PLEA BARGAIN AND ITS EFFECTIVENESS IN UGANDA'S JUDICIAL SYSTEM

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DECLARATION

I, Namuyonga Jacquie declare to the best of my knowledge that this research report truly my original and has not been submitted in the fulfillment for any award of a degree in any other institution of higher learning or university, so it is entirely out of my own efforts.

Signature

Date 24th September 2018
APPROVAL

This is to satisfy that this research report is done under our supervision and it is now ready for submission to the school of law in Kampala International University with our approval.

DR. MAGNUS CHIMA

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Date .............................................

6-9-2018
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CHAPTER ONE

1.0 Introduction

The term plea bargaining is one which attracts different meanings worldwide and there is no standard universal definition. A broad and simple definition would be where an accused person is given an incentive to plead guilty by a promise, or at least a chance, that he will be ‘rewarded’ in a certain way.¹ Black’s Law Dictionary offers a definition of plea bargaining that refers to the accused person and the prosecutor as working ‘out a mutually satisfactory disposition of the case subject to court approval. It usually involves the accused person pleading guilty to a lesser offence or to only one or some of the counts of a multicount indictment in return for a lighter sentence than that possible for the graver charge’.²

1.1 Background of the study

According to Kant “truth and error [2013] are only to be found in a judgement”, precisely in the “relation of an object to our understanding”.³ Truth is therefore based on a subjective understanding of the facts by each individual. The consequence of this approach is that different forms of truth can occur. In the context of transitional justice, where truth-seeking plays a major role for the purpose of reconciliation and peace-building, we have to ask: Who decides in this context what the truth is? A diverse picture of the truth after a violent conflict could undermine efforts to overcome the past. An official comprehension of the truth is needed which combines the different subjective views.

Truth-commissions became a frequently used institution after conflicts which are being installed to establish the truth of the past. However, this article will argue that also criminal proceedings after mass atrocities can serve as an important institution to seek

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¹ These ways will be examined in greater depth in the course of this thesis. See also N. Vamos, ‘Please don’t call it “Plea Bargaining”, 2009, CLR, 617 at p. 618
² Black’s Law Dictionary
truth. In both, common law and civil law systems, it is often stated that the truth-seeking function of a criminal procedure is only of minor value and that the main purpose of the proceedings is to render justice.\textsuperscript{4} However the value of a court as a truth-seeking instrument should not be underestimated, especially in international proceedings.\textsuperscript{5} Although it is claimed that only truth-commissions in comparison to criminal trials can establish an exhaustive picture of the truth, because a trial can only establish the individual guilt of a defendant and cannot do justice in every case when there have been massive and systematic violations, this article will argue that the truth reached by a court has a unique value in the process of transitional justice. Law as an element of reviewing the past could be even defined as the most important element of truth-seeking mechanisms, because it allows us to define a crime as a crime.\textsuperscript{6} Balkin says that “law has power over people’s imaginations and how they think about what is happening in social life”.\textsuperscript{7} To the same extent we must understand criminal proceedings as a measurement of transitional justice that helps to create a historical record and to establish what has happened in the past. This objective of a trial becomes especially important in the context of international law.

The traditional impression of the criminal justice process in an adversarial system has been for an independent prosecutor to prove an accused person guilty. Until such evidence is led, and the accused person proven guilty after a trial, they are considered to be innocent. If the accused person is found guilty either by a judge or jury they are then sentenced, that sentence being determined by the judge with reference to legislative guidelines. Modern adversarial criminal justice systems have, however, become dependent on the use of some form of plea bargaining in order to carry out their functions. For example, in the United States alone, statistics have indicated that approximately 95% of cases are resolved by use of plea bargaining.\textsuperscript{8} Plea bargaining, a practice which attracts much controversy even at the national level, is now used in the

\textsuperscript{4} Naqvi, International Review of the Red Cross 88 (2006), 245 f.
\textsuperscript{5} Naqvi, International Review of the Red Cross 88 (2006), 245 (246).
\textsuperscript{6} Hankel, ApuZ 42/2006, 3 (7).
\textsuperscript{8} Richard L. Lippke, The Ethics of Plea Bargaining, (2011), Oxford at p. 1
criminal courts of many jurisdictions worldwide, including, as will be illustrated in this thesis, in international criminal forums.

1.2 Statement of the problem

Logically, the criminal justice system would become overwhelmed. If every one of the millions of people who are funneled through the court system every year suddenly required a trial, complete with attorneys, judges, full jury boxes, court reporters, court rooms, and witnesses, the whole system would shut down. The resources required would be staggering. Clearly, if every defendant received the criminal procedure that the law guarantees him, the number of prosecutions would need to drop precipitously which would necessarily lead to a smaller prison population.

Moreover, it occurred to me that this scenario would likely result in less prosecutions for low-level crimes, and for poor defendants. The reason is that it is much more expensive for a prosecutor to prosecute a murder or an embezzlement case involving a lengthy investigation and trial than a case like the crack distribution case above. A prosecutor who wants to show she is effective by winning a large number of convictions does well to focus on the easy cases. However, if the easy cases were to become harder with the hard ones staying about the same, then the prosecutor’s incentives would shift. She would do better to prosecute cases with real social importance, especially when these cases cost the same, or only slightly more, to prosecute than the ones that are less important.

1.3 Purpose of the study

The study aimed at assessing the role of Plea Bargaining in Uganda Criminal Justice System

1.4 Research objectives

i. To examine the concept of plea bargaining in Uganda
ii. To examine the role played by plea bargaining in Uganda criminal system

iii. To examine the effectiveness and use of plea bargaining in the Uganda Criminal Justices System

1.5 Research Questions

i. To examine the concept of plea bargaining in Uganda

ii. To examine the role played by plea bargaining in Uganda criminal system

iii. To examine the effectiveness and use of plea bargaining in the Uganda Criminal Justices System

1.6 Scope of the study

1.6.1 Geographical scope

The research will be covering all role of plea bargaining in Uganda criminal justice system in Kampala and Uganda at large including the institutions, governance and government bodies in-line with plea bargaining. The research will be done in Kampala capital city which lies within the Kingdom of Buganda, in Central Uganda.

1.6.2 Content scope

The study examined the role of plea bargaining in Uganda criminal justice system. Plea bargaining is, however, a practice that is more complex than Black's definition suggests. For example, as Guidorizzi has pointed out, with reference to this definition, it is true that the accused person and the prosecutor work out a 'mutually satisfactory disposition', to the extent that the bargain must be voluntary and agreed to by both parties however there is no guarantee that the final disposal of the case (i.e. the sentence) is something that both parties will be mutually satisfied with. Guidorizzi has

9 See D.D. Guidorizzi, Should we really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining's Critics, (1998) 47 Emory L. J. 753 at p. 755. As Guidorizzi has pointed out there, the ability of both prosecutors and the accused to bargain may be impacted by, for example, concerns that the prosecutor may have
also pointed out that the reference in Black's definition to the disposition being subject to court approval indicates that the practice of Plea Bargaining is subject to judicial review, which, as will be discussed later in this chapter, is not always the case, particularly at the national level.10

1.6.3 Time scope

The study was conducted within a period of 4 month June 2018-Stepmber 2018.

1.7 Significance

This study is significant because the findings could assist policy makers make informed policy decisions that could help promote Plea Bargaining in Uganda criminal justice system.

The findings of the study will also fill the intellectual and information gaps about the legal criteria adopted while enhancing a Plea Bargaining in Uganda criminal justice system.

The findings could be invaluable in guiding policy implementers to promote in Uganda criminal justice system.

The findings could also help contribute to the body of knowledge in-regards to in Uganda criminal justice system.

Finally, this study will be carried out in partial requirements for the award of bachelors of laws degree of Kampala international university which will enable the researcher obtain the degree.

about the admissibility of evidence, for example. The accused person may also be faced with overwhelming evidence against them meaning that they are in a weak bargaining position in comparison with the prosecutor, who will be in a more powerful position. These matters will be discussed in further detail in the discussion on the arguments for and against Plea Bargaining later in this chapter.

10 Ibid. at p. 756 where Guidorizzi refers to 'implicit' plea bargaining where accused persons are faced with a more severe sentence if they choose to proceed to trial instead of pleading guilty and in which case there is no negotiation to be approved by the court. In these cases the concession is the likelihood of a less severe sentence for a guilty plea (although the legislation/guidelines on sentencing will vary depending on the jurisdiction and judges imposing sentences may have a wide discretion even where the accused person pleads guilty). In addition, as will be examined in further detail below, prosecutors can drop or vary charges and depending on the jurisdiction in which this occurs, the court is rarely required to approve this.
1.8 Methodology

Methodology utilized will be qualitative in nature as, according to Leedy\textsuperscript{11}, this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin (200:134) in Patton, it usually serves one or more of a set of four purposes: description and interpretation. According to QSR (a, 2011:115), qualitative research "is used to gain insight into people's attitudes, behaviors, value systems, concerns, motivations, aspirations, culture or lifestyles." QSR continues to explain qualitative research as a method of making informed decisions in both business and politics.

This study will utilize a descriptive approach as it will be necessary to observe and describe the role of plea bargaining in Uganda Criminal Justices System. Thus the researcher will utilize a descriptive approach so as to be able to assess the role of plea bargaining. The descriptive approach may be considered as inductive, according to Rhodes (1995:44) as conclusions are drawn from repeated observations that is letting facts speak for themselves. Statements are made about causes and consequences of the phenomenon being observed.

1.9 Literature review

The three types of plea bargaining used in western adversarial systems are charge, fact and sentence bargaining. In charge bargaining the accused person's representative will negotiate with the prosecutor and an agreement will be reached that the accused person will plead guilty to either a less serious charge or a reduced number of charges. The accused person, by pleading guilty, foregoes their right to trial and the right to have the case against them proven in exchange for the hope of a lesser sentence than the accused person would have had imposed for a more serious charge or for all charges against them. For example, the accused person would plead guilty to culpable

\textsuperscript{11} Established on 2001:148
homicide (Scotland) or manslaughter (England) instead of murder, a negotiation that would take place between prosecutors and the accused person’s solicitor. Another example of charge bargaining would be if the accused person is charged with ten charges, the prosecutor may accept a plea of not guilty to three of those charges and guilty to seven of them.

