REVISITING THE LEGAL BASIS OF CHARGE BARGAINING IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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Abstract

The International Criminal Tribunal for the former Yugoslavia (ICTY) explicitly recognized the practice of guilty plea admission through either sentence bargaining or charge bargaining to prosecute people responsible for serious violations of international humanitarian law. Out of the twenty cases wherein guilty pleas were admitted by the ICTY, fourteen cases involved charge bargaining. While the practice of charge bargaining was adopted for expediting prosecutions (as was required by the UN Security Council), it was arguably not valid in law because there was hardly any legal basis supporting it. Seemingly, the prosecutors did not rely on any standard test to determine the reduction in the number of counts. Also, such practice fundamentally thwarted the process of truth-seeking. The objective of this paper is to revisit the legal basis of charge bargaining in ICTY. The paper employs descriptive and analytical methods to correlate facts and frameworks governing the practice of charge bargaining in ICTY.

I. Introduction

THE INTERNATIONAL Criminal Tribunal for the former Yugoslavia (ICTY) was constituted by the UN Security Council Resolution No. 827 in 1993 mainly to prosecute people responsible for serious violations of international humanitarian law committed in former Yugoslavia since the war had started there in 1991 and had continued for about four odd years. Ever since its establishment,[1] ICTY had redefined the contours of international humanitarian law and had played an active role in providing solutions to critical questions and issues arising out of international criminal law. While administering criminal justice, one

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[1] The establishment of the ICTY was a reflection of the liberal ingenuity and realist interest of the interested national actors, and its establishment was a short-term political experiment and not a long-term commitment to the causes of international criminal justice. Frederic Megret, "The Politics of International Criminal Justice" 13 *European Journal of International Law* 1273 (2002).

of the impugned practices that it had endorsed and encouraged[2] was the admission of guilty pleas[3] in its criminal procedure.[4] The two often-used modes of admission were (a) pleading guilty to a charge/count (b) not pleading guilty to a charge/count.[5] Such admission of guilty pleas[6] was routed through either charge bargaining or sentence bargaining (the two major strands of plea bargaining), wherein the prosecutors were given leeway to bargain and settle charges against defendants in lieu of concessions in the form of dropping of counts or reduction in the quantum of sentence. Although, the prosecutors embraced such practice for expediting prosecutions (as was required by the UN Security Council),[7] the unregulated exercise of the discretionary power[8] (to shed counts or to reduce sentence thereby determining the guilt[9] of the defendants) bestowed on the prosecutors eventually violated the principles of equability and defeated the spirit of justice.

Since its formation, ICTY had indicted a total number of 161 persons out of which ninety were sentenced, eighteen persons were acquitted, thirteen persons were referred to their respective national jurisdictions for trial,[10] thirty seven persons died either prior to or during the pendency of the proceedings or had their indictments withdrawn, and three of them were referred to the International Residual Mechanism for Criminal Tribunals for retrial.[11] Out of the ninety people convicted for committing serious breaches of international humanitarian

[2] ICTY was of the opinion that such a practice would facilitate reconciliation because the victims would feel relieved once they come to know that the defendant(s) acknowledged responsibility for the crimes they committed. For more details see: Janine Natalya Clark, "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation" 20 *European Journal of International Law* 416 (2009).

[3] The lack of immunity may provide an explanation as to why plea bargaining should not have been allowed by the Tribunal. For more details see: Ilias Bantekas and Susan Nash, *International Criminal Law* 345 (Cavendish Publishing Limited, London, 2nd edn, 2003).

[4] It was only in 1997 that the provision of allowing guilty pleas was formally adopted in ICTY's Rules of Procedure and Evidence (RPE) as Rule 62 *bis*, indicating that the intention of the drafters was to exclude such a practice.

[5] If the accused did not plead guilty to a charge/count, the Trial Chamber or the Judge of ICTY (as per Rule 62A(iv) read with Rule 62A(v) of the RPE) had to enter a plea of not guilty on behalf of the accused to initiate a trial.

[6] These admissions largely helped as mitigating factors and had bearing on the quantum of sentence.

[7] Ralph Henham & Mark Drumbl, "Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia" 16 *Criminal Law Forum* 49 (2005); for further details see: Clark, *supra* note 2 at 419.

[8] The source of such power may be relegated to prosecutors' inherent interest to make gains out of the process. For more details see: George Fisher, "Plea Bargaining's Triumph" 107 *The Yale Law Journal* 859 (2000).

[9] The power to determine the guilt should ideally be bestowed on the court. For details see: Yehonatan Givati, 'The Comparative Law and Economics of Plea Bargaining: Theory and Evidence' Discussion Paper No. 39 *Harvard Law School* 3 (2011).

[10] This was done in accordance with Rule 11 *bis* of the RPE. Vide Rule 11 *bis*, prior to the commencement of a trial, a referral bench comprising judges from the Trial Chamber may be constituted which can then decide whether a certain case should be transferred to another court which has jurisdiction to try the matter. However, both the prosecution and the defence can question such a referral as a matter of right.

[11] Key Figures of the Cases, United Nations International Residual Mechanism for Criminal Tribunals, *available at* : https://www.icty.org/en/cases/key-figures-cases (last visited on July 26, 2020).

law committed in the territory of erstwhile Yugoslavia since 1991, twenty persons had pleaded guilty to various charges/counts mentioned in their respective indictments.

