

## IS THE PLEA AGREEMENT PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS A PATHWAY TO NEGOTIATED JUSTICE WITHIN NATIONAL JURISDICTIONS?

PhD. Lecturer Liviu Alexandru Lascu\*  
Agora University of Oradea, Romania

### **Abstract:**

*Having already a long career in the Anglo-American judicial systems, the Plea Agreement is a pioneering procedure in the civil law countries. In the latest decades it became more and more attractive to the European continental countries due to the fact it makes possible a significant workload's decongestion of the criminal law enforcement bodies as well as an easier prosecution in the other criminal files. However, there is a still remaining reluctance of the European continental legislators to employ this procedure to a wide scale of crimes and to allow negotiated justice with the perpetrators of the most severe crimes. The opponents of this concept consider this procedure as very difficult to reconcile with the traditional principles and procedural institutions of the civil law countries.*

*Within the context of the first steps of Plea Agreement in the most European continental countries we observe an already existent and consistent jurisprudence in this respect in the proceedings of the international ad-hoc tribunals, ICTY (international Criminal Tribunal for former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda). The expertise of the judicial bodies of these tribunals might be a valuable model of doing negotiated justice within the European continental countries at least because the patterns of their Plea Agreement are very similar.*

*The aim of this article is to emphasize the main features of the Plea Agreement procedure in the traditional systems, common law and civil law, as well as the features of this concept as it has been implemented into the proceedings of the ad-hoc tribunals and, accordingly, to analyze the reasons for which, the expertise of these international tribunals might be a pathway to negotiated justice to the national level of the civil law countries.*

**Keywords:** *plea agreement, plea bargaining, guilty plea, negotiated justice, ad-hoc tribunals, adversarial, inquisitorial, common law, civil law.*

### **1. Introductory remarks**

The *Plea Agreement* or sometimes called also *Plea Bargaining* is a criminal proceeding arising from the Anglo- American judicial establishment that requires a pragmatic attribution of criminal responsibility for a person who committed one or more crimes, in the sense that both the prosecutor and the Defense, taking into account the specific circumstances of the case, reach a mutually beneficial agreement.

---

\* E-mail: liviulascu@yahoo.com.

According to this agreement, the defendant accepts a self-incrimination while the prosecutor ensures a more convenient penalty than that the defendant would expect, if found guilty at the final judgment. Subsequently, this agreement must be approved by the court, thus relieving the judicial authorities to conducting adjudicative judgment according to the classical procedure. In such proceedings, in exchange for the defendant's admission of the alleged facts, depending on the jurisdiction to which we refer, the prosecutor have some different bargaining tools: he may waive some charges in exchange for the defendant's admission of committing others; he may offer a reduced penalty; he may offer lighter modes or less coercive forms of penalty enforcement; he can guarantee a range of benefits within the witness protection programs in exchange of the defendant's self incrimination and further cooperation for the prosecution of other criminals.

It is not completely random why this special procedure appeared in the criminal jurisprudence of the Common Law states, also known as the *adversarial judicial systems*. Here, the State, represented by the prosecutor, is only a part within the criminal process, sharing exactly the same statute like the defendant and the pattern of the process appears to be very similar to that of a civil process. In addition to this aspect, the adversarial systems traditionally provided significant procedural rights and safeguards for defendant while the State did not employ professional criminal investigators until to a later stage<sup>1</sup>. So being, the evidentiary activity of the State representative was quite often difficult. In addition to that, unlike in the inquisitorial systems of the *civil law* countries (known also like the European continental countries) where the professional judges render the verdicts, in the adversarial systems they are traditionally done by a jury, whose predictability in decisions is extremely low. Given these circumstances, the need for compromise came naturally from the both parties, each of them trying to avoid a risk of an absolutely unfavorable decision rendered by the jury.

Plea Agreement procedures have not only evolved over the time in the Anglo-American systems in as much as to become a common practice, especially in specific fields like organized crimes or corporate crimes, but due to the fact they significantly relieve the workload of the judicial bodies, began to be more and more attractive for the *civil law* systems applied in the European continental countries. In the past time, the latest systems were characterized by a clear disproportion between the Prosecutor and the Defense arms and also governed by the ubiquitous principle of mandatory prosecution<sup>2</sup>. So being, until not many years

---

<sup>1</sup> See, G. Fisher, "Plea Bargaining's Triumph", *Yale Law Journal* (YLJ) 109, (2000), pp. 857-897.

<sup>2</sup> See, for example, the German Code of Criminal Procedure, Section no. 152, paragraph (2): "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications", available on [http://legislationline.org/download/action/download/id/3235/file/Germany\\_CC\\_1971\\_amended\\_2009\\_en.pdf](http://legislationline.org/download/action/download/id/3235/file/Germany_CC_1971_amended_2009_en.pdf).

ago, they neither created concern for Prosecutor nor provided a legal possibility for negotiation with the defendant.

During the last decades of the twentieth century, the situation had been gradually changed when the majority of the European countries have amended the procedures in the aim of rebalancing the disproportion of the arms between the Prosecutor and the Defense by loaning some legal instruments from the adversarial systems. The fact many European states became members of the Council of Europe in the latest decades of the twentieth century and accordingly the effect of the European Convention for Human Rights on the national criminal legislations of those countries has determined, also, some significant changes in the sense of ensuring effective rights and safeguards for defendant during the criminal process and even of recommending a lenient conviction for the defendant who admit the facts as result of cooperation with the judicial bodies. All the above mentioned circumstances have created a room for negotiating: firstly, because the increasing rights and safeguards of the defendant entailed a more and more difficult evidentiary activity for the Prosecutor, and secondly, because the increased Prosecutors' workload made the means of alternative resolution of the criminal cases more attractive than ever.

## **2. Contrasting features of the *Plea Agreement* in Anglo-American and European Continental models**

Despite the fact most Anglo-American judicial systems don't use the same patterns of negotiated justice we can say that some common characteristics thereof distinguish them from those adopted in the European continental countries. These differences show us a pervasive presence of the negotiated justice in almost all kind of criminal cases and greater bargaining tools for the prosecutor in Anglo-American systems while a remaining reluctance in accepting the negotiation with the defendant in the European continental countries.

