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Critical Review of Jurisprudence: An Occasional Series

Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation

Janine Natalya Clark*

Abstract

To date, 20 defendants at the International Criminal Tribunal for the former Yugoslavia (ICTY) have pleaded guilty. Such guilty pleas have generally been accepted by the Trial Chambers as mitigating circumstances on the grounds, inter alia, that they can facilitate reconciliation in the former Yugoslavia. Yet as these guilty pleas are frequently induced through plea bargains, in which important concessions are accorded to defendants, this necessarily raises fundamental questions about whether guilty pleas can and do in fact foster reconciliation. The purpose of this article, therefore, is to explore this posited link between guilty pleas and reconciliation which, in turn, is one dimension of the broader linkage that the Tribunal makes between its work and reconciliation. It will focus on two particular claims made by the Tribunal – that guilty pleas aid reconciliation by helping to establish the truth and that when defendants acknowledge responsibility for their crimes, this may help to provide victims with closure. It will seek to demonstrate that both of these assertions are flawed, and will conclude by addressing some of the broader issues and questions raised by the ICTY's use of plea bargains, in particular the critical relationship between plea bargains and outreach work.

Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) was created in 1993 to try 'Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Ter-

ritory of the former Yugoslavia since 1991'. It has indicted 161 such persons and concluded proceedings against 117 accused. While the majority of these pleaded not guilty, 20 defendants have pleaded guilty. Such guilty pleas have generally been

* Department of International Politics, Aberystwyth University. UK Email: jjc@aber.ac.uk.

accepted by the Trial Chambers as mitigating circumstances on the grounds, *inter alia*, that they can facilitate reconciliation in the former Yugoslavia. Yet as these guilty pleas are frequently induced through plea bargains, in which important concessions are accorded to defendants, this necessarily raises fundamental questions about whether guilty pleas can and do in fact foster reconciliation. The purpose of this article, therefore, is to explore this posited link between guilty pleas and reconciliation which, in turn, is one dimension of the broader linkage that the Tribunal makes between its work and reconciliation.¹

The article will begin with a general overview of plea agreements. It will argue that the increased usage of plea bargains,² and in particular their reputed practical benefits, should be understood in the context of the Tribunal's completion strategy and the pressure it faces from the UN to complete its work by 2011.³ Drawing

heavily upon key ICTY judgments, section 2 will examine the Tribunal's claim that guilty pleas aid reconciliation by helping to establish the truth. It will suggest that this argument is problematic because, due to plea bargaining, and more specifically charge bargaining, the 'truth' that is established through guilty pleas will often be only an incomplete truth. The final section will address the Tribunal's contention that guilty pleas facilitate reconciliation on the basis that when defendants acknowledge responsibility for their crimes, this may help to provide victims with closure. Challenging this claim, it will argue that the reconciling potential of such acknowledgements is seriously undermined when defendants receive reduced prison sentences. It will conclude by identifying and discussing some of the broader issues and questions raised by the ICTY's use of plea bargains, in particular emphasizing the critical relationship between plea bargains and outreach work.

1 Background

The ICTY Statute does not explicitly address the issue of guilty pleas. Article 20(3) simply states, 'The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.' Dražen Erdemović, a soldier in the 10th Sabotage Detachment of the Bosnian Serb Army operating in the region of Zvornik, in north-eastern Bosnia, was the first defendant to plead guilty at the ICTY, on 31 May 1996. Subsequently, during the Fourteenth Plenary Session of 20 October and 12 November 1997, the ICTY adopted Rule 62*bis*. This declares that:

¹ In his annual report to the Security Council in 1994, the Tribunal's first President, Antonio Cassese, declared that '[t]he role of the Tribunal cannot be overemphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace': *International Tribunal for the Former Yugoslavia, First Annual Report*, UN doc. IT/68 (28 July 1994), at para. 16.

² According to Henham and Drumbl, 'The plea bargain ... plays an important role in the praxis of the ICTY, securing over one-third of all convictions': Henham and Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia', 16 *Criminal Law Forum* (2005) 53.

³ To cite Scharf, 'The use of both types of plea bargains [i.e., sentence bargaining and charge bargaining] is likely to further accelerate in response to pressure from the UN Security Council for the Tribunals [both the ICTY and its sister tribunal, the International Criminal Tribunal for Rwanda] to wrap up their work ...': Scharf, 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals', 2 *J Int'l Criminal Justice* (2004) 1074.

If an accused pleads guilty in accordance with Rule 62 (vi) or requests to change his or her plea to guilty and the Trial Chamber is satisfied that (i) the guilty plea has been made voluntarily, (ii) the guilty plea is informed, (iii) the guilty plea is not equivocal and (iv) there is a sufficient factual basis for the crime and for the accused's participation in it, either on the basis of independent indicia or in lack of any material disagreement between the parties about the facts of the case, the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

While Erdemović had pleaded guilty to murder (a crime against humanity), this was not the result of a plea agreement. The defendant had confessed to his involvement in the massacre of 1,200 Muslim men at a collective farm near Pilica, in the Zvornik municipality, 'at a time when no authority was seeking to prosecute him in connection therewith, knowing that he would most probably face prosecution as a result',⁴ and his guilty plea was not induced through the granting of concessions.⁵ Indeed, the ICTY's first

President, Antonio Cassese, maintained that plea agreements were not permitted in the Tribunal's proceedings.⁶ However, after a number of defendants following Erdemović also pleaded guilty,⁷ Rule 62*ter* was adopted on 13 December 2001. This states:

(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber: (i) apply to amend the indictment accordingly; (ii) submit that a specific sentence or sentencing range is appropriate; (iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph A.

Thus, in its sentencing judgment in the trial of Momir Nikolić, the former assistant commander and chief of security and intelligence of the Bratunac Brigade of the Bosnian Serb army, the Trial Chamber declared that it had 'no doubt that plea agreements are *permissible* under the

⁴ *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-*Tbis*, Second Sentencing Judgment (5 Mar. 1998), at para. 21.

⁵ The Trial Chamber did decide, however, that for the remainder of the proceedings it would dismiss the second count against the defendant – namely violations of the laws or customs of war – which had been charged as an alternative to the first count of a crime against humanity. The Appeals Chamber subsequently found that Erdemović's guilty plea was not informed, and accordingly remitted the case to a new Trial Chamber. In his second trial, Erdemović once again pleaded guilty, but this time to murder as a violation of the laws or customs of war. The Prosecutor withdrew the alternative count of a crime against humanity, which followed a plea agreement entered into between the parties on 8 Jan. 1998.

⁶ In a statement on 11 February 1994, Cassese rejected the possibility of allowing plea bargains. In his words, 'we always have to keep in mind that this tribunal is not a municipal criminal court but one that is charged with trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be': cited in V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995), ii, at 649, 652.

⁷ Goran Jelišić, Stevan Todorović, Duško Sikirica, Damir Došen, and Dragan Kolundžija.

Statute and Rules of the Tribunal'.⁸ What is more, plea agreements – that is to say 'bargaining through which a defendant agrees to plead guilty in exchange for sentencing or charging reductions'⁹ – have now become an increasingly important part of the ICTY's proceedings, not least for practical reasons.

By entering a guilty plea, a defendant waives certain procedural rights, including the right to plead not guilty, the right to require the Prosecution to prove the charges made against him at a fair and public trial, and the right to put forward a defence to those charges at such a public trial. Admissions of guilt, which have been accepted by the ICTY as mitigating circumstances¹⁰ even when they occur late in the proceedings,¹¹ thereby save the Tribunal a considerable amount of valuable time and resources. Hence, the judges have strongly emphasized the practical advantages of

guilty pleas.¹² As Judges McDonald and Vohrah argued in their dissenting judgment in Erdemović's appeal, guilty pleas should:

find a ready place in an international criminal forum such as the International

9/1-S, Sentencing Judgment (31 July 2001), at para. 81. However, in its judgment sentencing Duško Sikirica and Damir Došen, who had worked at the Keraterm detention camp in north-western Bosnia as a commander of security and shift leader respectively, the Trial Chamber found that notwithstanding the tardiness of the defendants' guilty pleas, they should nevertheless receive some credit for them. It further found that a third defendant, Dragan Kolundžija, a former shift commander at the Keraterm camp who entered a guilty plea before the commencement of his case, 'should receive close to full credit for his guilty plea': *Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija*, Case No. IT-95-8-S, Sentencing Judgment (13 Nov. 2001), at paras. 151, 193, and 228. In order to avoid inconsistencies, Beresford suggests that '[t]he Chambers should consider applying a graduated system whereby an accused who indicated during the initial appearance that he wished to plead guilty receives a greater discount than one who pleaded guilty on the date set for the trial, having previously indicated his intention to fight the case': Beresford, 'Unshackling the Paper Tiger – The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', 1 *Int'l Criminal L Rev* (2001) 65.

