Reconciliation or Betrayal? A Comparative Analysis of Domestic and International Plea Bargaining

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1) Introduction

This paper examines the strengths and weaknesses of plea bargaining in both domestic common law systems and in international criminal law. Although plea bargaining is a flawed practice, it would be unrealistic and unwise to abolish plea bargaining entirely. A more balanced approach would be for domestic and international systems to reduce and supplement plea bargaining in creative ways.

In domestic criminal justice systems, the practice of plea bargaining raises challenging legal, ethical, and philosophical questions. Perhaps the most profound question is whether plea bargaining amounts to true justice. Is it right to approach a prosecution as a kind of “game”? Much is at stake, including an accused’s liberty and the public’s faith in the administration of justice. What if an innocent accused lacks effective legal representation and simply takes a plea deal to quickly wrap up their case? What if the public disagrees with the lenient sentence offered to an accused? For these reasons, many

academics disapprove of plea bargaining, and some even argue that the practice should be abolished entirely (Jenia Turner, “Plea Bargaining and International Criminal Justice” at 222).

This paper adopts a balanced perspective on plea bargaining at both the domestic level and in international criminal law. Given the unique challenges faced by international courts in investigating crimes, some amount of plea bargaining is inevitable and advantageous. At the same time, the practice must be handled with great care. This paper will focus on the jurisprudence and legal frameworks of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). How have the tribunals’ approaches to guilty pleas helped or hindered the overarching goals of international criminal law? These cases in turn serve as valuable lessons for the International Criminal Court (ICC), which recently received its first guilty plea.

2) Domestic Plea Bargaining

a) Reducing Costs and Improving Efficiency

One of the most common arguments in support of domestic plea bargaining is that the practice saves valuable time, money, and court resources. The Supreme Court of Canada, for instance, has stated that “resolution discussions…are essential. Properly conducted, they permit the system to function smoothly and efficiently” (R v Anthony-Cook at para 1). However, plea bargaining may not be as essential to the administration of justice as one first assumes. For example, English courts do not use the grand jury system or pre-emptory challenges. The justice system also restricts the use of voir dires and challenges for cause. Because of this streamlining, plea bargaining is less prevalent in England than in other common law systems, such as the United States (Nancy Amoury Combs, “Copping a Plea to Genocide: The Plea Bargaining of International Crimes” at 46-47). Structural reform can therefore be just as valuable, if not more valuable, than relying on plea bargaining.

b) Promoting (and Threatening) Reconciliation Between Accused and Victim

Supporters of plea bargaining also argue that the practice can empower and heal victims of crime. According to the contrition argument, sentence bargaining should serve as a reward for remorseful accused persons. After all, acceptance of responsibility paves the way towards personal rehabilitation and social reintegration (Regina Rauxloh, Plea Bargaining in National and International Law at 36). Unfortunately, the reconciliatory potential of plea bargaining can be undermined in numerous ways. Most notably, the accused’s remorse may be far from clear. The behaviours associated with remorse often overlap with other psychological states, such as regret and humiliation. Worse still, accused persons have an incentive to fake remorse, knowing that they will likely receive better sentences (Richard L. Lippke, The Ethics of Plea Bargaining at 98). Victims may also feel alienated by the plea bargaining process, as discussions take place privately between counsel (Rauxloh, National and International Law, supra at 41). It is imperative that prosecutors approach plea bargaining in a balanced way that takes into account victims’ interests.

c) Jeopardizing Due Process

The greatest concerns associated with plea bargaining revolve around the accused's legal rights. In a common law system, the accused is granted the presumption of innocence, the right to remain silent, and the right to a fair trial. However, plea bargaining inverts these principles by promoting early "confessions" and penalizing those who proceed to trial. The logic is that an accused who is found guilty at trial is a "liar" and should therefore receive a tougher sentence than an accused who simply pled guilty in the first place (Rauxloh, National and International Law, supra at 47-48, 53). Certain prosecutorial tactics are especially troubling. American prosecutors frequently engage in overcharging, whereby an accused is charged with numerous offences when only one would suffice. Prosecutors may even add new charges when plea bargaining is unsuccessful. These practices can pressure the accused into pleading guilty as quickly as possible, even if they are innocent (Lippke, supra at 31-32).

