the unique purpose of the international war crimes Tribunals, seven years later they reversed course and began to aggressively pursue plea-bargains."[21]

18 Security Council Resolution 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (May 25, 1993).

19 Security Council Resolution 955, UN SCOR, 48th Sess., 3453th mtg., UN Doc. S/RES/955, 8 November 1994.

20 Morris, V., Scharf, M. P., 1995, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, London, Transnational Press, pp. 649–652.

21 Scharf, M. P., 2004, Trading Justice for Efficiency Plea-Bargaining and International Tribunals, *Journal of International Criminal Justice*, Vol. 2, No. 4, p. 1073.

This shift was also facilitated by a change in the Tribunal's presidency and the differing legal cultures of the presidents themselves. As Scharf noted, "this about-face occurred shortly after Judge Gabrielle Kirk McDonald of the United States replaced Antonio Cassese as President of the Tribunal."[22] While the Italian Judge Antonio Cassese was rooted in a European civil law tradition, where plea bargaining was typically restricted to minor crimes, Judge McDonald brought the experience of a federal judge in the United States – specifically in Texas, where around 95 percent of criminal cases are resolved through plea bargains[23] (and in the broader US context, "approximately 90 percent of criminal cases are settled via plea bargaining"[24]). This kind of "Americanization" of the ICTY's procedures played a crucial role in breaking the taboo surrounding plea bargaining at the international criminal law level. This occurred during a historical moment marked by the "globalization of plea bargaining"[25] wherein "[t]he debate about Americanization of law is, to a great extent, a debate about legal cultures"[26], as observed by Langer, although in a different context,[27] in 2004. Concerning the influence of American legal culture on the ICTY and the usage of plea bargaining, it has been stated that "over the course of the Tribunal's first ten years, only eight cases through May 2003 had been resolved through negotiated dispositions."[28] Moreover, "in response to increasing external pressure to expedite its adjudication process from both the U.N. Security Council (which has insisted that no new indictments issue after 2004 and that all trials conclude in 2008) and the George W. Bush administration (which supplies approximately one-quarter of the

22 *Ibid*.

23 *Ibid*.

24 Ma, Y., 2002, Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, Italy: A Comparative Perspective, *International Criminal Justice Review*, Vol. 12, No. 1, p. 25.

25 See Langer, M., 2004, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, *Harvard International Law Journal*, Vol. 45.

26 *Ibid*., p. 64.

27 *Ibid*. The author also observed that "In other words, it is a debate about how law is understood, thought of, and practiced in different jurisdictions, as well as about how certain conceptions of legal phenomena that prevail in the United States may overcome other conceptions." (*Ibid*.) See Damaška, M., 1997, The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments, *The American Journal of Comparative Law*, Vol. 45, No. 4, p. 839, who stated that "[i]n criminal procedure, a few good lessons have already been learned about problems that arise when factfinding arrangements from one family are incorporated into the institutional milieu of the other".

28 Cook, J. A. III, 2005, Plea Bargaining at the Hague, *Yale Journal of International Law*, Vol. 30, p. 475.

Tribunal's funding), the practice of plea bargaining has become a staple of ICTY activity."[29]

In the practice of the UN ad hoc tribunals, and especially the ICTY, plea bargaining was employed for several reasons beyond merely expediting proceedings. Henham and Drumbl summarized some of these reasons, noting concerns that, "as time passes, the memories of witnesses dim,"[30] and "the rigours of direct and cross-examination may retraumatise those who have survived mass atrocity"[31]; furthermore, "ICTY judges also have expressed their understanding that guilty pleas promote reconciliation in areas afflicted by violence the rehabilitation of offenders."[32] They also concluded that their analysis "has revealed inconsistency and obfuscation as regards the praxis of pleading guilty and plea bargaining and raised serious doubts about the contribution such practices can make to the achievement of peace and reconciliation in post-conflict societies beyond the furtherance of the purely system interests of the institutions of international criminal justice."[33] Other authors have noted that "[t]he ICTY has justified its use of plea-bargains on two main grounds – that they save the Tribunal time and resources and that they facilitate reconciliation."[34] As observed by Clark, for instance, the "Tribunal's use of plea bargains exposes a significant gap between, on one hand, its ambitious mandate and, on the other hand, the external pressures it faces to finish its work in accordance with its completion strategy. This, in turn, raises fundamental questions about whether and to what extent the Tribunal's mandate – to deliver justice, to deter, and to contribute to the restoration and maintenance of peace – is in fact realistic, that is to say achievable."[35]

Although it has been highlighted that "many feel that the gravity of the crimes within the jurisdiction of international criminal courts prohibits any negotiations with the alleged perpetrators,"[36] some authors have pointed out that "the histories of both the ICTY and the ICTR reveal the

29 *Ibid*.

30 See Henham, R., Drumbl, M., 2005, Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia, *Criminal Law Forum*, Vol. 16, No. 1, p. 60.

31 *Ibid*.

32 *Ibid*.

33 *Ibid*. p. 86.

34 Clark, J. N., 2009, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation, *The European Journal of International Law*, Vol. 20, No. 2, p. 433.

35 *Ibid*.

36 Rauxloh, R. E., 2010, Plea bargaining in international criminal justice – Can the International Criminal Court afford to avoid trials?, *The Journal of Criminal Justice Research*, Vol. 1, No. 2, p. 2.

substantial advantages to incorporating plea bargaining into the international criminal adjudication process."[37]

Some of the abovementioned scholarly opinions were previously summarized by President Antonio Cassese. In a separate and dissenting opinion in 1997, specifically in the *Erdemović* case,[38] he emphasized the significance and advantages of a guilty plea in international criminal proceedings. According to Cassese,[39] guilty pleas could avoid potentially lengthy trials with their attendant challenges, including the complexities of collecting evidence. Moreover, they could offer public benefits by reducing the significant costs associated with international criminal proceedings. These costs include tasks such as victim and witness protection, hosting facilities for the parties, simultaneous interpretation into multiple languages, transportation, and other forms of logistical assistance. Cassese also highlighted the potential advantages for the accused, including the possibility of a more lenient sentence, avoidance of public exposure during a trial, and mitigation of negative consequences for the accused's family and social position. However, Cassese argued that, in cases of guilty pleas, it is imperative to safeguard the fundamental rights of the accused. He emphasized that the waiver of the right to a trial should only be permitted under stringent conditions to ensure fairness and justice.[40]

Other ICTY judges held differing views. One notable example is Judge Wolfgang Schomburg, who, in a dissenting opinion in the *Deronjić* case,[41] expressed significant concerns, stating that pretrial agreement between the accused and the prosecutor (referred to as the "Understanding of the Parties") was, for unknown reasons, not included in the plea agreement submitted to the Trial Chamber.[42] Judge Schomburg argued: "*Da mihi factum, dabo tibi jus* – give me (all) the facts and I will present you the applicable law (and a just decision). This wise Roman principle unfortunately is not part of our Rules."[43] And he continues "[o]ne might say, under the Rules of this Tribunal, that it is for the Prosecutor alone to decide whom, and under which charges, to indict. In principle, this is

37 Kovarovic, K., 2011, Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Resolution at the International Criminal Court, *Journal of Dispute Resolution*, Vol. 2011, No. 2, p. 284.