Fact bargaining refers to the process where prosecutors agree to narrate to the court an altered set of circumstances surrounding a particular crime, which is likely to provide mitigating circumstances to any sentence imposed. In sentence bargaining the accused person may offer a plea of guilty knowing what sentence will be passed, that there will be a reduction in sentence in comparison to what the sentence would have been on tendering the plea or on the basis that the prosecutor will recommend a particular sentence to the judge.

The use of plea bargaining in international criminal law has the same foundation than in domestic law systems. With an ever-growing crime rate and limited court resources, the capacity of the international courts is exhausted at one point or another. A full criminal trial for every suspect seems therefore impossible. However, due to the broader objectives of international criminal law in the context of transitional justice and the gravity of the crimes that are being prosecuted by an international court, it has to be questioned if plea bargaining can be used in these trials.

It is important to primarily distinguish between two different forms of plea bargaining: “sentence bargaining” and “charge bargaining”. The former refers to the case in which the defendant receives a sentence reduction for pleading guilty based on an agreement between him and the prosecution. One of the major critiques on this practice is that the sentence lacks proportionality to the crime committed. The latter includes cases in which the prosecutor drops some charges in exchange for a guilty plea of the defendant

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12 See S Moody and J Tombs, Prosecution in the Public Interest (1982), chapter 6, "The negotiation of guilty pleas," which contains the only published account of charge bargaining and fact bargaining in Scots law.
for one of the other charges. This agreement can undermine the truth-seeking function of a tribunal as will be later explained.

Due to their international nature the courts are somewhere in between an adversarial procedural system and an inquisitorial system and the use of plea bargains is therefore still contested. While plea bargaining is widespread in adversarial mostly common law systems, its use in more inquisitorial civil law systems is still debated and not generally accepted. This is based on the different understanding of the purpose of a criminal trial as shown earlier and goes hand in hand with a divers comprehension of truth in a proceeding.


Had defendants refused to settle, many of them would not have been charged or would have escaped with lenient sanctions. But such collective stonewalling requires coordination among defendants, which is difficult if not impossible to attain. Moreover, the prosecutor, by strategically timing and targeting her plea offers, can create conflicts of interest among defendants, frustrating any attempt at coordination. The substantial bargaining power of the resource-constrained prosecutor is therefore the product of the collective action problem that plagues defendants. This conclusion suggests that, despite the common view to the contrary, the institution of plea bargains may not improve the well-being of defendants. Absent the plea bargain option, many defendants would not have been charged in the first place. Thus, we can no longer count on the fact that plea bargains are entered voluntarily to argue that they are desirable for all parties involved.


Fifty years ago, Clarence Earl Gideon needed an effective trial attorney. The Supreme Court agreed with Gideon that the Sixth Amendment guaranteed him the right to

\[13\] Oren Bar-GilliOmri Ben-Shahar 2009
counsel at trial. Recently, Galin Frye and Anthony Cooper also needed effective representation. These two men, unlike Gideon, wanted to plead guilty and thus needed effective plea bargaining counsel. However, their attorneys failed to represent them effectively, and the Supreme Court recognizing the reality that ninety-five percent of all convictions follow guilty pleas and not trials ruled in favor of Frye and Cooper\(^{14}\).

If negotiation is a critical stage in a system that consists almost entirely of bargaining, is there a constitutional right to the effective assistance of plea bargaining counsel? If so, is it possible to define the contours of such a right? The concept of a right to an effective bargainer seems radical, yet obvious; fraught with difficulties, yet in urgent need of greater attention.

In this Essay, I argue that the Court's broad statements in *Missouri v. Frye*, *Lafler v. Cooper*, and its 2010 decision in *Padilla v. Kentucky* about the critical role defense counsel plays in plea negotiations strongly support a right to effective plea bargaining counsel\(^{15}\). Any right to effective bargaining should be judged as other ineffective assistance claims are judged by counsel's success or failure in following prevailing professional norms. This Essay discusses the numerous professional standards that support the notion that defense counsel should act effectively when the prosecution seeks to negotiate and should initiate negotiations when the prosecution fails to do so, if it serves the client's goals.

**Becker (1968), a journal on Plea Bargaining Model Background**

The economic analysis of the criminal justice system stems largely from Gary Becker's seminal paper on the topic (Becker 1968), which appeared about the time that Law and Economics was getting a foothold as a serious discipline\(^{16}\). Prior to that, criminal justice had been considered largely outside the realm of economic analysis. Since that time, economists and legal scholars have developed several models of plea bargaining. These

\(^{14}\) Jenny Roberts 2013  
\(^{15}\) *Ibid* 14  
\(^{16}\) Rhodes 1976)
models are generally based upon neoclassical economic and rational choice concepts. The models assume rational decision making on the part of the agents involved, general access to relevant information and knowledge, and a lack of transaction costs. Indeed, the models offer few, if any, social considerations of defendants beyond their being rational actors. Chapter 4 contains a more detailed literature review of the economic modeling of plea bargains. However, some background on the structure of these models is necessary here in order to place this project’s model into a proper context.

Posner (2003) offers an overview of the economic analysis of plea bargain decision making. He does not present a formal model of plea bargaining as such. Instead, he presents an analysis of many of the issues involved in plea bargaining from several perspectives. Posner begins his analysis by arguing that the standard criticisms of plea bargaining are incorrect. These criticisms are that, from the defendant's side, it denies a defendant's right to trial, and that from the prosecutor's side, it leads to shorter sentences. Posner suggests that these criticisms are both incorrect as, “If a settlement did not make both parties to a criminal case better off than if they went to trial, one or the other would invoke his right to trial” (Posner 2003: 578)

Additionally, Posner argues that an abolition of plea bargaining would lead to longer waiting times for criminal defendants. This, he argues, would increase expected costs for those defendants held without bail before trial, common under the Bail Reform Act of 1984, especially for those who are actually innocent. It would also decrease expected costs for those who did receive bail. Additionally, Posner argues that while overall sentences would likely remain constant, the variance, and thus the economic risk involved would increase. Finally, he argues that, with all of the safeguards set up for criminal defendants, the reality is that most defendants are actually guilty, and many guilty defendants end up going free. Thus, Posner suggests, a little pre-trial detention, even for defendants who ultimately are acquitted, or against whom charges are ultimately dropped, is a good thing as it still provides some punishment and thus deterrence even without a conviction (Posner 2003).
As Posner (2003) notes, plea bargaining saves resources for the prosecutor, which ultimately drives sentences up. Plea bargaining represents an enormous resource savings, and allows for large expenditures on the occasional case for which a defendant will not bargain. Indeed, this boost in resources strengthens the prosecutor’s hand and increases her bargaining position in other cases by giving a defendant an unrealistically high impression of the length of sentences in the cases that do go to trial. That is, a defendant can only observe the few cases that do go to trial, not the situation where they all do. Thus, these higher sentences induce defendants to accept plea bargains by setting an artificially high standard for trial outcomes. If, on the other hand, all defendants acted collectively, each demanding a full trial, they could effectively clog the court system, leading to the minimum prison sentences in terms of man-years. In such a situation, this would force prosecutors to expend maximum resources for each trial in order to cover all of the costs of modern criminal process.

However, of course, each defendant would be in a difficult bind. While this situation would presumably lead to the release of many defendants, the few that remained would have an incentive to plea bargain. That is, once a defendant was given the signal from the prosecutor that he was one of the few who was going to be prosecuted and taken to trial, his incentive structure would be to make a plea bargain in order that his sentence be reduced. This would be in his interest, as it would presumably reduce his sentence. However, collectively, it would increase the prosecutor’s power by saving her resources for other cases leading to a cascading collapse of the defendants’ collective action.

Scott W. Howe (1981), The value of plea bargaining; Associate Dean for Academic Affairs and Frank L. Williams, Jr. Professor of Criminal Law, Chapman University School of Law. A.B. 1977, University of Missouri; J.D. 1981, University of Michigan.
Plea Bargaining and the Social Interest in Punishing Crime

This part makes the case that plea bargaining serves rather than undermines the public interest in punishing crime, but, more importantly, shows that shadow-of-trial efficiency theory does not help us resolve this question. This part begins by demonstrating that, given the basic constraints of our current criminal-justice system, plea bargaining tends to maximize punishment across cases regardless of whether participants in the bargaining process accurately discount trial outcomes. In so demonstrating, this part assumes the following constraints: (1) the amount of conduct defined as crime, (2) the amount of resources devoted to policing, adjudication, and incarceration, and (3) our constitutionalized approach to criminal trials. This part then takes up the question of whether we should change the constraints to abolish bargaining and, thereby, allow for greater punishment in cases that would have been bargained. Although this part concludes that we should not pursue abolition, its larger point is that shadow-of-trial theory does not accurately explain the utility of plea bargaining.


Guilty pleas became a major method of case disposition in the late 19th century and today account for over 85% of all felony convictions,' yet pleas are a continuing source of controversy. Some critics argue that a system of negotiated justice undermines the deterrent effectiveness of punishment and can be used by influential defendants to evade legal sanctions. Others maintain that defendants with prior criminal records, and hence more firsthand experience with the justice system, are able to negotiate more favorable sentences. Proponents of these views see plea bargaining as undesirable

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17 Scott W. Howe (1981), The value of plea bargaining; Associate Dean for Academic Affairs and Frank L. Williams, Jr. Professor of Criminal Law, Chapman University School of Law. A.B. 1977, University of Missouri; J.D. 1981, University of Michigan
because it weakens the deterrent and incapacitative effectiveness of the law by allowing some defendants to minimize their punishment.
CHAPTER TWO

RELATED LAW AND REGULATORY FRAMEWORKS ON PLEA BARGAINING

2.1 Introduction

Pt II 5\textsuperscript{19} A plea bargain may be initiated orally or in writing by the accused or the prosecution at any stage of the proceedings, before sentence is passed.

Criminal Justice administration is taking new dimensions worldwide. One of the recent developments in the administration of criminal justice is the emergence of plea bargaining. Most criminal prosecutions are concluded even without trial, this happens in the form of compromises between the parties concerned.

