

Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals

by

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Abstract

This thesis investigates the ethical issues and controversies that surround the use of plea bargaining in international criminal tribunals. Existing approaches to this subject have a tendency to be overly abstract, resulting in often ideologically deterministic justifications or critiques of plea bargaining in an international context. These approaches also fail to take into account any human dimension that may be involved in these negotiations. This thesis goes some way towards remedying this by making use of extensive in-depth interviews with international trial professionals. The thesis incorporates these interviews into an analysis of plea bargaining through three theoretical models: classic utilitarianism, classical liberal rule of law and legal imperialism.

Each of these three models highlights significant issues in relation to the use of plea bargaining in an international context. Whilst they offer both justifications and critiques, revealing a number of gaps and blind spots, elements of each offers something that can assist an understanding of the use of plea bargaining in such a controversial arena as international war crime tribunals. The thesis argues that, when considered together, a holistic approach begins to develop which offers a more nuanced approach to plea bargaining than is currently available. This analysis is assisted and illustrated by interviews with named participants in war crime tribunals. These assist in developing a more unique perspective on plea bargaining by contextualising its theoretical findings by placing them into the tangible and realistic contexts of legal practitioners.

The thesis opens with an introduction which sets out its aims and objectives. After which there is a separate chapter that discusses the methodologies used in this

thesis. This is then followed by two chapters that outline the role of the international tribunals and introduce the concept and to explain the trajectory of plea bargaining and its use in the global arena. The thesis then moves on to its more substantial chapters which evaluate the this particular legal phenomenon; the third explores the justifications for plea bargaining through the theory of utilitarianism, examining its relevance in light of the interview responses, whilst the fourth is concerned with the objections to plea bargaining that are contained within the concept of the classical rule of law. Here, once more, the interviews undertaken with legal practitioners are used to challenge the theoretical assumptions put forward by such liberal thinking. Building even further on these responses, the fifth chapter argues for a consideration of plea bargaining as a form of legal imperialism. The thesis concludes with a critical reflection that draws on its analysis of the three models to offer some recommendations concerning the future use of plea bargaining within the context of international war crime tribunals.

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Introduction

In 1993, 48 years after the Nuremberg and 47 after the Tokyo tribunals were set the task of bringing to justice those responsible for war crimes during the Second World War, the United Nations Security Council (UNSC) set up an *ad hoc* international tribunal, The International Criminal Court for the Former Yugoslavia (ICTY), to prosecute those responsible for atrocities committed during the conflicts that flared up around the break-up of the former Yugoslavia. The following year saw the establishment of the International Criminal Tribunal for Rwanda (ICTR) which was given the task of bringing to justice those who had been responsible for the atrocities committed during the recent civil wars in that country.

The establishment of these tribunals are significant as in the years between them there have been many human rights violations, many of which were due to war, where those responsible for mass violence were not subjected to international criminal justice. Therefore, the establishment of the ICTY and the ICTR can be seen as both a turning point for international criminal justice and a re-commitment on behalf of the international community to bring people to book for crimes against humanity. Following on from these two tribunals there have been a number of other tribunals that have been established in order to try human rights abuses. Examples of international courts include The Special Courts for Sierra Leone (SCSL) established in 2002, The Extraordinary Chambers in the Courts of Cambodia (ECCC) established in 2003, and The International Criminal Court (ICC) founded in 2002. More recently, there is The Special Tribunal for Lebanon (STL) established in 2009. The STL tribunal was set up in order to bring to justice those responsible for the assassination of the Lebanese President Rafic Hariri. Although this is not a war crime it is an

international criminal court with similar rules and procedures as the war crime courts mentioned.

International criminal tribunals have become an important aspect of transnational justice. They operate to apportion blame and then punish those who have been responsible for some of the most serious crimes committed. According to the International Centre for Transitional Justice international criminal tribunals are important because, ‘investigations and trials of powerful leaders (whether political or military) help strengthen the rule of law and send a strong signal that such crimes will not be tolerated in a rights-respecting society.’ Also they state, ‘trials remain a key demand of victims. When conducted in ways that reflect victims’ needs and expectations, they can play a vital role in restoring their dignity and delivering justice’ (Criminal Justice, ictj.org). In conjunction with this line of thinking, when Antonio Cassese, the first President of the ICTY, presented the first annual report of the Tribunal to the UN in 1994 he argued that it was founded upon the Hegelian principle: *‘fiat justitia ne pereat mundus’* (let justice be done though the world should perish) (1994: 12). International justice has come a long way from this statement and at times may feel far removed from the rationales put forward by the ICTJ above. This is particularly true when the tribunals dispose of cases via the means of plea bargains or negotiations. The international perspectives of international tribunals clearly show a desire to apply justice evenly across conflicts wherever they take place in the world. However, in this thesis I am concerned with the practical impact of the broad acceptance of the principles of plea bargaining within such contexts. To this end, I have undertaken a series of interviews with legal practitioners in order to further a discussion of the use of plea bargaining in the context of these international war crime tribunals.

For many years plea bargaining has been a regular fixture in the common law criminal justice systems of the United States of America and, more recently, the United Kingdom. This is due partly to its ability to render convictions in an efficient and economical way and because the use of plea bargaining has spread across the globe. One of the results of such proliferation has been a growing legal influence of the USA, one that has reflected a desire to construct, instigate and influence legal models based on its own model. One might argue that this initial taking up of plea bargaining has, at times, been a response to the local occurrence of problems that arise in the USA, such as the overcrowding of the court system which in turn led to the introduction of various judicial mechanisms, including plea bargaining, to better cope with such problems (Spence 2006: 217-251). However, significantly the use of plea bargaining has also spread to the level of international law with the first judgement to be handed down at the ICTY; a negotiated guilty plea in the case of *Erdemovic*. Following this it is now fairly common practice for defendants who are accused of grave international crimes to enter into negotiations with the prosecutors adopting a USA style model of plea bargaining. It is the proliferation of this style of negotiation that this thesis investigates, taking an interdisciplinary approach to its analysis of the law and the process of plea bargaining in the context of the application of international criminal law.

Structure of the Thesis

Whilst this thesis works on the premise that the practice of plea bargaining in international war crime tribunals is largely seen as unavoidable it sets out to investigate the ideas that underpin its application. However, before doing so it has a

brief section on methodology, setting out how the research was conducted and why particular critical methods were used. This thesis comprises of a number of substantive chapters. Chapters one and two are aimed at setting out the foundations for this work with a historical background to subject area and discussion of plea bargaining in general, helping inform this thesis. Chapter one also lays down background information regarding international criminal tribunals, and a brief history of plea bargaining cases in international law. Chapter two focuses on plea bargaining. It gives an explanation of what plea bargaining is and the different forms in which it may take, using primarily UK domestic law to illustrate the differences. The chapter then moves on to a discussion of the history of guilty pleas and plea bargaining in international law. This chapter also analyses a number of cases in order to highlight the progression of guilty plea throughout the different tribunals.

Following on from the exploration of the idea of plea bargaining, the substantive part of the thesis is set out in three main chapters. Chapters three and four offer an analysis of the two competing analytical models, utilitarianism and the liberal theory of the rule of law, which are most often evoked in discussions of this area and offered as explanations of and justifications for intuitional practices in this area. It will also explore objections raised that are based on the liberal ideology that the international criminal law holds as standard, especially with regard to fair trial principles. Chapter five offers a consideration of plea bargaining that draws on the notion of imperialism and in doing so highlights the limitations of the other two analytical models particularly when viewed from this particular prospective.

I would argue that the three different approaches are necessary for a comprehensive analysis of this subject area as no one single theory is able to give a full perspective on the practice of plea bargaining in international criminal courts.

Using these three theoretical approaches also opens up debates and issues surrounding plea bargaining by placing it into a practical context that can then be analysed through the information gathered via my interviews. This will give a more rounded and nuanced picture of international criminal law and the practices of plea bargaining within it. By way of support for these arguments the thesis draws extensively on primary materials such as interviews with professionals working, or who have worked, in the field of international criminal justice. These interviews took place over 2009-2011 and offer important insights not only to the actual working nature of plea bargaining in the international context but also their professional perspectives on it. This allows for a critical analysis of the ideological implications of empirical findings in relation to the theoretical work in this study. The overall aim of the thesis is to explore how far the concept of plea bargaining, rather than offering an abstract concept of justice, is in fact highly influenced by specific political and economic formulations and considerations.

To further develop these arguments, chapter three explores the justifications for plea bargaining using the principle of classic utilitarianism. It offers a brief overview of the main claims of this approach using the concepts and arguments put forward by Jeremy Bentham and John Stuart Mill. This then enables a detailed analysis of the justifications for plea bargaining through the interpretive framework of utilitarianism. Having discussed utilitarian justifications of plea bargaining in general, it then examines specifically at the case of *Plavsic* (IT-00-39 & 40/1) as a case study. Chapter three discusses the justifications given in this particular case in order to consider if they might still apply to cases yet to be heard before International war crime tribunals.

Chapter four investigates some of the criticisms of the use of plea bargaining through the lens of a classic form, the liberal theory of the rule of law. Firstly, there is an examination of the ideology of the liberal rule of law, focusing on those aspects that relate to plea bargaining. This is done through a close analysis of the principles of classical liberalism and uses the work of Dicey and Hayek. After which there is a discussion of how the application of the liberal claims in relation to plea bargaining and how its use, in particular in war crime tribunals, offends the liberal principles of the rule of law. Some of the justifications and the objections have been discussed by other academics (Combs 2006; Henham 2005; Henham and Findlay 2005; Drumbl 2007; Turner 2009; Schoun 2010). However, they have to some degree been glossed over in that there has been to date no sustained critical analysis of plea bargaining under these two expressly discussed theoretical frameworks. In other words, whilst broadly liberal and utilitarian points have made, the underlying cluster of beliefs and assumptions has rarely been developed in an express manner. Both these approaches are important as they provide an analytical context to the role of plea bargaining in the international criminal legal system, which in turns allows for deeper, more meaningful investigation into the case law, written law and the perceptions of it.

Chapter five interrogates the idea of legal imperialism in the context of plea bargaining in international law. Again, it is generally accepted that the use of plea bargaining has the potential to be imperialistic if and when imposed on sections of the global population who do not understand, wish or desire it as it forms no part of their indigenous legal tradition. There has been even less discussed about plea bargaining and legal and cultural imperialism. Responses from interviews I conducted and certain authors such as Combs (2010) and Linton and Rieger (2002) highlight the difficulties that some post conflict societies have when entering into negotiations. Unfortunately

Combs's work does not put this in a theoretical framework that advances the debate about imperialism in anyway. This section therefore aims to add to the understanding of the use of plea bargaining in international tribunals by using a socio-legal approach towards the notion of the legal transplantation of plea bargaining from the domestic legal system of common law regimes to the international system. This section will also examine what place plea bargaining has in the international sphere, especially where there people/populations that are potentially 'left out' of the international criminal system due to the lack of cultural and legal understanding of the laws and informal practices that surround plea bargaining. In conclusion, the thesis will offer a critical analysis of the ideological implications of my empirical findings drawing on a number of interdisciplinary approaches, including jurisprudence, political theory and criminology. From this, the thesis will present a framework of plea bargaining that takes all the limitations and positive attributes discussed to offer a more realistic and formulated model of plea bargaining in the international criminal arena.

Whilst many studies have analysed the role of plea-bargaining in the legal process few have considered how these applications are actually 'worked through' by legal practitioners working within the contexts of the international war crime tribunals. For this reason, one of the main supporting strands of my overall thesis has been drawn from extensive communication with a number of legal professionals who have acquired actual experience of negotiating plea bargains at international war crime tribunals. Therefore, my analysis of plea bargaining in international criminal tribunals not only offers in-depth critical analysis of the process drawn from the legal records but also benefits from the information, views and perspectives obtained through interviews conducted face to face, via telephone and through email correspondence with trial professionals. These have included: Professor David Crane

who is the Former Chief Prosecutor of the SCSL. In the text this shall be referred to as (Interview with Crane 2009). Sir Desmond De Silva QC who is the Former Deputy Prosecutor for the SCSL and Chief Prosecutor for the SCSL. In the text this shall be referred to as (Interview with De Silva 2010). Wayne Jordash who has worked as defence counsel at the ICTR, ICTY, SCSL and as a legal consultant at the ECCC. Throughout this shall be referred to as (Interview with Jordash 2010).¹ Karim Khan QC who has worked in the Office of the Prosecutor at the ICTY and ICTR and as defence counsel at the ICTY, SCSL, ICC, and lead counsel for a civil party at the ECCC. This shall be referred to as (Interview with Khan 2010).² Wayde Pittman who is a Senior Legal Officer at the ICTY. This shall be referred to as (Interview with Pittman 2010). Jonas Nilsson who is a Legal Officer at the ICTY. In the text this shall be referred to as (Interview with Nilsson 2010). Dr Eugene O'Sullivan who is defence counsel at the ICTY and the STL, referred to as (Interview with O'Sullivan 2010).³ HHJ Peter Murphy who has worked as defence counsel at the ICTY. In the text this shall be referred to as (Interview with Murphy 2010).⁴ Chief Charles Taku who is defence counsel at the SCSL and ICTR. In the text this has be referred to as (Interview with Taku 2010).⁵ Sir Geoffrey Nice QC who was a Deputy Prosecutor at the ICTY. In the text this shall be referred to as (Interview with Nice 2010).⁶ and Slobodan Zecevic who is defence counsel at the ICTY and is the Former President of the Association of Defence Counsel at the ICTY. Finally, this shall be referred to as (Interview with Zecevic 2011).⁷

Methodology

This chapter explains the methodologies I employed and how and why I used them to carry out this research. I start by discussing the role these methodologies play in distinguishing between the explanation of the development of plea bargaining in war crimes trials and the evaluation of the phenomenon and outline the extent that the research methods do this. I then move on to discuss the interviews I conducted, before going on to explain how the interviews developed the thesis.

In order to realise and achieve the research goals of this thesis I have employed a number of different approaches borrowed from other academic fields, making it both interdisciplinary as well as transdisciplinary. These include empirical analysis, case law analysis, legal theory, and an analysis of the written law in regard to the use of plea bargaining in international criminal law. Therefore, the research goals of this thesis are achieved by broadly employing what can be termed a socio-legal approach rather than a purely doctrinal approach.⁸ The overarching aim of this thesis is to place the use and role of plea bargaining in the context of international criminal law, asking what its use can actually achieve and what the real and ethical limitations of its application may be? This in turn facilitates a greater understanding of this legal phenomenon.

When reflecting back on the methodologies used to do this, it would seem that the thesis is predominantly concerned with evaluating the plea bargaining phenomenon.⁹ However, it should be noted that in order to do this satisfactorily there needs to be some degree of explanation of plea bargaining itself. By explanation I mean what actually constitutes plea bargaining and the development of its role and use in the international tribunals. Therefore this research devotes space to do this as well as its core evaluation of plea bargaining. This is carried out in order to lay a firm

foundation that allows for the sustained analysis and evaluation of plea bargaining that is contained within.

The methodologies I employ both aid the explanation and evaluation of plea bargaining. The aspects of the thesis that aid the explanation of what plea bargaining is and how it operates, offers just that, rather than an explanation of the causality of plea bargaining. This aspect is delivered throughout the thesis, but the main element that aims to do this is the examination of the case law, the analysis of the rules and laws governing plea bargaining, and to some extent the interview responses.¹⁰ The elements of the research which evaluate the use of plea bargaining are namely the analysis through the theoretical frameworks. Each of the three frameworks put plea bargaining into a specific context within international criminal law scholarship and by looking at the three of them separately, but in a connected manner, it is hoped that this thesis will go some way towards providing an overarching perspective. This also provides conceptual insights that will contribute to the understanding of plea bargaining. The frameworks themselves can be viewed as interpretive methodologies which have been dictated by the theoretical approaches chosen (Henham and Findlay 2007: 113).¹¹

Although I have distinguished between explanation and evaluation in order to help describe and understand what the different methodologies used have to offer the thesis, the reality is that there is no distinct methodology in this research that deals solely with the evaluation or explanation of plea bargaining as they overlap with each other. Rather, I acknowledge that it is important to recognise this as it is necessary to be able to fully analyse the issues and debates that arise from the use of plea bargaining and, following on from that, in order to achieve the aims of the thesis.¹²

When thinking about plea bargaining in international criminal law I began by considering how and why plea bargaining may take place in this particular legal system. In order to do this I gathered information about the use of plea bargaining in a number of domestic jurisdictions and approached them as a backdrop to the issue of plea bargaining in international law. This was initially carried out by conducting a conventional literature review focussing on plea bargaining in these domestic contexts before moving on to widen my research by reading work that engaged with plea bargaining in international criminal law. I then moved on to examining the case law that related to the subject area. All the while I kept in mind the actual rules and laws governing plea negotiations.

In order to establish the justifications for the use of plea bargaining in international criminal law one must start looking at how it has been established in case law and the literature. Having done this one should also bear in mind what the objections to this practice are in order to get a sense of what drives the discussions and debates within the field. This also helped with the explanation of the issues that surround plea bargaining, as without the theoretical frameworks there would be no base to ground the particular issues in. This in turn, leads one to evaluate the justifications and objections in order to move the thesis from being one that is purely explanatory to one which assesses and engages with these issues. From this research I found that many of the justifications for the use of plea bargaining broadly fell into the framework of classical utilitarianism as put forward by Bentham (2004) and Mill (2004). The objections to, and criticisms of plea bargaining, for the most part, fell into the classical liberal theory of the rule of law as highlighted by Dicey (1982) and Hayek (1944; 1960). It is appropriate to use these theories to evaluate the justifications and objections of plea bargaining as both are diametrically opposed to

each other, in that utilitarianism is concerned with the greatest happiness for the greatest number of people and the rule of law is interested in individual rights.

I used the classical models of these two theories over more contemporary versions for a number of reasons. The most obvious reason is that the articulation of the main issues that arise from plea bargaining most often draws broadly on the classical versions of these theories. Alongside this, without explicitly discussing either of the two theories, the trial professionals I spoke to, in my opinion, clearly articulate their responses to the issues raised by relating plea bargaining within these frameworks. In light of this, taken together, these theories offer an apt way to examine plea bargaining. Whilst there has been a considerable amount of work undertaken on plea bargaining in general, there has not been a sustained study of it in an international context that places this practice into any kind of theoretical framework. For this reason, it is worth reviving these theories which, at first sight may be considered as ‘old hat’ or ‘out of date’. I argue that they are highly appropriate when it comes to both explaining and evaluating the use of plea bargaining in an international setting as they provide a good foundation for the rest of my analysis in which I build an argument around, through and beyond them. Before moving on to discuss the interviews it should therefore be stressed that the theoretical analysis of plea bargaining remained important as the issues arising from these formed the basis of the questions I would pose to the trial professionals. Without this original theoretical exploration there would be no foundation the interviews would lack focus and direction.

The Interviews

Having undertaken my initial literature review I felt that there were two clear directions in which my research could go. The first would be to analyse further the use of plea bargaining through the two main theories I adopted and critiquing each theory through the lens of the other. Another was, following a theoretical consideration of plea bargaining, to investigate the lived experiences of the trial professional in relation to plea bargaining in the context of these courts. I decided on the second option as I felt this would give substantial insights into the role of plea bargaining in the context of war crime tribunals and allow for a more engaged analysis of the theoretical models that support or oppose the use of plea bargaining. This in turn, would result in an analysis that would contribute significantly to the evaluation and understanding of plea bargaining. Interviewing practitioners who have been involved in plea bargaining also offered the potential to uncover certain case specific insights into the process and procedures by which negotiations are carried out that are not in the public domain, and which can only be achieved through some sort of engagement with the trial professionals who hold this information. Again, this gave me the opportunity to add something new to the explanation of plea bargaining in the context of the international tribunals. The practice of plea bargaining is subject to a considerable amount of interpretation and human agency neither of which are codified in the existing literature on the subject. Interviewing trial professionals about their lived experiences brings out some of these factors.

Conducting the interviews also offered important insights that simply theoretical approaches may not offer as for the most part studies of plea bargaining in the international arena do not take into account the human agency that is involved in the process. Much of information gained from the interviews raised issues that were not present in the literature and case law surrounding plea bargaining. As they are not

only used to merely corroborate theories, the interviews add something distinct and new to international law scholarship as there is a lack of qualitative empirical research utilised within legal research.¹³ As Silveman says, '[T]he general purpose of such interviews is to explore in details specific topics relevant to the interviewee's knowledge and also relevant to the research questions and objectives forming the focus of the research project.' (2004: np)

Whilst Dobinson and John assert that, 'many law academics are simply untrained and lacking in experience when it comes to empirical research and the general rules applicable to such research' (2007: 17) this does not automatically mean that such an undertaking such research is not a useful venture. Indeed, as I have argued above, such research offers insights that can only be gained by actually talking to practitioners. In order to conduct this research I considered the work of writers associated with Cultural Studies in Britain, in particular those who theorised the importance of lived experience to an understanding of social institutions such as Raymond Williams (1981) and EP Thompson (1975). These assisted an investigation into the experiences of the trial professionals in the field in relation to the negotiation of plea bargaining.

I now turn to the interviews themselves, considering who I interviewed and what approaches I adopted in order to give some background and context to the material that influenced and shaped much of this thesis.¹⁴ Initially, I decided to approach individuals who were directly involved in the plea bargaining process and those who would have been present at the inception of the tribunals and therefore had direct experience of the decisions that were made to allow plea bargaining into the tribunals' jurisprudence. This allowed me to investigate and analyse the different

perceptions and views of the trial professionals in a much more nuanced and original way.

The first person who I contacted was Professor David Crane. I did this as he was the first Chief Prosecutor of the SCSL and would therefore be able to offer very informed views on the use of plea bargaining at this particular trial and why he felt plea bargaining would be a desirable mechanism in this context. For the same reasons I also approached Sir Desmond de Silva QC, who was the Deputy Prosecutor and then the Chief Prosecutor of the SCSL and therefore able to offer similarly well informed insights. Both of these prosecutors were practitioners who were implementing the law at the very inception of this tribunal so it would be very prudent to talk to them about their experiences. Both agreed to speak to me and this subsequently raised a number of issues that caused me to further consider the process of gathering information in this manner. However, following my initial success at securing interviews I found that there were a number of trial professionals who would be closed off to me due to a variety of ethical reasons,¹⁵ time constraints, and language barriers. In response to this, I therefore became more strategic in ‘targeting’ who I approached and interviewed, with the aim of obtaining a number of different viewpoints from those who have been involved in some way in the plea bargaining process. With this aim in mind, I interviewed Mr Karim Khan QC who had worked in a number of trials in the capacity of defence counsel. He had also acted as counsel for the civil party¹⁶ in the *Duch* Trial and worked for the OTP in the *ad hoc* tribunals. To further achieve my research goals, I also undertook extensive interviews with Mr Wayde Pittman, a senior legal officer at the ICTY, and Mr Jonas Nilsson, a legal officer at the ICTY. Both of these interviewees had worked on cases that involved plea bargaining and offered a different viewpoint from that of either defence counsel or the OTP. As

mentioned with my selection of trial participants, I secured a range of people from different cultural and work based backgrounds¹⁷ in order to gain a more balanced view of the use and role of plea bargaining in international law.

Whilst the interviews I conducted add substantially to my research, it is important to recognise they may also be viewed as somewhat limiting in what they can offer. This is because if a different selection of trial professionals had been selected and interviewed there may well have been a different set of responses due to differing viewpoints and perspectives, which in turn may have given rise to different conclusions. One way to remedy this would be to select a larger group of interviewees, but this would have been inappropriate as not only was this thesis bound by time and financial restraints but many of the trial professionals approached were unavailable for interview. However, I would argue that due to my careful selection of a range of interviewees from different legal and cultural backgrounds the information gleaned from the interviews and the subsequent analysis that was conducted from them has been sufficient to enable me to gain in depth and new insight into the issues involved in plea bargaining in the context of international criminal law.¹⁸ This was also achieved through the careful consideration of the questions that I asked the subjects of the interviews.

In order to ensure I garnered as much material as possible from the interview subjects I initially considered the use of questionnaires and structured formal interviews as I felt these would best enable the collection of useful and appropriate interview data and this method has more potential to yield a more uniformed outcome across a range of interviewees. Questionnaires can also be used across a wide range of trial professionals as they offer more potential for an unbiased response as the interviewer has a less active role in the information gathering process and the

interviewee is less likely to take their specific experiences and personal background into consideration when responding. Pre-structured interviews and questionnaires therefore give more scope for a quantitative analysis.¹⁹ However, my initial experiences conducting the empirical research suggested that this would not be an appropriate approach. The main reason for not conducting structured interviews and using questionnaires was that I received some negative responses from some of the trial professionals I initially sent questions to. A number of them felt that there were simply too many questions and that I should be concentrating on only one or two areas that pertain to plea bargaining. For example, the role of plea bargaining in the reconciliation process or the presumption of innocence and its relationship to plea bargaining. It also became apparent from my initial ‘face-to-face’ interviews that the trial professionals on the whole wanted to discuss their experiences and the issues arising from plea bargaining in their own way. This meant that the interviews had to be much more flexible and that I had to engage much more actively with what they were saying rather than sticking to a strict, predetermined structure. Mason (2004) describes this as a flexible and fluid base which is structured around an aide memoire or interview guide. The aim is usually to ensure flexibility in how and in what sequence questions are asked, and in whether and how particular areas might be followed up and developed with different interviewees. This is so that the interview can be shaped by the interviewee's own understandings as well as the researcher's interests, and if any unexpected information is given to be able to incorporate that into the interview questions or to change track and concentrate on these. I also had to be aware of the length and depth of the responses that were given as some would give long and detailed responses whereas others would give simple, straightforward answers. It was therefore necessary to treat the interviews in a formal but semi-structured way and be aware of the length of time the trial professionals were able to

spend on the interviews and how much detail they were willing to go into regarding their experiences.²⁰ This was also necessary as the interviews took place in a variety of different contexts, some formal others more relaxed and some via the telephone. The interviews varied in length depending on the amount of time people were able to offer, ranging from 30 minutes to 2.5 hours. When it came to email interviews, I once again had to take into account the issue of ‘overloading’ people with a long list of questions. In light of this, I thought it best to begin with open questions such as and what their experiences were with plea bargaining, what was their own personal opinion of plea bargaining in international criminal tribunals?²¹ After receiving the responses I asked more specific questions and developed an on-going dialogue with them. In all the interviews I made sure that I had asked what their views and experiences were with plea bargaining in general as an opening question. This allowed me to gauge how the interview would progress and adapt my approach accordingly.

I also made sure that the interviewees expressed their opinions regarding plea bargaining and the theories of utilitarianism and the rule of law as I was aware this would be important given the structure the thesis (Lindlof and Taylor 2002).²² For example, I asked whether they believed that plea bargaining can help with the reconciliation process within a post conflict society, or whether there is a significant contribution to the historical record by its use. I also asked questions such as whether the trial professionals thought that the use of plea bargaining breached the equal treatment clause in the rule of law. As the interviews were not structured I worked these questions in where appropriate. Often I did not have to ask these questions explicitly as the issues that plea bargaining raises were bought up by the trial professionals themselves when they spoke about their own views and experiences. It

also became apparent that many of the trial professionals spoke about the issues arising from these theories without actually having to explicitly discuss them in terms of utilitarianism or the rule of law. When preparing for the interviews I looked at the cases and the tribunals the interviewees worked on and in what capacity they were employed, for example were they defence counsel or prosecuting counsel. This enabled me to engage with the specific aspects of plea bargaining that arose through looking at the case law. By utilising this approach I was able to ascertain detailed information from the views and experiences of the trial professionals that could be related to the thesis' theoretical analysis. When undertaking an evaluation and critical analysis of the interview responses I only used material when it was consistent and well-illustrated either by case law, legal rules, theory or literature. I also made sure that there was no material that contradicted the interview responses used and so they are as corroborated as they could be. This ensured that they were not merely the personal opinion of the trial professionals but arguments that would be used in the context of the thesis' overall approach, adding to an understanding of plea bargaining in the context of international tribunals. When looking to identify themes that might be pertinent to plea bargaining, I only considered them if they were raised by at least two or more of the interviewees, this ensured that the subsequent evaluation of the issues are appropriate and not just asserting a mere opinion as a theme.²³ However, it should also be noted that often the interview responses offered material that the literature and case law by themselves did not, therefore the inclusion of the interview material and the subsequent analysis offers something new and distinct to the scholarship of this subject.

The interviews and their subsequent analysis developed the thesis in a number of ways: they were used in order to get the perspective of the trial professionals

working at the international tribunals; they helped inform some of the arguments put forward by the theory; they highlighted areas of plea bargaining that are inconsistent with the theories as well; and most importantly they brought to light issues surrounding the area of legal imperialism. The latter helped develop the thesis in a wholly unexpected way than was originally intended but which contributed greatly to its original thinking.

The idea of legal imperialism, as a theory by which to examine plea bargaining, was something that offered the thesis a number of things. Centrally it provided a framework for understanding some of the responses from the interviewees that did not fit fully either into the utilitarian justification or the rule of law objections of plea bargaining. Indeed, as already mentioned, the issues raised in some of the interviews were so unexpected that to do them real justice they required an analysis that went further than the mere explanation of them and how they may arise. This decision was not taken lightly and it came after much consideration regarding whether to continue on my original path,²⁴ possibly tackling the issues of imperialism outside the thesis, or to confront what trial practitioners were telling me and finding a theoretical approach that would enable me to fully explore them within the scope of my research. The issues that caused me to consider this issue were raised at the outset of the interview phase of my research. Professor David Crane spoke about an attempted plea bargain at the SCSL where the defendant had consulted with a witch doctor. Although the interviews that followed did not deliver such unusual information there was a growing amount of material that pointed towards the idea that understanding what is actually expected of the actors in a plea bargain is not at all clear to people who come from non-adversarial cultures and that they are therefore essentially at a potential disadvantage. One that does not come just from a lack of

understanding of the basic legal principal of plea bargaining but also the different manner in which plea bargaining can take place and the ideologies which underpin the adversarial legal culture that allows for it to take place. As other trial participants, in particular those from adversarial legal backgrounds, are able to navigate the unwritten and discretionary codes that are required when entering into a plea bargain much easier, I discovered that on occasion defence counsel had to employ lawyers from adversarial backgrounds in order to successfully negotiate a plea deal. However, in the context of plea bargaining, the idea of legal imperialism is not limited to defence counsel, it also extends to defendants, the prosecutorial teams, legal officers and judges when it comes to plea bargaining.

Although the chapter on legal imperialism relies heavily on the responses of the interviewees, it does not take these responses for granted. As mentioned above, all interview responses are corroborated and do not stand alone as just mere statements. Therefore, under the umbrella heading of legal imperialism, this chapter not only examines the use of plea bargaining under the traditional notions of imperialism but it also examines the trajectory plea bargaining has taken from its inception at the ICTY to its current place in international law by looking at how this has happened through an examination of legal transplant and plea bargaining. This chapter then looks at what the upshot of plea bargaining is under the notion of legal imperialism by examining it through approaches drawn from subaltern studies.

It is through combining more traditional theoretical approaches such as utilitarianism and the rule of law with more recently developed ones such as legal imperialism that this thesis offers an interdisciplinary approach that ensures that it offers something original to the study of plea bargaining in the international tribunals. The addition of the perspectives of those working in the contexts of these tribunals

means that this study is able to consider its theoretical findings alongside the lived experiences of trial professionals who are making ‘real’ decisions through their work creating case law. Having discussed the mythologies used to conduct this research I shall now move on to discuss the foundations that this area of research is built upon on.

1. An Introduction to Plea Bargaining in the International Tribunals

This Chapter will lay down the foundations upon which this thesis is based on. It aims to introduce the subject of plea bargaining in the international arena, from which the ideas in this thesis are built upon. The chapter goes on to give a case analysis detailing the history of plea bargaining in international law. The ICTY was established on 25th May 1993 under Resolution 827 of the UN Security Council and is located in the city of The Hague, capital of the Netherlands. The court's focus has been the civil war in the former Yugoslavia, during which at least 200,000 people were killed. It possesses jurisdiction to try crimes against humanity, genocide and war crimes that occurred in the region since 1991. Dusko Tadic (Case No. IT-94-1-T, 7 May 1997) was the first defendant brought to trial in 1997 at the ICTY, and he was sentenced to 20 years imprisonment after being found guilty of crimes against humanity.

The ICTR was the second *ad hoc* Tribunal and was set up in Arusha, Tanzania in November 1994 under Security Council Resolution 955. The function of this Tribunal is to try crimes of genocide and other serious violations against international humanitarian law that had been committed in Rwanda between 1st January 1994 and 31st December 1994. The first conviction handed down by this Tribunal was in 1998 and concerned the case of *Akayesu* (Case No. ICTR-96-4-T) where the first ever conviction for genocide was passed.

Significantly, and from their inception, both these tribunals were plagued with many obstacles, which included issues surrounding staffing and finances. However, over the years the two *ad hoc* tribunals have emerged from these difficulties and become functioning institutions for international justice. These pressures have resulted in the adoption of practices, such as plea bargaining, designed to assist

resolving these issues. Following on from these two examples, a number of other war crime tribunals have been created in order to attempt to bring to justice those responsible for what have been deemed international war crimes, and to end the impunity that was often seen to follow mass violence. These tribunals cover a wide geographic field, and include the special panels in the Dili District Court of Timor-Leste (2000), the Extraordinary Chambers in the Courts of Cambodia (2003), the Special Court for Sierra Leone (2002), and the permanent International Criminal Court (2002). There have also been a number of domestic trials for international crimes such as the Gacaca courts in Rwanda. In addition, the former Yugoslavian countries also have domestic war crime tribunals, as do Ethiopia, Chile and Argentina. More recently, a tribunal has been set up in Bangladesh to prosecute the crimes committed in the 1971 War of Liberation. All are built upon the desire to bring war criminals to justice. Before moving on to discuss plea bargaining in international law it would be prudent to discuss the role and function of international criminal tribunals themselves in order to have some grounding to understand where plea bargaining may fit into this. This will also give an indication of how far these are met when plea negotiations are entered into.

In the debate surrounding the international justice system, just as there is in domestic systems, there are a number of legal, moral and sociological reasons put forward for the justification and desirability for transitional and/or post conflict justice in the form of international criminal law tribunals. Ultimately the role of the international tribunals is to protect the international community from criminal behaviour this is done in a number of different ways.

The clearest justifications for criminal trials are that wrongdoers are punished, an idea that is based on the idea of retribution. The same justifications that underpin

the role of retribution and accountability in domestic criminal jurisdictions underpin it in the international sphere. That is to say that its purpose, finding accountability, is to bring about the end of the criminal activity individuals have perpetrated on their victims and are subsequently punished for it. It is hoped that in international law punishing perpetrators will help in ending impunity and this, in turn, will help bring about some form of stabilizing effect to the post conflict region. Retribution itself is not a future looking theory for punishment as it is concerned with the past and aims to punish those who have committed crimes, through which the wrong doing and the wrong doers shall be denounced through public reprobation and stigmatisation (Henham 2005: 89). Retribution through criminal proceeding is said to replace the desire for personal vengeance on the victims' part, as retribution is 'an inheritance of the primitive theory of revenge'. (*Prosecutor V Delalic et al.* IT-96-21-T Judgement 16 November 1998: Para 1231) Through this logic the greater the number of perpetrators who are subjected to the criminal process the less chance there is for revenge attacks and the instigation of further violence, hence the potential to have a stabilising effect. The use of plea bargaining works towards this function, as to date when a defendant has pleaded guilty they still received a custodial sentence. It is most likely the case that the sentence the defendant received is less than the one they would have received had they been found guilty after a full trial, but never the less there would still be some punishment and therefore achieves the tribunals' role of retribution. Also it should be mentioned that linked to retribution is the notion that criminal prosecutions remove the leaders who have been responsible for atrocities and mass violence.

Returning briefly to the concept of retribution, in the *Delalic* Judgement the Trial Chamber stated that the retributive functions of international justice conflict with the reconciliatory ambitions of it:

A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice. (Para 1231)

Therefore for the retributive function of international law to work it must work alongside the other functions and purposes of international justice.

Another aspect of international criminal justice that has a high value in the debate is that criminal trials will help with the reconciliation process in post conflict societies (Combs 2008). It is thought when evidence and witness testimony is analysed in open court post conflict societies will be able to understand what happened and why. From this they will be able to start to rebuild the community around them (Clark 2008).

The word reconciliation itself invokes a number of different meanings. These range from, the violence has stopped but people still may not live ‘harmoniously’ to past inequalities that gave rise to the conflict have been ‘reconciled’. Of course there are many more incarnations of what reconciliation may mean. Mendez points out:

There is great difficulty in defining “reconciliation” for these purposes, especially because the word has been recklessly used many times to attempt the justification of blatant impunity. Just as peace cannot be the mere absence of fighting, reconciliation cannot be decreed. It generally takes place through a long-term process aided by public policies and actions that confront the conflict between persons, institutions, or communities head-on and take an honest look at the conditions under which reconciliation can take place. (Mendez 2001:28)

This suggests that international criminal law is only one part of a complex and lengthy process that, regarding reconciliation, may not have any real guarantee of success for

a number of generations. Linked with reconciliation is the notion of truth telling and historical record. It is commonly held that reconciliation can only be really achieved if there is a truth telling function to the criminal proceedings. This is often found in non-judicial mechanisms such as a Truth and Reconciliation Commission (TRC) as seen in South Africa and Sierra Leone.

The issue of criminal trials forming a historical record is a controversial one and has been strongly debated by the trial chamber in *Blagojević* (IT-02-60) and the literature surrounding international law (Stuart and Simmons 2009: 28). The ICTY believes one of its functions is to form a historical record. The Judgment in the case of *Tadic* spends considerable time discussing this when it contextualised the war in the Balkans and expressed the importance of forming a historical record. (IT-94-1-T Opinion and Judgment May 7 1997 Para 130-197) Osiel (1997) observes that truth telling and the formation of a historical records should have more emphasise as a function of international criminal law than their punitive purpose, as this forms a type of collective memory of the peoples of the post conflict region. As mentioned above, there has been some debate as to whether it is appropriate for international courts to focus too much of their resources on this, but in short criminal trials are unequipped to deliver accurate historical truths, they are only able to deliver legal truths. Within criminal proceedings it is widely acknowledged that certain forms of evidence are used and other equally important and truthful pieces of evidence are not due to the rules of procedure and evidence that are in place (Combs 2007: 54). This has the potential to make any historical record formed a selective one, and one that is not able to reflect the many different competing ‘truths’ that emerge from mass violence and racial hatred.

All of these justifications for international criminal justice work alongside each other. Within them there are a number of complex ideologies that require much deeper analysis than the remit of this thesis allows. It should be noted that truth telling and reconciliation are functions that are generally associated with criminal justice systems that are more in line with the notion of restorative justice than retributive justice. Although international tribunals do not have a concrete ideology that they are grounded in (either retributive justice or restorative justice) their aims suggest that they try to straddle both these perspectives. Often adding confusion and uncertainty as to what the main aims of the tribunals are (Henham 2003, 2009).

There are also a few other aspects of international criminal trial that may not be considered as their main role or function but never the less are important. It is also thought that the international criminal tribunals may possess a deterrent effect. The Rome Statute of the ICC does not mention it as a factor explicitly. Instead it states in its preamble that criminal convictions will ‘contribute to the prevention of such crimes’. With this in mind it should be noted that the ICTY was set up whilst the conflict in the Former Yugoslavia was still going on, therefore one of this particular court’s roles was to deter future would be perpetrators from committing atrocities. (ICTY Annual Report, August 29 1994) Relating to this, Judge Macdonald in the *Tadic* said that ‘retribution and deterrence serve as a primary purpose of sentencing’ (Case No. IT-94-1-S, Sentencing judgement 14July 1997) The ICTR in the *Kambanda* case also followed this logic and stated:

[i]t is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights. (ICTR-97-23-S, Judgement and Sentence para 28 September 4 1998)²⁵

Despite the high expectation of international criminal law, it can be viewed that international law rarely has a deterrent effect. One only has to see the number of wars that are currently being waged to see that there are perpetrators of what might be considered international crimes who are unafraid and undeterred by potential international criminal sanctions against them. Secondly, it should not be forgotten that the massacre at Srebrenica occurred two years after the ICTY had been set up. Martha Minow writes, ‘Individuals who commit atrocities on the scale of genocide are unlikely to behave as ‘rational actors,’ deterred by the risk of punishment. Even if they were, it is not irrational to ignore the improbable prospect of punishment given the track record of international law thus far.’ (Minow 1998: 50)

On a more positive and realistic note, it is worth considering that if international criminal law did indeed have a deterrent aspect to it then it would be very difficult to detect. That is to say international crimes would not have been committed and by potential perpetrators. Therefore despite the above assertions that there is little deterrent effect, it could be replaced with the very slightly more optimistic, there is little evidence to suggest that there is a deterrent effect to international criminal law.

Considered from the perspective of restoration, international criminal tribunals are thought to offer some form of redress to victims. Investigations and trials of leaders who have committed crimes and caused mass political or military atrocities are important for victims of human rights abuses (Combs 2007: 46-47). Prosecution of such criminals can play a key role in restoring dignity to victims, and restoring trusting relationships in society, by ‘societies’ acknowledging and recognising the harm done to the victim (Clarke 2009). In the past, victims have not played a role in international criminal proceedings beyond being witnesses in a trial or being offered

compensation for any loss they suffered in the form of restitution. More recently, international tribunals have tried to integrate victims into the criminal proceeding through the introduction of civil party participation, often referred to as victim groups or civil party groups. These groups are represented by counsel who is present in court during the criminal proceedings. This innovation is feature in tribunals such as the ECCC, STL and the ICC.

Therefore it is thought that after a trial the acknowledgement of the wrong committed alongside the guilt of the perpetrator and the recognition of the victims suffering goes towards restoring at least some of the balance within the post conflict community (Rauschenbach and Scalia 2008: 415; Werner and Rudy 2010). In general terms it is thought that international justice mechanisms that aspire to the above imperatives will help bring about and maintain peace within the regions the tribunals work.

Given the roles and purposes of these tribunals and all the attempts to bring perpetrators of war crimes to justice, it is somewhat surprising that such war crime tribunals have implemented legal mechanisms that truncate trials or even avoid trials altogether, such as the use of plea bargaining, in order to meet their mandates. Whilst my next chapter goes into more detail regarding the concept of plea bargaining, it is worth stating here that it is, in its most basic form an agreement in which the Prosecutor and defendant arrange to settle a case against the latter. This is normally in the form of the defendant pleading guilty or no contest to all or some of their charges in exchange for concessions by the prosecutor. These concessions may take the form of a reduction of charges, the dismissal of charges, known as a charge bargain or the limiting of the punishment imposed upon the defendant, known as a sentence bargain. The Prosecutor will then disclose the facts of the case that involve the defendant in a

more flattering light, known as a fact bargain.²⁶ Generally, plea agreements allow those parties involved to agree on the outcomes, settle pending charges and expedite proceedings. Despite this, when considering the tribunals' roles and purposes set out above, plea bargaining may, in some way, help achieve them. Significantly for this study, plea bargains appear mainly in countries that apply an adversarial legal system. For this reason, the use of plea bargaining in war crime tribunals has engendered some controversy and it is this that is one of the starting points for this thesis.

There have been a number of significant studies of the use of plea bargaining in International War Crime Tribunals, such as those undertaken by human rights pressure groups, defence lawyers, war crime prosecutors and groups representing victims of specific war crimes (for example, Damaska 2005; Henham 2005, 2006; Dixon and Demirdjian 2005; Ellis 2005; Combs 2006). However, there has yet to be a sustained critical analysis that incorporates the actual experiences of the professionals who work in this field. More particularly, there is very little analytical work that considers the impact of institutional, professional and work-place ideologies on the formation of their perspectives on their role and subsequent decision making processes in relation to it. In order to rectify this, this thesis undertakes such a study, that is, one that addresses both the professional and ideological impact of real life experiences upon conceptions of justice in the actual application of plea-bargaining in instances of war crimes and crimes against humanity.

1.1 Rational for Selecting Case Studies

In order to better understand the ways in which the tribunals have operated regarding their varied use of plea-bargaining, I have elected to use a number of case studies. In

different ways, each of these illustrates how plea bargaining has evolved in contemporary war crime tribunals. These are, at the ICTY: *Prosecutor v Erdemovic* (Case No. IT-96-22-T); *Prosecutor v Jelisic* Case No. IT-95-10-PT; *Prosecutor v Todorovic* (Case No. IT-95-9/1); *Prosecutor V Biljana Plavsic* (Case No. IT-00-40-I). And, at the ICTR: *Prosecutor v Jean Kambanda* (Case No ICTR 97-23-S).

The first case to be dealt with by way of a guilty plea was that of *Prosecutor v Erdemovic* (Case No. IT-96-22-T) at the ICTY. What is particularly interesting about this case is the fact the Tribunal had never heard of the defendant. Erdemovic made a number of attempts to contact the tribunal via interviews he gave to journalists, and when he was arrested he was charged with one count of a violation of the laws or customs of war and one count of a crime against humanity (para. 80). He initially entered a guilty plea to the crimes against humanity charge. He also gave a great deal of vital information to the prosecution regarding other defendants, namely in the case of *Prosecutor v Krstic* (Case No. IT-98-33), and information on his involvement in the Srebrenica massacres (*Prosecutor v Erdemovic* Case No. IT-96-22-Tbis Para. 34-40). After initially being sentenced to a term of ten years imprisonment, the Appeals Chamber held that the Tribunal could not accept the defendant's guilty plea on the grounds that it was not informed. After which Erdemovic then entered a guilty plea to the second charge resulting in a sentence of seven years imprisonment being negotiated by the prosecution and his defence (para. 18d). Although the defence and prosecution negotiated a reduced prison term following the defendant both pleading guilty and showing remorse for his actions during the conflict, the defendant did not enter a guilty plea due to enticements made by the prosecution (para. 29) and therefore is not technically a plea bargain.

The next case to be dealt with by way of guilty plea in the ICTY was the case of *Prosecutor v Jelisic* Case No. IT-95-10-PT. This case quite clearly was not a plea bargain as the defendant was told by the prosecutors that they would not take into consideration his guilty plea and would recommend life imprisonment. However the defendant still chose to plead guilty believing that his guilty plea would still in fact grant him some concessions (Combs, 2007: 62). Although the prosecution dropped eight of thirty nine originally proposed charges, they did so due to the lack of evidence (Combs, 2007: 62). The trial chamber did consider his guilty plea at sentencing, but only as a principle, giving it little weight stating that Jelisic showed no remorse for the crimes he committed and sentenced him to forty years imprisonment (*Prosecutor v Jelisic* Case No. IT-95-10-T judgement para.127).

Prosecutor v Todorovic (Case No. IT-95-9/1)²⁷ was only the third case heard by the ICTY that obtained a conviction by a guilty plea. However, it was also the first case to be dealt with by way of plea bargain. The plea deal in this case came about due to the fact Todorovic's arrest was conducted in an improper manner - in fact the defendant was kidnapped. The defendant challenged the legality of his arrest, which would have caused much embarrassment to the Tribunal and those involved (Combs, 2007: 62). In order to save them from embarrassment, the prosecution offered Todorovic a plea deal - in exchange for a guilty plea and the withdrawal of his challenge to the legality of his arrest they dropped a number of the charges brought against him.

One of the most controversial plea bargains to occur in the recent Tribunals is that of *Prosecutor V Biljana Plavsic* (Case No. IT-00-40-I).²⁸ This case was concerned with crimes committed during the breakup of Yugoslavia. Here, Mrs. Plavsic was originally indicted with crimes such as genocide, complicity in genocide

and four crimes against humanity. At first she pleaded not guilty. However, later when a plea bargain was agreed, she pleaded guilty to three charges of persecution, which is a crime against humanity, and the other charges were removed. Plavsic originally did not co-operate with the Office of the Prosecutor (OTP) and had initially refused to give evidence against other military and political officials that were high in the chain of command. However, on July 6 2006 Plavsic was returned to The Hague to testify against her wartime political ally, Momcilo Krajisnik. She did so begrudgingly, stating that she was forced to do so, and was there against her will. Plavsic was sentenced to 11 years imprisonment.

At Plavsic's trial, Dr. Alex Boraine gave evidence in favour of her guilty plea, stating that her explanations of her actions and the remorse that she showed went a long way towards the reconciliation process in the Former Yugoslavia, and that this eventually could lead to peace. Dr Boraine said that this was because an admission from a higher ranking official, such as her, meant that the victims of the crimes committed no longer had to prove they have suffered and that their suffering had been recognised. Plavsic also encouraged other perpetrators to come forward and confess their guilt. There has been criticism of Dr Boraine's testimony. Minna Schrag, a former Trial Attorney in the ICTY, argued that during Dr Boraine's testimony the judge repeatedly asked whether there was any concrete or statistical evidence to support his views that acknowledgement of guilt and responsibility is the first step towards reconciliation. There was no such evidence (Minna Schrag, Public Hearing of the Prosecutor, 17-18 June 2001).

Guilty pleas at the ICTY seemed to be at their most popular during 2003, after which the number of defendants pleading guilty has dwindled. A possible reason for this is the departure of the American Chief of Prosecutors Michael Johnson, who left

in 2004 and was also a supporter of plea bargaining facilitating a number of the 2003 plea deals (Combs, 2006: 99). To date the tribunal has convicted eighteen defendants by the use of plea bargaining and two via guilty pleas. In comparison, the ICTR has obtained eight convictions through plea bargaining.

It would seem that cases heard at the ICTR are less likely to enter in to plea agreement than the ICTY. The major difference between the two is that the ICTR's caseload deals predominantly with genocide, possibly making the use of plea agreements more difficult. Another reason for the infrequent use of plea bargaining that has been put forward is that many of the ICTR's defendants are dissuaded from pleading guilty due to ideological factors (Drumbl, 2007: 168). Perhaps more relevant may be that the ICTR do not follow the ICTYs in readily giving generous sentence concessions to their defendants which can be seen in the case of *Prosecutor v Jean Kambanda* (Case No ICTR 97-23-S).

Regarding the use of plea bargaining at the ICTR, the Kambanda case is controversial as the defendant was one of the highest ranking defendants to be heard before this trial chamber, comparable to Plavsic's rank. Yet he received no sentence concessions for his plea and overall cooperation. Kambanda was the Prime Minister of the interim government in Rwanda, which had been established after the death of president Habyarimana. Kambanda was charged with six counts of genocide and crimes against humanity. From the outset, he stated that he was going to enter a guilty plea and co-operate with OTP. To this end, he provided the OTP with almost ninety hours of invaluable testimony which could be used in future trials. As a result of such, Kambanda's family became at risk of reprisals and in response the prosecutors helped with the relocation of the Kambanda family.²⁹

Before his trial Kambanda confessed his guilt regarding all the charges against him. The Tribunal verified that the plea of guilty was made voluntarily and that it was informed and unequivocal. It was stipulated that there had been no prior arrangements or promises made with respect to the sentence he would receive. However, Kambanda was sentenced to life imprisonment, and whilst the Trial Chamber wanted to recognise the amount of assistance he had given, they nevertheless considered themselves unable to do this. This was due to the ‘heinous and intolerable’ nature of the crimes that he had pleaded guilty to. The prosecution also argued that a life sentence would be appropriate because the ‘maximum penalty envisaged by the Tribunal’s sentencing regimes is the only appropriate sentence for the grave offences to which the accused has plead guilty.’ (para 62)

The Kambanda’s case was heard two years before that of *Todorovic* and *Sikirica* (IT-95-8). It was therefore unclear that a statement of remorse would constitute as a mitigating factor, and that a guilty plea was not an expression of remorse. Since he received his life sentence Kambanda has appealed this and has stopped co-operating with the OTP, and he even revoked his guilty plea demanding that he should be able to go to trial (*Prosecutor v Kambanda* ICTR-97-23-A Judgement 19 October 2000: Para 3). He claimed that pleading guilty was a mitigating factor, and should have received a sentence discount. The appeal was denied as it had been judged that the defendant’s original guilty plea was voluntary, informed and unequivocal (para 126). It was also concluded that the plea was supported by sufficient factual basis. The Tribunal also asserted that the gravity afforded to any mitigating factors is up to the Tribunal, and that it is up to their discretion how much or little weight they should receive. Here the Trial Chamber did consider his guilty plea to be a mitigating factor, but the aggravating circumstances

that surrounded his crimes, ‘negated the mitigating circumstances’ (para 62). Here, Kambanda was guilty of the most serious crimes and the Tribunal was not wrong when they sentenced him to life imprisonment. This was the only plausible sentence that they could give for the amount of culpability the defendant had in the genocide committed in Rwanda (para 62). Coupled with this was the knowledge that less culpable defendants were being sentenced to death for lesser crimes in Rwandan domestic courts at that time (Para 41).

The next defendant to plead guilty in the ICTR was Omar Serushago (*Prosecutor v Serushago* Case No ICTR-98-39-I). However, he was not on the list of suspects wanted for war crimes by the Rwandan authorities when he surrendered himself. But the OTP originally charged Serushago with five counts of genocide; murder; torture; extermination and rape. This defendant pled guilty to the first four charges but not the fifth, rape, and the prosecution dropped that one.³⁰ Serushago confessed to being in charge of the *Interahamwe* (the Hutu lead militia) in the Gisenyi prefecture, and to commanding bands of militiamen. Along with confessing to other crimes, he admitted that he had been in meetings with other military and civil authorities in which, amongst other things, the smooth running of the massacre were discussed (Combs 2002: 134). The OTP, as in *Kambanda*, ensured the protection of Serushago’s family. The prosecution noted the ‘valuable information’ that the defendant had given. In fact, he had been co-operating with the prosecution before he surrendered, which had resulted in the arrest of other high level perpetrators.

However, unlike Kambanda, Serushago showed remorse at his pre-sentence hearing where he begged for forgiveness from the Tutsi and his country. Serushago has continued to co-operate with the prosecution after being sentenced (Comb 2002: 135). Due to this he was given fifteen years imprisonment, despite the prosecution

recommending no less than twenty five years. The Trial Chamber when considering his sentence gave weight to the continuing co-operation the defendant gave the prosecution, his expression of remorse and his voluntary surrender. Serushago still appealed his fifteen year sentence. He stated that there was not enough consideration of his mitigating factors and that the sentence given was not in keeping with Rwandan sentencing practices. The Appeals Chamber has rejected this and his fifteen year sentence still stands (Combs, 2002: 136).