38 ICTY, *Prosecutor v. Dražen Erdemović*, IT-96-22-T, Separate and Dissenting Opinion of Judge Cassese, Appeals Chamber, 7 October 1997, para. 8.

39 *Ibid*., para. 9.

40 *Ibid*.

41 ICTY, *Prosecutor v. Deronjić*, IT-02-61-S, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, 30 March 2004, para. 11.

42 *Ibid*., para. 12.

43 *Ibid*., para. 6.

correct. However, it is also for the Prosecutor to safeguard that justice is seen to be done and to convince, in particular, those people on whose behalf this Tribunal is working that there is no arbitrary selection of persons to be indicted and no arbitrary selection of charges or facts in case of an indictment. I am afraid that such an unjustified premature procedure has been applied in the proceedings against Miroslav [Deronjić]. I accept that, in order to break up a circle of silence among perpetrators, some promises can be made by the Prosecutor vis à vis credible and reliable perpetrators. However, these promises shall, proprio motu, be disclosed to the bench by the Prosecutor. a) Promises, furthermore, can not result in de facto granting partial amnesty/impunity by the Prosecutor, particularly not in an institution established to avoid impunity. b) Amnesty can only be granted after an appropriate sentence has been determined. c) A limited amnesty or early release, if at all, can only be granted by those to whom this power is or will be vested, based on a sentenced person's entire post-crime conduct, or in order to restore peace. There is no legal basis in the Statute or the Rules for the Prosecutor to promise in the beginning of each statement that information provided by the Accused would never be used against him."[44] As Turner noted, "Judge Schomburg compared charge bargains to 'de facto granting partial amnesty/impunity by the Prosecutor' and criticized them as conflicting with the Tribunals' mission to avoid impunity, to establish the truth, and to promote peace and reconciliation."[45] This view also reflects the idea of other authors, stating that "there is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. Opposing lawyers shrink from battle, and the jury's empty box signals the system's disappointment. But though its victory merits no fanfare, plea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance. Plea bargaining may be, as some chroniclers claim, the invading barbarian. But it has won all the same."[46]

3.2. PRACTICAL APPLICATION AND CASE-LAW OF ORDINARY PLEA PROCEEDINGS

Of the 254 defendants across the ICTY (161) and ICTR (93), 30 opted for negotiated justice, including 21 before the Tribunal for the former Yugoslavia and 9 before the Tribunal for Rwanda. The first case of plea bargaining at the international level occurred on 31 May 1996 in the case of

44 *Ibid*., paras. 10–12.

45 Turner, J. I., 2017, p. 229.

46 Fisher, G., 2000, Plea Bargaining's Triumph, *The Yale Law Journal*, Vol. 109, p. 859.

Dražen Erdemović,[47] before the ICTY. At the ICTR, the first case was that of Jean Kambanda,[48] in 1998.

Both the ICTY and ICTR essentially apply the same legal framework, although with slight differences in the numbering of the articles and the rules of procedure and evidence.

Article 20(3) of the ICTY Statute, entitled "Commencement and conduct of trial proceedings", and identically Article 19(3) of the ICTR Statute, provide that "[t]he Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial." Both norms are similar to Article 24 of the Nuremberg Statute and Article 15 of the Tokyo Charter. However, the ad hoc tribunals have detailed Rules of Procedure and Evidence, which provide a precise discipline for guilty plea and plea bargaining.

Rule 62(a)(iii) of the ICTY-RPE provides that upon transfer of an accused to the seat of the Tribunal, the President assigns the case to a Trial Chamber. According to this rule, "the accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall: (i) satisfy itself, himself or herself that the right of the accused to counsel is respected; (ii) read or have the indictment read to the accused in a language the accused understands, and satisfy itself, himself or herself that the accused understands the indictment; (iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count."[49]

The same procedure is effectively outlined in Rule 62(a)(iv) of the ICTR-RPE regarding the ad hoc tribunal for Rwanda.

Rule 62 (A)(vi) of the ICTY-RPE specifies that if a plea of guilty is entered during the initial appearance, the single judge is required to forward the case file to the Trial Chamber to initiate the plea-bargaining process set forth in Rule 62 *bis* of the ICTY-RPE.

A similar provision is established for the ICTR, as per Rule 62 (A)(v).

The most relevant rule is therefore Rule 62 *bis* of the ICTY-RPE, entitled "Guilty Pleas".

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47 *Erdemović*, Sentencing Judgment, 29 November 1996, para. 3.

48 ICTR, *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Sentencing Judgment, 4 September 1998, para. 5.

49 Rule 62(A)(iii) ICTY-RPE.

As per this rule, "if an accused pleads guilty, [...] or requests to change his or her plea to guilty and the Trial Chamber is satisfied that: (1) the guilty plea has been made voluntarily; (2) the guilty plea is informed; (3) the guilty plea is not equivocal; and (4) 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."[50]

Only if all the four requirements of validity of guilty plea are evaluated by the judges may the Trial Chamber enter a "finding of guilt" and instruct the Registrar to set a date for the sentencing hearing.

The four abovementioned requirements derived from the case-law and specifically from the Joint Separate Opinion of Judge McDonald and Judge Vohrah, issued in the ICTY *Erdemović* case in October 1997.[51] Judge McDonald and Judge Vohrah set out what they called as the "minimum preconditions" for the validity of a guilty plea in international criminal law. Firstly, "the guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises."[52] The voluntariness requirement also involves, as specified in the opinion,[53] two additional elements. On one hand, an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty. On the other hand, the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence. The voluntariness was expanded by the ICTR in the *Kambanda* case in September 1998.[54] For the ICTR judges, the guilty plea satisfies the requirement of the voluntariness only if the accused entered the plea "freely and knowingly, without pressure, threats, or promises,"[55] as well as "if he clearly understood the charges against him as well as the consequences of his guilty plea."[56] Another aspect of the voluntariness, as highlighted in the *Kambanda* case, is that a guilty plea must be "unequivocal"[57], which is if the accused "was aware that the said plea could not be refuted by any line of defence."[58]

50 Rule 62 *bis* ICTY-RPE.

51 *Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 7 October 1997, para. 8.

52 *Ibid*.

53 Rule 62 *bis* ICTY-RPE, para. 10.

54 *Jean Kambanda*, Judgment and Sentence, 4 September 1998, Trial Chamber, para. 6.

55 *Ibid*.

56 *Ibid*.

57 *Ibid*.

58 *Ibid*.