Out of the twenty cases wherein guilty pleas were admitted, fourteen cases involved charge bargaining.[12] While the practice was adopted for expediting prosecutions and for managing the expanding caseloads,[13] it was arguably not valid in law because there was hardly any legal basis supporting it. Debatably, the prosecutors did not rely on any standard test to determine the reduction in the number of counts.[14] Also, such practice fundamentally thwarted the process of truth-seeking, and the international tribunal that acknowledged such practice had decided the quantum of sentence on the basis of half-truths only.[15] The objective of this paper is not to attack the institution of charge bargaining but to revisit the legal basis of such bargaining process from the perspective of ICTY. In light of its objective, the paper tries to answer two important questions (1) whether the prosecution adopted a consensual approach and (2) whether the prosecution relied on any standard test to determine the reduction in the number of counts. To answer these questions and to reach further generalizations, the paper provides an illustrative portrayal (through individual case excerpts) of the number of counts that were dropped following the charge bargaining procedures in the respective cases.[16] Finally, it argues that had the prosecutors adopted a consensual approach and had they applied a standard test to determine the reduction in the number of counts, the ends of justice would have been largely met. While ICTY is history now with its official closure announced in December 2017, the impugned practice that it had adopted demands a revisit at least theoretically because the jurisprudence created through the tribunal is often reflected in prosecutorial practices and in other judicial practices relating to the administration of criminal justice.

[12] In a few of the 14 cases, the prosecutors and the defendants also agreed on a sentencing range, although it was left to the discretion of the Trial Chamber to entertain such an agreement. For example, in *Babić's case* (*Prosecutor* v. *Milan Babić*, Case No. IT-03-72, A.Ch., July 18, 2005), the prosecutor and the defendant recommended a sentence of eleven years but the Trial Chamber had awarded a sentence of 13 years. For more details see: Henham & Drumbl, *supra* note 7 at 49.

[13] M. P. Scharf, "Trading Justice for Efficiency - Plea-Bargaining and International Tribunals" 2 *Journal of International Criminal Justice* 1070 (2004).

[14] Jeremy Ball, "Is it a Prosecutor's World?: Determinants of Count Bargaining Decisions" 22 *Journal of Contemporary Criminal Justice* 2 (2006).

[15] *Supra* note 2 at 416. According to Clark, 'truth that is established through guilty pleas will often be only an incomplete truth.'

[16] The cases have been referred to provide a brief narrative of the historical records of atrocities perpetrated by the offenders in former Yugoslavia between 1991 and 1995.

Interestingly, admission of guilty pleas only finds a passing reference in the ICTY Statute;[17] Article 20(3) of the Statute enjoins that the Trial Chamber of ICTY may allow an accused to enter a guilty plea before the conduction of trial proceedings. It states: "The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea." The language of article 20(3) is supposedly elusive and ambiguous; a plain reading of the provision suggests that a trial shall be held even if the accused pleads guilty.[18] Article 20(3) read with rule 62 of the ICTY's Rules of Procedure and Evidence (RPE) (as amended from time to time) empowers the ICTY's Judge/Trial Chamber to instruct the accused to enter guilty pleas or pleas of not guilty based on the charges mentioned in the indictment within 30 days of the initial appearance of the accused before the Judge/Trial Chamber. If he/she pleads not guilty or fails to enter a plea, the Judge/Trial Chamber shall have to plead guilty on his/her behalf and instruct the Registrar to commence regular trial. If the accused pleads guilty, he/she shall be guided by rule 62 *bis*, which enjoins that the Trial Chamber shall ensure that the plea is entered freely and that it is unambiguous, informed, and based on facts related to the crime and the participation of the accused in the crime. The Chamber may then decide on the guilt and ask the Registrar to proceed with the hearing for the determination of the sentence. Although the norm relating to the admission of guilt was created through rule 62 *bis*, it was not for another four years that the formal method relating to such admission was established through rule 62 *ter*,[19] which deals with plea agreement procedure. As per rule 62 *ter* (A), the prosecution and the defence may jointly agree to amend the indictment accordingly and/or to propose an appropriate sentence or a sentence range and/or not to oppose the demand of the accused for a reduced sentence. However, as per rule 62 *ter* (B), the Trial Chamber shall not be bound to regard such agreement.[20] Rule 62 *ter* (C) enjoins that the Trial Chamber shall require the disclosure of the agreement either in an open or in a closed session. Once the pleas are recorded in conjunction with the mandates laid down under

[17] The judges of the Trial Chamber had also initially rejected outcomes based on guilty plea admission since such practice was not in conjunction with the broad mandates of the Tribunal. Antonio Cassese, the first President of ICTY, was also not too keen on the admission of guilty pleas in the course of criminal proceedings. For details see: Maria Laura Ferioli, "Plea Bargaining Before the International Court: Suggestions Taken from the Experience of Ad Hoc Tribunals" Legal Studies Research Paper No. 2013-14 *Warwick Law School* 2 (2013).
[18] Refer to the joint and separate opinions of Justices L. C. Vohrah and G. K. McDonald of ICTY's Appeals Chamber in *Erdemovic's case* (*Prosecutor* v. *Dražen Erdemović*, Case No. IT-96-22, A.Ch., 1997).
[19] The rule was formally adopted in the RPE in December, 2001.
[20] In *Banović's case* (*Prosecutor v. Predrag Banović*, Case No. IT-02-65/1, T.Ch., 28 October 2003), the Trial Chamber had held that although the prosecution and the defence might jointly recommend the imposition of a sentence under the Plea Agreement procedure, the Trial Chamber would not be bound by such agreement.

rules 62 *bis* and 62 *ter*, the Trial Chamber in pursuance of rule 100, which lays down the sentencing procedure on guilty pleas, may pronounce the judgment accordingly. As per rule 100, the Trial Chamber may seek help either from the prosecution or from the defence or from both while determining the sentence. The Rule further says that the Trial Chamber must pronounce its decision in public and in the presence[21] of the person so convicted. In conjunction with the rules, the Tribunal adopted charge bargaining and to a lesser extent sentence bargaining (about six out of twenty cases involved sentence bargaining) to induce defendants to accept guilt. Interestingly, most of these Rules were not in place when the initial indictments were filed. Between November 1997 and December 2001, approximately ten persons (including Erdemović) out of the fourteen who had pleaded guilty had bargained their counts in response to their initial or final indictments. *Erdemović's case*[22] is a case in point. When Erdemović had pleaded guilty (he was the first one to have done so before the Tribunal) to murder in May 1996, no formal rules guiding plea agreements existed and the Tribunal was not interested to accept such uninformed admission.[23] Thus, his admission of guilty pleas was not induced through the granting of prosecutorial concessions.[24] Following *Erdemović's case*,[25] ICTY's norms were revisited and rule 62 *bis* was included in November 1997. In the time that followed, quite a few defendants had started pleading guilty and prosecutorial discretion increased manifold till an exception was made through rule 62 *ter* (B) in December, 2001.