The case of *Prosecutor v Bisengimana* (Case No. ICTR-2000-60-1) is important to examine as it the guilty plea by the defendant in this case was brought about by an aggressive use of charge bargaining. The initial indictment against this defendant contained thirteen charges of genocide, crimes against humanity and war crimes, alleging that the defendant was not only personally active in committing these crimes but also encouraged others to do the same (para. 1-4). The second indictment contained only five charges but they none the less still reflected the amount of the defendant's involvement in committing the crimes alleged (para. 26-28). After the revision of the indictment, the parties involved in this case entered into fuller plea negotiations. In exchange for a guilty plea for two relatively minor charges out of the possible five, the prosecution agreed to drop and seek acquittals for the other more serious charges, including genocide and rape. Along with this, the prosecution agreed to recommend a sentence of between twelve and fourteen years, as well as backing Bisengimana's request that he serve his sentence in a European prison (*Bisengimana Plea Agreement*) which can be considered a form of sentence bargaining. When reviewing the original indictment and the charges to which the defendant pleaded guilty, it is clear to see that the prosecution have also engaged in 'fact bargaining' as the facts in the first indictment merely resemble the facts that he admitted to. The

withdrawal of the genocide charge received much criticism in Rwanda. Indeed, the Rwandan government insisted that genocide charges only be dropped only when, ‘it would be difficult to prove beyond a reasonable doubt the role that the particular accused person played in the preparation of the genocide.’ (*ICTR and Rwanda Argue over Plea Bargains*, Hirondelle News Agency, April 2006)

The use of plea bargaining is not just limited to these two tribunals. It has been suggested by the NGO Human Rights Watch that Ethiopia’s war crime tribunals may resort to the use of plea bargaining in order to compensate for the difficulties they were having bringing their two thousand defendants to justice. The tribunal’s prosecutors decided not to take this advice and are currently trying defendants approximately seventeen years after they were arrested in 1991 (Amnesty International 1995; Human Rights Watch 1994). Although this particular tribunal does not use plea bargaining to get through their heavy case loads, other tribunals do. One such tribunal that has embraced the guilty plea process is the Dili District Court of Timor-Leste. Approximately half the convictions obtained in this tribunal have resulted from guilty pleas (Drumbl 2007: 169). This is not to say that the obtaining these convictions were without problems. Indeed, initially the institutions involved in the tribunals did not understand the guilty plea process. In turn, this resulted in a review of the guilty plea procedure at this tribunal. The case of *Joao Fernandes*, discussed below illustrates this.

The case of *Prosecutor v Joao Fernandes* (Dili District Court Special Panels for serious Crimes, Case No. 01/00.C.G.) was not only the first case heard before this particular tribunal, but it also shows the most basic of difficulties that can arise when entering a guilty plea when the charges involve international crimes.³¹ This is especially so when defendants and their advisers are unfamiliar with the legal system

they are being subjected to. Here the defendant pleaded guilty to murdering the village chief, but did so under the instruction of the Indonesian Military (para. 13-14). After being sentenced initially to twelve years imprisonment, Fernandes appealed on the grounds that his defence counsel were unfamiliar with the guilty plea process. He also asserted that the fact that he had acted under the orders of the military negated elements needed to obtain a conviction of this crime, namely his actions were not deliberate or premeditated, and this was confirmed at his appeal (*Joao Fernandes v prosecutor* Court of Appeal of East Timor, Criminal Appeal No. 2001/02). This then resulted in the a review of the tribunal's guilty plea procedure in order to make sure that when entering a guilty plea all parties involved, including judges, understand the process and are able to ensure the defendants plea is voluntary, informed ad unequivocal (Judgement of Egonda-Ntende. J, June 2001, para. 20). Seemingly guilty pleas are quite common in the East Timor Special Panels, where defendants readily admit their guilt to crimes where there may be a defence, such as duress, and/or without fully understanding the implications of the guilty plea (*prosecutor v Joao Fernandes*) East Timor seems to have a more reconciliatory nature to justice than Rwanda and the Former Yugoslavian countries (Combs 2006: 118). There is, one might argue, more of a karmic or socio-cosmic quality to East Timor society, where the admittance of any wrongdoing will go a long way to restoring the karma of the region.

Combs asserts that at the end of 2002 defendants in this particular tribunal were afforded better defence counsel. As a result there were not as many ‘confessions’ as defendants were being encouraged to plead not guilty. In a bid to receive guilty pleas the tribunal started to enter into plea negotiations (Combs 2007: 119-120). One such case is *The Lototoe Case* (Case No. 49/2001) where the

defendants Jhoni Franca³² and Sabino Leite³³ entered into negotiations. Both these cases were subject to charge bargaining and sentence bargaining. Both defendants entered into a written plea agreement (Comb 2007: 211). However, in the case of Franca the defendant asserted that he had not committed some of the crimes that he had pleaded guilty to. This was eventually put down to a misunderstanding in the translation of a conversation between the defendant and his counsel. He was subsequently sentenced to five years, two years less than what the prosecution had argued for. Both Franca and Leite gave statements of remorse and told the tribunal how they had acted under the duress of their superiors, this acted in way of mitigation for them both (East Timor Judicial System Monitoring Programme 2004: 26).

The use of plea bargaining in all international tribunals has caused controversy and concern. As of yet there has been no uniform procedure in which negotiations should be entered into, and what form they should take, let alone any uniformed sentencing policy (Henham 2005). The secretive nature of plea bargaining also raises the possibility that prosecutors may not enforce their end of the bargain (*Prosecutor v Dragan Nikolic Case No. IT-94-2-A*). Although the acceptance of guilty pleas in modern day war crime tribunals has now been accommodated for in the tribunals' statutes, it poses the same two opposing arguments in all of these tribunals. One the one hand the utilitarian benefits of plea bargaining which are too great to ignore, but on the other hand, the rule of law and equal treatment arguments, as well as the gravity of the crimes committed are factors that should not be forgotten.

In the case of the ICC, we have yet to see if the prosecutors will engage in plea bargaining. It will be of great interest to see how this permanent international court will unite its trial avoidance policies and practices, for whatever reason, with the justice needs of the different countries it aims bring justice to, whilst still maintaining

international credibility. In order to understand the ethical issues that plea bargaining may raise in these contexts I will now turn to the various ways in which the process may be used in a number of legal contexts.

2. International Adoptions of Plea Bargaining

In this section I will explore the history of plea bargaining. This is needed because in order to more fully understand the shifting application of the principles of plea bargaining one has to be able to reconstruct and grasp its incremental development and operation historically within different legal systems. This, in turn, allows an analysis of its application within the particular historical and cultural context of international law.

According to Vogel, it was in the lower court of Boston USA that plea bargaining began to emerge during the 1830s and 1840s where its use was generally concentrated on offences against property and security of the person (Vogel 2008: 93). Broadly speaking, in these cases a guilty plea was offered and this constituted the waiver of the defendant's right to trial. There are generally three types of plea bargain: 'Charge'; 'Fact'; and 'Sentence' bargaining. In the case of 'charge bargains', the prosecutor drops more serious charges in exchange for a guilty plea for a less serious one. Here, the charge dropped does not have to be the most serious and could be a lesser one in order to gain convictions for the others. It could be argued when, or if, charges are dropped it may be interpreted as saying that these crimes did not happen. For example, in cases of sexual violence where there is a lack of evidence due to witnesses not coming forward there is a danger that the prosecution may use rape charges as a bargaining chip. In such instances, the charge of rape may be dropped in exchange for a guilty plea. In the context of war crimes, this may be for crimes which traditionally have been thought of as more serious.

In cases of 'fact' bargaining, the prosecutor agrees to present the facts in a particular way suggesting that the crime is less serious than perhaps it actually is or could be

made to appear given a less sympathetic interpretation of the facts of the case. If this were done during an actual trial, this method of bargaining could be seen as glossing over the extent and depth of the severity of the crimes committed. Once again, in the context of war crimes trials this may have far reaching implications as indicated in the case of *Bisengimana*.

‘Sentence’ bargaining involves prior agreements with the judge where there is a likelihood of a reduction of sentence should the defendant plead guilty. This remains the most commonly used concession for defendants who plead guilty and/or cooperate with the courts.³⁴

2.1 What is Plea Bargaining?

A plea bargain is an agreement in which the prosecutor and defendant arrange to settle a case against the latter. This is normally in the form of the defendant pleading guilty or no contest to all or some of their alleged crimes in exchange for concessions by the prosecutor. These concessions may take the form of a reduction of the charges, the dismissal of charges or limiting the punishment imposed upon the defendant. The prosecutor will then disclose the facts of the case that involve the defendant in a more flattering light. At its greatest plea bargaining can take the form of an immunity agreement, where the defendant would be protected from being prosecuted for their crimes, in exchange the defendant would cooperate with the prosecution by for example giving prosecution evidence. Generally plea agreements allow parties to agree on the outcome and settle pending charges.

Broadly speaking, there are two types of legal systems, Common Law and Civil Law regimes. Countries that utilise Common Law, such as the UK, USA, Canada, Australia and New Zealand, apply the adversarial system. Under this, courts do not seek the truth in the sense of actively mounting a general investigation, but only decide if the evidence that the defence and prosecution lawyers produce is sufficient to prove beyond a reasonable doubt that the defendant is guilty. They are ideally neutral umpires holding the ring between rival advocates (Cassese 2003: 373; Combs 2002: 48). In general, these countries employ plea bargaining as a way to get through their large case loads. In contrast, Civil Law countries, such France and Italy, use the inquisitorial system. In this system, it is an official's task to actively collect the evidence that goes towards establishing the guilt or innocence of the accused. In this instance, it is the courts that play an active role in truth telling (Cassese 2003: 373; Combs 2002: 41; Zappala 2005: 15). Modern International War Crime Tribunals contain elements that can be attributed to both Common and Civil Law. Not surprisingly, the result of this is that the International Tribunal structure is something of a hybrid of the two systems.

The process of plea bargaining is often desired by utilitarians who emphasise questions of institutional efficacy including the optimal deployment of resources to secure the maximum outcomes, included case dispositions, as it cuts down the number of trials that the court has to hear. It also, more or less, guarantees a conviction for the defendant and it may also be used to illicit additional useful information from that defendant relevant to future prosecutions. However, there are a number of dangers to using plea bargaining identified as such by non-utilitarian perspectives, most notably classic forms of liberalism. For example, an innocent person who finds himself or herself accused may feel highly pressured into pleading guilty out of fear of a more

severe sentence being passed. These arguments of course are discussed in great detail in the following two chapters

Although the adversarial system originated in England, it is said that the USA is now a more adversarial one than the English. In the USA, approximately 90% to 95% of cases are disposed of by plea bargaining (Combs 2002: 46). In the UK a defendant normally decides to plead guilty as they discover that the evidence against them is overwhelming. The guilty plea is then usually rewarded with a discounted sentence of around one third as the guilty plea is taken into mitigation (Almandras 2011). It is worth noting that, in the USA, a guilty plea is more likely to be a result of a plea bargain or charge bargain (Cassese 2003: 370) consequentially saving the state's resources. There is a strong incentive for an accused to plead guilty. An examination of plea bargaining in the UK shall be used as an example to show the distinctions between the different forms a plea bargain might take and also to show the benefits of each style of negotiation. It should be noted that plea bargains and a plea of guilty are two similar but at the same time very different legal mechanisms, therefore it is important that the two should not be confused. In this thesis a plea bargain shall be referred to when there has been some 'negotiation', 'bargain', 'deal', agreement involving either charges, or the facts of the case, and or the sentence a defendant may receive in exchange for a guilty plea. Although defendants who enter a guilty plea without negotiation are still likely to receive a sentence discount for saving the tribunal the cost of a full trial, this is not a plea bargain. In this thesis it should be assumed that when plea bargaining is referred to it means that there was some form of negotiation in exchange for a guilty plea unless otherwise stated This also lays the foundations for the understanding of plea bargaining in the rest of the thesis.

2.1.1 Fact Bargaining

Fact bargaining refers to when a defendant changes his or her plea from not guilty to guilty on the reliance that the prosecution will present the facts of the case in a less incriminating light. Again, this is advantageous for the prosecutors as they obtain a guilty plea without having to take the risk of a full trial. Presumably, the defendant would also benefit from a reduced sentence in exchange for this guilty plea. The defendant would supposedly benefit from this kind of bargaining if they are actually guilty of a serious crime.

In cases where the defendant expresses a wish to plead guilty to a charge but the defendant's version of the facts differ from that of the prosecution, or the prosecution cannot accept the facts, then, according to the Code for Crown Prosecutors, 'The court should be invited to hear evidence to determine what happened, and then sentence on that basis' (The Code for Crown Prosecutors, paragraph 9.3). When this occurs, a Newton hearing is held.

One of the major concerns about fact bargaining is the lack of checks it has in place. For example, if the prosecutor presents facts concerning a defendant's involvement in a crime in a more severe light, then defence counsel would object. However, if the prosecution was to present facts in a way that was disproportionately flattering to the defendant, then no one would be able to object. The issue being that this would result in an unfair bias towards the defendant as it would place them in a stronger position. In turn, this could give the impression that the victim has lost their 'voice' in the proceedings.

2.1.2 Charge Bargaining

There are two kinds of situations where charge bargaining may be used. The first is where the defendant is charged with two or more crimes. Here, it is possible for the prosecution to drop one or more of the charges in return for a guilty plea for the remaining. The other situation is when the defendant has been charged with a serious offence. Here, the prosecution might drop this charge in exchange for a guilty plea to a less serious offence. A number of domestic criminal justice studies show that, on occasion, there has been a considerable downgrading of charges (Genders 1999; Henham 2002). One reason for this could be problems proving intent. For example, if a defendant is charged under S 18 of the Offences Against the Person Act, grievous bodily harm with intent, they may have this charge downgraded to a S 20 offence of the same Act, recklessly inflicting grievous bodily harm. It is also quite possible that the charge may also be even further downgraded to assault occasioning actual bodily harm, S 47 if what is thought to be an appropriate agreement is made. In international criminal law an examples may be the ICTY cases of *Plavsic* and *Momir Nikolic* where the genocide charges were withdrawn upon entering into negotiations with the prosecution. A possible reason for dropping such a serious an grave charge might be that it is very difficult to prove genocide as a crime, in particular that the defendant had the specific intent require to commit this crime. Examples of this are the case of *Jelisic* and *Kristic* (IT-98-33A), where both defendants where acquitted of genocide charges. This form of plea bargaining is beneficial towards the prosecutors as they are guaranteed at least one conviction without the risk of a full trial. Within the UK, Approximately 60% of contested charges are acquitted (Ashworth and Redmayne 2005: 271) and the practical reasons for this may include things such as witnesses not turning up on the day or trial. It is understandable then that some prosecutors may

choose to enter into charge bargaining, especially if they have a large number of cases to deal with. Interestingly, it is set out in the Code for Crown Prosecutors (2004) that:

Crown Prosecutors should only accept the defendant's plea if they think that the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors never accept a guilty plea just because it is convenient. (Para 10.1)

This version of the guidelines does not expand on what it means by 'convenient', although it is realistic in practice. The way that it is written could possibly give rise to uncertainty as to when it is acceptable to charge bargain. Presumably, the convenience of the court is acceptable, but the personal convenience of the prosecutor is not. An earlier version of this code implies that it is acceptable to accept a plea of guilty to a lesser offence if the maximum sentence for the lesser offence is comparable to the gravity of the defendants' wrong doing:

Administrative convenience in the form of a rapid guilty plea should not take precedence over the interests of justice, but where the court is able to deal adequately with an offender on the basis of a plea which represents a criminal involvement not inconsistent with the alleged facts, the resource advantages both to the service of the courts generally will be an important consideration. (Code for Crown Prosecutors 1986: Para 11)

From a defendant's point of view, the primary advantage or disadvantage would come down to whether the defendant is indeed guilty of the crime charged. If so, then obviously this type of bargain would be beneficial to the defendant as they would plead guilty to either a downgraded charge, or they would get one or more charges removed. There is no doubt a guilty defendant would enjoy the benefits of charge bargaining but the biggest disadvantage here is when an accused is in the situation where they are actually innocent of all the charges but feel compelled to plead guilty as a form of 'risk management' as if found guilty after a full trial they would receive a more severe sentence. Possible examples of this in international criminal law may include the ICTR case of *Bagaragaza*, where the defendant had given 'too much' information to the prosecutors therefore a plea deal was the only 'sensible' solution

for the defendant (Interview with Jordash 2010). Also the ICTY case of *Kovacevic* illustrates this, here the defendant had spoken candidly to journalists, not realising the impact the statements he made would have on his case, in this case no plea agreement was reached (D'amato 2000).

2.1.3 Sentence Bargaining or Pure Plea Bargaining

In instances of sentence bargaining, or pure plea bargaining, defendants would change their plea from not guilty to guilty for the purpose of receiving a reduced sentence.

Within domestic criminal law, S144 of the Criminal Justice Act 2003 is subject to the Sentence Guidelines Council. Here, the sentence guidelines apply to both Crown Courts and Magistrates Courts and the guidelines cover the whole range of sentences available, such as custodial, fines and community services. Importantly, the Courts are required to state that they have reduced the sentence and, although they are not required to under the guidelines, it is considered to be good practice to state how much of a reduction in the sentence has been agreed due to a guilty plea (Sentencing Guideline Council 2007).

There are a number of moments in the process that a defendant can plead guilty. The earliest of these is when a defendant pleads guilty at a ‘plea before venue’, which is normally at the Magistrates Court. Here, a defendant will elect to plead guilty and if they do the Magistrates Court has the ability to sentence them. However, this is only if the case falls within the Magistrates Court’s scope. If not, the case may be referred to the Crown Court for sentencing. The second instance a defendant can plead guilty is when there is an indication of sentence at the Magistrates Court. Pre-trial hearings in either the Magistrates Court or the Crown Court are examples of

other opportunities where a defendant can plead guilty and receive a substantially reduced sentence.

In 1970, the case of *R v Turner* [1970] 2 QB321 concerned the role that the judge played in the defendants decision to plead guilty or not guilty. In this case, the Court of Appeal set forth that Defence Counsel should be free to give advice to their defendant about the best approach. Having heard their Counsel's advice, it is then up to the defendant whether they take it or not. The judge and defence counsel should be allowed to meet and discuss necessary matters. An example of what might be considered a necessary matter is if a defendant is dying but does not know that they are dying. The only indication a judge may give as to sentence is that it will take the same form whether the defendant pleads guilty or is found guilty through conviction (Attorney –General's Reference No. 44 of 2000 (*Peverett* [2001] 1 Cr App R416 at 417). In the *Turner* case, the defendant, who had a number of previous convictions, pleaded not guilty to theft. Trial counsel approached the judge during an adjournment. After some discussion, counsel advised the defendant, Turner, if he pleaded guilty he would probably receive a non-custodial sentence, but if found guilty after a full trial he would receive a custodial one. Turner was under the impression that the judge had conveyed this information to counsel, and changed his plea to guilty. The notion that a defendant may receive a non-custodial sentence as a result of a guilty plea, compared to receiving a custodial sentence after a conviction through the full trial process, places enormous pressure on a defendant to plead guilty, even if the defendant is actually innocent of the crime charged. The Court of Appeal held Turner's guilty plea to be a nullity. The court believed that improper pressure was put on the defendant to plead guilty.

When plea bargaining the defendant benefits from a sentence discount in particular if he/she is in fact guilty of the original charges brought against them. There is also the benefit of receiving a non-custodial sentence instead of a custodial one in certain cases. No doubt there will be some defendants who plead guilty due to pressure put on them, but are in fact actually innocent of the crimes that they are charged with. The pressure that they feel that they are under may take a number of forms. For example, the defendants themselves may not believe that they will be able to protest their innocence successfully and so make the pragmatic choice to plead guilty in an attempt to make what they might see as the best of a bad situation.

Although defence counsels are not allowed to place undue pressure on a defendant, they are meant to advise them on what their best recourse is:

Counsel must be free to do what is his duty, namely, to give the accused the best advice he can, if need be, in strong terms. It will often include advice that a guilty plea, showing an element of remorse, is a mitigating factor which might enable the court to give a lesser sentence. Counsel, of course, will emphasise that the accused must not plead Guilty unless he has committed the acts constituting the offence charged. (Para 321)

It was also stated that, ‘the accused, having considered counsel’s advice, must have complete freedom of choice whether to plead Guilty or Not Guilty’ (Para 321).

Although this case had made it clear that the judge should be prohibited from giving indications of what sentence a defendant may receive, this was not always followed. This is evident in the case of *R V Peverett* [2001] 1Cr.App.R.27:

[t]his case has a lamentable history... it illustrates what can, and too often does, happen, if despite the repeated judgements of this court to the contrary, counsel, in cases which are not wholly exceptional, have recourse to the judge, in his room, in order to discuss please and sentence. (Para 417)

The essential facts of the case are that the offender, a deputy head master at a private preparatory school, pleaded guilty at Crown Court before to nine of the sixteen offences in the indictment, relating to indecent assault on pupils at the school. He has

originally entered a plea of not guilty to all charges, but changed his plea as a result of a meeting between defence and prosecuting counsel and the judge. The Judge indicated that the circumstances of the case were such that a suspended sentence would be justified. Subsequently, the offender was sentenced to a total of eighteen months' imprisonment, suspended for two years, ordered to pay £6,500 in prosecution costs and ordered to register under the Sex Offenders Act.

The court reiterated the rules set out in *Turner*. In response to the courts comments the Attorney General issued guidelines to prosecutors, with regards to discussions about sentencing with the judge and accepting guilty pleas (Attorney General's Reference (No. 44 of 2000)). It states that, hearings except those that are in the most exceptional circumstances should be conducted in public, including the acceptance of pleas by the prosecution and sentencing. The Code for Crown Prosecutors sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted. Where this is done, the prosecution should be prepared to explain their reasons in open court. The Court of Appeal has stated on many occasions that justice should be transparent, and that only in the most exceptional circumstances should plea and sentence be discussed in chambers. Where there is such a discussion, the prosecution should at the outset, if necessary, remind the judge of the principle that an independent record must always be kept of such discussions. The prosecution should make a full note of such an event, recording all decisions and comments.

Since the decision in *Turner* there have been significant changes in criminal procedure. These changes now allow, to some degree, an advance indication of sentence. *R v Goodyear* [2005] ECA 888, CA is an important case for sentencing implications. Namely following a request from a defendant a judge may give an

indication as to the maximum sentence to be imposed after a guilty plea. The judge may also remind counsel that the defendant is entitled to this in open court. Before *Goodyear* convictions that violated the rules in *Turner* would be liable to be quashed. The very basic facts of *Goodyear* are that the defendant pleaded guilty to an offence of corruption and was sentenced to six months imprisonment, suspended for two years, and a fine of £1000. This was in spite of the judge saying to Goodyear's barrister at a meeting in his chambers before the trial began that 'this is not a custody case'.

The main grounds for the appeal was, that on principle the sentence was wrong as the judge should have followed the indication he gave before the trial, not to impose a custodial sentence. The suspended sentence was also viewed as improper as the offence was not so serious that it could only be justified with a custodial sentence. It was held that Crown Courts need no longer follow the rules set out in *Turner* that a judge should not indicate the sentence that he might impose if defendant pleaded guilty. The indication must be sought by the defendant within seven days' notice and in writing and then it would not amount to 'improper pressure on him.'

Prior to *Turner* it was not unusual for counsel to be seen (often separately from their solicitors) by the trial judge in his chambers, and for the judge to tell counsel his view of the sentence which would follow an immediate guilty plea. The 37th Archbold (1969) says nothing, and certainly nothing critical, about this practice. It was *Turner* that bought the 'vexed question of so-called plea bargaining into the open (Para 31). The main distinction between this case and that of *Turner* is that the plea bargaining process is now more open and transparent allowing the defendant more agency over the process.

The majority of countries that have employed plea bargaining into their system usually do so to save court costs and in order to maintain the efficiency of the court. This practice in common law countries is encouraged in cases where there are long and lengthy documents that need to be analysed, such as in cases of corporate crime. It is also pursued when pleading guilty would mean that victims and witnesses of particularly traumatising crimes are saved from giving evidence. This is interesting when one looks at the plea bargaining system India has recently employed.

Although its legal system is based on that of England, it is only recently that plea bargaining has been introduced in the Indian Criminal Procedure Code (Chapter XXIA). Its introduction has changed the face of the Indian criminal justice system, where trials are forever stopping and starting, and often taking years to get through just one case.

Unlike the Anglo-American plea bargaining system, there are some constraining features in the one adopted by India. The use of plea bargaining in India is only allowed where it is applicable to offences that are punishable for up to seven years, where the offence has been committed against a woman or a child under the age of 14, or socio-economic crimes (Ghosh 2006). This is of interest here as it differs from most other countries that have adversarial legal systems in the way that it engages with plea bargaining. This could possibly be because that country is trying to redress gender inequalities within the criminal justice system, as well as in society more widely and wants to start to take seriously crimes against vulnerable persons. The thinking behind this may also be to use this punishment to act as a deterrence of other would be perpetrators, as they would see that the criminal justice system takes these charges so seriously that they must have a full trial where there would be no concessions received for guilty pleas or expression of remorse. Whereas in the UK

and USA plea bargaining where victims are women or children are often encouraged to avoid any distress to them. There is also the aspect that socio-economic crimes have to have a full trial in India unlike the UK and USA where again plea bargaining is persuaded. An example of such a case is that of Michael Kopper (*United States v. Michael Kopper* Cr-560-001), the former Enron executive. India could also be trying to curb the amount of corruption that it is so used to within its legal system. It is obvious that by using the plea bargaining model, India has adopted that its raison d'être is to safeguard the relative efficiency of the criminal justice system. The restrictive nature of the Indian model presumably is in place so that the public can maintain and gain confidence in a legal system that has, it might be argued, failed so many people.

Systems similar to plea bargaining are now appearing in Continental Europe. Although it is still not being used to the extent that it is in the UK and USA, there has been a clear increase in negotiated justice over the past 30 years (Ashworth and Redmayne 2005: 265). European trials are generally more straightforward than Anglo-American ones as their proceedings usually take the form of an inquiry by the judge, making them an example of an inquisitorial system. This is achieved through the use of a dossier containing a collection of written materials collated by the governmental officials investigating the case. All the contents of the dossier are made available to both the defence and the prosecution. Evidentiary rules are also not as strict as they are in common law countries, with the important exception of trials by jury (Bosly 2004: 1403). Here, evidence also does not need to be introduced solely through witness testimony. Unlike in the UK and USA, the role of the defence counsel is limited, and criminal proceedings are more centred on the establishment of truth not the rhetoric of counsel. The proceedings on the whole in continental criminal

courts are more ‘Judge orientated’, thus making the proceedings more efficient. This is not to say that the role of plea bargaining does not have an increasingly essential role in the criminal systems of continental countries. But the practice of plea bargaining is far more regulated than in the UK and USA.

2.2 The Potential Dangers of Plea Bargaining

So whilst plea bargaining is highly desired in the context of more everyday court proceedings it is also attractive when it comes to war crime trials. Here, as elsewhere, plea bargaining can contribute to cutting down the number of trials that a court has to hear. It also more or less guarantees a conviction for the defendant and can also be used to illicit further information from a defendant. There are also utilitarian justifications for plea bargaining in the context of war crimes such as the fact that an admittance of guilt may promote reconciliation and restoration in the effected society. However, the reduction of a sentence not only challenges the truth telling functions of a court but also its capabilities of providing retribution for the community.³⁵

There are however a number of dangers to using plea bargaining and I would like to raise these from the outset before returning to them as the thesis progresses. These include the potential situation of an innocent person who finds themselves accused of a crime feeling pressured to plead guilty out of fear of a more severe sentence. There is also a risk of unequal treatment before the court. For example, if a defendant can offer evidence on another defendant they may be able to receive a lesser sentence than one who does not have such evidence to negotiate with. This principle can extend to the perpetrators of war crimes and crimes against humanity who may be able to receive discounted sentences and have charges they are potentially

guilty off dropped in exchange for a guilty plea. As one can imagine for these reasons the use of plea bargaining is a very controversial area of study generally.

No analysis of plea bargaining has engendered as much controversy as McConville and Baldwin's. Their study disclosed that there were a number of behind the scenes discussions in relation to defendants entering a guilty plea which on the surface seemed not to have been the subject of negotiations. These conclusions appeared in the 1974 book, *Negotiated Justice: Pressures on defendants to Plead Guilty*, which involved a large-scale study into the outcome of jury cases in UK Crown Courts. In particular, their research focussed on the extent to which plea bargaining was used in Birmingham Crown Court and staff of the Institute of Judicial Administration in Birmingham assisted in carrying out the research.

Negotiated Justice: Pressures on Defendants to Plead Guilty caused such controversy that Mr Webster and Mr Napley, who were the Chairman of the Bar and President of the Law Society at the time, wrote letters to national newspapers claiming that the authors of the book had not carried out suitable research for their arguments and had no academic integrity. Indeed, they both campaigned publicly and privately to stop the publication of the book. The only way McConville and Baldwin could defend their work was to publish their findings so that the public and academics could evaluate it themselves. Broadly, their research concluded that plea bargaining was used frequently in Birmingham Crown Court and that the plea bargains negotiated may not have been in the defendants best interest as the process used to obtain these bargains may have gone beyond what was at that time acknowledged by English law. The book goes so far as to suggest that some of the defendants felt that they had been pressurised into pleading guilty to charges which they believed they were innocent of. The implication being that that they were unjustly treated and the

authors argued that this was due to institutional structure of the criminal law and the operations of the criminal courts.

A number of other countries, such as India and Nigeria, have recently included the use of plea bargaining in their judicial system in order to allow for the smooth and efficient running of their criminal justice systems (Famoroti 2009; Ghosh 2006). In Europe, plea bargaining can take a number of forms. For example, Italy uses a procedure called *Patteggiamento Sulla Pen* in order to curb long and time consuming trials. The Italian system closely resembles the Anglo-American plea bargaining system (Combs 2002: 39; Ashworth and Redmayne 2005: 265). Other European countries use mechanisms similar to plea bargaining to help the efficient running of the criminal justice system reflecting how all-consuming the process has slowly become. With this in mind, I will now consider how the use of plea bargaining moved from domestic courts to war crime tribunals.

2.3 Plea Bargaining at War Crime Tribunals

Whilst plea bargaining was not accommodated by the Nuremberg Charter, and there was no occurrence of it in the Tribunals that were held under Control Council No 10, there is evidence of negotiations between potential war criminals and the Allies. Salter (2004; 2005; 2007) argues that some of those who could have been charged with war crimes had the potential to escape prosecution due to their co-operation with the allies and in particular US intelligence. It is well known that General William Donovan and Justice Jackson had a temperamental working relationship and this can be seen in the proposed plea negotiations that Donovan had presented to Jackson, with the former

taking more of a pragmatic approach and the latter being firmly grounded in the ideal of the rule of law and opposing what he saw as back door negotiations. In particular, they disagreed on the negotiations Donovan entered into with Hjalmar Schacht and Herman Goring in which both defendants would give incriminating evidence in exchange for concessions, by way of what would now be considered sentence bargaining (Salter 2007: 411). Donovan envisaged such evidence and the testimonies that came from it would discredit the Nazi regime as high ranking officers would testify against each other and was thus a justified strategy.

When it came to Schacht, it seemed this defendant was sympathetic towards the idea of plea bargaining as he had originally made contact with the prosecution. Donovan thought this was a good opportunity to put Schacht on the stand and have him testify against other defendants. In investigating Schacht, Donovan found, with the help of a double agent Hans Gisevius who also was used as a trial witness, that he was in fact a member of an anti-Nazi group and, although he worked for Hitler, he had actually opposed him since 1936. As part of this, Schacht had been involved in the 20 July 1944 assassination attempt on Hitler and had spent time in concentration camps for his actions. In this instance, Donovan had proposed a private plea deal which caused much controversy as Jackson had doubts that Schacht should benefit from such behind the scenes deal (Salter 2007: 419). Whilst there was enough incriminating evidence against him, prosecuting Schacht would prove to be difficult as Gisevius and other defendants gave evidence that Schacht was not central to the regime and had in fact not only opposed Goring's influence in the Government but also Hitler himself.

Regarding the negotiations surrounding Goring, the defendant was willing to testify against a number of other defendants in exchange for receiving an honourable

execution before a firing squad rather than what he saw as a dishonourable one, being hanged like a common criminal. Goring also agreed to divulge certain information to Donovan but only in secret, requesting aspects of the interview be kept undisclosed, therefore adding to the conspiratorial and clandestine aspect to their relationship. At one point, Donovan and Goring had agreed on a set of questions and subsequent answers that they were both happy with, and it was only after this was agreed that Goring would take the stand. Jackson opposed this approach stating that defendants who wanted to give evidence against another should do so in writing. He believed that any testimony based on promises or favouritism would be tainted, particularly considering the international arena the trials were to take place in and the nature of the crimes being judged (Salter 2007: 423).

Crucially, these post-World War Two deals were carried out in secret. Modern day war crime tribunals have accommodated the criticisms of this in their statutes, and, in doing so supposedly ensuring any such actions are more transparent than in their historical antecedents. Many of the issues raised in these attempted negotiations still apply to contemporary war crime tribunals - the main one being how does such a tribunal balance the utilitarian institutional gains of plea bargaining, such as gaining a conviction and information which otherwise would be difficult to obtain, issues of reconciliation and remorse, with the more legalist notions of rule following and equal treatment before the law?

When the ICTY was set up, Judge Cassese rejected proposals from the US Government that would have enabled the Tribunal to use plea bargaining as a way to elicit evidence from defendants (Scharf 2004: 1073). The US said that:

We recognize that many other legal systems have difficulty with these concepts, but we believe that these tool would be helpful in the war crimes context for leading prosecutors up the chain of command from the foot soldier

who directly committed an atrocity to the military political leader who had knowledge of or commanded it. (quoted in Scharf & Schabas 2002: 90)

It was decided that the crimes that were to be heard by the court would be too serious to allow for negotiated justice, and therefore they would not be compatible with the functions of the Tribunal. Judge Cassese explained at a briefing to members of Diplomatic Missions:

The question of the grant of immunity from prosecution to a potential witness has also generated considerable debate. Those in favour contend that it will be difficult enough for us to obtain evidence against a suspect and so we should do everything possible to encourage direct testimony. They argue that this is especially true if the testimony serves to establish criminal responsibility of those higher up the chain of command. Consequently, arrangements such as plea bargaining could be considered in an attempt to secure other convictions. However, we 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. After due reflection, we have decided that no one should be immune from prosecution of crimes such as these, no matter how useful their testimony may otherwise be. (IT/29, 11 February 1994)

The use of plea bargaining was also considered distasteful in the early years of the tribunal as a number of ICTY prosecutors came from civil law countries where plea bargaining was not widely used. Hence the idea of convictions being received as a result of backroom negotiations was thought to be inappropriate (Combs 2006: 84). However, a few years after it was established it was thought that the Tribunal might actually benefit from the acceptance of guilty pleas as its facilities were slowly being overwhelmed by the ever increasing caseload. Whilst presiding over the *Erdemovic* case, Cassese stated that the use of guilty pleas, ‘undoubtedly contributes towards the public advantage.’ This statement was made in relation to the logistics of the Tribunal and financial difficulties that it then had (Appeals Judgement, Separate and Dissenting Opinion of Judge Cassese 7October 1997: Para 8). In relation to this change, Henham states that the rationale of plea agreements can be seen in the case of *Momir Nikolic*

where the Tribunal was now arguing that the expression of remorse helps with the reconciliation of a community, and in doing so was actually contradicting itself (Henham 2005:7; Combs 2007).

When considering the objectives of the International Tribunals it is possible to split them into two categories, those with long term aims and those with short term goals. Of course, there is considerable overlap between the two, but the reasoning behind them differs slightly. For example, a short term goal, such as deterrence, would be especially important as there would be a pressing need to stop the wrongdoing in the region. As a long term aim something such as truth finding would be important. This is due to the fact that after a region has become less volatile, the reconciliation process can begin only when the truth is told and retributive justice is done. Again, it should be noted that the one of the main objectives of the Tribunals is ultimately to encourage peace and reconciliation in the affected areas. However, on occasion it looked as if the Tribunals were more interested in the short term aims, such as plea bargaining, where charges are dropped or not mentioned and sentences were reduced or the full facts of the case were glossed over. Clearly such short term aims would undermine the long term aims of the Tribunals. With regards to these short term goals, it is understandable why indulging in plea negotiations may appear advantageous. For the international community the people who were in power and orchestrated the crimes needed to be removed. In turn, this renders plea bargaining a relatively quick method of obtaining guilty pleas and information that would incriminate high level officials and assist in removing them from power. In such cases, plea bargaining does indeed go towards providing justice in the short term.

The prospects of a reduced sentence and/or charges being dropped in exchange for a guilty plea, may also encourage lower ranking defendants to testify against

higher ranking ones, especially in cases of command responsibility. Command responsibility applies where a defendant is responsible for the actions of their subordinates, even though he may not directly have ordered the criminal activity (Cameron 2004: 68).³⁶ It is easy to see why the use of plea bargaining would be desirable in international tribunals as on average the pre-trial and actual trial process in one of these tribunals takes just over two years. The Tribunals call many witnesses and make extensive use of exhibits and long transcripts. All of these can be avoided if the tribunal had broader judicial notice, allowing them to re-use facts that have already been established (Scharf 2004: 1080). In addition, there are a number of other factors that slow down the trial process, such as fact finding and finding witnesses who will testify. This is particularly difficult as individuals are often frightened to come forward, and as people have been displaced or relocated this makes it especially difficult to track them down. It is accepted that the trial process is very lengthy, costly and complex. Making use of plea bargaining and accepting guilty pleas expedites the process and frees up the courts to hear trials that are disputed.

The Trial procedures for both the ICTY and ICTR are, for the most part, identical. The Tribunals Rules of Procedure and Evidence (PRE/rules) govern the procedures by which guilty pleas should be treated. Rule 62(B) of the PRE ICTR governs a defendant's guilty plea. Rules 100 and 101 set out guidelines for sentencing when a defendant has pleaded guilty. Rule 62 *bis* of the PRE deals with guilty pleas and Rule 62 *ter* deals with plea agreements. These rules set out the criteria required when accepting a guilty plea or a plea agreement. Rule 100 governs the procedure for sentencing a defendant and Rule 101 discusses how the defendant should be sentenced. The rules set out here are similar in language to that used in the ICTR statutes.

2.4 Issues in the Acceptance of Plea Bargains at Tribunals

The case of *Prosecutor v Goran Jelsic* (Case No. IT-95-10-T (para 25)) states that ‘[a] guilty plea is not in itself a sufficient basis for the conviction of the accused’. Consequently, the Tribunals should only accept a guilty plea if it is ‘voluntary’, ‘informed’, ‘unequivocal’ and based on adequate evidence. For the plea to be ‘voluntary’, the defendant must be found mentally competent to understand the consequences of pleading guilty. The plea must result from threats, inducements or promises. To be ‘informed’, the defendant must not only understand the consequences of the guilty plea but must also understand the nature of the crime the accused is pleading guilty to. To be identified as ‘unequivocal’, the guilty plea must not be accompanied by anything that contradicts the confession. For example evidence that the crime was committed under duress. This is to protect the defendant from giving up their right to a trial, (*Prosecutor v Drazen Erdemovic* (Case No IT-96-22)). The Tribunal also added a fourth element, that the plea be based on sufficient factual evidence. This would stop defendants pleading guilty to crimes that they did not commit, in order to have more serious charges dropped or the possibility of a lesser sentence (*Jelsic*). In these instances, the guilty plea must be genuine and not self-serving (Henham 2005: 14).³⁷ It is important to note that not all attempts of plea negotiations are successful, it is therefore necessary for there to be a proffer agreement, as a preliminary matter. This agreement takes place between the defence and the prosecution that if no plea agreement is concluded between the parties, no information provided by the accused and no details of the discussions between the

parties may be used against the accused during a subsequent trial (O’Sullivan and Zecevic 2011: 148).

There are a number of ‘mitigating and aggravating factors’ that a trial chamber must consider when deliberating an appropriate sentence. These factors become of particular interest when determining a sentence when the conviction has been obtained as part of a plea negotiation. This is because more consideration may be given to a mitigating factor in a plea bargain case than a case in which the conviction has come about through a lengthy trial, even though the mitigating factor in question may be the same. Rule 101 (B) of the RPE gives the factors the ICTY/R must consider, in the case of the ICC Rule 145(2)(b)(i) of the ICC RPE is used. Basically, aggravating factors tend to be those that influence the court to increase the sentence. These include the voluntary participation of the criminal, the method and severity in which this was carried out, and how widespread the crimes were. In domestic courts in common law countries not pleading guilty to a crime such as rape would count as an aggravating factor as the victim would have to give evidence about what happened, therefore reliving their ordeal again. Mitigating factors tend to decrease the sentence as they include co-operation with the Tribunal, remorse shown at the crimes committed, and voluntary surrender and pleading guilty (Schabas 2005: 169; Zappala 2003: 201). Certain crimes, such as rape and torture, should also be considered as aggravating offences especially if the defendant has aided and abetted their commission as the effects of this type of crime on the victim are not only physical but also psychological and therefore long lasting. (*Dragan Nikolic* (Case No IT-94-2).

When regarding guilty pleas as a mitigating factor one should consider at what precise stage of the proceedings the plea is entered. *Dragan Nikolic* pleaded guilty but did so just before six witnesses were going to give testimonies against him. He had

already spent 3 years in custody during which time he had asserted his innocence and contested the charges brought against him. In this example, the defendant eventually pleaded guilty to murder, rape, persecution and torture, and was not penalised for the lateness of his plea and was still given a reduced sentence of 23 years.³⁸ In this situation, although there was some conservation of resources, there had still been a lot of time and money spent over three years obtaining evidence against him and seeking witnesses. He did however save victims and witnesses the stress of giving evidence in court and being cross examined. The Chamber said the defendant would have received a life sentence if it hadn't been for his guilty plea, his remorse and their co-operation with prosecutors. They also noted that the crimes he admitted were essentially the first public account of what took place at Susica, and as such helped to establish the truth of what happened there. In cases such as this, the guilty plea seemingly may appear to be rather self-serving. This may be contrasted with the case concerning *Milan Babic* where he not only surrendered himself to the tribunal entered his guilty plea very early on in the proceedings, and received 13 years imprisonment.³⁹ Similarly, *Cesic* (Case No IT-95-11) pleaded guilty after 16 months of confinement but had also done so before any trial proceedings had taken place.⁴⁰

In both the cases of *Plavsic* and *Babic*, the defendants expressed remorse. *Babic* said in February 2006 that his guilt was, ‘a pain that I have to live with for the rest of my life.’ Dr Mladen Loncar, a Croatian psychiatrist, testified about the positive effects of the guilty plea. The defendant, Babic, had also given evidence in other trials, most notably in Slobadan Milosovic’s trial in 2002. This might be compared with the case of *Kambanda*, where the defendant pleaded guilty from the start. However, in this case guilty pleas were not considered to be mitigating factors. Examples such as these reveal that the use of plea bargaining in international criminal

law is continually evolving and it is becoming apparent from the establishment of more recent tribunals such as the ICC and the STL that it will, as a legal concept, remain within the international criminal jurisprudence. If this is indeed the case, there is clearly a need for a more nuanced evaluation of its use and place in international law. From this background to plea bargaining I shall now move on to analyse the theoretical and philosophical justifications and objections put forward with regard to plea bargaining in international criminal law.

3. Reading Plea Bargaining Through the Concept of Classic Utilitarianism

The following chapter explores the justifications for plea bargaining using an interpretative framework made up of the principles of classic utilitarianism as set out by Jeremy Bentham. The aspects of plea bargaining that are deemed to be desirable by academics, practitioners and the international tribunals fall broadly under the utilitarian aspects of criminal justice systems in the sense of imperatives related to optimising consequences widely regarded as optimally ‘beneficial’. These broadly are things such as efficiency of resource allocation (given limited time, money and organisational capacity), truth telling, and reconciliation. It is therefore not only sensible but essential for the theoretical and methodological side of this thesis to discuss the justifications (and possible limitations) of plea bargaining as these appear when seen through the lens of classic utilitarian theory. I aim not only to justify the use of plea bargaining through the principles of this theoretical framework but to also analyse how far these justifications can be sustained when subject to critical examination, including those from diametrically opposite perspectives such as classic liberalism. I have therefore to ask whether even those justifications that are consistent with utilitarian principles are nevertheless correct, proper and contextually appropriate, and if plea bargaining in the context of international war crime tribunals is justifiable not only to utilitarians. Clearly, even those aspects of plea bargaining which are entirely justifiable in utilitarian terms may nevertheless be entirely unacceptable to non-utilitarian perspectives on this subject, which qualify or even entirely reject its principles. I will divide this analysis into two sections. The first offers a brief overview of what classic utilitarianism is in general, as this helps lay the theoretical foundations on which is based the wider analysis of plea bargaining in the chapter. The second, more applied section sets out an analysis of the justifications of

key aspects of plea bargaining through the interpretative framework of concepts, principles, beliefs and assumptions of classic utilitarianism. Following this discussion of utilitarian justifications of plea bargaining in general, I will look in detail at the case of *Plavsic* to discuss whether the traditional justifications of the process still apply to cases heard before international war crime tribunals.

3.1 Classic Utilitarianism

The principle of utilitarianism is concerned with the moral worth of an action. From this perspective this is entirely determined by its overall utility both in terms of those perpetrating actions and those affected by them. Classic utilitarianism theories, such as those put forward by the likes of Bentham and Mill, are therefore concerned with the somewhat hedonistic notion that happiness must be maximised. In this regard Bentham wrote:

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne... The *Principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which s to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light. (Bentham 2004: 65)

Bentham believed that pain and pleasure not only explain our actions but also help us define what is good and moral. Key to his ethical system is the principle of utility. That is, what is the greatest good for the greatest number? For Bentham:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. (Bentham 2004: 82)

Fundamentally, the ‘principle of utility’ is that the consequences of any action that should be considered (as opposed to the alleged purity or impurity of a person’s inner intentions and motivations), and if that action has the best general outcome for the most people, then it should be selected and applied. Hence, utilitarianism can be seen as ‘future-looking’ as ultimately it is only interested in what has previously taken place, even wide spread acts of genocide, in so far as it may affect a future outcome of something, such as the removal or mitigation of the causes of genocidal ethnic warfare. As such, utilitarianism can be seen as a form of ‘consequentialism’ concerned primarily with the policy effects and implications of legal practices.

Consequentialism is the view that the moral rightness of an act depends on the consequences of that act or something related to it such as a rule requiring one to act in a particular way. That is to say, if the consequences are good, in the sense of optimising the pleasure and life-chances of the majority of affected parties, then the act is morally right because ‘the ends justify the means’. It should be noted that consequentialism differs from ‘deontological’ systems of ethics, that is those which hold that the rightness or wrongness of an action, including a judicial decision, is logically independent of its practical consequences, and lays instead within the act itself or the circumstances in which that act is carried out such as contractualism.

Under the principle of consequentialism, all the possible consequences of an action for different groups in society need to be ‘weighed up’ against each other, Whichever outcome results in the optimal consequence for all concerned parties is deemed to be the morally right one to select. Within the fundamental idea of utilitarianism this would be the outcome that achieves the greatest happiness for the greatest number, and it is usually thought that the right consequences are those with the most tangible benefit for humanity, or at least those parts of with a material stake in the issue in question. Whatever the actions that lead to those beneficial

consequences are deemed to be moral, while other choices, which lead away from them, are judged immoral. For example, some say homosexuality and same sex marriage is immoral, but what are the negative consequences that arise from this compared with its suppression? To be moral or immoral under consequentialism someone with a stake in the issue must be made better or worse off.

A further example of this that is commonly cited is that of promise keeping. If I make a promise I must weigh up the consequences of keeping it against that of breaking it. If, on balance, breaking the promise brings about the most overall happiness, then that is the morally right thing to do. For example, a manager may have agreed contractually to her boss to optimise staff efficiency but may nevertheless decide to act sympathetically to an underperforming subordinate who is undergoing difficult family circumstances, and therefore ‘cover for her’ in a supportive and protective way. Such an act may break a contractual promise but nevertheless be in the best interests of most if not all concerned. The issue, as far as utilitarians is concerned, is no longer, therefore, the abstract one of whether in all circumstances and come what may, every promise must be honoured as a precondition for morally correct action.

Plea bargaining itself may be seen as another example that illustrates consequentialism. As mentioned above, consequentialism is where ‘the ends’ (the concrete implications and effects of selecting one option over another) is held to justify the means (whatever it takes to optimise beneficial outcomes). The end in the case of plea bargaining is punishment of some sort, and the means is the act of negotiating a plea bargain, combined with the decision that to even consider it in this particular case. So the idea that a defendant may not be charged with all the crimes that they may have committed (based on the interpretative judgements of criminal investigators and prosecutors) is reasonable as the aforementioned end of securing an

appropriate punishment is met.

Nevertheless not all *ends* have a consequentialist value attached to them, and their will often be a range of priorities ascribed to them. Occasionally, it is *the way* in which the end is achieved that holds the positive consequentialist value. Williams uses the example of a traveller. Here, he suggests that sometimes it is not reaching the ultimate destination that holds the value but the journey itself (Williams 1973: 82).

Returning to the example of plea bargaining, the end result of securing a conviction and the defendant receiving a broadly appropriate type of punishment may not hold the most value, as it may be the entire prosecution and trial process that is deemed to hold the most good as for instance a display of even-handed justice and public accountability. In such instances, the positive consequences that may come out of the plea bargaining process include, truth telling, the public expression of remorse for crimes committed, and, on some occasions, information or evidence on another defendant. Each of these are often cited as justifications for the practice of plea bargaining in international war crime tribunals (Tieger and Shin 2005; Combs 2007; Jorgensen 2002). In this context, the reduced sentence a defendant might receive is outweighed by the benefit of the plea bargain as reducing the punishment and receiving information in exchange, increases the overall happiness. According to

Bentham, ‘it is cruel to expose even the guilty to useless suffering.’ (2004) A controversial example of this is that, after the end of World War Two, a number of Nazis were shielded from criminal prosecution because of their utility in advancing strategic intelligence, providing assistance to war crimes prosecutors, acting as penetration agents in neo-Nazi groups and armament goals in the cold war (Ingram 2006: 120). Of course, in the examples given above there will always be people who are aggrieved and who have not personally benefited by the actions taken. The essential thing for classic utilitarianism is that each person’s material interests in

securing a positive outcome are considered equally and the action that optimises the best consequences for the most people is selected as the right one to take. For its consequentialist orientation a decision is the right one, and therefore ‘works’ if, but only if, the overall perceived likely benefits of an action outweigh the likely costs. There is clearly an utilitarian dimension to any form of ‘cost benefit’ analysis deployed in, say, a legal system.

Another important aspect of utilitarianism is that when following its principle that and the action that is likely to brings about the most happiness or pleasure is the one that should be selected and applied, it must consider everybody’s interests equally without discrimination, and in a reciprocal manner. This is implied in Mill’s claim that:

In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as you would be done by and to love your neighbour as yourself, constitute the ideal perfection of the utilitarian morality. (Mill 2004: 288)

In light of this, it should also be noted that utilitarianism is said to be ‘monistic’, in that it only has one aim: to increase whatever affected parties understand as their measure of happiness, pleasure or overall welfare.

Bentham believed that the happiness created by an action could be calculated by what he called the *Felicific Calculus*. The grounds for this calculus were that there are always various aspects that need to be considered in order to assess the utility of an action. Bentham listed these in chapter IV of *An Introduction to the Principle of Morals and Legislation* (1987). The qualities he identified here included: intensity; duration; certainty; propinquity; fecundity; purity and extent.⁴¹ Bentham, unlike Mill, did not distinguish between the quality of pleasures in ranking some above others according to traditional high-cultural standards for example, only their quantity and intensity. Indeed, he stated that, ‘quality of pleasure being equal, pushpin is as good as

poetry'. In *Utilitarianism*, Mill (2004) had argued that it was not the quantity of pleasure that mattered but the quality. Mill's notion of utilitarianism distinguishes between higher and lower pleasures. Higher pleasures for example being attributed to the enjoyment of artistic, cultural, intellectual pleasures; and lower being those that human beings share with animals, which is 'mere' physical pleasure. He famously stated that, 'better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied' (Mill 2004: 281). Despite these differences, both Bentham and Mill's notion of utilitarianism might be seen as hedonistic, as they only include pleasure, happiness and how to maximize these as criterion for morally acceptable judgements and actions. The terms 'pleasure' and 'happiness' have, it would seem, fallen out of favour when applying utilitarian principles. Instead people in contemporary societies have more recently tended to use the related term 'welfare' (or 'best interests of the people'). However, the basic concepts remain, broadly speaking, similar.

When addressing utilitarianism, it is also important to be aware that there are two main variations of this doctrine. The first of these is 'Act Utilitarianism', which applies to individual acts, and suggests that an act can be considered to be right or wrong depending on whether committing that act would create or reduce the sum total of happiness. The second is 'Rule Utilitarianism', which applies to a system of rules that, if followed consistently by everyone, will tend to increase the overall happiness or welfare of society. Mill is generally considered as a Rule Utilitarian, as he believed that some rules, including legal and constitutional examples, have utilitarian justifications. He stated that, 'To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? I can give him no other reason than general utility.' (Mill 2004: 327). He also argued that it is sometimes right to violate general ethical rules if doing so

would lead to the greatest happiness:

[J]ustice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner. (Mill 2004: 337)

Within Rule Utilitarianism there are two variants. The first being ‘ideal’ Rule Utilitarianism, which holds that one should regulate ones actions by those rules that would maximise welfare if they were generally observed. The second is ‘actual’ Rule Utilitarianism which holds that one should comply with the rules actually accepted and observed in society in so far as acceptance of the rule maximises utility (Simmond 2006: 36). In short, Rule Utilitarianism weighs up a whole system of societal rules by how much happiness each produces, whereas, by contrast, Act Utilitarianism attempts to evaluate an individuals’ action in the same way.

A criticism of Act Utilitarianism is that it is very difficult to predict the outcomes of actions. To overcome this Bentham suggested a ‘rule of thumb’, which was, in a similar situation one should act/behave as they did in a previous situation, if that course of action brings about more happiness. In other words, decision-makers should assume a measure of regularity in human affairs based on general patterns of past events, which allows a measure of admittedly fallible generalisation.

Rule and Act Utilitarianism can both be explored through the use of plea bargaining. A pertinent example would be a complicated fraud case. In such an instance, there could be a large number of complicated documents entered into evidence, and there would likely be a number of expert witnesses called to give evidence. This would not only take a long time but would also cost a lot of money. Hence for prosecutors, entering into a plea deal might be desirable as this would save

substantial time and resources, not to mention that it would guarantee a conviction, understood as a generally beneficial outcome for all concerned, as the defendant would have already pleaded guilty. Here, the fact that a defendant would, as an incentive, almost certainly receive a lesser sentence than if they had been convicted after a full trial, could be justified by the wider benefits of resource and time saving. An Act Utilitarian would support a plea deal in a situation such as this as it would create the most happiness by delivering a conviction and saving scarce resources which are thereby freed up for other cases. In this instance, and assuming that the legal system itself has not established rules about plea negotiations, a Rule Utilitarian might object to the use of plea bargaining as it would be seen as undermining the rules that had been set in place. Although following the process may not be as advantageous as plea bargaining, Rule Utilitarians would still prefer to follow the established rules on the basis that this alone optimises welfare. Smart calls this ‘blind rule worship.’ (1973: 10)

In summary, for the purposes of this chapter utilitarianism is concerned with bringing the greatest good to the greatest number of people. In relation to plea bargaining and international criminal law, the morality of negotiating with a defendant who is accused of being responsible for war crimes, crimes against humanity and genocide will be evaluated by the consequences that it brings. If the consequences are good in that they bring the greatest ‘happiness’ to the greatest number of people, then under utilitarianism the practice of plea bargaining is deemed good and should be encouraged. If the negotiations bring about undesirable consequences then plea bargaining is bad and used not be used. Having explored the basic elements of classic utilitarianism understood as a theory of moral justification relevant to legal decision-making in general, I will now analyse the practice of plea bargaining, taking and applying a utilitarian perspective to its use and its legitimacy in

the contexts of War Crime Tribunals.