Secondly, "the guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty."[59] For the ICTY judges McDonald and Vohrah, "an informed plea would require that the Appellant understand: (a) the nature of the charges against him and the consequences of pleading guilty generally; and (b) the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other."[60] If the accused was not properly "informed", it must be afforded "an opportunity to replead to the charges with full knowledge of these matters."[61] Thirdly, "the guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility."[62] For the ICTY judges, "the requirement that a plea must be unequivocal is essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise."[63] Furthermore, they observed that this requirement "imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial. The courts in common law jurisdictions all over the world, except in the United States, have consistently declared that a guilty plea must be unequivocal."[64] They also clarified that whether a plea of guilty is equivocal "must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law. The Appellant pleaded guilty but claimed that he acted under duress. It follows therefore that we must now examine whether duress can constitute a complete defence to the killing of innocent persons."[65] Fourthly, the requirement on the "sufficient factual basis for the crime and the accused's participation in it" has been developed through jurisprudence, such as the case of *Ntakirutimana*[66] before the ICTR, or the case *Deronjić* where the ICTY stated that "the agreed factual basis is to be treated as mere support for the guilty plea specifically in the case where it is discrepant with the Indictment,

59 *Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 10.

60 *Ibid*., para. 14.

61 *Ibid*., para. 27.

62 *Ibid*.

63 *Ibid*.

64 *Ibid*., para. 28.

65 *Ibid*., para. 31.

66 ICTR, *Prosecutor v. Ntakirutimana*, ICTR-96-17, Decision on the Prosecutor's motion for Judicial Notice of Adjudicated Facts, 26 November 2001, para. 26.

such that the Indictment shall be regarded as controlling."[67] Furthermore, the existence of a sufficient factual basis must be established, free of discrepancies with the Indictment, and there must be no contestation by the defendant regarding the factual elements supporting the charges to which they have pleaded guilty (this circumstance can be inferred from the absence of disagreement between the prosecution and defense or from independent indicia). It is important to note that, in practice, the factual basis is also evaluated by the judges. As observed by Turner, "trial chambers have usually conducted an independent inquiry into the facts and have required that evidence other than the parties' agreement support the guilty plea."[68] After the guilty plea requirements are positively evaluated, there is room to activate the plea bargaining.

Contrary to the international military tribunals of Nuremberg and Tokyo, the UN ad hoc tribunals provide a specific written discipline for this procedure, named as "plea agreement procedure", respectively provided by Rule 62 *ter* for the ICTY-RPE and Rule 62 *bis* for the ICTR-RPE. According to these rules, the prosecutor and the defense may come to an "agreement" regarding the accused's plea of guilty. If the accused pleads guilty to the indictment, or to one or more counts within it, the Prosecutor may take several actions before the Trial Chamber. Specifically, the Prosecutor may: (1) request to amend the indictment to reflect the plea; (2) recommend a specific sentence or sentencing range as appropriate; or (3) agree not to oppose the accused's request for a particular sentence or sentencing range.

However, the Trial Chamber is not bound by any such agreement made between the prosecutor and the defense. In the event that a plea agreement has been reached, the Trial Chamber requires that the details of this agreement be disclosed in open session (alternatively, if there is "good cause", the disclosure may be made in closed session).

It is important to highlight that the parties do not waive the right to appeal if the judge exceeds the agreed-upon sentence. For instance, as summarized by Tieger and Shin, in the first case of plea agreement in the history of international criminal law, the *Erdemović* case[69], "Mr Erdemović pleaded guilty to murder as a crime against humanity. The Trial Chamber sentenced him to 10 years. Following his successful appeal against that sentencing judgment, Erdemović subsequently changed his plea to one of

67 *Ibid*.

68 Turner, J. I., Plea Bargaining, in Carter, L., Pocar, F., (eds.), 2013, *International Criminal Procedure. The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing Limited, p. 52.

69 *Erdemović*, Sentencing Judgment (SJ), 29 November 1996, para. 3.

guilty of murder as a violation of the laws and customs of war, and was sentenced to five years' imprisonment."[70]

As observed by Sayers, "the timing of a guilty plea is also significant in terms of its status as a mitigating factor. Belated pleas of guilty, deferred until the middle of the prosecution's case, or made during the accused's own case-in-chief, will generally be entitled to less credit than a plea made at a much earlier stage."[71]

According to various jurisprudence, such as the *Todorović* case, guilty pleas "should, in principle, give rise to a reduction in the sentence that the accused would otherwise have received."[72] In others case, such as *Plavšić*, it has been stated that "the Trial Chamber will accordingly give significant weight to the plea of guilty by the accused, as well as her accompanying expressed remorse and positive impact on the reconciliatory process, as a mitigating factor."[73] In *Sikirica et al*, the Trial Chamber stated that "the primary factor to be considered in mitigation of Duško Sikirica's sentence is his decision to enter a guilty plea."[74] In other judgments, such as *Deronjić,* judges have made criticism highlighting that as opposed to a pure guilty plea, a plea agreement "has two negative side effects. First, the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis. Second, it may be thought that an accused is confessing only because of the principle '*do ut des*' (give and take)."[75]

On this point, the doctrine observed that the jurisprudence "evidences a paucity of clear principles as to how pleading guilty intersects with other mitigating factors, leading to the phenomenon of what we identify as a praxis of cumulative mitigation."[76] For Henham and Drumbl, "once an offender plea bargains, does that automatically entitle the offender to a broader number of additional mitigating discounts because that offender then also can claim acceptance of responsibility, substantial cooperation

70 Tieger, A., Shin, M., 2005, Plea Agreements in the ICTY. Purpose, Effects and Propriety, *Journal of International Criminal Justice*, Vol. 3, No. 3, p. 667.

71 Sayers, S. M., 2003, Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia, *Leiden Journal of International Law*, Vol. 16, No. 4, p. 768.

72 ICTY, *Prosecutor v. Todorović*, IT-95-9/1, Sentencing Judgment, 31 July 2001, para. 80.

73 ICTY, *Prosecutor v. Plavšić*, IT-00-39&40/1, Sentencing Judgment, 27 February 2003, para. 81.

74 ICTY, *Prosecutor v. Sikirica et al*., IT-95-8-T, Sentencing Judgment, 13 November 2001, para. 148.

75 *Deronjić*, Judgment, 30 March 2004, para. 135.

76 Henham, R., Drumbl, M., 2005, p. 60.

with prosecution, remorse, and voluntary surrender? The jurisprudence is somewhat fragmented."[77]

Regarding the determination of the sentence, Rule 100 of both the ICTY and the ICTR Rules of Procedure and Evidence leave the judges room for discretion. According to both paragraphs (a) of Rule 100, if the Trial Chamber convicts the accused on a guilty plea, "the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence."

The only prohibition, differently from Nuremberg and Tokyo tribunals, is the issuance of the death penalty, as the maximum sentence in the ad hoc tribunals is life imprisonment.

