Prosecutorial discretion in international criminal justice

Davis, C.J.

Chapter 5
Negotiating Outcomes

> I wouldn't try to get a guilty plea if I didn't think I could prove it.
>
> Interview with P28

> Where we had sufficient evidence to prosecute someone to conviction, we never went for a plea bargain.
>
> Interview with P22

1 Introduction

Negotiating outcomes with a defendant is one of the most controversial things that international prosecutors can do. The reason is that the discursive space created by the concept of negotiated outcomes—typically called 'plea negotiations', though this name is misleading—is a microcosm of international criminal law's macro debates. In it, accountability is pitted against pragmatism; expense against value; comprehensive accounts of the truth against distorted portrayals of reality; and criminal justice against transitional justice. Despite this, there is a conspicuous lack of public, primary information about what informs prosecutors when they are negotiating outcomes. This is remarkable in light of the close relationship between this choice and the choice to select charges. With some minor exceptions,[1]

1 Such as a hypothetical agreement under which the prosecution agrees only to a sentencing range.

both relate to what is alleged against a defendant.

Through interviews with current and former international prosecutors, this chapter illustrates—for the first time—what has informed prosecutors when they negotiated outcomes in international criminal justice. It begins, in section 2, by describing the legal framework which governs these decisions. It then turns to exploring eight factors which appear to have informed prosecutorial decision-making. These eight 'thematic windows' are discussed across three sections. Section 3 addresses the functional considerations of the strength of the evidence; efficiency gains; the alleged conduct of the accused; and the risks posed to victims and witnesses. Section 4 moves on to two normative considerations: establishing the 'truth' and norm expression. Section 5 then explores the strategic considerations of the prosecutor's social capital and their legal background.

Finally, this chapter concludes by reflecting on what these thematic windows reveal about how prosecutors have adopted the roles of norm performers, builders, and guardians.

2 The Legal Framework

The legal framework governing negotiated outcomes depends on the type of negotiated outcome. Negotiated outcomes take two forms. The first (and arguably the most well-known) is the plea agreement, in which prosecutors offer actual or potential defendants concessions in return for pleading guilty by attempting to reduce the severity of the proceedings.

Guilty pleas themselves are relatively rare occurrences in international criminal justice. Only 10% of defendants, or 30 out of 298, have pleaded guilty. This has regularly been contrasted with US practice, where authors have noted the overwhelming majority of criminal matters (in the realm of 90%) are disposed of with pleas.[2] Table 5.1 contains a summary of all *guilty pleas* that have occurred at the ICTY, ICTR, SCSL, and ICC.

As shown in Figure 5.1, the first formal plea agreements (starting with Erdemović on his return to the Trial Chamber, Kambanda, and Serushago) were concluded in 1998. Erdemović's guilty plea predated his later plea

2 See, for example, Nancy Combs, 'Copping a Plea to Genocide: The plea bargaining of international crimes' (2002) 151(1) *University of Pennsylvania Law Review* 1, 9, citing *Brady v United States*, 397 US 742 (1970), 752 for the proposition that 90% of criminal cases resolve in pleas. In federal cases, the number is around 97%: Fair Trials, 'At a glance – A visual breakdown of plea bargaining' on *Fair Trials* (11 February 2016) <https://www.fairtrials.org/node/850>.

Defendant	First Charges	Final Charges	Plea To	% Change
ICTY				
Biljana Plavšić	9	1	1	-89%
Damir Došen	10	7	1	-90%
Darko Mrđa	3	2	2	-33%
Dragan Kolundžija	13	5	1	-92%
Dragan Nikolić	64	4	4	-94%
Dragan Obrenović	5	5	1	-80%
Dragan Zelenović	13	14	7	-46%
Dražen Erdemović	1	-	1	0%
Duško Sikirica	16	7	1	-94%
Goran Jelisić	56	32	31	-45%
Ivica Rajić	3	12	4	+33%
Milan Babić	5	-	1	-80%
Milan Simić	3	7	2	-33%
Miodrag Jokić	16	6	6	-63%
Miroslav Bralo	21	8	6	-71%
Miroslav Deronjić	6	1	1	-83%
Momir Nikolić	6	6	1	-83%
Predrag Banović	31	5	1	-97%
Ranko Češić	27	12	12	-56%
Stevan Todorović	15	27	1	-93%
Equating to 20 of 165 defendants, or 12%				
ICTR				
Georges Ruggiu	2	6	2	0%
Jean Kambanda	6	-	6	0%
Joseph Nzabirinda	4	1	1	-75%
Joseph Serugendo	4	-	2	-50%
Juvenal Rugambarara	9	1	1	-89%
Michel Bagaragaza	2	1	1	-50%
Omar Serushago	5	5	4	-20%
Paul Bisengimana	11	-	2	-82%
Vincent Rutaganira	7	7	1	-86%
Equating to 9 of 85 defendants, or 9%				
SCSL				
-	-	-	-	-
Equating to 0 of 11 defendants, or 0%				
ICC				
Ahmad Al Faqi Al-Mahdi	1	-	1	0%
Equating to 1 of 37 defendants, or 3%				
Guilty pleas were entered by 30 out of 298 defendants, or 10%				
The average reduction in charges from the first charging document is 58%				

Table 5.1: Defendants who have pleaded guilty to core international crimes. In the calculation of the 'First Charges' column and the 'Final Charges' column, alternative charges have been excluded. Charges framed as *possible* alternatives (ie 'Count 1 *and/or* Count 2') have been included. Thanks go to Barbora Holá for her assistance in providing the list of ICTR defendants who pleaded guilty.

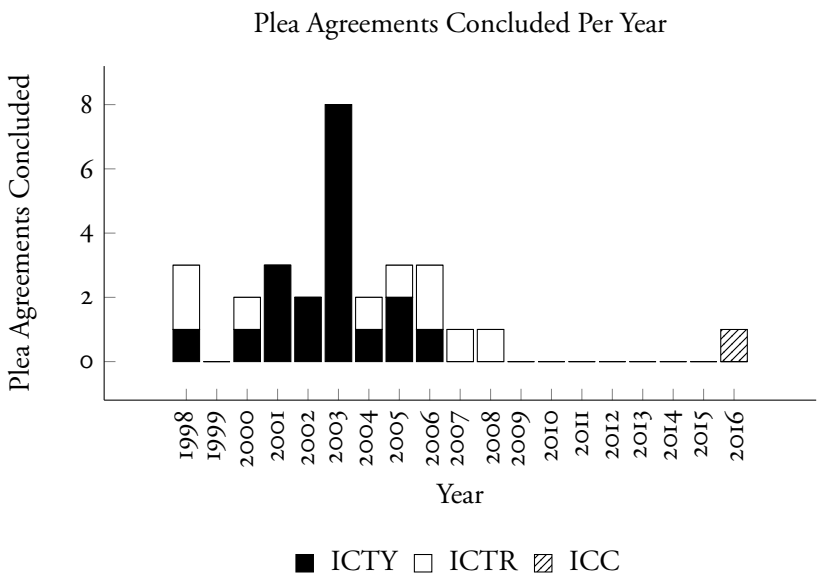

Figure 5.1: The number of plea agreements concluded each year, by court. This figure includes those plea agreements that are confidential and thus not publicly available.

agreement by over one and a half years.[3] ICTY, ICTR, and ICC prosecutors have concluded only 29 formal plea agreements, 13 of which are public.[4] Formal plea agreements were concluded with each defendant who pleaded guilty (as shown in Table 5.1), with the single exception of Goran Jelisić. Jelisić, a guard at the Luka camp in Brčko, was a particularly sadistic character who (among other things) took pleasure out of randomly executing detainees by systematically beating them before shooting them in the back of the neck. He also used to declare that he needed to kill twenty to thirty people before he could drink his coffee each morning, and referred to himself as 'Serbian Adolf' (including at his first appearance before the trial chamber judges).[5] He was apparently under the mistaken belief that he would receive a discount for his cooperation in pleading guilty, and—consistent with there being no agreement in place—got none when prosecutors held no punches in recommending a life sentence.[6]

3 While Combs argues that Erdemović's 1998 plea agreement cannot be considered the outcome of plea bargaining, and lists *Todorović* as the first ICTY case in which a plea agreement was reached, this disregards the fact that the outcome of the case was the result of negotiation. The Prosecution *did* undertake to submit that Erdemović had provided them with substantial assistance, withdraw the alternative count, and recommend a maximum head sentence of 7 years in return for Erdemović providing information and testifying as a prosecution witness in other trials. See Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 218; *Prosecutor v Dražen Erdemović (Annexure A to the joint motion for consideration of plea agreement between Dražen Erdemović and the Office of the Prosecutor)* (ICTY, Trial Chamber, IT-96-22-PT*bis*, 8 January 1998).