3.2 Utilitarianism in Practice: Plea Bargaining in International War Crime Tribunals

There is no obvious criminological basis for punishing an offender who pleads guilty less severely than one who elects to go to trial via a non-guilty plea. (Bargaric and Brebner 2002: 51). However, there are strong utilitarian reasons that favour prosecutor's employing the use of plea bargaining. The 'Statement of Purpose' of the Sentence Guideline Council Guidelines (SGC guidelines) sets out the main reasons for the use of plea bargaining:

A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concerns about having to give evidence. (Para 2.1)

Many of these justifications and benefits are not just ring fenced for domestic jurisdiction and also ring true when it comes to plea bargaining in International War Crime Tribunals. Each of these claimed utilitarian benefits will now be discussed in turn.

3.2.1 Efficiency

The most persuasive utilitarian justification for favouring the use of plea bargaining is that of efficiency.⁴² The main feature of 'efficiency' in the context of international tribunals is that it reduces the economic pressures placed upon them in a context of necessarily limited finances. This is particularly relevant when full trials cost a lot of what is in fact often taxpayer's money.⁴³ A plea of guilty in such instances, as

opposed to a full trial, would save considerably on the court's resources, allowing them to focus the use their resources on contested trials. As Dixon and Demirdjian put it, plea bargaining is an 'obvious shortcut to the tribunal's busy schedule.' (2005: 694) This serves as a good example of the utilitarian reasoning for the use of plea bargaining, especially for the tribunals, as most people pay taxes and saving collective money increases the general welfare of society. From a utilitarian viewpoint then, it would be better to enter into a plea bargain to avoid unnecessarily lengthy trials and prevent spiralling trial costs where, on balance, the beneficial side of this overrides any likely negative outcomes. Alongside this, the fact that defendants who have secured a plea bargaining may give evidence against their co-accused or other defendants, would also enable the prosecution to build stronger arguments in other cases, and use the resources at their disposal to gather other evidence for these possibly higher value trials.

Cases that are contested are generally in the criminal justice system for a longer length of time than those that are disposed of by guilty pleas, thus adding to the court's backlog of cases. This can be seen at the ICTY and the ICTR, where there have been numerous extensions to the duration of trials when the tribunals should really have been wound up and moved on (Interview with Pittman 2010). A current example includes that of ICTY defendant Vojislav Seselj (IT-03-67-T) who has been in the Tribunal's custody since 2003. His trial has been postponed on number of occasions for varying reasons such as the defendant's poor health to the defendant been disruptive and at one point this particular defendant went on hunger strike. Therefore, another utilitarian aspect of plea bargaining would be that it, in some cases at least, contributes to the efficiency and smooth running of the court by freeing up time which could be better used to try contested cases. There have been a number of judgements in plea bargained cases that cite this to be a valuable justification for the

advancement of guilty pleas in war crime tribunals. The ICTY praised the guilty plea process for ‘securing administrative efficiency’ (*Erdemovic*) and for the ‘substantial savings of international time and resources’ (*Plavsic*) as well as ‘saving the international tribunal the time and effort of a lengthy investigation and trial.’ (*Sikirica*) (Petrig 2008: 27) Even former ICTY President Theodor Meron stated in 2003 that now that the Tribunal is ‘running at full steam’ it ‘cannot try all the defendants.’ (Meron 2003)

This perspective would, therefore, see the extensive use of plea bargaining as simply, ‘part of the court’s coming of age.’ (Scharf 2004: 1076) Although the ICTR has not been involved in as many plea bargaining cases as the ICTY, it has followed suite and claims trial and financial efficiency as the grounds to enter into negotiations with an accused.⁴⁴ The SCSL sought to enter in to plea agreements for a number of reasons but it is hard not to consider financial efficiency to be the overriding reason for the acceptance of negotiated guilty pleas in exchange for reduced sentences as the former Registrar stated, when discussing the funding arrangements for the SCSL, ‘that the court is not lean and mean, but anorexic.’ (Dougherty 2004: 324; Letter to Kofi Annan on Financial Contributions to the SCSL, Human Rights Watch, 21 May 2003) Indeed, Scharf has speculated that, ‘[P]lea bargaining is also expected to play a role in the operation of other international and hybrid courts, including the special court for Sierra Leone, the permanent International Criminal Court and the Iraqi Special Tribunal.’ (Scharf 2004: 1070)

One might argue that the ICTY and ICTR could have operated more efficiently if they had engaged in even wider plea bargaining (Interview with Crane 2009). Indeed, Wayde Pittman has speculated that the ICTR had not entered into plea bargaining as much as the ICTY due to the fact there are still a number of fugitives at the ICTR. Certainly, if there was a sudden increase in the number of people bought to

trial at the same time, as there was in 2005 at the ICTY, this may have resulted in an increased use of plea bargaining at the ICTR in order to decrease the strain on the tribunal and the professionals working within would come under (Interview with Pittman 2010).⁴⁵ It might be argued that this is evidenced by the case of *Damir Dosen* (IT-95-8).⁴⁶ Here, the prosecutorial team entered into a plea bargain, even after the presentation of their case, at the Rule 98 bis stage as the same prosecutorial team was concurrently preparing for trial in the *Slobodan Milosevic* case.

Other occasions where plea agreements also have the potential to speed up trials are where defendants get ill during their trial, or are already in bad health slowing down trials because days have to be taken off in order for them to recuperate (Interview with Pittman 2010; Interview with Murphy 2010). This is not to say that this is universal and it is unlikely that the prosecution in the *Mladic* case (IT-09-92) will consider bad health as reasonable grounds to enter into negotiations with the defendant, as beneficial guilty plea have become to the tribunals, it would seem that some defendants and their cases are too ‘big’ to be disposed of through a negotiated plea. The utilitarian value of any admission of guilt from a defendant as notorious as General Mladic would presumably pale in comparison to an actual finding of guilt after a full and vigorous trial. It should also be noted that an increased number of plea agreements would bring about a greater number of convictions than full trials which in itself would be considered as rendering utilitarian benefits such as more perpetrators of atrocities being punished, more people being willing to admit their culpability, and a shedding of additional light on what happened which in turn helps build a more complete record of the events in question (Combs 2007: 45-57).

There are a number of prominent academics, such as Alschuler (1981) and Fisher (2003), who believe that generally the sentences received after entering into

plea negotiations are inappropriate as they are too lenient. However, the concept of an ‘appropriate sentence’ may differ depending on what the objectives of the criminal justice system in place are. A criminal system that is based on retribution would suggest a defendant should get a sentence of what is deserved in relation to the crime committed. In such circumstances, offering lower sentences in exchange for a guilty plea could undermine the purpose of sentencing a criminal. In a system that adheres to the utilitarian justifications for punishing criminals, the sentence received should incapacitate the perpetrator, act as a deterrent, or go towards their rehabilitation. Hence, lower sentences obtained through plea negotiations may be justifiable. However, when ‘rewarding’ defendants for admitting their guilt, it is worth bearing in mind that the sentences received should not be so discounted that it would appear that persons who elect to go to trial are punished with more severe sentences after conviction as, from a utilitarian perspective, it is not proper to punish a person excessively. As Mill states:

[I]t is universally considered just that each person should obtain that ... which he deserves; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most emphatic form in which the idea of justice is conceived by the general mind. (Mill 2004: 317)

[A]ll punishment is mischief: all punishment is itself is evil. Upon the principle of utility, if ought at all to be admitted, it ought only to be admitted is as far as it promises to exclude some greater evil. (Bentham 2004: 97)

Here, Bentham argues that the sentence handed down to a perpetrator should be sufficient to achieve utilitarian goals of punishment. Aschuler asks us to calculate how much of a sentence discount would equal the amount of money saved at trial by a guilty plea. He states that, ‘even to contemplate an exchange of human liberty (or of an interest strong enough to outweigh a defendants interest in liberty) for a purely economic benefit may seem to trivialise its value.’ (Aschuler 1981: 671) In light of this I feel that it is worth noting that the money saving and speedy trial completion

effects that comes from plea bargaining have been important reasons for its introduction into the international criminal system not just desirable effects or by products of it. Indeed, this is echoed in the statements made and already referred to by Wayde Pittman and Professor David Crane.

3.2.2 Other Utilitarian Justifications for Plea Bargaining

There are also a number of other utilitarian justifications.⁴⁷ One is the hope that the negotiating defendant will act as a witness for the prosecution in other disputed cases, or give vital insider information to the Office of the Prosecutor. This is important on utilitarian grounds for a number of reasons that I will discuss later in this chapter. Here it is worth noting the fact that through this process there would be a witness who was willing to give evidence which once again would save the courts time and resources as the prosecution would not have to look further afield for other perhaps less knowledgeable witnesses and prepare them for trial. This in turn would no doubt work towards the smoother running of the tribunals.

The notion of a defendant becoming a witness in exchange for a reduced sentence is a significant bargaining chip. As former SCSL Chief Prosecutor David Crane argues, plea bargaining a defendant, ‘should work for you, and move the case along’ (Interview with Crane 2009). With this in mind, at the SCSL the prosecutors set out a strategy through which they identified which persons to enter into negotiations with, or use as insider informants, and those with whom they would not. Reflecting this, Crane said that, ‘plea bargaining was clearly a possibility’ and as part of their strategy it was, ‘decided which defendants would be bought into the plea bargaining process’ as ‘plea bargaining done without association with the overall strategy in some cases may be dangerous, as you don’t know what the ramifications

are.' (Interview with Crane 2009) However, as noted earlier, insider evidence obtained as a result of the negotiations can help gain knowledge that would otherwise be difficult, costly and ultimately time consuming to acquire. Confirming this, Judge Antonio Cassese stated that, when asking the former Chief Prosecutor for the ICTY and ICTR for advice, she told him, 'you have to find an insider. If you don't you're lost.' (Stuart and Simons 2010: 86) This response highlights that this is an important utilitarian factor not only in its own right but that it most definitely aides the efficiency justifications for plea bargaining in war crime tribunals.

There are also a number of other ways in which war crime tribunals can be made more efficient without resorting to the use of plea bargaining. Scharf points to two very practical measures. The first one is that these tribunals should be more selective in issuing indictments, thus reserving international criminal tribunals for the highest level of perpetrators. The second is that tribunals should adopt a broader idea of judicial notice where facts are generally accepted and do not have to be re-established again in each new trial (Scharf 2004: 1080). Although these practices may indeed help tribunals conserve their resources, they will not do so to the same extent as plea bargaining. This is reflected in the fact that whilst the SCSL adopted a number of practices and strategies to help tribunals run more resourcefully, these did not relieve the prosecution of the desire to enter into plea bargaining if the opportunity arose (Interview with Crane 2009; Interview with De Silva 2010).

3.2.3 Showing Remorse as a Utilitarian Factor in Plea Bargaining

Another justification for the use of plea bargaining under the principle of utilitarianism is that the defendant may show or express remorse for what they have done. This argument asserts that the showing of remorse goes some way towards the

rehabilitation of a perpetrator. In turn, this is one of the major utilitarian justifications for punishment. Heart-felt apologies may also go towards easing tensions in the affected regions and aiding reconciliation.

The expression of remorse is a desirable aspect of admitting one's guilt in many jurisdictions, such as in Japan where apologies and other displays of remorse are seen as substantial benefits (Combs, 2007: 146). However, showing remorse in others, such as in the UK, is not always an essential component. In the context of the international tribunals, even when remorse is not publically shown, a guilty plea is still considered to constitute a mitigating factor (Para 2.3 of SCG Guidelines). The SCG Guidelines suggest that, 'The maximum reduction will be given only where the offender indicates willingness to admit guilt at the first reasonable opportunity' (Para 4.3 SCG Guidelines) (emphasis in the original). Significantly, and in contrast to the UK, the international criminal courts, when sentencing, do consider remorse to be a significant mitigating factor. In fact, they consider it to be of such significance that the ICTY has a section on their website entitled 'Statements of Guilt' in which, amongst other things, defendants express their remorse at their actions not only to the Trial Chamber but also to the wider public. So important is this deemed to be that it has been made available on-line, and one is able to now watch the defendants give these statements on the ICTY's *You Tube* channel. When looking at the ICTY's case law regarding guilty pleas, the Court it seems stresses that the display of remorse is a mitigating factor as it helps to encourage reconciliation in the (Combs 2001: 151-152). Therefore if by putting these statements on the internet increasing the audience, it would therefore follow that the more people who see these statements the greater the potential reconciliatory effect. As a side note, in day to day life we tend to feel people who are remorseful when admitting their mistakes are more truthful. In relation to international crimes, the statement of facts of the defendants who show

remorse may be perceived as more truthful than a defendant's who is not as apologetic. Consequently showing remorse when pleading guilty may well increase the overall utilitarian effect of plea bargaining.⁴⁸

Whilst it is therefore seemingly unquestioned by many that showing remorse is a positive thing, Bagaric and Amarasekara (2001) argue that there is in fact no strictly doctrinal justification for an offender to receive leniency because they feel sorry for their actions. Although their theoretical argument is sound, the actual, real life influence of remorse in relation to the practice of sentencing is plain to see, especially when positioned in relation to the ideals of utilitarianism.⁴⁹ Generally, the people that become defendants before war crime tribunals are those who have held power and managed to engender popular support for their ideas and actions during times of war. Therefore, given their position and ability to organise, encourage and implement the war crimes they are charged with, it is then not unreasonable to argue that if such a person was to display genuine and public remorse it would potentially go some way towards undercutting the ideologies used to justify mass violence as a legitimate form of action.

But what actually is remorse? Bagaric and Amarasekara say that it is, 'the feeling of regret or sorrow for what one has done.' (2001: 364) Although this may be true, Tudor, in a 2005 article, has critiqued their position offering a more encompassing and workable definition, especially for the purposes of war crimes trials, of remorse:

Remorse is an experience involving a particular complex of dynamically interrelated elements of feeling, understanding, desire and will. More specifically, it involves the kind of suffering felt by someone who acknowledges a wrong they have done to another person, who regrets doing it and wishes that they had not done it, who now desires somehow to repair the harm done and somehow to redeem themselves and who at some stage actually wills to action in some way in relation to that end (whether ultimately 'successfully' or not). This complex experience, moreover, takes place over a period of time and is not a passing sensation. (Tudor 2005: 761)

In the scholarship on international war crime tribunals, there is a long standing relationship between the issue of remorse and sentencing. In fact, it has been said that, ‘remorse is a bit of evidence that is important to consider.’ (Interview with Pittman 2010) This relationship was first established at the IMT where the defendant Albert Speer not only pleaded guilty but also expressed remorse and repentance. As a result, he was convicted mainly for his use of slave labour and received a relatively lenient sentence of 20 years. Benjamin Ferencz, a Nuremberg prosecutor, when asked what difference it would have made if any of his accused showed remorse at the tribunal, said:

I think I wouldn’t have tried him. I was prosecuting people who tried to justify their crimes. We had many prisoners’ we could have put hundreds of people from the *Einsatzgruppen* on trial. We had identified many. The notion that the Nuremberg trials were doing justice is inaccurate. It was only a small sampling.

Going on to state that:

The judges probably would have been more lenient in their sentencing if they had seen remorse. One important consideration was always, what excuses did the accused have? I think this is one reason why not everybody was sentenced to death. (Stuart and Simons, 2009: 22)

In more contemporary war crime tribunals, the issue of remorse was established as a mitigating factor in the 1996 case of *Drazen Erdemovic* (IT-96-22), which coincidentally was also the first case to be dealt with by a guilty plea. Tieger points out that little attention was given to the objective content of the defendant’s actual statement of remorse which stated that, ‘I only wish to say that I feel sorry for all the victims in the former [sic] Bosnia and Herzegovina regardless of their nationality.’ (Sentencing Judgement: Para.15), stating that the Trial Chamber gave more emphasis and time evaluating the sincerity of his remorse (Tieger 2003: 780). This was presumably done in order to limit the influence of statements of remorse that were self- serving, and to prevent any potential credit given to an unremorseful defendant

who has merely given an eloquent public apology, or even to distinguish a defendant who is very sorry, but in fact only sorry that they had been caught and not for their criminal behaviour. In the case of *Erdemovic*, the chamber relied on a statement given by an ICTY investigator who said that, ‘he had no doubt that the accused’s feelings of sorrow and remorse were genuine and real.’ (Tieger 2003: 780) Following this, the ICTY continued emphasising and evaluating the genuineness of any remorse put before it. In *Jelisic* (IT-95-10), the court relied upon their appointed psychiatrist who did not support any claims of sincerity in the remorse expressed by this defendant. The Trial Chamber reasserted, as they did in *Erdemovic*, the need for the remorse to be genuine. When discussing whether he had seen true remorse at the ICTY Judge Cassese said, ‘only once I saw remorse, in Drazen Erdemovic.’ He goes on to say that, ‘genuine remorse, I think, is very important. On that occasion I saw that somebody as human as I am happened to commit a crime because he found himself in the maelstrom of war ... I know that Erdemovic committed terrible crimes, he killed maybe 70 people, but I saw that he was really repenting.’ (Stuart and Simons, 2009: 87) However, in other instances, the court found assertions of remorse far less convincing and acted accordingly.

There are of course a number of possibilities why the court found Goran Jelisic’s particular expression of remorse wanting, even though the defendant pleaded guilty to thirty one charges out of thirty two. Geoffrey Nice QC indicated that there had been a number of disagreements that had taken place within the OTP regarding his genocide charge (Interview with Nice 2010). Jelisic had not shown any remorse before entering his plea, and apparently did not demonstrate any signs of remorse when shown photographs of himself carrying out these crimes. This coupled with the fact that he introduced himself as the ‘Serbian Adolf’ to his victims (IT-95-10-T: para. 102-3) probably influenced the Trial Chamber’s assessment that defendant was not

genuine in his remorse.

Therefore, the issue of remorse can be an important one when entering into plea negotiations as, to quote Wade Pittman: ‘judges are going to consider it as evidence, but the weight they attach to it depends on a person’s credibility.’ (Interview with Pittman 2010) In the case of *Jelisic*, it would seem that the fact that the Trial Chamber had found his remorse to be unconvincing was held to be an aggravating factor when it came to sentencing.

There are a number of other ways in which remorse may be expressed rather than in court or within a written statement showing sorrow. For example, it may be argued that if a defendant pleaded guilty and was willing to work with the prosecution they are almost automatically showing remorse in a material way by these deeds alone.⁵⁰ Desmond De Silva has noted that in doing so a defendant may be, ‘exposing himself and his family to danger’ (De Silva, 2010) and this in itself should be worthy of credit which may ultimately be reflected in the sentence received.⁵¹ Two such ICTY cases, which serve as good examples, are *Drazen Erdemovic* (IT-96-22) and *Milan Babic* (IT-03-72). Here both defendants were indeed very contrite and agreed to work with the prosecution with both giving evidence in other trials (Interview with Pittman 2010; Interview with Nice 2010). This arguably has more advantageous consequences as once again it saves the courts resources and helps with gaining information and evidence that may otherwise prove difficult, if not impossible to obtain.

It is not easy to see how much this sort of remorse or such statements of remorse impact on post conflict societies and, more generally, the general international world community. According to Jonas Nilsson, the issue of remorse, if it is to have an effect in the affected regions then it ‘depends on how it is done’. He goes on to say that ‘a few of them had any effect in the region, some of them where very

open but some are very standard, self-serving' and are performed as something that, 'should be done.' (Interview with Nilsson 2010) This can be seen in a number of statements of remorse that have been received by modern day war crime tribunals, even to the point that defendants offer to work with the prosecution in order to take advantage of any leniency that is available to them, although they may not be genuinely contrite.

Wayne Jordash considered that in the SCSL judges were easily swayed by such self-serving statements of remorse, as, for example, in the instances of Morris Kallon and Issa Sesay (SCSL-04-15-T-1269)⁵² (Interview with Jordash 2010). Here, both defendants had been found guilty after a trial for similar crimes but there was a 10 year difference in the sentences that they received. According to Jordash, 'there is the remorse that is expressed by the individual and there is the remorse that the institution perceives through cooperation with the individual.' (Interview with Jordash 2010) This may be indicative of the fact that the SCSL was set up 2002 - some nine years after the ICTY. De Silva notes that he and his colleagues had the benefit of being able to draw on the experiences of the ICTY. As the prosecution staff at the SCSL knew that they would have to be able to rely on insider testimony as well as evidence received from defendants in order to achieve 'justice' in an economically and politically acceptable time frame (Interview with De Silva 2010).

3.2.4 Potential Dangers in Evaluating Remorse

When evaluating the genuineness of remorse there is a number of other factors that cannot be accounted for in the actual written law, such as the demeanour, tone or conduct of the defendant. Again two examples that illustrate this point are the ICTY *Erdemovic* case, and the SCSL *Sesay* case. A number of the practitioners I have

spoken to who work in international tribunals have mentioned that the atmosphere in the court room, a person's body language and the defendant's conduct in the Trial Chamber all play a part in evaluating their perceived level of genuineness. Evaluating the genuiness of remorse can be a very difficult task,⁵³ and it would seem Trial Chambers have on occasion got it wrong. Mrs Plavsic, who was released from prison in October 2009, and had previously offered statements of remorse, has since re-asserted her innocence (Nordren 2009).

When dealing with the issues that arise during war crime trials, it is hard not to identify with the emotions that the participants of that case feel and express through non-verbal action, as empathy is a very 'human' instinct. The experienced Judge should be able to distinguish between genuine feelings of remorse or anguish and emotions that have been, 'put on for show'. Of course, the prosecution also have to be experienced when evaluating whether remorse is genuine, or at least if it is useful for their case. Desmond De Silva reflects this opinion stating that, 'the people appointed as chief prosecutors of international criminal tribunals are people of great experience' and that they should be, 'well able to distinguish of those who are really deserving of the greatest credit.' (Interview with De Silva 2010) Of course, people are liable to get this wrong. When talking about *Plavsic*, former Chief Prosecutor of the ICTY and ICTR Carla Del Ponte stated, 'she got up during her sentencing hearing and read out a statement full of generalist *mea culpas* but lacking compelling detail. I listened to her admissions in horror, knowing she was saying nothing.' (Del Ponte 2008: 161) Despite this, at the time the Trial Chamber believed this admission to be genuine and felt that it would contribute towards the reconciliation effort in the Former Yugoslavia.

However, in different cultures there are different customs, principles and subsequently different interpretations of body language. If misunderstood or misread,

then this could create a potentially disastrous situation. For example a witness not looking at the judging panel or counsel when being question may be deemed to be not being truthful, or hiding something, but the reality maybe that, in some cultures not looking directly at a person is a sign of deference. This is of particular importance as the trials are broadcast over the internet and therefore potentially have a very wide audience who are also assessing the credibility of witnesses, in their own way.

This is not to say that in the future that this issue of the policy implications of identifications and assessment of ‘demeanor’ or remorse relevant to relevant to utilitarian calculus may not cause problems. A particular example maybe, when cultural differences are more pronounced between the trial participants, which in turn may lead to the misinterpretation of things, such as body language. In order to help limit any potential problems, in the future any attention given to the demeanour of defendants should rest on substantial and tangible evidence rather than on conjecture or speculation (*Tang*, 578 F.3d at 1276, 1278). Therefore, from a utilitarian perspective, the Trial Chamber should not only continue to examine the genuineness of any remorse shown but also evaluate this remorse according to specific cultural interpretations and differences that may occur between persons in the trial to ensure that there is a basis for giving credit to a defendant as part of the overall consequentialist balancing of costs and benefits.

3.2.5 Truth Telling and Historical Record

Before looking in greater depth at the role of truth telling in plea bargaining from a utilitarian perspective, it is useful to look at the general idea of truth telling in war crime tribunals, which of course is one of the main functions and aims of international war crime tribunals, as it is hoped that the truth telling function of these tribunals will

help create a historical account of what happened. Albie Sachs, a former judge in South Africa's Constitutional Court, has devised four rough categories of truth (Sachs 2005). The first is 'microscopic truth', which according to Sachs, 'whether in natural or social science, involves narrowing the field to a particular frame and excluding all variables except those to be measured. In a court of law, we pose and answer a particular question in a defined field. You identify, circumscribe and verify.' (2005: np) In other words, it is the truth that lawyers debate and the facts that have to be proved beyond a reasonable doubt (Harvey 2008: np). In the case of plea bargaining, this truth concerning 'what really happened,' is negotiated between the defence and the prosecution and facts do not have to be proved beyond a reasonable doubt. This is not necessarily a bad thing as facts that have been agreed upon may present a truer version of events than the ones that have been argued and debated over at a microscopic level in court. This is true even at the point at which investigations into Human Rights abuses are conducted. As Weizman, when discussing the Goldstone Report, which investigated Israel's actions in Gaza in 2009, puts it, '[A]ssuming the reliability of human witnesses in Gaza would inevitably be contested, the authors of the Report opted for an increased emphasis on objectivity.' (2010: 10) He went on to state that:

[T]he assumption is that, unlike victim testimony the scientific evidence produced by expert witnesses is more difficult to contest legally, that the testimony of 'things' – bullets and missile casing, ruins, medical and autopsy reports, tissues showing the mark of white phosphorous cannot be undermined by any 'suspect political subjectivity. (Weizman 2010: 10)

The second is 'logical truth'. That is, according to Sachs, 'the generalised truth of propositions, the logic inherent in certain statements. It is arrived at by deductive and inferential processes, the capacity of language to reflect what is typical in nature as experienced by humanity.' (Sachs 2005: np)

Sachs' third category of truth is, 'experiential truth'. This kind of truth is subjective as, in the context of war crime tribunals, the people often being called as witnesses have been steeped in a particular ideology and therefore the 'facts' that they are testifying to may be biased towards that ideology. Truth in these contexts then is rarely objective, and that is why courts of law test and debate it in such detail. When it comes to plea bargaining, the truth offered by the defendant may well be biased even though the actual crimes that are being admitted to are acknowledged by both parties. This would be the case in a fact bargain. This however may be complicated by the information that the version of facts the defendant is pleading guilty to maybe one that has been put forward by the OTP. As Zecevic explains when discussing the factual document that is required as part of the plea deal:

This document which is drafted by the OTP, contains certain facts and constructions which are important for OTP's theory of that particular case or some other future case. The accused are tempted to agree to such facts, even though some are obviously outside of their purview or knowledge, because they think naively that it can't hurt them to confirm a thing or two they have no knowledge about. Such document on the other hand is a useful tool for Office of the prosecution to establish some facts or some constructions which will help them further their case in current or some future proceedings, even though the OTP according to ICTY Jurisprudence cannot rely on it as adjudicated fact. (Interview with Zecevic 2011)

Such a situation has the potential to raise claims of victor's justice.

Sachs final concept of truth is 'dialogical truth'. He describes this thus:

[W]e all have different experiences of reality, and diverse interests and backgrounds that influence the meaning of experiences for ourselves. The debate between many contentions and points of view goes backwards and forwards, and a new synthesis emerges, is challenged, controverted, and a fresh debate ensues. The process is never-ending, there is no finalised truth. (Sachs 2005 np)

The Truth and Reconciliation Commissions (TRC), which I shall return to shortly, to a certain extent embody 'dialogic truth', which is generally a more holistic version of what has occurred as all positions in the conflict are heard. It is argued that this has

the potential to lead to, ‘opportunities for closure, healing and reconciliation’ (Kiss 2000: 69). This relates very closely to the notion of *Ubuntu* which is part of African philosophy and is a form of restorative justice. The idea of *Ubuntu* is that a person endures as a person through the recognition of other persons (Graybill 1998: 47). In other words, both the victim and perpetrator have to be able to recognise the ‘person’ or humanity in the other for *Ubuntu*. In dialogical truth the victim and the perpetrator are able to imagine the position the other was in, and is in presently. Therefore there would be no finite conclusion to this process. Dialogical truth may be seen as not compatible with judicial proceedings where there is an end to the process and guilt/blame is apportioned and someone is punished accordingly.

In the final record of an international war crime tribunal, there should only be one prospective of what really happened and there should be no room for differing positions. By which I mean if a defendant has been found guilty, that is to say that it would be generally accepted that certain atrocities occurred, a full final record would not leave any doubt for those who wish to deny such atrocities ever occurred. Again when it comes to plea bargaining, although compelling arguments have been put forward by Combs (2007) for plea agreements to include more restorative elements, in reality they never can be truly restorative. This is because there is no possibility for a dialogue between the parties to occur. This is due to the fact that in a criminal trial each party involved is protecting their own interests, and not that of the wider community. Much of the judicial legal process is concerned with finding the connections between microscopic truth and logical truth (Sachs 2005). This in turn produces *a kind of truth but not necessarily the truth*. Once plea bargaining is introduced, the possibility of even this occurring is diminished as the idea of the truth may be even further distorted.⁵⁴

One of the most candid exchanges with regard to a defendant pleading guilty took place in open court at the ICTY in the case of *Prosecutor v Kunarac* (IT-96-23&23/1). Although the defendant ended up pleading not guilty and going to trial, he initially wanted to plead guilty to one charge of rape as a Crime against Humanity but not guilty to three other counts that were concerned with the crime of torture. The prosecution stated in open court that they would, in exchange for a guilty plea to three counts, were willing to drop the count of torture as a Grave Breach stating that, ‘In regard to Article 2 -- count 42 -- we would be ready to withdraw this count, but about the other two counts, we would like to have some time for consideration.’ (9 March 1998) It is clear from subsequent conversations in open court (10 & 13 March 1998) that the crux of these negotiations centred around the facts and one of the reasons negotiations failed was because the defence and the prosecution could not agree upon what the facts were. Dragoljub Kunarac stated, ‘I am the only one who knows the real truth. I know why I said yesterday that I was guilty of count 41. I also know why the public prosecutor did not drop count 42.’ (10 March 1998) This exchange offers us the slightest insight into negotiations as the OTP publicly declared they would drop one count one day and the next day refused to drop any counts as they were unable to negotiate an agreed version of the facts. It also highlights one of the themes that run throughout this thesis that is the matter of truth in this area.

Different people have different versions of the truth and what the defendant may perceive to be truthful may not be what is acceptable as truth within conception of legal truth. It should also be noted that when discussing complex crimes where the different charges often relate to each other plea bargaining has the potential to prevent the ‘whole picture’ of what happened emerging. As Zecevic put it, ‘I am still not at all sure if the plea bargaining in the context of war crime tribunals is especially useful

tool, as the complexity of crimes is such that it is very hard to take one specific crime out of context of other crimes.' (Interview with Zecevic 2011)

When considering the role of truth telling in plea bargaining from a utilitarian perspective, the truth needs to be of a kind that will be acceptable to most people. This means that although there may be issues about the nuances about what is truthful both legally and factually, for it to be truly beneficial one must disregard these in order to bring about a truth that under the theory of utilitarianism is not concerned with this, but is a truth that the public and people in the post conflict society can accept. This of course means that Zecevic's assertions above may be redundant under utilitarianism.

3.2.6 Plea Bargaining and 'Agreed' Versions of the 'Truth'

It would seem that there are many ways in which the truth can be derived within international tribunals. To get a more complete version of the truth and historical record, a holistic approach should be taken where there are a number of aspects considered together. As Hirsh points out:

There are many different ways of producing truth: law, fiction, journalism, art, memoir, historiography, religion, science, astrology. All have their own rules, methods and norms, but also their own claims and purposes. If we understand these different approaches to truth-finding as social processes, then we do not have to judge that one is authentic and the others fake; but nor do we have to judge that they are all equally valid. While they overlap, they all have distinct objectives and ways of operating. (Hirsch 2003: 146)

He goes on to argue that the rules that govern these trials create a different method of producing a normative truth not a better version of truth (Hirsh 2003: 392). Having considered the different forms truth can take, I will now move on to look at the actual role of truth telling and the historical record in international criminal tribunals where

plea negotiations are concerned using a utilitarian perspective. When a defendant admits to their guilt they are saying, or at least recognising, that the alleged crimes happened and that they are responsible for them. In doing so, they may offer an explanation as to why they committed such crimes and furthermore give information about other defendants. In other words, '[P]lea agreements can generate a contribution to the historical record of inestimable value – the indispensable prospective of the perpetrator.' (Tieger and Shin 2005: 671) This gives rise to a number of restorative principles such as providing factual details about crimes that only the defendant could know about. For example, why a particular victim was chosen and how they were (mis)treated. This may also help to understand why such atrocities took place, undercutting the mythologies that encouraged nationalism, racism and other forms of hatred. Furthermore, it may highlight the manipulation and propaganda used to encourage violence. Such agreements also lead to information about crimes that others have committed or the involvement of other would be defendants, hence aiding the potential prosecution of other wrongdoers. Reiterating David Crane's earlier assertions that when entering into a plea agreement, 'you want the witness (defendant) to work for you' as this 'helps move the case along' (Interview with Crane 2009).

Another principle, which is significant from a societal perspective, is that the acknowledgement by a perpetrator that they were involved in committing these crimes helps undercut any denials that generally can follow on from mass human rights violations, and this serves as a utilitarian benefit to overall social welfare (Combs 2007: 171). This view was eloquently expressed by Desmond De Silva, who said, 'now people come along and say, "the Holocaust was invented in Hollywood" it's very strange is it not that the defendants at Nuremberg didn't say that these things never occurred'. He continued, 'for all those people that came along and said that it

was all rubbish, why did the defence at Nuremberg not come along and say it was all rubbish?' (Interview with De Silva 2010) The assumption is that a defendant is telling the truth and that goes towards establishing a truthful historical account of what has occurred. De Silva believes this is an important aspect of international criminal tribunals as they, 'create an independent record for some awful tragedy that happened for the people involved and the crimes that were committed.' Therefore, for him, tribunals, such as Nuremberg, 'preserve a record of all the terrible crimes committed for the record' (Interview with De Silva 2010).

In reality, the use of plea bargaining probably only develops a partially truthful historical record because defendants plead guilty to allegations that have only the vaguest details of the actual nature of the atrocities that occurred (*Prosecutor v Deronjic*).⁵⁵ This was the case in *Plavsic* where the defendant provided information on a number of things, some of which were in her own personal knowledge, such as 'what Krajisnik said, etc', and some, which she did not have direct knowledge of and 'didn't see herself', such as the commission of 'particular crimes in particular localities' (Interview with Nice 2010). Also, during plea negotiations defence counsel and the prosecution can spend months establishing a version of events they both agree upon potentially making the historical record an unnatural and synthesised truth (Interview with Jordash 2010). When discussing his clients' and his own experiences, Jordash stated that, 'you're trying to hatch out the best deal for yourself, there's truth and there's something a bit less than truth.' (Interview with Jordash 2010) This can be sharply contrasted with a full trial where most of the details relating to the crime, such as the who, the what, the when and the how, are admitted into the proceedings. Although a full trial does allow there to be more scope for more of the facts of what happened to be presented, one should be careful not to attach too much attention to

the establishment of a historical record as the truth established at such tribunals. As Louise Arbour argued, when speaking of her experiences as the chief prosecutor for the ICTY, ‘The courts cannot provide the historical record, because history leaves room for doubt, it can be revised. But justice binds itself to a permanent and official interpretation of facts, because it has a need for finality.’ (Stuart and Simons 2009: 28) This sentiment is also shared by Judge Liu Daquin who, when presiding at the *Vidoje Blagojevic* (IT-02-60) trial at the ICTY, cautioned both the defence and the prosecutor for their improper conduct and personal attacks on each other in court. He said, ‘This is a tribunal – and international court – not a truth and reconciliation commission... The massacre in Srebrenica is a very big issue, and historians – not this tribunal – should provide answers to many of the questions,’ and reminded the parties present that the ‘mandate of the Tribunal is limited in this respect.’ He went on to say, ‘It is the purpose of this tribunal to determine whether the accused is guilty or not guilty in respect of that incident.’ (Transcript 22nd June 2004)

Such reasoning is not new and can also be found in Hannah Arendt’s critique of the Eichmann trial. She too believed that the criminal trial should not introduce historical, political and educational objectives, but should only aim to determine the defendant’s guilt or innocence:

The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes- ‘the making of a record of the Hitler regime...’ can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgement and to mete out due punishment. (Arendt 1963: 251)

Another utilitarian aspect of plea bargaining, as already mentioned, is that the potential it offers for charges to be dropped or lead to charge bargaining where questions of the balance of costs and benefits also come to the fore. This aspect definitely impairs the achievement of creating a historic record as certain charges,

often the most gravest of crimes, are removed from the court's agenda (*Prosecutor v Plavsic*, *Prosecutor v Momir Nikolic*). This does not mean that the agreed upon facts and charges are fictional. One of the main features of the plea bargaining process is that there needs to be a factual basis to what the defendant is pleading guilty to, and this theoretically gives a very narrow scope for untruthful charges and statements. The onus then is on the judges to make sure this is upheld, and neither the prosecution nor the defence is abusing the plea bargaining process. This therefore means that there would need to be a factual basis to the crimes which the defendant is pleading guilty to. The defendant would also be able to answer questions that are posed to them by the judges or undergo a cross examination. Not only would this give a more nuanced version of what happened and why, it would also ensure that the defendant is in fact pleading guilty to crimes committed by themselves and that they are guilty of (Interview with Pittman 2010).

When talking about truth telling in the context of international criminal courts it is important not to confuse the role of truth telling with judgements, which of course is the primary function of criminal courts. As discussed above, not only are there a number of different truths, there are also a number of different versions of the truth and different ways of obtaining it. Although one of the purposes of these tribunals is to formulate a truthful record of what happened, it does not produce the whole truth by any stretch of the imagination. As the prosecution may wish to conceal embarrassing aspects of the trials, for example, one of the reasons the ICTY negotiated a plea deal with Stevan Todorovic was because they did not want the details of his arrest, which was done illegally, to be challenged. No doubt the Trial Chamber came under great pressure from NATO to make the allegations 'disappear'. The official press release of the ICTY states:

On 13 December 2000 there was a hearing on the joint ex parte and confidential motion filed by the Office of the Prosecutor and counsel for Stevan Todorovic, dated 29 November 2000. The joint motion reflected a negotiated plea agreement whereby Stevan Todorovic would plead “guilty” to Count 1 of the indictment, namely persecutions on political, racial and religious grounds, as a crime against humanity. The agreement also provided that the accused would withdraw all Motions pending before the Trial Chamber relating to the evidentiary hearing regarding the circumstances of his arrest and his request for judicial assistance. Specifically, he would withdraw the allegations that his arrest was unlawful and that SFOR or NATO was involved in any unlawful activity in relation to his arrest. (Press Release, 11 December 2001)

Plea bargaining may also occur when issues pertaining to the case, if disclosed at trial, may jeopardise national security or, in the case of *Todorovic*, embarrass an international legal institution. The use of plea bargaining restricts microscopic truth telling and therefore prevents a more encompassing historical record. Consequently, any truth that is generated through the use of plea bargaining must be concrete. Also situations where defendants claim at a later date that they were indeed innocent and pleaded guilty for other reasons, as in the case of Mrs Plavsic, cannot occur, and the defendant’s guilt cannot be contested at a later date (Nordren 2009).

Despite these criticisms, even the synthesised truth that comes with plea bargaining, along with an admission of guilt, may ultimately generate tangible outcomes that need to be included within the overall utilitarian calculus of costs and benefits in relation to the consequences of different options. It may be a powerful creator of a historical record that is acceptable to post conflict societies and the world in general as some blame and responsibility has been acknowledged and punishment apportioned. So whilst guilty pleas and negotiated justice do not produce *the* truth they do, if done genuinely, produce *a* truth that is not only acceptable for the courts but also the people the courts wish to bring justice to. As Oscar Wilde said, ‘the truth is rarely pure and never simple.’ (Wilde 1895)

3.2.7 Plea Bargaining, Truth, and Reconciliation, within Post Conflict Societies

Many commentators argue that one of the outcomes of international criminal justice that needs to be included in any utilitarian calculus is that it has the potential to bring about reconciliation in the post conflict societies they work with. For example Graham Blewitt, former Deputy Prosecutor at the ICTY, holds that '[t]he ICTY was established, in part, as a measure for the maintenance of international peace and security, through its ability to contribute to reconciliation in the territorial States torn by violence and disunity.' (Blewitt 2006: 151)⁵⁶ Reconciliation is a consequentialist aspect of plea bargaining, and this is a factor important mainly in International War Crime Tribunals where whole societies are coming to terms with mass violence and atrocity. Admitting guilt and culpability for the crimes that have occurred have contributed towards helping communities to find closure, allowing them to move forward without animosity towards their previous enemies. Coming to terms with the atrocity that has occurred, according to Dr Alex Boraine, the former vice chair of South Africa's Truth and Reconciliation Commission, is a precondition for reconciliation since defendants who acknowledge their responsibility may show victim communities that they accept the role that they have played in their suffering. Boraine himself, testified in the *Plavsic* case that the reconciliation aspect of plea bargaining is only effective if the facts of the crimes are disclosed fully and the victims are put at the centre of the proceeding instead of the defendant whether that be judicial or non-judicial proceedings such as a truth and reconciliation commission (*Plavsic*, Judgement February 2003, Paragraph 75-77; Schuon 2010: 222).

There has, over the past few years, been some debate about the reconciliatory effect of plea bargaining in War Crime Tribunals defined as a positive benefit to

overall social welfare (Henham 2003, Henham and Findlay 2005, Combs 2007). With Jorgensen asserting that an acknowledgement of guilt is arguably more significant for reconciliation than a finding of guilt (Jorgensen 2002: 406).

One important, yet predictable, factor to consider when discussing utilitarian justifications of plea bargaining is that this practice does in fact increase the sheer number of convictions. This occurs in a context where for many including victim groups that is or should be precisely the central aim of such tribunals namely, to ensure that as many of those responsible for war crimes are punished, rather than only a small sample receiving exemplary justice. Furthermore, as an increase in the number of convictions could indeed aide post conflict societies feeling safer and having more confidence in the criminal justice system that has been imposed upon them. Of course, this would be through the utilitarian justifications of punishment that would lead to incapacitation, deterrence and rehabilitation. Also, the increased number of convictions may make it more difficult for people to revise history, and possibly help communities to come to terms with the knowledge that their politicians and leaders had used nationalist propaganda to manipulate them.

Having put forward this argument of a positive outcome relevant to utilitarian cost benefit analysis, we also need to recognise the possible limitations of plea bargains in specific contexts. For example, it is interesting to note that Slobodan Zecevic, who was involved in two plea bargains at the ICTY, said, ‘I am pretty sure that the victims perceive the plea bargains as a way out for perpetrators and they are very unhappy about it. There is still a fierce opposition for plea bargains in the region. On top plea bargains do not help reconciliation in the post conflict societies.’ (Interview with Zecevic 2011) This sentiment is echoed by Moghalu who, when debating the reconciliatory effect of having full trials where evidence is heard and debated, says, ‘[D]eep seated resentments – key obstacles to re-conciliation – are

removed and people on different sides of the divide can feel that a clean slate has been provided for.' (Moghalu 2004: 216)

When considering the effect of individual defendants pleading guilty the issue of reconciliation only became an explicitly reasoned factor after the *Plavsic* case. However, this does not mean that reconciliation was not a mitigating factor in other guilty plea cases. It was, but it was only merely asserted as one, and never reasoned as one (Schuon 2010: 222). In *Plavsic*, the prosecution justified their lenient sentence recommendation by saying the guilty plea was 'an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation' (*Plavsic* Sentencing Brief, Paragraph 24). When reflecting on the defendant's guilty plea, the Trial Chamber felt that by acknowledging her crimes Mrs Plavsic did indeed promote reconciliation (*Plavsic* Judgement February, 2003, Paragraph 77). Even Alex Boraine testified to the positive reconciliatory effect Mrs Plavsic's admission of guilt had on her. This was not just a solitary case as this train of thinking went on in other cases. In *Obrenovic* (IT-02-60/2-S) the prosecution determined that this defendant's guilty plea, 'represents a significant effort towards the advancement of reconciliation.' (Sentencing Brief, Paragraph 280). In other cases the Trial Chambers have felt that reconciliation is also aided by guilty pleas as they help establish a true record of events. The case of *Momir Nikolic* is an example of this where the Trial Chamber referred to a statement given by a survivor of the Srebrenica massacre who spoke about the effect of *Nikolic*'s guilty plea:

The confessions have bought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgement I have been looking for these past eight years. While far from an apology, these admissions are a start. We Bosnian Muslims no longer have to prove we were victims. Our friends and cousins, fathers and brothers were killed – we no longer have to prove they were innocent. (*Prosecutor v Nikolic* (IT-02-60/1-S Section A, Judgment, 2 December 2003, Paragraph 146)

Similarly, in the *Deronjic* case, a victim testified to the beneficial attributes of his

guilty plea:

I saw Miroslav Deronjic plead guilty on television. The Bosnian Muslims in the community that I have spoken to, felt relieved because he admitted his guilt. This is a positive thing and can heal the wounds of the community provided that he is punished adequately. (*Prosecutor v Deronjic* IT-02-61-S Judgment, 30 March 2004, Paragraph 238)

In the cases of *Milan Babic* and *Momir Nikolic* the victims have also expressed that pleading guilty has positive reconciliatory effects.

Schoun (2010: 224) points out that whilst the ICTY does recognise that there is a reconciliatory effect of pleading guilty taking it in to consideration when deciding what sentence to pass, the tribunal does not assert this formally in its case law.

Instead, it uses words such as ‘may’ promote reconciliation (*Cesic* IT-95-10/1-S) or ‘can’ (*Momir Nikolic*) and ‘has the potential to strengthen the foundations for reconciliation’ (*Miodrag Jokic* IT-01-42/1-S, Judgement, 18 March 2004, Paragraph 77). Whilst this aspect could be better asserted by the use of more precisely defined words, the ICTR has generally followed suit. One exception is the case of *Prosecutor v Bisengimana* (ICTR-00-60-T) where the Chamber held that the defendant’s plea ‘will assist the administration of justice as well as in national reconciliation.’ (Judgement, April 13 2006, Paragraph 128) Therefore, when sentencing a defendant the Trial Chamber should be clear in terms of what factors they consider to be mitigating and aggravating and how much weight they are giving to each. Therefore making the sentencing process more transparent, not only for the parties involved in the trial but also the victim communities and the general public, will create a better understanding of why a certain sentence was given. This, in turn, offers the possibility of stopping the feeling that the sentences handed out are too lenient and places other defendants who follow in a better position to make informed decisions as to whether they will plead guilty or not.

The supposed reconciliatory effects of plea bargaining are considered as

mitigating factors when establishing an appropriate sentence for a defendant. Alex Boraine, in *Plavsic*, stated that full disclosures of the facts are needed for reconciliation to take place. However, this does not always happen when dealing with plea bargains. The very nature of plea bargains suggests that the prosecution and the defence agree upon a version of the actual facts, agree on what witnesses should be called, and not to mention that the plea itself has been negotiated. This is done in order to reach a mutually beneficial outcome, and the notion of promoting reconciliation is only an afterthought, although a very influential one.

3.2.8 Plea Bargaining and Truth and Reconciliation: Utilitarianism in action

It has been the case in a number of post conflict societies that the governments' establish a Truth and Reconciliation Commission, such as the ones seen in South Africa and Argentina. As already touched upon, this is where people have been able to come forward with information about the crimes committed without the fear of criminal prosecutions. On the whole, this has been seen to be a successful endeavour with some eighteen countries choosing to set up Truth and Reconciliation Commissions of some sort. This has enabled the establishment of a truthful record of what happened, why it happened and how it happened in the hope that this process would bring closure to the people affected, and in turn bring some form of justice. The commissions also act as a learning tool from which people can learn how not to repeat the past human rights violations.

A Truth and Reconciliation Commission was set up in Sierra Leone which worked alongside the SCSL. This TRC was headed by Bishop Joseph Humper, from the United Methodist Church.⁵⁷ The Commission was established as a condition of the Lome Peace Accord in order to, 'create an impartial historical record of violations and

abuses of human rights and international humanitarian law related to the armed conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repletion of the violations and abuses suffered.'(The Truth and Reconciliation Commission Act 2000, Parliament of Sierra Leone, 2000)

There are also a number of community based grass roots initiatives that take place which are aimed at helping people reconcile their differences and move forward. Ultimately, the reasons for criminal proceedings are based around retributive themes and the need for some sort of punishment. This is the case even with defendants who pleading guilty where there is still a strong element of retributive justice as they are sentenced for the crimes committed. By in large then, such institutions are concerned with retributive justice. However, they are usually coupled with a lack of any actual concrete evidence concerning any positive role of reconciliation after a guilty plea. Hence, I would argue that, when determining a defendant's sentence afterwards, the Trial Chamber should not, at least not by reference to utilitarian criteria, regard this as one of the major mitigating factors that they consider. Indeed, just as the chambers recognise that there *may* be a positive effect on reconciliation they should not pass sentence as if there *is* automatically a positive effect on the resolution process when a defendant pleads guilty. Likewise, if a Trial Chamber does believe the defendant's contrition and that the guilty plea has had a positive effect regarding the reconciliation they should then state this in their judgement and not just in the sentence they hand down. This is not to say that TRC's are not desirable, but it is worth noting that David Crane, former Chief Prosecutor of the SCSL said that, in South Africa, the TRC encouraged people to, 'come and tell the truth, and if they came and told the truth and admitted there guilt then there was no prosecution, and that is a plea bargain.'

(Interview with Crane 2009)

Although a plea of guilty is normally met with a sentence reduction, the reasons why one would enter into plea negotiations can be very different to the rationale for testifying in front of a TRC. When it comes to plea bargaining, it is rarely the case that a defendant pleads guilty solely for the reasons that they want to tell the truth. There are of course exceptions to this (*Erdemovic*) but normally there is a level of discussion that takes place before the guilty plea regarding what facts will be submitted to the courts. However, in the case of a TRC people are, ‘able to say their piece and get their agony off their chest and tell the world what they felt and what they were involved in, without any penalties.’ (Interview with De Silva 2010) There is potentially a greater chance of reconciliation when the person is admitting their involvement in atrocities and is testifying in their own words. This allows for a realist truth rather than the agreed upon forensic truth that criminal trials and plea bargains bring about.

War crime trials do not automatically help in the reconciliation process as they are not a panacea to the problems in a post conflict society. The tribunal’s work must be complemented with other transnational justice initiatives, and community based programs for it to aid reconciliation. This is also true when admitting guilt and giving insider evidence does not aid post conflict societies’ reconciliation processes. When reviewing the case law governing guilty pleas and plea bargaining there a disproportionate amount of consideration to the role of reconciliation when sentencing and what the Trial Chambers are willing to commit to in their judgements. This can be shown by the victims outside the BiH State Court in the case of *Dusan Fustar* (IT-20-65). After initially pleading not guilty to charges brought against him at the ICTY, his case was referred to the BiH State Court, pursuant to Rule 11 *bis* of the ICTY’s Rules of Evidence and Procedure. He then entered in to a plea deal and pleaded guilty to crimes against humanity during his time as a shift commander at the Keraterm camp,

and received a nine year sentence. Clark notes, from her first-hand experience of being present in court the day Fustar's co-accused were sentenced, that victims held a peaceful demonstration outside against the plea deal Fustar had entered into brandishing banners stating, '*Sudite umjesto da trgujete*' (Judge [war criminals] instead of trading [with them]). She states that the victims had not been sufficiently informed about the plea deal due to poor communication, particularly with regard to the court's outreach programme (Clark 2009: 436).

3.2.9 According the Interests of the Victims and Witnesses

Although normally associated with plea bargaining in domestic jurisdictions, it is also true that its use in war crime tribunals obviates witnesses and victims from going through the trauma of giving evidence in court and 'this must have merit' (Interview with Khan 2010; Bohlander 2001: 161). Certainly, where there are a considerable number of potential witnesses, most of whom dread retelling their stories, a utilitarian is likely to regard the avoidance of such a possibility as falling on the benefits sides of the cost or benefit divide that forms part of their calculus. There have been a number of cases where this was considered to be a substantially advantageous effect of plea bargaining. For example, in the case of *Zelenovic* (IT-96-23/2) the Trial Chamber said the defendant's guilty plea spared his victims from reliving their trauma when giving evidence especially as some has been raped and tortured (TC, Judgement, 4 April 2007, Para. 49). Also, relieving witnesses from giving evidence may also be advantageous when they are unable to articulate the harm they have received. This may be due to their young age when they witnessed the crimes in question, or in the case of child soldiers, where there were exceptional circumstances which may result

in such witnesses not being able to understand the full legal consequences of their actions. It can also become very distressing for such witnesses to give evidence when they do not understand the actual nature of the questions being asked during direct and cross examinations due to cultural, educational and language differences between them and the trial staff (Combs 2010, Interview with Taku 2010; Interview with Zecevic 2011). This is also true when it comes to insufficient translations and witnesses cannot answer the questions asked of them or give answers that, when translated, may mean something different (Combs 2010: 78).

As Zecevic suggests, the credibility of witnesses is affected by problems with translations, ‘my experience at the ICTY is that it is extremely hard, if possible at all, for Judges to fully and correctly assess the credibility of the witness testimony if they don’t speak the language of the witness.’ (Interview with Zecevic 2011) This of course may prove to be very distressing for witnesses. Therefore, in these situations sparing witnesses from giving evidence is a compelling utilitarian justification for using of plea bargaining. De Silva reiterated that pleading guilty is a mitigating factor, arguing that, ‘when you have traumatized people, women who have been raped many times, children who have had their arms hacked off, others who have seen their parents hacked to bits before their eyes... It’s even worse when you have a defendant who may be guilty, who instructs his counsel to attack these people who might have suffered enough,’ he goes on to say, ‘these people, if found guilty, are deserving of no mercy at all.’ (Interview with De Silva 2010)

However emotionally charged and persuasive these comments are, it is very important from a liberal perspective for the tribunals to treat defendants equally. In other words, if a defendant pleads guilty to certain crimes, their sentence should not be substantially different to another defendant who may have been found guilty of the exact same crimes and which were carried out under similar circumstances.⁵⁸

Similarly, in cases, such as those associated with the Srebrenica trials of *Momir Nikolic* (IT-02-60/1-S) and *Dragan Obrenovic* (IT-02-60/2-S), the victims and witnesses would be recalled a number of times across a number of cases. Not only would these repeated appearances, where they would be questioned in detail about their ordeals, cause considerable strain, they could also cause serious disruption to their ‘normal’ everyday life due to the repeated requests to give evidence at international trials.