As Chifflet and Boas observed, "unlike most domestic jurisdictions, none of the international criminal tribunals has sentencing scales or tariffs that set out maximum (or possibly even minimum) penalties for the specific crimes within its jurisdiction."[78] As Hola explained, "the positive law sets only very loosely defined limits on the judges' discretion in sentence determination, the analysis focused on sentencing argumentation in individual cases."[79] In other words, and with reference to the jurisprudence of the ad hoc tribunals at these times, "Despite the recognised and increasing importance of international sentencing, it is evident that this area of international criminal law is still 'under construction' and many aspects are not regulated."[80]

In any case, plea agreements are not binding for the judges, although the "substantial cooperation with the Prosecutor by the convicted person before or after conviction" could represents a mitigating circumstance, according to Rule 101 of both ad hoc tribunals.

Finally, regarding the sentencing, it has been observed that "the ICTY has had a patchwork of sentences that might be said to reflect a lenient approach to sentencing. Meanwhile, the ICTR, at least where genocide convictions are entered, has been more consistently harsh."[81] For Chifflet and Boas, this divergence in sentencing is in part explicable by the higher percentage of defendants pleading guilty to genocide before the ICTR and

77 *Ibid*.

78 Chifflet, P., Boas, G., 2012, Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic And Miroslav Bralo, *Criminal Law Forum*, Vol. 23, No. 1, p. 138.

79 Hola, B., 2012, Sentencing of International Crimes: Consistency of Sentencing Case Law, *Amsterdam Law Forum*, Vol. 4, p. 22.

80 D'Ascoli, S., 2011, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC*, Oxford, Hart Publishing, p. 1.

81 Chifflet, P., Boas, G., 2012, p. 154.

an underutilization of plea bargaining.[82] According to other authors, "the ICTR has appropriately sentenced the principal architects and orchestrators of the genocide to life imprisonment, while developing the beginnings of a 'common law' of sentencing for serious international crimes that will benefit future tribunals."[83] For others, the difference in sentencing practice and history between the ICTY and ICTR represents "an interesting anomaly".[84] Judge Theodor Meron, specifically, and with reference to the internal divergence in sentencing in the ICTY, observed that that divergence was "partly in consequence of the ICTY's emphasis on individualized sentencing."[85]

3.3. THE SPECIAL PROCEEDINGS INVOLVING GUILTY PLEAS

In addition to the ordinary plea agreements, the statutes of the ad hoc tribunals provide two separate proceedings involving guilty pleas.

One is provided by Rule 50(b) of both the ICTY and the ICTR Rules of Procedure and Evidence, in case of amendment of the indictment. According to this rule, "if the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges."[86]

The other one is provided for both tribunals by Rule 77, in case of contempt of the tribunal. In the latter case, the only difference from the ordinary plea agreements is that, according to Rule 77(e), the time limit for entering a plea cannot each exceed ten days, (instead of the thirty days provided for the ordinary plea procedure as per Rule 62(a)(3)). Moreover, this procedure could also apply to the witnesses, as it happened in the case of witness Shefqet Kabashi,[87] who entered a guilty plea after he refused to answer as a witness in a case before the ICTY.[88] The rest of the procedures apply mutatis mutandis to this proceeding. Though, in case the contempt is committed by a counsel, Rule 77(I) confers to the judges the possibility

82 *Ibid*.

83 Sloane, R. D., 2007, Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda, *Journal of International Criminal Justice*, Vol. 5, p. 733.

84 Sayers, S. M., 2003, p. 752.

85 ICTY, *Prosecutor v. Galić*, IT-98-29-T, Separate and Partially Dissenting Opinion of Judge Meron, 30 November 2006, para. 9.

86 Rule 50(b) of both the ICTY RPE and the ICTR RPE.

87 ICTY, *Prosecutor v. Shefqet Kabashi*, IT-04-84-R77.1, Judgment, 16 September 2011.

88 ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, IT-04-84, T. 10939-10941, 20 November 2007.

of ruling that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel, pursuant to Rule 46 of both tribunals. Both rules establish that if a counsel's conduct is deemed offensive, abusive, obstructs the proceedings, or fails to meet the requisite standards of professionalism, they can be subject to sanctions (this includes failure to uphold professional competence and ethical standards). Moreover, in both rules, the chamber or judge must first provide a warning to the counsel before imposing any sanctions. ensuring that the counsel has an opportunity to rectify their behavior before further action is taken. Furthermore, both rules provide for the possibility of reporting the misconduct of counsel to the professional regulatory body in the counsel's State of admission, or, if applicable, to the governing body of the counsel's university (in the case of an "academic lawyer"). However, the ICTY and the ICTR apply a slightly different discipline regarding the misconduct of counsel. ICTY Rule 46 enumerates several specific offenses for which counsel may be sanctioned, including offensive conduct, abusive behavior, obstruction of proceedings, and negligence or failure to meet professional standards. Furthermore, it specifies that the chamber can, after a warning, either refuse the counsel an audience or, after hearing from the counsel, declare that the counsel is no longer eligible to represent a suspect or accused. The ICTR Rule 46 provision is more general, stating that sanctions can be imposed if the counsel's conduct remains "offensive or abusive" or obstructs the proceedings, but it does not explicitly mention negligence or failure to meet professional standards. The ICTR rule also refers to misconduct that is "contrary to the interests of justice", a broader and more flexible criteria.

4. The International Criminal Court

In 1998, the UN General Assembly convened a diplomatic conference of plenipotentiaries, during which it adopted the Rome Statute of the International Criminal Court (ICC) and Resolution F of the Final Act, which created the Preparatory Commission for the ICC. The International Criminal Court was subsequently established based on the Rome Statute, which was adopted on 17 July 1998. The Rome Statute entered into force four years later, on 1 July 2002, after being ratified by 60 countries. The ICC is an independent international organization and is not part of the United Nations system. It is headquartered at The Hague, in the Netherlands.

Differently from the UN ad hoc tribunals and from Nuremberg and Tokyo, Article 65of the Rome Statute (RS) of the International Criminal

Court, provides a specific procedure for plea bargaining, named as "proceedings on an admission of guilt".

4.1. FROM ARGENTINA AND CANADA TO ROME

The current Article 65 of the ICC Rome Statute is the result of an intense yet productive debate between the representatives of the member states of Canada and Argentina, reflecting an encounter between different legal cultures: Canadian Common Law and Argentine Criminal Law.

The original provision can be found in Article 38 (1)(d) of the 1994 International Law Commission's ICC draft Statute. The proposed norm stated that "at the commencement of the trial, the Trial Chamber shall: [...] Allow the accused to enter a plea of guilty or not guilty."[89]

This drafted rule was reworded in 1995 by the Ad Hoc Committee, which was tasked with evaluating the draft and proposing appropriate amendments. This committee highlighted that "a number of delegations reiterated in the context of this provision their view that the draft was not explicit enough on procedures and that more details should be provided, possibly through the rules of the court."[90]

However, in 1996 the Preparatory Committee drew attention to the need to "bridge the gap between different legal systems [...] with emphasis being placed on finding the common denominators in different legal systems."[91] Moreover, according to the Preparatory Committee, "it was further suggested that the trial chamber should determine whether the accused fully understood the nature and consequences of admission of guilt, whether the admission was made voluntarily without coercion or undue influence and whether the admission was supported by the facts contained in the indictment and a summary of the evidence presented by the prosecution before deciding whether to request additional evidence, to conduct an expedited proceeding or to proceed with the trial."[92] Additionally, it was stated that "the Court must have the power to satisfy itself before taking a decision."[93] Also, the question of the compatibility of plea

89 International Law Commission, Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, UN Doc. A/49/10, 1 September 1994, p. 54.