The first different aspect is that related to *the character of the defendant's act of self-incrimination*. While in the Anglo-American countries this is deemed as a defendant's failure to invoke his/her affirmative defenses or to raise his/her arguments in fighting the charges in exchange for the concessions offered by the prosecutor, in the Continental pattern, it supposes an in-court confession of the defendant. Thus the Anglo-American agreement is deemed as a quasi-contract and the other like an informal gentlemen's agreement<sup>3</sup>. The aspect is not almost irrelevant because, while in the Anglo-American systems, the plea agreement is able to avoid a trial, the Continental pattern is only able to shorten the trial.

Another aspect is that of the *field of application* of this concept because within the Anglo-American systems there is no restriction of negotiated justice for all kind

---

<sup>3</sup> See, M. Damaška, 'Negotiated Justice in International Criminal Courts', in *Journal of International Criminal Justice (JICJ)*, 2 (2004), Oxford University Press, 2004, p. 1027.

of crimes, regardless their gravity, while most of the Continental legislators still don't allow negotiations with the defendants who commit the gravest crimes. Moreover, if the former systems allow the negotiations to affect even the charges, in the sense of their alteration or partial elimination, the latest systems accept only some lenient penalties or less coercive ways of penalty enforcement to be negotiated with the defendant<sup>4</sup>.

When analyzing *the bargaining tools of the Prosecutor*, we can see more potential of the Anglo-American prosecutor given by the system of formal qualification of the crimes in the Common Law countries. It creates the possibility to charge the defendant with many crimes for one single committed fact and, accordingly, to burden the defendant with a severe final sentence due to the system of arithmetic aggregation of the penalties issued for each charge. So being, the threat of a severe sentence for defendant makes a certain magnitude for the concession offered by the Prosecutor and even a greater availability toward negotiations for defendant. On the contrary, in the civil law countries, where the system of arithmetic aggregation of the penalties is not allowed and sentencing the defendant for many charges means, often, the penalty issued for the gravest charge and possibly an increase of it (taking in account the number and the gravity of the other charges), the room for negotiations is not very large. In addition to it, the prosecutor cannot waive charges and even more the gravest charge which attracts the most severe penalty.

Even though within the both systems, the court is required to approve the agreement between the prosecutor and the defendant, *the involvement of the judge* is different<sup>5</sup>. Within the Anglo-American version, it doesn't need any implication of the judge in the transaction and, accordingly, it doesn't entail any obligation excepting that of assessing the legality and proportionality of the agreement, while the judge in the Continental systems, once the agreement has been approved and accepted the in-court confession of the defendant, as a commitment arising from the deal, is bound to issue a reduced sentence according to the relevant law provision.

A final observation is on *how much reliable are these agreements* in these two systems, from the perspective of the defendant. While both judges are free to disregard the agreement, the problem is what will be the risk faced by the defendant if it even happens? As in the Anglo-American systems the agreement is deemed as a quasi-contract, if the prosecutor renounces on the deal or the judges disapproves of it, then the defendant will be free of revoking the plea. Consequently, the trial is going to proceed without any harm for defendant. Unlike, in the civil law countries, the plea agreement means an in-court confession and therefore, if the Prosecutor waives the deal or the judge disapproves it, the

---

<sup>4</sup> *Ibidem*, 1025.

<sup>5</sup> *Ibidem*, 1026.

confession will remain valid and, very possible, a harsher than negotiated sentence will burden the defendant<sup>6</sup>. Then, it is quite clear that the Anglo-American pattern is much more reliable than that of the civil law countries because in the former system, in the case of the agreement's breakdown, the out of court self-incrimination of the defendant does not affect its rights and safeguards during the trial.

Taking in consideration the above mentioned differences, plus other less significant, of the concept of *plea agreement* in these two judicial systems, we can conclude the Anglo-American model is better developed, widely practiced in all kind of criminal cases, offers a greater potential in negotiations for the Prosecutor and is, also, more reliable for the defendant. Moreover the mutual concessions of the parties do not entail any involvement and obligation for the judge, thus not affecting his/her neutrality. Thus, the perspective of the agreement's failure does not affect the defendant rights and safeguards during the trial due to the followings: the out of court self-incrimination can be revoked; it has no any evidentiary weight in the trial; it is not known by the jury; the judge remains neutral in relation to the agreement.

In the Continental systems, *plea agreement* is just a pioneering procedure, allowed only in the cases dealing with some less grave offences, without prejudice to the charges, and involving an in-court confession which remains valid evidence, even when the agreement is violated by the prosecutor or disapproved by the judge.

However, despite of the features showing it as a better model in achieving an alternative resolution of the criminal cases, the Anglo-American *plea agreement* is not far away from criticism. The first is related to the asymmetrical position of the negotiating parts, that is, the severity of the threatened penalties as well as the greater informational and financial possibilities of the Prosecutor during the trial and even the psychological imbalance between the parties, might lead to some undesirable situations in which, even some innocent defendants would prefer an agreement with the prosecutor instead of an unpredictable verdict at the end of the trial<sup>7</sup>. This tactic of the prosecutor deliberately exaggerating the number and the gravity of the charges in order to create a larger room for negotiations entails a lot of criticism especially in U.S.A.. In order to prohibit such practice in U.K., the *Code for the Crown Prosecutors*, explicitly provides some rules in this respect<sup>8</sup>.

---

<sup>6</sup> *Ibidem*, 1027.

<sup>7</sup> See M. Yant 'Presumed Guilty: When Innocent People Are Wrongly Convicted' (1991), Prometheus Books, New York, p. 172.

<sup>8</sup> See, Code for the Crown Prosecutors, Selection of charges:

6.1 Prosecutors should select charges which: a. reflect the seriousness and extent of the offending supported by the evidence; b. give the court adequate powers to sentence and impose appropriate post-conviction orders; c. enable the case to be presented in a clear and simple way.

6.2 This means that prosecutors may not always choose or continue with the most serious charge where there is a choice.

Some other specialists criticize this marked - oriented approach of the *plea agreement* because it means an inter-party arrangement whose outcome might negatively affect the interest of the victims and of the general public in what regarding the transparency of criminal justice<sup>9</sup>. The lenient penalties offered by the prosecutor might, also, create a public sense of injustice. No less important is the discretionary power of initiating and concluding agreements of the prosecutor which might lead to an unequal treatment for those defendants for whom, the prosecutor doesn't have any interest in concluding an agreement with.