For all this, commentators such as Moghalu suggest that providing evidence is a cathartic process giving a voice to the victims, he argues that, ‘[W]hen justice is done, and seen to be done, it provides a catharsis for those physically or psychologically scarred by violations of international humanitarian law.’ (Moghalu 2004: 216)⁵⁹ This process allows victims to partake in the trial proceedings and, ‘their side of the story’ to be heard.’ This eventually brings about closure, as Rauxloh argues, ‘the public exposure at trial is part of the satisfaction brought to the victims and an important part of the justice process.’ (Rauxloh 2011: 13) This process is obviously denied if a defendant enters into a plea bargain. In this vein Clark asserts that, ‘especially in the context of mass atrocities, the criminal trials also serve as an official venue for the acknowledgement of the victims’ injuries.’⁶⁰ (Clark 2003: 103) It should be noted here however that international criminal proceedings are not meant to be therapeutic to the witness.

The future of plea bargaining in international criminal law is set to enter unchartered ground under the rules of the ICC regarding the interest of the victims as the rules shift to allow for victim participation.⁶¹ This, according to Murphy, ‘will change the landscape’ and may make ‘negotiations much more complicated, as victims may say that a case can’t be resolved without A, B, C and some provision for the victim.’ (Interview with Murphy 2010) The ICC may also order the presentation

of additional evidence despite the accused entering into a guilty plea, but this will only be done if it is in the ‘interest of justice.’ This provides a sensible balance between the need for victims to testify in order to properly determine the facts and the benefits of saving victims the distress of giving evidence. Petrig emphasizes that this may also change the self-perception of the victim in a positive way. She argues that, ‘the mere act of re-conceptualising oneself as a participant of a criminal trial and possibly even as the holder of rights can offer a sense of empowerment.’ (Petrig 2008:23) If this is the case, those undertaking the process must be aware that excluding the voice of the victims in the plea bargaining process may further continue the cycle of victimhood within effected communities.

Sparing victims the trauma of testifying and cross examination has traditionally been a strong utilitarian justification for plea bargaining. This still is a very pervasive argument especially in domestic jurisdictions, where generally there is only one victim. In international law there are normally many victims of a particular crime and the victims in the ICC STL and ECCC have been given an enhanced role within criminal proceedings. They have now been given the right to be heard and represented by counsel within the actual proceedings. This is still a new concept and in relation to plea bargaining victim participation is still uncharted territory. I now turn to see how victims may be integrated into the plea bargaining process.

3.2.10 Integrating Victims into the Plea Bargaining Process

Traditionally there have been no formal rights for victims in international criminal proceedings and this is particularly true with respect to plea bargaining. The only consideration victims are given in plea bargaining practices is that it saves them from giving in court evidence. Seemingly, there has been some effort to rectify this by

allowing victims to have a role in trial proceedings. The ECCC, STL and ICC⁶² have all introduced the concept of victim participation. To date the only time this has actually been put in practice has been at the ECCC where victim groups have been represented by counsel. The most prominent case is that of *Kaing Geuk Eav*, alias Duch (Case 001). Duch, a former member of the Khmer Rouge in Cambodia, was the first defendant at the ECCC and to date the only one to plead guilty in front of this particular tribunal. However, there were a number of complications surrounding his guilty plea including the fact that the ECCC has no provisions for accepting guilty pleas and that the defendant must undergo a full trial. It is worth pointing out here that no negotiations had taken place between Duch and the prosecution (Roux 2009).⁶³ Nevertheless, it is worth looking at how the civil parties operated in this context and how they were perceived in this trial as Francois Roux one of Duch's defence lawyers has said in an interview with the *Cambodian Tribunal Monitor* that he felt that they had been confusing their roles and had started to act as prosecutors (Roux 2009).

The notion of victim participation comes from the civil law model, and like many legal concepts that have been transplanted into the international legal system from a domestic one there is some form of confusion as how such concepts work, both in theory and in practice. It is important to remember that this concept is still in its infancy in international criminal law and has yet to be modified and tailored for this arena. Karim Khan who was the lawyer for the largest civil party group in the Duch case said that initially he was sceptical of victim participation but in the end he was 'shocked by the effects of and how meaningful the legal representation was for the civil parties themselves.' (Interview with Khan 2010)

Although this inclusion goes some way to embrace victims in the trial process, and therefore indicates a shift towards restorative justice principles, but it has yet to be seen how and if victims would play a role in the actual negotiation process when it

comes to plea bargaining. There has been some discussion in the past about increasing the involvement of victims in plea negotiations in domestic criminal systems which ranges from very minimal involvement to being part of the actual negotiation process (Welling 1987). It is therefore worth examining the different forms victim participation could take and assessing their pros and cons from a utilitarian perspective and their suitability in the context of international criminal justice.

The first suggests that victims may be informed of the negotiated plea and be present in court when the negotiated plea is tendered in court. This of course does not actually afford the victim anything more than is already in place as they, who remain part of the public, are already allowed to attend open court sessions and when the plea bargain is tendered it becomes part of the public record. The second form of involvement would actually allow the victims to participate in the proceedings. This potentially has a much greater impact so before going into what form this could take I will look at the ways in which this would impact on the interest of the parties involved.

Drawing on Welling's (1987: 309) argument, in such a situation the victim groups would have two interests. The first being that of restitution, which would require the charges the defendant is presented with to fall within the scope of what allows this. This in turn would mean restrictions on which charges could be negotiated and dropped. Alongside this, there is also the reality that in international criminal law restitution only takes the form of the return of property and therefore this would be a very rare situation. The second interest is retribution. This is where, in the opinion of the victims, the defendant gets a sentence that correlates with the gravity of their guilt. This creates the possibility of limitations being placed on the defence and prosecution's ability to negotiate a sentence bargain. When it comes to the

prosecutions stake in the negotiation, there could be the possibility of an involvement from victim groups which could help them achieve their goal of reflecting the harm caused by the defendant (Welling 1987: 310). This approach would allow the prosecution to be better situated when bringing charges and achieving a conviction for serious crimes.

It may also be argued that victim groups may disrupt negotiations as they may find certain concessions unacceptable, especially as there are almost certainly instances where the defendant has offered helpful confidential information to the OTP which the victim groups would not be informed of.⁶⁴ To reiterate this in turn would leave the victim groups feeling like they had been ignored, or even victimised again, as their testimonies have seemingly not been considered in any meaningful way. Such a response may render the whole process confrontational, making the idea of entering into negotiations for a defendant a risky one and something that puts them off pleading guilty (Welling 1987: 310), reiterating Murphy's comments above. In opposition to this argument, one can say that if victims are able to consult with the OTP about the plea bargain then the prosecution would be in a better position to achieve their goal as they would have more information than they would without working closely with the victim groups. However, making the bargaining process unequal in this manner would be a clear disadvantage for the defence and might be seen as operating against notions of justice for all sides.

From a utilitarian viewpoint the interests of the broader society must also be considered (Welling 1987: 309). If the victims are represented and involved in the process then the judges, as decision makers, are able to make better informed decisions due to the increased amount and potentially a better quality of information that would be presented to them. An involvement in the proceedings gives victims a

platform to present their side of the story allowing everybody to participate in the trial. This may also then resonate in post conflict communities, alleviating any feelings of alienation and disillusionment, leading to greater engagement with the community and increasing the confidence that they and the wider world have in the tribunals. Looking at the rules of the ICC and the other tribunals, victim groups are able to influence two features of plea bargaining. Firstly, they could influence whether the chamber accepts the plea bargain or not. For example, if after hearing the evidence from the victim groups it believes that the plea negotiation has distorted the facts too much then they may reject the deal as in the case of *Momir Nikolic*. The second area where victim participation is likely to have the most influence is in deciding what sentence may be given. Here, the testimonies that the victim groups give would provide the judges with more information when deciding issues such as culpability, aggravating and mitigating factors. The victims then may be able to express an opinion on these and how much weight should be given to them, in turn influencing and expressing an opinion on the sentence the defendant might receive. Although, as argued, victim involvement in the actual negotiating process would give a voice to victims potentially resulting in the post conflict society feeling connected to the tribunal, the reality is that it would potentially create a three way bargaining process that would be too complex and possibly more time consuming thus also working against one of the utilitarian drives of plea bargaining.

3.3 Case Study: *Prosecutor v Biljana Plavsic* (Case No. IT-00-39&40-PT)

In the sphere of International War Crime Tribunals the plea agreement in the case of *Prosecutor v Plavsic* (Case No. IT-00-39&40/1-S) has engendered a great deal of controversy, and whilst this was not the first plea bargain to have occurred in the

ICTY or international war crime tribunal, it certainly one of the most discussed. For that reason it is worth considering it a little further here.

Biljana Plavsic was the Serbian representative on the Presidency of the Socialist Republic of Bosnia and Herzegovina during the early 1990s. She was also the co-president for the Serbian Republic of Bosnia and Herzegovina and later became president of *Republika Srpska* (Serbian Republic). Perhaps with a nod to that other infamous strong female leader Margaret Thatcher, during her political career she was known as the ‘Serbian Iron Lady’, in her case this was due to her strong nationalist views. Although Plavsic was not the most blameworthy leader, she did play a more than significant part in encouraging the ethnic cleansing of Bosnian Muslims from the region she was responsible for, stating in an interview that:

In order not to have any fear as to what will happen, I would prefer us to cleanse Eastern Bosnia of the Muslims. They have introduced the term ‘ethnic cleansing’ to denote a perfectly natural phenomenon and qualified it as a war crime. Muslims originate from the Serbs, but it is spoiled Serbian genetic material which has converted to Islam and then naturally from generation to generation has condensed. It has deteriorated further. (Biljana Plavsic in Robertson: 2002, np)

Plavsic, alongside her co-defendant Krajisnik, was indicted with two counts of genocide and complicity in genocide and six counts of crimes against humanity. After surrendering herself voluntarily to the ICTY she pleaded guilty to one count of crimes against humanity and the other charges were subsequently dropped. Before the *Plavsic* trial plea bargaining before the ICTY had consisted of sentence reductions only in exchange for a guilty plea, so this was the first ICTY case to use charge bargaining (Scharf 2004: 1074). At her sentencing hearing, the prosecution recommended a term of between fifteen and twenty five years imprisonment. However, the Trial Chamber subsequently sentenced Plavsic to just eleven years after taking into account a number of factors, such as her voluntary surrender and guilty pleas amongst other things.

3.3.1 Utilitarian Justification for the Plea Bargain in Plavsic

I will now look at some of the utilitarian justifications for the plea deal in the particular case of Plavsic. Though many of the utilitarian justifications of plea bargaining can be applied to the *Plavsic* case, it is worthy of note that as Plavsic is a war criminal she does not have just one victim. She was responsible for the pain and suffering of whole societies of people and for planning some of the gravest atrocities in Bosnia. Yet, even in her case one might argue that most of the general utilitarian justifications for plea bargaining still stand.

From an Act Utilitarian stance, entering into a plea bargain in a case such as *Plavsic* would be the right thing to do. It would bring about the greatest happiness to the most people as without the agreement a large number of expert witnesses would be required to testify and that would not only cost a lot of money but would also take a long time, thus delaying any convictions that might be received by the Tribunal. Even though there has been much controversy over the short prison term Plavsic received, an Act Utilitarian would argue that a conviction has been obtained and that at least some justice has been served.⁶⁵ However, some utilitarian perspectives would not accommodate the plea bargain so easily. A Rule Utilitarian would believe that the rules and procedure of the Tribunal have been undermined. Presumably the rules and procedures are in place as they bring about the greatest happiness to the greatest number of people hence forgoing a full trial in favour of a guilty plea belittles not only the rules in place that would bring about a conviction but also the process itself. For example, plea bargaining would bring the burden of proof down below ‘beyond a reasonable doubt’. However, general classical utilitarian justifications for the implementation of the plea bargain in the *Plavsic* case do exist and I now want to turn

to these below.

There is no doubt that Plavsic's voluntary surrender and guilty plea relieved the Tribunal of the financial burden of a full trial. The saving of the costs and resources of the Tribunal is one of the most compelling utilitarian justifications for the plea agreement in *Plavsic*. The average trial takes over a year and costs over \$50 million (Combs 2002: 90), therefore not only would forgoing the trial process save money but so would the defendant's voluntary surrender since money was not used to actually arrest her. The Tribunal stated, 'a guilty plea before the beginning of the trial obviates the need for victims and witnesses to give evidence and may save considerable time, effort and resources.' (*Plavsic* Para 66)

Another justification arising as a consequence of this plea bargain is a conviction has been obtained. One of the main aims of the ICTY is to 'render justice' (Cassese 1994: 48). Even with charges removed and her sentence lowered, Plavsic ultimately has been punished and has had to serve a prison term, although an eleven year imprisonment with a chance of parole may be seen as a form of token justice. In fact she was released from prison on 27 October 2009 after serving six years. At the time of Plavsic's trial only the defendants convicted of genocide were those responsible for the massacres at Srebrenica (Combs 2007: 65, 74), and maybe if she had not entered a guilty plea but had opted to have a full trial she may have been acquitted of this charge. Therefore a utilitarian would argue some justice is better than none at all. It is also worth noting that Mrs Plavsic was 72 years old at the time of trial so it may be possible if she had stood trial she may not have been able to complete the process due to ill health and old age.

One of the features of this case is that the defendant *expressed remorse* for her actions. This illustrates that being remorseful goes some way towards the rehabilitation of the defendant and therefore contributing to the reconciliation of the

region, which is a strong utilitarian justification of plea bargaining in war crime tribunals. When Plavsic admitted her guilt to one charge of persecution as a crime against humanity she also admitted a five page document detailing the facts of this charge. The defendant also went so far as to give an explanation as to why she behaved in the manner that she did (*Plavsic*: Para 609). It can be argued that here Plavsic contributed to the historic record in doing so as to find out why such atrocities occur can only be answered fully by those who committed the crimes, or where present, when objectives were determined and orders given (Tieger and Shin 2005: 671). The historic record is enhanced by such insider detail, allowing for the change in perception of events. Other defendants may also give evidence regarding fellow defendants, although Plavsic did not choose to do this. Conversely, one might argue that the defendant only admitted responsibility to one charge in order to get the others dropped. If so then this impairs the historical record, instead of enhancing it, This is because her role in the atrocities could be downplayed if one only looks at the historic record of her punishment in years to come.

Apart from the judicial efficiency that plea bargaining offers, the next most important potential utilitarian effect of Plavsic's guilty plea lies in its contribution towards reconciliation. Plavsic's post conflict conduct and guilty plea were presented to the court as a significant and essential contribution towards reconciliation by a number of prominent witnesses. The Trial Chamber recognized that:

[A]cknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concludes that the guilty plea of Plavsic and her acknowledgement of responsibility, particularly in the light of her former position as President of the Republic Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole.
(*Prosecutor v Biljana plavsic* Case No. IT-00-39 & 40/ 1-S : Para 67)

Although this was not the first guilty plea to be heard by the ICTY, it is certainly the

most controversial. One of the outcomes of this plea bargain is that the ICTY has seen an increase in the number of guilty pleas it receives since this case.

Central objections to the justifications above are, most importantly, that the eleven year sentence that Plavsic received is too lenient a sentence for the criminal responsibility of the defendant and would seem to be disconnected to any retributive ideals that the ICTY has. However, it is widely accepted that a guilty plea from a defendant, especially a high ranking one, is of great value to the reconciliation of the region, but one might still argue that the sentence received should reflect the crime committed more than an admittance of guilt or remorse shown.

In *Plavsic* the sentence is so low that it may seem like the defendant was being rewarded for her guilty plea more than being punished for her crimes. There is certainly no doubt that Plavsic's guilty plea saved the Tribunal time, money and resources, but in this particular case where the defendant was a leader during the conflict judicial efficiency seems to have taken over the interests of those effected by the conflict. However in the defence of the plea agreement in the instant case, it is observed that plea bargaining is a reconviction measure, where the defendant actually admits their culpability. In the realm of international law where immunities and amnesties are relatively commonplace, it is difficult to waive responsibility of the crime once guilt has been admitted. A guilty plea, whether received due to a plea agreement or not, makes it difficult for post-conviction measures to take place, such as a pardon, especially when the defendant has given details of the crime they have said they committed.

There were a number of factors that were taken into account when Plavsic was sentenced; some were explicitly mentioned in her sentence hearing, whilst others are just my speculation. I shall now look at them and try and see if her sentence would have been altered if these factors had been different.

3.3.2. The 'What If...' Scenarios

When sentencing Mrs Plavsic (Case No.IT-00-39&40/1 (February 2003) there were a number of mitigating factors the Tribunal took into consideration, including her voluntary surrender and post conflict conduct. In this section I shall look at the factors the Trial Chamber took into account when passing an 11 year prison term in order to consider if the outcome of the sentence would have significantly differed if these factors did not exist. This will lend some insight into what in general is considered when sentencing takes place, and how much weight these factors receive.

The first factor I shall consider is her voluntary surrender. Plavsic was the first defendant who was in a superior position during the war, which ultimately enabled her to surrender herself to the Tribunal. Although this held some benefit for Plavsic when it came to sentencing, it was her guilty plea and post conflict conduct that held most weight (*Plavsic*: Para 110). This indicates if she had not surrendered herself the sentence she would have received would not have been much greater than the eleven years she actually got.

The second factor I will look at is Plavsic's post conflict conduct. This, along with her guilty plea, was the main feature considered when sentencing her. Following the war, Plavsic played an important role in the implementation of the Dayton Agreement and actively worked towards promoting peace in Bosnia (*Plavsic*: Para 578-79; Combs 2003: 932). This was backed up by a number of high profile witnesses who gave evidence in favour of Plavsic's conduct after the war. In light of this, if Plavsic had continued with her nationalist policies, and not strived for peace, presumably her sentence would have been significantly greater than that which she received.

The next factor I will look at is that of the defendant's guilty plea along with her expression of remorse. By doing this she accepted responsibility for her actions:

I have now come to the belief and accept the fact that many thousands of innocent people were the victims of an organised, systematic effort to remove Muslims and Croats from the territory claimed by Serbsour leadership, of which I was a necessary part, led an effort which victimised countless innocent people. (*Plavsic*: Para 601)

According to the Tribunal, this had a great impact on the reconciliation process, stating that this was, 'an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation.' (*Plavsic*: Para 24)

The reconciliatory effect of her guilty plea was the main focus of her sentencing hearing and the guilty plea without the accompanying apology would probably have had little effect on the reconciliation process in Bosnia. Of course, if she had not pleaded guilty in the first place it would be unlikely that she would have received such a lenient sentence. There is also the matter of judicial efficiency that plea bargaining has; as opposed to contesting them and going to trial it saves time and resources.

Another issue the Tribunal took into account when sentencing Plavsic was her age, as when convicted she was 72. The defence argued due to her age if sentenced to longer than eight years Plavsic would in effect be serving a life sentence thus violating the prohibition against 'cruel and unusual punishment' (*Plavsic*: Para 651). Although the Tribunal rejected this, they did bear in mind the defendants advanced age. If Plavsic were 30 years younger when convicted would she have received the same sentence? When the judges came to pass sentence her age was not the most persuasive reason for her lesser sentence but it did hold some relevance during her sentencing. To Plavsic, her age was one of the most significant factors to entering into negotiations with the OTP (Interview with Nice 2010). Theoretically then, if she were 42 years old when convicted the sentence she would have received would not have

been much greater than the one she actually got.

An interesting comparison to this case is the one of *Momcilo Krajinsk* (Case No.IT-00-39), who was Plavsic's co-inditee. Krajinsk was 58 years old at the time of his trial, he also did not plead guilty to any crimes, maintaining his right to trial. Unlike Plavsic who surrendered herself to the Tribunal Krajinsk was arrested at his home, and did not work towards peace during the post war period. After his trial Krajinsk ended up being sentenced to twenty seven years, sixteen years more than Plavsic.

What is also interesting is that at the time Plavsic was the only woman to have appeared before the ICTY and this, of course, caused problems as once charged Plavsic was bailed as there were no female holding facilities at the ICTY. It could be possible that the fact that the defendant is a woman could have indirectly worked in her favour when sentencing.

Another factor that may have had an effect on the sentence was the fact that up until that point the only defendants successfully convicted of genocide by the ICTY were those involved in the massacres at Srenbenica. If there had been other defendants convicted of genocide, in particular high level ones, then maybe the prosecution would not have dropped the genocide charge. By comparison, Plavsic's coinditee Momcilo Krajinsk, who contested his genocide charge, was acquitted of this charge due to insufficient evidence (Combs 2007: 65, 74).

With the exception of Carla Del Ponte, who is Swiss, the lawyers involved in the *Plavsic* case where from countries with adversarial legal systems in place, that is the USA, UK, Canada and Australia. No doubt these lawyers would have at some stage in their careers encountered plea bargaining. Therefore one might suggest that if the lawyers had not been from adversarial legal backgrounds then the plea arrangement may not have taken the form that it did. For example, if one of her

defence lawyers was Serbian maybe they would have encouraged her not to plead guilty to any of the charges and maintain her innocence. This may be due to ideological views held by the lawyer as well as the lack of knowledge and experience of plea bargaining. As already noted, Plavsic had a number of high profile witnesses that gave evidence supporting her guilty plea and her conduct after the war. The witnesses included former US Secretary of State Madeline Albright, former Deputy of South Africa's Truth and Reconciliation commission Alex Boraine and Nobel Peace prize winner Elie Wiesel. It is clearly hard not to be impressed on one level by Plavsic's witnesses and if they did not have the 'high international reputation' that they have, or even if these testimonies were not present, it would be interesting to see how much consideration the ICTY would have given them and if the outcome of Plavsic's sentencing would be different as a result.

3.3.3 The Plavsic Case Nine Years On

At present, the reality is that the *Plavsic* case remains one of the most controversial examples of plea bargaining in the field of war crimes tribunals. It is, therefore, important to reflect on how the utilitarian justifications for this particular plea bargain 'hold up' now that Mrs Plavsic has been released. The issues that arise here are also those that arise generally in discussions surrounding the use of plea bargaining in international tribunals. First and foremost, in a series of magazine interviews with Plavsic whilst she was still incarcerated in Sweden, it has emerged that she believes herself to be innocent and was happy retracting her confession (Nordgren 2009). On pleading guilty, she told interviewers that, she had been pressurised by one of her lawyers, a Canadian, Kratan Simic to plead guilty (Nordgren 2009). Both of these assertions significantly undercut the statement of remorse and apology she made at

her trial. These statements, that were lauded as significant contributions towards the reconciliation process by the expert witnesses who testified on her behalf, it would seem were cleverly written and constructed to manipulate not only the Trial Chamber but also the people of the Former Yugoslavia. This, of course, can be seen as the harshly realistic and practical face of plea negotiations. As the practice of plea bargaining increases, then it is possible that the defendants entering into negotiations may not be doing so out of contrition but for mere pragmatic self-serving reasons. No doubt in her situation Mrs Plavsic and her defence team knew this was the best thing for her to do (Interview with Nice 2010). In light of this, international criminal tribunals who wish to use plea bargaining as a judicial tool should bear in mind the possibility of defendants back tracking on their guilty pleas and apologies when released. One way tribunals can operate cautiously is by not making over reaching statements during judgement and sentencing hearings, and to be more measured when assessing the beneficial ‘by products’ of plea bargaining such as reconciliation, the value of expressions of remorse and truth telling.

In the *Plavsic* scenario matters where not helped when Milorad Dodik, the Premier of Republika Srpska at the time when Mrs Plavsic was released, publically welcomed her back to Belgrade. He had also set about changing the law so former Presidents were to be given honorary Presidencies, including Biljana Plavsic. If these plans had indeed gone ahead Plavsic would have been entitled to a car, allowance and security guard (Dalje.com 2009). Again, actions such as these would go towards undermining any of the reconciliatory effect the guilty plea may have had.

3.4 Conclusion

It must be pointed out that the utilitarian justifications for plea bargaining discussed

above do not exist in isolation and overlap with each other to deliver their utilitarian benefits. The most compelling reason for plea bargaining remains that it is financially efficient and is a simple way to dispose of complex cases that ordinarily would take a number of years to complete and would prove expensive to conduct.

Other reasons for engaging in plea bargaining, that are much more in line with restorative justice mechanisms, such as truth telling and reconciliation have only a limited effect, despite their appeal and support. With regards to truth telling, the utilitarian justification is limited by the idea of negotiated truths that are present in the statement of facts, where the truth here is agreed upon in private. The practice of charge bargaining also have the potential to distort the truth, as charges are removed from the indictment in order to obtain a guilty plea. It can be argued that the notion of plea bargaining in general may compromise any truth telling capabilities of the international tribunals. Taking the Nuremberg trial as an example, where there was no plea bargaining. The trials that took place amassed a large volume of documents and evidence, which decades on still serve as part of the historical record, and are open to be viewed and for scholars to analyse, thereby contributing to the truth telling function of these trials. To reiterate Mr Jordash's statement Plea bargaining offers a form of truth if not the full truth (Interview with Jordash 2010).

Reconciliation is also another utilitarian justification of plea bargaining. Where this may well be a seductive inducement to encourage plea bargains the issues that exist range from the mere notion of what reconciliation is and how it is measured as it is an abstract concept. This however does not mean that there has not been some reconciliatory effect from plea bargaining. For example the defence in *Dosen* (I-95-8S Judgement 13 November 2001 Para. 186) reported claims that there has been some reconciliatory effect due to the defendant's guilty plea.

Conversely victims groups have been critical of the ICTY sentencing. For

example, reacting to a fifteen-year sentence for Dragan Zelenovic, a Bosnian Serb accused of massive atrocities against Bosnians, Bakira Hasecic, President of the association Women Victims of War said, ‘The tribunal openly sided with the defence of war criminals.’ (Subotic 2009: 133) The reality of international tribunals then is that they cost a lot of money and any cost saving mechanism that renders convictions quickly and sufficiently will always be a welcome part of international proceedings. This factor, however important, should not overshadow the fact that international tribunals need to maintain contact with victim groups and the post conflict societies in general. Ultimately then, any of the utilitarian benefits of plea bargaining, with the possible exception of efficiency, will have no long lasting effect if the courts’ outreach programmes do not inform communities about the negotiations and educate them to what they are and why they were agreed (Clark 2009).

Boraine’s assertion, made in his testimony in the *Plavsic* case, that guilty pleas and plea negotiation processes must put the victims in the centre of the proceedings for them to have any kind of reconciliatory effect (*Plavsic*, Judgement February 2003, Paragraph 75-77). The main problem with this is that in most criminal proceedings it is not the victim that is central but the defendant. The main issue with regards to reconciliation is that defendants who plead guilty are able to retract their statements afterwards in the media whilst still in prison, or when released. This has been the case with Mrs Plavsic. This severely undercuts any reconciliatory effect that there may have been. It also has the potential to instil mistrust in the guilty plea process as after Mrs Plavsic’s retractions people may feel that a defendant is being disingenuous when admitting guilt.

Despite this there are compelling utilitarian justifications that trials are more efficient when plea bargains are employed and so ultimately utilitarian justifications, ‘must be given importance over the rule of law’ (Interview with Khan 2010). Khan’s

argument, championing a utilitarian perspective, highlights one of the main issues plea bargaining raises, that is the notion that it undermines a defendant's rights afforded to them under the rules and laws that govern the tribunals which in turn are informed by the concept of the liberal rule of law, as utilitarianism treats people as a means rather than individuals. Therefore plea bargaining then potentially undermines a number a defendant's rights such as the presumption of innocence, equal treatment and a right to a fair trial. Generally then, whilst tribunals find the reduced running costs and increased efficiency as desirable effects of plea bargaining they do not believe it to be a sole justification to enter into plea agreements. As noted in *Nikolic*, when discussing the plea bargain the trial chamber had to, 'to divorce itself from the administrative efficiency argument.' (Henham 2005: 216) Stating that:

The Trial Chamber notes that the savings of time and resources due to a guilty plea has often been considered as a valuable and justifiable reason for the promotion of guilty pleas. This Trial Chamber cannot fully endorse this argument. While it appreciates this saving of Tribunal resources, the Trial Chamber finds that in cases of this magnitude, where the Tribunal has been entrusted by the United Nations Security Council – and by extension, the international community as a whole – to bring justice to the former Yugoslavia through criminal proceedings that are fair, in accordance with international human rights standards, and accord due regard to the rights of the accused and the interests of victims, the saving of resources cannot be given undue consideration or importance. The quality of the justice and the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised. Unlike national criminal justice systems, which often must turn to plea agreements as a means to cope with heavy and seemingly endless caseloads, the Tribunal has a fixed mandate. It's very *raison d'être* is to have criminal proceedings, such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal conduct – not simply a portion thereof. Thus, while savings of time and resources may be a result of guilty pleas, this consideration should not be the main reason for promoting guilty pleas through plea agreements.
(Prosecutor v. Nikolić Case No. IT-02-60/1-S, Paragraph 67 (Dec. 2, 2003))

This highlights that even though international criminal justice values the utilitarian effects that plea bargaining offers utilitarian theory itself does not sit well into the international legal system, which is based upon liberal democratic values (Bass 2000).

Therefore reading plea bargaining through utilitarian theory only gives a partial analysis of this particular mechanism and its place within the international legal context. Hence it is necessary to tackle the concept of plea bargaining from the liberal view point, which is diametrically opposite theory to utilitarianism. The next chapter tackles this, offering a different critical perspective on the use of plea bargaining in international criminal tribunals.

4. Reading Plea Bargaining through the Classical Liberal Concept of the Rule of Law

The following chapter will look at a range of potential criticisms of plea bargaining using the classical liberal principle of the rule of law as an interpretative perspective and ultimately as a criteria for evaluation. I will do this in two parts. The first provides a general overview of the ideology of the liberal rule of law focussing on those areas that are especially pertinent to plea bargaining, such as formal equal treatment, rule-following and the presumption of innocence. The second will examine the application of these liberal perspectives in relation to specific instances of plea bargaining and examine how, in the context of war crime tribunals, such instances of negotiated justice may be interpreted as going against the implications of traditional classic liberal conceptions of the rule of law.

This chapter therefore sets out to answer the critique that admitting ones guilt in such contexts constitutes a transgression of the liberal norms usually afforded individuals through the Tribunals' statute and other principles of international law. A detailed analysis of this overarching issue will highlight what aspects of the rule of law may be violated, in the plea bargaining process. Alongside this, I will also consider whether forgoing a trial impacts upon the due process rights afforded to a defendant? Within this chapter, I will also ask if the use of discretion by prosecutors, when entering into negotiations, and judges, when accepting guilty pleas and sentencing defendants, takes place in a transparent and clear manner, and is one that allows defendants to make informed decisions about entering into negotiations and what to expect of the process? Finally, I will examine whether all defendants are indeed 'equal before the law', as classic liberalism requires, when they enter into plea

negotiations, or are some given more favourable treatment depending on the nature of the information they are able to provide the OTP. Whilst I will address these issues theoretically, I will also draw extensively on my interviews with trial professionals who have worked with and within the international tribunals. Their insights, drawn from their experiences, offer valuable perspectives regarding if and how liberal norms and the defendants' rights are potentially breached in the process of plea bargaining and, if so, to what extent.

As noted in the previous chapter, factors such as expanding caseloads and limited resources offer a possible reason for war crimes trials to be truncated by the guilty plea process. For the most part, the judges and lawyers in these trials accept this because plea bargaining does enable criminal systems to operate in a more efficient and timely manner. This is not to say that this is a 'fool proof' solution. There are, of course, a number of criticisms of plea bargaining, especially in relation to war crime tribunals, and the main objections one encounters are generally based, often implicitly, upon liberal principles. Legal concepts and assumptions of liberalism are firmly rooted in the idea of private 'autonomy', meaning that the liberty and freedom of an individual, typically considered in isolation, is held to take precedence over prevailing definitions of the 'broader interests' of society-at-large. The latter, which as we have already seen are prioritised by utilitarianism, includes an interest in maintaining an efficient and cost-effective system of criminal justice. The basic liberal principle here being that, as John Stuart Mill puts it, 'the only freedom which deserves the name, is that pursing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.' (Mill 1989: 18) Here, we have a classic statement of the liberal individualist imperative to promote rights absolutely, such that only rights-authorised actions that impede the exercise of

the rights of others can qualify or restrict the exercise of private autonomy. Here, only rights, not social obligations, can ‘qualify’ rights, not wider social responsibilities to optimise the realisation of social interests by realising collective and group needs. It is even misleading to speak of rights being qualified or restricted because the general ideological policy is the optimise rights-realisation across society as a whole by restricting all limitations upon the individual's exercise of private autonomy, even those that stem from rights themselves.

4.1 Defining the Rule of Law

The idea of the ‘rule of law’ has a long history and can be traced back to the Middle Ages where examples of its origins included the contests between Popes and Kings for supremacy, Germanic customary law and the Magna Carta (Tamanaha,2004: 15). Since those times, the rule of law has been embraced across the field in liberal democratic countries and is firmly rooted in liberal ideology. On the political right, there is Hayek, who places the rule of law at the heart of development policy (1960); whilst on the left, Marxist historian E.P. Thompson (1975) characterised in positive terms. He argued that, ‘the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an ‘unqualified human good.’ (Thompson 1975: 266-267)⁶⁶ Before moving on it may be useful to consider in some detail what they both actually talking about.

The rule of law defines a basic moral framework by underwriting the legitimate exercise of state/public power. This framework presumes that each person under all circumstances has ‘free will’ and can, therefore, be treated as responsible agents who act within the structure of clearly understood and commonly accepted

laws. In doing so, it projects and upholds the values of ‘individual freedom’ and ‘responsibility’ and is, therefore, based on the idea that an individual has personal ‘autonomy’ or the capacity to exercise informed choice. It can, however, also be characterised less idealistically by the term ‘legal domination’ (Weber 1968: 121).

In the classical liberal terms of John Stuart Mill, ‘the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self- protection.’ (Mill 1989: 15) Accordingly, ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’ (Mill 1989: 15) In other words, ‘coercion’ and paternalistic intervention by the state could only be allowed to prevent harm to other persons. In short, for the liberal tradition rooted in Mill, the optimisation of individual rights is a supreme value and, by implication, criteria for assessing the operation of any aspect of the criminal justice system, including of course plea-bargaining.

In addition to rights optimisation, liberal ideologies typically give central importance to their distinctive understanding of the ‘rule of law’, a doctrine that has both direct and indirect implications for how we assess both the theory and practice of plea-bargaining. As one might expect of a concept that has been in circulation for so long, over time there have been a number of incarnations of the rule of law. In his 1888 book *Introduction to the Study of the Law of the Constitution*, the English jurist A.V. Dicey gave the first concise, what one might call contemporary, analysis of the term as manifested in ‘liberal democratic’ societies, such as the UK and USA. Although Dicey did not originally conceive the rule of law, he can be credited for popularising it as a concept of key importance within ‘liberal democracy’.

Dicey's conception offered three defining principles. The first being that there can be no punishment without a clear grounding within a pre-existing law, as Dicey believed this type of legally uncontrolled discretionary punishment to be incompatible with the rule of law:

The ancient veneration of the rule of law has in England suffered during the last thirty years a marked decline. The truth of this assertion is proved by actual legislation, by the existence among some classes of a certain distrust both of the law and of the judges, and by a marked tendency towards the use of lawless methods of the attainment of social or political ends. (Dicey 1982: iv)

The second principle is that 'everyone is equal' before the ordinary law. Whilst in his third principle, he described what he believed to be the underlying source of the rule of law, which he thought was a product of, 'judicial decisions determining the rights of private persons in particular cases brought before the Courts.' (Dicey 1982: 115)

F.A. Hayek has also identified the rule of law as an integral part of liberalism and he too gave a very influential definition of it in his book *The Road to Serfdom* (1994) emphasising the important role of this doctrine in ensuring predictability and certainty. Following Dicey's belief that discretion was incompatible with the rule of law, he stated:

Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. (1994: 80)

In this more recent version of the liberal rule of law doctrine, citizens are supposed to know what actions they are allowed to take without being subjected to interference from the government. This is known as 'legal liberty' as the prior knowledge of what is permissible is the basis of this negative right (Weber 1968).

Hayek also believed that all theories of the rule of law must have three things in common; they must be general, equal and certain. According to Hayek, laws are

general when they are set out in theoretical terms and should be applied to all individuals equally (Hayek, 1955: 34). That is, laws that encroach on citizens' liberty should be regulated only by general rules, as distinct from ad hoc and situation specific administrative measures. The purpose of these general rules is to promote a genuine public good, and therefore they must not victimize any specific group or person. In order to explain this feature more fully, Hayek used Rousseau's version of generality. He stated that:

When I say that the object of laws is always general, I mean that the law considers the subject in the round and actions in the abstract and never any individual man or one particular action. For instance, a law may provide that there are privileges, but it must not name the persons who are to enjoy them: the law may create several classes of citizens and even designate the qualifications which will give entry into each class, but it must not nominate for admission such and such persons; it may establish a royal government with a hereditary succession, but it must not select the king or nominate a royal family; in a word, anything that relates to a named individual is outside the scope of legislative authority (1960: 170).

Hayek went on to state that the separation of powers between the legislature and the judiciary can be attributed to generality and, because of this feature, law can be set out in advance and in abstract terms. In turn, this makes the separation of powers between the legislature and judiciary an integral part of the rule of law (Tamanaha 2004: 66).

More recently, Kofi Anaan, the former UN Secretary General, gave a definition of what he believed to be the rule of law and its contemporary role, which for him includes a wider variety of elements which included respect for internationally sanctioned human rights standards. He stated that:

A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, fairness in the applications of the law, accountability to the law, fairness in the application of the law, separation of powers participation in decision-making,

legal certainty, avoidance of arbitrariness and procedural and legal transparency. (Annan 2004)

I will now turn to those aspects of the rule of law that are especially pertinent to plea bargaining.

4.1.1 Formal Equality

The second principle identified by Dicey asserted that no person was above the law and that everybody, irrespective of their status, is subject to the ordinary laws of the land. Dicey argued that no public official should receive any special immunities or privileges, stating:

[N]ot only that . . . no man is above the law, but (what is a different thing) that . . . every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. . . . [T]hough a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen. (Dicey 1982: 112)

This suggests that public officials, except the Monarch, who breach the law should all be held equally accountable by ordinary causes of actions before the ordinary courts in the same way as all other citizens of the state. This meant that, for Dicey, people in positions of power would not receive any special privileges and immunities and they would be subject to the law as much as ordinary citizens. Fundamentally, this position argues that everyone should be treated equally and that equality, in the sense of equal rights⁶⁷ and formal equality of opportunity as a distinct form, goes hand in hand with the ideology of liberalism and, in particular, the liberal rule of law.

In liberal theory, all people possess equal political rights and everyone is entitled to equality before the law, which in turn insists that the government take an unbiased stance on what they think 'the good' is. A relatively recent, and controversial, example of this took place in Israel and involved the former president

Moshe Katsav. In 2007, Katsav entered into a plea agreement when he was initially charged with the rape of a former employee. The rape charge was dropped as he agreed to plead guilty to three other crimes: sexual harassment, forcible indecent assault and harassing a witness. A number of petitioners have argued that the Attorney General, Menachem Mazuz, had presented enough evidence for the attachment of a rape indictment, and so wondered why the rape charge was dropped. Mazuz offered two reasons for this, the first being that the rape charge was used as a bargaining chip in order to obtain a conviction for the other charges, he stated that:

The rape charges were not simple, and we could not state with certainty that we would have achieved a conviction ... however, we thought there were grounds for an indictment on rape charges. That was the lever for creating the plea bargain. (Weitz 2007: np)

The second, and most important, reason Mazuz gave was that because of the high profile status Katsav had in Israeli society a conviction for rape and a lengthy public trial would be bad for Israel's image internationally. He argued that:

Without the plea bargain, there would have been a two- or- three years trial and no one could promise us how it would end. Israel would have paid an image price, since such a trial would have damaged the public interest. (Weitz 2007: np)

This, in conjunction with the fact Katsav received a suspended sentence and had to pay compensation, seems to violate the liberal model of the rule of law as set out above, especially as the charges carried a total maximum of ten years.

On the surface, Dicey's statement is an assertion not of distributive or substantive equality in the sense of equalising out social inequalities but rather 'formal equality'. Under the latter, all defendants in criminal proceedings are supposed to be 'treated alike' procedurally and everybody has 'equal opportunity' because of an absence of discrimination or special privileges including head of state or diplomatic immunity from criminal prosecution. The fact that an individual is a

serving or former President should, in principle at least, be irrelevant with regard to how he or she is treated by the criminal justice system. Here, formal equality differs from substantive equality in that in formal equality everyone is treated alike, for example, equality of arms, whereas, under substantive equality people in different situations or circumstances are treated differently in order to equalise their position in recognition of those substantive differences. A familiar example of a legal measure designed to achieve substantive equality is positive discrimination in favour of historically disadvantaged groups; a policy that flatly contradicts the formal equality asserted by Dicey's rule of law. In the example of plea bargaining a possible form of positive discrimination could be that defendants who do not have as much incriminating evidence to give the prosecution as high ranking defendants may still be encouraged to plead guilty in exchange for a lesser sentence. This may then work towards the utilitarian benefits of trial efficiency and achieving a greater number of convictions that the plea bargaining process brings.

In the context of plea bargaining the equal treatment principle is violated because, defendants who claim to have especially useful and admissible information to offer the prosecution case may receive far more generous concessions in exchange for this information when compared to those who do not. Those closest to the central decision-making of a genocidal regime may, by that fact alone, be in a better bargaining position than someone further removed. When discussing procedural equality, such as the equality of arms, both the prosecution and defence have equal rights with regards to receiving and obtaining evidence from each other. When discussing plea bargaining generally an inequality arises in the bargaining power as the prosecution are usually more experienced with the court or tribunal's procedures regarding these negotiations.

With regard to this, Hayek argued that ‘equal’ in this context meant that all the laws should apply equally to all persons, ‘as true laws should not name particulars, so it should not single out any specific persons or groups of persons.’ (Hayek 1960: 78)

Later he modified this view suggesting that certain legitimate rules may only apply to a specific group of people. However discrimination against people by the government must be held up on rational grounds, keeping in line with the standard that each person’s interests are treated with equal respect and importance. Such a perspective is consistent with the notion of the public good, consequently in part supplementing formal equality with some measure of substantive equality. An example of this would be the laws prohibiting rape, which in many common law systems can only be committed by males (Hamowy 1978: 291; Baumgarth 1978: 21). These rules are only legitimate if they are approved by a majority of people who are in, as well as out, of the differentiated group. This is because Hayek believed it is important in practice to be able to foresee how a law will affect particular people. Indeed, He argued that, ‘this does not mean that there must be unanimity as to the desirability of the distinction, but merely that individual views will depend on whether the individual is in the group or not.’ (Hayek 1960: 184)

It should be noted that Hayek believed that the outcomes of substantive equality were inconsistent with the rule of law, believing the law should apply to all equally and benefit no one individual. Substantive equality violates the rule of law, according to Hayek, as there is an endless number of different of situations that could arise which would make it impossible for all of them to be governed by general rules which have been set out in advance. In addition, the difference in treatment for one person to another generally violates the formal requirement for equality. Even if society was able to equalise opportunities for all its citizens, inequalities would still exist, for example, those based on differences in character or ability. In such

situations, it would be impossible to make adjustments for every unequal difference that may occur and it would also be difficult to regulate them with the rule of law standards that they should be equal, general and certain. Hayek acknowledged how unfair this disparity could be arguing that:

A necessary and only apparently paradoxical result of this is that formal equality before the law is in conflict, and in fact incompatible, with any activity of the government deliberately aiming at material or substantive equality of different people, and that any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law. To produce the same result for different people, it is necessary to treat them differently... It cannot be denied that the Rule of Law produces economic inequality all that can be claimed for it is that this inequality is not designed to effect particular people in a particular way. (Hayek 1994: 87)

As mentioned above, the third principle that Dicey championed focused on *the source* of the law. He noted that this aspect of the rule of law was specific to England stating:

The general principles of the constitution (as, for example, the right to personal liberty, or the right of public meeting) are, with us, the result of judicial decisions determining the rights of private persons in particular cases brought before the courts. (Dicey 1982: 115)

This defines constitutional law as not the source but the consequence of the rights of individuals afforded to them by the courts. It is here in the third principle that Dicey stresses the significance of the role of ordinary courts and the importance of public and judicial as distinct from private executive or administrative dominated hearings. He asserted that the English constitution is characterised by the rule of law owing to this feature. He chose to illustrate this with the example that, in his opinion, England had a freer press than other countries. Dicey felt this was due to the fact that the libel laws in place acted as the main control on the press and such cases were heard in the ordinary courts of the land before judges and juries and, therefore, they were not directly subject to governmental control (Dicey 1982: 146-168).

A liberal criticism of plea bargaining that relates to this principle highlights the unacceptably *private context* in which these takes place, and the lack of transparency of decision making. Plea negotiations are generally held in private as possibly some of the information being exchanged is of a nature that cannot be disclosed, or may jeopardise another trial. Examples of such information may be information that may pertain to national security issues or information that, if disclosed, may reveal confidential information that is relied upon in another trial. Even here there may be circumstances that disclosure could reveal embarrassing information, as in the case of *Todorovic* where the manner in which the defendant was arrested was brought into question. From the point of view of the Tribunal entering into negotiations with this defendant, it would have saved much of this information being disclosed and analysed in court thus preventing much embarrassment and upholding the Tribunal's integrity. Another reason that negotiations are held in secret may be to do with how the prosecution encourage a defendant to plead guilty, possibly by overcharging as shown in the Israeli case mentioned above. The problem this then poses is that by their very nature the prosecution and defence have already decided on the outcome before the suspect even becomes a defendant. An example of this can be seen in the ICTY case of *Erdemovic*, discussed below. This is not to say that the content of the negotiations should be disclosed as the negotiations are taking place, as amongst other things, this would severely undermine the defendant's right to be the presumption of innocence (O'Sullivan and Zecevic 2011: 151).

To sum up, equality under liberalism requires everybody to be treated the equal respect and dignity, and everybody has the right to equality before the law. When discussing plea bargaining this means that everybody should be offered the same opportunity when it comes to entering negotiations, regardless of their 'ranking'

within the criminal enterprise. The equality standard can also be extended to aspects such as bargaining power or position. Both the defence and prosecution must be equally equipped when it to the bargaining process.

4.1.2 Presumption of Innocence

Another concept included in the rule of law which can be undermined by the practice of plea bargaining is the ‘presumption of innocence’. This is perceived as a legal right that the accused has placing the burden of proof upon the prosecution. Therefore, when accused persons decide to plead guilty, they waive their right to be presumed innocent of the offences for which they are charged, and there is no longer a case for the prosecution to prove beyond reasonable doubt. The idea of the presumption of innocence is rooted in European judicial cultures (Henham 2005: 160), and most states adhere to it or have similarly enacted principles. For example, in Italy the principle that an accused must not be presumed guilty has been adopted into the country’s constitution (The Italian Constitution cf Art. 27 quoted in Zappala 2005: 83).

Cassese notes that generally there are three parts to this principle: (i) The defendant must be treated, within and outside criminal proceedings, as being innocent; (ii) The burden of proof is on the prosecutor, so the defendant may limit themselves to rebutting the evidence but do not have to actually prove their innocence; (iii) In order to actually find the defendant guilty of the crime charged, the court must be convinced of their guilt according to a certain standard of proof. In civil law countries this is normally ‘*L'intime conviction du juge*’, that is the Judge’s innermost conviction, and

in common law countries it is, ‘finding guilty beyond a reasonable doubt’ (Cassese 2003: 390).

In short, the rule of law is as pertinent now as it was in medieval times. It might be argued that, whoever is defining this doctrine, the rule of law basically comes down to three core and distinct points. Firstly, the law must apply equally to all persons without any prejudice or discrimination and it should be general in its application and implemented consistently and, most importantly, it should be capable of being clearly obeyed. Secondly, no one is above the law and the law applies to the sovereign and the instruments of the state with the law being applied by an independent judiciary. These features underpin the distinction between the rule of law (which is objective, impersonal and neutral) and dictatorial rule by means of law (which is potentially biased, ad hoc and unequal). Thirdly, that power exercised by the government must not be arbitrary, or discard the notion of rule of man. It should be noted here that the idea that laws should not be arbitrary does not mean that there needs to be a particular purpose to the law, although of course they should clear, accessible and certain. So, it is clear that in contemporary Western legal tradition the rule of law is the basis of human rights.⁶⁸ Of which the presumption of innocence is deemed so vital a right that it is enshrined in Article 11 of the Universal Declaration of Human Rights. Under the liberal rule of law plea bargaining a war crimes suspect very quickly becomes a war criminal, losing this very important right.

4.1.3 Due Process

Other important principles that are entrenched in the rule of law are a defendant’s right to the presumption of innocence and ‘due process’. Today, ‘due process’ is

supposed to help ‘fair’ procedures in court by ensuring that public officials have limitations imposed on their powers, hence aiding the ‘right to a fair trial’⁶⁹. Liberals could argue that the primary objective of due process is discovering the truth, as opposed to simply obtaining a conviction (Nasheri 1998: 4). In common law jurisdiction this is achieved by the defendant having their guilt or innocence decided in a strictly adversarial proceeding where evidence is open to scrutiny by the defence and cross examination by the prosecution. In civil law jurisdictions, by contrast, the inquisitorial role is carried out by the judge, who presumably applies the same level of scrutiny to the evidence presented. In other words, due process requirements are designed to ensure a fair trial, which is important because fair hearings allow for a reasonable interpretation of the law and the nuanced application of the law (Allen 2001: 8). Respect for due process requirements are especially important in tribunals where defendants are accused of crimes such as genocide, crimes against humanity and other war crimes carrying severe punishment and massive social stigma to someone convicted of these offences. This is because it acts as a kind of ‘quality control’ over these proceedings. Such measures may cut down on the quantity of cases a tribunal can hear. However, liberals claim that when a full trial is conducted it does give more of a qualitative and fairer outcome and sense of justice (Nasheri 1998: 5), as all the evidence and witnesses have been heard and scrutinized in open court. The potential for wrongful convictions can also arise if due process requirements are not met. The role of due process is also of importance to the control of discretion, as the danger to autonomy that Dicey and Hayek warn about in relation to arbitrariness becomes less of an issue when due process is followed (Allen 2001: 126). Hence the due process principle features in sound judicial decision making.

4.1.4 Discretion

The first of Dicey's principles was that no man could be punished, or lawfully interfered with, by the authorities unless in circumstances when the law has been breached. As he put it:

No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. (Dicey 1982: 110)

By this, Dicey was suggesting that a person could not be punished without there being an objective application of established rules or pre-existing, politically neutral law.

Put simply, the rule of law is a power regulator. It is also in this regard that governmental officials' exercise of their discretionary powers with a view to constrain or restrict or privilege specific individuals would be acting inconsistently with the rule of law. Therefore, all actions carried out by a government, including prosecutors, must be specifically authorised by law, making governments more rational and their policies more humane, but this is only the case if the laws themselves are humane.

This limits the scope of a 'rule of man' to situations occurring that displaces the rule of impersonal law, under which there is no limit to what rulers can do, or even how they implement their policies. Often in such circumstances, power exercised by a ruler comes from 'rule by law'. This is an instrument of government where the government itself is above the law but citizens remain bound by legitimate laws. The rule of law differs from this as it encourages an independent legal order that does not depend upon the law's instrumental capabilities but on its degree of autonomy and the extent to which the law is distinct to other potentially influencing factors such as religion. In other words, the objective of this principle is to protect all individual citizens,

including defendants who remain presumed innocent, from the unaccountable and arbitrary exercise of state power. Therefore a person must not be held criminally liable or punished without there already being a law so holding, hence the ban on *ex post facto* laws.⁷⁰ In the instance of plea bargaining an example of this would be where a defendant is charged with a vague offense, such as conspiracy, without there being enough evidence to obtain an actually conviction after conducting a full criminal trial. However the defendant is still charged with this crime in the hope that s/he will plead guilty to another charge in exchange the prosecution will drop the earlier charge that was only articulated as a leverage device.

In a similar vein, the third principle in Hayek's formula was that rules must be certain. He believed this to be of vital importance, stating, 'There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here.' (Hayek 1960: 183) Certainty, for him, entails that the persons who are subject to a law should be able to predict what rules will govern them and their conduct as well as how they may be applied. This would make 'it possible to foresee with certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.' (1960: 80) People should know in advance which actions would open them up to the risk of governmental sanctions. Therefore, one knows what actions are permitted and can be carried out freely, 'when we obey laws in the sense of general abstract rules laid down irrespective of their application to us we are not subject to another man's will and are therefore free.' (1960: 153) This means that a government cannot change the law or create new rules of use regarding its application to suit their own prejudices.

The notion of there being standing and generally applicable law in existence was also crucial to the thinking of John Locke.⁷¹ Dicey argued that the use of discretionary power by governmental officials in order to impose constraints on individual citizens is inconsistent with the rule of law. He believed that discretion and the principle of legality were poles apart arguing that the role of the judge in legal proceedings was merely to announce the law (Dicey 1989: 183). This is because unregulated discretion creates a serious threat of arbitrariness, therefore putting the rule of law in danger. Consequently, in this situation it cannot be claimed that no one is punishable or ‘can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before ordinary courts of the land’ (Dicey 1989: 183-4). Here, both the idea and practice of discretion contradicts the principles of liberal legality as it gives the appearance that the application of the constraints on citizens is not in keeping with specific rules thus allowing for a potential act or action to be an offence on one day but then a legitimate act the next.

Hayek agreed that in this context the law and discretion were polar opposites. However, he did acknowledge that officials within modern day governments must exercise some discretion in order to function efficiently. He equated discretion to arbitrary will, concerning himself more with the administrative officials whose actions may impact on private citizens and their property. Thus, he believed that if this discretion was carried out by officers in accordance to legal rules possessing the qualities of generality, equality, certainty and any coercive action against an individual was only warranted by a justifiable view of the public good, then they would not violate the rule of law (Hayek 1960: 212-217; Allen 2001: 125).

However, Hayek acknowledged that whilst no legal system may be able to adhere to his three principles at all times, they can still preserve the rule of law and liberty as a guiding ideal. He states that:

When we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. (Hayek 1960: 153)

In light of this, it is generally accepted that governments must exercise a certain amount of discretion in order to function efficiently when applying rules, as the application of laws require a certain amount of discretion to deal with unanticipated situations. According to Hayek, this type of action falls within the scope of the rule of law if the exercise of discretion is itself governed by rules that are general, equal and certain (1960: 211- 217).

Using this theoretical frame of reference just outlined, I will now turn to how the use of plea bargaining in war crime tribunals might be seen as operating against the principles and assumptions asserted by the classical rule of law.

4.2 Classical Liberal Rule of Law Objections to Plea Bargaining

It is from the perspectives offered by the concept of the rule of law that one can begin to identify and place in a wider intellectual and ideological context some of the objections to the idea and practice of plea bargaining within the field of the international war crime tribunals. As noted, the second aspect of the rule of law as made by the liberal tradition is that the law applies equally to all persons. From such a position, one might argue that not only should the law provide equal protection to all

but that it should be implemented and applied in a manner that makes all persons capable of following it.

