This paper examines the possibility of plea bargaining in the International Criminal Court. It looks firstly to the nature of international justice, and distinguishes it from the nature of domestic law by its aims and purposes. It then goes on to examine the extent to which plea bargaining in the international sphere will uphold, or undermine, some of the key features of international law: justice, peace, the welfare of victims and defendants, the importance of an accurate historical record, and the conservation of judicial resources. Finally, it is concluded that plea bargaining at the International Criminal Court seems likely in the near future, and recommendations are made as to the exact circumstances in which this can be properly exercised.

Key words: International criminal law; international justice; plea bargains; international criminal court

I. Introduction

While there is no universal definition of plea bargaining, the practice generally encompasses negotiation and reduction of sentence, the withdrawal of some or all of the charges, or reducing the charges, in exchange for an admission of guilt, conceding certain facts, foregoing an appeal or providing cooperation in another criminal case.¹ Plea bargaining is a relatively new concept in the international sphere. It can also take the forms of charge bargaining, whereby some charges are dropped entirely or exchanged for lesser crimes, or sentence bargaining, where Counsel will recommend a particular sentence or sentence range to the Court.² From its birth, the International Criminal Tribunal for the former Yugoslavia (ICTY) declared that the practice of plea bargaining was ‘inconsistent’ with its unique purpose and

functions.\footnote{Statement by the President [of the ICTY] Made at a Briefing to Members of Diplomatic Missions, IT, 29th Feb. 1994 reprinted in V. Morris and M.P. Scharf, An Insider’s Guide to the International Criminal Tribunal for the former Yugoslavia: Volume 2 (Transnational Publishers Inc. 1995) 649-652.} The Rwanda Tribunal (ICTR) swiftly followed suit, imprisoning the former president of Rwanda, Kambanda, to life imprisonment despite his guilty plea to the crime of genocide.\footnote{Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).} However, as the caseload of ad hoc Tribunals mounted, so too did the pressure on them to employ plea bargains.\footnote{M.P. Scharf, ‘Trading Justice for Efficiency: Plea-Bargaining and International Tribunals’ (2004) 2 J. Int’l Crim. Just 1070, 1071.} Since then some international cases have seen the use of plea bargains, such as \textit{Plavšić},\footnote{Prosecutor v. Biljana Plavšić, Sentencing Judgement, Case No. IT-00-39-40/1 (Feb 27, 2003).} \textit{Kambanda},\footnote{Kambanda (n 4)} \textit{Erdemović}\footnote{Prosecutor v Drazen Erdemovic (Appeal Judgment) Case No. IT-96-22-A (17th Oct. 1997).} and \textit{Nikolić}.\footnote{Prosecutor v Momir Nikolić, Sentencing Judgment, Case No. IT-02-60/1-S (Dec. 2, 2003).} It can be argued that the introduction of plea bargaining into the international paradigm has the “potential to wreak havoc”,\footnote{N.A. Combs, ‘Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts’ (2006) 59 Vand. L. Rev. 69, 150.} and any endeavour to do so must be done with the principles and aims of international justice firmly in mind.

The first section of this essay will provide a brief discussion as to the nature of international criminal law and how it is distinguishable from domestic law in its aims and purposes. While plea bargains are used in many domestic legal systems, it is crucial to distinguish these from international law in their aims and purposes. The second section will analyse the extent to which the practice of plea bargaining undermines or supports some of the most important functions of international law: justice, peace, the effect the practice has on victims and defendants, the importance of an accurate historical record and finally, the conservation of judicial resources. Finally, having concluded that it is likely plea bargaining will be adopted by the International Criminal Court (ICC) in the near future, a brief analysis of the circumstances under which this may be properly exercised will be examined.
II. Characterising International Criminal Law