Finally, the power to negotiate justice and the bargaining tools to the prosecutor's disposal raise a problematic issue of its role in the administration of criminal justice. In the Common Law jurisdictions, the judge is traditionally deemed as the best positioned in achieving the public interest in criminal matters. However, the out of court inter-party agreements which exclude the judge from attributing criminal responsibility and imposing penalties and the increased case-law of this procedure show a shift of the Prosecutor into the most important decision-maker and also make questionable this traditional role of the judge in doing justice in criminal matters<sup>10</sup>.

Undoubtedly, the above mentioned are not necessarily systemic weaknesses of the *plea agreement* procedure in the Anglo-American systems but rather found on a case by case basis, however, the fact there are several opinions of the experts depicting these weaknesses, demonstrates this procedure is not infallible but rather can elicit improvements.

### **3. Plea Agreement in the proceedings of the international ad-hoc tribunals**

#### **3.1. The historical context of implementing the ICTY Plea Agreement**

We chose to reflect on some aspects of the Plea Agreement procedure in the jurisprudence of international ad-hoc tribunals, ICTY (International Criminal Tribunal for former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda) because in many respects, they were designed and appear as hybrid courts, taking features of both traditional types of criminal trials, like currently many other national judicial systems. It is also to mention, the Prosecutor's Office members and the judges of these courts, in their great majority came from civil law

6.3 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.

6.4 Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

6.5 Prosecutors must take account of any relevant change in circumstances as the case progresses after charge. Available on [http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/charges.html](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/charges.html)

<sup>9</sup> See, M. Damaška, *supra* note 3, p. 1028.

<sup>10</sup> See, F. Tulkens, 'Negotiated Justice', in M. Delmas-Marty, J.R. Spenser, *European Criminal Procedures*, Cambridge University Press, Cambridge (2002), p. 74.

oriented systems and faced for the first time in their careers with the procedure Plea Agreement. From this perspective, we found a number of similarities between the onset situation of implementing this procedure within the practice of the ad-hoc international tribunals and the situation of many European Continental countries which just implemented or are about to implement Plea Agreement within their national legislation.

Regarding Plea Agreement procedure to ad-hoc tribunals, it should be mentioned that it was not previewed within the original version of the Rules of Procedure and Evidence (RPE) of the ad-hoc tribunals. The first step toward the negotiated justice in the proceeding of the ad-hoc tribunals was the formula of *Plea Guilty*. Even though not provided in the original version, since the amendment entered into force on November 12, 1997, the RPE of these tribunals provided the procedure of *Plea Guilty* (Rule no. 62 bis), which presupposes that the defendant may plead guilty in court on some charges or on all of them, in the hope of receiving a more lenient sentence. Following this defendant's statement of admission of the charges, the judge may order an in-court examination of some other evidence, or according to the situation, even to waive any examination, and taking in account, also, the evidence of the prosecutor's dossier, enters a finding of defendant's guilt and sets a date for the sentencing hearing. There is no any provision to oblige the judge to rendering a lenient sentence, however, given the defendant's statement of the admission which is deemed as a mitigating circumstance and the fact the plea guilty really shortens the trial, a lenient sentence is to be expected.

The Plea Agreement procedure, consisting in a confidential agreement between the prosecutor and the defendant was introduced by amending the RPE, only starting on December 13, 2001, eight years after the establishment of ICTY when a series of political events did significant influence the activity of the International Criminal Tribunal for the former Yugoslavia.

So, the era of the total reluctance of Yugoslavia led by Slobodan Milošević to cooperation with ICTY came to an end in December 2000 when the coalition of opposition parties came to the power in Serbia and its leader Zoran Đinđić became the Prime Minister of the coalition government. On April 1, 2001, Slobodan Milošević was arrested by the national authorities on the ground of corruption during his office and couple month later, on June 29, 2001, he was handed over to The Hague tribunal, due to the warrant of arrest on his name, issued by ICTY since May 1999. After the Milošević's arresting, the Prime Minister Zoran Đinđić, a steady pro-West oriented politician and willing Serbia to overcome its statute of stigmatized among the other European countries, did a commitment of handing over all the Serbian suspects or defendants still at large, on the name of whom, ICTY had issued arrest warrants<sup>11</sup>. Not only the commitment of the Prime Minister

---

<sup>11</sup> See, V. Peskin, *International Justice in Rwanda and the Balkans*, Cambridge University Press, 2008, Kindle Edition, p. 65.

Zoran Đinđić but also the tenacious insistence of the ICTY Prosecutor Carla Del Ponte and the constant and increasing pressure of U.S.A. and E.U. which conditioned the granting of political cooperation and economic aid, in exchange for Serbian government to hand over the suspects to the Hague authorities, decisively influenced the Serbian government policy toward cooperation with ICTY. This turning point in Serbia's relationship with ICTY created the essential premises for negotiated justice at ICTY. For the Đinđić government, the tracking down and apprehending the suspects hidden in Serbia still remained a difficult task, due to the strong opposition from the nationalist Democratic Party of Serbia (DSS), the Đinđić's ally to the power and also, because the involvement in their protection of some high ranking commanders of the special police unit, the Red Berets and of the Yugoslav Army's intelligence, still loyalist of the past regime. However, the time when Slobodan Milošević gave them a full protection was gone and the prospect of being captured and extradited to The Hague tribunal was increasingly likely<sup>12</sup>.

In these conditions, many Serbian suspects, hidden or not, announced their willingness to voluntarily surrender and to admit their involvement in the perpetration of the crimes during the civil war, provided that the international tribunal guarantees certain mitigating circumstances in sentencing them. In response to this willingness of many defendants, both at large and in custody of ICTY, the Plea Agreement had been implemented on December 13, 2001, within the Rule 62 *ter*, regulating this procedure.

Not only had the Serbian suspects urged for a negotiated justice but also the officials of ICTY had shown a special concern in adopting this procedure because it was seen as being able to open a new perspective for ICTY activities. Once some high ranking Serbian suspects had appeared before the court and even confessed their involvement in the commission of the alleged facts, the international tribunal expected to overcome a very difficult stage in achieving its purpose. Until then, only a few trials of minor-ranking defendants were conducted and the prosecution of the most important Serbian political and military leaders was particularly difficult because of the lack of cooperation of the Serbian participants to the relevant war operations.