4 The plea agreements that are *not* public are those for Miroslav Bralo, Ranko Češić, Miodrag Jokić, Darko Mrđa, Dragan Nikolić, Milan Simić, Stevan Todorović, Michel Bagaragaza, Paul Bisengimana, Jean Kambanda, Joseph Nzabirinda, Juvénal Rugambarara, Georges Ruggiu, Vincent Rutaganira, Joseph Serugendo, and Omar Serushago. Applications to access these documents have been unsuccessful. They have, therefore, not been analysed for this chapter. No plea agreements were concluded at the SCSL.

5 *Prosecutor v Goran Jelisić (Judgment)* (ICTY, Trial Chamber, IT-95-10-T, 14 December 1999), [38], [102]-[103].

6 Nancy Combs, 'Copping a Plea to Genocide: The plea bargaining of international crimes' (2002) 151(1) *University of Pennsylvania Law Review* 1, 117. As Geoffrey Nice QC remarked during his sentencing hearing,

> Every human instinct, we respectfully suggest—whether in the bereaved, in such victims this man has survived, or indeed even in the hearts and minds of lawyers and judges—will be that this man should receive the maximum possible sentence and should never again breathe the air of free society… The sentence on the

The limited practice of prosecutors concluding plea agreements has been attributed to several factors. The limited number of plea agreements at the ICTY was initially due to prosecutors wanting trials to run due to a lack of defendants, though it later became attributable to lenient sentences attracting "highly critical publicity" and a subsequent swing towards sentences *greater* than that recommended by prosecutors.[7] Defendants preferred to take their chances at trial. The departure of Chief of Prosecutions Michael Johnson—"a strong supporter of plea bargaining"—in early 2004 may also have contributed to the practice's decline.[8] Over at the ICTR, various other reasons contributed to accused not wanting to plead guilty. These included that "they truly [did] not believe that they [were] guilty of the crimes for which they [had] been charged"; prison dynamics militated against defendants entering pleas in return for cooperation with prosecutors in their prosecutions against more senior detainees; defence counsel may have had financial incentives to run trials or similarly believed in their client's innocence; and the limited life expectancy of defendants may have enhanced the attraction of staying out of gaol for longer (albeit remaining in the UN Detention Centre).[9] The lack of a "credible and predictable policy" at the ICC may historically have also deterred defendants from pleading guilty.[10]

Plea agreements see prosecutors grant an actual or potential defendant

---

> defendant, in our submission, should reflect the magnitude of the horrifying crimes that occurred and the suffering that was caused by him. He cries out effectively for mercy. He showed none. World opinion, it might be safe to conclude, would not want him to be shown any, and it is our submission that this Chamber should show him none and should impose on him the maximum sentence of life imprisonment.

Prosecutor v Goran Jelisić (Transcript of 11 November 1999) (ICTY, Trial Chamber, IT-95-10, 11 November 1999).

7 Nancy Combs, 'Procuring Guilty Pleas for International Crimes: The limited influence of sentence discounts' (2006) 59 *Vanderbilt Law Review* 69, 84, 87, 98. See also James Meernik, 'What Kind of Bargain is a Plea?' (2014) 14(1) *International Criminal Law Review* 200, 216.

8 Nancy Combs, 'Procuring Guilty Pleas for International Crimes: The limited influence of sentence discounts' (2006) 59 *Vanderbilt Law Review* 69, 99.

9 Nancy Combs, 'Procuring Guilty Pleas for International Crimes: The limited influence of sentence discounts' (2006) 59 *Vanderbilt Law Review* 69, 118, 120-122.

10 Alex Whiting, 'Encouraging the Acceptance of Guilty Pleas at the ICC' on *Post-Conflict Justice* (11 February 2015) <http://postconflictjustice.com/encouraging-the-acceptance-of-guilty-pleas-at-the-icc/>.

two core concessions that can be made separately or together.[11] The first concession that prosecutors can make to mitigate the severity of the outcome of the proceedings is through recommending a sentencing chamber impose a penalty within a particular range. This is commonly called 'sentence bargaining'. Of the 13 public negotiated outcomes, 12 contained a sentence bargain. *Plavsić* was the only case where prosecutors did not agree to a sentencing range, and did so expressly.[12]

The prevalence of sentence bargaining is in spite of two factors that would otherwise suggest its limited attraction for defendants considering whether it would be in their interests to enter a guilty plea. It goes without saying that the value to a defendant of a sentence bargain is ultimately found in the prosecution's ability to make a recommendation that has an effect on the sentencing chamber's disposition. But in all courts where negotiated outcomes were utilised, any agreement between prosecutors and defence lawyers (and defendants) with respect to sentence (or, for that matter, anything) was and is considered non-binding.[13] In this light, there have been two cases where the first instance sentencing chamber imposed a sentence *higher* than that agreed between the parties: *Babić*, where prosecutors suggested 11 years and he was given 13,[14] and *Momir Nikolić*, where the suggestion of 15 to 20 years was ignored in favour of a term of imprisonment of 27 years.[15] In other words, in 17% of cases where prosecutors agreed to a sentencing range, this was ignored by the first instance sentencing chamber.

11 See, for a brief discussion on the two types of plea agreements, Gideon Boas et al, *International Criminal Law Practitioner Library* (Cambridge University Press, 1st ed, 2011) vol 3, 221.

12 *Prosecutor v Biljana Plavsić (Plea Agreement)* (ICTY, Trial Chamber, IT-00-39&40-PT, 30 September 2002), [7].

13 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 62*ter*; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 62*bis*; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 65(5).

14 *Prosecutor v Milan Babić (Joint motion for consideration of plea agreement between Milan Babić and the Office of the Prosecutor pursuant to rule 62ter)* (ICTY, Trial Chamber, IT-03-72-I, 12 January 2004), [4](b); *Prosecutor v Milan Babić (Sentencing judgment)* (ICTY, Trial Chamber, IT-03-72-S, 29 June 2004), [102].

15 *Prosecutor v Momir Nikolić (Joint motion for consideration of amended plea agreement between Momir Nikolić and the Office of the Prosecutor)* (ICTY, Trial Chamber, IT-02-60-PT, 7 May 2003), [4](a); *Prosecutor v Momir Nikolić (Sentencing judgment)* (ICTY, Trial Chamber, IT-02-60/01-S, 2 December 2003), [183]. The case was appealed and Nikolić was resentenced to 20 years: *Prosecutor v Momir Nikolić (Judgment on sentencing appeal)* (ICTY, Appeals Chamber, IT-02-60/01-A, 8 March 2006), 48.

The second significant factor that would suggest sentence bargains would have been used less than they have is that guilty pleas appear to have little to no impact on the sentence the defendant ultimately receives. In his 2014 study, James Meernik found little evidence that pleading guilty provides a defendant with any substantial decrease in the ultimate sentencing disposition, and "even some indication that pleaders may be worse off".[16] Yet sentences are still negotiated.