⁸ *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgment (2 Dec. 2003), at para. 57.

⁹ Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Courts', 151 *U Pennsylvania L Rev* (2002) 10.

¹⁰ While there is nothing in the Tribunal's Rules of Procedure and Evidence on what count as mitigating factors, with the exception of substantial co-operation with the Prosecution, a clear jurisprudence has developed on this issue. Some of the mitigating factors recognized by the ICTY include expressions of remorse (Plavšić, Erdemović, Blaškić, Simić, Bralo), voluntary surrender (Simić, Bralo, Plavšić), age (Erdemović), family circumstances (Babić, Bralo), duress (Erdemović), prior good character (Momir Nikolić), and post-conflict conduct (Plavšić).

¹¹ In its sentencing of the former chief of police in Bosanski Šamac, Stevan Todorović, who entered his guilty plea 26 months after his initial appearance at the ICTY, the Trial Chamber found that, 'if pleaded at a later stage of the proceedings, or even after the conclusion of the trial, a voluntary admission of guilt will not save the International Tribunal the time and effort of a lengthy trial': *Prosecutor v. Stevan Todorović*, Case No. IT-95-

¹² In its sentencing judgment in the trial of Momir Nikolić, the Trial Chamber took 'note of the fact that other accused have been given credit for pleading guilty before the start of a trial or at an early stage of the trial because of the savings of Tribunal resources': *Prosecutor v. Momir Nikolić*, *supra* note 8, at para. 151. However, while appreciating the saving of Tribunal resources, the judges also emphasized that '[t]he quality of justice and the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised... Thus, while saving of time and resources may be the result of guilty pleas, this consideration should not be the main reason for promoting guilty pleas through plea agreements': *supra* note 8, at para. 67.

Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations, itself dependent upon the contributions of the United States.¹³

According to Jørgensen, therefore, ‘it may be stated tentatively that the guilty plea has come of age, which represents a triumph for pragmatism’.¹⁴ The practical benefits of guilty pleas, moreover, are especially apparent in the context of the Tribunal’s completion strategy. As an *ad hoc* tribunal, the ICTY – like its sister tribunal the International Criminal Tribunal for Rwanda (ICTR) – was never intended to be a permanent court, and in 2003 both Tribunals adopted their completion strategies. These strategies were subsequently endorsed by the UN Security Council in Resolutions 1503 (August 2003) and 1534 (March 2004). As a consequence ‘the International Tribunals are now compelled to adhere to their respective completion strategies,¹⁵ notwithstanding any judicial and practical challenges that may arise in fulfilling them’.¹⁶

The pressure on these Tribunals to complete their work¹⁷ undoubtedly enhances the practical benefits of plea bargains, as they provide ‘an obvious shortcut to the Tribunal’s busy schedule’.¹⁸ In his report to the UN Security Council on 10 October 2003, for example, the ICTY’s then President, Theodor Meron, indicated that the Tribunal’s first instance trials could not be completed by the end of 2008 and explained that the exact date when these trials could be concluded depended on several different factors, including the number of guilty pleas entered. Without such pleas, he insisted that to deal with all the current indictees ‘would probably require trials at least through 2009’.¹⁹ It can thus be seen that there is a link between guilty pleas and the expeditiousness with which cases are dealt with, thereby highlighting the usefulness of plea bargains in the context of the Tribunals’ completion strategies.

Notwithstanding their practical advantages, the controversy regarding plea bargains is that they typically entail the granting of certain concessions to the

¹³ *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Appeal Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 Oct. 1997), at para. 8.

¹⁴ Jørgensen, ‘The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea’, 15 *Leiden J Int’l L* (2002) 407.

¹⁵ Pursuant to these strategies, the Tribunals were to complete all investigations by 2004, all trials by the end of 2008, and all appeals by the end of 2010.

¹⁶ Mundis, ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’, 99 *AJIL* (2005) 143.

¹⁷ For example, UN SC Res. 1534, at para. 6, requests the ICTY and ICTR ‘to provide to the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions’.

¹⁸ Dixon and Demirdjian, ‘Advising Defendants about Guilty Pleas before International Courts’, 3 *J Int’l Criminal Justice* (2005) 694.

¹⁹ Cited in Raab, ‘Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals’, 3 *J Int’l Criminal Justice* (2005) 86.

defendant.²⁰ While plea bargaining is widespread in adversarial legal systems, for example in England and the United States,²¹ ‘however one views the desirability of such concessions in the domestic context, they appear particularly unseemly in the international criminal context given the gravity of the crimes being prosecuted’.²² Indeed, in its sentencing judgment in the trial of Momir Nikolić, the Trial Chamber itself observed that ‘[e]ven in criminal justice systems where the use of plea agreements is common ... its use is less frequent in cases of serious felonies or in the most notorious cases’.²³

In view of the gravity of the crimes with which the ICTY is dealing – namely crimes against humanity, violations of the laws or customs of war, grave breaches of the Geneva Conventions, and genocide – there must, therefore, be other justifications for guilty pleas and plea bargains *beyond* practical considerations. Thus, the judges have also repeatedly stressed, *inter alia*, that guilty pleas spare witnesses from having to travel to The Hague to give evidence,²⁴ and that they are important for

helping to establish the truth.²⁵ Linked to the latter claim, they have also frequently made the argument that guilty pleas aid reconciliation, thus furthering one of the Tribunal’s three official goals, namely the restoration and maintenance of peace in the former Yugoslavia.²⁶

This contention that guilty pleas facilitate reconciliation should be viewed in the context of a broader debate in the transitional justice literature regarding the relationship between retributive justice and peace/reconciliation. For supporters of international war crimes tribunals, there is a positive link between criminal trials and reconciliation. Moghalu, for example, maintains that

the attendant stress which this may incur’: *Prosecutor v. Stevan Todorović*, *supra* note 11, at para. 80. Similarly, in its judgment sentencing Miroslav Bralo, the judges found that ‘[s]ubstantial human and practical benefits flow from a guilty plea, particularly one tendered at an early stage in the proceedings. Victims and witnesses who have already suffered enormous psychological and practical harm are not required to travel to The Hague to recount their experiences in court, and potentially re-live their trauma’: *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-S, Sentencing Judgment (7 Dec. 2005), at para. 22.

²⁰ For example, ‘[t]he average sentence for an accused having pled guilty before the ICTY is approximately 11 years of imprisonment, whereas the average for cases that go to trial is approximately 17 years of imprisonment’: Dixon and Demirdjian, *supra* note 18, at 681.

²¹ Combs notes that ‘approximately 90% of all American criminal cases are disposed of by a guilty plea secured through plea bargaining ... Such high guilty plea rates are commonly believed necessary in order for the system to function’: Combs, *supra* note 9, at 19.

²² *Ibid.*, at 7.

²³ *Prosecutor v. Momir Nikolić*, *supra* note 8, at para. 47.

²⁴ In the trial of Todorović, e.g., the Trial Chamber highlighted ‘the important factor that by pleading guilty, an accused relieves victims and witnesses of the necessity of giving evidence with

²⁵ In its sentencing of Todorović, the Trial Chamber stressed that a guilty plea ‘is always important for the purpose of establishing the truth in relation to that crime’: *supra* note 11, at para. 81. Similarly, in the trial of Miroslav Deronjić, the former president of the crisis staff in the municipality of Bratunac it was pointed out that, ‘in contrast to national legal systems where the reasons for mitigating a punishment on the basis of a guilty plea are of a more pragmatic nature, the rationale behind the mitigating effect of a guilty plea in this Tribunal is much broader, including the fact that the accused contributes to establishing the truth about the conflict in the former Yugoslavia and contributes to reconciliation in the affected communities’: *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgment (30 Mar. 2004), at para. 236.

²⁶ The Tribunal’s other goals are to deliver justice and to deter further crimes.