The conclusion that implementing Plea Agreement was a really turning point in the ICTY case-law is demonstrated by the fact that immediately after its adoption, no less than 6 defendants already in the custody of the Hague authorities (the Simić group) concluded plea agreements with the ICTY Prosecutor and in the next years, other 11 Serbian defendants, still at large, voluntarily surrendered to the International Tribunal and concluded such agreements<sup>13</sup>. Among them, it is worth mentioning some defendants who confess their involvement in the famous

---

<sup>12</sup> *Idem*.

<sup>13</sup> See, Tieger, A. and Shin, M., 'Plea Agreements in the ICTY. Purpose, Effects an Property' in *Journal of International Criminal Justice* 3 (2005), Oxford University Press, 667



massacre of almost 7000 Bosnian Muslim men in the villages northward to Srebrenica and thus, they brought a very important light in elucidating the case. This policy of the ex-Yugoslav governments to convince the suspects to do a voluntary surrender to the Hague authorities and afterward to conclude plea agreements was successfully embraced after Zoran Đinđić's assassination in March 2003 by his successors Zoran Živković and Vojislav Koštunica, as well as by the reformist Prime Minister of Croatia, Ivo Sanader.

However the availability of the Serbian and Croatian governments to cooperate with ICTY - most probably not because of a genuine willingness to do it but of the occidental states' pressure and their agenda of becoming E.U. Member States - some very important figures of the Yugoslav civil war still remained at large. The Bosnian Serbs Radovan Karadžić and Ratko Mladić as well as the Croatian general Ante Gotovina remained hidden for many years after the warrants of arrest on their name were issued by the ICTY, in spite of their governments' efforts to track them down. It should be mentioned, however, that given their high ranking positions and involvement in the civil war, most probably neither the ICTY Prosecutor would have been offered nor they would have been accepted an agreement. The negotiated justice with these defendants would have defied the objectives and mission of ICTY and would have prejudiced, also, the memory of war's victims and the sense of justice. Even if the Plea Agreement procedure is provided in the content of RPE and there are no restrictions in its application, these defendants are precisely not the right targeting people for a negotiated justice. Most probably, they realized it, and therefore decided to remain still hidden.

### ***3.2. Procedural conditions and limits of the ICTY Plea Agreement***

In the following, we briefly outline the provisions which enable the ICTY Prosecutor and the defendant to conclude an agreement as set out in Rule 62 ter of the RPE: "*(A) The Prosecutor and the defense 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*". Throughout the following paragraphs it is provided that the trial court is not bound by the agreement between the parties and if the defendant wishes to change his plea or to waive the deal, the trial court is required to disclose in open session the confidential agreement and to follow one of the other procedures laid down in RPE.

From the wording of the regulation above mentioned, is apparent the conclusion that at least in the situations in which the indictment is already issued at the moment of Plea Agreement entering into force, the Prosecutor may amend the indictment, that is, the proposal to the court for some limits of the penalty and

even the waiving of certain charges. The court is not bound by the terms of the parties' agreement and therefore may question witnesses and do any other in-court examination of evidence or, if the case, to disclose the agreement and to conduct a classic procedure of the trial.

As mentioned above, according to the statistics of ICTY, the entering of Plea Agreement meant a real revival of its activity because the increasing number of resolved cases in a relatively short time and also because of the impact in the prosecution activity, in the sense of penetrating the circle of the high rank perpetrators still enjoying impunity. In addition to the positive aspects of this procedure there are also some criticism of the Plea Agreement application within the ad-hoc tribunals' case-law and following we'll turn our attention to both these aspects.

### ***3.3. Immediate positive effects of the Plea Agreement application***

#### *3.3.1 The cases' workload*

Among the positive effects of Plea Agreement implementation into the jurisprudence of the ad-hoc tribunals, we can mention, without doubt, the fact it is a very useful tool to overcome the difficulties arising from the huge workload of cases. In the aftermath of the civil wars, have been reported cases meaning tens of thousands of deaths in Yugoslavia, hundreds of thousands in Rwanda and millions of people forcibly displaced from their homes in the both countries. Even after selecting the cases and trying only the most important leaders of the perpetrators who had committed these crimes, the number and amplitude of these cases proved to be overwhelming for the ad-hoc tribunals, which have only three chambers of first instance and one chamber of appeals. Moreover, the activity of the ad-hoc tribunals is temporally limited and not just a few UN officials clearly expressed their worrisome, the activities of these courts are very expensive. All of these above mentioned were strong arguments to find remedies to shorten the duration and cost of the criminal processes. In these circumstances, the Plea Agreement procedure appeared as a very beneficial solution because, after its entry into force, a number of defendants representing about one third of their total<sup>14</sup>, have opted for it, decongesting thus a significant volume of pending cases.

#### *3.3.2. The simplification of the complex cases resolution*

Given the complexity of some cases, especially those of the highest ranking military and political leaders of the perpetrators, another positive impact of the Plea Agreement was the fact it relieved the burden of proof for the prosecutor which otherwise proved to be extremely difficult. The classic adjudicative trial within which the prosecutor must prove the involvement and guilt of the

---

<sup>14</sup> See, Clark, J. N., 'Plea Agreements at the ICTY. Guilty pleas and Reconciliation' in *The European Journal of International Law*, Vol. 20 no. 2 (2009) Department of International Politics, Aberystwyth University, U.K., 415-416.

defendants meant to the ad-hoc tribunals a huge evidentiary activity before the court, that is, the hearing of dozens or sometimes hundreds of witnesses, impressive forensic evidence, technical and medical reports, procurement of documents and many others<sup>15</sup>. Taking in account the ingrained lack of interest of the defendants' states in cooperation with the international prosecutor as well as the steady reluctance of the witnesses to appear before the court, the evidentiary activity was sometimes almost impossible to be accomplished. The fact Plea Agreement procedure raised the defendant's interest for cooperation not only dispensed the prosecutor to conduct a huge evidentiary activity during the trial but also offers, in the cases of other high ranking defendants, extremely valuable evidence in demonstrating their involvement in the perpetration of the crime. Thus, given the particular complexity of the cases brought before the international criminal tribunals, the Plea Agreement procedure facilitated the evidentiary activity in both cases where defendants concluded agreements and where others defendants were to be investigated or prosecuted and in which, the former defendants agreed to be heard as witnesses.