The second concession that prosecutors can make to reduce the severity of the outcome of the proceeding is to reduce the number of charges the defendant is facing by withdrawing, or moving to withdraw, particular charges. This method, commonly known as 'charge bargaining', is as prevalent as sentence bargaining and is evidenced in 11 of the 13 publicly available plea agreements (additionally, in *Deronjić*, the need for a charge bargain to be formally contained in the agreement was obviated by prosecutors filing a reduced indictment on the same day). The only other case where a charge bargain was not contained in a plea agreement was *Al Mahdi*, where the defendant's arrest warrant for a single charge was issued while he was in custody in Niger,[17] meaning that there was very little for the parties to negotiate over in terms of the charges he was facing.

The legal framework governing charge bargains depends on the stage of proceedings the charge bargain is concluded in. At the ICTY, ICTR, and SCSL, it was entirely within a prosecutor's power to withdraw a charge prior to its confirmation, however they required the leave of the confirming judge if the indictment had been confirmed but not yet allocated to a trial chamber or the trial chamber if the case had been allocated.[18] At the ICC, prosecutors can withdraw charges after providing notice to the Pre-Trial Chamber judges before the Confirmation of Charges hearing; and after the

16 James Meernik, 'What Kind of Bargain is a Plea?' (2014) 14(1) *International Criminal Law Review* 200, 216.

17 Milena Sterio, 'Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi case' (2017) 49(1) *Case Western Reserve Journal of International Law* 63, 66; citing Mark Kersten, 'Why the Timbuktu Case is a Breakthrough for International Criminal Court', *The Globe and Mail* (Online), 25 August 2016 <https://www.theglobeandmail.com/opinion/timbuktu-case-a-breakthrough-for-international-criminal-court/article31540221/>.

18 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 51; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 51; Special Court for Sierra Leone, *Rules of Procedure and Evidence* (31 May 2012), r 51.

commencement of trial with the leave of the Trial Chamber judges.[19] At no court where plea agreements were utilised was or is an agreement relating to charges binding upon the judges.[20]

In October 2020, the ICC Prosecutor released her *Guidelines for Agreements Regarding Admission of Guilt*.[21] This document outlines eight factors that prosecutors *should* consider when concluding a plea agreement. At their core, these guidelines emphasise the importance of ensuring the charges represent the gravity of the offending and the defendant's criminality, the wellbeing of the victims and witnesses, and the desirability of the defendant's cooperation with other investigations and prosecutions. Importantly, the *Guidelines* also stress that prosecutors should exercise "particular caution" before agreeing to withdraw or amend charges concerning sexual and gender-based violence, crimes against or affecting children, attacks against protected objects, and attacks against humanitarian or peacekeeping personnel.[22] They also stress that the ability of plea agreements to lead to greater efficiency may never be considered "the dominant factor" when prosecutors are deciding whether to conclude one with a defendant.[23]

Returning to the two forms of negotiated outcomes, the second form negotiated outcomes can take is the grant of immunity. This process, referred to by one prosecutor as 'dancing with the devil',[24] also allows prosecutors to make two concessions. The first concession is granting the actual or potential defendant immunity from prosecution. There are no statistics that reveal the actual *prevalence* of this form of immunity, although Nancy Combs observed in 2005 that "rumours abound… that insider witnesses are informally granted immunity".[25] Despite there being no information on

19 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 61(4) and (9).

20 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 62*ter*(b); International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 62*bis*(b); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 65(5).

21 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020).

22 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020), 5-6.

23 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020), 7.

24 Interview with P2.

25 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 217

how widespread the practice is or was (the charges may not be formalised in a charging document that is *subsequently* negotiated, so there may not be a paper trail), there are some known cases where immunity has been offered. In 2004, ICTR Prosecutor Hassan Jallow undertook (among other things) "[n]ot to prosecute [Michel Bagaragaza] before [the] ICTR" in exchange for his statements that allowed prosecutors "to make significant progress in the different ongoing cases".[26] The agreement also specified that the Prosecutor would refer the file to national authorities outside of Africa.[27] Ultimately, no national authority could be found and Bagaragaza was dealt with by the ICTR.[28] Immunity from prosecution was also granted to seven individuals by SCSL prosecutors,[29] who were able to provide information that took prosecutors "all the way to Charles Taylor very quickly".[30] It is not known who these individuals are, or were.

The second concession is the offering of 'use immunity'. Under a grant of use immunity, prosecutors undertake not to use any information obtained from a witness in a prosecution against them (therefore necessitating the prosecution proving, through the standard means, any charges against the accused). It is conceptually related to the privilege against self-incrimination; yet whereas the privilege allows a witness *not* to answer questions that may incriminate themselves, use immunity gives an individual the comfort to speak openly without fear that they are 'putting the noose around their own neck'.[31] There is similarly no information regarding the prevalence of this type of immunity, but it is known that Captain Dragan Vasiljković was offered—but refused—use immunity in the trial of Slobodan Milošević.[32]

(footnote 801).

26 *Prosecutor v Protais Zigiranyirazo (Agreement between the Prosector of the ICTR and Michel Bagaragaza)* (ICTR, Trial Chamber, ICTR-01-73, 28 November 2006), 1-2. Incidentally, the prosecutors also offered "[t]o change the face of the witness, if it is so required, through cosmetic surgery" in what is perhaps one of the more extreme known undertakings extended by a prosecutor (at 3).

27 *Prosecutor v Protais Zigiranyirazo (Agreement between the Prosector of the ICTR and Michel Bagaragaza)* (ICTR, Trial Chamber, ICTR-01-73, 28 November 2006), 2.

28 *Prosecutor v Michel Bagaragaza (Sentencing Judgment)* (ICTR, Trial Chamber, ICTR-05-86-T, 17 November 2009), [2]-[7].

29 Interview with P2.

30 Interview with S30.

31 Similar provisions exist in domestic legislation. See, for example, *Evidence (National Uniform Legislation) Act 2011* (NT), s 128(7) and its counterparts in other jurisdictions.

32 *Prosecutor v Slobodan Milošević (Transcript of 19 February 2003)* (ICTY, Trial Chamber,

There is no legal framework governing the conclusion of either type of immunity.

What emerges from the above is that while practice has developed four different concessions prosecutors can offer to actual or potential defendants when concluding negotiated outcomes, they are free to consider whatever they like when deciding whether they should be offered.[33] The following eight sections reveal what some of the factors are that prosecutors have considered when deciding whether to conclude negotiated outcomes with defendants.

3 Functional Considerations

3.1 The strength of the evidence

Prosecutors have expressed vastly different views on what impact the strength of the evidence has on the decision to conclude plea negotiations, as demonstrated in the epigraph at the beginning of this chapter. One prosecutor used plea negotiations only if the evidence they had did not establish *prima facie* case. In their view, plea negotiations were a means to dispose of weak files that they would not be able to prove in court. "The reason is that when we opted for the solution of the plea bargain, we had come to the realisation that the evidence that was available to the Prosecutor… was insufficient to obtain a conviction for the crimes that were charged", they admitted.[34] "Where we had sufficient evidence to prosecute someone to conviction, we never went for a plea bargain. No, we never did that… It was for the weak cases that we did go for the plea bargain".[35]

This account is strongly connected with the notion of symbolic capital.[36] Plea negotiations were a means for prosecutors to both increase the likelihood of a conviction being entered whilst reducing the prospect of an acquittal at trial. Convictions and acquittals are important sources of symbolic capital—they highlight a prosecutor's legal prowess, their power, their

IT-02-54-T, 19 February 2003), 16444.