90 UN GA, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 6 September 1995, paras. 169–170.

91 UN GA, Report of the Preparatory Committee on the Establishment of an International Criminal Court. Volume I, UN Doc. A/51/22, 13 September 1996, para. 263.

92 *Ibid*.

93 *Ibid*.

bargaining regarding international crimes was discussed. Indeed, it was expressly observed that "Paragraph 1 (d) was described as relating to the question of plea bargaining, which should be excluded given the fact that it is in contradiction with the structure of the Court and also given the serious nature of the crimes which affected the interests of the international community as a whole. However, it was also stated that guilty pleas were not inseparable from plea bargaining."[94]

Following the 1994 International Law Commission's ICC draft Statute, the Article 38(1)(d) proposal, the amendment put forward by the 1995 Ad Hoc Committee, and the observations made by the 1996 Preparatory Committee, a Working Paper submitted by Argentina ultimately proposed a clearer solution, entitled "summary procedure".

The Argentinian working paper first warned that the guilty plea "is not an institution that is accepted by legal systems based on the European-Continental model; for some countries, such a regulation could, in addition, be unacceptable by reason of limitations in their domestic law."[95] Therefore, an intermediate solution was suggested through the possibility of introducing a "summary procedure", a procedural mechanism more commonly found in European-Continental legal systems. The key distinction is that the accused is not required to enter a plea of guilty or not guilty to the charges in the indictment. Instead, they are invited to make any statement they deem appropriate after the indictment is read. The summary procedure may only be invoked if the accused acknowledges and admits the truth of the facts outlined in the indictment and after that recourse to the summary procedure.

The journey toward the current ICC "proceedings on an admission of guilt", however, was far from complete. Drawing inspiration from the Working Paper submitted by Argentina, a joint Argentine–Canadian proposal emerged,[96] embodying the latest and most significant effort, which ultimately gave rise to what we now recognize as Article 65 of the Rome Statute.

The term "admission of guilt", rather than "guilty plea", was chosen as it does not directly correspond to either the civil law or common law systems. It was selected as a hybrid solution in an attempt to merge two different legal traditions, or, as expressly highlighted by the ICC judges,

94 *Ibid*., para. 264.

95 UN GA, Preparatory Committee on the Establishment of an International Criminal Court. 12–30 August 1996, UN Doc. A/AC.249/L.6, 13 August 1996.

96 Preparatory Committee on the Establishment of an International Criminal Court. 12–30 August 1996, A/AC.249/WP.16, 20 August 1996. Proposal submitted by Argentina and Canada for Articles 38, 38 *bis*, 41 and 43.

"as an intermediate solution that blended traditional common and civil law concepts."[97]

The result of this proposal was the introduction of Article 38 *bis*, "Abbreviated proceedings on an admission of guilt", where guilty pleas and plea bargaining are separated and judges have full control over the agreement between the defense and the prosecution.

The full text of Article 38 *bis*, as drafted in the proposal submitted by Argentina and Canada,[98] was formulated as follows:

> "1. Where the accused makes an admission of guilt under article 38, paragraph 1 (d), the Trial Chamber shall determine whether: (a) the accused appreciates the nature and consequences of the admission of guilt and whether the admission is voluntarily made; and (b) the admission of guilt is firmly supported by the facts of the case that are contained in: i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits, and ii) any other evidence [...].
> 2. Where the Trial Chamber is satisfied that the matters referred to in paragraph l are established, the Trial Chamber shall consider the admission of guilt as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
> 3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made.
> 4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made."[99]

The subsequent and final step prior to the adoption of the ICC Rome Statute in 1998 was the proposal put forward by the Preparatory Committee on the Establishment of an International Criminal Court in 1997. In this proposal,[100] Article 38 *bis*, as initially formulated by Argentina

97 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, para. 24.

98 UN GA, Preparatory Committee on the Establishment of an International Criminal Court, Proposal submitted by Argentina and Canada for Articles 38, 38 *bis*, 41 and 43, 12–30 August 1996, UN Doc. A/AC.249/WP.16, 20 August 1996.

99 *Ibid*.

100 Preparatory Committee on the Establishment of an International Criminal Court. 4–15 August 1997. Distr. LIMITED, A/AC.249/1997/L.8/Rev.1, 14 August 1997.

and Canada, was largely reproduced, with the addition of a new paragraph 5. This paragraph clarified that the agreement would not be binding. The content of this norm was essentially retained in the Rome Statute, where Article 38 *bis* was classified as Article 65 and named "proceedings on an admission of guilt" instead of "abbreviated proceedings on an admission of guilt."

> "1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
>
> (a) The accused understands the nature and consequences of the admission of guilt;
>
> (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
>
> (c) The admission of guilt is supported by the facts of the case that are contained in:
>
> (i) The charges brought by the Prosecutor and admitted by the accused;
>
> (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
>
> (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
>
> 2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
>
> 3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.
>
> 4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
>
> (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
>
> (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

Decision taken by the Preparatory Committee at its Session held from 4 to 15 August 1997, 32–33.

> 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."[101]

In addition to the Rome Statute, other norms, such as the Rules of Procedure and Evidence and the Regulations of the Office of the Prosecutor, also regulate this discipline. Regarding the prosecutor, the discipline is set out by the Regulations of the Office of the Prosecutor, specifically Rule 62, titled "Assessment of Admission of Guilt". According to this rule, the prosecutor is tasked with considering whether the admission of guilt is informed and voluntary and whether it is supported by the facts pleaded. Furthermore, any "credible information or evidence indicating that the admission of guilt was not informed, voluntary or supported by the facts pleaded," must be communicated by the prosecutor to the Trial Chamber. The next step is a threefold judicial duty to control, which arises from Article 65 of the Rome Statute, concerning the validity of, first, the guilty plea of the accused. This judicial review aims to assess: 1) whether the accused understands the nature of the admission of guilt; 2) whether the accused understands the consequences of that admission; 3) whether the admission of guilt is voluntarily made by the accused; 4) whether the accused has had sufficient consultation with defense counsel before pleading guilty; 5) whether the admission of guilt is supported by the facts of the case, as contained in the charges brought by the Prosecutor and admitted by the accused, or in any materials presented by the Prosecutor that supplement the charges and which the accused accepts, as well as any other evidence, including the testimony of witnesses; 6) if, and only if, the judges consider it appropriate for any reason, or at the request of a party, to order a medical, psychiatric, or psychological examination of the accused to investigate whether the accused is unfit to stand trial and therefore unable to understand the admission of guilt (this latter requirement is set by Rules 115 and 135 of the ICC Rules of Procedure and Evidence). If the Trial Chamber is not satisfied with the establishment of one or more of the abovementioned requirements, the admission of guilt will be regarded as a *tamquam non esset*, meaning that the admission of guilt is treated as though it were never made. In such cases, the trial will proceed under the ordinary trial procedures (although before a different Trial Chamber, in order to prevent any conflict of interest and to ensure the impartiality and independence of the judges in the subsequent trial).