4.2.1 Equal Treatment and Plea Bargaining

When discussing plea bargaining, there are a number of varying circumstances where the standard of equal treatment before the law is clearly violated. For example, generally defendants that can offer the prosecution insider knowledge are often able to extract more favourable treatment when it comes to the actual plea deal and sentencing as the amount of information that the accused can offer acts as a bargaining chip to entice greater concessions in return - and hence leniency (Tieger and Shin 2005: 677-678; Henham and Drumbl 2005: 56; Rauxloh 2011: 10). A common example of this in domestic jurisdictions is a drug dealing ring where the defendant who is relatively low down in the organisation, such as a street dealer, would not be able to give as much helpful evidence, or information, generally regarding persons 'higher up' in the ring. However, a person who is close to the leadership would be able to give evidence or information that could lead to the conviction of a person who is in charge of the enterprise. This in turn, might provide kudos for all those involved in the prosecution. In such an instance, it is likely that the person who has the most incriminating information would be able to negotiate a 'better deal' with a greater reduction in sentence or even have charges dropped,⁷² and/or have the facts of the case presented in a less damning light. A similar situation may arise in war crime tribunals, here with respect to joint criminal enterprises (JCE)⁷³ where a defendant who has insider knowledge of the command structure

within a militia faction may receive a more favourable deal than say a ‘foot soldier’ who has no such knowledge to barter with.

Asserting this very point, Rauxloh has argued that plea bargaining should only be entered into if the defendant is able to offer new evidence that would contribute towards the reconciliation process of the affected region and/or contribute towards evidence gathering against a high ranking perpetrator (Rauxloh 2011: 21). Although this is highly desirable from the OTP’s viewpoint, it does however undermine equal treatment standards as prescribed by the rule of law. Take for example a defendant who is willing to cooperate fully with the tribunal and is genuinely contrite but is unable to offer any meaningful new information that could either help with the reconciliation process or help secure a conviction of another wrongdoer. The likelihood then, is that this person would either not be able to enter into negotiations with the OTP or would receive only a minimal discount in their sentence compared to other defendants who are able to offer more.

With respect to plea bargaining within war crime tribunals, the arguments put forward above can on face value be illustrated by the cases of *Rajko Cesic* (IT-95-10/1) and his co-accused *Goran Jelisic* (IT-95-10). The former entered into a plea agreement with the prosecutors, after initially pleading not guilty to the charges brought against him, in exchange for a promise of a lenient sentence. He then pleaded guilty to all charges against him which were ten murders and two instances of sexual assault. In this case, the prosecutor recommended a sentence of between thirteen to eighteen years imprisonment and requested a sentence of thirteen years be imposed,⁷⁴ the Trial Chamber handed down a sentence of eighteen years. In contrast, the defendant Jelisic, who was eventually charged with thirty-two counts; fifteen of crimes against humanity; sixteen of violations of the laws or customs of war and one

of genocide, pleaded guilty to thirty one of them against the advice of this counsel (Combs 2007: 62). He did however contest the charge of genocide and although he was acquitted of the charge he still received a forty year sentence which has since been upheld by the Appeals Court Chamber (Case No. IT-95-10-T).

So, although Jelisic pleaded guilty,⁷⁵ it would seem that he did not benefit from this with regard to sentence reduction in the manner that his co- accused and other defendants had. This example appears to emphasise the highly selective and discretionary manner in which prosecutors and judges can deploy plea bargains, highlighting the violation of the equal treatment principle championed in the rule of law, which insists that like cases' to be decided in a 'like manner' (Ewald 2010: 383). The implications of this are that cases, in particular plea bargained cases are not treated equally in international law.

4.2.2 Plea Bargaining and Sentencing Equality

Within the ICTR, there have also been issues regarding the equality of sentences received for defendants that have entered into plea bargains and those who have not .Chief Charles Taku when discussing his experiences in the cases of *Bisengimana* (ICTR-00-60) *Semanza* (ICTR-97-20) and *Runambarara* (ICTR-00-59) stated that:

The Indictment against Laurent Semanza whom I defended at the ICTR alleged that he perpetrated the crimes of Genocide, Complicity to Commit Genocide, Conspiracy in Genocide, Crimes against humanity, extermination, Torture, murder, Article 3 to the Geneva Convention and additional Protocol 2; in all 14 Counts, with Paul Besengimana and Juvenal Rungambarara. Finally Semanza was tried separately because the other two had not been arrested. However, the allegations against them were retained in Semanza's indictment. Semanza was tried and convicted to 25 years at trial level, increased to 35 on appeal. However, the two others made plea bargains with the Prosecutor who dropped the charges of Genocide against them. The plea

bargains agreement also indicated that they did not perpetrate the alleged acts of genocide, complicated in genocide or conspiracy with Semanza as alleged. They confessed to lesser crimes and were sentenced to very lenient sentences of about 12 years each. Rugambarara admitted to command responsibility as well as Paul Bisingimana, none actually incriminating Semanza in any serious way. (Interview with Taku 2010)

This level of variation and discrepancy is not grounded in legally significant factors and highlights first hand why there is a perceived unfairness and inequality when it comes to plea bargaining. Of course, these issues also arise frequently in domestic legal systems but seem to draw much more criticism in the context of serious crimes such as war crimes where the sentences received are very much in the public eye.

Likewise, the *Foca* (IT-96-23/1-2) case also highlights the level of inequality with regards to sentencing and the dropping of charges in the context of the war crime tribunals and this case is one of the most perplexing in this regard. Amongst other things, the decision at this trial highlights the level of injustice that victims of the crimes perpetrated are subjected to when plea bargaining is entered into. This is a landmark case as it was the first time sexual assault was investigated as torture, enslavement and as a crime against humanity (IT-96-23/1-T, Trial Judgment 22 February 2001). The original indictment named a number of defendants, three of whom were tried separately, and two who died so proceedings against them had been stopped. The three defendants who were tried together, *Kovac*, *Vukovic*, and *Kunarac*, all pleaded not guilty in the end, even though Mr Kunarac had tried to enter into negotiations with the prosecution, ultimately failing to come to an agreement (*Prosecutor v Kunarac* (IT-96-23/1) 10th March 1998).

The defendant in *Zelenovic* (IT-96-23/2) had entered into a plea bargain, concerning the charges he would admit guilt to and the sentence recommendation, whilst waiting for the judging panel to give a decision on the referral process back to

the courts in BiH under Rule 11 *bis*. As a result he pleaded guilty to rape and torture receiving only 15 years imprisonment. Zelenovic's codefendants Jankovic and Stankovic (IT-96-23/2) who were referred back to the BiH court, received 34 years and 20 years respectively after trial. This would indicate that had Zelenovic decided to contest the charges against him he could well have received a much longer sentence. The other three defendants *Kovac, Vukovic, Kunarac* received 20 years 12 years and 28 years that Zelenovic was initially charged with. Zoran Vukovic was found guilty of two counts of rape and torture which was considerably less than the several counts of rape and torture that his two co-defendants were found guilty of. The defendants in the *Foca* case were all convicted as part of a JCE that involved the gang rape of a 15 year old girl. It is, therefore, of interest to note the gap in sentence the defendants who pleaded guilty received as compared to those who did not. The judges in the *Foca* case were not 'happy to draw comparisons between the cases,' Zelenovic pleaded guilty to rape, the other defendants in the other cases also committed rape. Wayde Pittman points out that the disparity in sentencing could well be down to personal circumstances (Interview with Pittman 2010). What is interesting is to think about is what sentence Dragoljub Kunarac would have received if negotiations had not collapsed compared to what he actually received, and why it was acceptable to negotiate and enter into a charge bargain with Zelenovic years later and not Kunarac. On the face of it, it would seem that Zelenovic received a more favourable sentence due to his guilty plea. It is also possible that the judges applied some of the utilitarian justifications of plea bargaining discussed in the previous chapter and therefore awarded Zelenovic a lesser sentence as he saved the courts time and resource amongst other things. this indicates that in certain cases pragmatic justifications for sentencing takes precedent over the equal treatment provisions afforded to defendants under liberalism.

4.2.3 Plea Bargaining and Equality before the Law

The idea of equal treatment before the law also extends to instances where persons are charged with the same crime but where one defendant chooses to plead guilty and offer information on their co-accused, whilst the others decide to contest the charges against them. Here, the defendant who pleads guilty is generally more likely to receive a more favourable treatment in the form of a reduced sentence and possibly a reduction of charges than the other defendant. This would seem to clearly amount to ‘unequal treatment’ before the law. An interesting example of this can be seen in the ICTY cases of *Plavsic* (IT-00-39&40/1) and *Momcilo Krajinsk* (IT-00-39), who was Plavsic’s co-inditee, and charged with similar offences. He did not plead guilty to any crimes, maintaining his right to full trial, unlike Plavsic who gave up her right to trial and entered a guilty plea. After his trial, Krajinsk was sentenced to twenty seven years, sixteen years more than Plavsic’s eleven.

In international criminal courts the current situation is that the higher ranking the criminal the more information they can offer, even in another defendant’s trial. Therefore, if they give the prosecution evidence they will be given a ‘better deal’ than a lower ranking perpetrator who cannot offer nearly as much information⁷⁶ (Tieger and Shin 2005: 674).⁷⁷

Punishing defendants on the pragmatic basis of administrative efficiency and negotiation is, of course, different to punishing defendants on the gravity of the specific crimes that they are guilty of. The use of plea bargaining moves away from the notion that all perpetrators need to be punished on a strictly principled and legally explicable basis, particularly if they receive sentence discounts or charges are dropped

(Henham and Drumbl 2005: 56; Olusanya 2005: 82). The Tribunals seem to look at the quality of the information that is given, but if an accused cannot offer such information then, one might argue from a liberal perspective, they should not be comparatively penalised as this in effect amounts to discriminatory treatment.⁷⁸ If one is evoking the rule of law in its liberal incarnation, then this would suggest that there needs to be in practice an equal treatment of defendants before the court where all defendants are treated equally and receive the same rights and benefits as all others.

In my interview with him, Sir Desmond De Silva stressed that the people who are appointed as Chief Prosecutors of international criminal tribunals, ‘are people of great experience’ and so would be ‘well be able to distinguish those who are really deserving of the greatest credit’. He clearly felt that, due to their experience and their perceived calibre, they are able to see which defendant is the most contrite and helpful to the prosecution (Interview with De Silva 2010).

In spite of these points, Zappala argues that it would be interesting to see whether it can ever be possible to uphold ‘equality’ in the phase of the execution of a judgment. (2005: 217) In other words, if two defendants were convicted of the same crime, and then sent to different states to carry out their sentences, would they be treated equally with regard to early release and treatment in prison? In light of this, it can be argued that even the treatment they would receive in prison, or which particular prison they are sent to, may also throw up issues of equal treatment. In relation to international war crimes tribunals, the case of *Plavsic* (IT-00-39&40/1) once again offers itself as an appropriate example. By all accounts, Plavsic served her prison term in a Swedish prison that is equipped with horse riding facilities and a solarium,⁷⁹ whereas, in sharp contrast, other convicts who have committed war crimes will almost certainly not be experiencing as comfortable an imprisonment. Often,

when negotiating the terms of a plea bargain, the location where a defendant is to serve their sentence can a relevant factor (*Prosecutor v Bagaragaza* (ICTR-05-86)). Even the relocation and protection of a defendant's family are considered to be important bargaining tools, and often they are treated unequally in this regard as well. (*Prosecutor v Babic* (IT-03-72)) But, this may be due to the danger a defendant's family may be put in if they agree to give evidence and work with the OTP. For example, Chief Taku observed that for his cooperation Moriss Kallon's family would have been relocated to Canada (Interview with Taku 2010). When it comes to plea bargaining it is difficult to treat defendants equally as the reasons for entering into negotiations can be pragmatic. For example, if the OTP receives insider information from one defendant whilst another is unwilling or unable to provide such information the latter runs the risk of not receiving the offer of deals that match their co-accused who may simply have had more to bargain with.

4.2.4 Plea Bargaining and the Equality of Arms

Another type of 'equal treatment' liberalism insists upon for a defendant to receive a 'fair trial' is the notion of 'equality of arms'. This standard is particularly important in hearings in adversarial jurisdictions. It basically means, 'that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.'

(*Dombo Beheer B.V. v The Netherlands* Judgment of 27 October 1993, Series A No. 27. Paragraph 33)

The essence of the negotiation that takes place during a plea deal presents itself with a number of potential inequalities. In general, the prosecution is the party

that is in the more advantageous position during a plea deal. This is, by and large, because the prosecution work within the tribunals and therefore are more acquainted with the rules and procedures of the courts. Another factor that may arise is that the prosecution have more money to spend on witnesses and other trial professionals, than defence counsel.⁸⁰ Murphy pointed out that in general the prosecution has access to much more information about the crime locations, victims and potential witnesses. It has also been rumoured that at the ICTY the OTP had ‘over three million documents stashed away in the basement,’ of which ‘only a handful made their way to the defence’, Murphy went on to say that many of these documents were not even translated. (Interview with Murphy 2010)

There is also the issue of adequate space and working environment. For example, Professor D’amato noted that when trying to negotiate a plea deal for his client (*Prosecutor v Kovacevic* (IT-97-24-T) at the ICTY, the rooms in which defence counsel where expected to work during trials were cramped. When he asked if the plea negotiations could take place in the OTP offices he was informed that they were ‘off bounds to defence counsel’ (D’amato 2000: 3). ICTY defence counsel are housed away from the main building and they are provided with small offices in the actual ICTY building to use only during trial (McMorrow 2007: 152). This not only makes negotiating sensitive deals, where much confidential information can be revealed practically difficult but it potentially makes the day to day working life of defence counsel very isolated and difficult, if not impracticable. In a similar vein, Peter Murphy described how when he first started his duties as defence counsel at the ICTY there were certain parts of the ICTY building, ‘that defence counsel were not allowed in’ as you needed a pass or a key, such as the cafeteria. In fact, it is only recently that defence counsel have been allowed to use the cafeteria, after it was relocated to a

public area of the ICTY building following a fire (Interview with Murphy 2010).

Again, such discrimination highlights the impractical working environment that defence counsel have to endure as well as any, ‘social isolation’ that they may experience due to this (McMorrow 2007: 152) This, in turn, leads to the sociological assumption that despite its rules and procedures, the practice before the Tribunals is unequal. Tulken argues that these inequalities mirror already existing structural arrangements in society (Tulken 2002; Henham 2005: 103). As he puts it: ‘During proceedings, all the inequalities of the parties are reproduced- inequalities of condition (social origin, socio-economic level and cultural group), but also... inequalities of position.’ (Tulken 2002: 678)

In principle, the defence has the right to be treated equally in order to be on a ‘level playing field’ with the prosecution. The principle of ‘equality of arms’ also focuses on the right to obtain and receive evidence from the opposing party, the right to call one’s own witnesses and to question witnesses. However, O’Sullivan and Montgomery have argued that this principle, with particular reference to an accused’s right to cross examine a witness, has steadily been ‘eroded away’ as a result of a number of amendments in the RPE and decisions handed down by Chambers at the ICTY (O’Sullivan and Montgomery 2010). The fundamental principle is a general one - that all parties must be treated equally with regards to trial procedure. It should be noted, however, that this is a procedural equality and does not cover acts outside the control of the Trial Chamber, such as investigations, interrogations and arrests (*Prosecutor v Tadic* Case No. IT-94-1-A). When deployed as a legal criterion, this principle highlights potential instances where there may not be equal bargaining power between the defence and the prosecution.

Theoretically, such inequality can be alleviated by the defendant appointing, or having appointed if indigent, counsel who understand the plea bargaining process and who are able to negotiate effectively on behalf of the defendant.⁸¹ This is of significance where defendants themselves are not familiar with the notion of plea bargaining, as for example in the case of *Prosecutor v Joao Fernandes* (Dili District Court, Special Panels for Serious Crimes, 2001/02). If the plea negotiation process takes place after the indictment, but before a guilty plea is entered, then this gives more bargaining power to the defendant, especially with regards to sentence and fact bargaining. This then goes some way toward equalizing the bargaining power between the two parties, even if it remains very difficult to achieve full equality. In practice, any inequality that does transpire must, according to liberal ideology, then be compatible with a notion of justice that is grounded in the politics of equal protection. This is because here equality leads to a political emphasis on personal autonomy that is the defendant's autonomy (Donnelly 2003: 44).

In summary, this implies that there are a number of ways in which the defence are unequal to the OTP in the international tribunals. From the interview responses and evidence presented above it can be inferred that many of the material inequalities between the two parties can also have a manifest effect on the outcome and success of a plea bargain. The more recent tribunals such as the STL have taken steps to remedy this by establishing a Defence Office that has equal investigatory and procedural powers as the OTP. But it is yet to be seen if this does anything towards making the plea bargaining process more equal between the parties.

4.2.5 Plea Bargaining and the Presumption of Innocence

In international law, the principle providing for the presumption of innocence was not explicitly provided for in the Nuremberg and Tokyo Tribunals (Zappala 2005: 83). It was however provided implicitly as it was granted in Justice Jackson's Opening Address for the United States at IMT, *Nazi Conspiracy and Aggression*. He stated that, 'we accept that [the defendants] must be given a presumption of innocence' (at Paragraph 117; Zappala 2005: 83). This presumption has, however, been expressly stated in statutes of the more recent war crimes tribunals, such as Article 21 (3) ICTY and Article 20 (3) ICTR.⁸² These have set a high standard in this regard, stating that, 'The accused shall be presumed innocent until proved guilty according to the provisions of the present statute.'

The ICC has also made provisions for this in Article 66 of its statute. Indeed, the presumption of innocence has been enshrined in a number of other international instruments, such as Article 11 of The Universal Declaration of Human Rights (UDHR). This states that '[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law', Article 14 paragraph 2 of The International Covenant on Civil and Political Rights (ICCPR), and Article 6(2) of the European Convention of Human Rights (ECHR) also discuss the importance of guilt being proved by means of a fair and public trial. The latter states, '[E]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law' (ECHR, Art 6 (2)). The notion of the presumption of innocence has been afforded considerable importance in criminal systems and, therefore, not surprisingly it is taken very seriously in international criminal law, where media coverage and public perception often assumes that persons indicted by such tribunals must indeed be guilty of something. The issue of the presumption of innocence was brought to light by defence counsel in the opening statement of the case of *Prosecutor v Oric* (IT-03-68-T):

If I may illustrate the presumption of innocence in another way, and I say this also for the benefit of those following this trial, there may be members of the public watching today who may know little of criminal justice or indeed of this case who will be looking at Naser Oric in the dock and thinking: what's he done? Well, that's precisely what the presumption of innocence isn't. A better question would be: I wonder why the prosecution is bringing this case? (Page 263, line 1-7)

With this in mind, it is worth also noting the controversy at the SCSL when Geoffrey Robertson QC, a judge in the Tribunal's Appeals Chamber, was disqualified from serving on the RUF case due to comments he had made about the RUF in his book, '*Crimes Against Humanity: The Struggle For Global Justice*', prior to his appointment to the SCSL. He had stated that, '[T]he RUF had perfected its special contribution to the chamber of war horrors, the practice of "chopping" the limbs of innocent civilians.' (Robertson 2002: 466) Although prohibited from serving as a judge on the RUF case due to this perceived bias, he was however, allowed to continue as a judge at the appeals chamber. (SCSL Press Release, 13 March 2004).

There has been much discussion regarding whether pleading guilty and the waiver of the right to trial does in fact infringe upon Article 6 of the ECHR.⁸³ A decision in the case of *X v United Kingdom* (1972) 40 CD 64 would suggest that as long as there are satisfactory safeguards and the judge is confident that the accused understands the consequences of pleading guilty, then Article 6 (2) would not be infringed. This is backed up by Professor David Crane who when asked about this asserted that a defendant has a right to plead guilty if they so choose. He went on to stress that the crimes a defendant pleads guilty to are reviewed in open court, and, if necessary, questions are asked about the fact of the specific crimes the defendant is pleading guilty to. After this has taken place, if the trial chamber does not believe that the admission of guilt is voluntary, informed and unequivocal a plea of not guilty is entered, resulting in a full criminal trial (Interview with Crane 2009). A potential concern regarding the waiver of the right to trial and the presumption of innocence is

raised whenever a guilty plea is entered (Radosavljevic 2007: np). In other words, if a defendant facing a severe sentence is given an offer that is ‘too good to refuse,’ then there would be a potential breach of Article 6(2) ECHR. *Deweerd v Belgium* (1980) 2 EHRR 439 is often cited as an example of this. Here, the defendant was offered a fine in exchange for a guilty plea but, if they contested the charges and were found guilty after a trial, there was the prospect of serving a lengthy prison sentence.

Traditionally, issues around what sentence a defendant should receive are considered only after the issue of guilt or innocence has been determined. However, when dealing with plea bargaining, the determination of guilt is largely dependent upon the *substantive consequence of conviction*. This gives rise to the notion that if a defendant is offered a favourable deal, then they would probably waive their rights and plead guilty. This could occur even if they are factually innocent because accepting the deal may be the ‘better of two evils’ in terms of the type or length of punishment the defendant may receive. More telling in this regard are the sentiments expressed by Wayde Pittman who suggested that, international criminal tribunals had at least the same, if not more, measures in place to protect the rights of defendants, in particular their presumption of innocence, than domestic courts (Interview with Pittman 2010).

When discussing the issue of pleading guilty and the problems that this may pose with regards to the defendant’s right to be presumed innocent, the ICC’s rule on accepting guilty pleas seems to have made provisions for safeguarding this right. In particular, Article 65(4) of the ICC statute attempts to tailor traditional rules on guilty pleas to the specific demands of international justice (Zappala 2005: 88). This rule exhibits a more holistic approach to the issue of pleading guilty. It does so by taking into account the interests of all persons involved so the Trial Chamber can request that

evidence surrounding the basis of the guilty plea be presented to them before accepting the plea of guilty from the defendant. This is because there is a prevailing duty of the chamber to determine the truth beyond the allegations made by the parties; in other words, beyond a reasonable doubt. Amongst other things, this does go some way towards protecting the defendant's right to the presumption of innocence by making sure that the accused is not pleading guilty to a vague charge that has been brought against them only in an attempt to exert pressure upon them to plead guilty, and/or that they understand to what they are pleading guilty to. Despite all the safeguards in place, one still cannot ignore the fact that the use of plea bargaining moves away from the articulation of guilt or innocence, and replaces it with a sentence based upon a compromise.

Another controversial matter surrounding the presumption of innocence that may influence a defendant when deciding whether to plead guilty or to defend him/herself, is the conception of judicial notice. This is governed by Rule 98 (B) of the RPE.⁸⁴ It is relevant because tribunals have allowed for the use of adjudicated facts from other proceedings to be used in a current case.⁸⁵ In a bid to be judicially economical, the tribunals and courts have adopted this practice from the civil law's inquisitorial system (Knoops 2005: 27). The implication of Rule 98(B) is that the Trial Chamber accepts the facts as true, hence the prosecution does not have to admit any more evidence relating to these facts as, 'the types of facts falling under Rule 94(B) must be confined to those which are so notorious as to be beyond any reasonable dispute between people of good faith.' (O'Sullivan 2001: 338) The relation of this to plea bargaining is that if the onus of the burden of proof moves to the defendant, it potentially places the latter in a situation where they feel that they cannot possibly disprove 'facts' which the tribunal has already deemed to be true. There are a

number of ways in which a defendant's right to the presumption of innocence is infringed upon. Specifically for this thesis, when an accused is approached by the OTP with a possible negotiation the presumption of innocence is violated as they already have accepted the guilt of a defendant, potentially putting the defendant in a position that they feel they will not be able to defend, or will receive a longer jail sentence if they did contest the charges.

4.2.6 Plea Bargaining and 'Due Process'

One of the recurring liberal ideological criticisms of plea bargaining is that the latter violates a defendant's claimed right to 'due process of the law'. Again, connected to the classical liberal conception of the rule of law, the right to a fair trial, under Article 6 of the Human Rights Act, is strongly connected to the notion of due process.⁸⁶ In the context of the international war crime tribunals, the main due process objection to plea bargaining is that to secure a conviction the prosecution does not have to prove a case beyond a reasonable doubt as the defendant has already entered a guilty plea. This can be seen as manifesting a number of potential violations of liberal beliefs, values and principles.

As already discussed, defendants who choose to exercise their right to trial do not receive the same concessions if convicted than those who chose to plead guilty. In jurisdictions that rely on the mass production of 'excessive' guilty pleas to get through their caseloads, such as USA, there is the fear that charges may be bought against a defendant simply in the hope that the accused will be pressured into pleading guilty. In other words, the prosecution will 'over charge' the defendant for tactical reasons. Here, the prosecutor could make vague but serious allegations against the defendant in

the hope that they will plead guilty. Pleading guilty to a lesser charge, by way of a charge bargain, instead of contesting the original one ensures a conviction for the prosecution, and the defendant potentially escapes a lengthy prison term. It would seem on the surface that some sort of justice has occurred. However, from a liberal perspective, this form of overcharging is a way of manipulating and coercing defendants at the expense of their individual rights, including a right to exercise free and informed choice. Within legal systems where this is common practice, defence lawyers too risk becoming part of such manipulation. As such, it raises liberty issues related to the value of ‘freedom of choice’ and personal autonomy. As Alschuler recognises:

[O]vercharging and subsequent charge reduction are often components of an elaborate sham, staged for the benefit of the defence attorneys. The process commonly has little or no effect on the defendant’s sentence, and prosecutors may simply wish to give defence attorneys a “selling point” in their efforts to induce defendants to plead guilty. (Alschuler, 1968: 95)

Conversely, one may argue when entering into a plea bargain, ‘the individual’s rights are being watched out for by the judge and defence counsel.’ (Interview with Crane 2009) This then eliminates the possibility of abuse, regarding overcharging and pressurising a defendant into pleading guilty, with the defendants’ due process rights remaining intact. With the practice of plea bargaining now being an accepted legal mechanism it may be time that the international community looks toward issuing due process rules that should be followed when plea bargaining. Currently there are no formalised rules protecting the defendant’s rights if they chose to admit their guilt, which has the potential to allow coercive practices into the negotiation process.

4.2.7 Plea Bargaining and Coercion

Coercion challenges liberal projections of ‘private autonomy’. There is no apparent indication from the cases or the interviews I have conducted that the ICTY and ICTR coerce defendants into pleading guilty. That is to say, in conversation counsel were confident that the defendants are not pressurised into pleading guilty. Whilst this may be the case, there are a number of other reasons imposed by the prosecutors on a defendant which may lead them to plead guilty. Chief Taku explained that in the ICTR, in particular, he felt that defendants underwent very lengthy pre-trial detentions, which made the prospects of entering into negotiations a very compelling prospect:

In international Tribunals, where the minimum standards of fair trial guarantees stated in article 14 of the International Covenant on Civil and Political Rights, article 20 of the ICTR Statute, Article 17 of the Statute of the Special Court for Sierra Leone and article 21 of the ICTY Statute, are hardly applied, compounded by the sheer trauma and length of pre-trial detention as well as the paucity of resources placed at the disposal of an accused to ensure an illusory equality of arms in effecting a credible defence, he/ she is compelled to submit himself / herself to a plea bargain in the hope of mitigating his/ her suffering in the judicial system. Some of the accused have waited in pre-trial detention without a hearing for close to ten years. Others were arrested prior to investigations being initiated to find evidence to prosecute them. Applications for bail pending trial are almost always rejected. (Interview with Taku 2010)

Although this is not overt coercion, in the sense that a prosecutor is pressuring a defendant in the interview room, there is an argument that certain defendants may feel that they are in a hopeless situation solely due to the length of time they have spent in pre-trial detention, rather than feeling they will not be able to defend the charges against them. At the ICTY, Murphy explained that, although prosecutors offered very attractive deals to defendants they were still able to say no as, ‘at least two of my defendants were offered deals very readily by the prosecution.’ (Interview with Murphy 2010) In one case, the deal was dependent upon the, ‘the defendant giving evidence against X and Y’, in exchange the prosecution told him; ‘you can pretty much go home.’ Murphy went on to state that the prosecution would, ‘ask for a

nominal sentence and the defendant could go home in a year', but that his client said that whilst he may 'be home in one year but dead in eighteen months.' (Interview with Murphy 2010)

This insight into threats of violence against defendants and the families of those who give evidence, highlights how dangerous giving insider evidence can actually be. Even tempting concessions prove not to be worth the risks attached to negotiating with the prosecution. Murphy further points out that the only way negotiations with the prosecutor would have been possible would have been if defendants in vulnerable circumstances were offered witness protection. As it happens, Murphy's client said he would rather serve his sentence and then go home, all be it eventually. (Interview with Murphy 2010) It would also seem that the prosecution took a similar approach with the defendant Obrenovic (*Prosecutor v Obrenovic* (IT-02-60/2)), where the offered him a number of plea bargain opportunities during the pre-trial phase (Karganovic no date: 181).

Of course, there may be instances where the defendant and their counsel have perceived the prosecutors conduct as coercive, such as in the RUF trial. Although there may well be good cause for arguments of coercion, there is also a strong argument that cultural practices may have been the cause for this confusion. Also, again in the *Obrenovic* case, the conduct of the OTP may be perceived as coercive, especially for those who do not come from an adversarial legal background (a point discussed more fully in the next chapter). Karganovic states that after this particular defendant had refused offers to negotiate, a deal was struck between the OTP and co-defendant Momir Nikolic. A message was sent to Obrenovic a few days before the trial was to begin, stating that if he was to negotiate with the prosecution he would receive a very generous deal, 'for dropping out of the trial and saving the court its

time and resources.' (Karganovic no date: 181) The OTP also insinuated that if he wanted to change his mind later on the 'quality of the offer would decline dramatically.' (181) This may well have led the defendant to feel that he should plead guilty, as opposed to plead not guilty as he would know that this is just how prosecutors from adversarial backgrounds go about procuring a guilty plea. Karganovic also explains that in his opinion the prosecutor's conduct during the bargaining process was indeed coercive, 'The methods of exerting pressure that were applied by the prosecutor were diverse, but the pressure was fierce. I suppose that systematic intimidation would be the most accurate description of the conduct and atmosphere which marked these "discussions."' He went on to say that this resulted in 'an extremely unpleasant and threatening atmosphere.' (182) Again, it must be stressed that the conduct of the prosecutor is not inappropriate in the jurisdiction that he came from, America. Nor is it improper under the laws of the international criminal tribunals, but it does, never the less, have the potential to cause distress and confusion to a person who is not from such a legal and cultural background. Coercion when plea bargaining removes the defendant's choice when it comes to deciding whether to plead guilty or not. This is in conflict with the liberal democratic grounding international tribunals are built upon which champions itself on rights and the free will and personal autonomy of the defendants. (Bass 2000)

4.2.8 Plea Bargaining and 'Wrongful Convictions'

From a liberal perspective, the above scenario also has the potential to give rise to 'wrongful convictions' as defendants may feel that all is lost and there is far too much evidence against them, and as a result plead guilty to a lesser charge in order to obtain

a shorter jail term. This can occur although they are indeed innocent of the charges brought against them. Once again, this is of great importance in the context of international war crime tribunals. The charges that are bought in such hearings are, of course, of a very serious nature and not only do the persons and societies affected by these alleged crimes need some sort of justice, so do the persons accused of these crimes. Indeed, liberalism would focus on the rights of defendants, especially given those issues of personal liberty and state powers are at stake. By this, liberals generally mean that if a person is going to be tried for a crime against humanity they should be done so fairly and with a sense of justice being done for individual defendants. Due to the serious nature of these crimes, defendants who are accused should be tried with all their due process rights intact and without the fear that they will, in effect be punished for contesting the charges against them. In such instances, liberals would argue that there is no real justice if, for the sake of cost cutting and efficiency people are convicted of crimes they did not commit, or have charges of the crimes they actually did commit dropped.

Another feature of wrongful conviction that potentially contradicts liberal ideals is that defendants who have entered in to plea bargain may be required to give evidence for the prosecution, in the case either of a co-accused or another defendant, as part of their overall deal. This testimony runs the risk of being inaccurate, or completely false, in order to receive greater benefits for themselves, as they would be seen to be co-operating with the prosecution. Slobodan Zecevic corroborated this when discussing the factual document that is required as part of the deal, stating that:

This document which is drafted by the OTP, contains certain facts and constructions which are important for OTP's theory of that particular case or some other future case. The accused are tempted to agree to such facts, even though some are obviously outside of their purview or knowledge, because they think naively that it can't hurt them to confirm a thing or two they have no knowledge. (Interview with Zecevic 2011)⁸⁷

A number of accused have acted in this way in various war crime tribunals even when they have run the risk of jeopardising their family's safety as well as their own. This is not to say that international courts do not take due process very seriously. Former President of the ICTY Theodor Meron stated, 'there can be no cutting corners when it comes to due process.' (Meron 2003)

There are other aspects of plea bargaining that suggest another level of inequality and unfairness and suggest the very real possibility of a wrongful conviction. *Prosecutor v Jokic* (IT-01-42) is a pertinent example. In this case the defendant Miodrag Jokic, pursuant to a plea agreement by way of charge bargaining, pleaded guilty to six counts in the indictment and was sentenced to seven years imprisonment. However, when his co-accused Pavle Strugar (*Prosecutor v Strugar* ((IT-01-42) decided to contest the charges brought against him evidence came to light that the alleged victim of the cruel treatment he was supposed to have inflicted had in fact only received surface wounds.

These revelations led to this particular charge being dropped. The prosecution then went on to drop other charges with respect to property damage (*Prosecutor v Strugar* Decision on Defence Motion Requesting Judgment on Acquittal Pursuant to Rule 98 bis, June 21, 2004 (IT-01-42-T)).⁸⁸ It would therefore seem that Jokic admitted guilt to crimes that the prosecution could not even bring to trial let alone prosecute successfully. This type of situation is rarely highlighted as often it is a space that charges that can be proved are dropped in exchange for evidence and, more importantly, a cheaper more efficient way of disposing of cases. On the one hand, the type of situation in the *Jokic* case indicates that there may have been a possibility that the prosecution knew, or at least might have known, that there was not enough evidence to gain a conviction in this case. Therefore, on its face, this would violate the equality standard that is afforded to the defendant under the rule of law, and it raises

serious questions about the fairness of plea bargaining in these trials. On the other hand, it could equally be argued that this is just a part of plea bargaining, and a defendant should never plead guilty to a crime that they have not committed. It is difficult to know what inspired this particular defendant to plead guilty to crimes that the prosecutor would not be able to prove due to the private nature of the negotiations. This highlights the very real issue that defendants may plead guilty to crimes that they did not in fact commit or have knowledge of. This in itself is a very troubling aspect of plea bargaining.

4.2.9 Plea Bargaining and the Lack of Transparency

Liberalism insists that justice be seen to be done, taking place in public. Due to the lack of transparency, the clandestine manner in which guilty pleas can be negotiated violates the due process principles prescribed under the doctrine of the rule of law. These negotiations often take place behind ‘closed doors’ and the contents of them are not revealed to the public. This element of privacy can lead to a number of problems. For instance, it breaches the liberal ideology that affords individuals the right to receive a fair trial by protecting them from entering guilty pleas due to coercion. If the guilty plea was not voluntary, informed and unequivocal, this contradicts the liberal ideas of autonomy and personal freedom. Another aspect that would violate the due process rights of a defendant is if irrelevant or inadmissible evidence is used to procure a guilty plea from them.⁸⁹

The issue of transparency is not limited to public trials, or even information that the OTP may have but is not disclosing it to the defendant in the hope that they will enter into negotiations. At times, the issue of transparency in plea bargaining is

much more complicated. When talking about his experience working as counsel in the *Plavsic* case, HHJ Murphy said that the defendant had four lawyers, the lead counsel and a co-counsel negotiated with the prosecution whilst he and another lawyer prepared for trial, as they, ‘had to get ready for trial, as there was no great confidence that it (the negotiations) would be successful.’ (Interview with Murphy 2010) Due to the uncertainty surrounding the plea bargain and the controversial nature of this particular agreement, ‘the prosecution asked that there should be a wall within the defence team’, the two lawyers negotiating with the OTP ‘were not to discuss the progress of the negotiation.’ (Interview with Murphy 2010) This shows the exact extent of the lack of transparency that takes place during negotiations even if it might be understandable that there has to be a certain amount of confidentiality, as some information given to the OTP is too sensitive to disclose to the public.

Murphy stated that in the *Plavsic* case the ‘wall’ was placed between the defence counsels as the prosecution:

[W]ere worried about the possibility of confidential material being leaked.’ Understandably at times information that is exchanged in negotiations is not made public due to the sensitive nature of such information that at times may raise issues of, say, national security . Nevertheless, it is remarkable, even perhaps peculiar, that defence counsel working on the same case would be precluded from major aspects of the case. The counsel were updated about the plea negotiations in *Plavsic* insofar as the lead counsel would ‘report back’ and say things like we are ‘making progress on a possible agreement. (Interview with Murphy 2010)

Arguing that, the defence team could not abandon preparations for trial as the plea negotiations, ‘went on for a number of months and was a very drawn out process’ and that there was, ‘no great confidence that it would be successful’ (Interview with Murphy 2010). Murphy’s experiences with the *Plavsic* case highlight how temperamental such negotiations can be. The transcripts of the, already discussed, *Kunarac* case shows how quickly negotiations can collapse. For the time being it is

unlikely that we will know the true extent of negotiations when it comes to crimes of such gravity and sensitivity but suffice to say that the lack of transparency also has the potential to frustrate Judges. In a report by the *IWPR* it is stated that:

Judge Schomburg, for example, wants the judges at the tribunal to have access to more information - a feature of the civil law landscape in his native Germany. There, the prosecutor is duty bound to give all relevant evidence to the judges, who can demand that an indictment be amended or re-issued if they feel it is incomplete. No such obligation exists within the framework of the tribunal.

This led Judge Schomburg to display visible anger in the courtroom last spring, while presiding over the case of the Bosnian Serb politician Miroslav Deronjic, indicted for his role in the ethnic cleansing of eastern Bosnia in 1992.

In his witness statement, Deronjic spoke at length about events in Srebrenica in 1995, but the prosecution did not charge him with any crimes relating to that period - a decision that provoked Judge Schomburg's admonishment. He criticised the prosecution for indicting Deronjic for only a small part of what appeared to be a much greater scheme.

When the chamber sentenced Deronjic solely for his role in the events of 1992, Judge Schomburg dissented. But in an earlier interview with IWPR, he admitted that trial chambers, in principle, have limited opportunities to contradict the parties when both sides agree.

"If both [the defence and the prosecution] say 'we have no disagreement', then we have no chance of establishing the extent of a defendant's guilt," he said.
(Rachel S 2005)

As already mentioned, one of the justifications of plea bargaining in such crimes is that it helps to illicit important sensitive information in order to convict another in exchange for concessions. It is something of an open secret that persons who have committed terrible crimes and caused much pain and suffering receive concessions, often disproportionate to their culpability as they make themselves invaluable to the prosecution in the information and evidence they are able to give.

The amount a defendant is 'willing' to cooperate with the Trial Chamber raises an interesting question. If this is unknown, then judges do not know how much weight to give to this mitigating factor when deliberating sentence. In turn, this

presents a further problem in that, due to the lack of transparency, a defendant may not be able to successfully appeal the decision on both procedural and substantive grounds. This also raises questions as when the sentence is pronounced, both after a plea bargain or a full trial, only a total sentence is pronounced. It is therefore impossible to see how each conviction is broken down, and how the conviction is reflected in the actual length of the sentence (Hola and Smeulers and Bijleveld 2011: 413). Although this lack of transparency can be viewed as a general complaint against international sentencing practices in general it is also of particular importance when it comes to plea bargaining.

As this particular lack of transparency also opposes the rule of law as one of the main premises of plea deals is that there are negotiations over recommended sentence, which of course are done in private. This does not allow defendant to know that pleading guilty to some crimes over others leads to a greater sentence, or how much of a difference in sentence they might expect. Even the amount of gravity a mitigating factor is given is also unknown. This makes assessing what sentence length one might get difficult in relation to the exact contribution in sentence length each charge that has been admitted and any mitigating or aggravating factors that may be present, potentially reducing it to a guessing game.

Liberal norms may also be violated by the principle actors involved in a trial, i.e. defence and prosecution lawyers involved in the defendants case. Here, there is the real possibility that the parties involved may compel a defendant to waive the rights afforded to them through human rights laws and international treaties, by pleading guilty, thereby removing any element of free choice. However, Professor David Crane asserted that when plea bargaining a defendant pleads guilty to a reduction in the number of years they will serve in prison, hence they are not giving

up any rights, he argued that, ‘he can always say no and choose to enter a plea of not guilty’ or the judge can say ‘I don’t think you are guilty on that charge or series of charges’ and a plea of not guilty is entered for the defendant (Interview with Crane 2009). An example of liberal objections can be seen here as defendants who have a low level of understanding of their rights and the plea bargaining process are prevented from opting for full trials because of the undue pressure they are placed under. This is shown quite clearly in *Prosecutor v Joa Fernandes* Dili (District Court Special Panels for Serious Crimes, Case No. 01/00.C.G.).⁹⁰ In this case, the defendant did not understand what exactly he was pleading guilty to and the implications of entering a guilty plea, let alone the circumstances under which a plea of guilty should be entered.

From the classic liberal standpoint of Mill and Hayek, the very nature of plea bargaining might be considered objectionable as it inevitably includes a (comparative) ‘threat’ of receiving a harsher sentence if convicted after a full trial. There have been a number of studies that have examined this issue within domestic jurisdictions, namely, McConville and Baldwin’s book *Negotiated Justice: Pressures on defendants to Plea Guilty* (1974). The authors of this work suggested that some of the defendants they interviewed felt that they had been pressured into pleading guilty to charges which they themselves believed they were innocent of, leading to the implications that they were unjustly treated.⁹¹

Unfortunately, there has been no such work done in this regard in the world of International War Crime Tribunals. The ICC has the benefit of time to be able to develop their plea bargaining process, which other tribunals and courts have not had (Interview with Crane 2009). It would be interesting to see once the ICC is in full swing with a number of completed trials completed how the prosecutors, who are

employed by the Court, manage to approach plea deals with defendants and their counsel without resorting to coercive methods, if indeed they do.⁹²

4.2.10 Discretion, Uncertainty and Plea Bargaining

Liberalism generally insists that legal certainty, stemming from the predictable application of objective legal rules is one of the necessities for a rule of law governed state. By contrast, a state where legal decisions stem from the exercise of subjective discretion of the decision-maker, there can be no such certainty. In the last paragraph of his book *Sociology of Law*, Weber commented on the part discretion played in law in becoming almost common place, ‘inevitably the notion must expand that the law is a rational technical apparatus, which is continually transformable in the light of experiential considerations and devoid of all sacredness of content.’ (Weber 1978: 895) In most legal systems, officials within the criminal justice system are given a broad remit when it comes to decision making and, arguably, therefore discretion forms the basis of plea bargaining. When plea bargaining originally began to be adopted into cultural practice in the USA it was during a period of Whig leadership 1830-1860, its popularity was due to its informal and discretionary nature and the increase in the amount of control the Whigs had over sentencing policy (Vogel 2008: 220). This is, therefore, a central dilemma for defendants as they should be able to receive and rely on advice from defence counsel concerning what laws, if any, have been breached, and what the expected legal outcome may be. One might argue that such concerns also apply to plea bargaining as it allows the defendant to make an informed decision when deciding whether to plead guilty or not. There are a number of ways in which discretion can take place when plea bargaining, the following sections will analysis these under the lens of the liberal rule of law.

4.2.11 Prosecutorial Discretion and Plea Bargaining

In most domestic criminal justice systems there are a number of legal bodies, such as the police, prosecutors, judges and juries, that are expected to exercise discretion when deciding who should be subjected to criminal penalties and who should escape them⁹³ (Findlay and Henham 2005: 135). The results of which are the direct outcome of human decision making (Ewald 2010: 383). This is also true of war crime tribunals as it is the OTP that decides if an individual should be arrested and ultimately brought to trial, and whether allegations should even be investigated given the limited resources available. They also decide whether or not to offer or accept a plea deal and what will be the terms of such an agreement. This is usually based on factors such as the probability of obtaining a conviction, the nature of the alleged offence and the character of the defendant. There may also be a host of non-legal factors, such as the composition and orientation of the prosecution staff and the cultural and legal background of the lawyers involved⁹⁴ (Ewald 2010: 383). Jordash comments that, one should take into account who is actually in the prosecutorial team, as if there is someone who is: ‘determined to make his name, then it is difficult as you’re not going to be able to plead out the case’ due to reasons of professional vanity. He goes on to add that ‘of course there are some prosecutors and defence counsel who believe you should not plead’ on a matter of principle, be that legal or personal (Interview with Jordash 2010; Interview with Pittman 2010)

Nilsson also suggested that the makeup of the prosecutorial staff influences the use of plea bargaining. When talking about the fact that the ICTY had seen more

defendants enter into a plea negotiation than other war crime tribunals, he speculated that it could not have been a coincidence that more ICTY cases are disposed of by way of guilty plea than other tribunals, ‘it was due to the efforts and the initiatives taken in the prosecutor’s office … it was probably due to something internally.’ He also stressed that the ICTY was not more open to guilty pleas than the ICTR (Interview with Nilsson 2010). Here, Judges use their powers of discretion in determining whether the accused is guilty or not, as well as the severity of the punishment imposed on the defendant.⁹⁵

In international criminal law there is another element that adds to the discretionary nature of the law, prosecutorial discretion. I have already touched upon this earlier, but it requires a little more attention and discussion here. The prosecutor is entrusted with a vast amount of discretion throughout the whole judicial proceedings. It is they who decide who to investigate, who to use as an insider witness, and who to prosecute. They also have a large amount of discretion when it comes to plea negotiations. Of course it is the defendants choice whether or not they wish to plead guilty or to contest the charges against them, but it is the prosecution who normally have the end say in what the agreed fact will be and how many charges to drop and so on (*Prosecutor v Kunarac*). International criminal law now also has an interesting standard; that is it is in the ‘interest of justice’. This standard is afforded to a prosecutor under Article 53 of the Rome Statute which allows the prosecutor not to initiate an investigation or prosecution if it is in the interest of justice. Not only does this standard facilitate discretion but it also can be applied across a great variety of subject matters.⁹⁶

In discussing what charges to bring and indeed who to prosecute for which particular offences, it is worth looking at the aspect of the duty to prosecute in a little

more detail and its relationship with plea bargaining. In international criminal law, the prosecutor is bound by a number of legal instruments to prosecute certain crimes, making plea bargaining on the surface incompatible with these laws and treaties. One of the most compelling duties to prosecute concerns the crime of torture. The duty to prosecute this particular crime falls under another of different legal instruments. For example, the obligation to bring to court falls under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 4 (1) states '[E]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.' Article 7(1) states '[T]he State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.' Whilst this clearly sets out a duty to prosecute this crime, one just has to look at the plea negotiations that have taken place in the international criminal courts to see that the prosecutor's discretion overrides any duty that they are bound by to prosecute. This normally occurs if it is in the *interest of justice*. Article 18(1) of the ICTY Statute lays out the discretionary powers a prosecutor has, it states:

[T]he Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

This indicates that the prosecutor enjoys wide discretion regarding who and what to prosecute, without being made subject to judicial scrutiny. Judge Wald, in the *Jelisic* Appeal said, 'nowhere in the statute is any chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor's decision to bring a case.' (*Prosecutor v Goran Jelisic* (IT-95-10

Para. 4) This may also be back up by assertions made by Sir Geoffrey Nice QC regarding the *Jelisic* case, where the Judges had put pressure on the prosecution to drop the genocide charge, which was being contested by the defendant. Discussing the role that he and Louise Arbour had played Nice stated:

She resisted internal pressures. Goran Jelisic, aka 'Serbian Adolf', pleaded guilty to various war crimes he committed but not to genocide, also on the indictment. The genocide trial was due to start when I took it over. It would have been the tribunal's first genocide trial to reach a conclusion. The trial judges pressed Louise in back corridors to accept the pleas of guilty, leaving genocide for a (publicity-attracting) "bigger fish". She declined to yield to the judges; the evidence against Jelesic would have allowed lawyers to know whether genocide was appropriate as a charge for someone low in the "management chain"; the trial continued. Louise left before the end of the trial. The trial judges acquitted in defiance of one, or more, basic rules of natural justice despite one of them privately revealing the "bigger fish" consideration that led to the acquittal. On appeal Louise's position was completely vindicated. (Nice 2010a)

Nice also suggested that Carla Del Ponte had met with the Judges on her own despite being advised not to, as the Judges were trying to engage with a possible plea bargain in this case (Interview with Nice 2010). In light of the above, this would indicate that the Judge Wald is indeed correct in that there is very little that can regulate or control prosecutorial discretion.

The ICC differs from the ICTY and ICTR, although the prosecutors there seemingly also have unconditional discretion, but it is met by a number of checks which are set out in Article 15 of the Rome Statute. The checks are mainly in place to curb concerns states may have regarding 'a politically inspired prosecutor encroaching upon their sovereignty.' (Dukic 2007: 711) The essence of Article 15 with regards to the discretion a prosecutor may have when plea bargaining is similar to that of the ICTY and the ICTR's. The main source of this discretion comes from the 'in the interest of justice' clause. This clause in the remit of plea bargaining gives

the prosecutor the ability to bring a case against who he or she thinks is most criminally culpable. In turn, this of course means that a prosecutor also has the discretion as to who to use as an insider witness and who to initiate plea bargains with. In his experience at both the ICTR and SCSL, Chief Charles Taku explained that this wide discretionary practice was common practice in both tribunals. Suggesting this left the defendant at the mercy of the prosecutor's discretion, which then extended to the Judges when determining sentence, who relied heavily on the prosecution's evidence, regardless of whether it came from a reliable source or not (Interview with Taku 2010).

In relation to this Dukic argues that this may indeed leave the prosecutor susceptible to political factors or pressure to influence any decisions as who to prosecute and who to use as a witness and protect from future prosecution. This is potentially dangerous, as an end result it may lead to politically motivated prosecutions, and in turn let judgments in through the back door of in the *interest of justice* curbing the attempts by the International Tribunals to limit prosecutorial discretion (Dukic 2007: 718). This would raise concern amongst liberal jurists as it would most certainly breach the rule of law.

As the role of the international prosecutor has evolved Zappala has made the distinction that the role of the prosecutor at the ICC should that of an 'organ of justice' as opposed to a mere participant (Zappala 2003: 42). He argues that the prosecutor will be impartial with regards to political influence, explaining that, 'The institutional profile of international prosecutors has moved from a very partial dimension, deeply grounded both in a victor's justice paradigm and in the choice of an adversarial type of criminal procedure, to a more impartial character.' (Zappala 2003:

40-41) Zappala also points out this was also discussed by the ICTY in the case of *Prosecutor v Kupreskic* (IT-95-16-PT) where it was held that:

[T]he Prosecutor of the Tribunal is not, or not only, a party to adversarial proceedings, but is ... an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting. (Decision on Communication between the Parties and their Witnesses, 21 September 1998 Para 3(ii))

This is particularly significant in light of Chief Taku's views regarding the wide and unquestioning discretion the prosecutor has, leaving the prosecutor's version of events to be held as true. This is also reiterated by Slobodan Zecevic who, when taking about the factual document that is required says:

This document which is drafted by the OTP, contains certain facts and constructions which are important for OTP's theory of that particular case or some other future case. The accused are tempted to agree to such facts, even though some are obviously outside of their purview or knowledge, because they think naively that it can't hurt them to confirm a thing or two they have no knowledge about. (Interview with Zecevic 2011)

However, as David Crane explained, without insider witnesses or defendants giving evidence on their co-accused the SCSL would lack a coherent prosecution strategy.

He argued that:

[I]f you don't have a strategy then you don't know where individuals fit in and the importance of particular witnesses.' With regards to the overall strategy and plea bargaining, Crane stated that plea bargaining was 'clearly a possibility' he went on to say that when thinking about negotiations one had to 'decide which ones (defendants) are bought to the plea bargaining process. As plea bargaining without association with the overall strategy in some cases could be dangerous as you don't know what the ramifications are. (Interview with Crane 2009)

The SCSL had less financial resources compared to other international criminal tribunals at the time. It was, therefore, important for the prosecutors to work out a strategy of who to prosecute and who to enter into negotiations with in order to obtain enough information and evidence that would allow for a successful prosecution of a

defendant. For this to happen effectively and efficiently, the prosecutor must be endowed with a large volume of discretionary powers. It is telling that Karim Khan, a very experienced lawyer in the field of international criminal law,⁹⁷ believes that discretion in the, ‘international jurisdiction is much more fettered than in the USA’, indicating that the prosecutors in international criminal tribunals do restrain their discretionary powers (Interview with Khan 2010).

Concerning discretion, it may be that different trial professionals come to international criminal justice with many different backgrounds, which in turn leads to different approaches to how a trial should be conducted, or cases investigated and so on. This makes the theory and practice of discretion especially pertinent. It is important that the lawyers are afforded a broad amount of discretion as there will be differences in their approaches towards the law and the actual trial process itself depending on which legal culture they come from. This thinking is also extended to judges as well and the way that they conduct and oversee trial proceedings. In explaining this, HHJ Murphy stated that, ‘Judges from civil law countries are more proactive’ than those from common law countries. The last case that he was involved was a 16 month assignment to *Prlic et al* (IT-04-74), before he went to the Bench in the UK. This was ‘presided over by a French Judge and his two wing men were from Switzerland and Hungary.’ Murphy went on to say that this was a, ‘very interesting experience’ and it was clear to him the judging panel were doing, ‘their best to be fair.’ Although ‘they came from a different worlds they [the lawyers and the judges] were finding a common language from which to work with.’ Despite this, Murphy perceived that the French Judge was much more, ‘controlling and would take over cross examinations of the witnesses’ unlike a British judge who presided over a trial that Murphy was involved in was ‘hands off’ and had the attitude of ‘try the case for me, in the British tradition.’ (Interview with Murphy 2010) In an interview with the

IWPR, Judge Wolfgang Schomburg said, ‘The composition of the chamber has an effect on the outcome of the trial.’ (Rachel S 2005)

4.2.12 Plea Bargaining and Legal Certainty

As discussed previously, one of Hayek’s three principles of the rule of law is that the law should be certain. In situations where plea bargaining takes place it is difficult to ensure certainty due to the discretionary nature of the process. For example in a domestic jurisdiction a defendant who is charged with mass murder may then enter into a plea bargain resulting in the original charge being dropped to manslaughter. In the area of international criminal law an example may be the removal of genocide charges in favour of a charge of a crime against humanity, like in the *Plavsic* case. This also may lead to them receiving a shorter prison term. Alongside this, another defendant who is also charged with a similar such murder and who may also enter into a plea agreement hoping to receive a short prison term and have the charges dropped may not receive equal treatment before the law although their crimes and conducts are identical. This provides no guarantee that the latter defendant will receive the same concessions as the previous one. Clearly such instances would violate both the certainty imperative valued by liberals as well as the ‘equal treatment’ values. There is also an issue that due to the lack of certainty in the plea bargaining process, it is unclear what it is that the prosecution must prove before obtaining a conviction, thus making this aspect of plea bargaining further incompatible with the rule of law doctrine as interpreted by liberalism.