‘[w]hen justice is done, and seen to be done, it provides a catharsis for those physically or psychologically scarred by violations of international humanitarian law. Deep-seated resentments – key obstacles to reconciliation – are removed and people on different sides of the divide can feel that a clean slate has been provided for.’²⁷ Many of the discussions on this topic, however, are merely theoretical and not empirically grounded. Indeed, this is an area in which there is a significant lack of empirical research.²⁸ Nevertheless, the ICTY has frequently made a positive link between the work that it is doing and reconciliation in the former Yugoslavia.²⁹ Graham Blewitt, for example, the Tribunal’s former deputy Prosecutor, maintains that ‘[t]he ICTY was established, in part, as a measure for the maintenance of international peace and security, through its ability to contribute to reconciliation in the territorial

States torn by violence and disunity’;³⁰ and in an address to the NATO Parliamentary Assembly in October 2007, the Tribunal’s then chief Prosecutor, Carla Del Ponte, declared that ‘[t]he Tribunal was established as a measure to restore and maintain peace and promote reconciliation’.³¹

It has never been entirely clear, however, what the Tribunal actually understands by reconciliation³² or who it is seeking to reconcile – individuals, communities, or whole societies. More importantly, it is necessary to question just how realistic – that is to say achievable – this particular goal actually is, not least because the Tribunal has never had sufficient resources to fully achieve the peace-building role that the UN has assigned to it.³³ The Tribunal is located

²⁷ Moghalu, ‘Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions’, in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (2004), at 216.

²⁸ To cite Byrne, ‘[t]he rhetorical potential of international criminal justice to transform post-atrocity societies is separated by a gulf from an empirical understanding of the evolving dynamics of international prosecutions and their impact on national communities’: Byrne, ‘Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda’, 14 *European Rev* (2006) 495.

²⁹ UN SC Res. 827 (25 May 1993) itself, however, makes no mention of reconciliation. It simply states that the Security Council is ‘[c]onvinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law ... would contribute to the restoration and maintenance of peace’.

³⁰ Blewitt, ‘The International Criminal Tribunal for the Former Yugoslavia and Rwanda’, in M. Lattimer and P. Sands (eds), *Justice for Crimes Against Humanity* (2006), at 151.

³¹ Del Ponte, ‘Address by Tribunal Prosecutor Carla Del Ponte to NATO Parliamentary Assembly’ (2007), available at: www.un.org/icty/press-real/2007/pr1193e.htm.

³² There is a vast literature on reconciliation, but very little consensus on how to define the concept. As Bloomfield highlights, ‘[r]econciliation’s basic problem is that no one agrees how to define it or do it’: Bloomfield, ‘On Good Terms: Clarifying Reconciliation’, 14 *Berghof Report* (2006) 4. The relationship between criminal trials and reconciliation is also ambivalent. To cite Alvarez, ‘[w]hat “national reconciliation” means or requires under the international legal paradigm is not altogether clear’: Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’, 24 *Yale J Int’l L* (1999) 437.

³³ According to the first ICTY chief Prosecutor, Richard Goldstone, ‘I had assumed that a United Nations tribunal, which was a sub-organ of the Security Council itself and established by the unanimous vote of its members, would be adequately funded and well supported by the international body. That, unfortunately, turned out to be a naïve assumption’: R. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000), at 77.

in The Hague in the Netherlands, not in the former Yugoslavia; its working languages are English and French, not Bosnian/Croatian/Serbian; and while it uses a mixture of the adversarial common law system and the inquisitorial civil law system, it leans towards the former, a system with which people in the former Yugoslavia – where the civil law system is applied – are unfamiliar.³⁴ Hence, if the Tribunal is to aid reconciliation in the former Yugoslavia, it is essential that people in the region are well informed about it and understand its proceedings and judgments. To cite the former ICTY deputy Prosecutor Graham Blewitt, ‘It is important that the elaborate factual discussions and findings in ICTY judgments be properly received in the republics of the former Yugoslavia, so that their reconciliatory potential is appropriately made use of in those war-torn societies, especially for the benefit of their emerging generations of citizens.’³⁵

From the outset, therefore, the ICTY needed to reach out to local people in the former Yugoslavia. Its outreach department, however, was created only in 1999 – too little too late – and it is staffed by just two people. In addition, the outreach department has never received funding from the UN, and instead has had to rely

exclusively on voluntary donations.³⁶ This has undoubtedly compromised the Tribunal’s outreach work, with the result that ‘[t]he outreach of the ICTY to the victim societies has evidently failed to bridge the gap in knowledge and appreciation of its work at the grassroots level’.³⁷ For example, the author’s recent research in Bosnia and Herzegovina (BiH)³⁸ found that,

³⁶ According to the former ICTY deputy Prosecutor, David Tolbert, ‘[t]he Outreach Program has never received funding from the United Nations and has had to rely exclusively on donations, which illustrates the view that the tribunal’s impact on the region in general, let alone on the region’s justice systems, is of marginal interest to UN policymakers’: Tolbert, ‘The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings’, 26 *The Fletcher Forum of World Affairs* (2002) 13.

³⁷ Zacklin, ‘The Failings of Ad Hoc International Tribunals’, 2 *J Int’l Criminal Justice* (2004) 544. Based not in Rwanda but in Arusha in Tanzania, the ICTR, which also operates in English and French and not in the local Rwandan language of Kinyarwanda, faces similar problems. To cite Rigby, ‘one of the complaints against the International Criminal Tribunal for Rwanda that has been sitting in Arusha for so many years to so little effect has been that this process has been too far “removed” from the Rwandan people and from the Rwandan state as well insofar as its bench is composed of international jurists from around the world’: Rigby, ‘Civil Society, Reconciliation and Conflict Transformation in Post-War Africa’, in O. Furley and R. May (eds), *Ending Africa’s Wars: Progressing the Peace* (2006), at 58.

³⁸ Between 11 May 2008 and 29 August 2008, the author conducted semi-structured interviews with 65 victims throughout BiH. The term ‘victims’ is defined as including those who lost close members of their families, those who spent part of the war in concentration camps, landmine victims, those who were raped, and those who were ethnically cleansed from their homes. Of these 65 interviewees, 35 were women and 30 were men. In terms of ethnicity, 52 interviewees were Bosnian Muslims, eight were Bosnian Serbs and five were Bosnian Croats. The interviews took place in north-eastern BiH (Tuzla), Sarajevo (including Iljaš and Ilidža), eastern BiH (Foča,

³⁴ It is not only victims and defendants who are unfamiliar with the common law system, however. In addition, ‘defense attorneys come to the Tribunal under-equipped to represent their clients effectively given their unfamiliarity with the process of the court. Confronted with a largely foreign trial and dispute-resolution system, many attorneys proceed to litigate cases involving serious violations of international law with neither the knowledge nor the skills necessary to perform their assigned tasks adequately’: Cook, ‘Plea Bargaining at The Hague’, 30 *Yale J Int’l L* (2005) 498.

³⁵ Blewitt, *supra* note 30, at 151.

overall, victims – a significant number of whom are still searching for the remains of their missing loved-ones³⁹ – remain fundamentally disconnected from the Tribunal, viewing it as a remote and alien institution that has little relevance to their everyday lives.

This problem, moreover, has arguably been exacerbated since the adoption of the Tribunal's completion strategy. The ICTY's outreach department is now primarily focused on capacity-building work, that is to say on developing the capacity of local courts in the former Yugoslavia to prosecute war crimes. Given that transfer of cases back to national courts – pursuant to Rule 11*bis* of the Tribunal's Rules of Evidence and Procedure – is a critical component of the Tribunal's completion strategy, such capacity-building work is extremely important. However, such work needs to complement, rather than

supersede, fundamental outreach work with local communities in the former Yugoslavia. It cannot be over-emphasized that 'the relationship between a tribunal and the local populace is a critical dimension of its success'.⁴⁰

While it is open to question whether the ICTY has sufficiently heeded this point, its judges have made a positive link between guilty pleas and reconciliation. For example, in the trial of Dragan Obrenović, the former chief-of-staff and deputy commander of the 1st Zvornik Infantry Brigade of the Drina Corps of the Bosnian Serb army, the Trial Chamber found that the defendant's guilty plea 'is indeed significant and can contribute to fulfilling the Tribunal's mandate of restoring peace and promoting reconciliation'.⁴¹ This posited linkage between guilty pleas and reconciliation can be broken down into two core sub-claims, namely that guilty pleas establish the truth and that they offer a degree of closure to victims through the defendants' acknowledgement of the crimes committed. It is submitted, however, that because guilty pleas are typically the result of plea bargains, in which the Prosecution agrees either to drop certain charges and/or to recommend a prison sentence within a particular range, the reconciliatory potential of such pleas is thus undermined.