There is polarity of contemporary reactions to this practice. Nevertheless, most participants in the plea bargaining process find the practice as a panacea in the administration of criminal justice. In an epoch where the practice of plea bargaining has come under opprobrium, especially in relation to the anti-corruption fight, it is only apt to engage in an exercise of self-flagellation and make a few recommendations that will impact on criminal justice administration.

2.2 Form of plea bargain agreement

According to Part 9 (1) Where the parties are voluntarily in agreement, a plea bargain agreement shall be executed as prescribed in the Form set out in the Schedule\textsuperscript{1} and filed in court.

According to Part 9 (2)\textsuperscript{20} Subject to sub rule (1), where the plea bargain agreement involves a child, the agreement shall be executed by either the parent, guardian, probation and social welfare officer or the legal representative of the child.

\textsuperscript{19} The Plea Bargain Rule
\textsuperscript{20} The Judicature (Plea Bargain) Rules, 2016

14
According to Part 10 Plea bargain agreement to be explained to accused person

A plea bargain agreement shall, before being signed by the accused, be explained to the accused person by his or her advocate or a justice of the peace in a language that the accused understands and if the accused person has negotiated with the prosecution through an interpreter, the interpreter shall certify to the effect that the interpretation was accurately done during the negotiations and execution in respect of the contents of the agreement.

2.3 Considerations in Bargaining

The prosecutor bases his decision on whether to proceed to trial or enter into a plea arrangement upon many factors: the gravity of the crime, the defendant's criminal record and characteristics, the victim, and the evidence.21

2.3.1 The gravity of the crime

The severity of the crime provides the obvious starting point for the prosecutor and the defendant in plea negotiations. The exact nature of the crime contributes to the bargaining power of the prosecutor in negotiations - the more horrible the crime, the longer the sentence, and the greater likelihood of a lesser included offense. All of these elements provide leverage for the prosecutor to use against the defendant. Furthermore, the more heinous the crime, the greater the public demand for the criminal to be apprehended and convicted. The public may even perceive an acquittal at trial as the prosecutor's failure to present the case competently rather than the actual innocence of the alleged perpetrator. The impetus to bargain is then not only for efficiency but also a way for the hesitant prosecutor to ensure conviction.

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2.3.2 Adequacy of punishment

To preserve the integrity of the justice system and the separation of powers, it is important that the prosecutor consider the adequacy of punishment when deciding whether to enter into a plea agreement. The prosecutor must not bargain away adequate punishment of a criminal in order to ensure conviction through a plea bargain, nor must he usurp the legislative power in defining what measure of punishment is adequate.

The prosecutor must recognize that an offer of reduced time is not always persuasive; rather it should be compared with the sentence if the defendant were to be convicted by a jury. Since the more heinous crimes have longer sentences imposed upon conviction, a prosecutor faces the dilemma of having to reduce the sentence by a greater amount than he would if the crime did not carry a long sentence to make an offer attractive to a defendant.

When considering whether to enter into a plea bargain, the federal prosecutor is supposed to obtain a bargain for the most serious, readily provable offense. The prosecutor compromises by dismissing the additional charges while still retaining public confidence by having the criminal admit to the most serious charge. However, the prosecutor possesses substantial control in determining the most serious charge.

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22 Especially relevant in this consideration are the two extremes, probation and the death sentence. Both powerfully influence a defendant's decision in assessing the risks of going to trial. See Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998) (striking down certain plea provisions of the New York capital punishment statute, which imposed death penalty only on those who asserted innocence and proceeded to trial, as they needlessly encouraged guilty pleas by allowing criminal defendants to avoid the possibility of a death sentence); Douglas A. Smith, The Plea Bargaining Controversy, 77 J. CRIM. L. & CRIMINOLOGY 949, 952 (1986) (noting that statistical evidence indicates that "pled cases were 53 percent less likely to result in incarceration than cases where the defendant was convicted by a jury").

23 Taking two years from a five year sentence is much greater than taking two years from a 30 year sentence.


25 One could imagine the public outrage if a prosecutor allowed a murderer to plead guilty to assault in exchange for a dismissal of murder charges.
brought by being able to cast the facts in a particular light or omitting facts that would aggravate the crime.

2.3.3 The offender
The unique characteristics of each defendant are also important in the prosecutor's plea bargain decision. If the defendant is uneducated or socially disadvantaged, the prosecutor may wish to show leniency to the defendant.26 Likewise, if the defendant is particularly young or old, the prosecutor may determine that a plea bargain, or a diversion program, is27 More appropriate.

The criminal record of the defendant provides the prosecutor with numerous incentives to enter negotiations. First, the prosecutor may assume that the defendant is more likely to have committed the crime because of his prior record.28 The defendant's previous record may bias the prosecution because his prior record demonstrates the defendant's willingness to break the law. The prosecutor can use this leverage over the defendant to encourage expedited closure through a plea bargain because any repeat offenses many determine the severity of the sentence. Second, were the case to go to the trial, the jury would not necessarily be privy to the information about the prior convictions for the sake of determining the defendant's character.29

2.3.4 The victim
Although the prosecutor represents the state, he should not discount the wishes of the victim in contemplating the prudence of offering a bargain.30 Particularly in crimes

26 This raises equal protection concerns, as the prosecutor discriminates upon the education or social background of the defendant.
27 See JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS§ 5.25(a) (2d ed. 1983).
28 This assumption is well founded. From records of the convictions in 1999, 27,652 of those convicted were repeat criminals and 23,579 were first time offenders. See Pastore, supra note I. Given that the defendant has a criminal record, and that the pool of convicted criminals is much smaller than the pool of non-criminals, the probability that a previous offender is guilty of an offense is inordinately higher than if he has no criminal record.
29 See Fed. R. Evid. 404.
causing emotional distress to the victim, such as sexual crimes, plea bargaining allows for expedited closure without the victim having to face the accused.\textsuperscript{31}

2.3.5 Evidence

Evidence the prosecutor has against the defendant is instrumental in his decision whether or not to pursue a prosecution or to enter a plea bargain.\textsuperscript{32} The prosecutor’s access to evidence is not limited like the jury’s. The prosecutor can evaluate inadmissible evidence in considering whether it is likely that the defendant is guilty, whether to pursue the prosecution, and whether to offer a plea bargain.\textsuperscript{33} Even if the evidence is inadmissible, the prosecutor can use it as leverage over the defendant in plea bargaining by bluffing that the evidence is actually admissible.\textsuperscript{34} Moreover, she can attempt to find other avenues at trial to admit related evidence.\textsuperscript{35} The prosecutor, likewise, can threaten to introduce the evidence at sentencing.\textsuperscript{36}

The terms of any agreement proffered by the prosecutor will be based on the factors above, along with the amount and quality of the evidence. The defendant’s acceptance of the plea depends on his own perception of the probability of being convicted at trial based on the available evidence.

In the case of weak evidence, the prosecutor lacks leverage over the defendant, and the bargains that he can propose will lack appeal, either to the defendant because the chances of conviction are so low, or to the prosecutor because the proffered sentence will be so short. Because of mandatory sentencing minimums, less evidence tends to

\textsuperscript{31} See Roland Acevedo, Note, Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study, 64 FORDHAM L. REV. 987, 992 (1995); but see Rebecca Hollander-Blumoff, Note, Getting to "Guilty": Plea Bargaining as Negotiation, 2 HARV. NEGOT. L. REV. 115, 133 (1997) (arguing that victims are not provided with vindication without a trial).

\textsuperscript{32} See McDonald, supra note 21, at 172.

\textsuperscript{33} Debra S. Emmelman, Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys, 22 LAW & SOC. INQUIRY 927, 940 (1997).

\textsuperscript{34} Jeff Palmer, Note, Abolishing Plea Bargaining: An End to the Same Old Song and Dance, 26 AM. J. CRIM. L. 505 524-25 (1999).

\textsuperscript{35} For example, illegally obtained evidence can be used to impeach a defendant or other witnesses at trial. See United States v. Havens, 446 U.S. 620 (1980).

\textsuperscript{36} See Federal Sentencing Guidelines section 6A1.3(a) (permitting the sentencing court to consider otherwise inadmissible evidence as long as it has "sufficient indicia of reliability to support its probable accuracy").
lead either to dismissals or to trial instead of bargains for negligible sentences or probation. Similarly, the constant weight and pressure of other cases on the prosecutor's docket affect the decision whether to dismiss. Although a prosecutor may well want to go to trial even though he has a weak case against the defendant—indicating a low probability of large gains versus a certainty of a small gain-efficiency will normally compel the prosecutor to dismiss the case. As the scholar Alschuler noted, 
"[ w ]hen the prosecutor ... entertain[s] serious doubts concerning a defendant's factual guilt, he is likely to decline to prosecute."37

CHAPTER THREE
CRITICAL ANALYSIS ON PLEA BARGAINING IN UGANDA

3.1 Introduction

According to (Under section 41(1) and 41(2) (e) of the Judicature Act, Cap.13) "plea bargain" means the process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend a particular sentence subject to approval by court; and

3.2 The Arguments against Plea Bargaining at the National Level

3.2.1 Pressure to Plead and Condemnation of the Innocent

Critics of plea bargaining argue that the practice places too much pressure on accused persons to plead guilty, with the result that innocent persons plead guilty to avoid the risk of a harsher punishment.\textsuperscript{38} The widespread use of plea bargaining in the United States, for example, is in contrast with earlier precedent which relied upon previous case law on confessions, dismissing bargains that provided some kind of incentive to defendants and permitting the withdrawal of statements or guilty pleas by the defendants involved.\textsuperscript{39} Public confidence both dictates and requires a system where we can be sure that wrongful convictions emanating from guilty pleas are not tolerated and regarded as nothing less than unacceptable. In 1970 the United States Supreme Court supported this position in stating that:

'It is critical that the moral force of the criminal law not be diluted by a standard of proof [or a procedure for conviction] that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that

\textsuperscript{38} For a discussion on this matter see F. Leverick, Sentence Discounting for Guilty Pleas: An Argument for Certainty Over Discretion (2014) Crim.L.R Issue 5 338 at p. 340