Domestic systems have created various safeguards to ensure the validity of pleas secured through bargaining. Under Canada's Criminal Code, the court must be satisfied that: the plea is voluntary; the accused admits to the elements of the offence; the accused understands the nature and consequences of the plea; and the accused understands that the court is not bound by any plea agreement. The court may conduct a plea inquiry to ensure these criteria are met, though this is not mandatory (s. 606). This raises the concern of uneven treatment: what if some judges thoroughly question the accused, while others accept pleas at nearly face value? R v McIlvride-Lister, a 2019 Ontario case, offers insightful commentary on the shortcomings of the plea inquiry mechanism. For instance, judges are not required to explore the accused's motives or ask whether the accused was misinformed (para 64). Thus, even with procedural protections, a fair and transparent process is not fully guaranteed.

3) Plea Bargaining in International Criminal Law

a) Balancing Cost-Effectiveness with Other Objectives

International criminal courts are concerned about many of the same practical matters as domestic systems, such as resource allocation and procedural efficiency. The time and cost constraints for international trials are especially staggering. Consider the ICTY case of Kordi? & ?erkez: the trial was 20 months long, with 240 individual sitting days and 241 witnesses (para 3). In the face of daunting trials and precarious finances, plea bargaining can be an appealing alternative. In Bralo, the ICTY observed that "scarce legal, judicial and financial resources that would otherwise be expended in preparing for and conducting a lengthy and expensive trial may be redeployed in the interests of securing the wider objectives of the Tribunal" (para 64).

At other times, however, courts have been cautious towards the rationale of efficiency. After all, efficiency alone is not a fundamental principle of international criminal justice (Turner, supra at 240). The ICTY has stated that "in cases of this magnitude…the saving of resources cannot be given undue consideration or importance" (Momir Nikoli? at para 67). Cost-efficiency therefore poses a difficult balancing problem in the international context. Time and money are critical concerns, but courts must not ignore their grander vision of achieving maximum accountability for international crimes.

b) The Complexities of Reconciliation and the Historical Record

Plea resolutions have important practical and symbolic implications for victims of international crimes. On the one hand, guilty pleas generate admissions and insider information, which are often invaluable to the historical record (Regina Rauxloh, “Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining” at 751). In Bralo, the ICTY praised the accused for cooperating with investigators and demonstrating remorse. For instance, he helped investigators locate and exhume human remains, which brought some closure to the victims’ families (paras 67-69). He was also the first to admit responsibility for crimes committed in the Vitez municipality, which the tribunal deemed an “extremely important” step towards local reconciliation (para 71). In addition, plea bargaining helps individual victims by sparing them the long, treacherous journey to the international courts. For instance, testifying can make victims and their family members easy targets for retribution (Rauxloh, National and International Law, supra at 219-220).

However, foregoing a trial in favour of plea bargaining can also have severe consequences for reconciliation. The notorious case of Biljana Plavši?, former Co-President of the Republika Srpska, vividly illustrates such concerns. For her part in promoting the ethnic cleansing of Bosnian Muslims and Croats, Plavši? pled guilty to one count of persecution. In exchange, the prosecutor withdrew the seven other charges, including genocide (para 5). The ICTY recognized the accused’s guilty plea and post-conflict behaviour as “substantial” mitigating factors (para 110). In fact, the decision presented the guilty plea in almost glowing terms. The prosecutor deemed the plea “an unprecedented contribution to the establishment of truth” (para 67). The court sentenced Plavši? to only 11 years (para 134). In 2009, she was released from prison early and admitted that she had only pled guilty to receive a good deal (Rauxloh, “Negotiated History”, supra at 751). This case serves as an important cautionary tale for future plea bargaining with government leaders. Indeed, such admissions of guilt have the power to either reconcile or betray entire communities.