Višegrad, Goražde, Srebrenica, Potočari, Bratunac, Kravica), central BiH (Ahmići, Gornji Vakuf-Uskoplje, Milići), north-western BiH (Prijeđor, Kozarac, Trnopolje, Sanski Most), and western Hercegovina (Mostar, Čapljina, Stolac). Only 11 of the interviewees spoke English. The remainder of the interviews were conducted by the author in the local language (i.e. Bosnian/Croatian/Serbian). All interviews were recorded and transcribed, except in those cases where interviewees opposed this. In such instances, the author relied on hand-written notes. Most interviews lasted approximately one hour, but some were closer to two hours.

³⁹ According to the International Commission on Missing Persons (ICMP) in Sarajevo, which was established in 1996 on the initiative of the then US President Bill Clinton, '[o]ut of a population of 3.4 million at the end of the conflict in 1995, an estimated 30,000 persons [in BiH] were unaccounted for. Today, the fates of approximately 13,500 persons remain unknown. Most are still in mass graves': ICMP, *Background Document on the Work of the International Commission on Missing Persons* (2007), at 11.

⁴⁰ Fletcher and Weinstein, 'A World Unto Itself? The Application of International Justice in the Former Yugoslavia', in E. Stover and H.M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004), at 44.

⁴¹ *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgment (10 Dec. 2003), at para. 11.

2 Truth, Reconciliation, and Charge Bargaining

The ICTY's three Trial Chambers have repeatedly claimed that when defendants enter a guilty plea this is important for ascertaining the truth, and that truth, in turn, is a fundamental element of reconciliation in the former Yugoslavia.⁴² In its judgment sentencing Biljana Plavšić, for example, the former co-President of the *Republika Srpska*, the Trial Chamber emphasized 'the role of the guilty plea of the accused in establishing the truth in relation to the crimes and furthering reconciliation in the former Yugoslavia';⁴³ and in the second judgment sentencing Dražen Erdemović, the judges highlighted that '[d]iscovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process'.⁴⁴ The direct correlation that the ICTY makes between truth and reconciliation, however, is problematic for at least two major reasons. First, truth is a contested concept, and therefore has no

inherent positive value; and, secondly, the ICTY practice of charge bargaining means that the 'truth' that is established is often only an incomplete truth.

A Truth is a Disputed Concept

As the Erdemović trial demonstrates, guilty pleas can play a significant role in establishing the facts. In pleading guilty, Erdemović furnished the Tribunal with valuable information about four events – hitherto unknown to the Prosecution – in Srebrenica, Vlasenica, the Branjevo farm in Pilica, and in the public building in Pilica, and thus greatly aided the Office of the Prosecutor (OTP) in its investigations. Furthermore, according to Tieger and Shin, 'plea agreements can generate a contribution to the historical record of inestimable value – the indispensable perspective of the perpetrator'.⁴⁵ Certainly, the written statements which frequently accompany defendants' guilty pleas arguably offer some level of insight into why horrific crimes were committed in the former Yugoslavia during the 1990s.

In his statement, for example, Darko Mrđa, a former member of the special Serbian police unit in the town of Prijedor in north-western Bosnia, wrote, 'In the beginning of the 1990s, things changed abruptly. Radio, television, press, everything was full of threats against Serbs and against Muslims, depending on whose media it was ... Believing that we were faced with the same threat as Jasenovac in the past, I responded to the mobilisation'. He added, 'Your Honours, I hope you will believe me. I did not commit this because I wanted to commit this or I

⁴² Some defendants have also made a link between truth and reconciliation. In the written statement appended to his guilty plea, for example, the late Milan Babić, the former President of the Republic of Serbian Krajina, explained, 'Your Honours, I can't say anything else but that I'm very sorry for what I did. I've appeared before this Tribunal and I've told the truth, and I believe that this will help to achieve reconciliation among the peoples in the Balkans': Statement of Milan Babić (2 Apr. 2004), *Case Information Sheet, 'Republic of Serbian Krajina' (IT-03-72)*.

⁴³ *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39 & 40/1-S, Sentencing Judgment (27 Feb. 2003), at para 73.

⁴⁴ *Prosecutor v. Dražen Erdemović*, *supra* note 4, at para. 21.

⁴⁵ Tieger and Shin, 'Plea Agreements in the ICTY: Purpose, Effects and Propriety', 3 *J Int'l Criminal Justice* (2005) 671.

enjoyed this. I did not hate these people. I did it because I was ordered to do so.⁴⁶ In a similar vein, in Erdemović's written statement he maintains that '[b]ecause of everything that happened I feel terribly sorry, but I could not do anything. When I could do something, I did it.'⁴⁷

One of the most comprehensive explanations offered by any defendant for his/her behaviour came from Biljana Plavšić. In her statement, she emphasized the role of fear, 'a blinding fear that led to an obsession, especially for those of us for whom the Second World War was a living memory, that Serbs would never again allow themselves to become victims'. She continued, 'In fact, I immersed myself in addressing the suffering of the war's innocent Serb victims ... I remained secure in my belief that Serbs were not capable of such acts. In this obsession of ours never again to become victims, we had allowed ourselves to become victimisers.' Commenting on Plavšić's statement, Tieger and Shin note that while this may not have represented a new insight in terms of the motivation for the crimes:

it marked the first time that a leader charged with war crimes and crimes against humanity referred to the role still played by the memories of the atrocities of the Second World War as a motivation, albeit not as a justification, for the commission of the crimes in which she had been involved.⁴⁸

The power of such memories and the obvious destructive potential of an 'unresolved past'⁴⁹ fundamentally challenge Renan's view that '[i]t is good for everyone to know how to forget'.⁵⁰ Rather, what they demonstrate is that the past must be addressed and dealt with – it cannot be simply suppressed or ignored. In this sense, therefore, the ICTY has a very important and valuable role to play. By making a stand against impunity and trying those accused of some of the most heinous crimes, it is helping to establish a historical record of events which occurred in the former Yugoslavia during the 1990s.

What is problematic, however, is the Tribunal's claim that guilty pleas aid reconciliation by countering denial. In its sentencing of Miroslav Deronjić, for example, the Trial Chamber found that 'the Accused's and others' acknowledgement of these crimes serves two purposes: it establishes the truth and it undercuts the ability of future revisionists to distort empirically what happened'.⁵¹ While it is true that 'Facts once subject to dispute have now been established beyond a reasonable doubt by Judgements',⁵² it is also true that denial remains prevalent throughout the former Yugoslavia. According to the United Nations Development Programme, for example:

⁴⁶ Statement of Darko Mrda (22 Oct. 2003), *Case Information Sheet, 'Vlašić Mountain' (IT-02-59)*.

⁴⁷ Statement of Dražen Erdemović (20 Nov. 1996), *Case Information Sheet, 'Pilica Farm' (IT-92-22)*. In its second judgment sentencing Erdemović, the Trial Chamber accepted that the defendant had been forced to make a choice: either kill or be killed: *Prosecutor v. Dražen Erdemović*, *supra* note 4, at para. 17.

⁴⁸ Tieger and Shin, *supra* note 45, at 672.

⁴⁹ This term is borrowed from Parin, 'Open Wounds: Ethno-Psychoanalytic Reflections on the Wars in the Former Yugoslavia', in A. Stiglmeier (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina* (1994), at 37.

⁵⁰ Cited in S. Farmer, *Martyred Village; Commemorating the 1944 Massacre at Oradour-sur-Glane*, (1999), at 207.

⁵¹ *Prosecutor v. Miroslav Deronjić*, *supra* note 25, at para. 260.