\textsuperscript{39} See A.W. Alschuler, Plea Bargaining and Its History, (1979) 79 Colum. L. Rev. 1, 19-24 at p. 20
It is correct that we must have confidence that a system is required that prevents condemnation of the innocent without the choice of adjudication or opportunity of some kind of trial procedure.\textsuperscript{41} We have the odd scenario under a number of legal systems that confessions offered in exchange for some kind of reward are regarded as inadmissible because they may provoke an innocent person to plead guilty to a crime that they did not commit whilst plea bargaining, which also offers some kind of reward in exchange for a guilty plea, is entirely permissible. It has been stated by Heupel that \textquoteleft[t]he justification for this difference is that a defendant who pleads guilty expressly admits his guilt in open court, where the voluntariness of the plea may be ensured, and consents to the entering of a judgment of conviction without a trial.\textsuperscript{42} It is difficult to see any practical distinction, particularly where the outcome of the acceptance of guilt would be the same.\textsuperscript{43}

It is possible, however, to say that when a guilty plea is made in open court the person accepting their guilt will have the physical protection of the court, which may differ from a set of circumstances where, for example, a confession is induced by the police inflicting physical violence on a suspect. It has been stated that \textquoteleft[a] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape ... that no credit ought to be given.\textsuperscript{44} However, when a plea

\textsuperscript{40} In \textit{re Winship}, (1970) 397 US 358 at p. 364
\textsuperscript{41} John H. Langbein, Land Without Plea Bargaining: How the Germans Do It, (1979) 78 Mich. L. Rev. 204. This article is against plea bargaining on the basis that it is condemnation without adjudication. See also Albert W. Alschuler, Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas, (2003) 88 Cornell L. Rev. 1412 at p. 1417. This article raises concerns that the innocent are coerced into pleading guilty.
\textsuperscript{43} Ibid
\textsuperscript{44} This is taken from the 1783 English case of Rex v Warrickshall, found in L.E. Dervan and V.A. Edkins, The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence
agreement is entered between an accused person and the prosecutor the accused person is clearly 'hoping' that they will receive a more lenient sentence and there comes an analogy with the 'reward' and subsequent lack of credibility in a bargained guilty plea. The mental fear endured by an accused person facing a longer prison sentence if they do not plead guilty is, arguably, in no practical way when considering the outcome different to, for example, the type of physical fear or pain that may be inflicted to induce a confession. However it should be acknowledged that the fear incurred during physical violence, for example, is distinguishable in that the person may genuinely fear for their life and the confession may be something that they make under pressure when they do not have the time to think about or reflect on the consequences.

Despite the guilty plea being submitted whilst the accused person is technically under the protection of the court, the risk that innocent persons will be induced to plead guilty through fear of a harsher sentence is still a real possibility. Surely acceptance of guilt by the perpetrator in the knowledge that they are doing so to have charges against them dropped (charge bargaining), a different factual picture presented in court from what their court papers initially indicated (fact bargaining) or a more lenient sentence (sentence bargaining) all in exchange for not requiring the evidence against them to be tested through a trial procedure, must be regarded as them receiving a 'reward' for accepting their guilt (whether they are in fact guilty or not). It is a very fine line distinction however the argument can be made that by the time a guilty plea as a result of a bargain is being entered in court, the accused person is under the authority of the court and certain safeguards will have been passed by that time, for example, there must be sufficient evidence of the crime to bring the accused person to court in the first place.

An illustration of the dangers that plea bargaining risks innocent persons pleading guilty can be seen in the US Supreme Court case of Bordenkircher v Hayes45. This case also

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provides a good early example of how the plea bargaining process in the US can operate and the attitude that the court was starting to take to the practice, in terms of considering plea bargaining as a permissible practice. Hayes, who had two previous felony convictions, was indicted for forgery of a cheque for $88.30, an offence punishable by two to ten years imprisonment. As part of a plea negotiations the prosecutor offered to recommend a sentence of five years imprisonment if Hayes tendered a guilty plea prior to the trial. If Hayes had not tendered a plea on the terms requested by the Prosecutor, this would have meant that he would be charged under the Kentucky Habitual Criminal Act and if convicted he would receive a mandatory life sentence. Hayes refused to plead guilty and was convicted following trial.

Hayes appealed to the Supreme Court on the basis that the prosecutor's actions were coercive, retaliatory and fundamentally unfair. His appeal was refused on the basis that no distinction could be drawn between an offer and a coercive 'threat.' There had been nothing stopping the prosecutor charging Hayes as a habitual offender in the first instance. The court did not dispute that the difference in sentence was as a result of the accused's right to test the evidence against him and stated that 'the imposition of such difficult choices is the inevitable and permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' For Hayes, in hindsight it seems logical than he plead guilty to a crime that he is innocent of rather than face the risk of life imprisonment if convicted after trial.

Hessick and Saujani have highlighted that there is a risk with plea bargaining that the system becomes 'an assembly line in which defendants are pressured, deprived of due process, and regarded as secondary to efficiency.' Although there has been discussion

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46 At 364.
47 F. A. Hessick III and Reshma M. Saujani, Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defence Counsel and the Judge, 16 BYU J. Pub. L. 189, 2001-2002 at p. 197. Although Hessick and Saujani are correct to acknowledge the dangers where, essentially the human rights of the person accused of a crime are not upheld in order to ensure a system runs quickly and within budgetary requirements, the reasons behind any criminal justice system in general must be borne in mind in terms of ensuring that we are not living in an state of anarchy, where victims have the right to those who have wronged them being brought to justice and those who commit crimes are aware of the consequences of doing so.
of the plea bargaining process in cases such as Hayes, plea bargaining has been
described as an 'unregulated' industry. The plea bargaining process in the United
States, however, for example, has some degree of regulation in federal cases whereby
'the judge who accepts the plea must be satisfied that there is a factual basis for it,
advise the defendant whether the court is bound by the parties' recommendations,
decide whether to accept or reject the plea agreement, and ensure the proceedings are
captured in a verbatim record to facilitate review.' The main concern however of the
courts, as laid down in the case of Brady v United States, is that '[w]aivers of
constitutional rights not only must be voluntary but must be knowing, intelligent
acts done with sufficient awareness of the relevant circumstances and likely
consequences.' Pleas induced by 'force, threats or promises' will not therefore
necessarily render the plea involuntary and as a result the prosecutor has a broad
discretion in terms of the negotiation of the plea. The promise of a significant
reduction in sentence from that which an accused person would face after trial does not
render a plea involuntary.

As a result of the precedent set down by Brady, even the threat of the death penalty
would not be sufficient to render a guilty plea involuntary. It is then open to the
innocent accused person to voluntarily admit guilt in order to avoid being tried, wrongly
convicted and then receive a more severe sentence. If an innocent accused person was

49 Ibid. at p. 165
50 Brady v. United States, (1970) 397 U.S. 742 at 748 (1970) cited by Blume and Helm, Ibid. In Brady, the Court basically held that the threat of the death penalty could be used to induce a guilty plea as long as the plea was knowing and intelligent. 397 U.S. at pp. 747-748.
51 Blume and Helm, Ibid. at pp. 165-166. Also, in Bordenkircher v. Hayes, (1978) 434 U.S. 357 at 363, 'it was stated that acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.'
52 See Blume and Helm, Ibid. who cite Hayes, 434 U.S. at pp 364-365, and acknowledges that Hayes, in theory, rejects 'the suggestion that prosecutors cannot threaten a lengthy and serious criminal punishment that has not been applied, at least occasionally, to similarly situated defendants-meaning that a charge that would not have been brought originally could be threatened if a guilty plea was rejected.'
53 Blume and Helm, Ibid.
therefore threatened with the death penalty in a case where the evidence against them was minimal, they will be very unlikely to take the risk and essentially gamble with their life. It is sufficiently unfortunate that an innocent person would have to spend part of their life in prison for a crime that they did not commit but a worse scenario would be to lose their life as punishment for a crime they did not commit.

Some legal academics have portrayed a bleak picture of plea bargaining as a procedure for conviction that fails to ensure the public confidence in the system that the Supreme Court has viewed as so critical. For example, Professor Ellen Podgor has written in respect of plea bargaining in the United States, that '[o]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations.\(^54\) Academics and commentators have made reference to 'the innocence problem\(^55\) which deals with concerns that a system of plea bargaining permits 'too many' wrongful convictions.\(^56\)

An innocent person being forced to plead guilty through fear of the consequences should they decide to 'run the risk' of proceeding to test the evidence against them at trial, is nothing short of a travesty and extreme miscarriage of justice.\(^57\) No credible legal system can in any way permit this kind of practice in any organised or systemic manner and any system which openly permits wrongful convictions is fundamentally


\(^56\) See M. Young, In Defence of Plea Bargaining’s Possible Morality, (2013-2014) 40 Ohio N.U. L. Rev. 251 at p. 257

\(^57\) See R. Balko, False Confessions, Please Plea Me, Reason Magazine 08/2008, this article highlights a scenario where the defendant has felt in such a vulnerable position that he felt compelled to plead guilty. In this case, in December 2005, James Ochoa was wrongly convicted of a 'car jacking.' Ochoa pled guilty and served 16 months imprisonment but was cleared of this crime following DNA extraction from hair fibres left in the car matching the DNA of another male. The judge told Ochoa that 'should he insist on his constitutional right to a jury trial and should the jury find him guilty, the court would slap him with the maximum sentence the law allowed: life in prison.'
flawed. The concept of ‘too many’ wrongful convictions is concerning in itself because it can never be determined how many would be okay. One wrongful conviction is one too many.

However, it would be naive to profess that a system could be devised or already exists that would ensure in 100 percent of cases that no person is ever going to be wrongfully convicted. Some allowances must be made for human error when witnesses give evidence at a trial in terms of their reliability and it also has to be accepted that there is the possibility of incredible witnesses. Forensic evidence has also evolved over the years but has, in some cases, resulted in wrongful convictions as a result interpretation errors by scientists and fingerprint experts, for example. Experts frequently disagree and often whether a person is convicted boils down to which expert’s evidence that the judge or the jury prefer. All of these factors mean that there can never be a system that will ensure in every prosecution without fail that no person is ever wrongly convicted. However, any reliable legal system must ensure that safeguards are in place to minimise the risk of wrongful convictions and not encourage them. In assessing whether plea bargaining is a practice that encourages the innocent to plead guilty it is necessary to consider whether there is evidence of innocent persons pleading guilty as a result of a plea bargain.