If "the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in

101 This is the wording of previous Article 38 *bis*.

particular the interests of the victims, the Trial Chamber may request the Prosecutor to present additional evidence, including the testimony of witnesses, or order that the trial be continued under the ordinary trial procedures."[102] Even in such cases the admission of guilt is consider as not having been made, though judges have the discretion, and not the obligation, to remit the case before another Trial Chamber. If, contrary to both of the previous scenarios, the Trial Chamber is satisfied that all matters and requirements for the validity of the admission of guilt and guilty plea have been established, it will consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime. In any case, according to Rule 139 of the Rules of Procedure and Evidence, the Trial Chamber "may invite the views of the Prosecutor and the defence" before taking a decision. Moreover, it is important to note that Article 65(5) establishes the absolute non-binding nature of any agreements between the Prosecutor and the defense concerning the admission of guilt, modifications to the charges, or the penalty to be imposed. Furthermore, Rule 139 of the Rules of Procedure and Evidence provides that the Trial Chamber is required to "give reasons for this decision, which shall be placed on the record". Both aspects belong more to civil law traditions than to common law traditions. On this point, as the ICC judges observed in *Al Mahdi* that "the solution reflected in the final Article 65 of the Statute follows a 'third avenue' between the traditional common law and civil law approaches."[103]

4.2. FROM THE *AL MAHDI CASE* TO THE PROSECUTORIAL GUIDELINES

The case of Ahmad Al Faqi Al Mahdi was the first war crimes proceeding brought before the ICC related to an attack against protected objects.[104] Specifically, Al Mahdi was charged with the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012. For the ICC, the targeted buildings were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali and did not constitute military objectives.[105]

102 See Article 65 of the Rome Statute.

103 *Al Mahdi*, Judgment and Sentence, para. 27.

104 See Vrdoljak, A. F., 2018, *Prosecutor v. Ahmad Al Faqi Al Mahdi*: Judgment and Sentence & Reparations Order (Int'l Crim. Ct.), International Legal Materials.

105 ICC, Situation in the Republic of Mali ICC-PIDS-CIS-MAL-01-09/22_Eng, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15.

Some authors observed that "the International Criminal Court's ability to prosecute cultural destruction as a war crime is considered an important deterrent against iconoclastic tactics, but until recently it had never been wielded."[106] This case "was also the first conviction of its kind, and advocates of cultural preservation have celebrated it as a much-needed general deterrent in North Africa and the Middle East, where iconoclasm has become a favorite tactic of various state and non-state actors in armed conflict. However, the *Al Mahdi* trial may in fact be the exception that proves the untenability of the legal regime protecting cultural heritage sites."[107]

This case is the first – and only – case where an accused of international crimes before the ICC pleaded guilty and decided to trigger Article 65 of the Rome Statute, in so accessing the proceeding on an admission of guilt. It represents a landmark in the ICC case law since it also summarized the blend of legal cultures that characterize the international criminal procedure.[108] As observed by the Court, "an accused is afforded an opportunity to make an admission of guilt at the commencement of the trial, a procedure which looks not dissimilar to the traditional common law 'guilty plea', [...] implicitly authorizes discussions corresponding to plea agreements in common law legal systems."[109] At the same time, Article 65 also requires the Chamber to conclude that the admission is "supported by the facts of the case", specifically requiring it to consider both the admission of guilt "together with any additional evidence presented". As the ICC Trial Chamber observed in the *Al Mahdi* case, the latter is more analogous to a summary or abbreviated procedure traditionally associated with civil law systems.

Procedurally, the first step and constitutional basis of the proceeding on an admission of guilt was a document titled "agreement regarding the confirmation of the charge".[110] This agreement, made by Al Mahdi, his defense counsel and the prosecutor, highlighted that in exchange for his admission of guilt, the Prosecutor would recommend to the Trial Chamber "a

106 See Burrus, J. E., 2017, "So Far as War Allows": Why the Al Mahdi Conviction Is Unlikely to Stem the Pace of Cultural Destruction Perpetrated by Non-State Actors, *Washington International Law Journal*, Vol. 27, No. 1, p. 319. See, also, Gerstenblith, P., 2016, The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?, *J. Marshall Rev. Intell. Prop. L.*, Vol. 15, No. 3, p. 387.

107 Burrus, J. E., 2017, p. 317.

108 See Chiarini, G., 2025, *The Evolution of International Criminal Procedure. From Nuremberg and Tokyo to the International Criminal Court*, Milton Park, Routledge, p. 170.

109 *Al Mahdi*, Judgment and Sentence, para. 27.

110 ICC, Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-78-Conf-Exp, translated by author.

sentence within the range of nine to eleven (9–11) years of imprisonment, and recommend that Ahmad Al Faqi Al Mahdi be given credit for the time he has served in the custody of the Court."[111] Moreover, the Prosecutor would not appeal any sentence imposed by the Trial Chamber within the agreed range. It was also stated that the agreement did not in any way limit the parties' ability to offer admissible evidence or make submissions to the Trial Chamber regarding the factors referred to in the agreement itself or the determination of an appropriate sentence, so long as such evidence and submissions were not inconsistent with the agreement.[112]

In this document Al Mahdi was advised that, by making this agreement, "he gives up, in whole or in part, the opportunity to exercise the following rights: (a) The right to plead not guilty and to require the Prosecutor to independently prove the charge against him beyond reasonable doubt at a full trial; (b) The right not to confess guilt and to remain silent, without such silence being consideration in the determination of guilt or innocence; (c) The right to raise defences and grounds for excluding criminal responsibility, and to present admissible evidence at full trial (without prejudice to his right to make submissions and present admissible evidence under article 65 or with regard to sentencing); (d) The right to examine, or to have examined, the witnesses against him at a full trial and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (without prejudice to his right to examine any witness that may be called to testify, and his right to call witnesses and to have them examined on his behalf, at any proceedings under article 65 or with regard to sentencing); and (e) The right to appeal a conviction, confirmation of the charge against him, or any pre-trial ruling regarding admissibility or jurisdiction, or to appeal a sentence within the range set forth at paragraph 19(a) above (without prejudice to his right to appeal pre-trial or trial rulings regarding sentencing procedure and any sentence imposed in excess of the range set forth at paragraph 19(a) above)."[113] Furthermore, the public prosecutor was required to support any potential request for a review of the sentence, in accordance with Articles 110 of the Rome Statute and Rule 223 of the Rules of Procedure and Evidence, provided that at least two-thirds of years of imprisonment would had been served.