⁵² See www.un.org/icty/cases-e/factsheets/achieve-e.htm.

the public in many countries [throughout the region] is ... engaging in denial of war-related responsibility. Examples include the public demonstrations in support of Ante Gotovina⁵³ in Croatia ... and the outrage among Albanians in Kosovo whenever there is a prosecution of KLA [Kosovo Liberation Army] members for war crimes. In each case, civilians have been unwilling to accept the truth about what their military and political leaders did during the war years.⁵⁴

The fact that denial exists underscores one of the reasons why the linkage that ICTY judges have repeatedly made between truth and reconciliation is problematic. As Borneman points out, 'truth or rightness is also always perspectival',⁵⁵ and hence there will always be disagreement on what constitutes the 'truth'. It can thus be argued that truth is a quintessentially contested concept. Claude Jorda, a former President of the ICTY, maintains that '[e]stablishing the truth of the events is certainly progress that can be attributed to the Tribunal in The Hague'.⁵⁶ In the specific sense of contributing to reconciliation, however, there can be little progress unless the 'truth' established in the ICTY courtrooms is accepted and internalized in the former Yugoslavia. In the words of

Forsberg, 'from the point of view of the future, the acknowledgement of the facts is often more important than the simple revealing of the past'. That is to say that, '[e]ven if factual truth is established, facts do not speak for themselves. In political life, it is the interpretation that the facts are given that is most important; and if the different interpretative frameworks do not converge, facts alone will not help to form a shared past'.⁵⁷ Thus, it is short-sighted to claim that '[t]he ICTY will contribute to interethnic reconciliation by telling the truth about the underlying causes and consequences of the Yugoslav tragedy'.⁵⁸ The crucial point is that the truth cannot have a positive effect *unless it is acknowledged*. A truth which is contested will promote divisions and antagonism rather than reconciliation and healing.

B *Incomplete 'Truth'*

Notwithstanding the ICTY's truth-seeking function, when defendants enter a guilty plea the truth that ensues will often be only a partial truth. This is first because a defendant who pleads guilty thereby foregoes his right to a full public trial, and this in turn has important implications for the comprehensiveness of the truth subsequently established. As the Trial Chamber noted in its sentencing of Momir Nikolić:

A public trial, with the presentation of testimonial and documentary evidence

⁵³ Ante Gotovina was a Croatian general indicted by the ICTY in 2001 for war crimes and crimes against humanity committed during Operation 'Storm' in August 1995. His trial at the ICTY began on 11 March 2008.

⁵⁴ L. Aucoin and E. Babbitt, *Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia* (2006), at 116.

⁵⁵ Borneman, 'Reconciliation after Ethnic Cleansing: Listening, Retribution, Affiliation', 14 *Public Culture* (2002) 299.

⁵⁶ Jorda, 'The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn from Them', 2 *J Int'l Criminal Justice* (2004) 577.

⁵⁷ Forsberg, 'The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues', in N. Biggar (ed.), *Burying the Past: Making Peace and Doing Justice* (2003), at 73.

⁵⁸ Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Q* (1998) 741.

by both parties, creates a more complete and detailed historical record than a guilty plea, which may only establish the bare factual allegations in an indictment or may be supplemented by a statement of facts and acceptance of responsibility by the accused.⁵⁹

The second reason is that guilty pleas are almost always entered following the conclusion of a plea agreement, and as part of such an agreement the Prosecution will often agree to drop certain charges against the defendant – i.e., charge bargaining. For example, as part of a plea bargain made between the Prosecution and Dragan Zelenović, a former soldier in the town of Foča in eastern Bosnia, the Trial Chamber found the accused guilty on the seven counts of crimes against humanity contained in the plea agreement and granted the Prosecution's motion to withdraw the remaining seven counts of torture and rape (charged as violations of the laws or customs of war).⁶⁰ While charge bargaining frequently forms a part of plea agreements made between defendants and the Prosecution, it is nevertheless a highly controversial practice. Scharf, for example, maintains that 'plea-bargaining that results in the dropping of charges has the effect of editing out the full factual basis upon which a conviction rests and thus has the potential to distort the historic record generated by the Tribunal';⁶¹ and, according to Combs, while the ICTY considers one of its primary purposes to be the creation of a historical record, 'because charge bargaining virtually always distorts the

factual basis upon which a conviction rests, its use would severely undermine that purpose'.⁶²

Although the ICTY has countenanced the use of charge bargaining when defendants plead guilty, some judges have nevertheless voiced concerns. For example, in its judgment sentencing Dragan Nikolić, the former commander of the Sušica detention camp in the municipality of Vlasenica in eastern Bosnia, the Trial Chamber acknowledged that when plea agreements are made 'the admitted facts are limited to those in the agreement, which might not always reflect the entire factual and legal basis'. Hence, '[n]either the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement. This might create an unfortunate gap in the public and historical record of the concrete case'.⁶³ Similarly, the judges in the trial of Momir Nikolić acknowledged that, '[i]n cases where factual allegations are withdrawn, the public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a "bargaining chip" in the negotiation process'.⁶⁴

As a result of a plea agreement, Momir Nikolić pleaded guilty to persecutions on political, religious, and racial grounds, a crime against humanity, and the five remaining counts against him were withdrawn, including genocide/complicity to

⁵⁹ *Prosecutor v. Momir Nikolić*, *supra* note 8, at para. 61.

⁶⁰ *Prosecution v. Dragan Zelenović*, Case No. IT-96-23/2-S, Sentencing Judgment (4 Apr. 2007).

⁶¹ Scharf, *supra* note 3, at 1081.

⁶² Combs, *supra* note 9, at 146.

⁶³ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgment (18 Dec. 2003), at para. 122.

⁶⁴ *Prosecutor v. Momir Nikolić*, *supra* note 8, at para. 63.

commit genocide. In this case, the Trial Chamber noted with interest that:

while the Prosecution moved to dismiss numerous charges against Momir Nikolić, including genocide, it did not seek to remove any of the factual allegations underlying these crimes. Thus, the factual basis upon which the remaining charge of persecutions is based can be found to reflect the totality of Momir Nikolić's criminal conduct.⁶⁵

Even if the factual basis remained intact, however, it must be emphasized that 'the plea bargain may bury allegations and consequently erase those victims and bar the determination of the truths of their claims. The allegations themselves become no more than withdrawn charges or, worse, a bargaining chip'.⁶⁶ More importantly, it can be argued that prosecuting a defendant for a crime against humanity does not have the same symbolic and moral significance as prosecuting him for genocide. The ultimate crime against humanity, to prosecute genocide as anything less than genocide is to do a fundamental injustice to the victims and their families. It is also necessary to consider how the withdrawal of a genocide charge may be interpreted. The dropping of genocide charges against Biljana Plavšić, for example, who, like Momir

Nikolić, pleaded guilty to persecutions on political, religious, and racial grounds, may, according to Scharf, 'be erroneously viewed in Serbia as an admission by the prosecutor that those crimes did not take place',⁶⁷ thus further entrenching denial of those crimes.

To conclude this section, it is argued that the ICTY'S claim that guilty pleas aid reconciliation by establishing the truth is flawed. First, such pleas will foster reconciliation only if the truth they bring to light is acknowledged. The fact, however, that denial remains a problem in the former Yugoslavia is indicative of the contested nature of ICTY truths. Secondly, because guilty pleas routinely follow a plea bargain, in which the Prosecutor agrees to withdraw certain charges, the truth that is thus established is likely to be incomplete, leaving victims with many unanswered questions. Even if the dropping of certain charges does not affect the factual basis, any truths which involve the withdrawal of genocide charges are arguably more likely to anger than to heal affected communities.

3 Acknowledgement, Reconciliation, and Sentence Bargaining

When defendants plead guilty they thereby accept responsibility for their actions, and the ICTY maintains that this acknowledgment of responsibility can have a positive impact on reconciliation. For example, in the trial of Momir Nikolić – the first defendant to acknowledge criminal responsibility in relation to events at Srebrenica – the Trial Chamber observed that:

⁶⁵ *Ibid.*, at para. 51. *A propos* charge bargaining, in his dissenting judgment in the trial of Miroslav Deronjić, Judge Schomburg opined that '[t]he test should be whether individual separable parts of an offence or several violations of law committed as a result of the same offence are not particularly significant for the penalty to be imposed. In those cases the prosecution may be limited to the other parts of the offence or violations of law': *Prosecutor v. Miroslav Deronjić*, *supra* note 25, Dissenting Opinion of Judge Schomburg, at para. 8.

⁶⁶ Henham and Drumbl, *supra* note 2, at 82.

⁶⁷ Scharf, *supra* note 3, at 1079–1080.