Young has stated that the question of how many innocent people have felt compelled to plead guilty through fear or finding themselves in a more undesirable position if they proceed to a trial and are then found guilty has, surprisingly, not formed a significant part of the plea bargaining debate. In fact, there is evidence that ‘factually innocent’

58 See the website of The Innocence Project at http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science
59 M. Young, supra note 32 at p. 257 where he makes reference to the failure of Schulhofer, supra note 31 and Alschuler, supra note 2 to address the question of how many wrongful convictions are too many in the context of the plea bargaining debate. Young has also acknowledged the difficulty in quantifying how many wrongful convictions are too many where he poses the question of, ‘where some wrongful convictions are inevitable in any merely human system of justice, what rate of wrongful conviction is sufficient to constitute per se systemic injustice?’ This is an incredibly difficult question to provide any uncontroversial answer to. There will also be scenarios where a person is still convicted, having maintained their innocence and tested the evidence at trial. The truth behind these cases may never come to light. Perhaps more in depth research and attempts to collate and quantify data on wrongful
defendants do plead guilty\textsuperscript{60} and there are a number of documented examples of persons who have pled guilty in circumstances where they are innocent as, on balance, they have weighed up the risks and decided it would be better to plead guilty than face a significantly harsher sentence.\textsuperscript{61}

\textbf{3.3 Plea Bargaining Violates the Human Rights of the Accused}

Whether an accused person is guilty or not, as an accused person they have the right to have the prosecution prove the case against them beyond reasonable doubt. It must be considered whether plea bargaining puts too much pressure on the accused person to relinquish their rights to have the prosecution prove the case against them beyond reasonable doubt to obtain a potential reward. Article 6 of the European Convention on Human Rights includes the right to, inter alia, in any criminal charge against them, 'a fair and public hearing within a reasonable time by an independent and Impartial Tribunal established by Law.'\textsuperscript{62} This article also includes the pronunciation that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law,'\textsuperscript{63} and the right to 'examine or have examined' witnesses.\textsuperscript{64} When an accused person exchanges these rights for the promise of a more lenient sentence, for example, there must be safeguards in place to ensure that the accused person is not under undue pressure to forego their rights.

A case which illustrates the human rights concerns associated with putting too much pressure on accused persons to plead guilty is the extradition case of McKinnon v United States of America.\textsuperscript{65} In this case, the practice of plea bargaining by US

\begin{footnotesize}
\textsuperscript{60} Id. See also BL Garrett, \textit{Convicting the Innocent: Where Criminal Prosecutions Go Wrong} (2011). This book examines the first 250 DNA exonerations in the US using the work of the Innocence Project (\texttt{www.innocenceproject.org}). 16 of the 250 involved pled guilty at p. 150.

\textsuperscript{61} See J Brockman, "An offer you can't refuse: pleading guilty when innocent" (2010) 56 Criminal Law Quarterly 116, who provides a number of examples from Canadian practice.

\textsuperscript{62} Article 6(1), European Convention on Human Rights (hereinafter ECHR)

\textsuperscript{63} Article 6(2), ECHR

\textsuperscript{64} Article 6(3)(d) ECHR

\textsuperscript{65} 2008 UKHL 59
\end{footnotesize}
prosecutors was explored by the UK courts. Between 2001 and 2002 McKinnon allegedly hacked into 97 US Government and military computers from his home in England. He deleted data, resulting in significant disruption to US Army and Navy networks. He also threatened further disruption. He made admissions during the course of a police interview. The US authorities sought his extradition. McKinnon challenged his extradition and appealed to the House of Lords. The only issue left for determination by the House of Lords was whether the extradition proceedings should be abandoned as a result of the US prosecutors having engaged in earlier plea negotiations.

McKinnon had been offered a plea bargain deal that would mean he would be likely to receive a three or four year prison sentence if he consented to his extradition and agreed to a set of facts that had been presented by US prosecutors. If McKinnon refused to accept this plea bargain he was told he could expect a sentence of eight to ten years imprisonment for charges and facts that prosecutors would frame in the most serious way possible. McKinnon argued that the significant difference in relation to what he was being offered to forego what he had a lawful right to resulted in unlawful pressure. The court concluded that '[i]n one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here (as to the way the case would be put and the likely outcome) before it constituted unlawful pressure such as to vitiate the process (of extradition). So too would the predicted consequences of non-cooperation need to go significantly beyond what could properly be regarded as the defendant's just desserts on conviction for that to constitute unlawful pressure.\textsuperscript{66}

It is clear from this that for the court to find that what is offered in a plea negotiation would amount to unlawful pressure to forego legal rights is a very high threshold. However it's not clear from this decision what exactly would have amounted to unlawful pressure, it is not clear how 'generous' the prosecutor's offer would have to be, albeit this is something that would be difficult to quantify and would be required to considered

\textsuperscript{66} \textit{Id.} at para 38.
on a case specific basis. It is also noteworthy that the court did not reject the notion that a plea bargain could amount to unlawful pressure to relinquish your rights to have the prosecution prove the case against you. By implication, this suggests that the prosecutor's power in conducting plea bargains can be subject to some form of judicial review. Notwithstanding this, the high threshold places the Prosecutor in a position of power to conduct their negotiations with an accused person who is, for example, facing losing their liberty for a significant period of time and to that extent in a reasonably vulnerable negotiating position.

The undue pressure on the accused to plead argument and the argument that plea bargaining violates the accused person's human rights by causing them to relinquish their right to have the prosecution prove the case against them are two arguments that are clearly linked. There is a risk that by offering incentives to plead guilty that innocent persons may relinquish their right to have the prosecution prove the case against them. There are, however, safeguards to reduce this risk through the accused's access to a solicitor and the overseeing of the legal process by the judiciary. These parties in the legal process will also play a key role in monitoring the actions of the prosecutor in the plea bargaining process.

3.4 Plea Bargaining gives too much Discretion and Power to the Prosecutor

The prosecutor's power and discretion are topics that have amassed much controversy in the plea bargaining debate. The role played by the prosecutor in utilising plea negotiations has placed the prosecutor and their motivations under the spotlight. In entering into any plea bargains or agreements, prosecutors have a number of factors to take into consideration, including the nature of the charges, the accused's criminal record, the available evidence, the quality of that evidence and the impact on the

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67 A.W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, supra note 2 at pp. 59-60 has made reference to his interviewing of a number of prosecutors and stated, "[o]ccasionally I encountered prosecutors who were defensive about the guilty-plea system and who seemed unwilling to say anything that might lead to criticism. Even these prosecutors, however, were quick to note that the state of the evidence was a major consideration in bargaining. "Half a loaf is better than none" was their philosophy. It apparently never occurred to them that the role they had assumed of "protecting society" as vigorously as possible might be criticized." It must however be stated, that although the prosecutor can and should
victim, both of the crime and consequences of accepting a plea to less charges or a less serious charge.\textsuperscript{68} All these factors can assist the prosecutor in terms of determining what negotiations they should be entering into and what they are best to accept, weighing up the likelihood of conviction after trial. In addition to the external factors that the prosecutor is required to take into account they also tend to approach their role with a number of different hats on.

Alschuler has described the prosecutor, in negotiating plea agreements as undertaking a number of different roles including that of ‘administrator,’ ‘advocate,’ ‘judge’ and ‘legislator.’\textsuperscript{69} In the Prosecutor’s role as administrator, they have resources and efficiency, in terms of disposing cases to free up resources to prosecute the next, in mind.\textsuperscript{70} With their advocate hat on the prosecutor may be keen to ‘win’ cases in order to secure a vast number of convictions per case that they decide to initiate proceedings for and ensure the maximum sentences are imposed.\textsuperscript{71} They may see this as enhancing their own reputation and ensuring public confidence in them in enforcing justice. Part of this should be the inclusion of what the victim in a crime may think of the plea and what they want.

Although the prosecutor has a different role from the judge in any case, part of the prosecutor’s role is to be a judge, particularly when determining what to do with cases.\textsuperscript{72} For example the prosecutor may choose, in deciding on an appropriate plea to accept, to take into account the personal circumstances of the accused person\textsuperscript{73} i.e. their living conditions, mental health and family difficulties they have faced etc. They

\textsuperscript{69} A.W. Alschuler, supra note 2 at pp. 52-53
\textsuperscript{70} \textit{Ibid.} and at p. 55 Alschuler has quoted a Manhattan Prosecutor stating, ‘Our office keeps eight court­rooms extremely busy trying five per cent of the cases. If even ten per cent of the cases ended in a trial, the system would break down. We can’t afford to think very much about anything else.’
\textsuperscript{71} Alschuler, supra note 2 at p. 53 and at p. 59 Alschuler has quoted a Chicago prosecutor stating, "When we have a weak case for any reason, we’ll reduce to almost anything rather than lose."
\textsuperscript{72} Alschuler \textit{Ibid.}
\textsuperscript{73} Alschuler \textit{Ibid.} at p. 53
also may take into account external factors, such as the time an accused person has already spent in custody for a particular crime. If the prosecutor decides to discreetly take on the role of legislator they may, for example, choose to drop charges because they believe the penalty is too harsh for the criminal conduct.\textsuperscript{74}

It may be considered that the prosecutor is, in circumstances where they decide to take on the role of legislator, going beyond their remit.

Many argue that the prosecutor, regardless of the 'hat' that they decide to wear, is in a position of overwhelming power with the ability to drop a case or accept any bargain that pleases them and as such can hold the fate of the accused person in their hands. It has been argued that the downside for the accused is that they have to deal with the prosecutor and cannot 'shop' for a better deal.\textsuperscript{75} However, this is not entirely accurate because, in practice, where individual prosecutors have their own discretion in cases some may develop a reputation for being more 'soft' than others and may be targeted by an accused persons defence counsel. This may encourage a practice of prosecutor shopping. The prosecutor is, however, in the unfortunate position of being unable to 'shop' for a more reasonable accused person or defence counsel (as it is most likely that the prosecutor will actually negotiate with the accused person’s counsel).