Let us now do a case-wise assessment of the number of counts that were dropped following the charge bargaining procedures in the respective cases.

II. Practice of charge bargaining in ICTY: A case-wise analysis

(i) RSK case[26] – It was alleged that between October 1991 and February 1992, Milan Babić (born 1956) played an active role in abetting the killing of thousands of non-Serb people. He was indicted in November 2003 on the basis of individual criminal responsibility[27] on five

[21] Such presence is subject to the provisions of rule 102 of the RPE.
[22] *Supra* note 18.
[23] *Supra* note 2 at 416.
[24] *Id*. at 417.
[25] *Supra* note 18.
[26] *Supra* note 12.
[27] Art. 7 of the ICTY Statute speaks about the circumstances in which a person may be held individually liable (criminally) even if he/she is working under a superior command. Under art. 7(1) of the Statute, any person who

counts - one count of crimes against humanity and four counts of violations of the laws or customs of war. He pleaded guilty in January 2004 to the count of persecutions on political, racial and religious grounds (a crime against humanity). Following his admission of guilt, the counts relating to the violations of laws or customs of war were dropped. In June 2004, the Trial Chamber sentenced Babić for thirteen years for committing crimes against humanity, in violation of article 5(h) of the ICTY Statute. He appealed against the judgment, but the Appeals Chamber, in July 2005, turned down his appeal.

(ii) Omarska & Keraterm Camps case[28] – While working as a guard at the Keraterm camp, Predrag Banović (born 1969) was alleged to have committed serious offences, including murder, inhuman acts and torture, against the non-Serbs. He was initially indicted in 1995. In the final indictment of July 2002, he was charged on the basis of individual criminal responsibility on five counts (three counts of crimes against humanity and two counts of violations of the laws or customs of war). In June 2003, he pleaded guilty to the count of persecutions on political, racial and religious grounds. In October 2003, the Trial Chamber, based on his guilty plea and on the statement of the prosecution, sentenced him to eight years imprisonment.

(iii) Keraterm Camp case[29] – In this case, three persons, *viz.*, Duško Sikirica (born 1964), Damir Došen (born 1967) & Dragan Kolundžija (born 1959), were convicted. They were charged with various counts because of their alleged involvement in the killing and ill-treatment of the non-Serb detainees in the Keraterm Camp located in the town of Prijedor in North-western Bosnia and Herzegovina.

(a) The case of Duško Sikirica: Between June and July 1992, Duško Sikirica was alleged to have shot dead a person and to have been involved in the inhuman and torturous treatment and massacre of Keraterm camp detainees, most of whom were non-Serbs. He was initially indicted in July 1995. The final indictment of January 2001 charged him on the basis of both individual criminal responsibility and superior responsibility[30] on nine counts (four counts of

plans, instigates, commits, aids, abets or orders the crime of genocide, the crimes against humanity, the crime of committing grave breaches of the Geneva Conventions of 1949 or the crime of violating the laws or customs of war shall be individually liable for the same.

[28] *Prosecutor* v. *Predrag Banović*, Case No. IT-02-65/1, T.Ch., 2003.

[29] *Prosecutor* v. *Duško Sikirica, Damir Došen & Dragan Kolundžij,* Case No. IT-95-8, T.Ch., 2001.

[30] As per art. 7(3) of the ICTY Statute, if any of the grave crimes mentioned under the Statute is committed or is intended to be committed by a subordinate because of some act or omission of the superior, the superior will be equally liable under the principle of command responsibility.

crimes against humanity, two counts of genocide[31], and three counts of violations of laws or customs of war). In September 2001, he pleaded guilty to the crime of persecutions on political, racial, and religious grounds. Following his plea admission, the Trial Chamber, in November 2001, sentenced him to fifteen years imprisonment.

(b) The case of Damir Došen: Between June and August 1992, Damir Došen was employed as a shift leader at the Keraterm Camp. During his tenure as the shift leader, many Muslim and Croat detainees in the camp became victims of violent crimes such as rape, sexual assault and murder. He was initially indicted in July 1995. The final indictment of January 2001 charged him on the basis of both individual criminal responsibility and superior responsibility on seven counts (four counts of crimes against humanity and three counts of violations of the laws or customs of war). In September 2001, he pleaded guilty to the crime of persecutions on political, racial and religious grounds. In November 2001, the Trial Chamber in consideration of the mitigating factors sentenced him to five years imprisonment.

(c) The case of Dragan Kolundžija: Between June and July 1992, Dragan Kolundžija was alleged to have been involved in the ruthless torture of the captives at the Keraterm Camp. He was initially indicted in July 1995. The final indictment of January 2001 charged him on the basis of both individual criminal responsibility and superior responsibility on five counts (three counts of crimes against humanity and two counts of violations of the laws or customs of war). In September 2001, he pleaded guilty to persecutions on political, racial and religious grounds. In November 2001, the Trial Chamber in consideration of the mitigating factors sentenced him to three years imprisonment. He was the one to receive the minimum sentence.