It is often argued that the nature of international criminal law (ICL) is so distinguishable from that of domestic law that the use of plea bargaining at international level is unjustifiable.\textsuperscript{11} ICL regularly needs to operate in a situation where a country or a region has been torn apart by armed conflict between groups.\textsuperscript{12} While national law aims for retribution and vengeance, deterrence and prevention, rehabilitation and restorative justice, international law goes beyond this.\textsuperscript{13} It aims to replace impunity with accountability for “egregious human rights violations”,\textsuperscript{14} facilitate reconciliation between the victims and the defendant, put the guilty to a fair trial and so, in turn, uphold the rule of law.\textsuperscript{15} The Courts must also endeavour to contribute to peace and reconciliation being built between parties, provide support for the reconstruction of society and create an accurate historical record.\textsuperscript{16} International criminal law empowers victims by providing them with a forum in proceedings through which they offer their evidence without the risk of danger to themselves or their families. Ultimately, international criminal law seeks to promote and protect human rights by punishing “gross violations of human rights”,\textsuperscript{17} while balancing this with also protecting due process rights of the defendants.

\textsuperscript{11} Statement by the President [of the ICTY] Made at a Briefing to Members of Diplomatic Missions, IT/29, 11\textsuperscript{th} Feb. 1994, \textit{Kambanda} (n 4) 1073.
\textsuperscript{15} Rauxloh (n 12) at 3
\textsuperscript{17} ibid 434.
The “driving spirit”\textsuperscript{18} behind the development of ICL is the aim to end impunity\textsuperscript{19} for perpetrators of atrocity and human rights abuses.\textsuperscript{20} Another key aspect is to bring the most responsible perpetrators before trial. It can be peculiar to perceive that international criminal courts and tribunals would be willing to dispose of this trial once they have achieved the difficult objective of bringing a defendant before the Court. Indeed, the practice of plea bargaining appears to “compromise the goals of international criminal justice, namely the duty to prosecute, the principle of just dessert, the establishment of a historical record, and the realisation of the victim’s interests.”\textsuperscript{21} There is no doubt that such goals of the international criminal trial are admirable and worthy of aspiration. It can however be argued that at times they are idealistic and difficult to achieve in reality, which can be attributed to the “inherent tension”\textsuperscript{22} between them. In light of this, it can be contended that the use of plea bargaining can in fact be of great assistance to the international courts and in some cases, necessary.\textsuperscript{23}

III. Reconciling the practice of Plea Bargaining with the underlying principles of international criminal justice

A: Justice

It is, in general, questionable whether plea bargaining is an acceptable method of administering justice in international criminal trials; as plea agreements are rarely adopted with the most serious crimes in national law, it seems absurd to then allow such practice when

\textsuperscript{18} Rauxloh (n 12) 20.

\textsuperscript{19} Preamble to the Rome Statute of the International Criminal Court, hereinafter ‘Preamble’,paragraph 5.


\textsuperscript{21} Petrig (n 13) 4.

\textsuperscript{22} Schrag (n 16) 428.

\textsuperscript{23} Rauxloh (n 12) 18.
dealing with crimes of greater gravity. Justice can present itself in different forms but at its very core is the concept that a convicted offender will suffer a proportionate sentence and that the Court’s judgment will reflect the crimes committed. This is embedded in the Preamble of the Rome Statute – “the most serious crimes of concern to the international community as a whole must not go unpunished”. Parties to the Rome Statute – “resolved to guarantee lasting respect for and enforcement of international justice”. While the Rome Statute doesn’t specifically make reference to proportionate sentencing, this principle is assumed in that a disproportionate sentence is ground for appeal for both Prosecution and Defence. The ICC’s goal to put an end to impunity does, by definition, ensure that a guilty defendant will not leave Court with a low sentence that is disproportionate to his crimes. This is problematic when considering plea bargaining; a sentence reduction as a result of such an agreement doesn’t reflect the true blameworthiness of the defendant, nor the severity of the crimes. However, it is worthy of note that a perpetrator will never receive a punishment parallel with their crimes. The Rome Statute prohibits the death penalty – the maximum sentence available is life imprisonment, and any sentence lower than this cannot exceed 30 years. It can also be argued that plea bargaining in itself does not act as a barrier to proportionate sentencing; the Prosecution and Defence can make recommendations to the Court for a lower sentence, but the Court has discretion to reject sentences it feels are too lenient. It is worth bearing in mind though, that if the Court continuously rejected sentence recommendations emanating from a plea agreement, future defendants may avoid entering into an agreement.