33 Even the ICC Prosecutor's *Guidelines for Agreements Regarding Admission of Guilt*, the only and therefore most comprehensive official document to date on the subject, is phrased in non-mandatory terms: prosecutors *should* consider the eight factors it contains, but there is no requirement that they *must*.

34 Interview with P22.

35 Interview with P22.

36 The concept of symbolic capital is introduced in chapter 3 on page 67.

capabilities, and their effectiveness. For plea negotiations to be used in the circumstances described by this prosecutor arguably demonstrates that they had a degree of anxiety about what the effect on their symbolic capital would be if the defendant was acquitted. Plea negotiations were a useful method to secure convictions in circumstances where time and resource-intensive trial proceedings would likely result in the embarrassing spectacle of an acquittal. Plea negotiations provided the prosecutor with an easy means of protecting their own interests and those of their Office.

On the other side of the coin, another prosecutor used plea negotiations only if they had a *prima facie* case upon which they believed a defendant could be convicted. "[I]f I felt that I didn't have a case, I wouldn't get into a plea negotiation", they remarked.[37] "If I felt that we didn't have a case, I didn't think it was then appropriate to try and negotiate a guilty plea", they repeated, as if to reinforce the point.[38] "… Either I can prove it, or I can't. I wouldn't try to get a guilty plea if I didn't think I could prove it".[39] While this may have resulted in provable charges being withdrawn, the prosecutor was of the opinion that any distortion of reality could be appropriately addressed in sentencing. "In all of these files where I accepted guilty pleas, I would say basically we will take a position on sentencing that reflects the degree of culpability that we see in this case, as compared to the involvement of others", they explained.[40]

In contrast to the first account, this latter account places no emphasis on the capacity of convictions to produce symbolic capital. Instead, it is evidence that the prosecutor has adopted the role of an institution builder by demonstrating an institutional power struggle between prosecutors and judges for the right to determine the outcomes of proceedings. By claiming the power to recommend sentences and withdraw charges, prosecutors can reshape the ways international courts respond to allegations of criminal conduct. They create a second layer of arbitration which is more flexible in terms of possible outcomes than the limited powers of judges to merely assess guilt and punish.

37 Interview with P28.
38 Interview with P28.
39 Interview with P28.
40 Interview with P28.

3.2 Efficiency gains

Perhaps unsurprisingly, prosecutors have been drawn to the economic efficiencies negotiated outcomes afford them. In the 22 public prosecution sentencing briefs for defendants who have pleaded guilty under a negotiated outcome,[41] ICTY, ICTR, and ICC prosecutors have (with only four exceptions) emphasised that a guilty plea has saved time, effort, or resources that would otherwise have been spent running a trial against the accused. The fact that a plea has saved resources is the most common argument that prosecutors have employed as to why the plea should count as a mitigating factor, and is argued in 82% of their public sentencing briefs. In two cases where prosecutors did *not* emphasise this point—*Simić* and *Todorović*—the defendant's pleas were entered after the commencement of the trial (in *Banović* and *Jelisić*—the remaining two cases—there is no obvious explanation for the absence of the submission). There is no doubt that the economic advantages pleas bring are seen as significant motivators for concluding negotiated outcomes.

The economic value of negotiated agreements is also reflected in the agreements themselves. In 54% of the plea agreements that are publicly available, the defence undertook not to appeal the awarded sentence if it was within the recommended range. 38% contained the agreement not to appeal the conviction, and 31% the agreement not to withdraw the guilty plea.

Plea negotiations also mean that resources can be spent elsewhere. "Trials at the [ICTY] were complex and time consuming", explained one prosecutor, adding that "I took the view that prosecuting every charge on an indictment would consume unnecessary time and would dissipate out limited human and material resources, particularly if an indictee was willing to plead guilty and cooperate".[42] One former ICC and ICTY prosector recalled that they turned their mind to "the risks that [the trial] won't be successful or the evidence will fall apart" in deciding whether to attempt a negotiated outcome.[43] A similar view was expressed by an ICTR prosecutor who explained that ICTR prosecutors concluded negotiated outcomes when the evidence on file was incapable of obtaining a conviction.[44] The

41 The sentencing briefs that are apparently *not* public are those for Milan Babić, Georges Ruggiu, Jean Kambanda, Joseph Serugendo, Michel Bagaragaza, and Omar Serushago.

42 Interview with P6.

43 Interview with P24.

44 Interview with P22.

use of resources can also be seen through the lens of missed opportunities. One prosecutor, for instance, described that they needed to assess "[w]hat are the opportunity costs in terms of other cases and other prosecutions you might bring[?]".[45]

In this sense, international criminal courts could be conceptualised as managed investment funds. They are designed to provide valuable returns on the investment of significant amounts of money. Prosecutors are the fund managers, and convictions are the currency. Plea agreements not only provide convictions, but also allow prosecutors the opportunity to obtain more of them. Convictions are a visible and easily understood (albeit incredibly simplistic) metric of a court's success. They are an important source of symbolic capital, allowing prosecutors to demonstrate to state representatives that they are competent, efficient, and capable.

Beyond the saving of time, effort, and resources that would otherwise have been spent running a trial against *the accused*, prosecutors have also emphasised that guilty pleas may encourage *other* potential defendants to accept responsibility and/or plead guilty. This may similarly provide economic benefits to prosecutors, albeit with regard to other files. According to Dragan Kolundžija's defence, for instance, his guilty plea may have induced the pleas of his co-accused.[46] Prosecutors made comparable arguments in *Jokić*, *Bisengimana*, and *Rugambarara*, arguing more broadly that the guilty pleas of those defendants may encourage other participants in the alleged crimes to accept responsibility for their own conduct, although it is not clear whether they were referring to live files that would have granted them direct economic benefits.[47]

Of course, negotiated outcomes are a two-way street. They require the agreement of both parties. The economic advantages they bring to prosecutors are largely dependent on the defence's willingness to grant them. Recognising this, one prosecutor was attuned to the importance of reaching fair agreements that appropriately balanced the interests of both parties

45 Interview with P24.

46 See the summary of the Defence's submissions in *Prosecutor v Duško Sikirica, Damir Došen, and Dragan Kolundžija (Sentencing Judgment)* (ICTY, Trial Chamber, IT-95-8-S, 13 November 2001), [213].

47 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [50]; *Prosecutor v Paul Bisengimana (Mémoire de Procureur relatif à la sentence)* (ICTR, Trial Chamber, ICTR-00-60-T, 16 January 2006), [58]; *Prosecutor v Paul Bisengimana (The Prosecutor's sentencing brief)* (ICTR, Trial Chamber, ICTR-00-59-T, 12 September 2007), [55].

so as to attract the pleas of other defendants. The finalisation of one plea negotiation, they recalled, saw other people "coming forward and wanting to negotiate guilty pleas".[48] "I got calls after the fact from Defence counsel on cases that weren't even my own", they continued.[49] "They're saying, 'well, we trust you', and… they wanted to surrender their accused into custody if I would take the case. Of course", they added, "I couldn't do that. But it was an indication that word among Defence counsel spread that… there are certain people you can come to and they'll negotiate in good faith".[50] The prosecutor concluded by reflecting that they were "very pleased to have exercised prosecutorial discretion in that fashion with those kinds of results".[51]

Plea agreements therefore have an important communicative effect: they are not concluded simply to abbreviate the proceedings the prosecution has commenced against the defendant. Plea agreements are an advertisement for prosecutors and an act of marketing; the criminal law equivalent of a 'Sold' sign plastered over a 'For Sale' placard. They advertise to defence counsel that prosecutors are ready and willing to offer meaningful concessions in return for a defendant's cooperation. In this sense, they are a source of valuable symbolic capital and allow a prosecutor to demonstrate to defence counsel and defendants that they are reasonable, fair, and can be relied upon to maintain agreements. Plea agreements can provide benefits to prosecutors beyond the case that they are negotiating.