Plavši?’s punishment raises another contentious issue: achieving proportionality in sentencing. Prosecutors may be tempted to seek the toughest sentences for particularly horrifying crimes. However, if punishments are too harsh, other perpetrators may fear admitting responsibility. One example is the plea of former Rwandan Prime Minister Jean-Paul Kambanda. Although the plea was a mitigating factor, the ICTR focused far more on the aggravating factors. The tribunal stated that the crimes “carry an intrinsic gravity, and their widespread, atrocious and systematic character is particularly shocking to the human conscience” (para 61). The tribunal sentenced Kambanda to life in prison (para 62). This result may have satisfied victims, but accused persons were hesitant to enter plea agreements for years afterwards (Rauxloh, National and International Law, supra at 210).

c) Validity of Guilty Pleas

Like domestic systems, international courts must ensure proper procedural safeguards for guilty pleas. Under Rule 62 bis of the ICTY Rules of Procedure and Evidence (ICTY-RPE), the Trial Chamber must be satisfied of the following: the plea has been made voluntarily; the plea is informed; the plea is not

equivocal; and there is a sufficient factual basis for the offence and the accused's involvement in it. The ICTR-RPE contains a nearly identical provision. Commentators have criticized the Rule 62 bis framework for being "remarkably bare-bones" (Julian Cook, "Plea Bargaining at the Hague" at 481). Indeed, the ICTY jurisprudence following the introduction of Rule 62 bis is concerning. In one case, the judge read the plea agreement and confirmed with the accused that "everything was clear" to him. The judge, however, did not probe deeper into whether the accused was truly informed (Mrda, Plea Transcript at 86). It is essential that international courts not only devise robust statutory frameworks, but also implement them effectively and consistently.

4) Plea Bargaining at the International Criminal Court: An Opportunity for Reflection

Given the troubled history of domestic and international plea bargaining, one might ask whether the ICC should venture down this same path. By learning from past jurisprudence, the ICC can structure its own careful approach to future plea agreements. The most important step for the ICC to take with regards to plea bargaining is to create a long-term plan (Rauxloh, "Negotiated History", supra at 763). Otherwise, the practice risks becoming a "convenient informal shortcut to avoid trials" (ibid at 767). For instance, the court could follow the lead of domestic systems such as England and supplement plea bargaining with other procedures. One example would be pressuring UN Member States to cooperate with investigations. This strategy would reduce the need for obtaining evidence through plea agreements (Rauxloh, National and International Law, supra at 243).

In 2016, the ICC received its first-ever admission of guilt when Ahmad Al Faqi Al Mahdi pled guilty to the war crime of attacking cultural property in Mali (here). The sentencing judgement echoes many of the recurring themes found in the ICTY and ICTR cases. The Trial Chamber held that the admission "undoubtedly contributed to the rapid resolution of this case, thus saving the court's time and resources and relieving witnesses and victims of what can be a stressful burden of giving evidence in court" (para 100). Nevertheless, the court found that the mitigating factors had "limited weight" when compared to the gravity of the offence (paras 97, 100). The ICC is already demonstrating a sense of balance with respect to admissions of guilt, which is a promising sign.

Conclusion

Plea bargaining is but one mechanism that can help build a bridge towards reconciliation. It would therefore be amiss to reject plea bargaining simply as a matter of principle. All actors in the justice system have the responsibility to use plea bargaining in an ethical manner, to ensure that justice is achieved for victims – even if that justice is imperfect.

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Image: ICTY courtroom 1 in session, view from defence side; ICTYphotos posted originally to Flickr, licensed under the Creative Commons Attribution 2.0 Generic license.