25 Article 76 of the Rome Statute of the International Criminal Court. Hereinafter all Articles referred to are those of the Rome Statute.
26 Preamble, paragraph 4.
27 ibid, paragraph 11.
28 As per Articles 81(2)(a) and 83(3).
29 Preamble, paragraph 5.
30 Rauxloh (n 12) 4.
31 Article 77 (1)(b).
32 ibid (1)(a).
33 Article 65(5).
Charge bargaining proves most controversial in whether plea agreements undermine the principles of justice that international criminal law must adhere to. This practice - whereby the Prosecution offers to drop some of the charges against the defendant if he pleads guilty to the others – means that the defendant is not brought to justice for some of the atrocities he has committed, even if there is evidence to prove this. This is problematic for two reasons. Firstly, it means he is not justly sentenced and indeed, some of his crimes will go unpunished completely. Secondly, he will not be made to bear the label of the other crimes he has committed: “not only the sentence but also the judgment and its inherent condemnation by the international community are essential parts of justice”. 34 This alludes to letting him escape responsibility for his other crimes and can also hinder retribution sought by his victims, who may want recognition for the suffering they have endured. For this reasons we must recognise that plea bargains are dangerous in that the defendant may avoid a proportionate punishment and an accurate label of the crimes committed.

However, it is important here to reiterate that plea bargains are not binding on the Court.35 Each trial encompasses the possibility that the guilty defendant will be acquitted where the Prosecution cannot successfully prove their case. As noted above, a full investigation in international law is difficult; the danger of acquittal should not be underestimated. One advantage of a plea bargain then is that it procures an admission of guilt for some crimes, meaning the defendant will then be punished appropriately for those crimes at least. Conviction of some charges coupled with a reduced sentence is preferable to, and more just than, a complete acquittal after trial.36

34 Rauxloh (n 12) 6.
35 Article 65(5).
36 Rauxloh (n 12) 6.
B: Reconciliation and Peace

The aims of peace and reconciliation within the international community are go beyond bringing perpetrators to justice. They also encompass the goal of making a contribution to peace and reconciliation. It is very difficult to actually measure a tribunal’s impact on reconciliation as there are so many independent variables.37 Yet plea bargains can potentially further peace as they result in an admission of guilt by the defendant. The admission of responsibility in hand with a public acknowledgment of victims’ suffering can be of ‘immeasurable value’ for reconciliation.38 In Nikolic39 the Trial Chamber emphasised “through the acknowledgement of the crimes committed and the recognition of one’s own role in the suffering of others, a guilty plea may be more meaningful and significant than a finding of guilt by a trial chamber to the victims and survivors”.40

However, one could also argue that victims deserve these concessions without rewarding the defendant in the process. Furthermore, an insincere admission of guilty will fail to contribute to the construction of peace and reconciliation. This is highlighted by the Plavšić41 case when despite a guilty plea, Plavšić later told the Swedish media: “I sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges. If I hadn't, the trial would have lasted three, three and-a-half years. Considering my age that wasn't an option.”42 She was then imprisoned for a mere eleven years in Sweden with access to sauna, gym, solarium, massage room and horse-riding paddock.43 In the meantime,

38 Rauxloh (n 12) 6.
39 Nikolic (n 9).
40 ibid para 72.
41 Plavšić (n 6).
war torn victims who had not been convicted of crimes against humanity began rebuilding their lives in the absence of such luxury.

So, it can be seen that the practice of plea bargaining incites an admission of guilt which can have a positive effect on the reconstruction of peace and reconciliation in conflict-torn societies. However, each case needs to be assessed on its own facts; the circumstances of the sentence, such as where the imprisonment is to be carried out, will factor into this assessment. It is impossible to say either way whether plea bargaining can be reconciled with aims of peace and reconciliation – each case needs to be evaluated individually.