Prior to Human Rights legislation and advances in legislation on disclosure by the prosecutor of their case to the defence, the Prosecutor could then have been regarded as being in a much stronger position than the defence. The prosecutor knew exactly what evidence they had and could make an informed decision about the likelihood of the accused person being convicted in deciding where to set the bar in a plea negotiation. The disclosure obligations imposed on the Prosecutor places the accused person and their Counsel on a significantly more level playing field in terms of the negotiation process.

\textsuperscript{74} Alschuler \textit{Ibid.}
Although laws on disclosure in many Western jurisdictions have striven to ensure that the defence have equality of arms in preparing their defence, some are still of the view that the defence will not have the same resources and information available to them as the prosecution. If however the defence have disclosure of the evidence against them then they are in a position to analyse the likelihood of conviction after trial vs accepting guilt as part of a negotiated plea. The defence will also have access to information that the prosecutor does not have access to. For example defence counsel will be able to examine the accused’s defence by interviewing the accused himself and will be able to investigate this in full with the information from the prosecution. The prosecution will not necessarily have full information in relation to the accused’s defence and they have the high burden of proving the case beyond reasonable doubt. Disclosure ensures that the prosecutor cannot present any exaggerated view of the evidence or promote chances of likelihood of conviction beyond what they are, in the negotiation process, in order to secure a guilty plea. In any case it would be misconduct and inappropriate for the prosecutor to misrepresent the evidence and similarly they should not be engaging in the plea bargaining process with a view to securing any personal benefit.

Plea bargaining has been described by those who object to the morality of the practice as a ‘tool for corruption.’ In considering whether plea bargaining can be considered such a tool it is necessary to consider how much discretion prosecutors have in determining plea bargains and how their discretion can be monitored to prevent corruption. There must also be a process in place to investigate any allegations of suspicious plea bargaining by prosecutors. In some jurisdictions guidelines have been put in place for prosecutors in order to assist them with how they should be exercising their discretion, for example, under the Code for Crown Prosecutors in England and

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76 Id. at p. 713
77 A.W. Alschuler, Plea Bargaining and Its History, (1979) 79 Colum. L. Rev. 1, 19-24 at p. 24. Alschuler has advised that there is documentary evidence to suggest that in 1914 an attorney in New York had developed a common practice of standing ‘out on the street in front of the Night Court’ and would ‘dicker away sentences in this form: $300 for ten days, $200 for twenty days, $150 for thirty days.’
Wales, in order to proceed with charges, there requires to be a ‘realistic prospect of conviction’\(^7\).  

Of significance to the plea bargaining debate, the Code also states ‘Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.’\(^7\) This Code also states, ‘Crown Prosecutors should only accept the defendant’s plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors must never accept a guilty plea just because it is convenient.’\(^8\) These guidelines are in place to ensure that prosecutors do not take advantage of their discretion and to ensure that the plea is only accepted if the sentence can reflect the gravity of the conduct. This seeks to ensure that prosecutors do not have free reign to decide on any plea that pleases them. However, it is unclear whether the actions of Crown prosecutors, for example are monitored in order to ensure compliance with the Code. If there is no monitoring process, there is no way of knowing that the decisions by prosecutors are being checked and no way of ensuring then that corruption is being prevented.

Prosecutors should base their decisions on what the charges should be and what charges should be acceptable based on evidence that has been gathered, usually by the police or other investigators working for public authorities. It should not be the position that prosecutors are proceeding with crimes where they do not have sufficient evidence to prove that the person is guilty. They may take into account the weight of particular evidence and the volume of evidence in considering the ‘risk’ posed of running a case to trial and the likelihood of conviction. In reality, the situation where they would be bargaining with an accused in circumstances where it is clear that that person is not

\(^7\) See the CPS Code for Crown Prosecutors in England and Wales  
\(^7\) Ibid  
\(^8\) Ibid
guilty is incredibly remote. At least, in most well developed criminal legal systems, it would be considered highly unethical and unprofessional for prosecutors to accept pleas of convenience.

If it becomes clear during the course of an investigation by the prosecutor that an accused person is in fact innocent, they should not then proceed to negotiate with the accused and they should discontinue proceedings against that person. If it is clear that an accused person is innocent the prosecutor should not be engaging in any plea negotiation with them, just to see if they can secure a conviction in the case. This is highly unethical and immoral. Hessick and Saujani have professed that the prosecutor offers the same plea to the guilty or the innocent irrespective of whether they are actually guilty or not.81 This is an odd proposition to make given that the Prosecutor will, certainly in the vast majority of jurisdictions in the world, have no direct contact with those that they have accused of crimes and should never be at the stage where they are negotiating with someone who they know is innocent.

Hessick and Saujani have also maintained that the prosecutor is in a 'precarious position' because of his 'lack of information' and go as far as saying that the prosecutor 'prosecutes those who may be innocent because the prosecutor recognises his ignorance: he cannot let the guilty escape, and must depend on the system to indicate the innocent.'82 They also cite Scott and Stuntz83 in averring that prosecutors are more

81 Hessick and Saujani, supra note 23 at p. 198 with reference to R. E. Scott and William J. Stunz, Supra note 31
82 Hessick and Saujani Ibid. Where they also make reference to the United States Supreme Court decision of North Carolina v Alford, 400 U.S. 25 (1970), where it was stated at p. 37, '[h]ere the State had a strong case of firstdegree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30year term.' In this case the Supreme Court apparently 'condoned' the concept of an innocent person weighing up their risks and prospects in entering a plea agreement and ultimately doing so in order to get a better deal than face the risk of being convicted and face a more harsh punishment. However, it was acknowledged that the judge was required to 'scrutinise the evidence closely to find 'a strong factual basis' to support the defendant's plea'.
83 Scott and Stuntz, supra note 31 at p. 1948
likely to be carrying out plea bargains with the innocent as 'the prosecutor perceives innocence as a lack of evidence.\textsuperscript{84} This completely ignores the fact that prosecutors are already working under the constraints of the law and that to, for example, indict an accused person there must be sufficient evidence to justify doing so.

The accused person's defence counsel are therefore in a position where they should be levelling the playing field between the power of the prosecutor and the accused. An accused person will place faith and dependence in the expert advice given to them by their defence counsel and as a result it is important that this is subject to some form of review as well as being able to review the actions of the prosecutor.\textsuperscript{85} There are concerns that the interests of the clients and the interests of their defence solicitors or counsel may be variable and this may have an impact on the advice given on whether the accused person should plead guilty or not. The defence counsel may have a greater desire for their client to plead guilty for financial reasons. Taking a case to trial may not be financially lucrative in terms of the fee that they receive and the preparation work that they will require to do in proceeding to trial.\textsuperscript{86}

\textbf{3.6 Plea Bargaining results in Sentences that fail to recognise the Gravity of the Criminal Conduct}

It has been stated that the decision on sentencing can be regarded as 'the symbolic keystone of the criminal justice system.\textsuperscript{87} Punishment for a crime in the form of the sentence imposed is something that will be at the forefront of the accused person's mind in determining what they should do in relation to charges that they are facing. They will want to know what 'incentives' or 'deals' will be available should they choose to relinquish their right to a trial and plead guilty, whether via sentence, charge or fact bargaining. The practice of sentence discounting involves the judge imposing a more lenient sentence for the accused pleading guilty, which is used as an incentive for

\textsuperscript{84} Hessick and Saujani, supra note 23 at p. 199
\textsuperscript{85} Ibid. at p. 207
\textsuperscript{86} Ibid. at p. 208-209
pleading guilty. The discount in sentence may be as a result of an early plea. Alternatively the accused person may indirectly receive a more lenient sentence than they would have done as a result of pleading to a less serious charge, a smaller number of charges or as a result of a factual narrative presented to the court that is less grave than the facts that would be presented at trial, for example.

Alschuler has criticised the practice of plea bargaining by stating that it,

[M]akes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings. In contested cases, it substitutes a regime of split-the-difference for a judicial determination of guilt or innocence and elevates a concept of partial guilt above the requirement that criminal responsibility be established beyond a reasonable doubt.

This quote overgeneralises and makes unfounded assumptions about what is involved in the practice of plea bargaining. Alschuler assumes that, the judiciary, in issuing sentences that have resulted from some form of plea bargaining do not take into account the conduct or characteristics of the accused, which may be only marginally different following a plea bargain, or not different at all if the plea has involved a charge bargain that does not change the factual narrative. These matters must still be taken into account for the judge to sentence the accused at all and guidelines for sentencing are often in place for judges at the national level.

In considering whether plea bargaining results in sentences that fail to recognise the severity of criminal conduct, it is of assistance in the national context to consider the practice of sentence discounting for guilty pleas in the jurisdictions of Scotland and England where the plea bargaining is frequently practiced. For example, in Scotland,

sentence discounting is governed by Section 196(1) and 196(1A) of the Criminal Procedure (Scotland) Act 1995 (hereinafter the 1995 Act). This section states:

(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account—

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which that indication was given.

(1A) In passing sentence on an offender referred to in subsection (1) above, the court shall—

(a) state whether, having taken account of the matters mentioned in paragraphs (a) and (b) of that subsection, the sentence imposed in respect of the offence is different from that which the court would otherwise have imposed; and

(b) if it is not, state reasons why it is not.

The statute therefore very clearly sets down that it is possible to offer sentence discounts for guilty pleas. The undertone of the legislation suggests that discounts should be offered for guilty pleas as the legislation specifically states that, in circumstances where no sentence discount is given for an early plea, the court must state reasons why the sentence is not discounted. The legislation however falls silent on the question of the amount of discount to be given by the court. This has then fallen to the judiciary to establish.