In relation to the Tribunal's mission to assist in restoring peace and bringing reconciliation to the territory of the former Yugoslavia, guilty pleas can certainly contribute significantly. Through the acknowledgement of the crimes committed and the recognition of one's own role in the suffering of others, a guilty plea may be more meaningful and significant than a finding of guilt by a trial chamber to the victims and survivors...the Trial Chamber recognises that an admission of guilt from a person perceived as "the enemy" may serve as an opening for dialogue and reconciliation between different groups.⁶⁸

In particular, the Trial Chambers have repeatedly argued that a defendant's acceptance of responsibility can provide a degree of closure to his victims. As one illustration, in its sentencing of Dragan Obrenović, the Trial Chamber remarked that, '[a]lthough the victims of these crimes and family members of those killed were fully aware of the crimes committed before Dragan Obrenović pled guilty, it cannot be doubted that the recognition of the crimes

committed against them by a former officer of the *Republika Srpska* may provide some form of closure'.⁶⁹ The judges referred to an article written by a Bosnian Muslim man from Srebrenica, Emir Suljagić, about his personal response to the guilty pleas of Dragan Obrenović and Momir Nikolić. Suljagić explained, 'the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgment I have been looking for these past eight years.'⁷⁰ The fact that these defendants acknowledged responsibility for their crimes in Srebrenica, moreover, may have contributed to the admission by the *Republika Srpska*, in a report released in June 2004, that units under the government's control had 'participated' in the massacre, a fact which it had hitherto denied.

Nevertheless, it is suggested that defendants' acceptance and acknowledgment of responsibility are not necessarily conducive to reconciliation, due to the practice of sentence bargaining. When defendants plead guilty as part of a plea agreement, they will often – though not always⁷¹ – receive a reduced sentence. As the Trial Chamber stated in its sentencing

⁶⁸ *Prosecutor v. Momir Nikolić*, *supra* note 8, at para. 72. The Trial Chamber also emphasized this link between acknowledgement of responsibility and reconciliation in the trial of Biljana Plavšić. The judges were strongly influenced by the testimony of Dr Alex Boraine, the former deputy chairperson of South Africa's truth and reconciliation commission, 'who spoke about the acknowledgement and acceptance of responsibility for grave crimes and the impact this can have on the process of reconciliation. He explained that if accountability for such crimes is not present, then the concept of reconciliation would be a contradiction in terms': *Prosecutor v. Biljana Plavšić*, *supra* note 43, at para 75. In her written statement, Plavšić herself stressed that '[t]o achieve any reconciliation or lasting peace in BiH [Bosnia and Herzegovina], serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility – regardless of their ethnic group. This acknowledgement is an essential first step': *supra* note 43, at para. 74.

⁶⁹ *Prosecutor v. Dragan Obrenović*, *supra* note 41, at para. 111.

⁷⁰ *Ibid.*, at para. 112.

⁷¹ In the trial of Momir Nikolić, for example, the Prosecution recommended a sentence of between 15 and 20 years, pursuant to Rule 62ter (A)(ii), and the Defence submitted that Nikolić should not be sentenced to more than 10 years' imprisonment. However, the Trial Chamber found that 'it cannot accept the sentences recommended by either the Defence or the Prosecution; neither sentence adequately reflects the totality of the criminal conduct for which Momir Nikolić has been convicted': *Prosecutor v. Momir Nikolić*, *supra* note 8, at para. 180. It thus sentenced the accused to 27 years' imprisonment. This was reduced on appeal to 20 years.

of Stevan Todorović, ‘a guilty plea should, in principle, give rise to a reduction in the sentence that the accused would otherwise have received’.⁷² Thus, in the trial of Miroslav Deronjić, for example, the Trial Chamber accepted the Prosecution’s recommendation that the defendant receive a prison sentence of 10 years.⁷³ While the judges have given various reasons for the mitigating effect of a guilty plea – including ‘the showing of remorse and repentance, the contribution to reconciliation and establishing the truth, the encouragement of other perpetrators to come forth and the fact that witnesses are relieved from having to testify in court’⁷⁴ – a guilty plea which is rewarded with a reduced sentence is arguably more likely to hinder than to encourage reconciliation. If, as the Tribunal claims, there is no peace without justice, the reality is that shortened prison sentences have left many victims – who are central to the reconciliation process – feeling that justice has not been done.⁷⁵ In short, they ‘clearly have an interest in seeing a true offender convicted, and many victims may be prepared to face the ordeal of a court appearance rather than

seeing the offender receive a significant sentence reduction in return for a guilty plea’.⁷⁶

In Dragan Nikolić’s trial, the Trial Chamber acknowledged that, ‘[n]o doubt, the attempt to achieve reconciliation can only be fostered if the punishment, as it has always to be, is proportionate to the gravity of the crime’. Yet it went on to emphasize that ‘[t]he limited contribution of the punishment to reconciliation, however, was highlighted by victims and their relatives who were heard during the sentencing hearing’.⁷⁷ The Trial Chamber in the trial of Biljana Plavšić similarly maintained that ‘[n]o sentence which the Trial Chamber passes can fully reflect the horror of what occurred or the terrible impact on thousands of victims’.⁷⁸ Of course, no prison sentence will ever be sufficient punishment for the taking of another human life.⁷⁹ This does not mean, however, that the prison sentences handed down by the ICTY should not, as much as possible,

⁷² *Prosecutor v. Stevan Todorović*, *supra* note 11, at para. 80.

⁷³ In his dissenting judgment, however, Judge Wolfgang Schomburg maintained that Deronjić deserved a prison sentence of no less than 20 years, ‘thereby adequately acknowledging the fate of the victims and their relatives’: *Prosecutor v. Miroslav Deronjić*, *supra* note 25, dissenting Judgment of Judge Schomburg, at para. 19.

⁷⁴ *Prosecutor v. Dragan Nikolić*, *supra* note 63, at para. 231.

⁷⁵ According to Stover, ‘[s]hort – one might even say mind-boggling short – prison sentences have clearly embittered many witnesses towards the ICTY’: E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2007), at 142.

⁷⁶ Henham, ‘Some Issues for Sentencing in the International Criminal Court’, 52 *Int’l and Comp LQ* (2003) 103.

⁷⁷ *Prosecutor v. Dragan Nikolić*, *supra* note 63, at para. 245.

⁷⁸ *Prosecutor v. Biljana Plavšić*, *supra* note 43, at para. 132.

⁷⁹ Torrance thus highlights ‘the failure of “justice” to deliver what it promises – to make things *ius-tus*, “right”’. For example, what does it mean to speak of ‘justice’ after the murder of a child? According to Torrance, ‘[j]ustice requires that the child be allowed to live his or her life fully and in peace. When that has been irretrievably denied, even the ultimate retributive act, namely the death penalty, cannot make the situation *isutus* – that is, “right”’: Torrance, ‘The Theological Grounds for Advocating Forgiveness and Reconciliation in the Sociopolitical Realm’, in D. Philpott (ed.), *The Politics of Past Evil: Religion, Reconciliation and the Dilemmas of Transitional Justice* (2006), at 61.

reflect the gravity and heinousness of the crimes committed. When sentences are reduced, this inevitably 'animates concerns within victim communities as to whether the ICTY is attaining its retributive aspirations'.⁸⁰

The ICTY has repeatedly insisted that a reduced sentence does not detract from the seriousness of the crime. For example, in its sentencing of Miroslav Bralo, a former member of the 'Jokers' – the anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council (HVO) – the Trial Chamber stressed that '[t]he acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the condemnation of his actions';⁸¹ and the judges in the trial of Dragan Obrenović similarly underscored that 'the allocation of significant weight to the mitigating circumstances in this case should not be interpreted as dismissal of the gravity of the offence for which Dragan Obrenović has been convicted'.⁸²

The problem, however, is that the victims and their families are unlikely to see things in this way and they cannot be expected to, particularly in the absence of adequate outreach work by the ICTY. A witness who testified in the Deronjić trial, for example, explained, 'I saw Miroslav Deronjić plead guilty and I felt glad that he admitted his guilt. I do not, however, understand how it is possible to give him a lenient term of imprisonment after what

he himself has confessed';⁸³ and Combs notes that 'Plavšić's victims were reportedly gratified by Plavšić's plea, but they decried the withdrawal of the genocide charges and condemned in harsher tones still the lenient, eleven-year sentence'.⁸⁴ Truth telling is one thing, deal cutting is another, and the latter appears to have few conciliatory effects.⁸⁵ Through adequate outreach work, however, the ICTY could provide victims with much-needed explanations regarding the use of plea bargains and their implications in terms of sentencing. If victims were more informed in this regard, plea bargains would perhaps be less controversial.