C. The Rights of the Defendant

It cannot be said that there is justice in a case unless the trial is fair,\textsuperscript{44} and this is of particular importance at an international level dealing with more serious crimes. A legitimate conviction can be reached only under the rules of evidence\textsuperscript{45} and maintaining the defendant’s rights.\textsuperscript{46} In its capacity as a promoter of human rights, international criminal law must uphold the accused’s following rights: the right to a fair trial, to a public hearing; to examine, or have examined, witnesses on their behalf; to not be compelled to testify against themselves, and to be presumed innocent until proven guilty by the Prosecution.\textsuperscript{47}

In the result of a plea bargain agreement, no full trial is held. In this sense, the defendant effectively loses these rights in exchange for the advantages of a plea bargain – a reduced

\textsuperscript{44} Rauxloh (n 12) 7.
\textsuperscript{45} Article 69.
\textsuperscript{46} Article 67.
\textsuperscript{47} Article 14 of the International Covenant on Civil and Political Rights.
sentence, avoiding a lengthy trial and a potential absence of responsibility for some of the crimes committed. Where there is a good chance of conviction, the option of a more lenient sentence and conviction of lesser charges may prove tempting. Furthermore, the defendant escapes the shame of a public trial.

The defendant’s rights are of a high standard in the Rome Statute and it has already been established that evidential problems are rife in international prosecutions. In light of this, a high sentence discount may be offered which the defendant may feel pressured into accepting. It can be contended that plea bargaining will compel defendants to submit a guilty admission even where they have a potential chance of acquittal. Guilty pleas are often coercively extracted from defendants. Yee argues that one example of this is the *Erdemovic* case at the ICTY, where the defendant pleaded guilty to crimes against humanity, a plea not induced by prosecutorial promises of lenient treatment. It is argued that while the Statute and Rules were properly upheld, several aspects of the trial were “questionable if not revolting” and left the author with “serious doubts as to whether justice had been done.”

The defendant in this case appeared not to understand what he was pleading guilty to when confronted with charges of a crime against humanity or an ordinary war crime. He stated he was guilty but did not specify to which crime. He then pleaded guilty to a more serious crime instead of a lesser one. Finally, while pleading guilty, the defendant became extremely

48 Article 67 construes the right to be tried in the absence of undue delay; the examination of witnesses; the right not to testify, etc.
50 *Erdemovic* (n 8).
53 Yee (n 50) 272.
54 Ibid.
emotional and continually expressed remorse; 56 he stated he “had to do this. If I had refused, I would have been killed together with the victims”.57 Erdemovic clearly did not understand the nature of the charges, nor the meaning of the alternative charges available to him; he seemed to believe they were the same, or constituted one crime.58 He also did not unequivocally plead guilty.59 Furthermore, his reaction during his plea demonstrates that he was pressured into pleading guilty by threat of death. This, it can be argued, constitutes a miscarriage of justice – “it is revolting to see an accused who has a colorable defense going to jail without a good fight”60 and should have invalidated the plea.61

This highlights the issue of coercion in the practice of plea bargains. It can be questioned where the line is drawn between inducement to waive rights and unacceptable coercion.62 If the ICC is to develop a practice of plea bargaining, it must be ensured that the guilty plea is only extracted “voluntarily and intelligently”63 in the interests of justice and as per the rights of the defendant. Furthermore, the admission should “express the defendant’s recognition…of her guilt”.64 This cannot be said to be the case if it is obtained by threats or inducements.65

Secondly, plea bargaining includes the risk that the agreement will fall apart once the defendant has admitted guilt, resulting in a sentence different to the one promised initially.

The Prosecution can only recommend sentence to the Trial Chamber; The Court is not bound

57 Transcript of Erdemovic (n 54) 9.
59 Yee (n 50) 272.
60 Yee (n 50) 278.
61 ibid.
62 Feeley (n 1) 203.
63 Yee (n 50) 274.
by recommendation or the agreement.\textsuperscript{66} Only in the event of a full admission of guilt combined with an expression of genuine remorse will the Court be convinced that a lower sentence can be justified. In Nikolic\textsuperscript{67} the Trial Chamber emphasised that the sentence must “accurately reflect the actual conduct and crime committed”\textsuperscript{68} rather than the content of the agreement. In essence, the defendant entering into a plea agreement ultimately has no security that the bargain will be upheld. As such the defendant will fear that the Court fails to accept a guilty plea as a sufficient sign of remorse. This admission of guilt cannot be retracted and this would then leave the defendant in a compromising position. Consequently, this may prove sufficient in deterring a defendant from accepting a plea bargain and it must be acknowledged that sentence inducements therefore “have only limited persuasive value”.\textsuperscript{69}