From the Tribunals’ inception ICTY and ICTR judges have been pronouncing sentences for extraordinary crimes while lacking any detailed legislation or precedents

for guidance. To date the positive law has too been unable to offer any assistance with the issues surrounding sentencing. (Hola and Smeulers and Bijleveld 2011: 412) This issue of the lack of certainty is of course intensified when plea bargaining is introduced. This lack of certainty in plea bargaining is due to a lack of rule governance which encourages like cases to be dealt with in a like manner. In turn, such loose regulation raises a problem in international war crime tribunals as the tribunals do not have any form of sentence guidelines. Judges do not have to hand down sentences in accordance with the prosecution's recommended sentences (Henham 2007; Cook 2005: 476).⁹⁸

This can result in defence counsel only being able to speculate on what the outcome of a proposed or actual plea bargaining is likely to be. The ICTY provides good examples of this in the case of *Babic* (IT-03-72-S). Here, the prosecution recommended a sentence of 'below eleven years', the prosecutor emphasized, 'I stress here the word below.' (Transcript, 24 April 2004 at 191) In fact he received thirteen years with the trial chamber stating that an eleven year sentence 'would not do justice.' (*Babic* Sentencing judgment, 29 June 2004 paragraph 101-02) Although the court gave him an even harsher sentence than the one the prosecution had suggested, the Trial Chamber did give him credit for voluntarily surrendering and pleading guilty. However, they took the fact that he had stayed in power during the Yugoslav conflict to be an aggravating factor, stating that:

In conclusion, the Trial Chamber accepts that the following factors establish that a reduced sentence is appropriate: Babic's admission of guilt and the promptness thereof; his voluntary contact with the Prosecution prior to confirmation of the indictment against him and his substantial cooperation with the Prosecution not only in his own case but also in other trials before this Tribunal; his voluntary appearance after confirmation of the indictment against him; his showing of remorse; and his family and personal situation. (para. 97)

Babic appealed this sentence but lost the appeal in 2005 (IT-03-72-A).

In a similar fashion, *Dragan Nikolic* (IT-02-60/1-A) received twenty three years instead of the recommended fifteen years, which was then reduced to twenty years in 2005 following an appeal. In contrast, *Momir Nikolic* was sentenced to twenty seven years, for his role in the genocide at Srebrenica. This was considerably higher than the fifteen to twenty years that had been recommended. The *Jokic Case* (IT-01-42/1-S) differs from the others in that the defendant received a lower sentence than the one that was recommended. He received seven years not the recommended ten years due to the promptness of his guilty plea and his voluntary surrender. The latter provides an interesting comparison to the *Babic* case. Here, the ICTY also took into account the substantial co-operation that was offered to the prosecution, stating that:

In light of the above, the Trial Chamber finds that the following are relevant mitigating circumstances to which appropriate weight has been attached when determining the sentence: Voluntary surrender; Guilty plea; Remorse, also shown by the conduct concomitant and posterior to the committed crimes; Cooperation with the Prosecution; and Personal circumstances (paragraph 103).

Not forgetting the controversial case of *Plavsic*, which has already been discussed, where the defendant received only eleven years for her role in the mass violence that took place in the Former Yugoslavia, we can see that there is a lack of certainty in violation to the rule of law in the plea bargaining process in international war crime tribunals. Therefore, for liberal ideology, plea bargaining increases the problems a defendant may face due to the highly unpredictable nature of the decisions made by the tribunals. This can be illustrated by the diminished interest in guilty pleas at the ICTY after 2004. Such a change was at least partly due to the departure of Michael Johnson, who was the Chief of Prosecutions at the Tribunal. Johnson, an American lawyer, was a strong supporter of plea bargaining and had been involved in many of the plea negotiations that took place during 2003 (Combs 2006: 99). Wayde Pittman

and Jonas Nilsson also suggested that this also may be due to the fact that, around this time, the ICTY had received a huge number of accused. Had other tribunals had also undergone such an influx in cases then they too may have seen an increase in plea bargaining (Interview with Pittman 2010; Interview with Nilsson 2010). HHJ Peter Murphy points out that the recent slowdown in the number of guilty pleas seen at the ICTY could be attributed to the fact that the Tribunal is coming to an end and hearing its last round of cases. The defendants who are at trial at the moment are too high ranking for the prosecution to enter into a negotiation with them. Murphy also suggested that if these defendants were to be convicted, then they ‘must go away for a very long time’. (Interview with Murphy 2010)

It should also be noted that with regards to certainty and consistency of sentencing, the *ad hoc* tribunals prescribe in their statute the idea of handing down individual sentences, namely in Article 24 (1) of the ICTY Statute, and Article 23 (1) ICTR Statute. When considering these ‘individualised’ sentences, the Tribunal looks at mitigating and aggravating factors surrounding the circumstances of the case in question and then sentences the defendant accordingly⁹⁹ (Zappala 2005: 204). This is to protect individual defendants from being punished for the general crimes that occurred during the time of conflict they are accused of taking part in but also to punish defendants for the specific crimes that they did in fact commit. Achieving this is not only a necessary component of international criminal law when it comes to sentencing in general but it also contributes towards the lack of predictability and rule governance at a sentencing stage. Factors such as remorse and the family life of the defendant, *Plavsic* (IT-00-39-40/1) *Kambanda* (ICTR-97-23-A) and *Tadic* (IT-94-1-S) for example, have all been deemed to be pertinent factors when deciding the punishment a defendant should receive, potentially becoming a ‘bargaining chip’. However, if these considerations were carried out under a specific sentencing

framework, then it would allow for greater predictability and, therefore, make them more aligned with the liberal conception of the rule of law. Olusanya argued that one of the reasons for this lies within the distinctions between what constitutes a mitigating factor as opposed to an excuse for the criminal conduct. He states:

[I]n the ICL context it is difficult to know where this boundary lies; owing to confusion and a lack of a clear picture of how a person's criminal responsibility may be affected by contextual determinants, judges have vacillated between guilt and innocence, between exoneration and condemnation, and between heuristics and normative reasoning. As a result the boundary of international criminal responsibility is simultaneously expanding and contracting, and thereby exposing fissures in the edifice of international criminal law. Thus inconsistency and a lack of uniformity exist in the treatment of defendants vis-à-vis excuse and mitigating circumstances. Furthermore, in exercising their discretion judges have narrowly focused on volition and reason at the trial phase, thereby failing to take sufficient account of relevant contextual processes in attributing blame. (Olusanya 2010: 30-31)

Although this aspect of international law applies to sentencing discretion in general rather than plea bargaining specifically, it is still important when regarding plea bargaining. This is because it contributes towards the problems faced by defendants when deciding to enter a guilty plea by adding to the uncertainty that a defendant faces when considering whether to plead guilty to lesser charges or contest the charges and go to trial. According to Pittman, one way to help ease this uncertainty is for the judges to get involved in that if they believe that the recommended sentence range is either too high or too low, then they should either send back the case to the two parties to 'renegotiate', or they should not allow the agreement to go ahead. As Pittman stated, 'you can either plead guilty, but there would be no agreement or plead not guilty or renegotiate. But if the judges do accept the agreement then the trial chamber would be bound by it and must stay within the sentence recommendations when deciding on an appropriate sentence. This way you know what sentence you are getting.' (Pittman 2007)

In his article *Making a Case for Binding Plea Agreements at the ICTY* (2007), Pitman suggests the case of *United States v England*, where the defendant was involved in the maltreatment of detainees at the Abu Ghraib prison facility in Iraq as an example as to how this might work. The judge presiding over this case rejected the guilty plea when the defendant contradicted herself through the testimony of a witness she called during the sentencing stage. Although the defendant had entered into a binding plea agreement, the judge sent the case back and the defendant had to reevaluate whether to plead guilty, not guilty or to enter into a new plea agreement (Pittman 2007: 158).

There are a lot of varying factors that are considered when negotiating a plea that can make the outcome uncertain and therefore confusing. It is important to note that some of these non-legal or extra-legal factors determine the outcome of negotiations which of course impacts on the sentence a defendant receives. The next section will look at the issues of sentencing and discretion when entering into negotiations.

4.2.13 Sentencing Discretion and Plea Bargaining

In the case of the International Criminal Court (ICC), similar to the two *ad hoc* tribunals, Article 78(1) of their statute emphasises the importance of individualisation of sentencing. It states that, ‘in determining the sentence, the court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as gravity of the crime and the individual circumstances of the convicted person.’¹⁰⁰ Like the ICTY/R, this Article does not suggest any parameters to this, or how much weighting should be given to said ‘factors’. It therefore fails to give a framework

which can be used for guidance (Henham 2007: 770). To add to the confusion over the lack of certainty over what sentence an accused may receive, the ICC Statute positively encourages the use of discretion. This is provided for in Article 76(1) of the ICC statute which merely states that, ‘in the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.’ (Radosavljevic 2007)

If liberalism is correct, determinate rules are required for a legal system to function effectively and fairly, then it would also be the case that the predictability and certainty of the law pertains to the proper method of legal interpretation. In other words, if the judges follow the exact language of the law then that secures predictability. This is known as the textualist approach (Easterbrook 1994: 17). Problems that may arise from this is that there are certain laws that sometimes need a broader interpretation to what the written rules give, in order to be more encompassing and fair. An example of this is may include the now more encompassing definition of rape and sexual violence as a war crime, and that acts of sexual violence can now be categorised as genocide (Allen 1996; Askin 1997).

There are also a number of other factors that may make the outcome of the rules applied uncertain for defendants, one such factor is the language used in legal rules. There are many instances where the law is not framed in a clear and determinate language.¹⁰¹ This potentially leaves room for a vast amount of discretion, which in turn may lead to uncertainty. In particular, the rules that govern the use of plea bargaining in the world of international criminal law employ vague standards by using indeterminate terms such as ‘reasonable’, ‘significant’. One such standard that is important to plea bargaining is remorse. As discussed in detail in the previous chapter

a defendant's expression of remorse when pleading guilty is considered a desirable effect of plea bargaining. Remorse however remains an ambiguous concept where a lot of discretion is given to judges to decide what is classed as 'remorse', if it is genuine, and whether to give it any mitigation, and how to apply such mitigation in a consistent and coherent manner (Ward 2006: 131). As Tieger observed,

Remorse presents a particularly compelling demand for clarity because of its subjective nature... Remorse... resides within the perpetrator and can only be identified through circumstantial evidence or reliance on the declaration of the accused. This subjectivity further complicates a sentencing court's effort to ensure that the basis for its decision is understood. (Tieger 2003: 777-778)

Showing remorse puts the court and its participants in a difficult situation as a defendant may appear to be contrite, and therefore possibly be on the way to being rehabilitated and reconciled. However, the implementation of factors such as remorse is not governed by any actual rules and so consistent application becomes difficult to ensure. Such factors are classed as legal standards, which are vague to say the least and therefore indeterminate which again may lead to uncertainty.

Of course, the use of vague standards in law need not necessarily leave the legal system uncertain. There are instances where the certainty that is desired can be achieved through the use of vague and indeterminate legal standards. These standards of course have to be well crafted and have parameters placed upon the scope and level of discretion that can be applied to them. Still using remorse as an example of an indeterminate legal standard, legal systems have made factors such as remorse a legal norm that is expected of defendants. As well as expressing remorse by way of apology and/or trying to rectify the harm caused, remorse is also a mental state and is often lacking linguistic clarity and is governed by ambiguous rules if any.

Raban suggests that we look at these factors as multi-dimensional situations (Raban 2010: 187). He argues that the phenomena they describe are informed by

various combinations and factors, each having different and varying importance. Therefore for international judges to determine remorse would resemble making a medical diagnosis (Raban 2010: 118).¹⁰² Where a diagnosis is made there are normally a number of factors to consider which are mutually exclusive to each other and do not impinge on other factors whether they are present or not. Say out of 100 factors, there need only be 40 factors to diagnose an illness, if there are more factors then possibly there is a better chance of a correct diagnosis. Also the presence or absence of certain factors may point to the intensity of illness.

Looking at the example of remorse in more depth the presence of a number of factors may help decrease the amount of uncertainty for a defendant when pleading guilty. For remorse to have any mitigation there usually are a number of things that are present, a statement of remorse, cooperation with the OTP, a psychiatric evaluation, a guilty plea, favourable post conflict conduct, family and personal circumstances to name a few. Although the evaluation of each of these is open to a certain amount of discretion and indeterminacy itself, each would carry weight and mitigation on its own merit, with certain factors carrying more merit than others, such as a guilty plea and cooperating with the OTP. The absence of any positive post conflict conduct or any other factor should not go towards undermining the mitigating circumstances already present.¹⁰³ Therefore, by instilling multi-factor, multi-weight legal tests to evaluate vague legal standards may in fact increase the predictability and certainty desired in liberal legal systems¹⁰⁴ (Raban 2010: 188).

Despite Hayek's arguments for rules to be fixed and announced beforehand and therefore unambiguous (Hayek 1944: 72) he came to realise that the use of vague legal standards may increase certainty and predictability over well-defined legal rules:

This [last remark] throws important light on a much discussed issue, the supposed greater certainty of the law under a system in which all rules of law

have been laid down in written or codified form, and which the judge is restricted to applying in such rules as have become written law. In my own case even the experience of thirty odd years in the common law world was not enough to correct this deeply rooted prejudice, and only my return to a civil law atmosphere has led me to seriously question it. Although legislation can certainly increase the certainty of law on particular points, I am persuaded that this advantage is more than offset if its recognition leads to the requirement that only what has this been expressed in statutes should have the force of law. It seems to me that judicial decision may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law. (Hayek 1973: 117)

The ICC aims to hear cases from all over the world and, from a liberal rule of law perspective, it is especially important to have predictability and certainty in sentencing policy in this particular court. It aims to try different defendants who were involved in different conflicts with some sense of equality. It will be interesting to ascertain how judges will maintain a certain and predictable sentencing policy when faced with markedly different defendants. By way of example, if one imagines that the cases of *Plavsic* and *Kambanda* (ICTR 97-23-S) were heard at the ICC, it would be interesting to see if there would have been such a difference in the respective sentences received. This disparity in sentence, with Plavsic receiving eleven years and Kambanda receiving life imprisonment after both pleaded guilty, could also lend itself toward the argument that the use of plea bargaining in war crime tribunals violates the equal treatment and predictability standards that are required by the classical liberal rule of law. It is evident that there are many factors that are considered when issuing a sentence, the factors considered often overlap with each other and are rarely mutually exclusive to one another. This is also true of the rights that a defendant loses when deciding to plead guilty, for example the loss of the right to equality impacts on the due process rights of the defendant.

4.3 Conclusion

In this section I have discussed the implications of plea bargaining in international war crime tribunals from a liberal perspective, emphasising the importance of the ideological principle of the rule of law in relation to prosecution practice in these contexts. This is not to say that this is the only interpretative model that one may follow in analysing plea bargaining. There has been much debate about the decline of liberal rule of law, and how its ideologies are incompatible with modern legal systems. In recent years, there has been a revival of the arguments put forward by Carl Schmitt in his criticisms against liberalism and the rule of law in general.¹⁰⁵

As already noted, legal systems based on liberalism are rights based and individualistic. This holds that the main aspects of plea bargaining are incompatible with the liberal rule of law. These areas are mainly based around the discretionary nature and the unequal treatment the defendants receive and the lack of transparency that arises when plea deals are negotiated. This, of course, contributes greatly to the lack of certainty a defendant will have when deciding whether to enter into negotiations or to go to trial. Although the very nature of plea bargaining means that this will always be the case. These issues highlighted in this section are of great importance, especially as international tribunals do their utmost to enshrine these rights in their laws and rules. The stark reality is that full and complete adherence to the rule of law when employing judicial mechanisms such as plea bargaining is unrealistic. The liberal rule of law sets high standards that in reality cannot be met when entering into a plea bargain as evidenced by the interviews above. As far as notion of judicial certainty involves strict rule following to generate predictable outcomes, this in itself is impossible. Although there needs to be some degree of rule

following otherwise this would lead to random outcomes, which would be unacceptable.

When it comes to defendants' claimed rights to 'equality before the law', it seems that there is a division in whether people regard this to be breached or not. Generally, from the interviews it is defence counsel that believes that they and their clients are treated unequally, and often gave examples to illustrate their point. Chief Taku offered his first hand knowledge of the inequality and unfairness in plea bargaining when he discussed his experience in the cases of *Bisengimana*, *Semanza* and *Runambarara*¹⁰⁶ (Interview with Taku 2010). Related to equal treatment, His Honour Judge Peter Murphy talked about the lack of the equality of arms when it came to plea bargaining, at one point stating that it had been rumoured that at the ICTY the OTP had 'over three million documents stashed away in the basement', of which 'only a handful made their way to the defence', Murphy went on to say that many of these documents were not even translated (Interview with Murphy 2010).

Whereas other trial professionals believe that the tribunals do their utmost to ensure the equal treatment rights. This may be because the defence like most criminal courts international tribunals are often in a less advantageous position than the prosecution, who have amassed evidence and information through the investigations that have already taken place. It would seem prudent that in this situation the only realistic measure that can be taken is that defendants are treated individually even when a particular defendant's case is part of a JCE that they are given equal opportunity to plead guilty and that the procedure governing the bargaining process are applied equally to all defendants. This should also be extended to defence counsel who may not be as familiar with the plea bargaining process as the prosecution. As O'Sullivan and Zecevic point out:

[T]here is a lack of uniformity in plea bargaining as a result of the fact that the opportunity to enter into such an agreement has been only recently introduced in the legal system and it inevitably will take time to create and develop certain standards for this process in the domestic criminal practice. It may be understandable that counsel from the inquisitorial system lack the experience and sufficient knowledge of the plea bargaining process. (O'Sullivan and Zecevic 2011: 150)

The other area of concern highlighted in this section is the lack of transparency that occurs when entering into negotiations. Although this most certainly breaches the right to a public trial, it would be inconceivable to hold negotiations involving war crimes in open court, this therefore would most definitely infringe upon a defendant's presumption of innocence.

As far as plea bargaining is concerned, it is clear to see that the theory of the rule of law and the use of plea bargaining however reformed are incompatible. It may be as shown above through the use of interviews that certain aspects of plea bargaining, such as the loss of a defendant's right to the presumption of innocence, may not always be an issue in reality and that the trial professionals have full confidence in the tribunals to protect this right.¹⁰⁷ This does not mean that it may not become an issue later on, possibly in another tribunal. (Interview with Pittman 2010)

The rule of law in itself is also an incomplete theory one of the main down falls of this particular approach in the context of plea bargaining in relation to such large scale crimes is that it fails to consider the rights of the victims unlike utilitarianism.¹⁰⁸ From the interviews I undertook with practitioners who have experience of working at the tribunals, it is apparent that both of these theories fail to provide adequate frameworks for the use of plea bargaining 'on the ground' in international criminal law. This is particularly apparent when the very concept of plea bargaining is alien to the persons the international justice imperative is aimed at. With this important factor in mind, the next chapter deals with the differing theories of legal

imperialism and neo-colonialism exploring these issues from a non-liberal perspective using the idea of legal imperialism as a way of further developing a critique of the liberal rule of law. Once again I will substantiate my position by illustrating the arguments with empirical evidence derived from the experiences of practitioners who have worked on cases that have involved the use of plea bargaining in war crime tribunals. These interviews allow me to reflect on abstract legal theories and consider how far ‘hard and fast’ theoretical positions are actually workable in the reality of the contemporary international legal systems.

5. Plea Bargaining at International Tribunals and the Concept of Legal Imperialism

This chapter will explore the issues that surround the use of plea bargaining in war crime tribunals through the lens of the interpretative framework of legal imperialism. This notion is complex and, therefore, in order to fully explore the issues it raises here, this section will be broken down into three parts. The first will discuss the theories that inform the idea of legal imperialism, such as post-colonialism and cultural imperialism, and relate them to the thesis' central research question; the justification of prosecutors deploying various forms of plea bargaining in international criminal law cases involving war crimes charges. The second will look at the subject of plea bargaining as a form of legal transplant, considering the reasons how and why it was transplanted into the international system. This section will be using *Prosecutor v Sesay, Kallon, Gbabo* (SCSL-04-15-A) as a case study. The third section will examine the implications of plea bargaining using subaltern theories, highlighting the long term problems that may occur when negotiating guilty pleas.

Unlike the previous two chapters, this section does not aim to represent the use of plea bargaining merely as something of a hindrance to the realisation of liberal ideals, or as an instrument of justice as defined by utilitarian criteria. Instead, it offers a more nuanced analysis that incorporates some of the more viable lessons provided by the earlier perspectives and examples of institutional practice but also vitally acknowledges the roles of previously imperialist powers in constructing a continuing legacy of international law and transplanting aspects of their particular systems into the international context, often as false over-generalisations as if any particular system can be taken to represent universal criminal justice as such.

In light of this, and unlike the previous two chapters, this section does not take as its starting point an analysis of the role of plea bargaining in international tribunals in relation to already established legal theories. Rather, it engages more directly with the issues that arose from the interviews I conducted with legal practitioners drawn from both western and non-westerns legal systems. Although I have already discussed some of these issues discussed here, it is worth revisiting them but this time through the prism of writing about imperialism and post-colonialism in ways that could not be fully addressed by the frameworks offered by utilitarian or liberal approaches.

5.1 Legal Imperialism and Post Colonialism

Recently, the idea of an imperial ordering of the world has returned with the terms ‘imperialism’ and ‘empire’ denoting geopolitical issues (Hurrell 2007: 107). This contrasts with the twentieth century where a more ambiguous and theoretical meaning was used under the influence of Marxist theory (Zolo 2009: 107). Indeed, recently substantial quantities of sovereign states have transferred some of their autonomy to international establishments, such as the European Union, NATO, the World Bank, the G8, The Arab League and the International Criminal Court and of course ICTY and ICTR.

However, whilst there may have been some moves to such internationalisation, the post-war period also saw the development of a hegemony driven by Western powers led by the USA. This is exemplified by the role that the USA took in the liberalising agenda of trade negotiations and the expansion of the World Trade Organisation’s scope (Hurrell 2007: 108). Hurrell notes that at the core of this was a specific form of legal practice. He states that there was an,

‘extraterritorial application of US law’, arguing that, ‘the externalizing of US domestic law and domestic regulatory practices’ was part of a wider strategy leading to what he termed ‘global regulation’ (Hurrell 2007: 108). It is this form of imperialism that is particularly relevant to this thesis, specifically the use of plea bargaining in war crime tribunals via the implementation of a ‘legal transplant’ that is not indigenous to the legal tradition into which it is introduced.

There has been much written about imperialism and international law (Anghie 2004; Mieville 2005, 2008; Schmitt 2005), in particular the areas of humanitarian law (Bricmont 2006), and environmental law (Crosby 2004; Gonzales 2001). Some of these authors also question the role of international criminal justice and its place and function in the world today, whilst some refer to the imperialistic nature of the institutions that define it. In doing so they use terms such as ‘new’ and ‘liberal’ or neo-liberal imperialism (Stromseth, Wippman and Brooks 2006; Weinstein and Van de Merwe 2007) and ‘lawfare’¹⁰⁹ (Comaroff and Comaroff 2006; Kelsall 2009: 8). However, for all this, there is still insufficient analysis of which aspects of international criminal law may be usefully regarded as a form of imperialism and why such a characterisation can helpfully supplement the more familiar insights I have discussed and that are derived from the perspectives of liberalism and utilitarianism. Generally, it is taken for granted by such writers that aspects of the international legal system can indeed be viewed as being imperialistic without sufficient discussion, elaboration or firm evidence.

Returning to its origins, the classical notion of international law was also the product of a European legal culture which, ‘is an incontestable fact that no-one questions.’ (Jouannet 2007: 380) This is evident in international criminal law where debate about legal imperialism is often confined to questions of whether the

international legal system should be based on the inquisitorial or adversarial systems and which one of these has become more dominant. In fact, the tribunals are supposed to be a hybrid of the adversarial and inquisitorial systems which leaves very little room for anything else, least of all non-European modes of trial and conceptions of justice. In the context of the discussions contained in this thesis, it is of interest to see how plea bargaining might be interpreted in other tribunals, especially those that are not funded by and therefore potentially influenced by, the USA. As Judge Peter Murphy said when interviewed for this thesis, ‘the ICC, due to the absence of an American influence, has moved over to the civil law...There is not much adversarial about that (tribunal)’. He went on to say, ‘regrettably the UK doesn’t have as much influence as the USA does.’ (Interview with Murphy 2010)

There has been little discussion regarding whether the basis of the international legal system could take on another, non-European, form. However, a considerable amount of consideration has been given to the idea that certain elements of other systems, such as Traditional Informal Justice Mechanisms and other non-judicial forms of accountability such as Truth Commissions, may be incorporated in certain circumstances¹¹⁰ (Drumbl 2007; Kelsall 2009). Jouannet argues that this is a form of modern day imperialism and represents a type of neo-colonialism as the Eurocentric international legal and cultural ideals are not considered to be compatible with non-European legal cultures (Jouannet 2007: 383). Here, the aspect of international criminal law in question is plea bargaining and in this chapter the introduction and use of plea bargaining is examined as a possible form of imperialism originating from the adversarial legal system, and in particular the USA.

In discussing the issue of legal imperialism and plea bargaining it is useful to first consider what is meant by the term ‘imperialism’. The study of imperialism

has a long history, one that traditionally directs attention to discussions concerned with the development of international capital. Here, imperialism is most widely understood as the expansion of a state's power over other states in a manner that usually creates an imbalance in territorial, economic and cultural fields. In the past, this type of activity has been synonymous with notions of empire and much of the legal scholarship surrounding imperialism is based in notions of capital which can be characterised by perpetual motion and continual expansion (Marks 2008: 13).

Imperialism may also be defined as 'a policy of extending a country's power and influence through colonization, use of military force, or other means.' (Marks 2008: 13) Hence, it should therefore not be confused with colonialism, which Edward Said suggested was best understood as, 'the practice, the theory and the attitudes of a dominating metropolitan centre ruling a distant territory.' (Said 1993: 8) In a legal context this resonates with the idea of plea bargaining as this was initially introduced into the Tribunal's debate by the US advisors and which has taken on an adversarial mode which is more in keeping with its interpretation within the US legal system.

It can be argued that the use of plea bargaining in international tribunals is a form of American imperialism for two reasons, it is a form of cultural imperialism and it is also that the way in which plea negotiations are conducted 'looks after' American interests. When looking at the justifications of plea bargaining I noted that one of the major reasons for its use was economic efficiency. Much of the money for these tribunals is donated by nation states and in the case of the ICTY a quarter of their funds come from the USA (Scharf 2004: 1077). Hence, any money that is saved in this context ultimately serves the economic interests of the USA and therefore the material interests of United States citizens as it is their tax money that is funding international justice. Going even further, Mieville (2005; 2008) states that,

‘imperialism and international law are part of the same system. Modern capitalism is an imperialistic system, and a juridical one. International law’s constituent forms are constituent forms of global capitalism and therefore imperialism’. (Mieville 2008: 120) This assertion is illustrated by comments the former prosecutor of the ICTY and ICTR, Carla Del Ponte, made at a speech she gave in 2005 at the London branch of Goldman Sachs entitled, The Dividends of International Criminal Justice. Del Ponte emphasized that international criminal tribunals facilitate profit making for others by bringing about stability in the effected regions via prosecutions. She stated that, ‘this is where the long-term profit of the UN’s work resides. We are trying to create stable conditions so that safe investments to take place.’ (Del Ponte 2005) Presumably the ‘safe investments’ can be taken out by private companies, individuals and governments alike.

As discussed in the utilitarian chapter, the more guilty pleas there are, the more criminal convictions there are. In turn, this helps restore some of the wrong doing that had occurred and works towards the re-stabilising of a region¹¹¹ (Combs 2007). This, of course, would also create an environment for safer economic investments. In addition plea bargaining conserves funds donated by States’ governments and by extension the need for further funding. Hence, if one adopts a materialistic stance, these governments can potentially be viewed as having a vested interest in effected regions. Historically, this may have been due to their being, for example, former colonies or having close geographic regions. Today not all major donors, such as the USA, have former colonies in Africa or Eastern European for example. However, many states do have an economic interest in helping to bring justice to the regions in question in order to stimulate conditions for safer investment. Put simply, the leaders of western countries are seeking to pacify and civilise ‘third

world' and war torn regions using high level prosecutions and rule of law strategy programs (Alkon 2010; Kelsall 2009: 8). This can be viewed as form of 'lawfare'. Donor countries such as the USA, where there are many big businesses with international investments, may see the increased number of convictions through plea bargaining as proof of the stabilisation process and a way to maintain their financial position in the global economy. As already noted, this would lead to greater confidence in the investment in post conflict countries and Plea bargaining in international war crime tribunals can this be viewed as an economic trade off.

Another issue that Del Ponte raised was that at times Tribunals have found themselves lacking in vital funds, as was the case with the SCSL, which found itself 'terribly under resourced the international community was suffering from donor fatigue at the time.' (Interview with De Silva 2010) In such cases there may be the possibility that private companies are invited to fund criminal prosecutions which may in turn also lead to more plea bargains as private companies would desire efficiency. Such concerns reflect an ideological position that demands results that puts economic concerns ahead of abstract notions of justice.

5.1.1 Schmitt, Imperialism and the Law

It is worth discussing the notions of imperialism that are pertinent to this thesis through the theories advanced by Carl Schmitt as, although very controversial, they can help explain plea bargaining as a legal mechanism put forward by the US that many of the persons involved in international criminal law have no or very little knowledge of. Schmitt's theory of international law is set out in a number of his texts¹¹² where he lays out his philosophy of empire through a criticism of the USA's

Monroe Doctrine.¹¹³ He offers the idea of an American *grossraum* (geo-political space), which refers to the strategies used to spread US policy to other states such as those of the Caribbean and South America in order to create an ideological consensus (Zolo 2009: 118). According to Schmitt, another example would be the construction of the League of Nations which highlights the US's most radical form of imperialism, as through it they were able to influence other nation states. Schmitt observed in *Der Nomos Erde* that the world:

[h]as reached a clear dilemma between universalism and pluralism, between monopoly and polopoly. The question was whether the planet was mature enough for a global monopoly of a single power or whether a pluralism of coexisting *grossbraume*, spheres of influence, and cultural spheres would determine the new international law of the earth. (Schmitt 2003: 243-244)

Zolo points out that the USA has also managed to reign supreme not only because it has managed a global monopoly through its economy but also because it has imposed its own lexicon and theoretical vocabulary, as Schmitt notes, '*Caesar dominus et supra grammaticam*' (Caesar also reigns over the grammar)¹¹⁴ (Schmitt 2003).

Following these observations, one might argue that the USA has also been able to maintain a global empire by not only contributing substantial funds to the criminal courts but also by drafting the laws and procedures that are in place in these institutions. Their influence also advanced by the fact that there has been at least one lawyer from either the USA or the UK involved in a plea bargaining case; a fact that assists in the assertion that the legal system that is most dominant is able to enforce their interpretation of the laws on an institution applying them. This gives rise to a new form of imperialism where the imperial power dominates without actually ruling, creating a kind of legal globalism. Reflecting this, the future Under-Secretary for Disarmament Affairs of the Bush Administration John Bolton, asked, 'should we take global governance seriously?' answering, 'Sadly...yes'. For him, globalism,

‘represent[ed] a kind of worldwide cartelization of governments and interest groups’, something the US needed to combat with all its energy. He stated that, ‘It is well past the point when the uncritical acceptance of globalist slogans...can be allowed to proceed. The costs to the United States...are far too great, and the current understanding of these costs far too limited to be acceptable.’ (Bolton 2000: 221 in Koskenniemi 2004: 1) For this thesis this idea may be illustrated by pointing out the provisions in the ICC statute that allow for guilty pleas to be accepted although the USA has not yet signed the Rome Statute. The inclusion of this provision is no doubt due to the ICTY and ICTR accepting guilty pleas and entering into plea bargains under the sway of US law makers.¹¹⁵

It can then be argued that the use of plea bargaining in international tribunals represents a form of legal imperialism, and needs to be expressly recognised and characterised as such, as it is an invention of the Anglo-American criminal system, and until recently few other jurisdictions had such a mechanism in place. When it comes to the domestic use of plea bargaining, there have been a considerable number of jurisdictions that have introduced this practice through the process of legal transplantation. Many jurisdictions that have been involved in war crime tribunals, such as Serbia and Bosnia and Herzegovina (Alkon 2010) have subsequently introduced plea bargaining into their own war crime tribunals due to its use at the ICTY, which in turn has led to it being introduced into their domestic jurisdiction. Although its origins are in the common law system, it is also not unheard of in the civil law jurisdiction in some form. For example, in Italy they have the *Patteggiamento Sulla Pen* and a number of post-colonial countries have legal systems that are based on the common law model such as India and areas of Nigeria which have also introduced variations of the American styled of plea bargaining. These

countries have encountered problems with the notion of plea bargaining not because the criminal system is alien to the common law base that plea bargaining comes from but rather because of the cultural practices plea bargaining is rooted in. In particular, Eurocentric versions of Judeo-Christian dogma where the idea of confession, admitting ones sins and showing remorse is encouraged and met by redemption (Vogel 2007: 221).

In relation to plea bargaining, the introduction of its use into international criminal practice may be perceived as imperialistic in one regard as it is the expression of US legal culture and its continued use can be viewed as preserving a legal culture conducive to US interests. From its introduction into the international arena, the use of plea bargaining has also been transplanted into the legal systems of the states that are involved in these tribunals. In another regard, plea bargaining's introduction into a forum where the defendants that are being tried are not from jurisdictions that traditionally have provisions for this in their legal systems may also be seen as imperialistic. This is because the use of such a European and, in particular, adversarial legal mechanism may be perceived as a way to exclude or marginalise a state's indigenous legal ideologies and culture, therefore excluding them from the hegemonic ordering of the international institution. If this is the case, then it would maintain the position of the 'leading' legal systems and their States as the pre-eminent bearers of their own distinctive models of justice and legality.

5.1.2 Plea Bargaining and Cultural Imperialism

As discussed in the introduction, the use of plea bargaining is an integral part of the US criminal system, with approximately 90% of cases being settled by way of such

negotiations. I therefore argue that the use of plea bargaining in international criminal law can be construed and discussed as a form of cultural imperialism in a similar way to how this practice is seen as an example of both classic liberalism and utilitarianism. Unlike the general concept of imperialism, the specific theory of cultural imperialism does not have a long history and is still an emerging area of study but offers insights that can be useful in the context of this thesis (Tomlinson 1991: 2).

The concept of Cultural Imperialism started to evolve in the 1960s and has since become part of the general discourses around imperialism in the second half of the twentieth century (Tomlinson 1991: 2). However, arriving at a working definition of cultural imperialism is not easy, as Mattelart notes, ‘It is always with a certain apprehension that the problem of imperialism is approached and especially what is known as cultural imperialism. This generic concept has too often been used with ill-defined meaning.’ (1979: 57) However, when related to the concept of plea bargaining and the idea of legal transplants, many of the discussions that arise can be usefully evoked, in particular the alleged need for a ‘common’ culture. Yet the term ‘culture’ embraces a disparate and indefinite range of phenomena. According to Taylor, culture can be defined as, ‘that complex whole which includes knowledge, belief, art, law, custom and any other capabilities and habits acquired by man as a member of society.’ (Taylor 1871: 56) This definition includes law as an integral part of a wider notion of what constitutes culture. Merry asserts that legal systems ‘are often embedded in very different ways of thinking about the fact/law dichotomy, the nature of evidence, and the meaning of Judging.’ (Merry 1988: 871)

Whilst there has been no substantial analysis regarding plea bargaining as a form of cultural imperialism, there has been discussions about the general difficulties that may arise when western legal traditions are superimposed on non-western

cultures in international criminal law. Judith Shklar noted, when talking about the Tokyo trials:

When... the American prosecutor at the Tokyo trials appealed to the law of nature as a basis for condemning the accused, he was only applying a foreign ideology, serving his nation's interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethnocentric vision of international order. It was the claim that these universal rules were 'there' - the assumption of general agreement, which was so contrary to the culture and realities of the situation. (Shklar 1964, 1986: 128)

The tribunal went ahead, with the prosecution validating their position but asserting the Christian-Judaic ethics. Shklar asks, 'what on earth could the Christian-Judaic ethic mean to the Japanese?' (Shklar 1986: 186) Shklar's response to her own question was that the trial was 'a complete dud' (Shklar 1986: 124). This can be also seen in the ECCC case of Duch (Kaing Guek Eav Case 001), where the defendant pleaded guilty to the crimes he was accused of but the court did not accept this or his counsel's arguments that this could be an expedited way to gain a conviction. This may have happened because the tribunal staff was made up of both international lawyers and Cambodian lawyers. In this instance, there would not have been a majority of lawyers from western legal backgrounds or who had been experienced in conducting plea bargains. Alongside this, there were enough people at the tribunal from the region not to allow legal mechanisms that were so far removed from their own legal ideology. This would have enabled the putting of the legal process into a cultural perspective that victims and the wider Cambodian community could have related to. Former prosecutor David Crane gave a speech questioning what the justice the SCSL sought to pose was, and hoping it was not just 'white man's justice' (Crane 2006: 1685-6). He argued:

Our perspectives are off-kilter. We simply don't think about or factor in the justice victims seek ... We approach the intersection of international justice

paternalistically. I would even say with self-righteous attitude that borders on the ethnocentric ... We consider our justice as the only justice ... We don't contemplate why the tribunal is being set up, and for whom it was established ... After set up, we don't create mechanisms by which we can consider the cultural and customary approaches to justice within the region. (Crane 2006: 1685-6)

He also said there are, 'many alternatives to justice rather than the international model.' He went on to argue we, 'must be respectful before making a decision to set up an international tribunal, as they are costly and politically problematic.' He also pointed out that if using an 'alternative to international criminal justice, you must ensure some justice is done rather than no justice.' (Interview with Crane 2009) This indicates that Crane was very conscious of what the SCSL was set up to do, and that was to try those who bore the greatest responsibility. This is interesting as, although Crane does consider local justice methods or traditional informal justice mechanisms to be important and is on the whole culturally sensitive towards the participants of the trials, he took a very adversarial approach towards the attempted plea negotiations that took place at this court. This does not mean that Crane behaved inappropriately. It merely means that he acted in complete accordance with his own legal culture, which the defendants themselves did not trust or comprehend at the time (Jordash 2010; Taku 2010). These arguments are developed throughout the rest of this section of the thesis.

Despite the many different facets the notion of imperialism has, it seems as with the utilitarian arguments, the most dominant factors concerning the use of plea bargaining are centralised around finance and the financial preservation of the courts in question. Having laid down a basic framework for why the use of plea bargaining may be considered a form of legal and cultural imperialism it is important to now turn to how it was introduced into the international jurisdiction and how it has been adapted by through an analysis of legal transplant.

5.2 Legal Transplant and Plea Bargaining

The purpose of this section is to look at the transplant of plea bargaining in the international system and the extent to which it has taken root and why. There have been many legal transplants over time. In fact it said that there is no contemporary legal system that has not had a legal rule or procedure transplanted into their system (Watson 1974). The most common example of legal transplantations occurred during the expansion of the Roman Empire were Roman laws and procedures which were based in notions of Roman morality, a form of natural law, were applied over the colonised populations, over cultural beliefs and practices held by the indigenous people (Goodman 1995; Gillespie 2006: 3). Generally, Western European states have been influenced by Roman law, which was a form of natural law which legitimised European colonisation over non-Christian peoples (Gillespie 2006: 3). Natural law doctrine like the more contemporary right based laws held that all human beings had a right to salvation, and colonial laws were not allowed to revoke this ideal and therefore not allowed to dismiss indigenous laws. Yet they did so (Gillespie 2006: 3). Gillespie uses the example of the French colonial rule over Vietnam, where French legal transplantation ignored this sentiment and set out to regulate and prohibit local practices (Gillespie 2006: 4). Many legal transplants can easily be seen in countries that have been colonised for example Cambodia's legal system still follows the French legal code (Ratner and Abrams 2001:284). Similarly it is considered common knowledge that India's judicial system has been influenced by the British legal system that was implemented during the colonial rule as was the case in Sierra Leone (Kelsall

2009: 25). It is interesting that these countries have been able to maintain many cultural practices as well follow the formal legal systems.

Legal transplants feature in all areas of law from economic policy to contract and property law. A legal transplant is in its most basic form is the moving of one rule, legal system or legal concept from one country or legal system to another (Watson 1974). The term legal transplant was coined by legal scholar Alan Watson in the 1970s but he was more concerned with private law than with public law, such as the transfer of criminal rules, or criminal procedures from one jurisdiction to another. In modern times it would seem that legal principles are still being transplanted into a State's legal systems from another State. There are a number of wide ranging benefits for this an example may be, a change in commercial law facilitates interstate commerce due to the harmonisation of the laws between the trading states, or a change in intellectual property laws helps prevent the quality control of the protected product, for example medical drugs. It can therefore be argued that introducing aspects of Anglo-American system equates to a form of cultural and legal imperialism. This is because in doing so it imposes a legal culture on a system as discussed above. There are a number of varying reasons why transplants take place.

At one end of the spectrum, legal transplants can be viewed as a form of imperialism, when it is forced on a population without consultation or consent and at the expense of pre-existing arrangements. For example, this occurred in the European colonisation of Australia and North America, where not only were the indigenous people displaced but there was also a change in institutions, religious administrations as well as various social relations such as marriage (Merry 2000). This allowed for the transfer of European legal systems. On the other hand, wholesale transplants of legal systems, or even the transfer of some legal principles can be useful when there is

nothing else available in the native legal system. Examples would be the case of Central and Eastern European countries after the Cold War in 1989, when these countries needed to borrow legal and political rules and institutions following decades of Soviet domination. This was also the case after the reunification of East and West Germany, when it was not only the laws that were transferred, but also legal personnel from Western Germany were seconded to the East to administer the transplanted system (Norbert-Horn 1991; Gillespie 2006: 4).

The introduction of plea bargaining into a number of domestic jurisdictions has generally been to act as a solution to unmanageable court backlogs and the financial strains that this then causes (Turner 2009: 139).¹¹⁶ A number of new legal systems that have been established contain provisions for plea bargaining, as the system that has been transferred incorporates jury trials and, therefore, the inclusion of plea bargaining into the system safeguards the cost effectiveness of the courts. It is said that ‘growth of law is principally to be explained by the transplantation of legal rules between legal systems, or by the elaboration of existing legal ideas within systems so as to apply them with an analogy to new circumstances.’ (Cotterall 2006: 110)

There are a number of benefits to transplants. Some of the advantages include the laws have already been tried and tested in their original legal system, and therefore in theory any lessons that need to be learnt would have been learnt in the home jurisdiction avoiding any potential problems, and if any did occur the judiciary would have already preempted any possible defences. Some of the drawbacks of legal transplants primarily are that the transplant may not ‘take root’. Other problems that may be encountered as a result of this is that it may challenge local customs that are already in place, or even require rule change in other aspects of the law in order for a

particular transplant to be accepted. The latter may, in turn, lead to a change in culture and potentially then stifle local development or upset local traditions. Although laws that are transplanted may benefit from the experience of the transferring state, in respect to that law the borrowing system rarely seems to benefit from any amendments that the donor system may make to them in their own jurisdiction after the transplant, potentially leaving the transplant outdated and ineffective (Merry 2000: 49). Watson's theory was that laws in the most part have a life of their own, they are autonomous. According to Watson law and legal systems develop due to the existence and practice of legal transplants. He believes that such rules would not occur naturally due to an inevitable consequence of the social structure of the borrowing society, and would have emerged even without a model to copy. What is of interest to this thesis is that in Watson's notion particular legal transplants occur because the foreign rule or law is known to those who have control over law making and because they have observed the apparent merits that it may yield. In this thesis, plea bargaining was borrowed from the adversarial legal system after the United States had already suggested that it be included in the ICTY's jurisprudence, as it would aid the functionality of the tribunal and no doubt the rules regulating the use of plea bargaining were implemented under the advice of those who had knowledge and first hand experience of how it works (*Prosecutor v Drazen Erdemovic* IT-96-22-A, AC, Judgement, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997 Para 6-9; Morris and Scharf 1995: 531-532).

Kahn-Freund, was also working in the area of comparative law in the 1970s, his notions of legal transplants, differed from Watson's. Under Watson's notion, there is no relationship between a state's law and the state's society. Kahn-Freund asserts that the laws transplanted must not be separated from their purposes or the

circumstances in which they were made. He argues, ‘we cannot take for granted that rules or institutions are transplantable’ and that there are ‘there are degrees of transferability.’ (Kahn-Freund 1974: 6-27) For example, plea bargaining was introduced into war crime tribunals to facilitate the judicial process of the tribunals effectively and efficiently, but as the rate of guilty pleas via negotiation increased the tribunals started to assert other factors for entering into negotiations and awarding sentence reductions, such as reconciliation (*Plavsic*), protecting victims and witnesses from the added trauma of cross examination (*Zelenovic*). Kahn-Freund theory was summarised by Ewald as, ‘legal institutions may be more-or-less embedded in a nation's life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.’ (Ewald 1996: 495) Unlike Watson, Kahn-Freund offers a process to determine the feasibility of a potential transplant. This is a two-step procedure, the first step is to determine the relationship between the legal rule, concept, institution to be transplanted and the socio-political structure of the donor state. The second step then requires comparative analysis of the socio-political environment of both the donor and the recipient state (Kahn-Freund 1974: 11-18). International criminal law is relatively new, in some aspects still operating in uncharted territories,¹¹⁷ it seems practical that other aspects of other established legal systems are donated to the emerging international system to ensure smooth running or at the very least some sort of theoretical functionality. An example of this the introduction of plea bargaining in Russia to help combat the backlog of cases that have arisen due to the introduction of jury trials (Pomorski 2006).

Whether the transplant is accepted or takes root in that particular system may still cause problems or tensions. Transplants generally take some time to be taken up

and assimilated into a new legal system. An example of this is the case of *Erdemovic*, which is discussed elsewhere. It may seem that it has taken root at the ICTY, but if you scratch the surface you will find that such transplanted practices do not resonate very well in the post-conflict communities, especially in relation to the sentence reductions defendants received (Clark 2007; 2009; 2011). This sentiment is also reinforced by Chief Taku who said, '[F]or the Tribunal for Rwanda, the plea bargains have absolutely no impact in Rwanda because for a majority of Rwandans, the entire judicial process is taking place is unfair to the extent that it is victor's justice. Besides, the trial process is perceived by many as a vindictive politically motivated exercise that neither benefits the victims nor the rule of law.' (Interview with Taku 2010) Mr Zecevic has also expressed this by saying, 'I am pretty sure that the victims perceive the plea bargains as a way out for perpetrators and they are very unhappy about it. There is still a fierce opposition for plea bargains in the region. On top plea bargains do not help reconciliation in the post conflict societies.' (Interview with Zecevic 2011)

This is a good point to move on to the specific technicalities of legal transfers. Over the years there has not been a great amount of understanding of the definitions and methods of modern day transfers and transplants. This is particularly true of legal concepts that have been transferred up, from domestic jurisdictions to supranational ones, such as the international criminal tribunals and courts. It is just as important to look at the recipient of the transfer as it is the donor analysing the legal and political culture of the institution, as well as the impact of the legal transfer.

Gardener has identified six types of legal transfer:

Direct- Transfer of specific legal institutions and instruments (e.g. constitution, code, statute, court).

Indirect- Transfer of legal concepts and models (e.g. legal values or ideas, jurisprudential or professional models).

Invited- Where the initiative and encouragement for the legal transfer process comes principally from the recipient legal culture (e.g. the requested importation of specific legal instruments or legal models).

Imposed/Uninvited – Where the initiative and encouragement of the legal transfer process comes principally from exporting legal cultures (e.g. the largely imposed transfer of the legal models that has often accompanied geopolitical conquest and colonization).

Infused- Which is neither invited nor imposed in the usual sense of these words, but in which premeditated initiative and encouragement come principally from the exporting legal culture often with selective participation on the part of the recipient culture.

Interactional – Less premeditated or time specific, more *ad hoc* and on-going, legal transfer process, frequently related to on-going cultural and intellectual interchange generally (Gardener 1980: 33).

It is obvious that some transplants fit better into some systems than others. There may be a number of reasons for this. An important one is if both the donating system and the receiving system have a common or overlapping culture. In certain situations, the legal cultures are too divergent to harmonize together for a successful transplant to take place (Legrand 1996: 61-62). Take, for example, the introduction of plea bargaining in Russia under US supervision was met with suspicion even though it made judicial sense as it would free up the backlog of cases. Unfortunately the notion of plea bargaining did not resonate well in the general population, ‘many Russians felt that confessions before trial in plea bargaining smacked too much of the

forced confessions of Stalin's show trials.' (Spence 2006: 232) Much of the modern day legal transplantation that occurs in domestic jurisdictions are legal concepts of American legal origin, and their successful import often serves at least indirectly to reiterate or protect American interests. Examples of such interests and transplants include the marketization of former communist economies was accompanied by 'wholesale transplants' of US securities, banking and capital markets law.' (Drumbl 2007:125) International criminal law has also seen a number of transplants from both the adversarial and inquisitorial legal systems, plea bargaining is the most prominent transplant in international criminal law, as it has been alien to most legal systems apart from the Anglo-American criminal systems. Although transplants are necessary for international legal systems, the fact that transplants occur does not mean that this should be over looked and escape critical examination, as it has done so in the past. As Drumbl, one of the few scholars in the field of international law who recognises this need for analysis, points out, '[A]lthough transplants are a fact of life where power meets rules in frameworks of supranational regulation, this does not dissipate the need to think critically about them.' (Drumbl 2007, 125)

There has been much written about legal transplants between domestic jurisdictions, and transplants from international systems down to domestic jurisdictions, but there has not been much written about transplants from domestic jurisdictions to international systems. Maximo Langer (2004) discusses the Americanisation and globalisation of law with the export of plea bargaining to other nation states. However, again there is very little discussion about the transfer of plea bargaining from national legal systems up to the international criminal systems. Legal transplants have been pioneered mostly in an inter-state or transnational context. As

one author put it in the area of international environmental law, one of the few strands of international law where this issue has been given attention:

One might look for answers to these questions in the rich literature on legal borrowing. A great deal of work has been done to document and explain the pervasive use of legal transplants from other legal systems. But that line of scholarship offers surprisingly little guidance on the [question of international law borrowing from national law] because the extant literature focuses almost entirely on borrowing across national legal systems. (Wiener 2001: 1297)

Although this is a relatively new area of study, a positive matter of empirical legal evolution, comparativists tend to see national law as borrowing from other national law, and internationalists tend to see international treaty law as borrowing from other international treaty law; with neither of them meeting in the middle ground as it were (Wiener 2001: 1297; Megret 2003). Wiener quite rightly goes on to state that, ‘one is hard pressed to find the comparative law concept of legal borrowing being applied to the sister subject of international law.’ (Wiener 2001: 1302; Megret 2003)

When the British colonised other nation states one of their perceived greatest achievements was the transplant of the legal system, and British style constitution and the rule of law as understood by the British Empire. As Hoeber-Rudolph state ‘for most Englishmen, having established the ‘rule of law’ on the Indian subcontinent was probably the proudest achievement of the British.’ (1967: 253) When discussing a contemporary British perspective to legal transplant, Kenneth Robert-Wray noted that he did not understand the urge to have a new constitution produced in such a way that it can claim to be an entirely local product (Gardener 1980: 30). He continued:

It is not as if independence constitutions enacted in the United Kingdom are imposed upon the country. They are always the outcomes of full consultation and discussions and in the majority of cases independence constitutions have been preceded by one or more full-scale conferences. It can justly be claimed that the constitution gives the people what they asked for. (Robert-Wray 1963: 43)

He went on to discuss the British colonial office as a ‘constitution factory’ exporting in the Westminster model ‘a nicely adjusted piece of legal machinery’, which ‘works overtime giving substance and political designs.’ (Robert-Wray 1963: 60-61)

Although the ‘nuts and bolts’ of the legal system have been exported to nuances, changes, advancements made by the colonising/exporting state generally have not been adopted by the colonised state after they achieved independence. Recently due to the increase in globalisation many aspects of law, as mentioned have been transplanted to aid harmonisation of the laws between states and to facilitate economic benefits. But transplants have not stopped there. As this thesis addresses plea bargaining, it is only proper to point out that there has been a recent surge in plea bargaining transplantation over recent years, such as India in 2006 (Ghosh 2006), Nigeria in 2006 (Yekini 2008), Russia in 2001 (Pomorski 2006; Reynolds and Semukhina: 2009). Anecdotally the increase in the transfer of the plea bargaining phenomenon may possibly be due to the transfer of rules of evidence and procedure in to criminal systems, therefore becoming more complex and the transfer of plea bargaining help cut down the amount of money and time spent trying these cases.

The use of plea bargaining in war crime tribunals in so far as the ICTY and ICTR have taken the form of a direct and invited transfer from the Anglo-American criminal systems. The notion of pleading guilty and plea negotiations had been subject to much discussion before it was introduced into the system. These two tribunals, the ICTY in particular have adopted the use of plea bargaining with relative ease, and through discussions I had with defence lawyers it became apparent that the tribunal would have engaged in many more plea negotiations had the defendant been willing (Interview with Murphy 2010). In other tribunals, such as the SCSL, the transplant of plea bargaining would be more akin to an imposed or an uninvited transfer. As there

have been no successful plea agreements in this particular tribunals even though there have been substantial negotiations in at least two of the three defendants in the RUF case. It can, therefore, be inferred that this particular transfer did not ‘take root’ and flourish in this particular environment.

The ECCC and the Special Panels again pose a different type transplant. At the Special Panels many defendants admitted to some culpability but they were not strictly plea bargains and at the ECCC there is no mechanism to enter into negotiations. Hence defendants must undergo a full criminal trial even if they plead guilty, as seen in the *Duch* case. Therefore, there has not really been a transfer here. Although not a war crime tribunal, but still an international criminal tribunal, the STL has held a training session for Lebanese defence lawyers on plea bargains, the seminars were conducted by ICTY and ICTR defence counsel who were experienced in plea bargaining in international tribunals (Press Release March 4, 2010). This could therefore be classified as an invited transfer. The ICC is again a different scenario as far as plea bargaining is concerned. This is because the court intends to hear cases from all over the world, and as the other tribunals have shown there are a number of differing cultural factors that have influenced the type of transfer or transplant of the same mechanism. Therefore the use of plea bargaining would have to develop over time as David Crane stated that the, ‘ICC has the benefit of time and the evolution of the jurisprudence.’ (Interview with Crane 2009) Crane is right. This particular tribunal does indeed benefit from having time to consider what is appropriate and how to enter into negotiations. It will also need to consider the role of victims in the plea bargaining process due to the introduction of victim participation in this court, which may indeed make the guilty plea and the negotiations, ‘will change the landscape.’ (Interview with Murphy 2010)

From all of the above, it is apparent that the concept of legal transplant is a unilateral migration from one legal system to another. In international criminal law, the practice of plea bargaining is not transplanted or transferred in the way that other existing criminal systems with their own traditions have ‘grafted’ (Megret 2003:9) this procedure. As there were in effect no procedures or rules in the international system to speak of when the ICTY was formed many of the laws were constructed to fit its specific purpose. The migration of some of the laws and procedures from other more established legal systems helps form a system, in turn helping form a legal culture and tradition where one did not previously exist.