3.3 The alleged conduct of the accused

Initially, prosecutors were hesitant to conclude negotiated outcomes because of the gravity of the conduct they were alleging against people. "When the ICTY was first established", argued Combs, "plea bargaining was understandably considered a distasteful and unnecessary procedural device".[52] The gravity of the crimes that fell within the jurisdiction of the ICTY was such that plea negotiations were viewed as "particularly unseemly".[53] Immunities, too, were considered undesirable for international crimes. For-

48 Interview with P28.
49 Interview with P28.
50 Interview with P28.
51 Interview with P28.
52 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 216.
53 Nancy Combs, 'Copping a Plea to Genocide: The plea bargaining of international crimes' (2002) 151(1) *University of Pennsylvania Law Review* 1, 7.

mer ICTY President Antonio Cassese's well-known opinion on a proposed amendment to the *Rules of Procedure and Evidence* which would have allowed ICTY prosecutors to grant defendants immunity summarises the general view:

> The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.[54]

At least in the early days of the ICTY and the ICTR, prosecutors adopted a similar perspective. "[M]y attitude was that crimes of that level shouldn't be subject to plea bargaining", remarked one former senior ICTY and ICTR prosecutor, who continued, "… I don't think you can tell somebody, well, we won't charge you with genocide; if you plead guilty, we'll charge you with crimes against humanity".[55] Richard Goldstone was certainly of this opinion. He believed that plea negotiations were not suitable in the context of international criminal law, and this view was so strong that one of the first rules—if not the first rule—he issued to his staff, in the words of one prosecutor, "was that there was to be no plea bargaining".[56] This position obviously changed with the arrival of Louise Arbour, under whose leadership ICTY and ICTR prosecutors concluded their first three plea agreements.[57] More recently, when confronted with the proposition that negotiated outcomes might be unsuitable in the context of international criminal justice, one prosecutor responded "[w]ell, *chacun à son goût*".[58] In light of the practice of concluding plea agreements, opinions seem to have changed.

A negotiated outcome necessarily involves granting the defendant concessions and casting them as a beneficiary. Therefore, some prosecutors have considered "the nature of the participation of the person with whom you

54 Antonio Cassese, quoted in Michael Scharf, *Balkan Justice: The story behind the first international war crimes trial since Nuremberg* (Carolina Academic Press, 1st ed, 1997) 67, itself quoted in Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 217.

55 Interview with P10.

56 Interview with P10.

57 With Dražen Erdemović, Jean Kambanda, and Omar Serushago.

58 Interview with P6.

want to negotiate the plea".[59] In other words, they asked "whether or not to accept *x* as the person who would be the beneficiary of the bargain".[60] Prosecutors have illustrated the implementation of this idea in two ways. The first concerns a prosecutor's assessment of the *character* of the accused person, including consideration of mitigating factors that might normally be relevant to sentencing. One prosecutor recalled the situation of one defendant indicted on a whole raft of offences including wilful killing, murder, outrages upon personal dignity, persecution, cruel treatment, and others. Nevertheless, they described that witnesses "had said very positive things" about the defendant, describing his efforts to bring them food and afford them "certain favours".[61] Witnesses described that " 'he actually tried to help us' ", paraphrased the prosecutor.[62] "Well", they concluded, "I thought that was relevant".[63] Moreover, the prosecutor continued, "[h]e was not a bad guy at all. But he got caught up in the situation".[64] The second way that prosecutors have assessed whether a defendant should be the beneficiary of a bargain concerns the defendant's mode of participation. "Sometimes", recalled one prosecutor, "[individuals] were simply facilitators and not direct perpetrators".[65] "That helped us", they continued.[66]

The relevance of the accused's conduct to the conclusion of a negotiated outcome is principally attributable to prosecutors adopting the role of institution builders regarding who within the international criminal justice machinery should assess and punish allegations of criminality. On the one hand, treating as irrelevant the accused's specific conduct is a clear message that the prosecutor alleges conduct and the judge assesses the allegations and punishes them. The prosecutor has no role in assessing the moral culpability of the defendant or determining the severity of the procedure. Under this approach, prosecutors emphasise the *idea* of the alleged crime rather than the *conduct* through which it was allegedly committed. Prosecutors do this by treating procedure *as* punishment by not making concessions in the defendant's favour. The defendant is punished by confronting allegations of all their conduct and not benefiting from any compromises with

59 Interview with P22.
60 Interview with P22.
61 Interview with P28.
62 Interview with P28.
63 Interview with P28.
64 Interview with P28.
65 Interview with P22.
66 Interview with P22.

regard to sentence. All crimes are treated as equally severe without lessening the burden of trials in light of the defendant's actual conduct. Victims may see defendants face the full force of accusations against them, perhaps giving them the satisfaction that regardless of the judicial outcome, the alleged perpetrator suffered through being confronted with the gravity of their allegations.

On the other hand, the act of considering the accused's conduct as relevant to whether a negotiated outcome should be concluded fulfils different purposes. It establishes that prosecutors have a role in assessing the severity of the outcome facing a defendant by breaking down the role division between prosecutors and judges. It emphasises that the accused's *conduct* is more important than the *idea* of the crime to bringing about desirable normative change. While less-severe procedures may not fulfil the same punitive, preventative, or restorative functions than those in which prosecutors refuse to concede any charges or possible sentences, they do emphasise the importance of individual morality and allow prosecutors to both reward and highlight laudable (or less-severe) conduct while condemning that which is morally repugnant.

3.4 The risks to victims and witnesses

Finally, prosecutors have considered the risks that running a trial will pose to victims and witnesses when assessing whether to negotiate outcomes with defendants. One prosecutor described that they needed to assess "what are the risks that… victims or witnesses will be traumatised or jeopardised or put in danger" by running the trial.[67] The power of a guilty plea to save victims and witnesses from having to give evidence or the accompanying prospect of retraumatisation is the third most noted benefit that prosecutors have argued pleas result in, following from resource savings and establishing the 'truth'. In 68% of all public sentencing briefs, prosecutors have argued that this should be considered by the judges as a mitigating factor. The ICC Prosecutor's *Guidelines for Agreements Regarding Admission of Guilt* also highlight that plea negotiations can avoid victims and witnesses going through the possibly "traumatic experience" of a trial.[68] It is therefore evident that prosecutors feel a sense of responsibility to victims and witnesses not to retraumatise them through the process of giving evidence

67 Interview with P24.

68 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020), 7.

and have adopted a guardianship role over them.

On the other hand, one prosecutor expressed the view that plea negotiations can harm victims. In their words, plea negotiations were "demeaning of the victims" because the gravity of the crimes alleged against defendants would be diluted should they be negotiated.[69] This view instead emphasises the importance of prosecutors conveying the gravity of the *notion* of the crime, as opposed to the conduct of the defendant. Plea negotiations would not fulfil the prosecutor's role in communicating the severity of the crimes that they were entrusted to prosecute, and represent an abandonment of the victims and their interests.