(iv) Pilica Farm case[32] – Dražen Erdemovič (born 1971) served as a combatant in the 10th Sabotage Detachment of the Bosnian Serb defence forces. In July 1995, while he was posted at an area in Zvornik municipality in northeastern Bosnia and Herzegovina, he was alleged to have shot and killed about seventy people, mostly Bosnian Muslim men, who were transported from the town of Srebrenica and evacuated near the Pilica farm in the Zvornik municipality. He was indicted in May 1996 on the basis of individual criminal responsibility on two alternative counts (one count of murder as a crime against humanity and another

[31] The Trial Chamber, upon a motion for acquittal, had dismissed the two counts of genocide against Duško Sikirica.
[32] *Supra* note 18.

count of murder as violations of the laws or customs of war). In May 1996, during his first appearance before the Trial Chamber, he pleaded guilty to the crime of murder as a crime against humanity and maintained that he carried out the killings out of the fear of his death. Following his confession of guilt, the charge of murder under article 3[33] of the ICTY Statute was dismissed. In November 1996, the Trial Chamber sentenced[34] Erdemovič to 10 years imprisonment following which he preferred an appeal to the Appeals Chamber. The Appeals Chamber did not reduce the sentence but allowed for a retrial since according to the Chamber, Erdemovič decision to admit guilty plea was not an informed decision.[35] During the second trial, Erdemovič was allowed to change his plea to one of murder committed under article 3 (violations of the laws or customs of war). Eventually, the charge of murder as a crime against humanity was dropped. In March 1998, the Second Trial chamber looking at the mitigating circumstances and at the fact that the crime was committed under duress,[36] sentenced him to five years imprisonment.[37] *Erdemovič's case*[38] being the first one in ICTY wherein guilty pleas were admitted, had added a new jurisprudential dimension and it was for the first time that the Appeals Chamber had gone all the way to construct expressions such as 'enter a plea' and 'enter a plea of guilty or not guilty' appearing in the ICTY Statute and its RPE.[39]

(v) Brčko case[40] – Between May and early July 1992, Goran Jelisić (born 1968) was alleged to have committed several offences such as killing people, plundering, and committing other inhuman acts, against the Croat and the Muslim detainees at the Luka camp, a detention facility located in Brčko. He was initially indicted in July 1995 on the basis of individual

[33] ICTY Statute, 1993, art. 3. According to art. 3 of the Statute, the violations may include employment of lethal weapons, destruction, loot and plunder of property, destruction or wilful damage done to institutions, attack or even bombardment of undefended towns, *etc.*

[34] A few days before the Trial Chamber verdict, there was a pre-sentencing hearing of Erdemovič (since Erdemovič had already admitted to a guilt on which there was hardly any sentencing guidelines).

[35] It was a split verdict with Justice Haopei Li holding that the plea entered by Erdemovič was unambiguous and valid and that there was no need to remit the case for another retrial.

[36] One of the essential elements in a plea of duress is proportionality, which is the hardest to satisfy, the burden of proof being on the accused. For more details see: Bantekas and Nash, *supra* note 3 at 136.

[37] The separate opinion of Justice Mohamed Shahabuddeen focused on a few critical issues such as (1) what should be the quantum of sentence for the same act (murder, in the respective case) committed under two separate categories of international crimes (crime against humanity and war crimes, in the given matter) (2) whether duress is a complete defence against killing innocent people.

[38] *Supra* note 18.

[39] The joint and separate opinions of Justices L. C. Vohrah and G. K. McDonald of the Appeals Chamber highlighted why a retrial became necessary for not satisfying certain conditions before entering a guilty plea. The three preconditions (1) the guilty plea must be voluntary (2) the guilty plea must be informed (3) the guilty plea must not be equivocal, mentioned by them eventually took shape in the form of rule 62 *bis* in the RPE.

[40] *Prosecutor* v. *Goran Jelisić*, Case No. IT-95-10, A.Ch., 2001.

criminal responsibility. In the final indictment in October 1998, he was charged with forty four counts (twenty one counts of crimes against humanity, twenty two counts of violations of the laws or customs of war and one count of genocide). In October 1998, he pleaded guilty to almost all the charges (thirty one out of forty four counts) but did not plead guilty to the crime of genocide. In December 1999, the Trial Chamber sentenced Jelisić to forty years of imprisonment. Against such an exemplary punishment, Jelisić preferred an appeal, which was eventually denied by the Appeals Chamber in July 2001. He was the one against whom maximum charges were framed (forty four counts) and also the one to have received the maximum punishment.[41]

(vi) Srebrenica case[42] – Momir Nikolić (born 1955) served as the Assistant Commander of Bratunac, a town in eastern Bosnia and Herzegovina, Brigade of the Bosnian Serb Army. Between July and November 1995, when the war in the former Yugoslavia was formally about to end, Nikolić was allegedly involved in the killing of several Muslim men from Bosnia. He was indicted in March 2002 on the basis of individual criminal responsibility on six counts (four counts of crimes against humanity, one count of violations of the laws or customs of war and one count of genocide). In May 2003, he pleaded guilty to persecutions on political, racial and religious grounds apropos of which other charges were dropped. Nikolić was sentenced to twenty seven years imprisonment by the Trial Chamber in December 2003. On appeal, the Appeals Chamber of ICTY in light of some of the discernable errors committed by the Trial Chamber,[43] especially while prescribing the term of imprisonment, reduced the sentence to twenty years.

(vii) Srebrenica case[44] – In July 1995, Dragan Obrenović (born 1963) allegedly abetted the preparation and execution of persecutions that killed thousands of Bosnian Muslim men, mainly those from Srebrenica. In March 2001, he was indicted on the basis of both individual criminal responsibility and superior responsibility on five counts (one count of violations of the laws or customs of war, one count of the crime of genocide and three counts of crimes against humanity). In May 2003, he pleaded guilty to persecutions on political, racial and

[41] It was the maximum punishment in comparison to the punishments awarded to the others who pleaded guilty. Imprisonment for life is the maximum penalty that a Trial Chamber of the ICTY can impose vide the provisions of art. 24 of the ICTY Statute read with Rule 101 of the RPE.
[42] *Prosecutor* v. *Momir Nikolić*, Case No. IT-02-60/1, A.Ch., 2006.
[43] The Appeals Chamber was of the opinion that the Trial Chamber committed a discernible error in taking into account twice in sentencing (double counting) the role the Appellant played in the commission of the crimes. The Appeals Chamber also pointed out to a few more lacunas in the judgment rendered by the Trial Chamber.
[44] *Prosecutor* v. *Dragan Obrenović*, Case No. IT-02-60/2, T.Ch., 2003.

religious grounds following which other charges were dropped. In December 2003, the Trial Chamber in consideration of the mitigating circumstances and in view of Obrenović's assistance to the prosecution sentenced him to seventeen years imprisonment.

