

Symposium Contemporary Challenges and Alternatives to International Criminal Justice, Maastricht, 10-11 June 2021.

Negotiated Justice Before the International Criminal Court – Myth or Reality?

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1. Plea agreements – legacy of ICTY and ICTR

- guilty pleas and plea agreements have become an established feature of international criminal justice
- since the first guilty plea at an *ad hoc* tribunal in 1996 (Erdemović), 29 other accused persons
- After 2007 and 2009, no defendant before the ICTY and ICTR made agreement to plead guilty
 - Reason?
 - judicial backlash
 - defendants' lack of confidence

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2. Al Mahdi – first plea agreement before ICC

- Ahmad Al Faqi Al Mahdi first and only ICC defendant who agreed to plead guilty
- he admitted his involvement in the destruction of mausoleums in Timbuktu > war crime of attacking protected objects (Article 8(2)(e)(iv) Rome Statute)
- Trial Chamber accepted OTP's recommendation of nine to eleven years and sentenced Al Mahdi to nine years of imprisonment
- precedent for establishment of sentence bargaining at the ICC

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3. Guidelines for agreements regarding the admission of guilt

- An accused person may choose to admit his or her guilt pursuant to an agreement between the parties
- Article 65(5) – „discussions between the Prosecutor and the Defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court”
- WHEN ? Any time prior to or even during trial
- PURPOSE ? Admission of guilt;
 - regarding all of the charges in a case, or only with respect to some charges and not to others

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3. Guidelines for agreements regarding the admission of guilt

- admission of individual criminal responsibility pursuant to one or more modes of liability under the Statute, but not pursuant to other modes of liability.
- agreements will often, though not always, address **sentencing**
- agreements regarding admission of guilt may include a waiver of appeal
- every agreement shall acknowledge that it is binding only on the accused and the Office of the Prosecutor and does not bind any other Organ of the Court

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3. Guidelines for agreements regarding the admission of guilt – critical overview

Factors for Consideration

- ***Consistency with the Rome Statute*** > agreement should be consistent with the purpose and requirements of the Rome Statute and the goals of the Office of the Prosecutor
- ***Acceptance of responsibility*** > the Prosecutor shall not enter into any agreement in which the accused disputes the essential facts establishing his or her guilt
- ***Charges*** > agreements regarding the admission of guilt may be reached at any time, but an admission of guilt itself can be made no earlier than the beginning of trial

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3. Guidelines for agreements regarding the admission of guilt – critical overview

Factors for Consideration

- **Cooperation** > An admission of guilt can be an opportunity for an accused person to provide critical information relevant to other investigations or prosecutions
- **Sentence** > Prosecutor may agree to recommend, or not to oppose, a specific sentence or a sentence within a particular range
- **Factual basis** > article 65 requires a sufficient factual and evidentiary basis to establish the truth of the charges against the accused

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3. Guidelines for agreements regarding the admission of guilt –

Factors for Consideration

- **Impact on victims and witnesses** > An admission of guilt will ordinarily eliminate or reduce the need for victims and witnesses to testify at trial, which can be a traumatic experience.
- **Efficiency** > freeing of resources (time, money, personnel or court space)

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4. Concluding remarks

1. ICC is underperforming – few convictions - plea agreements could be right solution
2. Admissions of guilt and plea agreement can also help fulfill the goals of international criminal justice
3. Judicial review – mandatory
4. OTP should adopt a transparent policy with respect to plea agreement
5. OTP should develop confidence of the international community that he is doing the right thing
6. Plea agreement cannot bind the court – the court should not be the „rubber-stamp”

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THANK YOU FOR YOUR ATTENTION

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