4 Normative Considerations

4.1 Establishing the 'truth'

A desire to establish the truth appears to have been motivated by prosecutors acting as builders of history, and guardians over their respective courts and their own self-interest. While plea negotiations may mean that prosecutors "get less than the complete conviction",[70] they have also been seen as useful tools to uncover evidence and advance investigations. In 62% of public plea agreements, the defendants agreed to testify in other proceedings when requested by prosecutors; and in 54% they agreed to provide prosecutors with information that might advance or bring about investigations or prosecutions. A defendant's evidential value has therefore been an important consideration in assessing whether to attempt a plea negotiation. One prosecutor, for example, described looking at whether an accused would be cooperative and was "in a position to provide useful information".[71] Another prosecutor explained that they thought it was "very important" to look at "the difficulty of obtaining evidence otherwise".[72] Plea agreements can, for example, act as "incredibly useful tool[s] in prosecuting complex criminal investigations" that allow prosecutors "to penetrate the organisation and get cooperation".[73]

Prosecutors have considered that granting immunity from prosecution is useful for the same reason. Immunities have helped prosecutors deter-

69 Interview with P10.
70 Interview with P24.
71 Interview with P24.
72 Interview with P22.
73 Interview with P24.

mine who is most responsible for the alleged offences, and through what structures. For example, if a person was capable of "listing all the individuals involved, all the command structures, information and evidence, if they could support a crime base event prosecution", they were in the SCSL prosecutors' sights.[74] Immunity would be granted to those who "provided specific, credible information to include the admission of their own wrongdoing, that we could verify".[75] Given that SCSL prosecutors were acting in a very unique situation—tasked with prosecuting the heads of the warring factions—identifying who these valuable individuals were was a comparatively easy task. As one former SCSL prosecutor reflected, "I knew exactly who these people were, why they would help me, what kind of cases they would assist in, etcetera etcetera".[76] This tactic—which the same prosecutor referred to as "dancing with the devil"[77]—proved effective in facilitating the collection of evidence that took SCSL prosecutors "all the way to Charles Taylor".[78] In total, SCSL prosecutors informally awarded 7 individuals immunity from prosecution with one prosecutor recalling that prosecutors "chose not to indict them in return for cooperation or information".[79] In one senior SCSL OTP staff member's view, the power to offer immunity or a reduced sentence "were the two key things that I think really spurred [the investigations] along very quickly", and offering negotiated outcomes "turned out to be a very wise choice".[80]

One of the drivers behind the need to negotiate with people of evidential value has been a feeling of frustration that the evidence on file was insufficient to prosecute those deemed most responsible. For example, despite ICTR prosecutors having confirmed indictments against senior accused, cases were falling apart. With the passage of time, one prosecutor recollected, "we had this strange phenomenon: [the] [t]ampering of witnesses. Witnesses, over time, got frustrated. They got discouraged. They lost confidence in the Tribunal. So that even the witnesses that we had obtained sort of credible statements from… started backtracking".[81] To make matters

74 Interview with S30.
75 Interview with S30.
76 Interview with P2.
77 Interview with P2.
78 Interview with S30.
79 Email from P2 to Cale Davis, 8 August 2019; Interview with P2.
80 Interview with S30. It should be noted that in *none* of the core cases that proceeded to sentence did prosecutors argue that there were mitigating circumstances, so in practice, immunity from prosecution was the concession that was ultimately granted.
81 Interview with P22.

worse for prosecutors, this was occurring while accused were in pre-trial detention.[82] "[T]he Prosecutor had his back on the wall", they reflected, and "[t]he only practical tool we had that would have allowed us even to proceed with those we had in custody was to plea bargain".[83] If prosecutors wanted to mitigate the haemorrhaging of evidence from files, plea negotiations were a good solution. Georges Ruggiu—the Belgian public servant-turned-radio broadcaster charged with inciting genocide against Tutsis and Hutus opposed to the government—was encouraged by prosecutors to assist them with their investigations and testify in other proceedings. "[H]ad we not taken the practical step of encouraging [Georges] Ruggiu to help us, we probably would have lost the case against Ferdinand Nahimana and Jean Bosco Barayagwiza", the prosecutor reflected. "[H]e helped us with evidence that was relevant to the prosecution of… Hassan Ngeze, and the rest".[84]

There is significant evidence that plea negotiations have proven evidentially useful at the ICTY, too. Perhaps the most famous example was Milan Babić. "I thought… [it] was incredibly important to get his evidence", reflected one prosecutor who was involved in reaching a negotiated outcome with him.[85] Prosecutors were not exactly sure *what* evidence Babić was going to provide, but "it turned out it was against Slobodan Milošević".[86] Babić would go on to be a key witness in the Milošević trial. Dražen Erdemović, too, testified in multiple Srebrenica trials, identifying his co-perpetrators. According to one prosecutor, he also "identified a crime scene that we were completely ignorant about" at the Pilica Cultural Dom.[87] The prosecutor continued:

> We had no idea that this crime had occurred. There were no survivors. And so, based on Mr Erdemović's information, investigators went to the cultural dom. The doors were locked. We cut the chains on the doors with a bolt cutter. There was clearly evidence that a massacre had taken place. Blood and tissue on the walls. You know. Gunpowder residues, etcetera. Under the stage, there were, there was drippings of blood that were stalactites, you know, coagulated. So, I mean, that's the

82 Interview with P22.
83 Interview with P22.
84 Interview with P22.
85 Interview with P24.
86 Interview with P24.
87 Interview with P6.

> benefit of plea bargaining. And in an *ad hoc* tribunal where, as I say, limited resources, limited time, you advance the ball considerably by having reliable and verifiable insider information.[88]

Erdemović also provided prosecutors with information about other unknown incidents, including the killings at the Pilica collective farm, the killing of an unidentified male in Srebrenica, and a killing in Vlasenica on 13 July 1996.[89] Similarly useful information revealing previously unknown crimes was also provided by other defendants, including Miroslav Deronjić and Joseph Serugendo.[90]

However, one former ICTY prosecutor expressed doubt about the evidential utility of plea negotiations. "I'm afraid I don't think [plea negotiations] had a huge evidential value", they remarked.[91] They correctly observed that the value of a plea negotiation is largely dependent on whether other defendants are willing to accept the evidence of someone who has pleaded guilty. "[A]t the beginning", they recalled, "every single basic crime was contested by the Defence. I mean, really. Every single crime. Didn't happen, you know, they're all lying".[92] While the parties were able to agree facts, this rarely happened. Plea negotiations therefore offered little advantage to the prosecution, when whatever evidence was obtained by virtue of a plea would nevertheless be contested in subsequent prosecutions that sought to rely on it. Nevertheless, the value of plea agreements increased over time.[93]

Other prosecutors have been hesitant to rely on negotiated outcomes out of concern over the veracity of evidence that would be forthcoming. "I think it's very dangerous to rely on evidence that is obtained in that sort of manner", noted one prosecutor, observing that "it's like [they're] a gaol house snitch".[94] The risk of the individual manufacturing evidence for their own benefit was too great. "[T]hey could give false evidence, if they thought it would assist themselves", the prosecutor explained, adding

88 Interview with P6.

89 *Prosecutor v Dražen Erdemović (Sentencing Judgment)* (ICTY, Trial Chamber, IT-96-22-T*bis*, 5 March 1998), 17.

90 *Prosecutor v Miroslav Deronjić (Sentencing Judgment)* (ICTY, Trial Chamber, IT-02-61-S, 30 March 2004), [255]; *Prosecutor v Joseph Serugendo (Judgment and Sentence)* (ICTR, Trial Chamber, ICTR-05-84-I, 12 June 2006), [61].

91 Interview with P23.

92 Interview with P23.

93 Interview with P23.

94 Interview with P28.

that "…I have not engaged in that kind of behaviour at the ICTY" and "I would not feel comfortable doing that".[95] Using negotiated outcomes for this purpose, they went on, was not "in keeping with how I view the role of the Prosecutor. It's not to get a conviction at all costs. It's to see that justice is done in a fair way".[96]

It should be noted that it is not a *sine qua non* of a prosecutor concluding a negotiated outcome that the individual be of *any* evidential value in terms of their capacity to provide prosecutors with previously-unknown evidence or testify in other cases. Some defendants have pleaded guilty to a reduced indictment and failed, or were not in a position, to provide any substantial information. Prosecutors noted with respect to Predrag Banović, for example, that "there has been some cooperation but by no means substantial cooperation" with prosecutors, apparently in part due to his low rank within the police.[97] No evidential assistance appears to have been provided by Duško Sikirica, Damir Došen, or Dragan Kolundžija, either;[98] and, indeed, no cooperation clause was included in their respective plea agreements.[99] At the ICTR, Juvénal Rugambarara similarly appeared not to provide prosecutors with any useful information,[100] and Paul Bisengimana expressly—according to the *Defence* (for some unknown reason)—"did not cooperate with the Prosecutor".[101]

---

95 Interview with P28.

96 Interview with P28.

97 *Prosecutor v Predrag Banović (Transcript of 3 September 2003)* (ICTY, Trial Chamber, IT-02-65/1, 3 September 2003), 116; *Prosecutor v Predrag Banović (Sentencing Judgment)* (ICTY, Trial Chamber, IT-02-65/1-S, 28 October 2003), [60].