(viii) **Bosnia and Herzegovina case**[45] – From 1990 until the end of 1992, Biljana Plavšić (born 1930) served as one of the head political representatives to the collective Presidency of Bosnia and Herzegovina. As a political head, she exercised *de facto* control over the Bosnian Serb armed forces and other police authorities. During all the years while she was in power, she was alleged to have participated both individually and collectively in the planning, instigation and execution of persecution of the non-Serb population, especially the Bosnian Muslims and Croats in almost all the municipalities of Bosnia and Herzegovina. She was also alleged to have abetted genocide by fuelling in ethnic tensions among the non-Serb population in the entire region of Bosnia and Herzegovina. In April 2000, she was initially indicted. The amended consolidated indictment of March 2002 charged her on the basis of both individual criminal responsibility and superior responsibility on eight counts (one count of violations of the laws or customs of war, two counts of genocide and five counts of crimes against humanity). In September 2002, she pleaded guilty to persecutions on political, racial and religious grounds. Following her admission of guilty plea, the charges of violations of the laws or customs of war and genocide were dropped. In February 2003, the Trial Chamber imprisoned her for eleven years on the basis of individual criminal responsibility for persecutions on political, racial and religious grounds. While giving out the verdict, the Trial Chamber considered both her confession of guilt and her surrender as mitigating circumstances in the case. She was the oldest of all the accused who were convicted by the Tribunal on the basis of guilty pleas.

(ix) Stupni do case[46] – In October 1993, Ivica Rajić (born 1958) played an instrumental role in commanding an attack in Stupni do, a village near the town of Vareš in central Bosnia, which killed several Bosnian Muslim men. He was initially indicted in August 1995. In January 2004, he was finally indicted on the basis of both individual criminal responsibility and superior responsibility on ten counts (five counts of grave breaches of the Geneva Conventions of 1949 and another five counts of violations of the laws or customs of war). Since Rajić could not be remanded to custody, a rule 61 hearing took place in September

[45] *Prosecutor* v. *Biljana Plavšić*, Case No. IT-00-39 & 40/1, T.Ch., 2003.
[46] *Prosecutor* v. *Ivica Rajić*, Case No. IT-95-12, T.Ch., 2006.

1996 to confirm the charges specified in the initial indictment. Subsequent to the hearing, an international arrest warrant was issued although it was not until April 2003 that Rajić could be arrested by the Croatian authorities. In October 2005, he admitted to his involvement in the wilful killing, inhuman treatment, destruction and appropriation of property, *etc.* Following the admission, charges under article 3 were dropped. In May 2006, the Trial Chamber imprisoned him for twelve years on the basis of individual criminal responsibility for committing grave breaches of the Geneva Conventions of 1949. In determining the quantum of sentence, the Trial Chamber considered the admission of guilt by Rajić as a mitigating factor.

(x) Bosanski Šamac case[47] – It was alleged that between September 1991 and February 1993, Milan Simić (born 1960) committed several offences, especially the offence of torture by subjecting Bosnian Croats and Bosnian Muslims to unprecedented humiliation and physical agony. He was indicted in January 2002 and was charged on seven counts (five counts of crimes against humanity and two counts of violations of the laws or customs of war). In May 2002, he eventually pleaded guilty on two counts of the crime of torture. In October 2002, the Trial Chamber sentenced him to ten years imprisonment (five years each for each count of torture). Simić was arguably the only defendant (who pleaded guilty) against whom contempt proceedings were initiated by the Trial Chamber in September 1999 since it was alleged that he forcefully tried to influence a potential defence witness to testify on his behalf. The charges of contempt were, however, not proved and he was exonerated in December 1999.

(xi) Bosanski Šamac case[48] – Between September 1991 and December 1993, Stevan Todorović (born 1957) was alleged to have been involved in subjecting the non-Serb residents of Bosanski Šamac to cruel and inhuman treatment, assault and torture. He was charged with several offences, for example, cruel treatment, torture, inhuman acts, persecutions on political, racial and religious grounds, etc., and was initially indicted in June 1995. In the final indictment of November 1998, he was charged on twenty seven counts (ten counts of crimes against humanity, nine counts of grave breaches of the Geneva Conventions of 1949 and eight counts of violations of the laws or customs of war) on the basis of both individual criminal responsibility and superior responsibility. In December 2000, he pleaded

[47] *Prosecutor* v. *Milan Simić*, Case No. IT-95-9/2, T.Ch., 2002.
[48] *Prosecutor* v. *Stevan Todorović*, Case No. IT-95-9/1, T.Ch., 2001.

guilty to persecutions on political, racial and religious grounds following which the prosecutor withdrew all other charges (altogether twenty six charges were withdrawn) against him. In July 2001, he was sentenced to ten years imprisonment on the basis of both individual criminal responsibility and superior responsibility by the Trial Chamber.