D. Plea-Bargaining from the Victims’ Perspective

It is debatable whether plea bargains can be said to be in the victims’ interests or not. On the one hand, a guilty plea spares the victims from trial. This means the witnesses avoid having to relive their trauma via cross-examination and do not have to travel to a foreign country to do so.\textsuperscript{70} Contrastingly, not all victims will perceive the trial as a burden; it can act as a forum through which the victims are given a voice.\textsuperscript{71} This can prove therapeutic and make up an important part of the “healing process”.\textsuperscript{72} Furthermore, a full trial “in the context of mass atrocities…serves as an official venue for the acknowledgement of the victims’ injuries”.\textsuperscript{73} The withdrawal of charges that resulting from the agreement can prove problematic for the

\begin{itemize}
  \item \textsuperscript{66} Article 65(5).
  \item \textsuperscript{67} Nikolic (n 9).
  \item \textsuperscript{68} ibid para 65.
  \item \textsuperscript{69} Combs (n 10) 148.
  \item \textsuperscript{70} R. Rauxloh, \textit{Plea Bargaining in National and International Law} (1\textsuperscript{st} edn Routledge 2012) 220.
  \item \textsuperscript{71} Rauxloh (n 12) 13.
  \item \textsuperscript{72} Armatta (n 55) 219.
  \item \textsuperscript{73} Combs (n 10) 103.
\end{itemize}
victims. The defendant may not be charged for some crimes in exchange for a lower sentence, meaning these crimes go essentially unacknowledged by the law and also means the defendant is not forced to take responsibility for these actions. This may hinder the process of reconciliation – “I heard survivors say they could only forgive their perpetrators only if the perpetrators admitted the full truth”. The victims may view this as a reward for the defendant for his cooperation with the Court, as opposed to an appropriate punishment for atrocities he has committed. However, as limited numbers of witnesses can attend the trial due to time and cost limitations, not all victims are offered the opportunity to tell their story anyway. It must also be emphasised that the ‘story-telling’ aspect of the witness’ account is overestimated; the story of the victim must be restrained so as to only provide information relevant to the criminal responsibility of the defendant. Oftentimes written testimony is provided instead of oral, which could be said to further reduced the ‘healing power’ of the trial. Each case needs to be weighed on its own merits dependent on the individual facts; the gravity and nature of the crimes must be taken into account to determine whether a plea bargain would be in the best interests of the victims or not.

E. Truth-Seeking: The Historical Record

Establishing truth in the wake of human rights violations is crucial not only for the study of history, but also in its healing properties for the victims of atrocities: “only by remembering, telling their story, and learning every last detail about what happened and who was responsible were they able to begin to put the past behind them”. This begs the question of

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75 Yee (n 50) 219.
76 ibid.
77 ibid.
78 Hayner (n 73) 2.
whether plea bargaining generates a sufficient historic record.\textsuperscript{79} The need for precision is of particular importance in countries such as Yugoslavia and Rwanda, where propaganda was used to feed hatred of the victims and back the government’s genocidal policies. Only through proving facts – such as the full nature and extent of the atrocities, the planning and execution of these plans, and who exactly administered them - could the “distortions”\textsuperscript{80} created by the leaders be shattered. Establishing a historical record of conflict is also vital in the aim of international criminal justice to further peace and reconciliation, and the reconstruction of a stable society.\textsuperscript{81} In order to learn from conflict and prevent its reoccurrence it is “crucial to expose its history”.\textsuperscript{82}

Two examples can be contrasted here to examine the effects of plea bargains on the accuracy of the historical record. Firstly, as mentioned above, despite admitting guilt for the charge of crimes against humanity, Mrs Plavšić’s remorse was later revealed to be a sham plea employed as a means by which she received a lower sentence.\textsuperscript{83} The document submitted as part of the plea agreement was only five pages long, meaning her contribution of facts to the historical record was poor.\textsuperscript{84} Had a full trial been conducted, many more factual findings would have been uncovered, including witness statements and forensic evidence.\textsuperscript{85} It goes without saying that when aiming for accuracy such documentation would have prove far more useful. Furthermore, it can be argued that the Court has bestowed upon her the privilege of omitting parts of history and in this way, rewriting it to her fancy.