When looking particularly at whether and if so to what extent plea bargaining has ‘taken root’ and become part of the workings of a particular tribunal, it is not just whether there is a common theory that underpins the foundation of the tribunal’s jurisprudence. The backgrounds and the traditions of the people involved in these tribunals are also an influencing factor in the overall acceptance and integration of a transplant. As one of the downfalls of the theoretical analysis of plea bargaining is that it fails to take into account human agency (Maynard 1984: 166). I will first discuss the role judges play in this. Although I was not able to obtain any interviews from any judges who work or have worked in international criminal law it is still worth discussing the role judges have played with regards to plea bargaining.

5.2.1 Judges and the Evolution, Acceptance and Nature of Plea Bargaining

Judges play an important part in determining the future orientation of the tribunal in question as it is their interpretation of the tribunal’s founding documents that set the course which the tribunal will take. Kennedy states that ‘[J]udges are supposed to

submit to something “bigger” and “higher” than “themselves.”” (Kennedy 1997: 3)

Koskenniemi points out this is usually the case when the substance of the laws and rules that are being applied, and not the actual application of them (Koskenniemi 2011: 285). This is particularly clear when looking at the *ad hoc* tribunals, where the judges are given the power to amend their own rules of evidence and procedure. The inclusion of the provision of guilty pleas and negotiations took this path.¹¹⁸ As already discussed initially the ICTY did not provide for the guilty pleas and plea bargaining as fashioned in adversarial, common law jurisdictions. In its initial policy, as outlined in the First Annual Report 1994 the ICTY had clearly ruled out the use of plea bargaining. (1st Annual Report Para. 74) The rules initially were left open to interpretation by the judges in either the common or civil law tradition. The ambiguous Article 20(3) states, ‘[T]he trial chamber shall...instruct the accused to enter a plea. The trial chamber shall then set a date for trial.’ The wording in this particular incarnation of the Article allows for civil law interpretation insofar that if a guilty plea is entered it does not explain what happens then, it merely states that after a plea is entered the chamber will set a date regardless of what the plea may be, as seen in the ECCC in the Duch case. The original Article can also be read in the common law style to allow for guilty pleas due to the open ended terminology used (*Prosecutor v Erdemovic* AC, Judgement, joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, Para 6; Schoun 2010: 200). This can also be seen in the wording of the original Rule 62, as it failed to clearly set out the procedure the chamber should follow.¹¹⁹ Rule 62(A)(iv) of the initial Rule 62 (now Rule 62(A)(v)) stated that the chamber would ‘instruct the registrar to set a date for trial’ but did not specify that this will only be the case if there is a plea of not guilty. In the face of Erdemovic’s guilty plea, the judges of the tribunal made amendments to these Rules in January 1995 inserted the phrase in Rule 62(iv) ‘in case of a plea of not guilty’

before a trial date is set. The new Rule 62 (v) sets out that after a guilty plea a date for a sentencing hearing will be set, (Schuon 2010: 200) therefore clearing up any ambiguity and taking the tribunal along a common law path, not only in the language it was using, but also in that set out to establish an Anglo-American style procedure for guilty pleas. This is relevant for the purposes of legal transplants, as it shows that amongst the ICTY judges at that time there was an acceptance that guilty pleas were legitimate. It also shows the sequential and systematic migration of the plea bargain procedure from the original Rule 62 to the Rule 62 *bis*, which is the rule that has been in existence since 1997 at the ICTY setting out the requirements for a guilty plea that were presented in the *Erdemonovic* case. In order to justify their decision, the judges referred to the origins of Rule 62, whose provenance can be traced back to ‘Rule 15 of the Suggestions Made by the Government of the United States of America, Rules of Procedure and Evidence for the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia.’ It stated:

[U]nder many common law systems, the prosecutor enjoys broad powers to offer immunity to, and enter into plea-bargain agreements with, accused who provide meaningful and substantial cooperation in the investigation or prosecution of other cases ... Without such mechanisms, the International Tribunal may be unable to successfully prosecute a significant number of high-level figures. (*Prosecutor v Drazen Erdemovic* IT-96-22-A, AC, Judgement, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997 Para 6-9; Morris and Scharf 1995: 531-532)

Again the guilty plea and plea agreements underwent another transformation in December 2001 with the introduction of Rule 62 *ter* which explicitly included provisions for plea bargaining in its most adversarial form. This was only included after a number of plea bargains and guilty pleas, as well as attempted plea negotiations (*Prosecutor v Stevan Todorovic* (IT-95-9/1) July 2001; *Prosecutor v*

Goran Jelisic (IT-95-10) December 1999; *Prosecutor v Milan Kovacevic* (IT-97-24)

Dies August 1998; *Prosecutor v Drazen Erdemovic* (IT-96-22) March 1998; *Sikirica et al.* (IT-95-8) November 2001). This in turn set a precedent for the other tribunals to follow suite. Accordingly, the initial tenor of international criminal tribunals has always been negotiated politically, and inevitably reflects power structure in the international community. The combination of the ascendancy of the common law in the last 50 years, and of the US as a world power from 1917 onwards, means that the influence of the common law has been particularly visible for the *ad hoc* tribunals (Megret 2003).

When it comes to the ICC, its rules of evidence and procedure differ from the previous rules of other international criminal tribunals in that they are dictated by the Rome Statute, a treaty, which will not allow for the amount of discretion in interpretation that the *ad hoc* tribunals enjoyed. Yet the ICC and its rules have benefitted from the advances made by the *ad hoc* tribunals. We have yet to see how the notion of pleading guilty and plea negotiations play out in the ICC's system, which leans far more towards the inquisitorial, civil law jurisdictions, as the US forfeited a leadership role early on. As Judge Murphy put it the tribunals are 'meant to be hybrid... in a way that has never been achieved. The ICC due to the absence of American influence has moved over to civil law.' (Interview with Murphy 2010)

This analysis would not be complete without pointing out that at the ICTY saw an increase in the number of defendants before the tribunal, and this potentially may be a reason for the increase in the rate of guilty pleas seen here during 2001-2004. This may also be the reason why other tribunals have not engaged in as much plea bargaining as they have not seen a sudden spike in the increase of accused before the tribunal as the ICTY did. As noted by Wayde Pittman, 'there are still a lot of

fugitives in Rwanda. If they were to all come in maybe there would be an increase in guilty pleas at the ICTR.' (Interview with Pittman 2010) It should be observed that the increase in plea bargaining at the ICTY can be attributed to the change in stance of the tribunal's political and financial backers and the pressure exerted by the UN Security Council and the US administration (Simons 2003; Schoun 2010: 202). At the time, the increase in plea bargaining might well have been attributed to the 2003 completion strategy, which has now been revised, and will no doubt be revised again after the recent arrest of General Mladic. However, the decrease seen in the number of plea bargains in the international tribunals does not mean that the tribunal has reverted to civil law style adjudication or that transplant has been rejected.

5.2.2 Differences in Sentencing at the ICTY and ICTR

This is a good point to discuss the differences between the sentencing practices of the ICTY and the ICTR to show the disparity in the outcomes of plea bargaining and how this particular practice has evolved. These two tribunals offer a good example as they are the only two tribunals that are purely UN tribunals, and they are also the only two tribunals that have openly engaged with plea bargaining under the Anglo-American model. Both of these tribunals, as well as the ICC, lack an express sentencing framework, unlike many national jurisdictions. At first sight, the average sentences handed down by the ICTR are shorter than the ones handed down by the ICTY being 11 years and 12.5 years respectively.¹²⁰ This seems peculiar as the overall average sentence for the ICTR is 45 years and the ICTY is 15 years, and at first blush would seem to indicate a potential issue with sentencing. These 'discrepancies' are easily explained. There have been a higher number of people that have pleaded guilty

at the ICTY. In fact, 20 defendants more than the ICTR - where there have been 9 defendants who have admitted their guilt. There have also been considerably fewer defendants at the ICTR than the ICTY on the whole. Alongside with these very practical explanations, there are other factors that should be considered when looking at the differences between these two tribunals.

Although both these two tribunals prosecute the same classification of crimes such as genocide, crimes against humanity and war crimes, there are some very stark differences that effect the way the transfer of plea bargaining and its usage has taken root. The first being the actual crimes themselves, the reasons for the two conflicts behind the two conflicts are very differ widely from each other. They were committed in very different circumstances and in different ways with the people committing the crimes and their victims coming are from very different backgrounds. When considering the ICTY and ICTR the international community tried to overcome this by harmonising the prosecutorial strategy by having the same prosecutor for both the tribunals. This is evidenced by David Schaffer who when discussing a conversation with then Prosecutor Richard Goldstone said:

Goldstone visited me in New York on October 19 to discuss strategy. He was strongly opposed to a separate prosecutor for the Rwanda tribunal. We both agreed that it was critical to approach atrocity crimes in the Balkans and Rwanda with the same prosecutorial perspective so that cases would be litigated consistently with international criminal law as it existed then and would be developed in the years to come. Goldstone conceded that it would make sense to set up a deputy prosecutor's office in Kigali, which was accomplished in 1995. Ultimately, we successfully negotiated dual prosecutor responsibilities for Goldstone. (Scheffer 2011: 79)

Despite this there is still a wide difference in the sentence ranges and the number of guilty pleas received by the tribunals. Considering this how would plea bargaining work at the ICC, where there would be many different atrocities and crime bases, but

the same category of crime? How would, say hypothetically two defendants of the same ranking and culpability of the same crimes, but one is from Libya and the other from The Democratic Republic of Congo, be treated with regards to plea bargaining? Still, like the ICTR and ICTY the backgrounds of the conflict and the political climate that the crimes took place will affect the use of plea bargaining and in turn sentencing. We know that admitting guilt and offering information to the Office of The Prosecutor offers mitigation in sentencing, but whether this mitigation is applied is unknown due to the almost indefinite amount of discretion bestowed on the judges and the lack of transparency when it comes to sentence decision making. Would the family circumstances or the good behaviour in detention of one defendant be taken into consideration more than another? When sentencing would the notoriety of one defendant act against him or her than another less well known defendant? Also, will the political pressure asserted onto the court and their staffs from outside donor countries and institutions influence the decisions the judges make as well? Again it is difficult to speculate what the ICC may or may not do when it comes to plea bargaining, but one thing is for sure, and that is, that it may well be difficult for the ICC to adhere to classic liberal forms of rule of law standards requiring like cases to be judged in a like manner. No doubt the role of legal transplants is not to transplant one legal concept into a legal system as a wholesale transfer, but rather to mould and adapt to the culture and the needs of the system it has been transplanted into. More so than other national jurisdictions, in international law culture changes with the differing conflicts and the differing staff members that make up prosecuting and defending counsel, and more recently counsel representing victim groups. As Justice Jackson said ‘International law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in international law are brought about by the action of governments, designed to meet a

change in circumstances. It grows, as did the common law, through decisions reached from time to time in adapting settled principles to new situations.' (Report to the President by Mr. Justice Jackson, 6 June 1945: 51-52) This would be a good place to discuss the legal transplantation of plea bargaining at the SCSL.

5.2.3 Plea Bargaining as a Legal Transplant at the SCSL

In this section I will discuss the failed attempts to enter into plea negotiations at the SCSL and the reasons why the use of this practice was not taken up more successfully in other tribunals. I will concentrate on the RUF trial to illustrate this, focusing on the defendants Morris Kallon and Issa Sesay.¹²¹ Although there are other issues that arise in the SCSL that potentially effected the legal transfer of plea bargaining, I think they are best discussed in other parts of this thesis - namely in the sections addressing legal and cultural imperialism above and it is these two cases where most of my knowledge, through the use of interviews lies. I also think that these two cases illustrate generally the reasons why plea bargaining has not taken root in the SCSL, rather than very specific and unique examples, such as the use of witch doctors. It quite clear from my interviews with the two prosecutors at the SCSL that there was a definite will to engage with plea bargaining, and to obtain insider witnesses. In fact, David Crane even alluded to this in his opening address to the court by stating the prosecution were going to 'dance with the devil'. During my interview with him, Crane also explained that the prosecution at the SCSL had a very clear prosecution strategy. He stated that they knew who to try, who to negotiate with as insider witnesses, and where 'plea bargaining is clearly a possibility.' (Interview with Crane 2009) For Crane, the prosecution at the time had decided which defendants to bring to trial and which ones

to enter into the plea bargaining process (Interview with Crane 2009). Professor Crane had also told prosecution staff that if they were approached with ‘a professionally offered plea,’ they should ‘listen and consider it.’ (Interview with Crane 2009)

From my research I believe that the main factors contributing to plea negotiations collapsing are the cultural differences between the parties involved. The senior prosecutorial staff, who at that time, came mainly from common law backgrounds, took an aggressive adversarial approach, which the defendants themselves were completely unprepared for, and which was alien to the type of legal system they were used to. This turned out to one of the main causes of the breakdown in the negotiations. It should be stressed that the approach taken by the prosecution and their staff was not improper under international criminal law and in particular the laws of the SCSL, law as it stands. They were acting in a way that would wholly acceptable and expected in the US where David Crane, the then Chief Prosecutor, was from. due to the insufficient financial and strict time constraints¹²² and the colossal task the SCSL had in bringing the persons who bore the *greatest* responsibility to trial, they did not behave in a way that would have been unthinkable, especially when it comes to the plea bargaining. It was just the wrong place to carry this out, or at best they needed much more time, so they could afford to be more culturally sensitive and refine the jurisprudence of the court (Interview with Crane 2009). This shows that both legal and wider culture plays a very important role in the uptake and success of legal transplant.

The RUF case had three defendants, Sesay, Kallon and Gbao. Sesay and Kallon had entered into initial negotiations with the SCSL prosecution,¹²³ but Gbao to my knowledge had not. My correspondence with Scott Martin, Gbao’s co-counsel, indicates ‘Note that the Gbao case did not involve plea bargaining.’ (email

correspondence with Martin 2010) To fully explain the situation, it is important to start with Sesay and his arrest and not the actual plea negotiations that took place later on. Put briefly, Sesay was initially contacted by the tribunal and bought in for questioning as a witness for the prosecution. But when this did not work out, he became an indictee. During this time Sesay, had been aggressively interviewed at some length by investigators. These interviews had taken place in the absence of any defence counsel present, or being offered and without being informed of his rights (Van Tuyl 2008). He was also allegedly given off the record assurances from Dr Alan White, a senior investigator to the effect of, ‘Issa, there is no hope left for you. This is the only way forward. You talk to us. This is the only way out.’ (*Prosecutor v Sesay et al* Trial Transcript 19 June 2007: P 46 lines, 11-13) Coupled with the allegations that Mr Morissette had also ‘plied pressure’ on Sesay (P 83, lines 20-26) and in effect told him that he was wasting any opportunity he may have to cooperate as an insider witness for the prosecution (P 51, lines 3-12, 5-24). Sesay recalled ‘[H]e would come and say, “Issa, we are just trying to help you. But what we have been hearing, if you don't confirm these things, how will we be able to help you?” He said, “So you have to confirm the things that we have heard. That's the only way we'd be able to help you, so that you will be out of this problem.”’(P 47, lines 28-29- P 48, lines 1-4) The actual way he was interviewed and the ethics and validity of any plea that was based on these interviews, is discussed elsewhere in this thesis.¹²⁴

It was information deduced from these interviews with Sesay that the prosecutors used to try and negotiate a deal with the defendant Kallon. When discussing how the prosecution went about trying to negotiate with Kallon Chief Taku, Kallon’s defence counsel, stated:

He obtained several hundreds of pages of evidence which he keep in transcripts and video and photographic form. After that he approached Mr

Kallon with the information in an attempt to pressurize him to co-operate, cut a bargain and plead guilty to one count of enlistment of child combatants in exchange for a 12 year conviction and a relocation of his family to Canada. Because Kallon was also expected to testify against Foday Sankoh and other RUF commanders, he turned down the request. The evidence obtained from Sesay was not tendered at trial and so would be deemed to have had no probative value against Mr Kallon. (Interview with Taku 2010)

Chief Taku also went on to say that the prosecutor had, ‘showed him evidence he had obtained from Sesay to entice him to enter into a plea bargain with him. Kallon showed me a piece of paper on which the Prosecutor made suggestive notes on this matter and at trial, the court did not want Kallon to adduce evidence on this subject.’ (Interview with Taku 2010)¹²⁵ This shows a very determined effort to enter into a deal with the defendant. This is also a strongly adversarial approach the prosecution chose to take. It is more than likely that people who do not come from jurisdictions where this is common practice will also believe this to be coercive and improper practice. On discussing the reasoning why the negotiation may have fallen apart,

Chief Taku listed four reasons:

1. The court processes were perceived as a rush to convict than to do justice. The accused saw a process in which witnesses were given incentives to testify as unjust and unreliable and so did not trust that the Prosecutor could be trusted in a process of plea bargain.
2. The manner in which the accused were arrested, interrogated and kept without counsel and the pre-trial violations they suffered in the hands of the Prosecutor made the accused suspicious of the Prosecutor.
3. Finally, the high handed manner in which the Prosecutor conducted the plea negotiations, like the case of Sesay and Kallon resembled more an entrapment than a genuine will to negotiate a plea bargain.
4. The Prosecutor displayed such lack of patience, insensitivity and cultural and psychological indifference towards the accused and the process. (Interview with Taku 2010)

From Kallon's perspective, it is easy to see why he felt he could not or should not enter into a plea bargain. The whole process was too alien for him to be able to engage with, even with the wisdom and experience of his counsel. The approach was far too adversarial, showing Kallon Sesay's statements¹²⁶ not only felt like a betrayal to Kallon, but understandably felt like 'entrapment' (Interview with Taku 2010). Again, as already mentioned prosecutorial tactics such as these are not unheard of in the USA and are quite common. In fact, most crime/police based TV dramas in the USA exhibit this type of procedure, indicating that the approach taken here in the *Kallon* case is very much part of the cultural fabric of the US criminal system. Again this would be very difficult for somebody who is not aware of this to understand the process, and would quite rightly not wish to negotiate under such circumstances as their plea would not be unequivocal. Realistically when entering into a plea bargain where the crimes concerned are of great complexity and gravity, such as the ones tried in war crime tribunals, it is rare that a defendant will be pleading guilty to what they actually did. Pleading guilty as part of a plea bargain requires a great deal of pragmatism, persons who are not familiar with this way of thinking or understanding within the legal context will undoubtedly find this very complex and possibly encounter difficulties within the legal system. This is particularly the case if there is a TRC in place alongside the tribunal encouraging people to come forward and tell the whole truth and accept culpability in their own words and as they see it.

Moving back to the defendant Kallon, there are a number of other factors that contributed to Mr Kallon specifically not wishing to enter into negotiations. Primarily, he had helped, along with Issa Sesay to broker the Lome Peace Accords and both were granted amnesty (Interview with Taku 2010). It was after negotiations with Kallon had failed and the RUF trial had begun in late 2004 that actual plea

negotiations had started with regards to Issa Sesay. Both defence and prosecuting counsel knew each other, as they had worked together on a case in the UK (Interview with Jordash 2010).

After spending a considerable amount of time defining and refining the statement of facts and the plea agreement, both the defence and senior prosecuting counsel met to discuss the indictment. The prosecuting counsel had then taken the indictment back to the Chief Prosecutor who disagreed with aspects of the plea agreement. At this stage the original agreement had been conveyed back to the defendant, and defence counsel had to go back to his client to tell him that the prosecution no longer agreed to this deal, and would have to renegotiate (Interview with Jordash 2010). Given the experiences that Issa Sesay had had with the SCSL from when he was bought in as an insider witness to becoming an inditee to the negotiations, one cannot be surprised that he lost confidence in the Tribunal and decided not to renegotiate. Jordash points out because the SCSL has no history of plea bargaining so he was unable to reassure his client as to how the trial chamber would decide when it comes to sentencing, as he had been able to with his clients at the ICTR (Interview with Jordash 2010). Also bearing in mind the trial chamber is not bound by sentence recommendations, possibly this also added to the anxiety felt by the defendant when he decided to end negotiations. An issue that occurs in this particular tribunal more than others is that defence counsel consider that there was ‘no process’ in place on how to negotiate between the prosecutorial staff and themselves. Hence, defence counsel does not know what to expect. With regards to Sesay, he found it very difficult to enter a guilty to plea to things he felt he was not guilty of, which when plea bargaining is one of the fundamental aspects of plea deals, counsel on both sides negotiate what the crimes are and what the potential sentence range

should be. To put it crudely both parties have something to gain and they both have something to lose. Sesay was not able to understand this and judged that he should be able to admit his guilt in his way much like in a truth and reconciliation commission, which he was willing to testify in front of in 2003 along with Augustine Gbao (Interview with Jordash 2010; Kerr and Mobekk 2007: 93).

The fact that the defendants were not only alien to the adversarial practice of plea bargaining they were also alien to the notion of the SCSL and the rules and procedures that go with any sort of rule based criminal tribunal. As Jordash put it, '[O]ne of the problems with the SCSL from the outset is that they are taking men who have been running around the bush with AK47s and then putting them in a fancy western model of justice and expect them to follow exactly what's going on. They didn't, none of them fully understood what was going on.' (Interview with Jordash 2010) From this it is easy to see why the transfer of plea bargaining was not successful at the SCSL. If the people that had been put on trial at the SCSL had not even been engaged or familiar with the laws of Sierra Leone, then it is unlikely they would be able to comprehend and participate with the sophisticated rules and procedures of an international tribunal. Jordash explained, 'Sierra Leone does not have a functioning criminal system, at best it has a haphazard system in Freetown. In the provinces it has customary law, "town square" adjudication', he went on to say that Issa Sesay was not even part of that ad hoc system, that he was in the bush and exercised a sort of military law, which seemed to revolve around whatever they thought was appropriate at the time. When Sesay found himself at the SCSL it was clear to Jordash that he found this, 'very surreal', as did all of the defendants who six months to a year ago had been in the bush fighting. Jordash pointed out, 'They now found themselves sitting in an international court' whilst they eventually adapted to

the process, ‘for the first year didn’t know what the hell was going on.’ (Interview with Jordash 2010) It would therefore be impossible for the prosecution to enter into meaningful negotiations with the defendants in this context. If negotiations under similar circumstances take place there would always be serious doubts about whether the defendant’s plea was unequivocal.

When asked about the Tribunal staff understanding the nuances of plea bargaining, David Crane, then the Chief Prosecutor, stated that to his knowledge there were no specific members of staff being confused by the process and practice of plea bargaining as it never really moved beyond the initial stages. Although the ‘admissions of guilt are done routinely’ in traditional forms of justice ‘but the concept of plea bargaining can be confusing to both the court personnel’ and it would be a ‘challenge to have judges understand what’s going on.’ (Interview with Crane 2009)

If the tribunal had had the time and resources to develop understanding and procedures, I believe that the defendants themselves would have had much more confidence in the system, as there would have been a way for them to see what was going on. Much more time and sensitivity needed to be spent in this tribunal to nurture the transplant for it to take root in this environment. Although the Truth and Reconciliation Commission in Sierra Leone was well received with the people of Sierra Leone, it is hard to see how they would have felt about plea bargaining. If introduced into the SCSL, the tribunal would have to make sure that the population of Sierra Leone was aware of it and how it works, especially in the RUF case were many of the population do not believe Sesay or Kallon should have been tried or received such lengthy sentences¹²⁷ (Interview with Taku 2010). I do not think that plea bargaining would have translated into the post conflict community of Sierra Leone especially when there is a successful Truth and Reconciliation Commission

that grants immunity from prosecution at the SCSL to anything that is disclosed at the Commission.

A good example by way of comparison is the STL, where there has been a defence seminar regarding how to plea bargain (STL Press Release March 4, 2010), therefore, embedding into defence teams the notion of guilty pleas that what to expect from negotiations. This also may give the impression that the STL may be gearing up to obtain convictions from negotiated pleas, as the nature of the crimes that will be tried are highly political and very sensitive. These trials also have the potential to embarrass nation states depending on the tactics the defence take. It may be the case that the STL is taking its lead from other national terrorism cases where there have been guilty pleas, notably the on-going negotiations with American prosecutors and Umar Farouk Abdulmutallab, the ‘Underwear Bomber’, hence opening the gate for negotiations in terrorism cases to go ahead.

Unlike the SCSL, the STL has set out a process on how to proceed with plea bargains, in particular the defence counsel have been informed on what to do and when to do it through training sessions. The ADC-ICTY have also published a manual that informs the readers on the basics of what to do when plea bargaining (STL Press Release 4 March 2010). Therefore they are in much better prepared to advise and defend their clients in light of any plea negotiations that may occur. If this sort of planning had taken place, then there may well have been a place for plea bargaining at the SCSL. From the above it is evident that there is a likelihood that the use of plea bargaining may not ‘catch on’, yet prosecutors or defence counsel may push for its use in situations where it would be inappropriate. The potential, very ideologically problematic issues that can arise are discussed below using a framework drawn from subaltern studies.

5.3 Plea Bargaining Through Subaltern Studies

In light of some of the responses in the interviews I conducted and the research carried out by Professor Nancy Combs for her book *Fact Finding without Facts* (2010), which highlights the cultural differences between the defendants and the tribunals, this chapter on post-colonialism and legal imperialism would be incomplete without an analysis of plea bargaining that is informed by the field of subaltern studies. This is needed because there is currently little analysis of international criminal law from this perspective, which is one that assists an understanding of what problems may occur when legal mechanisms are transplanted to an arena where trial participants come from different legal cultures.

5.3.1 Subaltern Studies a Definition

The area of Subaltern Studies has arisen from the field of post-colonial theory and came to prominence in the 1980s when scholars, such as Gayatri Chakravorty Spivak (1988), began to discuss issues relating to post-colonial and post-imperial societies in South Asia. Whilst there is some discussion surrounding the notion of the subaltern in international legal studies this usually focuses on the role of international law and its dominance over persons of a state (Singh 2010; Rajagopal 2003; de Sousa Santos 2003). However, there is no substantial analysis of the notion that persons can be classed as subaltern in actual international institutions, such as the tribunals, through the implementation of legal practices that are alien to participants. It is therefore important to discuss the impact of a mechanism such as plea bargaining has on the

trial participants in this context. The previous section of this chapter has discussed how plea bargaining is transplanted into the international system and that it does not always ‘fit’ well with the legal backgrounds of the staff and accused alike, making it difficult if not impossible for the uninitiated to enter into negotiations with full understanding of the potential implications of the process.

At its most basic, ‘subaltern’ refers to marginalised groups who are rendered without agency by their social status (Young 2003). From this there follows a number of other, more nuanced, meanings of the term subaltern. Homi Bhabha, for example, emphasises the importance of social power relations, and according to him subaltern groups are:

Oppressed, minority groups whose presence was crucial to the self-definition of the majority groups: subaltern social groups were also in a position to subvert the authority of those who had hegemonic power. (Bhabha 1996: 210)

Spivak in turn resists defining the subaltern, as for her it is often, ‘employed far too vaguely to denote “oppression” or “otherness”’ (Didur and Heffernan 2003: 2). Rather, she offers only a description, which is of interest here as it reinforces the idea that the subaltern can be situated only in the context of the imperial power (Maggio 2007). In an interview with Leon De Kock she stated that:

subaltern is not just a classy word for oppressed, for Other, for somebody who's not getting a piece of the pie....In postcolonial terms, everything that has limited or no access to the cultural imperialism is subaltern—a space of difference. Now who would say that's just the oppressed? The working class is oppressed. It's not subaltern....Many people want to claim subalternity. They are the least interesting and the most dangerous. I mean, just by being a discriminated-against minority on the university campus, they don't need the word 'subaltern'...They should see what the mechanics of the discrimination are. They're within the hegemonic discourse wanting a piece of the pie and not being allowed, so let them speak, use the hegemonic discourse. They should not call themselves subaltern. (De Kock 1992: np)

Following on from this and considering the study of international law generally de Sousa Santos (2002) uses the term *Subaltern* in the context of counter hegemonic practices, struggles and resistances against neo-globalisation. In essence, for de Sousa

Santos the subaltern are those struggling against hegemonic globalisation (de Sousa Santos 2002: 180). In relation to international law he states that, '[T]he common heritage of humankind in particular, which originated in public international law, has been under sustained attack by hegemonic especially the US.' (de Sousa Santos 2002: 181) Drawing on this work, I use the term subaltern to refer to a person or persons who, through the practice of plea bargaining, are marginalised or left out of the hegemonic order of the international tribunal in question.

There are a number of ways those whose cultural; religious beliefs; philosophy are incompatible, or outside that of the tribunals 'understanding' are marginalised within the context of the tribunals. An example of this can be found in the SCSL case, *Prosecutor v Brima et al.* (Case No. SCSL-2004-16-PT). The following exchange highlights the difficulties the tribunal staff may experience when receiving evidence from a witness who is not from the same cultural, philosophical, or educational background as themselves:

Question: Do you know whether it was in the year 1999 or the year 2000? 1999 or 2000?

Answer: These things, Pa, I do not understand these things. When you tell me 1990 I don't understand. I don't even say months, I only understand [inaudible] numbers. I really don't understand anything. (Transcript April 8, 2005 at 20)

Witnesses such as this may be seen as obstructive by counsel and the judges and the trial chamber may well deem the witness to be unreliable when the responses given do not fit into the tribunal's understanding of concepts such as time, distance or weight. This idea can be taken further and might be seen to have greater ramifications when there are also significantly differing notions of more abstract concepts such as truth.¹²⁸

When it comes to truth telling it is worth reiterating Jordash's earlier point regarding truth telling and plea bargaining. He stated that, 'there is truth and there's

something a bit less than truth', arguing that this concept can be difficult for an, 'accused who does not have such a pragmatic head on them, it seems a little odd to them' He went on to talk specifically about the defendant Sesay, who, 'was a bit like that, because he was the sort of guy who didn't understand what the court required of him.' (Interview with Jordash 2010) Combs also argues, after conducting numerous interviews with trial staff, that, 'Rwandans and Sierra Leoneans viewed truth and deception differently from Westerners.' (Combs 2010: 131) The cultural differences in truth telling are also highlighted by Kelsall, who states that, in Sierra Leone:

Krio saying *Tok Af Lef Af* encapsulates the idea that only the foolish, untrustworthy or downright reprehensible person will divulge everything they know in a first encounter, meaning that many people will withhold some portion of the truth, taking half, leaving half not least because the person they are dealing with might constitute a threat. (Kelsall 2009: 214-15)

When it comes to issues such as these, there is clearly the potential for witnesses to be seen as obstructive by the judging panel and counsel alike which in turn may leave a witness without any role or voice in the proceedings. It might be argued then that in order for witnesses, defendants, and trial personnel to fully participate in criminal proceedings in any meaningful way they must embrace the hegemonic order and in so doing adopt western notions of thought, reasoning, language and so forth. This argument may equally be extended to the populations of post-conflict societies who must also adopt such a world view in order to operate in an informed way when it comes to the Tribunals' methods and philosophies. This process is often facilitated by the tribunals outreach programs and will pose an issue in the newer tribunals such as the ICC and the STL (Clark 2009: 436). One of the major areas where this acceptance of a particular set of values and perspectives has a potential impact is that of plea bargaining, which as I have argued has become a central area of the work of the international war crime tribunals. For this reason I now return to the idea that

members of the trial system can be classed as subaltern when alien legal mechanisms, such as plea bargaining are implemented into the jurisprudence.

5.3.2 Examples of Plea Bargaining and the Notion of the Subaltern

It is worth highlighting once more that the legal system international tribunals have adopted is based either on the Continental legal model or the Anglo-Saxon one - both European forms of justice. Because of this it is possible to argue that persons who do not hail from places that use such European legal models may feel that they have had been subjected to an alien legal system and are at a disadvantage. This is due to the fact that different cultures have different notions of justice often focussing on things such as retribution, truth telling, or reconciliation (Drumbl 2007; Cavadino and Dignan 2006; Mani 2002). However, despite the local culture, when it comes to the issue of human rights violations it seems the norm to bring about justice to the affected community through criminal proceedings. Reflecting this, when interviewed for this thesis, Professor Crane reiterated that:

[T]here are many alternatives to justice rather than the international model. They must be respected before making a decision to set up an international tribunal. As they (international tribunals) are costly and politically problematic...when using an alternative to justice one must ensure that some justice is done rather than none. (Interview with Crane 2009)

The predominance of western systems at the tribunals may also be explained by the wider world which is outraged at the atrocities committed want to see justice done and also have a culturally specific notion of what this means.¹²⁹

Plea bargaining as a predominantly Anglo-American concept has become central to this process. However, to date, none of the defendants who have engaged in

plea negotiations in international tribunals have been from either of these two jurisdictions. Alongside this, many of the negotiations that have taken place have done so in a manner that is akin the Anglo-American model of negotiating a plea rather than the newer, alternative, models that have been developed in continental Europe.¹³⁰ Whilst on the surface the negotiations at the ICTY seem to have been conducted relatively smoothly we must not forget the case of *Erdemovic*. Here the guilty plea was not negotiated but it did put the wheels in motion for procedures to allow plea bargaining and guilty pleas into the system. However, there were problems with his guilty plea as the trial chamber rejected his initial plea and asked him to re-enter his plea. This was in part due to the defendant and his counsel not fully understanding the concept and implications of pleading guilty in the way the tribunal staff from a common law background did.¹³¹ Fortunately, the Trial Chamber acted on this and Rule 62 *bis* was added to the statute, which states, If an accused wishes to plead guilty then the Trial Chamber must be satisfied that: (i) the guilty plea has been made voluntarily; (ii) the guilty plea is informed; (iii) the guilty plea is not equivocal; and (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case. Ironically, *Erdemovic* was the first ever judgement to be handed down by the ICTY.

Due to the nature of international criminal law, those who are not able to participate, due to issues such as education, cultural and religious backgrounds may be classed as subaltern. That is because they do not fit within the hegemonic order of international criminal law and they are unable to communicate to the tribunal in a way that is recognized, or more importantly is willing to be recognised (*Prosecutor v Joa Fernandes Case No. 200/15*).¹³² It can also be argued that the tribunal does not

communicate with participants in a way that would allow them to enter into the hegemony of the courts. In the cases of *Issa Sesay* and *Morris Kallon* there were a number of factors that occurred that resulted in negotiations breaking down which have been discussed above.

One factor that needs to be drawn out here is the fact that plea bargaining is fundamentally an informal negotiation that takes place between the prosecution and the defence. There are a number of ways in which this may take place depending on the legal and cultural background of the persons involved, for example in the UK the Bar is congenial (Interview with Murphy 2010) and therefore negotiations may not be as adversarial as they are in the US. This means that there are unsaid and informal procedures in which one may carry out a negotiation. In other words there is a ‘dramaturgy’ to negotiations. This dramaturgy is not taught or laid out in the tribunals’ rules but generally learnt through experience. If counsel or defendants are not privy to this knowledge and are therefore unaware of what is required of them then they are very much at a disadvantage and are possibly unable to negotiate in any meaningful way (Maynard 1984: 165-209).

Also, although obvious, it should be noted that tribunal personnel come from a variety of different legal backgrounds, therefore it is possible that the differences between them culturally may also cause problems in regards to the actual negotiating process despite in depth knowledge of what plea bargaining is and theoretically understanding how to proceed. As Slobodan Zecevic, Former President of the ADC at the ICTY counsel in the cases of *Milan Simić* (IT-95-9/2)¹³³ and *Miroslav Deronjić* (IT-02-61), both of which are plea bargain cases, said, ‘Of course I was aware of the possibility of plea agreements and in general was aware of it and how it works’, stating that:

There is no doubt that defence counsel and their clients coming from inquisitorial background are seriously disadvantaged in the plea bargaining process. In my case except from general knowledge and Jurisprudence I was completely unaware of the actual process in technical terms meaning what needs to be done, when, how and alike. For these reasons in both my plea agreements I had an experience defence counsel from adversarial system who was actually running the show from the defence side. (Interview with Zecevic 2011)¹³⁴

He went on to argue that:

After the two pleas I did, I am quite sure that if we were not assisted by Ms.Baen it would have been virtually impossible for us to finalize the plea agreements. Starting from Proffer agreements to actual negotiation there has been so many situations where we were in doubt what needs to be done or how we should approach that issue. Therefore, I am sure the outcome and overall experience would have been different had we been on our own, without Ms. Baen. (Interview with Zecevic 2011)

Zecevic's statements illustrate that even the most experienced international criminal lawyers may find themselves unable to work within the Tribunal's laws and procedures when they come from different legal and cultural backgrounds. Such cultural differences should not be underestimated and the fact that these stark differences potentially disadvantage some of those that come into the orbit of the tribunals and therefore marginalised.

5.3.3 The Case of the Special Panels

In relation to these debates, one of the most interesting factors of international law arose at the Special Panels for Serious Crimes of the District Court of Dili. Here, almost every accused person who appeared before it admitted to being involved in some aspect of the crime they have been charged with (Linton and Reiger 2002: 2). They also usually informed the courts that they did so under duress or because they were ordered to do so. Such as in the case *Public Prosecutor v Sarmento* (Special Panel for Serious Crimes, Court Record June 30, 2003) where the defendant Benjamin

Sarmento indicated that he was willing to plead guilty to the charges against him, but asserted that he had done so under duress stating that, ‘People send us to kill. That’s why we did it. That’s why we accept our guilty’ going on to say that, ‘[t]his charge, I accept, because they told me to do it. That’s why I accept. But the problem is that for me to think about doing it, I wouldn’t have done it. That is because I was told to do it.’ (*Public Prosecutor v Sarmento* at 10 in Combs 2010: 43) Despite the obvious defence that Sarmento had, the trial chamber still accepted the guilty plea. This occurred again in the same case when the co-accused Romerio Tilman, pleading guilty, explained his involvement in the crime charged but also had a valid defence of duress. Guilty pleas and claims of duress arose over and over again, so much so that the frequency of these claims indicates that there was a pattern of coercive behavior in the pro-Jakarta forces.

However, there was also a desire on the part of many of the accused to acknowledge their involvement in crimes and be reconciled with their communities as is the local custom (Linton and Reiger 2002:2; Combs 2007: 169-70). It should be pointed out that even though there was a high number of guilty pleas there was no indication of improper conduct in procuring admission but there has been a lack of representation during police questioning of suspects due to lack of a defence counsel (Linton and Rieger 2002: 2). Although it is clear that the defendants did not fully understand the consequences of pleading guilty and that they should have had entered a plea of not guilty and raised the defence of duress. The Special Panels continued to accept uninformed and equivocal pleas that were not based on a sufficient factual basis as the defendants could have raised a valid defence and potentially be found not to be guilty.

Linton and Rieger argue that the Special Panels only once took a cautious approach when accepting a guilty plea; that was in their first case, *Prosecutor v Joa Fernades*, where the guilty plea was rejected. There were other cases in which admissions of guilt were also rejected and Linton and Rieger refer to these as partial admissions as the admissions or confessions by the defendants did not entirely match the allegations against them (*Julio Fernades; Yoseph Leki; Manuel Lete Bere; Jose Valente; Agustinho da Costa; Gaspa Leite; Lospalos*). Since these cases it would seem that the Special Panels have taken a more lenient stance. This can be compared with a multi-party trial where the lead defendant pleaded guilty, the trial chamber waited until the end of the trial to accept the guilty plea, after hearing all evidence and submissions presented to the court (Linton and Rieger 2002: 13; *Public Prosecutor v Joni Marques & Ors* case No.9/2000 ‘*Lospalos Case*’ Decision 4 December 2001). In this situation The Special Panels have generally been unable to decide whether there was duress or people followed superior orders and so have erred on the side of caution and have not accepted guilty pleas and have gone to a full trial.

This approach was favored by Judge Stephens in *Erdemovic*; in this particular case the Appeals Chamber rejected the plea of duress from the defendant because of the lack of evidence and proceeded to sentencing. Judge Stephens said that the onus of proof should be placed on the defendant (*Erdemovic* Appeal Decision, Separate Opinion of Judge Stephen; Paragraph 22). This would mean that defendants would have to call their own witnesses in order to prove they were forced into committing criminal acts. It could also be possible that this could raise further confusion regarding the distinction between what constitutes a defence and what constitutes a mitigating circumstance.

It would also appear to be the case that defendants who pleaded guilty did not understand that they may not in fact be guilty as they may have been able to raise a successful defence of duress. This would seem to further alienate defendants from the western notion of justice. Evidence of this can be seen in the aforementioned case of *Joa Fernandes*. Here, the fact that the defendant claimed he acted under duress and in accordance with superior's orders was indeed viewed as mitigation in his defence. On appeal, the Appeal Chamber used the *Erdemovic* case to reject the defence that Fernandes was forced to kill acting under superior's orders. The Special Panels viewed Fernandes as having acted under superior orders and only accepted the matter of duress as a mitigating factor. They sentenced the defendant to twelve years accordingly (Trial Judgement; Paragraph 6).

Significantly, when this case went to appeal the defence counsel were confused by the distinction between superior orders and duress even though the differences between the elements of what constitutes duress and superior orders are set out in UNTAET Regulation 2000/15 (Linton and Rieger 2002: 15). It is possible that there was a genuine misunderstanding between the Bench and defence due to inadequate translations. English and Portuguese were the official languages of this tribunal even though many of the defendants and witnesses only spoke one of the East Timorese languages.¹³⁵ In the case of Fernandes this led to some crucial issues not being addressed by the Appeals Chamber as the Tribunal did not understand what he was trying to tell them (Linton and Rieger 2002: 15-19).

It seems that there are a number of factors that need to be considered here. Although the defendant accepts that they have committed the acts they are accused of they also claim that they were forced to commit those acts therefore lacking any specific intent. It is clearly the case that the defendant did not understand the nuances

between the defence strategies that may have been available to them or that pleading guilty may take away these defences. This in turn would raise the possibility that defence counsel were unable to determine the nuances themselves as if they entered into a plea bargain they may have been able to negotiate with the prosecutors to modify the charges. The defendant would then be pleading guilty to a more accurate account of their actual involvement and culpability. As it stands, if these defendants are to be believed it might be thought they have been held fully liable for crimes where there may be a partial defence, such as duress. This of course is a highly relevant mitigating factor when it comes to sentencing. In these circumstances defendants have unfortunately fallen foul of a system that cannot accommodate their desire to confess to the acts that they have committed in a manner that they can express themselves properly.

Judge Egonda-Ntende has also engaged with this issue. He argued that in order to make sure that the chamber understood the defendant it should have investigated: firstly whether he or his counsel knew the difference between duress and superior orders; secondly, whether he and his counsel knew the difference between mitigating factors under East Timor's New Laws or the consequences of pleading guilty when the defendants operating under superior orders may have been used as a mitigating factor; and thirdly if they knew what a claim of duress meant, i.e. acquittal not a lighter sentence (*Joa Fernandes* Appeal, Judge EgondaNtende Separate Opinion 29 June 2001 p 30). This highlights the dangers of using mechanisms such as plea bargaining in a forum where the participants do not hail from the same cultural and philosophical sphere as those where plea bargaining is a helpful and important judicial instrument.

This case study indicates the issues that may arise when foreign legal instruments are transplanted into a system where the participants are not aware of the nuances within this particular system and how they work. It also highlights how persons may be left outside this system when there is only a vague and/or improper understanding of how the system works. Another way in which a person or a group of persons may be left out of the hegemonic order of international criminal justice is when there is a clash of cultures between the supranational institution and the region the tribunal is working with. The following example of the Special Court for Sierra Leone highlights this.

5.3.4 The Case of the Special Court for Sierra Leone

One aspect of Sierra Leonean culture the SCSL and its staff had to deal with that other international tribunals have not had to contemplate was the issue of witchcraft.¹³⁶ The CDF (Civil Defence Forces) trials heard a great amount of evidence that was based on witness accounts of the role and use of witchcraft during the conflict in Sierra Leone. This included evidence involving issues such as initiation rights and the belief that if people follow certain rituals they may become immune to bullets. (*Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa* (SCSL-04-14-T)) The evidence adduced in these trials shows how seriously people in Sierra Leone believed in the rites and rituals associated with mystical powers¹³⁷ and this in turn raises the question once again of how far defendants fully grasped the judicial system they were tried within.

When issues of mystical nature arose the bench tried to understand the part it played in Sierra Leonean culture and the violence that tore through the country. In this

respect Judge Thompson, who is Sierra Leonean, in the *Hinga Norman* case stated that, ‘the witness believes that we are familiar with the culture. We’re not. That’s why I sought clarification.’ (Transcript 22nd February 2006, P32-33) On another occasion he admitted that the court’s culture was alien to that of some of the trial’s participants, and said that there was a sense of oppositional positions in their understanding of what was going on, ‘in other words, this traditional thing as against the western position.’ (Transcript 15th February 2006, p15-16) The SCSL is the first international court to deal with witchcraft, however, it is not the first Western style court to deal with the issue. As Kelsall points out, there have been instances in some post-colonial African countries where issues of witchcraft have been integral parts of criminal proceedings (Kelsall 2009: 113-117). Although the SCSL was prepared to try and understand the issues of witchcraft, it was not integrated into the proceedings as either a legitimate defence or some form of mitigating factor. This suggests that even when working with the best of intentions, international criminal law may be considered a form of imperial justice as it is ultimately unable to, or chooses not to, accommodate beliefs that its participants and the wider population itself may believe in. Although not public knowledge as the negotiations in this particular scenario collapsed, the issue of witchcraft even affected the potential for the court to accept guilty pleas. This raised the question of how to bring justice to defendants whose belief systems are outside of the Tribunal’s philosophical and cultural beliefs.¹³⁸

When interviewed for this thesis, SCSL prosecutors David Crane and Sir Desmond de Silva QC stated that there was another instance when a plea deal had been negotiated where the defendant would enter a guilty plea and give evidence on behalf of the prosecution (Interview with De Silva 2010).¹³⁹ The agreement was ready to sign on Friday morning and defence counsel was scheduled to leave in the evening

that day. When defence counsel went to meet with the defendant, they were informed that he wished to consult with a witch doctor before signing the document (Crane 2009; De Silva 2010). After consulting with the witch doctor the defendant decided not to sign the plea agreement under their advisement. Regardless of the defendant's decision, Sir Desmond and Professor Crane had decided that they would not be able to rely on this defendant as a credible witness. Sir Desmond acknowledged that, 'this was an unusual situation' and that he 'could foresee endless problems.' (Interview with De Silva 2010) The 'endless problems' the prosecution could have envisaged would likely include the fact that the credibility of the witness may be a risk, as 'if he goes in to the witness box, and says I pleaded guilty but consulted with my witch doctor first' (Interview with De Silva 2010), the Bench may not give any weight to any of the evidence elicited at trial. The second issue that the prosecutors may have considered is that if the defendant had pleaded guilty after discussions with the witch doctor, his plea may not be voluntary or unequivocal and therefore it would be very wrong for the OTP to accept a plea under such circumstances.

This particular negotiation at the SCSL raises a number of questions with regards to subaltern studies. Firstly, it highlights the difference of opinions within the tribunal; when discussing the use of witchdoctors Chief Charles Taku stated that:

Throughout the entire proceedings an allegation was made about the RUF consulting a witch doctor during the so-called "fata fati" campaign which they alleged Kallon sabotaged by staying away and discouraging others to do so. The campaign failed with the RUF having heavy casualties and Kallon was suspended, recalled and punished...Entry into the detention centre and access to Kallon and others was always rigid and I will be surprised if witch doctor gained ingress into the centre and interfered with the Judicial process in the manner alleged. (Interview with Taku 2011)

Chief Taku went on to suggest that there may indeed be some confusion and that the defendant in question had not wished to see a witch doctor for magical purposes but had wanted to speak to a spiritual leader for guidance. Taku went on to say that he

believed that in general there was a distinct clash of religious philosophies between the participants of the trial proceedings. He gave the specific example of the differences seen between the defendants who were Muslim and the bench in the RUF case stating that the Bench when passing judgment quoted the Bible to the defendants:

This allegation comes to emphasize a religious twist that was evident in the trial and which was stated so eloquently by Judge Galega King in his joint dissenting opinion with Judge Kamanda when they cited the Holy Bible (The Plsamist) about “We’re the good and them the bad”. The reliance on their (the Judges) religious beliefs to support their finding in a case in which two of the convicts were Moslem was and remain troubling indeed. (Interview with Taku 2010) (*Appeals Judgment, Prosecutor Vs Isa Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-A) 26 Oct. 2009, p491. Joint dissenting opinion of Justice Galega King and Justice Kamanda).

Therefore, it may be the case that anything that was not grounded in Western legal tradition or Christian ideology was not welcomed into the court and that any faith in metaphysical beliefs was deemed incomprehensible. Persons with such beliefs are marginalised and left outside the tribunals workings. As such they are unable to interact and engage at a level where all parties are able to work together in order to establish the truth of whether the defendant is legally culpable of the crimes charged or not.

Although the details of this particular negotiation are vague, it shows that international criminal justice at times cannot incorporate the beliefs of the people it serves. This particular scenario also highlights that in this situation the defendant was unaware that seeking advice about pleading guilty or not from a witch doctor would not only be inappropriate, as conceptually guilty pleas should only be entered if one is factually and legally guilty rather than accepting or denying guilt on metaphysical advice. But again, this situation may also have been misconstrued as Chief Taku suggests. This also helps show how fraught negotiations of this nature can be and that neither the prosecution nor defence are able to ‘rest on their laurels’ as they must be

ready to go to trial in case negotiations fail, as in the *Plavsic* case. For the most part, this particular, highly unusual scenario, points to the difference in cultures and that international law as it stands is unable to integrate beliefs that Western notions of justice would find illogical. It is therefore fair to say that justice mechanisms such as plea bargaining implemented into legal systems where it does not resonate within the wider populations of the post conflict society and the trial participants it is indeed then an inappropriate transplant. It is therefore essential that the international community when deciding the tribunals mandate must factor in these differences and envisage the problems that may occur. Therefore an appropriate and realistic tribunal budget and completion strategy needs to be instated.

5.4 Conclusion

This chapter of the thesis has taken on a distinctly different format from the previous two chapters as, in order to fully analyse the issues that arise from plea bargaining, one has to consider that it may constitute a form of legal imperialism. It is difficult to ignore the obvious financial constraints international tribunals find themselves placed under and the impact this has on the increased application of plea bargaining in international courts. However, whilst utilitarian approaches explain the financial drive behind the introduction of plea bargaining in the international tribunals, one that fully acknowledges the imperialistic urge to stabilise trouble torn regions to enable the financial investment of international capital offers a more nuanced and one might argue, realistic, rationale for their usage.

If legal transplants are to be appropriate then not only do the courts need to be adequately funded they also need adequate time for defence counsel to explain to

defendants the way in which plea bargains work. An analysis of the process of plea bargaining that acknowledges the potentially imperialistic drive of transplant without explanation and its potential to create a subaltern layer of populations in conflict zones opens up the process of plea bargaining to a wider set of concerns that move beyond the more classical approaches utilised in my earlier chapters. This approach reveals that the courts must carry out their work with respect to the cultural and spiritual beliefs of the post conflict society in order for there to be any real and lasting impact in the region. This may be achieved with more effective outreach programs but these in turn must acknowledge the need to be seen as developing and adapting the legal transplant to the point of destination instead of simply forcing it upon it (Clark 2009). The outreach will not only act as a method of disseminating information about judgments and sentences handed out but must also play an integral role in the dissemination of information regarding the courts rules and procedures by discussing and explaining how and why plea bargaining is used in these courts. Again, to allow a tribunal the ability to do this there needs to be adequate funds available and time in which this work can be carried out, after which the transplantation of alien legal tools may have a better chance of being successful. As already discussed above, it is of great interest to see how the use of plea negotiations and guilty pleas will progress at the ICC.

To date there have been a number of practical reasons why plea bargaining has been implemented into the international system, namely over-burdened court dockets and the lack of resources. But international courts must ensure that their prosecutorial strategy is not influenced by the funders or the dominant legislators who, as it has been argued above may be viewed as imperial states that have subjected defendants to alien legal mechanisms. This may also raise potential questions as to whether this has

had any impact in deciding who should enter into negotiations and who should go to trial. If there is even a slight perception of this in the regions where the tribunals work, there will no doubt be claims of victor's justice.

Conclusion

What has become evident throughout the interviews I have undertaken for this project is that, whilst there is a generally accepted understanding of what might constitute a plea bargain in the context of the international tribunals, there is no universal acknowledgement of how to either conduct one or more precisely how to proceed in the negotiations leading up to the establishing of one.¹⁴⁰ O’Sullivan and Zecevic go some way to alleviating this through their work on plea bargaining in the *ADC ICTY Manual* (2011). However, even their contribution has not provided a set dramaturgical model that may be followed during plea negotiations in the manner available for trial proceedings. Here, there remain a number of central questions that exist during the process. In particular, how does a trial participant interact with another participant within the spaces of the court room? This is particularly pertinent as any resultant plea bargain delivers a criminal conviction without a trial. This means that there must be aspects of the negotiations that take a formal and legalistic approach within what is generally considered an informal method of evaluating the facts and deciding the guilt of a defendant. Whilst there may be economic and even theoretical justifications for plea bargaining, without an understanding of how such deals may be entered into, and which types of ‘actions’ are permissible in the exchange between the parties, there can be no broadly acceptable practice of how to proceed with or what to expect from plea negotiations. Furthermore, if there is no common understanding of what constitutes a plea bargain in international law, then the somewhat ad hoc process employed will be open to charges of cultural imperialism. Such accusations can often be driven by a perceived imperialistic superimposition of contextually inappropriate assumptions and

practices and unequal treatment regardless of any institutional benefit that may be achieved from employing plea bargaining.

As international criminal law continues to evolve and with the emergence of new conflicts, often resulting in new indictments being issued and new prosecutions taking place, it is evident that there will continue to be a place for negotiated justice. This has proved to be the case with provisions within the rules of the ICC and STL to accept guilty pleas. Presently, justifications drawn from utilitarian approaches are once again being evoked as, if persistent rumours are to be believed, the ICC has proposed financial cuts which will impact on the fees defence attorneys receive (Walker 2012: np). If this is indeed the case, then it will be of interest to see if plea bargaining materialises into the actual practice of the ICC, particularly in light of counter-utilitarian assertions such as *fiat justitia ne pereat mundus* (let justice be done though the world should perish) (Kant 1795), that are all too readily made in discussions by liberals about international justice. What is for sure is that debates around the use of plea bargaining in the context of international tribunals will continue.

This thesis has examined the use of plea bargaining in war crime tribunals from three distinct interpretive viewpoints: classical utilitarianism; the classical liberal concept of the rule of law; and legal imperialism. The three theoretical models serve the purpose of testing and evaluating the different ways in which plea bargaining impacts on international criminal law. In formulating my arguments I have utilised responses drawn from the extensive interviews that I have conducted with international criminal trial professionals. These perspectives have helped supplement, nuance and either reinforce or challenge the assumptions often present in more theoretical arguments about plea bargaining in war crime tribunals.