(xii) Foća case[49] – Dragan Zelenović (born 1961) was a Bosnian Serb soldier in the municipal town of Foća situated in the south-eastern part of Bosnia and Herzegovina. Foća had one of the largest detention units in former Yugoslavia and many of the Bosnian and Croat Muslim men and women were confined in the unit, post the takeover by the Serbian army in April 1992. Between April and July 1992, when the town of Foća was in the midst of an armed conflict, Zelenović was allegedly involved in systematically attacking the non-Serb population, especially Bosnian and Croatian Muslim women. He was initially indicted in June 1996. In his final indictment in April 2001, he was charged on the basis of individual criminal responsibility on fourteen counts (seven counts of crimes against humanity and seven counts of violations of the laws or customs of war). In November 2004, the prosecutor filed a motion of referral (since Zelenović was at large for a long time and the prosecutor did not have any clue about his whereabouts) invoking rule 11 *bis*[50] of the RPE. In January 2007, he pleaded guilty to seven counts of rape and torture as crimes against humanity. Following his admission, other charges of rape and torture as violations of laws or customs of war were dropped. In April 2007, the Trial Chamber sentenced him to fifteen years imprisonment. Against the sentence, Zelenović appealed pleading that the Trial Chamber failed to assess adequately the mitigating circumstances in his case. The Appeals Chamber in October 2007 turned down his prayer and affirmed the sentence of the Trial Chamber.

The following table makes a comparison between the counts that were mentioned in the final indictment of the individual convicts and the counts that eventually led to their conviction. The table will help us know the number and type of counts that were dropped subsequent to a plea agreement between the defendant(s) and the ICTY prosecutor(s).

Table 1. Dropping of Counts following Plea Agreement – ICTY

Sl. No	Persons Convicted	Counts as per the Final Indictments	Counts at Conviction

[49] *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2, T.Ch., 31 October 2007.
[50] *Supra* note 10.

		Genocide	Crimes against Humanity	Grave breaches of the Geneva Conventions of 1949	Violations of the laws or customs of war	Crimes against Humanity	Grave breaches of the Geneva Conventions of 1949	Violations of the laws or customs of war
1.	Milan Babić	-	1	-	4	1	-	-
2.	Predrag Banović	-	3	-	2	1	-	-
3.	Duško Sikirica	2	4	-	3	1	-	-
4.	Damir Došen	-	4	-	3	1	-	-
5.	Dragan Kolundžija	-	3	-	2	1	-	-
6.	Dražen Erdemovič	-	1	-	1	1	-	-
7.	Goran Jelisić	1	21	-	22	15	-	16
8.	Momir Nikolić	1	4	-	1	1	-	-
9.	Dragan Obrenović	1	3	-	1	1	-	-
10.	Biljana Plavšić	2	5	-	1	1	-	-
11.	Ivica Rajić	-	-	5	5	-	4	-
12.	Milan Simić	-	5	-	2	2	-	-
13.	Stevan Todorović	-	10	9	8	1	-	-
14.	Dragan Zelenović	-	7	-	7	7	-	-
Total Counts		**7**	**71**	**14**	**62**	**34**	**4**	**16**

As per Table 1, a minimum number of one count (considering the total number of counts) was dropped in the case of Dražen Erdemovič (one count of violations of the laws or customs of war). A maximum number of twenty six counts (nine counts of crimes against humanity, nine counts of grave breaches of the Geneva Conventions of 1949 and eight counts of violations of the laws or customs of war) were dropped in the case of Stevan Todorović. A minimum number of two counts was mentioned in the indictment of Dražen Erdemovič whereas a maximum number of forty four counts were mentioned in the indictment of Goran Jelisić. With regard to the crime of genocide, the prosecution had dropped counts in cases of Momir Nikolić, Dragan Obrenović and Biljana Plavšić. In *Jelisić's case*,[51] the one count of genocide was contested through a regular trial and he was ultimately acquitted. In *Sikirica's case*,[52] the Trial Chamber, upon a motion for acquittal, had dismissed the two counts of genocide. The result was that none of the accused could be prosecuted for the crime of genocide.[53] Out of the thirteen convicts who were charged with a total number of seventy one counts of crimes against humanity as per the respective indictments, all were convicted on the basis of thirty four counts. Out of the two convicts who were charged with a total number of fourteen counts of grave breaches of the Geneva Conventions of 1949, one was convicted on the basis of four counts. Out of the fourteen convicts who were charged initially with a total number of sixty two counts of violations of the laws or customs of war, only one was convicted on the basis of sixteen counts. Overall, out of the 154 total counts mentioned in the indictment(s), the defendants pleaded guilty to fifty four counts (35.06%) that led to their conviction.

III. The legal basis of charge bargaining in ICTY

In view of the findings from individual cases with reference to the dropping of counts and in light of the facts and contextual frameworks referred to in this essay, it may be assumed that the prosecutors at ICTY had adopted a concessionary approach[54] in dropping of counts.

[51] *Supra* note 40.
[52] *Supra* note 29.
[53] Arguably, among the five accused, Momir Nikolić and Dragan Obrenović were alleged to have been involved in the Srebrenica genocide that killed thousands of Bosnian Muslims. Also, the dropping of genocide charges against Biljana Plavšić created discontentment among her victims. It is unfortunate that the prosecution perfunctorily dropped the charges of genocide against them.
[54] In a concessionary model, charging manipulations and sentencing concessions grease the wheels of justice and there is hardly any scope to facilitate fundamental fairness and consistency of the process. For more details see: Peter. F. Nardulli, R. B. Flemming and J. Eisenstein, "Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process" 76 *Journal of Criminal Law and Criminology* 1107 (1985).