### ***3.4. Controversial aspects concerning the Plea Agreement application***

#### *3.4.1. The victims lost the opportunity to be heard by the court*

The first aspect of critical nature related to the Plea Agreement application in the jurisprudence of the ad-hoc tribunals is the fact it frustrates the survivors of massacres to have the opportunity to be heard in public trials thus to be evoked and recorded the facts with both legal and historical relevance. Many opinions claim that within the international criminal courts we need to glimpse some features of the so-called *transitional justice*<sup>16</sup>. This kind of justice is found in the jurisprudence of the states in the immediate aftermath of the collapse of dictatorial regimes when some important leaders of the former regime are brought before the courts and when, in addition to their main role of doing justice, the courts constitute also some genuine tribunes for the victims, giving them the opportunity to reveal in a public and formal way, the trauma and suffering they were subjected to within the atrocities committed by the defendants. Within this kind of trials, the number of the victims and witnesses allowed to be heard are usually much in excess of the evidentiary threshold for the prosecutor to prove the guilt of the defendants, but they are allowed by the courts just in the aim their confession to serve for a fair historical assessment of the facts, separately from their evidentiary role in the trial.

However, given the concrete circumstances of the ad-hoc tribunals' practice, we consider, at least some aspects of these criticisms are not sufficiently argued. In

---

<sup>15</sup> See, Tieger, A. and Shin, M., *supra* note 14 at 668.

<sup>16</sup> See, Marstone Danner, A. and Martinez, J. S. 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' in *California Law Review*, vol. 93 (2005), 90-96.

the first hand, in all the cases the procedure Plea Agreement has been applied, the courts asked the prosecutor to provide supporting evidence both for the indicted charges and that accompanying the confidential agreement of the parts. Although critics argue that such evidentiary material available to the court may not be comparable with that recorded by the court during the trials, given the lack of cross-examination hearings during the prosecution phase, there is another aspect that compensates for this. If we admit the historical reality of the events that generated the perpetration of the crimes can be objectively assessed only when a significant number of facts are brought to the light, then, the Plea Agreement procedure in spite of its shortcomings, creates the possibility of solving a much larger number of cases<sup>17</sup> and of bringing to the public acknowledgement some very important facts that contribute to the shaping of historical reality. On the other hand, once the defendant pleads his/her guilt for the indicted charges, then it is assumed that, in principle, it does not contradict the facts avowed by the victims and witnesses even if the statements of those people were not taken within a cross-examination hearing during the prosecution phase. Thus, the accuracy of the facts depicted by the victims and witnesses shouldn't be questioned.

#### 3.4.2. *The effect of the deal on the charges*

Taking into account the seriousness of the crimes brought before the international tribunals an anxiety arisen from both the court<sup>18</sup> and the victims in the sense the agreements between the parts do not profoundly affect the act of justice by pursuing only a pragmatic calculation or a specific agenda of the Prosecutor's Office. The waiver of certain charges from the indictment normally would not been justified than in recital of the lack of supporting evidence of some elements of those crimes and the waiver shouldn't be done as a result of the defendant's attitude during the process. It is true that, according to the procedural rules, the prosecutor is the only one who decides for what charges will be the defendant brought before the court and also only one who can amend afterward the indictment in this regard. The specialists and even the court fear<sup>19</sup> (see the Nikolić Case) that although the ICTY Prosecutor withdraws certain charges, allegedly after reassessing the evidence in respect of the constituent elements of those crimes, in fact, he/she does so in pursuing a bargain, in exchange for the guilty plea of the defendant. Nevertheless, the aspects of entering a Plea Agreement in Nikolić Case should be understood within the specific context of this case because at the time the indictment was concluded and submitted to the court the procedure Plea Agreement didn't exist and after its adoption and the manifestation of the defendant's willingness to conclude a plea agreement (which

---

<sup>17</sup> See, See, Tieger, A. and Shin, M., *supra* note 14 at 670-674.

<sup>18</sup> Sentencing Hearing, Case Momir Nikolić, Sentencing Judgment Momir Nikolić, (IT-02-56-I), Trial Chamber I, December 2, 2003, paragraph 65.

<sup>19</sup> *Idem*.

proved to be very useful for prosecuting other defendants), the prosecutor's bargaining tools were quite small. A charge of extreme gravity such as complicity to genocide would not have allowed the prosecutors to propose as reduced sentence as to arouse the interest of the defendant to plead guilty. Therefore, it is likely that the amendment of the indictment meaning the withdrawal of this charge has been made as a consequence of negotiated Dragan Nikolić's guilty plea rather than a reassessment of the evidentiary support for that crime. In the cases that followed the Nikolić Case the situation was completely different because the prosecutor had the possibility to conclude an agreement with the defendant before drawing up the indictment and therefore there was no suspicion of withdrawing some indicted charges in the purpose of reaching an agreement with the defendant and thus affecting the principles and goals of the international justice. Our opinion is this fear still exists regardless of the more or less transparent Prosecutor's demarches and it depends only on the good faith of the Prosecutor and its spirit of justice that the application of Plea Agreement does not distort its aim as well as the ad-hoc tribunals' purposes.

#### 3.4.3. *Equal treatment for defendants*

The unequal treatment enjoyed by defendants in negotiations with the prosecutor is another problematic issue which rises when applying Plea Agreement procedure. Even if there is no any text law or principle granting penalty reductions for the defendants based on the quantity and quality of the information they make available to the prosecutor, nevertheless, it seems to be a reality in some cases<sup>20</sup>. The penalties received thus by the defendants are likely to distort the real reflection of the gravity of their acts. Following this reasoning, a defendant who has perpetrated several crimes or was involved in planning, ordering, aiding or abetting many such crimes is, obviously, able to provide more valuable information than that provided by a less involved defendant. Even if for the prosecutor, the statement of the former is more useful than that of the other, an agreement providing for a less severe punishment for the more involved defendant taking into account with priority the quantity and quality of the provided information, appears as being a totally unfair treatment<sup>21</sup>. Such situation would be contrary to the principles governing the attribution of the penalties within the sentencing process to the ad-hoc tribunals, that is, the penalty must be established in accordance with the seriousness of the crimes and the personal circumstances of the defendant. So, even if the quantity and quality of the information provided by the defendant must be taken in account as mitigating circumstance in assessing the defendant's conduct during the trial, it shouldn't

---

<sup>20</sup> See, Sentencing Judgment, Case Stevan Todorović (IT-95 9/1-S) Trial Chamber, 31 July 2001, paragraph 87 and Sentencing Judgment, Case Miroslav Deronjić (IT-02 61-S), Trial Chamber II, 30 March 2004, paragraphs 246, 254, 255.