After the confirmation of the charges hearing, held before the Pre-Trial Chamber I, which preliminary confirmed all the charges against

111 *Ibid*.

112 ICC, Situation in the Republic of Mali, Annex 1, Public Redacted Version, ICC-01/12-01/15-78-Anx1-Red2, 19 August 2016, para. 14.

113 ICC, Situation in the Republic of Mali, Annex 1, para. 21.

him,[114] Al Mahdi was sent to Trial Chamber VIII for the trial phase. At this stage, Al Mahdi formally pled guilty, in accordance with Article 65 of the Rome Statute. Nonetheless, the Trial Chamber decided to hold a three-day hearing on 22–24 August 2016[115] for cross-examination of the witnesses and the evaluation of the evidence.

The evidence presented by the prosecutor was analyzed and the witnesses were examined and cross-examined. Finally, the parties presented their final arguments, mainly in respect to the sentence criteria, and the Court set the date for the judgment for 27 September 2016[116]. As previously analyzed, "The Chamber was satisfied that the accused understood the nature and consequences of the admission of guilt and that the admission was voluntarily made after sufficient consultation with defence counsel and also that the admission of guilt was supported beyond a reasonable doubt by the facts of the case."[117] "The Chamber convicted Al Mahdi of the war crime of attacking protected objects as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the Statute and sentenced him to nine years of imprisonment"[118]. Also, on 17 August 2017, Trial Chamber VIII issued a Reparations Order[119] concluding that Al Mahdi was liable for EUR 2.7 million in expenses for individual and collective reparations for the community of Timbuktu,[120] confirmed for the most extent by the Appeals Chamber on 8 March 2018. On 25 November 2021, a panel of three judges of the Appeals Chamber[121] decided to reduce Al Mahdi's nine-year sentence of imprisonment by two years.

The *Al Mahdi* case led to the establishment of specific Guidelines for Agreements Regarding Admission of Guilt, published by the ICC Office of the Prosecutor (OTP) in October 2020.[122] The guidelines, recognizing that "guilty pleas and plea agreements have become an established feature of

114 ICC, Situation in the Republic of Mali, Public Redacted Version, ICC-01/12-01/15-84-Red, 24 March 2016.

115 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript of hearing, ICC-01/12-01/15-T-4-Red-ENG, 22 August 2016.

116 *Al Mahdi*, Judgment and Sentence.

117 Chiarini, G., 2021, Negotiated Justice in the ICC: Following the Al Mahdi case, a Proposal to Enforce the Rights of the Accused, *PKI Global Justice Journal*, Vol. 13, No. 5.

118 *Ibid*.

119 ICC, Repatriation order, ICC-01/12-01/15-236, 17 August 2017.

120 *Ibid*.

121 Public Redacted Version of the Decision on the review concerning reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-434-Red3, 25 November 2021.

122 International Criminal Court, The Office of the Prosecutor, *Guidelines for Agreements Regarding Admission of Guilt*, October 2020.

international criminal justice," aim to provide eight requirements, titled as "relevant factors", that the Prosecutor should carefully weigh before deciding to enter into an agreement of an admission of guilt with an accused of international crimes. These relevant factors can be summarized as follows:

1) Consistency of the agreement with the Rome Statute and the goals of the Office of the Prosecutor.
2) The acceptance of responsibility of the accused of international crimes, which means providing the Prosecutor with a full and truthful account of his or her own conduct relevant to the charges. The acceptance of responsibility benefits victims, the public, the parties, and the Court; moreover, it has an impact over future generations, since it will be more difficult to contest those facts in the future decades or centuries.
3) The exercise of "particular caution" by the Prosecutor "before agreeing to seek the withdrawal or amendment of charges which have been traditionally under-prosecuted, such as crimes against or affecting children, sexual and gender-based crimes, attacks against cultural, religious, historical and other protected objects, as well as attacks against humanitarian and peacekeeping personnel."[123] Moreover, as per the guidelines, as part of any agreement, the prosecutor should ordinarily insist that the accused admit guilt with respect to all confirmed charges.
4) The evaluation of the cooperation of the accused with the office of the prosecutor, in terms of critical information on other investigations or prosecutions, including the possibility of testifying on behalf of the Prosecution in other trials; according to the guidelines, "only those accused who cooperate with the Prosecution to the full extent they are able will receive the maximum benefit."[124]
5) The sentencing recommendation should properly reflect "the gravity of the crime and the accused's role therein,"[125] and all relevant circumstances.
6) All agreements should contain a "detailed and thorough statement of the facts underlying the admission of guilt"[126] and the Prosecutor is not authorized to agree to withhold any fact material from the Trial Chamber.

123 *Ibid*.
124 *Ibid*.
125 *Ibid*.
126 *Ibid*.

7) The consideration of admission of guilt as an instrument to "ordinarily eliminate or reduce the need for victims and witnesses to testify at trial, which can be a traumatic experience [...] tak[ing] into account the interests of the victims, as well as their expressed views and concerns"[127] regarding the agreement.
8) The efficiency in terms of saving significant resources that would have been used for trial and appeal. According to the guidelines, the freeing of resources for other cases can lead to greater accountability, both through a greater number of prosecutions and also prosecutions against those most responsible for crimes. As highlighted in the *Al Mahdi* case itself, "the speed at which cases can be resolved following admissions of guilt saves the Court both time and resources, which can be otherwise spent advancing the course of international justice on other fronts."[128]

What emerges from both the *Al Mahdi* case and the OTP guidelines is the insufficient attention given to the rights of the accused. Article 65 of the Rome Statute and the legal framework related to this special proceeding would benefit from further amendments addressing the uncertainties faced by defendants who wish to make an admission of guilt.[129] Specifically, it would be helpful to clarify how many hearings an accused person might face if they admit guilt, given the complexities of the hybrid procedure. The following proposal,[130] for instance, would help to ensure the right of the accused and consists of six interconnected amendments:

> "A) An insertion of a paragraph 2 bis into article 65, namely: *'In order to establish all the essential facts that are required to prove the crime to which the admission of guilt relates, as set out in paragraph 2, the Court may hold a hearing, as long as these are limited to a reasonable time, considering abbreviated nature of the proceedings regarding an admission of guilt.'*
> "B) An additional paragraph 11 bis to article 61, namely: '*Once the charges have been confirmed in accordance with this article, and in case the accused has decided together with the Prosecutor to proceed with article 65, the Presidency – after having constituted a Trial Chamber in accordance to paragraph 11 – shall decide the number of hearings in accordance with the reasonable time requirements as set out in paragraph 2* bis *of article 65 of this Statute.'*
> "C) An additional paragraph 2 to Rule 139 of the Rules of Procedure and Evidence: '*The Trial Chamber shall respect the number of hearings decided by the Presidency under paragraph 11bis of article 61 of the Statute.'*

127 *Ibid*.
128 *Al Mahdi*, Judgment and Sentence, para. 28.
129 As proposed in Chiarini, G., 2021.
130 *Ibid*.