\textsuperscript{79} Scharf (n 5) 1072.
\textsuperscript{80} Scharf (n 5) 1079.
\textsuperscript{81} Yee (n 50) 221.
\textsuperscript{82} Yee (n 50) 222.
\textsuperscript{83} The Local: Sweden’s News in English (n 42).
\textsuperscript{84} Scharf (n 5) 1080.
\textsuperscript{85} Petrig (n 13) 16
On the other hand, the Nuremberg trial illustrates how a plea bargain can be said to be more effective than a full judgment. The idea that the German nation accepted the findings of the International Military Tribunal as the defendants were “convicted over their feeble denials on the strength of their own meticulously kept incriminating documents” is a common misconception. In actual fact, the defendants of the Nuremberg trial had the support of the vast majority of Germans; few Germans questioned the innocence of the defendants until the 1960s. An accused individual whom maintains innocence until the end of the trial and beyond would “set the stage for endless debates about the correctness of the Court’s historical record”.

It is debatable whether an admission of guilt – even where this will result in a “negotiated historical record” and for lesser crimes – could be preferable to this. Alternatively, it could be argued that if the ICC is to implement plea agreements, they should only be used where new evidence or information will be extracted from the defendant. This would offer the defendant the option of a lower sentence whilst maintaining the accuracy of the historical record.

F. International resources: the cost and length of proceedings

Finally, the issues of cost and length of proceedings will inevitably impact the Court’s decision in accepting or rejecting a plea bargain. It may be argued that a full trial is unduly

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86 ibid.
89 Petrig (n 13) 14.
90 Petrig (n 13) 15.
91 Rauxloh (n 12) 21.
time consuming: “too costly, too inefficient and too ineffective”, particularly in the case of significant political and military leaders. A full trial takes longer, and so costs longer, and is even more expensive than a national trial. The average trial at the ICTY or ICTR costs around $50 million and takes between ten months to just over a year. It is thought that in the future, the conservation of time and resources in international courts will be an overriding objective. The problem this highlights is whether the court will opt for a less time consuming and costly trial, being mindful of resource restraints, and prioritise this over the aims of establishing the truth and bringing perpetrators to justice. If this is found to be the case, it is difficult to see how this can be justified; it would in essence be “an allowance of administrative concerns to mitigate the punishment of those convicted for the most heinous crimes”. It goes without saying that where a sentence is lowered, this also has the benefit of relieving some of the imprisonment costs the defendant would otherwise have yielded. On balance, the Court should always seek justice over financial and time restraints where possible in accordance with the Rome Statute.

It can be argued that plea bargaining therefore offers the Court a dangerous shortcut. However, the response of the Court to this issue is reassuring thus far. In Nikolic the Trial Chamber emphasised that in cases of magnitude, the saving of resources cannot be given undue consideration or importance. It can also be purported that plea bargaining encourages defendants to surrender further useful information regarding other cases in process, which can

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94 Rauxloh (n 12) 10
97 Clark (n 49) 109
98 Nikolic (n 9)
in turn free resources for other complex cases that require more investigation.\textsuperscript{99} It is an additional benefit that the Court is then spared the cost and time of adjudicating the case.\textsuperscript{100} There is no problem with this as long as it is indeed a ‘side effect’ and not the driving cause behind a plea bargain acceptance. It is also essential that cutting the corners of cost and time does not in turn lead to an omission of the defendants’ rights. If this is the case, plea bargaining can be used sensibly by the Court provided it does not abuse its discretion to adopt such a practice. This can then provide “an obvious shortcut…providing the rights and interests of the accused are properly respected”.\textsuperscript{101}