<sup>21</sup> See, See, Tieger, A. and Shin, M., *supra* note 14 at 677-678.

prevail over the other aspects and to distort the punishment the defendant deserve in relation to the seriousness of the committed crime. On the other hand, the information of interest for the prosecutor is known in different amounts by defendants and therefore objectively, they cannot provide the same information even if willing to do so. Therefore, the prevalence of this criterion in the prosecutor's availability to propose a reduced punishment would produce serious inequities among the defendants and a distortion of the justice's aim. The fear that such situations may happen in practice when the prosecutor is tempted to do so, driven by a particular interest of solving other cases, is real and therefore, the fairness of the justice largely depends on the conduct of the prosecutor.

#### *3.4.4. Reduced penalties in exchange for saving time and resources*

It is undoubtedly a reality, the fact Plea Agreement application exceeds from the general principles of criminal law with respect to the sentencing process. No doubts, a classic adjudicative criminal trial, following the standard procedure and a sentencing process which fully comply with the seriousness of the crimes committed and the personal circumstances of the defendant would be a noble goal and fully consistent with the expectations of victims or their families. The reality facing the international tribunals, however, makes it almost impossible to achieve this goal<sup>22</sup>. On the one hand, the ad-hoc tribunals have a deadline to conclude their trials according to the UN Security Council decisions. Their operational costs are also very high just because of the complexity of their cases. As an echoing confirmation in this respect, we can mention the statement of the President of ICTY, professor Antonio Cassese within Erdemović Case<sup>23</sup>, in which, he mentioned only a few of the many activities that require huge consumption of resources by the international tribunal, such as: gathering a huge amount of evidence, protection measures for the victims, organizing and deployment of processes involving simultaneous translation in several languages, writing documents in multiple languages, transfer from the home countries to the court seat and providing various forms of assistance for the victims and witnesses, payment for the specialists and experts examined. Professor Cassese emphasized the fact that by pleading his/her guilt and avoiding the employment of resources for the above mentioned activities, the defendant contributes undoubtedly to the achievement of the public interest. So given this public interest in a reasonable and effective allocation of resources for justice is competing with another public goal, that of doing justice by convicting every breach of the criminal law, the Plea Agreement procedure does nothing else than to achieve a compromise between them.

It must also be pointed out the fact Plea Agreement is not required and should not be applied in all the cases the defendant displays a willingness to do an

---

<sup>22</sup> *Ibidem*, 678-679.

<sup>23</sup> See, Case Dražen Erdemović ( IT-96-22-A), Judgment of October 7, 1997, Separate and Dissenting Opinion of Judge Cassese to Erdemović Appeals Judgment, paragraph 8.

agreement. From the practice of the ad-hoc tribunals we observe that it has been used with the aims of reducing time and resources for the trials and in determining the defendant's cooperation with the prosecutor when his statement was deemed as of crucial importance in the successful prosecution of other defendants. Conversely, in the cases of the most important political and military leaders responsible for scale perpetration of the crimes during the conflict, concluding such plea agreements with the defendants might profoundly affect the act of justice and the memory of hundreds of thousands victims and would discredit the international tribunals. If these defendants would like to admit their guilt, the procedural rules allow them to do it before the court. This Plea Guilty procedure does not involve a confidential agreement with the prosecutor but an in-court confession which normally should be taken in account as a mitigating circumstance in determining the sentence. The major purpose of Plea Agreement is, thus, to be employed mainly in the cases of low ranking defendants as a legal instrument for the international tribunals to fulfill the fundamental purpose for which they were established, namely, the prosecution of the most important persons responsible for grave breaches of the human rights during the civil wars. Any use of this procedure in other purposes, would lie beyond the reason for which it was adopted.

#### **4. Plea Agreement in the proceedings of the civil law jurisdictions**

As said in the above chapters, while the Anglo-American systems have already developed a solid and thorough practice in applying the Plea Agreement procedure, especially in U.S.A.<sup>24</sup> where the greatest majority of the cases are solved in this way, in the European Continental countries, the practice shows us a remaining reluctance for implementing it in many countries as well as some problematic issues in the countries where Plea Agreement has been adopted. In this chapter we propose a brief comparative analysis of these issues and have chosen seven representative countries but not only that adopted or accepted Plea Agreements within their jurisprudence from each European Continental category, that is, France, Italy and Germany from the group of the West European countries, Poland and Romania from the Central and East European countries, Estonia and Georgia belonging to the group of the ex-soviet countries.

##### **4.1. France**

In France, the Plea Agreement with the name *La comparaison sur reconnaissance préalable de culpabilité (CRPC)*, also called *plaider coupable* has been introduced in the French Criminal Procedure Code by the so called "*Perben Act II*" of 9 March 2004, which was designed to adapt the French criminal justice to the evolution of

---

<sup>24</sup> See, A. Alschuler, W. 'Plea Bargaining and Its History' in *Colombia Law Review* 79 (1), (1979) pp. 1-43.

criminality. The plea bargaining procedure, previewed within Articles 495-7, 495-16 and 520-1 of the French Criminal Procedure Code is a new response to those situations in which, according to the concrete circumstances and the spirit of the criminal legislation, a fully adjudicative trial can be avoided. According to the above mentioned articles, the prosecutor could make a deal with the defendant who is suspect of committing some relatively minor crimes<sup>25</sup> by proposing a penalty not exceeding one year in prison in turn for the defendant's guilty plea. Once concluded, the deal is a subject of the approval of the president of the *tribunal de grande instance* (High Court) or of another judge appointed for the former. According to the provisions of the Article 495-11, the defendant, assisted by his/her attorney, after concluding the agreement with the prosecutor, has to do an in-court confession of his guilt. The judge, according to the concrete situation and taking in account the supporting evidence of the case, can render an ordinance of confirming the penalty proposed by the prosecutor which has the power of a final sentence. The judge's ordinance must be enforced immediately after its pronouncement.