Because of their authoritative position, they enjoyed the liberty of selecting the charge and the sentence that a defendant would face in the event his/her case went to trial.[55] Without the connivance of the trial judges, they had allowed unjustified leniency[56] in the form of charge reduction.[57] In a way, such a process of charge reduction allowed unfettered prosecutorial discretion,[58] and, to an extent, wilful mislabelling.[59] Also, such exercise of discretion defeated the pious objective of internatonal criminal law of promoting accountability by replacing impunity; international criminal trials are expected to build an extensive and objective historical record that discloses 'the way in which the people had been manipulated by their leaders into committing acts of savagery on a mass scale' so that the cycle of violence can be broken and repetition of a conflict avoided.[60]

In the absence of a normative framework governing charge reduction, most of the charging decisions of the prosecutors that eventually affected the disposition of individual cases were ungovernable and unreviewable.[61] In all the fourteen cases involving charge bargaining, the prosecutor(s) allowed concessions to the defendants (altogether about 3/5th of the charges were dropped) not only within individual categories but also across categories of international crimes mandated under the ICTY Statute. It further leads us to assume that the grant of such concessions lacked a rational basis; how pleading guilty to a count or counts of one category of a grievous international crime[62] led to the dropping of count(s) of another category of international crime? After all, the contextual elements of one international crime are fundamentally different from that of another; the contextual elements of the crime of

[55] Oren Bar-Gill and Omri Ben-Shahar, "The Prisoners' (Plea Bargain) Dilemma" 1 *Journal of Legal Analysis* 745 (2009).
[56] Ralph Adam Fine, "Plea Bargaining: An Unnecessary Evil" 70 *Marquette Law Review* 627 (1987).
[57] John. H. Langbein, "Torture and Plea Bargaining" 46 *The University of Chicago Law Review* 8 (1978).
[58] The exercise of such discretion is concomitant of a prosecutor's perception with regard to the gravity of individual offences. Because of this perception issue, in borderline serious cases, there is seemingly more disagreement between the prosecution and the defendant as a consequence of which the prosecution doles out more genuine concessions. For more details see: Ball, *supra* note 14 at 8. Apart from individual perception on the seriousness of offences, prosecutorial passion also affects the exercise of discretion; prosecutorial passion may induce or exaggerate cognitive biases that can affect bargaining outcomes. For more details see: Alafair Burke, "Prosecutorial Passion, Cognitive Bias, and Plea Bargaining" 91 *Marquette Law Review* 196 (2007).
[59] *Supra* note 57 at 16. According to Langbein, such wilful mislabelling eventually impacts crime statistics.
[60] Regina E. Rauxloh, "Plea Bargaining in International Criminal Justice - Can the International Criminal Court Afford to Avoid Trials?" 1 *The Journal of Criminal Justice Research* 3 (2011).
[61] *Supra* 54 at 1105.
[62] Whether plea agreements can be accepted in serious international crimes invokes another serious debate. The Trial Chamber in *Nikolić's case* (*supra* note 42) had held 'even in criminal justice systems where the use of plea agreements is common … its use is less frequent in cases of serious felonies or in the most notorious cases.' For more details see: Clark, *supra* note 2 at 420.

genocide,[63] for example, are different from that of crimes against humanity or war crimes. Also, the contextual elements of individual crimes of the same genre but defined under separate international crime categories may be different; for example, the contextual elements of the crime of murder within the meaning of article 3 of the ICTY Statute are seemingly different from that of the crime of murder contemplated under article 5 of the Statute.[64] Similarly, the contextual elements of the killing of a civilian as a war crime are apparently different from the killing of a civilian as a crime against humanity.[65] Had the prosecutors adopted a single-crime-count-shedding model,[66] there would have been at least some justification behind the exercise of discretion.

The fetters of the concessionary model could have been partly removed had the prosecutors adopted a consensus model in deciding on the reduction in the number of counts. The consensus model not only reduces the scope of prosecutorial discretion[67] by restricting manipulations, concessions, and coercion in producing pleas but also creates an interactive discussion space wherein the agents of change (judges, prosecutors, defendants, witnesses, etc.) may enter into a constructive dialogue to ensure that the ends of criminal justice are met.[68] The best part of such a model is that it creates a level-playing field for all the actors involved in the bargaining process.

The second question on whether the prosecutors relied on any standard test to allow concessions is far trickier. *Prima facie*, it seems that the prosecutors did not employ any standard test such as the minimum threshold test to decide on the reduction in counts and to

[63] The norms concerning genocide are deeply embedded in the customary rules of international law, and have arguably acquired the level of *jus cogens*. For more details see: Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law* 90 (Springer, Heidelberg, 2014). In *Nikolić's case* (*supra* note 42), the Trial Chamber judges wondered whether the prosecution could hold Momir Nikolić accountable for genocide in the event his confession would be found inadmissible. For more details see: Henham & Drumbl, *supra* note 7 at 49.

[64] Justice Mohamed Shahabuddeen in his separate opinion in *Erdemović's case* (*supra* note 18) had contested the basis of introducing a sentencing differential between an offence of murder committed under art. 3 and that committed under art. 5 of the ICTY Statute. (According to art. 5 of the Statute, ICTY shall have the power to prosecute persons responsible for (a) murder (b) extermination (c) enslavement (d) deportation (e) imprisonment (f) torture (g) rape (h) persecutions on political, racial and religious grounds (i) other inhumane acts, when such crimes are committed in any international or internal armed conflict, and is directed against any civilian population.)

[65] Adil Haque, "International Crime: in Context and in Contrast" Rutgers Law School – Newark, Research Papers Series Paper No: 081, *The Social Science Research Network Electronic Paper Collection* 1 (2010).

[66] This model proposes that counts of a particular stipulated category of crime may only be dropped. So, for example, if a person is indicted on five counts of crimes against humanity and four counts of genocide, the prosecutor may drop a few or all counts of either crimes against humanity or genocide but not of both.

[67] *Supra* note 14 at 3.