It must, of course, be acknowledged that '[j]ustice, like beauty, is in the eye of the beholder and can be interpreted in a variety of ways'.⁸⁶ Hence, not even the harshest prison sentences can be expected to satisfy everybody that justice has been done.⁸⁷

⁸³ *Prosecutor v. Miroslav Deronjić*, *supra* note 25, at para. 239. The Trial Chamber nevertheless accepted the Defence's submission that 'a sentence is a relative category because ... there is no sentence that can give the victims full satisfaction for their losses': *supra* note 21, at para. 240.

⁸⁴ Combs adds that '[p]rospects for reconciliation were dealt a further blow when Plavšić was sent to serve her term in a posh Swedish prison that reportedly provides prisoners with use of a sauna, solarium, massage room and horse-riding paddock, among other amenities. Victims reacted with predictable outrage': Combs, 'Prosecutor v. Biljana Plavšić: Case No. IT-00-39&40/1-S', 97 *AJIL* (2003) 936.

⁸⁵ *Ibid.*, at 936.

⁸⁶ Weinstein and Stover, 'Introduction: Conflict, Justice and Reclamation', in Stover and Weinstein, *supra* note 40, at 4.

⁸⁷ It is also important to emphasize that, for victims, 'justice' is not simply about putting war criminals on trial and sending them to prison. Rather, it also means, *inter alia*, 'returning stolen property, obtaining reparations and apologies, being able to live free of fear and so on': Stover, *supra* note 75, at 15.

⁸⁰ Drumbl and Henham, *supra* note 2, at 81.

⁸¹ *Prosecutor v. Miroslav Bralo*, *supra* note 24, at para. 42.

⁸² *Prosecutor v. Dragan Obrenović*, *supra* note 41, at para. 153.

Yet while the ICTY endeavours ‘to use the guilty plea’s potential to promote reconciliation as a justification for rewarding it with sentencing concessions’, perhaps the ultimate irony is that ‘rewarding it with sentencing concessions undermines its potential to promote reconciliation’.⁸⁸

To conclude this section, it should be noted that while many guilty pleas at the ICTY are accompanied by apologies and expressions of remorse,⁸⁹ the fact that most of these pleas result from plea agreements necessarily raises questions about the sincerity of these words. Are these expressions of regret and remorse genuine or simply calculated attempts to gain a reduced sentence?⁹⁰ Indeed, ‘the only way to be sure that a defendant has the “right” motivation for pleading guilty is

to eliminate any other motivation – that is, to eliminate sentencing concessions. However, that is not a viable option because doing so would substantially reduce the number of guilty pleas.’⁹¹

Among the victims interviewed by the author in BiH in the summer of 2008,⁹² the overwhelming consensus was that defendants who claim they are sorry for what they did are being disingenuous and are simply seeking to get a reduced sentence. In the words of a Bosnian Muslim woman from Srebrenica, ‘[d]efendants say that they are guilty just to get a shorter sentence. They are good actors. At the beginning of their trial, every defendant says that he is not guilty, but then when he sees all the evidence against him, he may change his mind and plead guilty.’⁹³ It should be noted, however, that none of the interviewees had actually read any of the statements made by those defendants who have pleaded guilty. What is more, while they often knew about the guilty plea of a defendant from their own area, the interviewees were completely uninformed about other such pleas, thus further highlighting the flaws in the Tribunal’s outreach programme.

Genuine remorse, it is argued, is demonstrated not simply through words. As Dragan Nikolić emphasized in his written statement, ‘mere words are not enough. Acts are needed’.⁹⁴ In his trial, he was asked by a witness whether he could provide information on the whereabouts of her two sons, whom she had last seen at the Sušica detention camp. After consulting with his lawyers, Nikolić sought to

⁸⁸ Combs, *supra* note 9, at 151.

⁸⁹ If a defendant shows no remorse, the Tribunal will attach little weight to his guilty plea. Thus, notwithstanding his entering of a guilty plea, Goran Jelisić was sentenced to 40 years in prison (upheld on appeal), the equivalent of a life sentence for the 31-year-old defendant: *Prosecutor v. Goran Jelisić*, Case No. IT-35-10, Sentencing Judgment (14 Dec. 1999).

⁹⁰ According to Cook, ‘regardless of the defendant’s state of repentance, it is an indisputable fact that a primary objective of such personal statements is to persuade the court to impose a favorable sentence’: Cook, *supra* note 34, at 491. In his trial at the International Criminal Tribunal for Rwanda (ICTR), for example, Jean Kambanda – the former Prime Minister of Rwanda – pleaded guilty to the charges brought against him, provided the prosecution with nearly 90 hours of recorded testimony for use in subsequent trials of senior political and military figures, and promised to testify for the prosecution in those trials. However, when he got nothing in return, Kambanda was outraged and immediately stopped co-operating with the prosecution. He also sought to withdraw his guilty plea and proceed to trial. He was sentenced to life imprisonment: *Prosecutor v. Jean Kambanda*, Case No. 97-23-S, Sentence Judgment (4 Sept. 1998).

⁹¹ Combs, *supra* note 9, at 151.

⁹² *Supra* note 38.

⁹³ Author interview, Sarajevo, 29 May 2008.

⁹⁴ Statement of Dragan Nikolić (6 Nov. 2003), *Case Information Sheet, ‘Sušica Camp’ (IT-94-2)*.

answer her question and stated, '[e]ven earlier I expressed my desire to meet certain persons, including victims, and people like Mrs Hadžić in order to provide them with some of the information that I have and tell them what I know'.⁹⁵ The Trial Chamber thus found that Nikolić's remorse was sincere and that he had clearly demonstrated 'his willingness to contribute to the peace-building process and reconciliation in the region'.⁹⁶ Similarly, the judges in the trial of Miroslav Bralo found that he was genuinely remorseful for his actions. Bralo had attempted to surrender himself to the ICTY in 1997, despite being unaware of the existence of an indictment against him, and he had made efforts both to assist in the location of the remains of his victims and others killed in the conflict and to aid in de-mining operations.⁹⁷

Thus, while Jørgensen maintains that '[a]n acknowledgement of guilt is arguably more significant for reconciliation than a finding of guilt',⁹⁸ it is contended that the simple acknowledgement of guilt is not enough. As the above cases suggest, guilty pleas are more likely to promote reconciliation when defendants do not simply express remorse but also demonstrate through their actions that they are genuinely sorry for what they have done, for

example by revealing where the remains of their victims are buried.

Conclusion

The ICTY has justified its use of plea bargains on two main grounds – that they save the Tribunal time and resources and that they facilitate reconciliation. Both of these claims, however, raise important broader issues which merit attention. First, the Tribunal's emphasis on the practical advantages of plea bargains highlights the political constraints placed on it. To cite Cook, '[f]orced to confront pressures from both the United Nations and the United States that threaten its continued existence, the ICTY has little choice but to adopt a plea bargaining strategy'.⁹⁹ Thus, it is submitted that the Tribunal's use of plea bargains exposes a significant gap between, on one hand, its ambitious mandate and, on the other hand, the external pressures it faces to finish its work in accordance with its completion strategy. This, in turn, raises fundamental questions about whether and to what extent the Tribunal's mandate – to deliver justice, to deter, and to contribute to the restoration and maintenance of peace – is in fact realistic, that is to say achievable.¹⁰⁰ In short, '[n]ever before have there been such ambitious expectations for international prosecutions as for the trials underway at the

⁹⁵ *Prosecutor v. Dragan Nikolić*, *supra* note 63, at 247.

⁹⁶ *Ibid.*, at 252.

⁹⁷ In the statement appended to his guilty plea Bralo wrote, 'I wish to make a personal apology to each one of my victims who I made suffer, and to each member of every one of the families affected by my actions. I wish to say that I am truly sorry for their suffering and the suffering of their loved ones. What I said in court last time I really meant: I am guilty and I deeply regret it': Statement of Miroslav Bralo (7 Oct. 2005), *Case Information Sheet, 'Lašva Valley' (IT-95-17)*.

⁹⁸ Jørgensen, *supra* note 14, at 406.

⁹⁹ Cook, *supra* note 34, at 476–477.

¹⁰⁰ It can be argued that 'a primary weakness of writings on justice in the aftermath of war and political violence is the paucity of objective evidence to substantiate claims about how well criminal trials or other accountability mechanisms achieve the goals ascribed to them': Weinstein and Stover, *supra* note 86, at 4.