98 No reference to cooperation is made in the sentencing remarks: *Prosecutor v Duško Sikirica, Damir Došen, and Dragan Kolundžija (Sentencing Judgment)* (ICTY, Trial Chamber, IT-95-8-S, 13 November 2001).

99 *Prosecutor v Duško Sikirica (Joint submission of the Prosecution and the Accused Duško Sikirica concerning a plea agreement and admitted facts)* (ICTY, Trial Chamber, IT-95-8-T, 6 September 2001); *Prosecutor v Damir Došen (Joint submission of the Prosecution and the Accused Damir Došen concerning a plea agreement and admitted facts)* (ICTY, Trial Chamber, IT-95-8-T, 6 September 2001); *Prosecutor v Dragan Kolundžija (Joint submission of the Prosecution and the Accused Dragan Kolundžija of a plea agreement)* (ICTY, Trial Chamber, IT-95-8-T, 30 August 2001).

100 *Prosecutor v Juvénal Rugambarara (Sentencing Judgment)* (ICTR, Trial Chamber, ICTR-00-59-T, 16 November 2007).

101 *Prosecutor v Paul Bisengimana (Judgment and Sentence)* (ICTR, Trial Chamber, ICTR-00-60-T, 13 April 2006), [127]. Defence counsel bluntly submitted that "[a]s far as Paul Bisengimana is concerned, he did not cooperate with the Prosecutor": *Prosecutor v Paul Bisengimana (Transcript of 19 January 2006)* (ICTR, Trial Chamber, ICTR-00-60-T, 19 January 2006), 34.

Prosecutors have, however, believed that guilty pleas—regardless of whether the defendant has some evidential significance—do in any event have benefits beyond advancing their investigations and obtaining guilty verdicts. In 77% of their public sentencing briefs for defendants who have pleaded guilty,[102] prosecutors have argued that the plea would contribute to establishing the truth. This belief has been widely held by judges.[103] The argument that guilty pleas are beneficial because they establish 'the truth' did not appear in the first two sentencing briefs (with respect to Erdemović; and Sikirica, Došen, and Kolundžija), but gained traction afterwards and appeared in all sentencing submissions from 2002 onwards. Only the argument that guilty pleas save resources has been relied on by prosecutors more in support of their value.[104]

Guilty pleas have also been seen to contribute to reconciliation. Prosecutors made this claim in 68% of their public sentencing briefs for defendants who pleaded guilty. As one prosecutor explained, a defendant's guilty plea means "they admit to committing the crimes and then there's no longer any dispute about that".[105] "It seemed to me", argued another prosecutor, "that if we got a guilty plea, in other words an acknowledgement by the accused that they had done something wrong… that the inhabitants of the community where he would ultimately return to would recognise the fact that he had admitted his guilt and that would be sort of a reconciliation process for everybody".[106] The prosecutor continued, "[a]nd it turns out that's exactly what happened. Once there was an acknowledgement of guilt", they explained, "and you know, being sorry for what they had done—and they were caught up of course as military people and were having to follow orders, etcetera—it made a difference. So I think it was a very positive thing. And I have no regrets about having done that".[107] Similarly, a former ICTR prosecutor recalled asking themselves "what is the benefit of putting to rest the issue of guilt and having the defendant say publicly that 'I'm responsible and I'm guilty', and will it be perceived as a genuine guilty plea, as genuinely taking responsibility?".[108] "At the end of

102 See footnote 41 for the sentencing briefs that remain under seal.

103 Janine Clark, 'Plea Bargaining at the ICTY: Guilty pleas and reconciliation' (2009) 20(2) *European Journal of International Law* 415, 423.

104 As discussed on Page 153.

105 Interview with P24.

106 Interview with P28.

107 Interview with P28.

108 Interview with P24.

the day", remarked another prosecutor, "everybody wanted closure. Everybody wanted closure. And I would dare say, by benefit of hindsight, that it is that closure that has helped Rwanda to be what it is today. Because of what good would it be to send all the people to gaol and then continue to have a fractured society?".[109] Judges adopted a similar perspective. In 72% of sentencing remarks for defendants who have pleaded guilty (23 out of 29 remarks), trial chamber judges have recalled the link between guilty pleas and reconciliation.[110]

The claim that guilty pleas contribute to reconciliation is, however, problematic. In all sentencing remarks that claimed a defendant's guilty plea may contribute to reconciliation (with one exception), the citations given by judges to support this proposition do no such thing. All citations are simply references to other cases that similarly refer to other cases. In some cases, there is no citation at all. The single exception to this is the sentence for Miroslav Bralo, where all the judges relied on was a single, context-specific, one-page witness statement provided by Mehmed Ahmic (the President of the Ahmici Municipality Council) appended to the Defence's sentencing brief where the Ahmic claimed

> If five or six or seven years ago there were people like Miroslav Bralo who would say they had done this and this, and that and that happened, it would now be much better for people to live at peace with one another here, and move from the hard positions against each other.[111]

To date, this single sentence is the *only* evidence that has *ever* been relied on by judges for the proposition that a plea may help reconciliation. This supports Janine Clark's argument that "[m]any of the discussions on this topic… are merely theoretical and not empirically grounded".[112]

The belief that plea negotiations can contribute to reconciliation by

---

109 Interview with P22.

110 The number 29—and not 30 (ie, the number of defendants who have pleaded guilty)—is due to there being three defendants who were dealt with in a single sentencing judgment (Duško Sikirica; Damir Došen; and Dragan Kolundžija), and that Dražen Erdemović was sentenced twice by the Trial Chamber (the initial sentence, and resentence).

111 *Prosecutor v Miroslav Bralo (Sentencing Brief on Behalf of Miroslav Bralo)* (ICTY, Trial Chamber, IT-95-17-S, 25 November 2005), annex B13 ('Witness Statement of Mehmed Ahmic'), [4].

112 Janine Clark, 'Plea Bargaining at the ICTY: Guilty pleas and reconciliation' (2009) 20(2) *European Journal of International Law* 415, 421.

virtue of the defendant pleading guilty is a myth.[113] It is a message that prosecutors (and judges) take from the act of a guilty plea without an awareness that it is merely their own background (as opposed to any actual evidence) that disposes them to understand guilty pleas as reconciliatory acts. Perhaps attributable to a desire to repair societies damaged through bloody conflicts; perhaps because of its prominence in discourse, the myth of reconciliation has arguably motivated prosecutors to conclude plea negotiations. The myth of reconciliation has appropriated the act of guilty pleas and cemented its claim to them. With every unsupported claim that this relationship exists, the myth has gained power.

Guilty pleas have also been understood as beneficial because they prevent the writing of revisionist history. This claim is made in 55% of prosecutors' public sentencing briefs for defendants who pleaded guilty. They have been seen to act as confirmation to victims that the other people recognised that the crimes occurred. "[T]o get a plea, particularly from a high-level perpetrator, was… exceedingly important for those who were the victims of the crimes", expressed one prosecutor.[114] This, they explained, was because victims "could see that the argument that 'we didn't commit crimes, we were merely reacting to the crimes that were being committed by others, or we were acting in self-defence'… wasn't going anywhere".[115] Plea negotiations may therefore also be motivated by a desire on the part of prosecutors to author history by establishing an uncontested record of a defendant's conduct.