In the case of Spence v HM Advocate\(^90\) the court sought to establish guidance for the judiciary to supplement Section 196 and stated that '[t]he extent of the discount will be on a sliding scale ranging at its greatest from one third, or in exceptional circumstances

\(^90\) Spence v HMA [2007] HCJAC 64: 2008 JC 174
possibly more, to nil. However, the Scottish courts have relatively recently recanted from the guidance set down in Spence. In Gemmell v HM Advocate, the Lord justice-Clerk said that 'the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons', and 'the broad principle that, in general, the discount will be the greater the earlier the plea is probably a sufficient statement of guidance for most purposes. In Murray v HM Advocate, the court ruled that there should be 'no mandatory sliding scale' and was of the view that any discount 'was reserved to the discretion of the sentencer in every case. The particular judge, Lord Gill, who delivered the opinion in Murray seemed to be in favour of such an approach in order to instil public confidence in the justice system and ensure that large discounts are imposed only for those who deserve such a discount.

It may be difficult to distinguish, for the judge who takes a plea from an accused person, between who 'deserves' to receive the reward of a discounted sentence for an early plea and who does not. Clearly a plea in mitigation following an accused person's guilty plea will provide the court with a background, in terms of the accused person's personal circumstances, difficulties that they have faced in life, information on health problems for the accused person and difficulties with family members. The wider discretion afforded to the judiciary by the decision in Murray leads to uncertainty that could deter an accused person from pleading guilty or entering any kind of plea bargain with the prosecutor. In Scotland, no process exists of sentence bargaining between the accused person and the Prosecutor. The prosecutor has no locus in determining the sentence to be imposed by the court, so despite engaging in a fact or charge bargain with the prosecutor, there will be real uncertainty on the part of the accused person as to whether they will achieve the 'incentive' they hope for in entering a guilty plea.

91 Ibid. at para. 14
92 [2011] HCJAC 129
93 Ibid. at para. 77
94 Ibid. at para. 78
95 Murray v HM Advocate [2013] HCJAC 3 at para. 24
96 See F. Leverick, supra note 14 at p. 342, citing Gemmell v HM Advocate [2011] HCJAC 129 at para. 74
3.7 The Arguments for Plea Bargaining at National Level

There are a number of arguments for permitting plea bargaining at the national level. If an accused person pleads guilty this results in efficiency for the court system and saves resources in the prosecutor's office in order that those preparing the cases can focus on the cases that will be trials. The accused also has the incentive of a promise or likelihood that he will receive a more lenient punishment. There is a strong argument that the accused pleading guilty indicates his remorse and that can mean a lot to victims. Guilty pleas avoid witnesses being inconvenienced by being required to come to court and give evidence, a daunting process for anyone. The matter being resolved more quickly is also of benefit to the accused and victims as they will not have the criminal proceedings hanging over them for a significant period of time.

Critiques of Plea Bargaining

The critiques of plea bargaining are numerous. It has long been recognized, for instance, that a guilty plea arrived at through coercion is invalid. In addition to the invalidity of an improperly arrived at plea bargain, Alschuler (1993) suggests the following as just some of the problems inherent in plea bargaining: Plea bargaining makes an offender's sentence depend more upon tactical decisions than upon the actual crime or the offender's personal characteristics; It substitutes a regime of 'split the difference' for a concern with finding guilt beyond a reasonable doubt; It treats human liberty as a commodity; It leads lawyers to act as judges rather than as advocates as well as making figureheads of judges; It diminishes the value of attorney-client privilege and cheapens the profession of lawyering; It substitutes relatively inexperienced, partisan attorneys for relatively experienced, nonpartisan judges; It circumvents the will of the electorate; It perverts the initial charges brought by prosecutors; It circumvents the will of the legislature by allowing defendants to receive sentences of shorter length than those prescribed for various crimes; It promotes perceptions of corruption; It has perverted the Supreme Court's analysis of constitutional waiver; It has eliminated a culture of listening to and understanding

97 F Leverick, supra note 14 at pp. 339-340
defendants; It has undercut the goals of legal doctrines such as the exclusionary rule, the insanity defense, the right to confrontation, and the right of the press to observe criminal proceedings; It has frustrated both attempts at sentence reform as well as the Due Process revolution of the Warren Court; It has accommodated lazy lawyers allowing them to cut corners; It has increased the opportunities, and undoubtedly the prevalence, of favoritism and personal influence; It conceals systemic abuses and masks dangers of representation by inexperienced lawyers, as well as putting a roadblock in front of paths for lawyers to gain more experience; It promotes inequalities; It results at times in both unwarranted lenience as well as unwarranted harshness; It merges the tasks of adjudication, sentencing, and administration into a single process; It treats legal rights as bargaining chips; and It increases the number of innocent defendants who are convicted.\footnote{Alschuler 1983}
CHAPTER FOUR

SUMMARY OF RESULTS ON THE ROLE OF PLEA BARGAINING IN UGANDA CRIMINAL JUSTICE SYSTEM

1.1 Introduction

It is clear from the arguments outlined that plea bargaining at the national level is a controversial practice, with opinions on the practice often splitting legal academics and practitioners. Whilst engaging in plea bargains has downsides in that the accused, including innocent accused persons, may be pressured into relinquishing their rights by pleading guilty, there are some safeguards in place to ensure that the plea is voluntary, for example the accused’s solicitor being there to represent their interests and having access to the evidence that the prosecutor has through disclosure to ensure that the accused person is getting a ‘fair deal.’ This will also keep the prosecutor’s power in check.

Given the high volumes of cases resolved by way of guilty pleas and plea bargains outlined earlier in this chapter it is clear that both in terms of time and resources, that the criminal justice systems discussed, that are heavily reliant on the prosecutor and defence engaging in plea bargaining, would grind to a halt. The amount of time it would take for accused persons to be brought to trial would be likely to violate their human rights in terms of a right to a trial within a reasonable time. Whilst there is an argument that plea bargaining results in sentences that do not account for the full gravity of the criminal conduct, a balance has to be struck in ensuring that the accused persons are punished, that the criminal justice system runs smoothly and that justice is achieved for victims, whilst avoiding distressing and lengthy court proceedings. It is necessary to achieve a balance between efficiency and justice and as long as this can be done the arguments for plea bargaining outshine those against. However, when dealing with the most serious of international crimes, such as crimes against humanity
and genocide, both the arguments for and against plea bargaining are elevated to a more controversial level.

4.2 Efficiency

Plea bargaining's prime incentive to the prosecutor is an increase in the total efficiency of the criminal justice system.\textsuperscript{99} Efficiency is achieved through maximal conviction of the guilty and dismissal of charges against the innocent. However, efficiency is not the most important aspect for entering into plea negotiations in a particular case, but efficiency is the overriding cause for entering plea negotiations in general.\textsuperscript{100} Hundreds of thousands of criminal cases are processed each year.\textsuperscript{101} In 1998, in the federal district courts alone, 69,769 cases were filed, and 60,958 entered into plea agreements.\textsuperscript{102} Deprived of the plea bargaining option to dispense with the vast majority of these cases, and without another legislatively permitted alternative to a jury trial, the legal system would crumble under the weight of the cases requiring juries and judges.\textsuperscript{103} Furthermore, the prosecutor's failure to enter into plea bargains would be seen as a direct cause of disruption in citizens' lives because an increase in trials would result in increased taxes and more frequent jury duty. Plea bargaining minimizes these consequences by reducing the time a prosecutor spends on a case. Less time spent on each case means that more cases can be handled. For lightening the prosecutor's burden and contributing to overall efficiency, defendants receive reduced sentences when they enter pleas. The law has recognized these reduced sentences as being in accordance with justice.\textsuperscript{104}

\textsuperscript{100} See Alschuler, supra note 6, at 52-58; see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 561-64 (4th ed. 1992).
\textsuperscript{101} See, Pastore, supra note I, at 419, Table 5.21.
\textsuperscript{102} Ibid
4.3 The theoretical arguments for and against plea bargaining at the international level

Theoretically many of the arguments that apply for and against plea bargaining at the national level apply equally at the international level. There are, however, further distinct elements when dealing with international plea bargaining that may elevate some of the arguments for and against the practice.

As demonstrated, when negotiating plea agreements prosecutors have not only the evidence of guilt but also efficiency, budgets and resources in mind. It is clear that ‘bargaining’ when justice is involved attracts much controversy even when dealing with minor offences. Plea bargaining sits even less comfortably with impartial international justice, particularly when dealing with the gravest of international crimes.105 The following chapter will consider how the aforementioned arguments for and against plea bargaining apply at the international level and will also consider any arguments for and against plea bargaining that exist in isolation at the international level.

4.4 The Arguments against Plea Bargaining in International Courts

4.4.1 Pressure to Plead and Condemnation of the Innocent: The International Context

The pressure to plead and condemnation of the innocent arguments against plea bargaining outlined previously in the context of domestic law are applicable in the international criminal law context and are even more compelling given the serious nature of crimes being dealt with at the international level and the likelihood of lengthy prison sentences following conviction for serious international crimes.

On the one hand the accused person may feel under even more pressure given the serious nature of the crimes being dealt with. A conviction for a charge of genocide, is

undoubtedly going to attract a very lengthy sentence. When faced with a very lengthy sentence and even very lengthy trial process that could take years, the accused person may see any opportunity for a more lenient sentence as their least risky option, regardless of their guilt or innocence. On the other hand it must be considered whether genuinely factually innocent accused persons at the international level are going to be likely to plead guilty to such serious crimes as crimes against humanity and genocide that will inevitably attract a very lengthy custodial sentence. This is less of a concern at national level where more minor crimes are being bargained over, where the reduction in sentence is less significant and in some cases may only amount to a lesser financial penalty.

The stakes and sentences are higher in an International forum. On the one hand this may mean that the international accused will feel under pressure to plead to avoid spending the remainder of their life in prison, or, given the likelihood that they will still receive a lengthy prison sentence they may feel that they might as well run the case to trial in the hope of an acquittal. The evidence against the accused person will undoubtedly be a very significant part of the considerations of the accused person in deciding whether to engage in a plea bargain or not. The international accused person may wish to engage in a plea bargain to ensure that the full truth of their criminal conduct does not come out in evidence during the course of a trial, with the consequence of a more severe punishment.