ICTR and ICTY'.¹⁰¹ If these expectations are too high, it will necessarily be very difficult to judge these tribunals fairly and to assess their work. Hence, one of the conclusions to be drawn from this article is that 'a more realistic view of what trials can accomplish in postwar societies needs to be adopted',¹⁰² and this, it is suggested, underscores the importance of much-needed empirical research, discussed below.

Secondly, this article brings to the forefront one of the major debates in the transitional justice literature, namely the relationship between retributive justice and reconciliation.¹⁰³ Judges at the ICTY have consistently argued that guilty pleas facilitate reconciliation in two key ways – by helping to establish the truth, without which a society cannot move forwards; and by providing victims with a substantial degree of closure, as a result of the defendant acknowledging responsibility for his actions. Yet since most guilty pleas result from plea agreements, involving charge bargaining and/or sentence bargaining, the reconciling potential of guilty pleas is arguably undermined.

This, however, raises the much broader question of whether tribunals can realistically be expected to contrib-

ute to reconciliation, particularly when, as in the case of the ICTY, ICTR, and the International Criminal Court (ICC), they are physically, conceptually, and linguistically removed from the intended beneficiaries of their work, namely the relevant local communities. Part of the problem is that while there has been much theoretical discussion about the nexus between criminal tribunals and reconciliation, what has often been lacking is a critical empirical dimension. In short, 'there have been virtually no studies that systematically have attempted to examine or measure the contribution of trials to reconciliation and social reconstruction'.¹⁰⁴ Perhaps one explanation is that it is very difficult to actually measure a tribunal's impact on reconciliation as there are so many independent variables. As Meernik argues *vis-à-vis* the ICTY, 'establishing a causal link between ICTY actions and the behavior of Croats, Serbs, and Bosniaks is a task fraught with complexity. The pathways of influence between the ICTY and

¹⁰¹ Byrne, *supra* note 28, at 486.

¹⁰² Stover, *supra* note 75, at 144.

¹⁰³ See, e.g., Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda', 7 *Duke J Comp and Int'l L* (1997) 325; A. Fatić, *Reconciliation via the War Crimes Tribunal?* (2000); Stover and Weinstein, *supra* note 40; Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia', 42 *J Peace Research* (2005) 271; Kerr, 'Peace Through Justice? The International Criminal Tribunal for the Former Yugoslavia', 7 *Southeast European and Black Sea Studies* (2007) 373.

¹⁰⁴ Fletcher and Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Q* (2002) 585. According to two authors who have undertaken such research, however, 'our studies suggest that there is no direct link between criminal trials (international, national, and local/traditional) and reconciliation, although it is possible this could change over time': Stover and Weinstein, 'Conclusion: A Common Objective, A Universe of Alternatives', in Stover and Weinstein, *supra* note 40, at 323. For his part Hayden maintains that, 'while a major part of the justification of the ICTY and other such international tribunals has been that it will "support reconciliation between the groups or states involved in a conflict", the ICTY's influence on the Balkans has probably been more to hinder reconstruction of the post-Yugoslav space rather than to foster reconciliation': Hayden, 'Justice Presumed and Assistance Denied: The Yugoslav Tribunal as Obstruction to Economic Recovery', 19 *Int'l J for the Semiotics of L* (2006) 390.

Bosnia's ethnic groups are many, multifaceted, and not always so obvious'.¹⁰⁵

Nevertheless, the judges' contention that guilty pleas aid the healing process provides a useful starting point, and should therefore be empirically tested through research with the relevant local communities, and in particular victims. How do the latter assess plea agreements? Do they associate them with justice? Do plea bargains provide them with the truth that they are looking for? Does a defendant's guilty plea bring them a degree of closure? Do they receive any comfort when defendants acknowledge responsibility for their actions and apologize? Do guilty pleas help to counter the problem of denial?¹⁰⁶ These are

fundamental questions which need to be explored through detailed empirical research.

The author's own research is just a starting point. What it does demonstrate, however, which brings us to the third key issue, is that plea agreements cannot have a positive impact in the absence of knowledge. Ordinary people must know about the plea agreement, why it was entered into, and what the agreement means in practical terms. This, in turn, highlights the necessity of effective and comprehensive outreach work. To cite Stover, '[i]t should be standard operating procedure for all international and hybrid tribunals to develop an outreach program similar to the one developed at the Hague tribunal'.¹⁰⁷ Indeed, tribunals as diverse as the ICC, the Special Court for Sierra Leone, the ICTR, and the State Court of BiH all have outreach programmes. This does not necessarily mean, however, that they have recognized the critical relationship between outreach and plea bargains.

To take one example, in 1995 the ICTY indicted Dušan Fuštar, a guard shift commander at the Keraterm detention camp on the outskirts of Prijedor in northwest Bosnia, with crimes against humanity committed between 24 May and 30 August 1992. He pleaded not guilty to all charges. On 6 May 2006, his case was transferred to the State Court of BiH under Rule 11*bis* of the ICTY's Rules of Evidence and Procedure, and Fuštar entered into a plea agreement with the Prosecutor. On 22 April 2008, he was sentenced to nine years' imprisonment for crimes against

¹⁰⁵ Meernik, *supra* note 101, at 288.

¹⁰⁶ It is interesting to note that notwithstanding the guilty pleas of defendants such as Momir Nikolić and Dragan Obrenović (Srebrenica), and of Predrag Banović and Duško Sikirica (Omarska and Keraterm camps), denial *vis-à-vis* these crimes still exists. For example, while visiting Srebrenica and Bratunac in June and July 2008, the author encountered numerous examples of what Stanley Cohen has termed 'interpretative denial', whereby 'it is not the raw facts (something happened) that are being denied, but they are given a different meaning from what seems obvious to others': S. Cohen, *States of Denial: Knowing About Atrocities and Suffering* (2001), at 7. The author met Serbs who claimed that while Bosnian Muslims were killed in Srebrenica, they were not civilians but rather armed combatants; that the number of Bosnian Muslim deaths in Srebrenica was far lower than the widely accepted figure of 7,000; and that what occurred in Srebrenica was not genocide because women and children were spared. Similarly, while in Prijedor in July 2008, the author spoke to Serbs who completely denied that camps such as Omarska and Keraterm were concentration camps in which horrific crimes were committed, instead claiming that Bosnian Muslims freely chose to go to these 'collective centres' because they felt safer there than they did in their own homes.

¹⁰⁷ Stover, *supra* note 75, at 153.

humanity. On 30 May 2008, the day on which Fuštar's co-accused were sentenced,¹⁰⁸ camp victims from Prijedor and Kozarac made a peaceful demonstration in front of the State Court to protest against Fuštar's plea agreement and nine-year prison sentence. Holding banners with phrases such as 'Sudite umjesto da trgujete' ('Judge [war criminals] instead of trading [with them]'), they were angry that the Prosecutor, in the words of the president of the Association of Camp Survivors in Kozarac, 'se sporazumjelo s monstrom iz Keraterma' ('reached an agreement with the monster from Keraterm')¹⁰⁹ and that they had not been sufficiently informed about the plea agreement. Not until July 2008 did the prosecutor involved in the

case travel to Prijedor to speak to victims about Fuštar's plea agreement.

Thus, the third and final conclusion to be drawn from this article is that if war crimes tribunals are going to use plea agreements, and if these agreements are to stand any chance of having a positive impact, one of the priorities for these courts' outreach units should be to inform and to educate local communities – and in particular victims – about these agreements. This lesson is perhaps particularly pertinent to the ICC, as a permanent court. Learning from the ICTY's experience, it has recognized the importance of outreach work,¹¹⁰ and it is to be hoped that it will also come to appreciate the crucial relationship between outreach work and plea bargains.

¹⁰⁸ The author was present in the courtroom when the State Court delivered its verdict. Željko Mejakić, the commander of the Omarska detention camp in north-west BiH, was sentenced to 21 years' imprisonment; Momčilo Gruban, a guard shift commander at the Omarska camp, was sentenced to 11 years' imprisonment; and Duško Knežević, who held no official position at either the Keraterm or Omarska camp, was sentenced to 31 years' imprisonment. All three men had pleaded not guilty. Some of the victims from Prijedor and Kozarac attended the verdict and they were extremely dissatisfied with the Court's decision, particularly with Mejakić's sentence.

¹⁰⁹ Avdić, 'Protest logoraša', *Dnevni Avaz* (31 May 2008) 11.

¹¹⁰ For an overview of the ICC's outreach programme see Clark, 'International War Crimes Tribunals and the Challenge of Outreach', 9 *Int'l Criminal L Rev* (2009) 99.