Prosecutors have, therefore, been apparently informed by their role as builders of history when conducting plea negotiations as evidenced by their desire to establish 'the truth'. However, underpinning this consideration also appears to be a sense that the need to be conscious of their own, or their respective institutions', self-interest. This is because plea negotiations have been directly tied to the provision of efficiency benefits. By using plea negotiations to advance investigations and achieve convictions, prosecutors have been able to promote the production of tangible judicial products that serve as signs that their institution is functioning and relevant.

113 This specific understanding of myth (as the manner through which meaning is created through the appropriation of other meanings) is introduced in chapter 3, page 79.

114 Interview with P23.

115 Interview with P23.

4.2 Norm expression

There is a single example of a case where a prosecutors expressed the belief that a guilty plea was capable of contributing to normative development. The *Jokić* case concerned the JNA's shelling of Dubrovnik in the early hours of the morning on 6 December 1991. The Prosecution's sentencing brief, filed by Susan Somers, linked Jokić's guilty plea to three positive effects that do not feature in any of the other submissions that had been filed or have subsequently been filed for cases that resolved in guilty pleas. The first is that Jokić's plea was said to send a message to the world more broadly that the shelling was illegal.[116] The second was that the plea showed the shelling was "utterly senseless and unjustifiable by any standard".[117] Finally, it was hoped the plea would encourage discussion about the attack, as it "breaks the code of silence which has hovered over and surrounded this shameful event, which was witnessed by the world as it unfolded".[118]

All of these ideas are innovative and unique in the publicly available sentencing briefs for defendants who have pleaded guilty, and appear to be underpinned by the role of the prosecutor as a performer of moral norms. They did not appear before *Jokić*, and they have not appeared subsequently. These expressed benefits of pleas mark a radical departure from the narrow view that guilty pleas help to establish the truth, promoting the idea that guilty pleas have a broader expressive capacity with the potential to bring about legal and social-normative change and promote open discussion about the events that occurred. Jokić's plea of guilty was seen to mythologise unquestionable moral opprobrium, a myth that may not necessarily have emerged had he maintained his innocence and been found guilty instead by judges. The plea negotiation may, therefore, have been motivated by a conscious engagement with the role of the prosecutor as an agent of normative change. It is arguably evidence of a belief that guilty pleas have a communicative power that should be promoted by prosecutors engaging in plea negotiations.

116 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [49].

117 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [49].

118 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [50].

5 Strategic Considerations

5.1 The prosecutor's social capital

If the motivation to engage in plea negotiations is not properly explained, prosecutors run the risk of harming their own credibility. An example of where this occurred was in the prosecution of Omar Serushago at the ICTR. Serushago was charged with five counts, one of which was a charge of rape as a crime against humanity. At his first appearance, he pleaded guilty to every charge *except* this rape charge. As Serushago had voluntarily surrendered to the Court, Combs observed that prosecutors and defence had apparently not consulted with each other regarding what charges he would be pleading guilty to prior to the issuing of the indictment.[119] When defence counsel threatened to continue with the trial on this count alone, prosecutors withdrew it.[120] Reflecting on the agreement to withdraw this charge, one ICTR prosecutor recalled that "that decision to withdraw the charge, we lived with it in an unpleasant way for a hell of a long time… most people could not understand why that was done".[121]

It is evident then that plea negotiations have been seen to post a risk to a prosecutor's social capital, and prosecutors may well be motivated by a desire to protect it from being harmed by their decisions. If the decision to withdraw a charge (particularly one that has historically been underprosecuted though widespread) is not properly explained or understood by office outsiders, a prosecutor's reputation may be tarnished. The lesson from *Serushago* therefore appears to be that prosecutors subsequently became aware that they also needed to be conscious of how plea negotiations would perceived by others.

5.2 The prosecutor's legal background

Finally, different legal cultures had an impact on the willingness of prosecutors to engage in plea negotiations. One prosecutor recalled that Goldstone's background as a lawyer in South Africa was a part of his decision to prevent his staff from engaging in plea negotiations, as, according to them, "certainly in South Africa there's never been such a thing as a plea

119 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative justice approach* (Stanford University Press, 1st ed, 2007), 94.

120 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative justice approach* (Stanford University Press, 1st ed, 2007), 94.

121 Interview with P22.

bargain".[122] A former ICC prosecutor reflected that in the event that a defendant was not willing to confess their guilt, "you go to trial", and not enter into plea negotiations.[123] Relevant, too, is that according to one prosecutor what "a lot of Prosecutors and judges don't like who are not from a culture that has plea agreements" is the perception that the prosecutor is bargaining with a defendant.[124] The defendant—perhaps seen as malicious, fiendish, manipulative—should not be elevated to the status of an equal bargaining power to the prosecutor with all the authority of states parties behind them to prevent and punish exactly what the defendant has been accused of. Therefore, while international criminal courts are, at least on paper, a mix of different legal traditions, it is impossible to completely remove the influence of a prosecutor's prior domestic experiences on the way that they work.

The fact that the prosecutors grappled with whether it would be appropriate to engage in plea negotiations for prosecutions before international criminal courts arguably demonstrates that they assumed the role of performers of both moral and procedural norms. They were conscious that the potential for plea negotiations existed, and in some cases sought to make sure they were not conducted. In doing so, they attempted to affirm both the severity of international crimes and also that trials are the appropriate procedural response to them.

6 Conclusion

The eight thematic windows discussed in this chapter have illustrated what has informed prosecutors when they are assessing whether to conclude negotiated outcomes with defendants. This chapter has demonstrated that these decisions are informed not only by functional concerns regarding evidence and efficiency, but also normative and strategic considerations.

These considerations appear to have been informed by prosecutors assuming three different role identities. First, they have acted as *norm performers*. Prosecutors have adopted the role of performers of moral norms, evidenced by the conscious engagement with the communicative potential of guilty pleas to send messages about the moral opprobrium of specific crimes and the more general condemnation of international crimes through the

122 Interview with P10.
123 Interview with P1.
124 Interview with P24.

refusal to offer alleged perpetrators concessions in the form of negotiated outcomes. Prosecutors have also appear to have been informed by their role as performers of procedural norms. Their decisions have engaged with whether international criminal justice procedures should accommodate negotiated outcomes in the first place, and thus demonstrate that they have contributed to the procedural framework governing the conclusion of criminal proceedings.

Prosecutors also appear to have been informed by their role as *builders*. When they have considered the strength of the evidence and the alleged conduct of the accused, prosecutors have arguably been motivated by their role as agents of institutional transformation. These decisions demonstrate that prosecutors have grappled with the respective roles of prosecutors and judges within courts as arbiters of a defendant's guilt. They have also acted as builders of history, when they have emphasised the value of negotiated outcomes in establishing 'the truth'.

Finally, and most significantly, the thematic windows discussed in this chapter suggest that prosecutors have been motivated by their role as *guardians*. While the fact that prosecutors have considered the risks to victims and witnesses when deciding whether to negotiate outcomes with defendants indicates that they have assumed the role of their protector, they have also acted as guardians over themselves and over their respective courts. This is evidenced by prosecutors considering the strength of the evidence, efficiency gains, establishing the truth, and their own social capital. All of these considerations demonstrate that prosecutors have been attuned to the fact that their decision-making can have a significant impact on their social capital and the reputations of their institutions. Negotiated outcomes have therefore been informed by prosecutors engaging with the question of what would be in their own, and their courts', best interests.

Negotiated outcomes, therefore, are about more than advancing investigations or increasing the prospects of convictions. When prosecutors decide to negotiate an outcome with a defendant, they act as norm performers, builders, and guardians.