As shown in the context above, it has not been unheard of that accused persons at the ICTY have pled guilty to obtain a more lenient sentence and still maintained their innocence. This indicates that the too much pressure to plead and condemnation of the innocent arguments are still live issues in the international context. There are a number of checks required by the Statutes of the international courts discussed below, to be conducted by the Trial Chambers which ensure that the likelihood of a truly innocent person reaching the stage in international proceedings where they have the opportunity to plead guilty and have this plea accepted is very slim.
One of the official in the criminal justice system said, the argument that plea bargaining runs the risk that the sentence imposed does not reflect the moral gravity of the crime, which might lead to a loss of public protection and of public confidence in the criminal justice system. This argument has even greater force in the international context, where some have argued that plea bargaining is inappropriate for serious international crimes such as genocide and other crimes against Humanity.\textsuperscript{106} Some have argued that a lesser sentence following a plea bargaining in the international criminal law context does not fit the moral gravity of the crime.\textsuperscript{107} On the other hand some have argued that it is simply morally wrong and distasteful to ‘bargain’ over such serious crimes.\textsuperscript{108}

\textbf{4.4.2 Plea Bargaining can result in the failure of the court to Realise the Full Truth and Distorts the Historical Record}

There is also a further argument against plea bargaining that can be made specifically in the international context, which is that plea bargaining might distort the accuracy of the historical record. It is important that any criminal court has, as part of its remit, an aim of establishing what the truth is in terms of whether or not a crime has been committed. It has been stated that 'it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing Process...'.\textsuperscript{109} Pursuing and establishing the truth is therefore particularly important in the context of dealing with international criminal courts where whole communities have suffered as a result of ethnic and religious hatreds.

A significant reason for the formation of the ad hoc international criminal tribunals, ICTY and the ICTR was, in addition to the punishment of those responsible for the gravest of crimes, to discover the truth. If we know the truth about what has happened


\textsuperscript{107} See D. Radosavljevic, Restorative Justice under the ICC Penalty Regime, 2008 L.P.I.C.T. 7(2), 235-255


\textsuperscript{109} U.S. Representative Mrs Albright statement 25 May 1993 UN SCOR, 4 8 h session, 3217 meeting UN Doc. S/PV3217, taken from R.E. Rauxloh, History: The Historical Record in International Criminal Law and Plea Bargaining (2010) ICLR 10 pp. 737-770 at p. 737
and caused a mass atrocity, for example, then we can take steps to deter and prevent this happening again in the future.

However, it must be considered whether a criminal prosecution and trial can and should ever be the mechanism for establishing the truth and creating a thorough accurate historical record. If it cannot and should not, then one of the main arguments against plea bargaining in an international criminal court is inherently weak. There are inevitable limitations involved in using an international criminal court to establish an accurate historical record. Historians are generally those responsible for studying and collating events in the past. Lawyers do not tend to be trained or qualified in recounting historical matters, nor is it common practice for historians to provide expert testimony. The jurisdiction of the ad hoc international tribunals has been restricted to certain periods of time and geographical areas, meaning that a full picture of the conflict outwith the time periods and locations, or the whole truth, is not something that is realistically achievable in any case at those tribunals.

4.4.3 Prosecutorial Incentives to Entering into a Plea Bargain

The prosecutor has many incentives to enter into plea bargains. When a prosecutor enters into plea bargains, he is able to handle more cases; conviction rates soar; and most importantly, more criminals—if they are out on bail or otherwise would not be in jail—are more quickly removed from the streets. The public confidence in the

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111 Ibid.
112 Rauxloh, Ibid. at p. 742, however she acknowledges that the ICC covers a wider jurisdiction (after 1 July 2002). The jurisdiction and significance in association with plea bargaining will be examined further in chapter 6 below in the context of the International Criminal Court.
113 See generally Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50 (1968);
114 See Pastore, supra note I, at 419,423, Table 5.21, 5.25. Convictions by plea were 91 percent percent and 87 percent in state and federal proceedings, respectively.
government rises accordingly,\textsuperscript{116} and, less altruistically, the prosecutor advances his own career through a higher conviction rate.\textsuperscript{117} These incentives, coupled with the near absence of disincentives, lead to the logical result that prosecutors frequently try to enter plea bargain agreements.

**Convictions:** Convictions are guaranteed by a plea bargain. Although trials are essential to our system and protected by the Constitution,\textsuperscript{118} the chances for an acquittal, a mistrial, a hung jury, jury nullification, a witness's refusal to testify, and the loss of evidence, all contribute to the prosecutor's hesitation to go to trial. Each one of these possible results indicate that the prosecutor has misallocated his resources and time in deciding to prosecute the case.\textsuperscript{119}

**Assistance:** Frequently, the prosecutor will enter into negotiations with a defendant with the hope of gaining information necessary to indict and convict other criminals. The prosecutor must then balance whether it is prudent to offer a deal to the cooperator in exchange for evidence to convict the defendant guilty of a graver crime. The plea bargain struck often provides that the concessions offered to the defendant will reflect the value of the evidence after it has been proffered.\textsuperscript{120}

**Finances:** The prosecutor is influenced by financial motives. While supported by government financing, his financial resources are not infinite\textsuperscript{121} Limited financing encourages the prosecutor to offer plea bargains. If the defendant has rejected the offer, the prosecutor must consider whether he is willing to expend resources on a trial.


\textsuperscript{118} See U.S. CONST. art. III, amend. VI.

\textsuperscript{119} See ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 177 (3d ed. 1996). Even in the case of a conviction, the prosecutor has wasted resources in not securing the conviction through a plea.

\textsuperscript{120} See, e.g., United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973).

\textsuperscript{121} Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 CALIF. L. REV. 1471, 1495 (1993).
CHAPTER FIVE

RECOMMENDATION AND CONCLUSION

5.1 Conclusion

The study argues that the plea bargaining system is, in part, responsible for both the large Uganda prison population as well as the disproportionately large number of minorities who make up that population. It is based on the premise that self-serving decisions made by self-interested actors can aggregate in ways detrimental to those same decision makers. How people make decisions is a very broad topic. In the traditional simplified rational choice model, actors make decisions by weighing costs and benefits to find the greatest payoff. Determining costs and benefits, however, is subjective for each person. Indeed, social psychologists have added a great deal of nuance to understanding how people actually make decisions. In this model, not only will a defendant's subjective beliefs about the criminal justice system influence his decisions, but his view of his particular predicament will as well. Indeed, the prosecutor's, the defense attorney's, and the judge's views will also matter.

The observation that, not only do Blacks fare worse in the criminal justice system than whites, but that this would influence how African Ugandans would individually approach the institution is not new. Indeed, over a century ago DuBo is made the following observations: "Courts usually administer two distinct sorts of justice: one for whites, and one for Negroes ... The methods of punishment of Negro criminals is calculated to breed crime rather than stop it" (DuBois 1904). Surveys of Ugandas show that, compared to whites, Blacks distrust the criminal justice system. Indeed, in many minority communities, defendants can observe that those around them have generally faired poorly once entering the criminal justice system. That is, a Black defendant will likely estimate his chances at trial to be lower than for a white defendants based upon the high conviction rates of people around him.
Plea bargaining though useful in cost, time and human resources savings, requires some edge trimming even in the Uganda.

Uganda has reached a stage in its developmental process when it has to face the challenges facing its justice delivery system and explore viable options to move its legal system forward.

Government must not leave plea bargaining as a practice of courts, and go further to make legislation.

There is need to look at some other forms of punishments including non-custodial punishments using guidelines on sentencing to obliterate or eclipse the likelihood of gross abuse by the courts and provide scope of operation.

5.2 Recommendations

More effort should be made by counsel to furnish the Courts with relevant facts which could enable the judge to pass an appropriate sentence.

Judges should devote more time in reviewing and where necessary inquire from relevant materials necessary before passing their sentence.

The number of years of imprisonment awarded should always appear so that anybody carrying out research on sentencing practice could appreciate the trend and the degree of the variation in sentencing.

Those responsible for reporting cases should endeavour to remember to always include aspects relating to “Allocutus”, bearing in mind that some still include it at the moment, it should be a regular feature.

It should be mandatory that judges should give reasons for the sentences imposed to be able to advert to its guiding principles.
Practice direction on sentencing should be laid down by the superior courts, more appropriately the Court of Appeal as the need arises especially with respect to prevalent offences.

Prosecuting counsel should, whenever necessary, emphasize the aggravating factors, by showing for example the prevalence of the offence and urge a deterrent policy.

Judges should familiarise themselves with the conditions in our prisons and should visit them from time to time to get firsthand knowledge of the sentence involved.

Seminars should be organized from time to time for judges to deliberate on sentencing practices.

Statistics of reports of after effects of particular sentences should be kept. These may form the basis of useful discussion at seminars.
BIBLIOGRAPHY

Books

Archbold J. *Pleading and Evidence in Criminal Cases* (1st Am. ed. 1824)


Bohlander M. *Plea-Bargaining before the ICTY*, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Richard May et al. eds., 001)


Newman D. Conviction: *The Determination of Guilt or Innocence Without Trial* (1966)


Schabas W. A. *An Introduction to the International Criminal Court* (Cambridge Univ. Press 2d ed. 2004)


Hodzik R. Living the legacy of mass atrocities: victims' perspectives on war crimes tribunals, 2010 J.I.C.J. 114

Cases

Domestic cases

Brady v. United States, 397 U.S. 742 at 748 (1970)
Commonwealth v. Battis, 1 Mass. 95 (1804)
Gemmell v HM Advocate [2011] HCJAC 129
Murray v HM Advocate [2013] HCJAC 3
United States v. Dixon 1 D.C. (1 Cranch) 414 (1807)
Rex v Warrickshall (1783)
Wight v. Rindskopf, 43 Wis. 344 at 357 (1877)
In re Winship, 397 US 358 (1970)

International Cases

Prosecutor v Akayesu Case No. ICTR 96-4-T
Prosecutor v Milan Babic Case No. IT-03-72-S
Prosecutor v Paul Bisengimana Case No. ICTR 00-60-T
Prosecutor v Erdemovic Case No. IT-96-22-Tbis, IT-96-22-A
Prosecutor v Jelisic Case No. IT-95-10-PT
Prosecutor v Kambanda Case No. ICTR-97-23-S
Prosecutor v Germain Katanga ICC-01/04-01/07
Prosecutor v Kayishema & Ruzindana, Case No. ICTR 95-1-T