IV. Plea Bargaining in the International Criminal Court

Having assessed the extent to which the practice of plea bargaining can be reconciled with the aims and principles of international criminal justice, it is necessary to now briefly consider under which circumstances this practice could be adopted. The Rome Statute does not prohibit plea agreements, and there are clear advantages to such arrangements, as discussed above. Moreover, members of court staff from the ICTY – where plea bargains are utilised - are increasingly eager to seek employment at the ICC. It is therefore assumed the ICC will implement such a practice in the future. As noted, many of the crucial goals of an international trial are so difficult to meet that utilising plea bargains can be helpful and in some cases, necessary. However, the risk of impinging the rights of defendants, the interests of the victims and the legitimacy of the court are also of great importance. In light of this, it is asserted that plea bargains must only be used in limited, controlled circumstances. Firstly, if

\textsuperscript{99} Rauxloh (n 12) 10
\textsuperscript{101} Dixon and Diemirdjian (n 96) 693-694
plea bargains are to be adopted, The Court must consider whether admission of guilt was made voluntarily - guilty pleas are often coercively extracted from defendants - and if the defendant is aware of the rights they are sacrificing.102 Rauxloh proposes that a Rule be added to the Rules of Procedure and Evidence obligating the Court to fully inform the defendant of the implications an admission of guilt has, and that the agreement with the Prosecution is not binding.103 As Yee puts it, “a guilty plea is not a bargain to be struck at a flee market where the maxim “buyer beware” reigns”.104 While the examination of Article 65 and the process of informing the defendant of the above aspects will take considerably longer, this is necessary to procure the legitimacy of the admission of guilt, and indeed the legitimacy of the plea bargaining practice itself; moreover, this would still take less time than conducting a full trial.105 Additionally, Clark emphasises that “plea agreements cannot have a positive impact in the absence of knowledge”106 and so the Court must prioritise informing local communities and victims of the implications these agreements have.107

V. Conclusions

It seems likely that the ICC will develop a practice of plea bargaining in the near future due to the success of cases at the ICTY and ICTR. If it does so, it must seek to uphold the principles and aims of international criminal justice, notably: the preservation of justice; contributing to peace and reconciliation in countries suffering atrocities; balancing respect for the rights of the defendant and the victims’ best interests, constructing an accurate historical record and being mindful of judicial resources. The guilty plea procedure “is strong medicine, and it

102 Rauxloh (n 12) 22.
103 ibid.
104 Yee (n 50) 278.
105 ibid.
106 Clark (n 37) 435.
107 Ibid.
must be administered with care and proper safeguards to ensure that no innocent person is
punished merely because the procedure has been simplified”.108 The Court must provide
boundaries to safeguard against an “unbridled use of plea agreements that could result in an
unequal treatment of perpetrators”.109 It remains to be seen whether it can truly be said that
plea bargaining can be reconciled with the principles of international justice; this is, perhaps,
best assessed on a case by case basis rather than attempting to provide a determinative
answer. Crimes of the nature seen at international level “involve not only physical harm but
also the denial of dignity, personal integrity and autonomy”110 and as such it is of utmost
importance that the Court proceeds sensitively when considering plea bargain agreements.
Where possible, other means should be used to bring defendants to justice; it is asserted that
plea bargains, despite their clear utility, should be used as a tool by which justice and
accountability are furthered,111 and not as a means of preserving the Court’s resources, be it
pecuniary or otherwise. The primary aim should always be to seek justice in the best way
possible and not to save time and money accepting sham plea bargains. It is however
acknowledged that the benefits of a plea bargain practice are clear – removing a leader from
active conflict can prevent further deaths and injuries, obtain an admission of guilt, cut costs
and time of a lengthy trial, and kickstart the process of restoring peace and humility to war
torn lands. If practiced properly, there is no reason for the ICC to hesitate in doing so.

108 Yee (n 50) 268-269.
109 Tieger and Shin (n 93) 679.
110 Petrig (n 13) 23.
111 Tieger and Shin (n 93) 666
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STATUTES

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-The Rome Statute of the International Criminal Court:

Article 65(5)

Article 67

Article 69

Article 76

Article 77(1)(b)

Article 77(1)(a)
Article 81(2)(a)

Article 83(3)

-The International Covenant on Civil and Political Rights:

Article 14

OTHER