This new procedure is not very well viewed by the French practitioners. Most of them consider it as creating the premises for the violation of defendants' rights and safeguards because it gives too much power to the prosecutor and would encourage defendants to accept a sentence only in order to avoid the risk of a more severe sentence in a trial, even if they did not really deserve it. A relevant proof of its lack of popularity in France is the statistic of criminal cases in 2011<sup>26</sup> which shows 77,569 criminal cases out of 513,911, representing only 15,09% of the decisions rendered by the correctional courts, were concluded following a Plea Agreement.

#### 4.2. Italy

Italy was a pioneer of the European Continental countries implementing the Plea Agreement, called *patteggiamento*<sup>27</sup>, as it is known among the Italian provisions of criminal procedure since 16 February 1987 when the Article 45 point 2 of the Law no. 81, enabling legislative delegation to the Government of the Republic for promulgation of the new Code of Criminal Procedure entered into

---

<sup>25</sup> At the moment of its adoption in 2004, the Article 495-7 of the French Criminal Procedure Code provided a limit of punishment of 5 years imprisonment for the crimes which could be a subject of plea agreement. The Article 495-7 has been amended on 13 December 2011 and the limit of punishment has been removed excepting the cases of intentional or unintentional, physical or sexual assault for which, some limits of punishments still remained.

<sup>26</sup> See, '*Les chiffres clés de la Justice - 2012*', Ministère de la Justice, Secrétariat general, Service support et moyens du ministère sous-direction de la Statistique et des Études 13, place Vendôme - 75 042 Paris Cedex 01, available on [http://www.justice.gouv.fr/art\\_pix/chiffres\\_cles\\_2012\\_20121108.pdf](http://www.justice.gouv.fr/art_pix/chiffres_cles_2012_20121108.pdf).

<sup>27</sup> See, Borasi, Ivan, *Il patteggiamento. Approccio di sistema alle implicazioni procesuali*, Altalex Editore, Ebook format, chapters I-II



force and as it was reshaped in the Article 444 of the Italian Code of Criminal Procedure as amended by the Law no. 134 of June 12 2003. Summarizing its content we can see an opportunity for the defendant to conclude an agreement with the prosecutor when he/she deems that the punishment that would, concretely, be handed down is less than five years imprisonment. In turn for his/her guilty plea, the prosecutor may offer a reduced sentence, an exempt from the payment of the proceedings fees, a drop of some charges or a change of them with other less severe. Basically, the Italian bargaining is not about the charges but about the sentence in the sense, once concluded and approved, the penalty can be reduced by one third. The deal between the prosecutor and the defendant must be submitted to the Court. The judge is not bound to this deal and after assessing the evidentiary support of the Plea Agreement, he/she can disapprove it, if the evidence shows the defendant's guilt is not sufficiently proved, or in the case, if proved to be guilty, the proposed punishment for defendant is too lenient. If the defendant is deemed guilty and there is proportionality between the committed facts and the proposed punishment, the judge must approve the agreement. The Italian rules of criminal proceedings provide the possibility for this sentence of approval the plea agreement to be appealed before the *Corte di Cassazione* (Court of Cassation), the highest Italian court which rules only on assessing the legality of procedure and the interpretation of the law.

Even though the Italian practitioners have much more expertise than other European colleagues in negotiating justice and even a reshaping of the relevant law provision according to the practice requirements, they still consider this procedure as very difficult to reconcile with the Italian traditional procedural institutions. A conclusive opinion on this matter is done by the Italian highest court, *Corte di Cassazione* in its sentence *15 Cassazione Penale (1990) 47*, in which, the negotiated admission of guilt was deemed as a 'hypothetical judgment'<sup>28</sup>.

#### 4.3. Germany

The *German* approach to doing negotiated justice was the most original among the European Continental countries because, in spite of its obvious presence in the practice, there was no legal provision providing expressly a Plea Agreement procedure since May 2009 when the German Federal Parliament adopted a new provision of the German Criminal Procedure Code, Section 257 c named Negotiated Agreement which explicitly acknowledged plea bargaining. Until then, the so called *Absprachen* (The Agreements) emerged in practice without statutory authorization and, paradoxically, not being bound by some legal limits of the penalties to the offenses on which the plea guilty was negotiated, such agreements could be encountered in many kinds of criminal cases, even in those involving serious crimes like drug trafficking and homicide. This is an aspect which

---

<sup>28</sup> See, G. Lattanzi, E. Lupo, '*Codice di Procedura Penale*', Vol. VI, Giuffrè, Milano, 1997, p. 205-215.

demonstrates a less concern of the practitioners in harmonizing their work with the procedural principles but rather in achieving their main goals. Due to the fact that until the explicit adoption of plea agreement in the German Criminal Procedure Code a practice in this respect has been already outlined, the law provision did nothing more than to legislate something which became almost usual. In this respect, it worth mentioning some characteristics of the German Negotiated Agreement, as previewed in the Section 257 c: there is no provision limiting the application of plea agreement to only some kind of offenses or to the offenses with a specific limit of penalty previewed by the law; an in-court confession shall be an integral part of any negotiated agreement; the measures of reform and prevention, may not be the subject of negotiation; on free evaluation of all the circumstances of the case as well as general sentencing considerations, the court may indicate an upper or lower sentence limit and the agreement will come into existence only if both the prosecutor and the defendant agree with the sentence limit proposed by the court; if legal or factually significant circumstances have been overlooked in the agreement, the court is not bound of it and may enter a trial following the classic procedural rules and then the defendant's confession may not be used, a fact the court shall notify to the parties.

As a conclusion, we must remember the former German approach because of its originality and ingenuity to find a way of doing negotiated justice by interpreting the criminal procedure in the sense that something which is not expressly prohibited may be permitted as well as the current formula which does not limit its application only to some less serious crimes and which protects the defendant's right of not self-incriminating, in the case the agreement fails. However, due to the fact that Plea Agreement has some inaccuracies with the traditional principles of criminal procedures it is not very popular with the German specialists<sup>29</sup>.