> "D) An amendment of Regulation 54 to the Regulations of the Court, with an additional paragraph 2: '*the decision on the number of the hearings in case of proceedings on an admission of guilt under article 65 of the Statute shall not be discussed in the Status conferences before the Trial Chamber*.'
> "E) An additional paragraph 4 bis to article 65: '*When the Trial Chamber, at the conclusion of the hearings under paragraph 11* bis *of article 61, is not satisfied that the matters referred to in paragraph 1 of this article are established, it shall order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and shall remit the case to another Trial Chamber*'.
> "F) Finally, an amendment to article 67, inserting a subparagraph (l) in paragraph 1: '*If the accused has pleaded guilty and decided to proceed under article 65 of this Statute, he has the right to be informed about the numbers of the hearings, according to paragraph 11* bis *of article 61 and with respect to the principle of reasonable time*'."

Although it may not be feasible to establish a specific number of hearings applicable to all cases, the accused should be informed that, even in instances where guilt is admitted and a sentence has been agreed with the Prosecutor, the Trial Chamber retains the discretion to schedule hearings, albeit within a "reasonable time".

5. Conclusions

The use of plea bargaining, firstly denied by the statutes of post-World War II international military tribunals of Nuremberg and Tokyo, has emerged gradually through the establishment of the UN ad hoc tribunals, particularly via the judicial interpretations of the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It has come to be recognized as a procedural instrument primarily guided by principles of efficiency and the reasonable duration of proceedings, and, to some extent, by a transitional justice perspective.[131] Starting in the 1990s, the use of negotiated justice raised several concerns, particularly regarding the proportionality of the sentence in relation to international crimes, which in some cases were considered excessively lenient;[132] moreover the exclusion of victims from the entire procedure has been deemed unjustifiable, especially in relation to international crimes against entire communities,

131 On the reconciliation, see Clark, J. N., 2009; *Deronjić*, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, 30 March 2004.

132 See, for instance, *Erdemović*, Separate and Dissenting Opinion of Judge Cassese, para. 9; Kovarovic, K., 2011; Chifflet, P., Boas, G., 2012, p. 154.

peoples, religions, and cultures, in addition to individuals. It has also been emphasized that "[f]or the victims it is important that the factual and legal truth not be sacrificed on the altar of expediency."[133] Whether plea bargaining is viewed as appropriate in international criminal justice seems to depend on how international criminal trials are interpreted. If we consider them as "transformative structures whose primary function is to provide the means of reconciling the ideology and the morality of punishment for victims and post-conflict societies,"[134] then negotiated justice in the form of plea bargaining may face several criticisms in international criminal law, or "it may be stated tentatively that the guilty plea has come of age, which represents a triumph for pragmatism."[135] Differently, if we consider international criminal trials primarily as purely procedural mechanisms aimed at ensuring the just and prompt punishment of those accused of international crimes – while prioritizing the rights of the accused, essentially treating international criminal trials as akin to domestic trials with an international dimension – then the use of plea bargaining should be seen in a positive light, as an intrinsic component of any criminal court, whether national or international. In this view, despite critical perspectives, a plea-bargaining procedure, as the ICC proceedings on an admission of guilt, can be considered an extremely practical procedural instrument and, in some cases, a right of the accused, already recognized in many domestic criminal codes across various legal systems and traditions. However, as Damaška cautioned, "the architects of the international criminal process would be well advised to follow the motto: as many trials as possible, as much bargaining as necessary."[136] More than a decade later, this foresight appears to reflect the current state of Article 65 proceedings at the ICC, where plea bargaining remains the exception rather than the norm. The practice of plea bargaining has indeed reached an impasse in ICC proceedings. This is not only attributable to the heinous nature of international crimes and their moral consequences; procedurally, this stall is mainly attributable to (at least) two factors: the ICC's limited use of plea bargaining, with only a single case

133 Vasiliev, S., 2014, *International criminal trials: A normative theory*, PhD thesis, University of Amsterdam, 25 April, p. 884.

134 Henham, R., 2005, The Ethics of Plea Bargaining in International Criminal Trials, *Liverpool Law Review*, Vol. 26, No. 3, p. 210.

135 Jørgensen, N., 2002, The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea, *Leiden J Int'l L*, Vol. 15, No. 2, p. 407.

136 Damaška, M., 2004, Negotiated Justice in International Criminal Courts, *Journal of International Criminal Justice*, Vol. 2, No. 4, p. 1039.

to date, and the lack of clear statutory law regarding the rights of the accused and the timing of abbreviated proceedings. If these procedural ambiguities are not addressed, they could have significant long-term negative consequences for the development of negotiated justice at the ICC. In conclusion, the study of negotiated justice in the history of international criminal law shows that modern international criminal courts have moved beyond simple guilty pleas and are going toward a proceduralization of negotiated justice itself – first by adopting plea bargaining procedures inspired by common law traditions in the UN ad hoc tribunals, and later by developing a hybrid procedure at the International Criminal Court. Yet, the limited and inconsistent use of plea bargaining at the ICC reveals that its current framework remains underdeveloped. As this paper has argued, the lack of clear procedural rights of the accused and ambiguities in the rules governing abbreviated proceedings on an admission of guilt have hindered the implementation of negotiated justice at the ICC. If more procedural rights are granted to the accused through appropriate amendments to the Rome Statute, the ICC Rules of Procedure and Evidence, and its regulations, the result could be the increased use of plea bargaining in future ICC proceedings, stabilizing the proceduralization of negotiated justice in international criminal tribunals.

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IZA PRIZNANJA KRIVICE: PROCEDURALIZACIJA NAGODBE U MEĐUNARODNIM KRIVIČNIM TRIBUNALIMA

Giovanni Chiarini

APSTRAKT

Pregovaračka nagodba je prvi put kodifikovana u okviru *ad hoc* tribunala UN, gde je razvijen konzistentan korpus sudske prakse. Nasuprot tome, pregovaranje o priznanju krivice i priznanje krivice su u velikoj meri odbijeni na ranijim Nirnberškim i Tokijskim suđenjima. Ovaj rad ispituje teorijski i praktični razvoj pregovaranja o priznanju krivice, prateći proceduralizaciju pregovaračke pravde u međunarodnim krivičnim tribunalima, što je na kraju rezultiralo skraćenim postupkom MKS o priznanju krivice – hibridnim modelom koji uključuje karakteristike iz sistema građanskog prava i običajnog prava, predstavljajući kompromis anglosaksonske i evropske pravne tradicije. Ovaj rad takođe pokazuje da je u MKS upotreba pregovaranja o priznanju krivice došla do bezizlazne situacije, prvenstveno zbog dva faktora: njegove izuzetno ograničene primene – koja se do sada odražava samo u jednom slučaju – i nejasnih normi u vezi s pravima optuženog, kao i dužinom postupka.

Ključne reči: MKS, Međunarodni krivični sud, međunarodni krivični postupak, Nirnberški procesi, tribunali Ujedinjenih nacija, priznanje krivice, međunarodno krivično pravo, uporedni krivični postupak.

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