[68] *Supra* note 54 at 1107.

record reasons for such reduction. They seemingly did not refer to any substantive standard to determine (1) which counts of a crime may or may not be dropped (2) how many counts of the crime may be dropped (3) why shall the counts be dropped (the reasoned decision behind the 'which' and the 'how'). But why? The requirement of a higher standard of proof in serious international crimes may provide an explanation as to why the prosecutors chose to shed counts of those crimes that were difficult to be proved (in light of the 'beyond reasonable doubt standard'), thereby leading to unintended consequences.[69] Being unable to amass substantive evidence to effectuate a conviction at trial, they believably chose to induce defendants to admit pleas to a lesser charge.[70] Therefore, possibly, in *Todorović's case*,[71] the prosecutor decided to drop all the nine counts of grave breaches of the Geneva Conventions of 1949 thinking perchance that such a crime category would require a higher standard of proof in comparison to other categories of war crimes.[72] Another explanation may be taking cases to trial would have meant a loss in prosecutors' revenues.[73] Yet another likely explanation lies in sentencing guidelines. Charge bargaining is inextricably linked with sentencing outcomes.[74] Any decision to shed counts must go hand-in-hand with the possible sentencing outcomes of individual cases based on the evidence available.[75] ICTY followed no specific sentencing tariff to set the maximum and minimum sentences for individual crime categories.[76] In the absence of a sturdy sentencing framework on the mandated international crimes,[77] the prosecutors chose the easier route of charge bargaining. But even that seems to be a flawed disposition; the prosecutors could have taken cue from other domestic models such as the Washington or the Maryland model[78] to create their own threshold measurement.

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[69] *Supra* note 63 at 77.
[70] S. Bibas, "The Need for Prosecutorial Discretion" 19 *Temple Political & Civil Rights Law Review* 372 (2010).
[71] *Supra* note 48.
[72] *Supra* note 63 at 77.
[73] S. Sungi, "Plea Bargaining in International Courts" 7 *Journal of Theoretical and Philosophical Criminology* 23 (2015)
[74] Anne Morrison Piehl and Shawn D. Bushway, "Measuring and Explaining Charge Bargaining" 23 *Journal of Quantitative Criminology* 105 (2007).
[75] Evidence does not always influence pleas. For details see: Shawn D. Bushway and Allison D Redlich, "Is Plea Bargaining in the "Shadow of the Trial" a Mirage?' 28 *Journal of Quantitative Criminology* 452 (2012). The authors employed a 'shadow of the trial' model to eventually infer that evidentiary factors hardly impact the probability of conviction for those who plead guilty.
[76] Barbora Hola, Alette Smeulers and Catrien Bijleveld, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice" 22 *Leiden Journal of International Law* 81 (2009).
[77] Since the Tokyo and Nuremberg Charters were largely silent on sentencing guidelines, the task had befallen on ICTY to develop its own sentencing standards *vis-à-vis* individual crime categories. ICTY did so by revising the RPE but the experiment went on for years together. For more details see: Mark A. Drumbl and Kenneth S. Gallant, "Sentencing Policies and Practices in the International Criminal Tribunals" 15 *Federal Sentencing Reporter* 140 (2002).
[78] *Supra* note 74 at 111.

They should have objectively prioritized cases throughout each level of their decision making, to determine which cases warranted charges, which cases should be bargained and under what terms, which should be tried or dismissed, etc.[79] A fourth potential explanation regarding why the prosecutors shied away from adopting a standard model in the determination of reduction in counts is that most of the cases were multiple-charge cases[80] and the cost of trying those through the regular trial route would have far outweighed benefits.

The lack of an objective standard in charge bargaining seemingly interfered with truth-seeking, a fundamental purpose based on which the ICTY was created. Although in a few of its judgments, the Trial Chamber(s) had consistently maintained that admission of guilty plea had helped in ascertaining the truth, whether the claim is valid or not remains an open question. For example, the Trial Chamber in *Nikolić's case*,[81] had held that a guilty plea, might only establish the bare factual allegations in an indictment or might be supplemented by a statement of facts and acceptance of responsibility by the accused. It further noted that although the Prosecution dismissed numerous charges against Momir Nikolić, including the charges of genocide, it did not seek to remove any of the factual allegations underlying the crimes that he had committed.[82] The Nikolic ruling, in fact, reveals that the Tribunal did not only try to achieve the purpose of truth-seeking but also underscore the infirmities inherent in a charge bargaining procedure. But didn't the Tribunal sacrifice the purpose of seeking truth (whether whole truth[83] or substantive truth[84]) when it allowed charge bargaining in many of its subsequent cases for the noble purpose of promoting expediency in its judicial process?

IV. Conclusion

In the absence of any minimum threshold test, the exercise of prosecutorial discretion in the shedding of counts was perhaps based on the prosecutors' subjective understanding of the facts underlying the respective charges and not on an objective interpretation of the charges

[79] *Supra* note 58 at 188.
[80] Malcolm M. Feeley, "Plea Bargaining and the Structure of the Criminal Process" 7 *Justice System Journal* 344 (1982).
[81] *Supra* note 42.
[82] *Supra* note 2 at 428.
[83] A. Petrig, "Negotiated Justice and the Goals of International Criminal Tribunal" 8 *Chicago-Kent Journal of International and Comparative Law* 15 (2008).
[84] Laura Burens and D. Haag, "Plea Bargaining in International Criminal Tribunals: The End of Truth-seeking in International Courts?" 7-8 *Zeitschrift für Internationale Strafrechtsdogmatik* 323 (2013).

or their import.[85] Even if we accept for the sake of argument that ICTY was under pressure from the UN to complete its trial process expeditiously, the prosecutors always had the golden opportunity to create a normative framework substantiating the rationale behind the shedding of counts. Without any substantive basis, the practice of ICTY prosecutors in allowing a concessionary approach to shed counts seemingly frustrated the principles of rule of law.[86] Concludingly, it may be said that in the absence of a resilient legal basis, the practice of charge bargaining in ICTY undermined the justice system's credibility and legitimacy in the eyes of the public. The disorder apparently inherent in the practice of shedding counts will continue to draw scholarly attention[87] till the time the beneficiaries are in a position to effectively discern the rational basis behind the exercise of such prosecutorial discretion in charge bargaining.

[85] *Supra* note 58 at 191.
[86] Ronald. A. Cass, "Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law" 15 *Engage* (2014).
[87] *Supra* note 80 at 339.