The first two analytical models I utilise, utilitarianism and the rule of law, provide a good theoretical background to the study of plea bargaining as they are diametrically opposite, and therefore allow the limitations of each to stand out emphatically when seen from the perspective of the other. They also explain the issues and nuances surrounding the use of plea bargaining that would not be initially apparent. The development of my third approach was, however, necessary due not only to the limitations of the first two but also because of the responses that arose from a number of the interviews.¹⁴¹ As my research progressed, it became apparent that there were aspects of the interview material I was gathering that did not fit into the interpretative framework of either of the two models and upon reflection it became increasingly apparent that they could be better assimilated and made sense of when viewed through the lens of legal imperialism. Therefore, without these theoretical frameworks I would not have been able to fully evaluate the responses that I received from the interviews. Within this research a number of aspects relating to the use of plea bargaining have arisen that have added to the explanation of how plea negotiations are conducted in the various international tribunals. Examples include the way in which the attempted negotiations took place in the RUF trials, (Interview with Taku 2010; Interview with Jordash 2010) and the lack of transparency in the *Plavsic* trial (Interview with Murphy 2010).

The international tribunals have been championed by liberal democratic societies such as the UK, USA, Germany and France (Bass 2000). These States hold individual rights to be paramount to the functioning of their societies and the influence of their Western legalism is clearly visible in the tribunals. It is arguably wrong for tribunals to employ plea bargaining as it disregards the rights that they vow to uphold in their bid to be seen as fair and just and avoid claims that they are meting

out a form of ‘victors justice’ (Zolo 2009). Utilitarianism as a theory, and as an institutional practice within the tribunals, is understood as the principle or imperative of the greatest happiness for the great number. As such, it is unable to adhere with the tribunals’ generally liberal principles and ideology because, as a theory, utilitarianism disregards the sanctity of individual’s rights in favour of a collectivist policy concern for optimising the interests of the greatest number. In practice, this means that under a legal system that champions a utilitarian form of justice, rights such as the presumption of innocence, or the right to a fair trial may be forfeited wherever this serves the greatest happiness for the greatest number principle. Therefore, when thinking about plea bargaining the responses from the interviews help emphasise the contradiction between its use and the principles of liberalism on which the tribunals have been established.

Another important issue that has the potential to undercut the utilitarian justifications when entering into plea agreements in war crime tribunals, is that the nature of the crimes being investigated are of great complexity and involve large number of people. War crimes generally are not committed in just one single political context. There are normally a number of political and sociological reasons for armed conflicts, and the crimes committed within them. There are often many differing opinions regarding, and understandings of, what constitutes and what does not constitute not a war crime. This often extends to questions relating to who is a war criminal when in some contexts perpetrators may be considered a war hero. With this in mind, under utilitarian thinking it is not possible to determine what a cost is and what is a benefit for everybody in general, in every post conflict situation that exists or may exist in the future. Utilitarian justifications, such as the promotion of reconciliation, may be more suitable to certain regions of the world than to others; not

least because one person's peaceful reconciliation efforts are another's attempts at ethnic or cultural assimilation. People from different post conflict societies may see the presence of plea negotiations as a corrupt practice in the international legal system, and also linked to wider tendencies to 'peace without justice' that they oppose. Conversely, others may believe that this promotes reconciliation within the affected region,¹⁴² which by definition is in everyone's interest because war is everyone's enemy. The very nature of utilitarianism is that it is pragmatic. Therefore, in order for plea bargaining to deliver the greatest happiness to the greatest number it does not have to be applied equally across the range of defendants.

In summary, the theory of utilitarianism treats defendants as a means to an end rather than individuals. The 'ends' for the purposes of this thesis is a criminal conviction. Utilitarianism disregards the 'quality' of convictions in favour of the quantity of convictions.¹⁴³ By doing so it sacrifices aspects such as, the rights that are bestowed on to a defendant in international criminal tribunals to contributing towards a full and truthful historical record in exchange for a number of convictions that have been efficiently obtained.

I then turned to a consideration of the use of plea bargaining from a liberal perspective in order to give a fuller analysis of this area of international criminal law practice. From this chapter, it is clear that the use of plea bargaining is at odds with the rights based liberalism that informs the tribunals' procedural laws. The interview responses have offered additional insight to these theoretical issues,¹⁴⁴ allowing for nuanced evaluation determining how much the theoretical objections concern the real consequence of the actual practice of plea bargaining. It has also become apparent from the interview responses that the strict rule following normativisms and doctrinal certainty requirements of liberalism are impossible to maintain, especially in relation

to plea bargaining, which in itself is necessarily subject to much additional discretion.

This was highlighted by wayde Pittman who pointed out the judges had not followed to a number of sentence recommendations and had sentenced defendants to longer prison terms (Interview with Pittman 2010). One of the problems with classical liberal theory, unlike utilitarianism, is that its individualistic focus on the rights of defendants does not concern itself with the plight of the victims of war crimes. With the introduction of victim representation in the form of civil party groups, this has the potential to disrupt the liberal theory underpinning plea bargaining. The theory itself is limited within the area of international criminal justice in general. With regards to equality, there will never be true equality as at the beginning of criminal proceedings, be that at an arrest or at the beginning of negotiations. The prosecution on the whole are in a more dominant position due to the lengthy investigations that they have carried out before the defendant is even arrested. This leads to an imbalance in the information and resources available to the defendant. Still on the subject of equality, within a legal system it is impossible to treat defendants equally. The best a criminal system can hope for is that the defendants are given equal access to legal measures in place. The use of plea bargaining in it is subject to a vast amount of discretion that impacts on the defendant's right to equality.¹⁴⁵ It also increases the level of uncertainty for defendants. Under liberalism it is the law that decides cases not the people who are involved in them. Making it impossible for legal systems, in particular international legal systems to deliver the strict and utopian demands of the rule of law, as the success of plea bargains often rests on the lawyer's negotiation skills and the human agency involved in conducting a plea negotiation. Therefore, like utilitarianism, the classical liberal approach is also limited in its ability to offer a complete understanding of plea bargaining's place within the context of international tribunals.

Both the classical utilitarian and classical liberal frameworks go some way in advancing an understanding of plea bargaining and offer useful approaches to the issues surrounding plea bargaining, but in light of the interviews conducted this is an incomplete and, for present purposes, arguably insufficient one. In the context of international law both these theories reveal significant problems and naiveties when scrutinised under the theories of legal imperialism. Chapter 5 offered a general framework for legal imperialism in order to best address the troubling interview responses regarding the use of plea bargaining in war crime tribunals, and to explore possible alternatives to liberal and utilitarian orientations. Again, as a framework in which to think about plea bargaining this too is inadequate, at least insofar as it operates in isolation from liberalism and utilitarianism and remains unreceptive to their admittedly limited positive features. Not all transplantation can be understood as imperialistic. The high cost and the time it takes for a full trial to take place, tribunals such as the ICTY would not have been able to bring to trial all the suspects they had set out to bring to the Hague and face prosecution, had there not been provisions for plea bargaining. It is therefore evident that in new legal systems there needs to be a certain amount of legal transplantation, in order to have a functioning tribunal. Plea bargaining is a highly adversarial mechanism that comes from adversarial jurisprudence. Therefore, it is predictable that persons from different legal backgrounds are not comfortable with the notion of plea bargaining, this in itself does not constitute legal imperialism. Arguments of imperialism arise when plea bargaining is employed or possibly imposed in a culturally insensitive manner, as seen in the RUF trials (Interview with Taku 2010), or if there is an inadequate level of understanding of what is involved to the extent qualified and experienced defence counsel are unable to proceed.¹⁴⁶ This may arise when cultural differences appear between the defence and the prosecution, therefore making the actual exchange during

negotiations the source of the problem. In turn, this potentially leaves the defence and the defendant in a vulnerable position, and permits a form of cultural imperialism to arise. This may further link into issues of equality before the law, and equality of arms as the defence are in general disadvantaged by their lack of experience or understanding in this area of legal practice.

All three of the theories I have used to evaluate the use of plea bargaining do not offer a satisfactory understanding into the research area when taken in isolation from each other. That is not to say that there are no aspects to these theories that offer insights into plea bargaining which merit inclusion in an emerging alternative position. Together, particularly if their more viable elements can be integrated, they offer a nuanced and holistic approach to considering plea bargaining and its future in international criminal law. Therefore, this research has analysed plea bargaining in the international context in a number of ways which has added to the explanation of what plea bargaining is the different forms it may take, as well as the evaluation of this particular legal phenomenon which offers an interdisciplinary approach to the use of plea bargaining in the international context.

With this in mind, I will now distil the main aspects from evaluation of the three models that seem the most pertinent to plea bargaining from which I aim to deliver a more nuanced way of considering plea bargaining in the future. As the use of plea bargaining in international criminal law is continually evolving within the diverse political and cultural contexts in which the international tribunals work. It is also apparent from the establishment of more recent tribunals, such as the ICC and the STL, that plea bargaining as both a legal concept and institutional practice will remain within the international criminal jurisprudence.

From the chapter relating to the utilitarian justifications of plea bargaining, it is very clear that the overarching benefit of plea bargaining is that it improves the efficiency of international justice, by way of cutting cost drastically and speeding up the judicial process, as evidenced by the interviews with Chief Taku (2010), Sir Desmond (2010) and Professor Crane (2009). Although there are other by products of plea bargaining that may be considered desirable¹⁴⁷ it still remains that the potential to increase international productivity is the only concrete and undisputable rationale for its entry into the international criminal justice system.

From the chapter that dealt with the objections to the use of plea bargaining under the theory of the classical liberal rule of law, it is apparent that there is a high level of discretion from the judges and prosecutors throughout the entire process of plea bargaining. This then leads to the high level of uncertainty as to what the final outcome of a plea bargain may be (Interview with Taku 2010; Interview with Pittman 2010; interview with Jordash 2010). The second prevailing issue in relation to liberalism's objections to plea bargaining that was informed by the interviews surrounds the area of equality and equal treatment, where certain defendants are given more favourable plea deals than others on grounds that cannot be justified in terms of liberal principles, such as having more valuable information that the OTP can utilize than another defendant (interview with De Silva 2010). Upholding a strict adherence to every aspect and implication of the rule of law, as defined by liberal ideology, is unrealistic. However, this does not mean that there must not be a structure in place which instils at least a general concern for equal treatment for defendants such that inequalities require a measure of justification, and all the participants of the trial and allows an optimal amount of certainty.

From the chapter focussing on imperialism it can be inferred that the use of plea bargaining will not be successful if the defendants and the populations of the post conflict society do not understand the nuances that are involved in plea bargaining.¹⁴⁸ This will lead to a contextually inappropriate transplant of plea bargaining. This in turn very much has the potential to create confusion and mistrust in the international courts, for example, at the SCSL Issa Sesay felt he could not trust the prosecutors or the legal system regarding plea bargaining during his actual negotiations (Interview with Jordash 2010). Another aspect that arose from this chapter is that international tribunals rely on donor countries to fund them. Hence, it is of utmost importance that tribunals remain free from political influence when deciding who and what to investigate, charge and ultimately enter into negotiations.

Finally, drawing on these conclusions I argue that in order to make the use of plea bargaining more uniform and fairer to all, a number of practical initiatives should be employed by the international criminal tribunals. The first main recommendation derives from the evaluation conducted in this research regarding legal imperialism and the rule of law objections in particular the use of discretion, and is, that there needs to be an understanding between the three offices of the tribunals, namely, the defence associations, the office of the prosecutor, and the judges, as to what parameters should be employed during the negotiation process. These parameters may encompass a number of things. For example, to date there are no guidelines as to how to initiate the plea bargaining process. This will avoid situations that Morris Kallon found himself in at the SCSL (Interview with Taku 2010) and Dragan Obrenovic at the ICTY (Karganovic, no date). More importantly it will go some way to stop allegations of coercion from the prosecution. There may also be parameters established that indicate

the amount of discretion a prosecutor may have when deciding what charges shall be dropped.

In this regard, I would argue that that the Indian model of plea bargaining may be a useful guide because here there are a number of important caveats. For example, in India under the Criminal Procedure Code, 1973 Chapter-XX1A Section 265-L parties are unable to enter into negotiations if the crime is committed against women of children below the age of 14 (Gosh 2006). A version of this may be adopted to fit and then implemented in international law in a bid to limit the practice of overcharging defendants and, at the same time, post conflict communities are not let down when the most serious and grave charges are dropped as part of a deal. For instance, a rule may be imposed, similar to the Indian model that prohibits plea negotiations in charges of genocide, conspiracy to commit genocide, for example.¹⁴⁹ Currently, there are no sentencing guidelines in international tribunals therefore at present it is impossible to make suggestions such as there should be a prohibition on entering into agreements where the alleged crime is punishable by twenty five years or more. The implementation of this new model may also help curb feeling of betrayal from the wider population by the tribunals when they engage in charge bargaining, as the most serious charges a defendant may be charged with will not be subject to charge bargaining regardless of the amount of information the defendant is able to give to the OTP. The proposed parameters should help inform the parties as to how judges come to their decisions when sentencing, for example how much weight to apportion to the different mitigating and aggravating factors. These proposed parameters are not aimed to restrict discretion that is involved when engaging in plea bargaining. However, they are aimed at enabling defendants make informed decisions

and to understand the decision making processes that are involved, hopefully taking some of the uncertainty out of the whole process.

The second main recommendation is to promote legal training for counsel in which legal mechanisms such as plea bargaining are discussed in detail and the dilemmas they raise are confronted openly and from diverse standpoints.¹⁵⁰ This means that counsel will be aware of what plea bargaining is and the nuances and how to proceed in plea bargaining. Defence counsel will then be better able to advise their clients. There has been some head way with this, defence counsel at the STL have already received training (STL Press Release Mach 4 2010). The ICTY Association of Defence Counsel have also recently issued a defence manual, in which there is a chapter discussing the basics of plea bargaining (O'Sullivan and Zecevic 2011).

The third recommendation has arisen from the analysis of plea bargaining and legal transplant, and that is to increase the dissemination of information regarding plea bargaining from the tribunals back to the post conflict communities. This can be done through outreach programs.¹⁵¹ Not only will this inform the communities about the outcomes, they should also be informed about the procedures of plea bargaining and the role it plays in international justice. If there is to be a successful legal transplantation of plea bargaining and therefore any lasting positive effect of the plea bargains that take place then there must be some sort community engagement. If there is not then plea bargaining will remain a foreign legal practice offering little benefit within the post conflict society it aims to help.

In the early stages of this thesis I laid down a brief explanation of the trajectory and history of plea bargaining in the UK. With this in mind and in conjunction with the conclusions I have drawn, it would be suitable at this point to have some discussion as to whether the use of overt sentence bargaining involving

judges would be an appropriate development in international law, as in the UK case of *Goodyear*. To recap, in *R v Goodyear* [2005] ECA 888, CA it was set out that following a request from a defendant a judge may give an indication as to the maximum sentence to be imposed after a guilty plea is entered. The judge may also remind counsel that the defendant is entitled to this in open court. In light of the findings of this thesis I will now briefly discuss if overt sentence bargaining in international criminal law would be appropriate.

Overt sentence bargaining of this kind would of course limit the uncertainty and the lack of transparency elements of that the use of plea bargaining raises, as a defendant would be able to learn what sentence s/he could expect after entering a guilty plea. This on its face would also open up the guilty plea process to the wider public, as they would be able to see how the process of sentence reduction takes place, why the defendant is receiving such a sentence and seemingly there has not been a clandestine meeting between the defence and prosecution to negotiate a sentence. Therefore as a result of what I have argued in this thesis overt sentence bargaining similar to that put forward by the *Goodyear* principles seems appropriate.

Unfortunately, like many areas of international criminal law, things are rarely clear cut and what seems sensible and efficient has the potential to give rise to a number of other issues if not adapted to fit the arena and purpose they serve. I noted in the thesis that at times the crux of the negotiation does not always rest on the sentence a defendant may receive. Factors such as family relocation (*Kallon; Kambanda*) are very important to defendants, where they may serve their prison sentence (*Plavsic*) or even negotiations as to whether or not they give evidence in other trials (*Deronjic; Plavsic*) are very important and are at times given more emphasis in the negotiation process than sentence length (Interview with Jordash

2010). Often these factors are what the negotiation rests on, but they are not within the judge's control and therefore cannot be communicated by them to the defendant. Put simply, it is not their decision to make. Another aspect of the *Goodyear* principles that may be problematic is that when a defendant asks what sentence s/he might receive upon entering a guilty plea, this has the potential to violate the right to the presumption of innocence, especially if the defendant then opts to go to trial. As, in theory the defendant would have alerted the judges that they are not guilt free when it comes to the charges that they are willing to plead guilty to but are now contesting. This issue was discussed in the section relating to the presumption of innocence in the rule of law chapter and the case of *Kunarac* was used as an example. Another serious issue that might arise is if after asking for a sentence indication a defendant chooses to plead not guilty, this is problematic as one can imagine the effect that this may have on post conflict societies. Victims may feel aggrieved that the defendant is now reneging on the acknowledgement of the crime they perpetrated on them and their communities this may also lead to mistrust in the institution.

The issues that are dealt with international criminal tribunals vary in degrees of sensitivity, the most sensitive issues being dealt with in private session. When it comes to plea bargaining the *Plavsic* case illustrates this, I refer to the fact that the prosecution felt that the information in the case was so sensitive that a 'wall' had to be put up between members of the defence team (Interview with Murphy 2010). It possibly would not be appropriate to have overt sentence bargaining when the actual plea bargain would also be subject to rigorous and secret negotiations by the defence and prosecution, of which the judges are unaware of when issuing the expected sentence. Therefore, although the *Goodyear* principles can help solve some of the issues and controversies that arise in this research it brings with it another set of issues

and controversies which would make this a difficult development to implement. If it was to be implemented, as I have argued in the section relating to legal transplants it would need to be adapted in a way to best fit the international system and its many facets.

Of course, the findings, reflections and proposed recommendations of this thesis are not aimed to act as a panacea to the issue of plea bargaining in international criminal law. They only aim to add to the study already done and, through the interview responses, aim to give a more nuanced idea of what plea bargaining can actually offer the international community. With the increased globalization of international criminal justice and the changing landscapes and political contexts in that international trials occur it is clear that there is still much more study to be done in this area in order to provide a definitive evaluation of plea bargaining. Further study in this field that I have identified includes the role of civil party groups¹⁵² in negotiating guilty pleas. Although touched upon in this thesis, an in depth study of plea bargaining and legal indeterminacy in the international context would also help create a more sound understanding of the wider subject matter.

Plea bargaining in war crime tribunals will of course always remain controversial, at least insofar as liberal and anti-imperialist sensibilities remain active in this field. With many commentators believing that it is inappropriate, especially in relation to the crimes that have been committed and the sheer number of victims that persons who commit such acts leave in their wake. But the practical benefits plea bargaining brings has enabled it to act as salve to help with the continuing concerns regarding the finances and resources of the tribunals. In turn, this has meant that it will also be a viable option in which a pragmatic form of justice is done or at least optimised in contexts where, given inevitable resources limitations, there can be no

ideal solutions. But to quote Weinstein and Stover '[J]ustice, like beauty, is in the eye of the beholder and can be interpreted in a variety of ways.' (Weinstein and Stover 2004:4) What this thesis has achieved is showing how three different interpretative perspectives can each, in their own way, highlight relations between justice, international legality and plea-bargaining in the context of war criminality in ways that remain charged with continuing and still partly unfulfilled relevance to on-going debates that show no sign of being exhausted in the near future.

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Prosecutor v Drazen Erdemovic (IT-96-22)

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Prosecutor v Goran Jelsic (IT-95-10-T)

Prosecutor v Miodrag Jokić (IT-01-42-PT)

Prosecutor v Jean Kambanda (ICTR 97-23-S)

Prosecutor v Radovan Karadžić (IT-95-5/18)

Prosecutor v Dragan Kolundžija (IT-95-8-T)

Prosecutor v Radomir Kovač (IT-96-23 and 23/1)

Prosecutor v Momcilo Krstić (IT-00-39)

Prosecutor v Radislav Krstić (IT-98-33-A)

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(5/2000)

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Prosecutor v Dragan Nikolić (IT-94-2-PT)

Prosecutor v Momir Nikolic (IT-02-60/1-S)

Prosecutor v Dragan Obrenović (IT-02-60-PT)

Prosecutor v Biljana Plavsic (IT-00-40-I)

Prosecutor v Prilic et al (IT-04-74)

Prosecutor v Ivica Rajić (IT-95-12-PT)

Prosecutor v Georges Anderson Nderubunwe Rutaganda (ICTR-96-3)

Prosecutor v Laurent Semanza (ICTR-97-20)

Prosecutor v Omar Serushago (ICTR-98-39-I)

Prosecutor v Issa Hssan Sesay (SCSL-04-15-A)

Prosecutor v Vojislav Seselj (IT-03-67)

Prosecutor v Duško Sikirica (IT-95-8-T)

Prosecutor v Blagoje Simic (IT-95-9)

Prosecutor v Milan Simić (IT-95-9/2-T)

Prosecutor v Dusko Tadic (IT-94-1-T)

Prosecutor v Stevan Tododrovic (IT-95-9/1)

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Prosecutor v Dragan Zelenović (IT-96-23/2)

R v Goodyear [2005] ECA 888

Tang, 578 F.3d at 1276, 1278

R v Turner [1970] QB 321

R v Peverett [2001] 1 Cr App R 416

United States v. Michael Kopper CR-560-001

X v United Kingdom (1972) 40 CD 64

Interviews with Author

Professor David Crane, 29th October 2009, via telephone

Sir Desmond De Silva QC, 8th January 2010, London

Wayne Jordash, 23rd February 2010, The Hague

Karim Khan QC, 23rd February 2010, The Hague

HHJ Peter Murphy, 26th April 2010, via telephone

Sir Geoffrey Nice QC, 9th March 2010, London

Jonas Nilsson, 25th February 2010, The Hague

Wayde Pittman, 25th February 2010, The Hague

Dr Eugene O'sullivan, 24th February 2010, The Hague

Chief Charles Taku, 9th October 2010; 10th November 2010, via e-mail

Slobodan Zecevic, 14th December 2011, via e-mail

FOOTNOTES

Introduction

1 Mr Jordash's cases include: *Prosecutor v Jovica Stanišić* (IT-03-69); *Prosecutor v Sesay* (SCSL-04-15-A); *Prosecutor v Bagaragaza* (ICTR-2005-86-R); *Prosecutor v Bagishema* (ICTR-95-1A-T); *Khieu Samphan* (Case-002); *Nuon Chea* (Case-002).

2 Whilst working for the OTP at the ICTY and ICTR Mr Khan's cases included: *Prosecutor v Delalic* (IT-96-21); *Prosecutor v Akayesu* (ICTR-96-4-T); *Prosecutor v Kayishema and Ruzindana* (ICTR-95-1-A); *Prosecutor v Musema* (ICTR-96-13-A). Whilst working as defence counsel his cases included: *Prosecutor v Fatmir Limaj* (IT-03-66); *Prosecutor v Charles Ghankay Taylor* (SCSL-03-1-T); *Prosecutor v Alex Tamba Brima* (SCSL-04-16-ES); *Prosecutor v Bruno Stojic* (IT-04-74); *Prosecutor v Kaing Guek Eav, alia Duch* (001118-07-2007-ECCC/SC); *Prosecutor v Astrid Haraqija* (IT-04-84-R77.4); *Prosecutor v Florence Hartmann* (IT-02-54-R77.5); *Prosecutor v Jean-Pierra Bemba* (ICC-01/05 -01/08); *Prosecutor v Bahar Idris Abu Garda* (ICC-02/05-02/09); *Prosecutor v Abdullah Banda and Saleh Jerbo* (ICC-CPI-20110308-PR635).

3 Dr Eugene O'Sullivan's cases include: *Prosecutor v Zejnil Delalić* (IT-96-21); *Prosecutor v Milojica Kos* (IT-98-30/1); *Prosecutor v Biljana Plavšić* (IT-00-39&40/1); *Prosecutor v Miodrag Jokić* (IT-01-42/1); *Prosecutor v Milan Milutinović* (IT-05-87); *Prosecutor v Mićo Stanišić* (IT-08-91); *Prosecutor v Salim Jamil Ayyash* (STL-11-01).

4 HHJ Peter Murphy's cases included: *Prosecutor v Esad Landzo* (IT-96-21); *Prosecutor v Plavšić* (IT-00-39/40); *Prosecutor v Bruno Stojic* (IT-04-74); *Prosecutor v Blagoje Simic* (IT-95-9); *Prosecutor v Haradin Bala* (IT-03-66).

5 Chief Charles Taku's cases include: *Prosecutor v Laurent Semanza* (ICTR-97-20); *Prosecutor v Francois-Xavier Nzuwonemeye* (ICTR-00-56-T); *Prosecutor v Morris Kallon* (SCSL-04-15-A).

6 Sir Geoffrey Nice QC's cases include: *Prosecutor v Kordic* (IT-95-14/2); *Prosecutor v Jelisic* (IT-94-10); *Prosecutor v Milosevic* (IT-02-54).

7 Mr Slobodan Zecevic's cases include: *Prosecutor v Milan Simić* (IT-95-9/2); *Prosecutor v Momir Talić* (IT-99-36/1); *Prosecutor v Miroslav Deronjić* (IT-02-61); *Prosecutor v Milan Milutinović* (IT-0-87); *Prosecutor v Mićo Stanišić* (IT-08-91).

Methodology

8 Consider for example Roger Cotterrell's claim that:

All the centuries of purely doctrinal writing on law has produced less valuable knowledge about what law is, as a social phenomena, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal

studies... Socio-legal scholarship in the broadest sense is the most important scholarship presently being undertaken in the legal world. Its importance is not only in what it has achieved, which is considerable, but also in what it promises. (Cotterrell 1995: 296, 314)

9 When talking about evaluation it is noted by way of reference that there is a scholarship related to evaluation known as, *Evaluation Studies*. The very basic aim of this particular discipline is to assess information and provide feedback (Leeuw 2011). This particular area of study has been described by Scriven as a ‘transdiscipline’. He used this term to indicate that theories, research designs and methods from disciplines like psychology, economics, sociology, public administration, and statistics and, to some extent, law, have merged into a field, called evaluation studies (2008: 65-66). Although this thesis employs a number of different methodologies to evaluate plea bargaining it does not it is here were the similarity ends.

10 This is particularly evident in the chapter dealing with legal imperialism.

11 Henham and Findlay (2007) discuss this in relation to analysis of the trial process in more detail.

12 Again this is most evident in chapter which discusses plea bargaining in relation to legal imperialism. Here much of the chapter is devoted to the explanation of the development of plea bargaining in the various international criminal tribunals in order to explore the issues relating to plea bargaining and legal imperialism.

13 Recently Rauxloh (2012) has conducted qualitative regarding plea bargaining, but her focus was on the Former GDR.

14 I stress that I complied with the university research ethics at all times. I respected the confidentiality of the interviewees.

15 Examples of such reasons are, they were still involved in aspects of cases that may be brought up during the interview, the office that they worked for did not allow them to be interviewed, they had their own personal reasons why they felt it would be ‘unethical’ to be interviewed.

16 Civil Parties are victim groups that are participating in the trial proceedings, they are usually represented by counsel.

17 By this I mean that the interviewees came from a different range of professional legal backgrounds. For example defence counsel, the OTP, legal officers.

18 This also ensured that there was little to no issues surrounding snowballing. That is Interviewees give the names of other potential interviews with the same viewpoints as them (Dobinson and Johns 2007: 56).

19 For an example of this see Turner (2010).

20 For an illustration of semi-structured interviewing in a sociolegal project see Sawyer (2000).

21 On occasion this did not happen as it was the interviewee who initiated the interview process and I had to find a way to ask questions in a way that would still allow them to discuss the issues they wanted to tell me about on their own terms as well gain the information required for this thesis.

22 Lindlof and Taylor (2002) assert that the specific topic or topics that the interviewer wants to explore during the interview should be thought about in advance. It is generally beneficial for interviewers to have an interview guide prepared, which is an informal grouping of topics and questions that the interviewer can ask in different ways for different participants depending on their background and experiences.

23 The clearest example of this is the issue of plea bargaining and legal imperialism. A number of the interviewees gave responses that indicated that there is the potential for a form of legal imperialism.

24 Examining plea bargaining in international tribunals through the rule of law and utilitarianism and examining the finding of each analysis through the lens of the other one.

Chapter 1

25 See also Prosecutor v Rutaganda ICTR-96-3 Judgement and Sentence, 6 December 1999) and Prosecutor v Serushago (ICTR-98-39-S Sentence 2 Febuary 1999 para 20).

26 These distinctions of the different forms of plea bargaining are discussed in more detail in the next chapter. It should be pointed out that in general plea bargains contain aspects of all three of nuanced versions of the phenomenon. Usually it is very difficult to distinguish what exact form of negotiation has taken place due to the secretive nature of plea bargaining.

27 This case was specifically dealt with by sentence and charge bargaining.

28 This case featured aggressive charge, sentence and fact bargaining.

29 Although ensuring the safety of a defendant's family does not come under the three headings of the different types of plea bargaining it has proved to be a popular method used by the prosecution to entice defendants to plead guilty. This is discussed later on in the thesis.

30 It is unclear whether this particular charge was dropped due to charge bargaining, or if there was a lack of evidence.

31 This case was not dealt with by way of a plea bargain, although the defendant pleaded guilty it was by way of confession.

32 Jhoni Franca pleaded guilty to four counts of imprisonment and one count of torture as a crime against humanity. The prosecution withdrew one count of

persecution and two counts of inhumane acts, as these charges were covered by the one that he had pleaded guilty to.

33 Sabino Leite pleaded guilty to torture, three counts of imprisonment and other inhumane acts. Again, as in the case of Jhoni Franca the persecution charges were withdrawn and was sentenced to three years imprisonment.

Chapter 2

34 These three distinctions are discussed in greater detail below.

35 It is noted that truth telling and retribution are some of the aspirations of international criminal tribunals.

36 For more on command responsibility see Mundis (2003).

37 Note that both of these defendants did not enter into plea negotiations even though they entered guilty pleas.

38 This particular case was dealt by sentence bargaining and charge bargaining. The initial rape charge where the defendant was accused of raping a teenaged girl nearly every night for two months was replaced with a more general charge of rape where the defendant facilitated the rapes of other women and girls (*Prosecutor v Dragan Nikolic* IT-94-2-PT Second Amended Indictment, para. 21-22 January 7 2002).

39 This case involved all three types of plea bargain. Four of the initial counts that the defendant was charged with were removed and he pleaded guilty to one count of persecution. It was also agreed that the OTP should recommend a sentence of eleven years imprisonment (Plea Agreement para 4 January 22 2004). The factual statement that was present to the court not only contained information that implicated the defendant in the charge he pleaded guilty to it also contained assertions that minimised his involvement in the commission of the crime (Factual Statement para 4 January 22 2004).

40 The accused admitted his guilt on all twelve counts contained in the third amended indictment and agreed to testify in other proceedings before the Tribunal. A written factual basis describing the crimes and Ranko Češić's participation in them was annexed to the plea agreement (October 28 2003). It would seem that this defendant benefited greatly from a sentence discount as his co accused, Goran Jelisic received forty years imprisonment.

Chapter 3

41 Fecundity to Bentham meant the chance the same kind of pleasure or pain may be repeated. Purity meant the chance the act in question not being followed by the opposite sensation, and by extent he meant the number of people who would experience the pleasure or pain. (Mcleod 2005: 165)

42 In a telephone interview with the former Chief Prosecutor of SCSL Professor David Crane stated that, although the SCSL had not actually disposed of a case through plea bargaining he believed that the use of plea bargaining in war crime tribunals aids the efficient running of the tribunal, speeding up the process (Interview with Crane 2009).

43 This is also true for international criminal tribunals, as it is the money from the tax payers from the donor countries that is donated to these tribunals.

44 Jorgensen also highlights the practical benefits of plea bargaining, saying, ‘it may be stated tentatively that the guilty plea has come of age, which represents a triumph for pragmatism.’ (Jorgensen 2002: 407)

45 This may raise concerns that the prosecution may start to use coercive methods to pressurise defendants to plead guilty and entering into negotiations. This is discussed in more depth further on in the thesis.

46 Damir Dosen and his two co-defendants, Dusko Sikirica and Drazen Kolundzija, all pleaded guilty to persecution as a crime against humanity each admitting to varying degrees of culpability and methods. It is clear that the plea agreements limited the responsibilities of the defendants, which would be in line with a fact bargain. The plea agreements also set out a maximum sentence recommendation by the prosecution pursuant to a sentence bargain (Admitted Facts Relevant to the Plea Agreement of Drazen Kolundzija, September 4 2001: Paragraph 3; Admitted Facts Relevant to the Plea Agreement of Damir Dosen, September 6 2001: Paragraphs 8-10; Joint Submission of the Prosecution and the Accused Dusko Sikirica Concerning the Plea Agreement and Relevant Facts, September 6 2001: Paragraph 8-10).

47 Although an economic analysis of plea bargaining is important, it does not feature in this thesis. For more general study of the economic analysis of plea bargaining see Oren Bar-Gill and Oren Gazal-Ayal (2006); Oren Bar-Gill and Omri Ben-Shahar (2007); Limor Riza and Oren Gaal-Ayal (2009).

48 It is noted that the construction of a truthful historical record is one of the aims of the international tribunals, as discussed earlier in this thesis.

49 For example, receiving mitigation in the way of a sentence reduction for expressing remorse does not fit into the just desert theory put forward by Von Hirsch, who argues that punishment should be assessed objectively and must be based on the degree of harm and offender blameworthiness, with remorse only becoming relevant, (if at all) the post sentencing stage (Von Hirsch, 1993: 72; Henham, 2005:105).

50 In Plavsic’s sentencing judgement it was said ‘indeed, it may be argued that by her guilty plea Mrs Plavsic has already demonstrated remorse.’ (IT-00-39 & 40/1-S: Para. 73)

51 The mitigation a defendant may receive does not necessarily have to take the form of a sentence reduction. It could be an agreement on where the defendant serves their sentence, and protection and relocation for the defendant’s family (Interview with Khan 2010; *Prosecutor v Kambanda*; *Prosecutor v Bagaragaza*).

52 The facts of the RUF case and the attempted plea bargains in this case are discussed in the chapter about legal imperialism.

53 Judge Cassese has said that he would think that it would be ‘very good if it was allowed for a judge to go and talk to an accused before sentencing. A two-hour talk between human beings, off the record, about what he felt at that time. I would want to know whether somebody is genuine, and maybe thought twice about what he did.’ (Stuart and Simons, 1999: 88)

54 There may be some scope for this if there is a conceptualisation of criminal system that is based more on restorative principles. This is important and requires much more analysis, unfortunately this is outside the remit of this particular research.

55 This case involved an aggressive form of charge bargaining, as well as a sentence bargain that resulted in a dramatic sentence reduction. For his part of the agreement he cooperated openly with the prosecution and it was agreed that he would not be charged with any crimes relating to Srebrenica.

56 Former Chief Prosecutor for the ICTY and ICTR Carla Del Ponte reiterates Blewitt’s assertions in an address to the NATO parliamentary Assembly stating that, ‘the Tribunal was established as a measure to restore and maintain peace and promote reconciliation.’ (Del Ponte 2007)

57 Sir Desmond De Silva recounted a potential problem with the TRC, ‘one defendant wanted to give evidence before the TRC after being indicted’ De Silva had to step in and advise the defense counsel not to allow their defendant to do that as, ‘it would be inevitable that the prosecutor would have the right to that material.’ (Interview with De Silva 2010) This is despite assurances that any evidence given in the TRC would not be used to prosecute a person (Interview with Crane 2009; Interview with De Silva 2010).

58 The idea of equality before the law is discussed in detail in the Rule of Law section of this thesis

59 For more on this argument also see Bohlander (2001) and Waspi (2000).

60 This of course is more in keeping with the restorative aims of international criminal law.

61 Victim participation has been part of the ECCC’s and will be part of the STL’s trial proceedings.

62 The ICC as stated above may ask that victims/witnesses testify. This does not mean that they are able to participate in the actual negotiations, and this only states what the court may do, it is not under obligation to call victims/witnesses to testify. This was also the case in *Medlin v State* (208 S.E. 2d 648 (S.C. 1981)).

63 This is discussed in more detail elsewhere in this thesis.

64 Although this would increase the requirements of transparency that is required under contemporary legal systems, it is widely accepted that in war crime tribunals that there will be an element of evidence/information given by defendants that must be kept confidential.

65 This kind of thinking seems to have fallen out of favour with the prosecutors at the ICTY. This can be evidenced by their refusal to drop charges in Karadzic's case, as Marko Hoare put it, 'With Biljana Plavsic barely punished [and] given early release, it would be very wrong to yet again compromise and take the easy option and let off one of the few key perpetrators who hasn't been brought to justice [and] actually trim his indictment further. How many more times are the victims going to be let down?' (Jennings, 2009: np)

Chapter 4

66 For a critical response from the left to E. P. Thompson's work, see (Horwitz 1977).

67 According to John Stuart Mill, 'men are born and always continue free and equal in respect to their rights' (1989: np). It is only when each person is given equal respect and treatment under the law that any notion of justice can be obtained.

68 The centrality and importance of the above concept of the rule of law can be found in John Locke's *Second Treatise of Government*. Locke's notion of liberalism was inherently legalistic and he observed that 'where-ever law ends, tyranny begins' (1980: 103), distinguishing the rule of law as the, 'Freedom of men under government is, to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.' (1980: 17)

69 This can be traced back to Chapter 39 of the Magna Carta which states,

No free man shall be taken or imprisoned or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. (Tamanaha, 2004: 26)

Thus requiring the Monarchy to obey the law and also limiting the extent to which the Monarchy could change the law.

70 Ex post facto or retroactive law is one that punishes certain conduct or individuals retrospectively. With the possibility of criminalising an action that was legal when conducted.

71 Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with ends of society and government, which men would not quit the freedom of the state of nature for, and tie themselves up under, were it not to preserve their lives, liberties and fortunes, and by stated rules of right and property to secure their peace and quiet ... [F]or all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at both the people may now their duty, and be safe and secure within the limits of the law; and the rulers too kept

within their bounds...' (Locke 1980: 72) Here Locke gives a concise blueprint for legal liberty as well as for constitutional governance, one where the attainment of certainty and predictability advances the idea of equality before the law in the rule of law ideology.

72 This is discussed more generally in Rauxloh (2011: 5).

73 Joint criminal enterprise (JCE) is a legal doctrine in international law to prosecute war crimes. The JCE doctrine considers each member of an organized group individually responsible for crimes committed by group within the common plan or purpose.

74 This may be due to negotiations that took place concerning the sentence recommendation, which would result in a sentence bargain.

75 It is alleged by one of Jelisic's lawyers that the defendant pled guilty over his lawyers' objections on the mistaken belief that his guilty plea would be considered as substantial cooperation with the prosecution (Combs, 2007: 62).

76 It may be the case that lower ranking perpetrators commit the majority of the most serious offences such as murder and rape during times of conflict, as lower ranking perpetrators are unable to provide as much incriminating information. Therefore the policy criteria for the tribunals is that most of the attention and the priority need to be redistributed to senior officials, with the useful information, but this should be done to a justifiable scale.

77 See also *Prosecutor v Dragan Nikolic* (IT-94-2-S), 18 December 2003, Para 46.

78 It could be argued that a justice system based on retribution will perceive this as acceptable, as some punishment is being meted out.

79 Plavsic was granted early release in October 2009.

80 Wayne Jordash, who was lead defence counsel for Issa Hassan Sesay at the SCSL (Case No. SCSL-04-15-T), alleged in an interview with Dutch radio that the prosecution witnesses were paid to give evidence at his client's trial (<http://www.rnw.nl/int-justice/article/trial-legal-principle>).

81 This does not mean that defence counsel will be able to represent the clients effectively, as they may also be influenced by outside personal and professional pressures. An example of this is where the defence counsel in the Sierra Leone plea bargaining case had to leave Freetown on the same date the plea agreement was agreed to be signed. This case was discussed in the Introduction and Historical Background section (Interview with Crane 2009).

82 For more general discussion of the presumption of innocence at the ICTY see Guy-Smith (2011: 9-21).

83 For a more general discussion of the issues regarding the presumption of innocence when plea bargaining or guilty pleas are involved see Ashworth (1998: 288-292) and Ashworth (2006).

84 Rule 98(B) of the ICTY RPE provides that the Trial Chamber may take judicial notice of facts or documentary evidence from other proceeding which relate to matters in the current proceedings.

85 This issue was raised in the case of *Prosecutor v Milosevic* (IT-02-54).

86 See Ashworth (1998: 286-292) for discussions regarding due process issues in the context of the European Convention on Human Rights.

87 This would also be counterproductive for the international courts to fulfil their truth telling aims.

88 It should be noted that Strugar was sentenced to seven and half years for the crimes he was found guilty of.

89 For more information on this matter D'amato (2000) goes into detail about his own experiences with plea negotiations at the ICTY and this may shed some more light on this matter.

90 Details of this case can be found in the Introduction and Historical Background section.

91 An example of this can be found in the case of *Turner*, which has already been discussed, which deals with the issue of undue pressure to plead guilty.

92 These arguments also form the basis for the ‘equality of arms’ arguments, discussed above.

93 For more general information on this matter see Ashworth (1987) and Jodoin (2010) for more information on decision making in international criminal law.

94 For more analysis of decision making see Ewald (2010).

95 There is much discretion involved in criminal proceedings. Starting firstly with the prosecutor who has a vast amount of discretion, as it is s/he that decides what charges to bring against an accused and up to a point the facts that are relevant to the commission of the alleged crime. They also decide whether to enter into plea negotiations with the defendant or not. After a certain point in the criminal proceeding the prosecution lose their discretionary powers, as they are transferred to the judges presiding over the case. The main crux of a judge’s discretion surrounds the enviable judgment that has to be given. Unlike the prosecutor who had many choices, judges only have two choices, is the defendant guilty of the charges brought against him/her or not? They come to this decision from a vast range of opinions and competing interpretations concerning the facts of the case and the laws and rules that govern these facts as well as the procedure in which the trial is conducted. The main aspect of the judge’s discretion surrounds the sentencing stage of the proceedings.

They are able to decide on what sentence best fits the crimes the defendant have been found guilty of, in the case of plea bargaining they do not have to follow the sentence recommendations given to them by the prosecution.

The study of the discretion in international criminal tribunals is an interesting and important one. Unfortunately much of the issues that pertain to this area of study falls outside of the scope of this research, which is only able to deal with issues of discretion and plea bargaining.

96 For more on this concept see Dukic (2007).

97 Khan was worked for both the Prosecution and Defence in international war crime tribunals, such as the ICTY, ICTR, ECCC, SCSL, the Special Panels for Serious Crimes of the District Court of Dili, and the ICC.

98 Although Sir Desmond De Silva QC stated that when it came to recommending a sentence he would be willing to recommend a reduction off a third, in exchange for a guilty plea and cooperation with the prosecution (De Silva, 2010).

99 Langbein points out that earlier versions of the adversarial trial process objected to the use of guilty pleas as it was thought that this would result to loss of any mitigating evidence that would otherwise be available to the court (2003: 20).

100 As M. Cherif Bassiouni states, ‘The idea that penalties should fit the offender and not the offence was not new, and it had its roots in canon criminal law, which expressly permitted analogy in the imposition of penalties.’ (Bassiouni, 1996: 132)

101 This broadly comes under the subject heading of Legal Indeterminacy. The law itself doesn’t produce a single right answer, there is often more than one right answer giving contradictory outcomes. Leading to the assumption that decisions made by legal professionals, such as, judges and lawyers are influenced by external extra legal factors other than these legal rules, thus making the law indeterminate. Legal Indeterminacy is a very wide and interesting and much needed area of study especially in the examination of plea bargaining. However it is outside the remit of this particular thesis and the general issues described above are there merely to illustrate a point rather than offer an in depth analysis.

102 It should be noted that the tribunals do actually employ medical professionals to determine the mental state of defendants and to determine the genuiness of their contrition.

103 Although the presence of negative aggravating factors may negate any mitigation given, but the whole idea would be that defendants and their counsel would understand more clearly how much weight and consideration is given to each factor as well as how it would be applied. This would then enable counsel to advise their client and the defendant to be able to make decisions with confidence.

104 Although at the international level one could still not give a definitive benchmark to what remorse is there would instead be a ‘well-crafted vague standard’ (Raban 2010: 186) that will help refute uncertainty allowing lawyers to advise their clients confidently and for defendants make more informed decisions.

105 For more information see Schmitt (1996) and Beiner et al (1999).

106 Chief Taku stated:

The Indictment against Laurent Semanza whom I defended at the ICTR alleged that he perpetrated the crimes of Genocide, Complicity to Commit Genocide, Conspiracy in Genocide, Crimes against humanity, extermination, Torture, murder, Article 3 to the Geneva Convention and additional Protocol 2; in all 14 Counts, with Paul Besengimana and Juvenal Rungambarara.

Finally Semanza was tried separately because the other two had not been arrested. However, the allegations against them were retained in Semanza's indictment. Semanza was tried and convicted to 25 years at trial level, increased to 35 on appeal. However, the two others made plea bargains with the Prosecutor who dropped the charges of Genocide against them. The plea bargains agreement also indicated that they were did not perpetrate the alleged acts of genocide, complicated in genocide or conspiracy with Semanza as alleged. They confessed to lesser crimes and were sentenced to very lenient sentences of about 12 years each. Rugambarara admitted to command responsibility as well as Paul Besingimana, none actually incriminating Semanza in any serious way. (Interview with Taku 2010)

107 Note that the interview responses show that the trial professionals believed that this particular right is better enforced and protected in the international arena than the domestic one.

108 Liberalism is not concerned with the aims and functions of the tribunals, only that they reach these aims in fair and open manner that adheres to equal rights and due process principles that are the foundation of such criminal tribunals.

Chapter 5

109 The term 'lawfare' currently does not have an official definition but the use of the word generally means at least for this thesis, the use and implementation of Western laws and judicial systems to achieve strategic military or political ends.

110 An example may be seen in East Timor. In East Timor conflict resolution usually takes place in the form of a village meeting, where the perpetrator aims to restores the social balance through community work or by paying a fine. The fine itself can take a number of different forms, for example it can be paid with livestock, land or money depending on the nature and seriousness of the crime, but the main focus of the process is reconciliation (Kerr and Mobekk 2007: 169).

111 It should be noted that this is one of the main roles that international criminal law plays in the global community.

112 Such as Volkerrechliche Formen des Modernen Imperialismus (1933); Volkerrechtliche Grossraumordnung mit interventionsverbot fur raumfremde Macht (1939); Der Nomos der Erde (2003).

113 The Monroe Doctrine is a policy of the United States introduced on December 2, 1823. It stated that further efforts by European nations to colonize land or interfere with states in North or South America would be viewed as acts of aggression requiring U.S. intervention.

114 The language used in the rules that govern plea bargaining are looked at later on, when discussing legal transplant.

115 See David Schaeffer's memoirs for insight into how much influence the USA had over the construction of the ICTY and ICTR and their laws (Schaeffer 2011).

116 For more general information on this matter see Weigend (1992).

117 For example the STL has introduced the notion of absentia proceedings.

118 For more on the open-ended characteristics of interpretation of rules and laws see Lauterpacht (1978) and more generally Koskenniemi (2005).

119 Rule 62 has now been replaced by Rule 62 (A)(vi).

120 This information has been calculated by me from the data available on the Tribunals' websites.

121 Up until this thesis Kallon's negotiations with the OTP have not been made public.

122 Quoting then-SCSL Registrar, Robin Vincent's characterization of the Court as not so much, 'mean and lean' as it was 'anorexic' (Dougherty 2004: 312).

123 These negotiations, if successful would have taken the form of sentence and charge bargaining. Chief Taku asserted that in Kallon's deal not only would the sentence be greatly reduced but his family will also be relocated to Canada in exchange for a guilty plea and cooperation with the OTP (Interview with Taku 2010). In the case of Sesay the defendant told the Trial Chamber about the attempts of negotiation stating:

Before my trial the Prosecutor offered me a deal to cooperate with them in order to serve only 12 years in jail. The deal was that I should accept that I ordered RUF fighters to amputate civilians; I should accept that I was involved with raping; I should accept that I agreed with orders to kill civilians in Sierra Leone; I should agree that I was involved in burning. (Appeals Hearing September 2 2009: 416)

124 For more detail on the initial interviews conducted see VanTuyl (2003).

125 The coercive nature of the negotiations are discussed in a previous chapter.

126 Which it should be pointed out where not used in the RUF trial, they were thrown out. The only reason there are transcripts of this is because a Voir Dire was held in order to eliminate these transcripts from evidence (*Prosecutor v. Sesay et al*).

127 Chief Taku expressed that many Sierra Leonean people did not believe defendants Kallon and Sesay should have had charges brought against them, saying, ‘In Sierra Leone, the people are bitter, very bitter that Issa Hassan Sesay, Morris Kallon and Augustine Gbao who opted for the peace process were tried and jailed to long terms of imprisonment.’ (Interview with Taku 2010)

128 This is discussed in detail in the section of the thesis discussing utilitarianism.

129 Analysis into this aspect of international criminal law may well stem from the idea of humanitarian intervention as a form of imperialism and the subsequent legal proceedings may be an advancement of this argument. For more on humanitarian intervention as imperialism see (Bricmont 2006).

130 Such models include *patteggiamento* in Italy and *plaider coupable* in France.

131 However it is recognised that duress cannot be a complete defence except in the most (unlikely) of circumstances, it is, however, very relevant to mitigation.

132 This case is discussed below.

133 This particular defendant pleaded guilty to two counts of torture as a crime against humanity and the remaining five charges were dropped, seemingly this was due to a charge bargain. Also as part of the plea deal it was agreed that.

134 The ‘defence counsel from an adversarial system’ was Ms Catherine Baen from Texas US.

135 Issues of interpretation seem to be an issue in all international tribunals. Mr Zecevic also asserts this. ‘The interpretation in my experience at the ICTY is that it is extremely hard if possible at all for Judges to fully and correctly asses the credibility of the witness testimony if they don’t speak the language of the witness. The interpretation, despite the fantastic job that is done here at ICTY by the interpreters, basically removes the witness from the trier of fact.’ (Interview with Zecevic 2011)

136 For more on witchcraft at the SCSL see Kelsall (2009). For more on witchcraft within African cultural practices see Behrand (1999); Jolles and Jolles (2000); Junger (2007).

137 The use and belief in witchcraft is not just an African phenomenon. Cambodian forces loyal to the Lon Nol regime in the 1970s were given amulets to protect them from the Khmer Rouge (Maguire 2005: 44-45). For more general information on the use of magic as cultural and religious practices see Kidd (1995) and Mauss (2006).

138 It should be noted that in this particular circumstance both Professor Crane and Sir Desmond are both very experienced prosecutors and both aware of the cultural and traditional practices in Sierra Leone. Professor Crane has a Masters degree in African Studies and Sir Desmond is a member of the Sierra Leone Bar and has practiced there. If there was a less equipped prosecutor at the time it is almost certain that it would have been near impossible to negotiate with defendants who would have such diametrically opposite beliefs, let alone being able to evaluate practical legal problems that may occur.

139 The name of the case has not been disclosed to me by either of the prosecutors.

Conclusion

140 For example, when talking about his experiences at the ICTR and SCSL Wayne Jordash expressed that both institutions had very different practices when it came to initiating and carrying out plea negotiations stating that, ‘the problem with the SCSL was that there was no process.’ (Interview with Jordash 2010) Also as seen in the chapter relating to legal imperialism Chief Taku described the very adversarial approach by the prosecution took to enter into plea negotiations (Interview with Taku 2010). Slobodan Zecevic said that he would not have been able to proceed with the plea negotiations had he not been assisted by counsel from an adversarial background (Interview with Zecevic 2011).

141 In other words, these analytical models are used primarily to evaluate plea bargaining. They also help develop an explanation of plea bargaining from which the subsequent evaluation is possible.

142 As illustrated in the ICTY and ICTR case law, such as *Plavsic; Obrenovic; Bisengimana*.

143 This of course is one of the main aims for international criminal justice, to find guilt and then punish those who are indeed found guilty.

144 For example the lack of transparency in plea bargain cases such as *Plavsic* (Interview with Murphy 2010) and the lack of equality before the law (Interview with Murphy 2010; Interview with Jordash 2010).

145 This goes against the suggestions of many scholars, who advocate that plea bargaining should encompass features that are in tune with restorative justice (Combs 2007; Rauxloh 2011). Such suggestions often disregard the need for equality as set out by the liberal rule of law.

146 See for example the chapter relating to legal imperialism. In particular the interview responses from Mr Zecevic, former president of the ADC at the ICTY where he states that:

There is no doubt that defence counsel and their clients coming from inquisitorial background are seriously disadvantaged in the plea bargaining process. In my case except from general knowledge and Jurisprudence I was completely unaware of the actual process in technical terms meaning what needs to be done, when, how and alike. For these reasons in both my plea agreements I had an experienced defence counsel from adversarial system who was actually running the show from the defence side. (Interview with Zecevic 2011)

147 Such as it makes help form a truthful record of what happened, it may aid reconciliation, the consequent punishment helps the tribunals reach their retributive purposes.

148 This is particularly clear in the RUF trials at the SCSL where neither Kallon nor Sesay were sure of the procedure or the ideologies that plea bargaining is based on. (Interview with Jordash 2010; interview with Taku 2010) Many of the guilty pleas at the Special Panels where it is clear that the defendants do not understand what the ramifications of pleading guilty are (Linton and Reiger 2002: 2).

149 This may also help tribunals achieve their purpose of deterrence, as there would be no prospect to negotiate a deal in situations where such charges are bought therefore potentially deterring would be perpetrators from committing such crimes, as there would be ‘no way out’ from prosecution.

150 Although the issue of legal training was not mentioned specifically in the interviews, it can be inferred from some of the responses (interview with Crane 2009; interview with Zecevic 2011) that some form of institutional training at an early stage would avoid potential problems and complication that may arise through the use of plea bargaining. Professor Crane states that the concept of plea bargaining can be confusing to both the court personnel¹ and it would be a ‘challenge to have judges understand what’s going on.’ (Interview with Crane 2009) In this vein Mr Zecevic states that:

After the two pleas I did, I am quite sure that if we were not assisted by Ms.Baen it would have been virtually impossible for us to finalize the plea agreements. Starting from Proffer agreements to actual negotiation there has been so many situations where we were in doubt what needs to be done or how we should approach that issue. Therefore, I am sure the outcome and overall experience would have been different had we been on our own, without Ms. Baen. (Interview with Zecevic 2011)

These two statements indicate that there should be at least some training when it comes to legal mechanisms such as plea bargaining.

151 For more on the role of the tribunals’ outreach programmes see Clarke (2011).

152 Civil Parties are victim groups that are participating in the trial proceedings, they are usually represented by counsel.