#### **4.4. Poland**

Since 1998, *Poland* has also had a kind of plea agreement<sup>30</sup> which proved to be a very original one because according to the Article 387 paragraph 1 of the Criminal Procedure Code of Poland, the agreement is not concluded in the pre-trial phase of the process but during the hearings before the court. The plea agreement is applicable only to the misdemeanors punishable by no more than 8 years of

---

<sup>29</sup> See, B. Schüneman, 'Wohin treibt der deutsche Strafprozess' in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 114 (2002), p. 570. Paradoxically, in spite of the fact the author Bernard Schüneman is one of the most bitter opponent of introducing plea agreement into the German legislation, he had to admit in his research that 91 per cent of the judges, 90 per cent of the prosecutors, and 53 per cent of the defence lawyers expressed a preference for informal agreements rather than trial in cases involving evidential difficulty.

<sup>30</sup> See, the Criminal Procedure Code of Poland, Act of 6 June 1997, Article 387 para. 1-5, (English version) available on <http://legislationline.org/download/action/download/id/4172/file/Polish%20CPC%201997am%202003.en.pdf>.

imprisonment. The procedure allows the defendant, until the conclusion of the first examination at the first-instance hearing, to submit a motion for a decision convicting him and sentencing him to a specified penalty or penal measure without evidentiary proceedings. It is called also the procedure of 'voluntary submission to a penalty' and allows the court to pass the agreed sentence without reviewing the evidence. The proposed penalty will be accepted by the court and afterward enforced only if the prosecutor, the victim and the court, all of them, agree on it. Nevertheless, the court may not accept the terms of proposed plea agreement, in spite of the fact they were already agreed by the victim and the prosecutor and may suggest some changes. If the defendant agrees with the court requirements and submits a new penalty proposition accordingly, the court must approve it and render the sentence according to the plea agreement. Even if the Polish Plea Agreement supposes an all parties deal during the trial and apparently, there is no reason for appealing the sentence, all of them, the prosecutor, the defendant and the victim have, also, the right to appeal. We can mention, as a very interesting feature of this procedure, the key role that has been assigned to the victim because he/she appears as a veritable 'auxiliary prosecutor'. It is well known the fact in Polish criminal proceedings the victim can ask and may act as an 'auxiliary prosecutor' and therefore, among the other similar procedural rights, the victim gains also the right to appeal, exactly like the official prosecutor. Finally, if the Plea Agreement represents, among the others, a concession to the defendant in exchange for his/her conduct, in the sake of the fairness of the justice act, the increased role of the victim within the Plea Agreement procedure appears as being welcomed.

#### **4.5. Romania**

The new Code of Criminal Procedure of Romania into force since February 1, 2014 explicitly previews the procedure of plea agreement<sup>31</sup>. According to it, during the pre-trial phase of the criminal process, from the incentive of both the defendant and the prosecutor, can be concluded an agreement of defendant's admission his/her guilt for the charges, or only for part of them, in exchange for a lenient punishment. In Romania, the bargain is not about the charges but only about the sentence that is, a reduced penalty or less coercive forms of penalty enforcement like, for example, the suspending of its enforcement. The written consent of the supervisory prosecutor is necessary as a precondition to conclude the plea agreement. According to the law provision, concluding such agreement is prohibited for the most serious crimes for which the criminal law previews a punishment of more than seven years imprisonment. In order of guaranteeing the legality and the interest of the defendant within negotiations, the law previews as a

---

<sup>31</sup> See, the new *Criminal Procedure Code of Romania* as adopted by the Law no.135/2010, published in the Official Monitor of Romania no. 486 of July 15, 2010 and modified by the Law no. 255/2013 published in the Official Monitor of Romania no. 515 of August 14, 2013, Articles 478-488.

binding rule, the defendant to be assisted by an attorney. The plea agreement in its written form and accompanied by evidentiary support is submitted to the court of first instance. The judge, once receiving it, commences a public but non-contradictory session in which invite the prosecutor, the defendant and his/her attorney to make opening speeches. After the hearings and examination of the evidentiary support of plea agreement, the court takes a decision which can be: a sentence of convicting the defendant to a punishment no more severe than that proposed in the agreement, if the legality of proceedings, the rights of defendant and the proportionality between the gravity of the facts and the severity of the penalty are provided; a disapproval of the plea agreement and the return of the criminal file to the Prosecutor's Office if there is not enough evidentiary support for demonstrating the guilt of the defendant, the agreement overlooked some legal requirements or, the proposed penalty is too much lenient in comparison with the committed facts. Whatever of the both above mentioned decisions of the court of first instance would be rendered, the defendant and the prosecutor can appeal it.

In this moment is too early to assess the impact of Plea Agreement in the criminal jurisprudence of Romania but some remarks related only to its legal background can be done. It appears to be in the trend of European Continental model, applied only for some less severe crimes, with scarce bargaining tools for the prosecutor and involving an in-court confession of the defendant.

#### 4.6. Estonia

Since 1 September 2011 when the amendments of the Criminal Procedure Code adopted on 23 February 2011 entered into force, *Estonia* has its own Plea Agreement<sup>32</sup> which is actually called Alternative Proceedings (Articles 233- 238). It supposes a request of the defendant to the Prosecutor's Office to follow this procedure, according to which the court may adjudicate a criminal matter by way of alternative proceedings on the basis of the materials of the criminal file without summoning the witnesses or other qualified persons. Alternative Proceedings is prohibited for the most serious crimes for which the punishment of life detention is previewed, as well as for the cases where several defendants are accused and at least one of them does not consent to the application of alternative proceedings. If the defendant and the prosecutor consent to the application of alternative proceedings, the Prosecutor's Office prepares the statement of charges which is going to be included in the criminal file and the file shall be sent to the court.

Once the criminal file was received and the session was opened, the judge announces the commencement of examination by the court and makes a proposal to the prosecutor to make an opening speech. The prosecutor gives an overview of

---

<sup>32</sup> See, the Criminal Procedure Code of Estonia, passed on 12.02.2003 published in the *Riigi Teataja* I 2003, 27, 166 entered into force on 01.07.2004, Articles 233- 238, (English version) available on [http://legislationline.org/download/action/download/id/4709/file/Estonia\\_CPC\\_am2013\\_en.pdf](http://legislationline.org/download/action/download/id/4709/file/Estonia_CPC_am2013_en.pdf).

the charges and the evidence which corroborates the charges and which the prosecutor requests to be examined by the court. After assessing the legality of the proceedings, the judge shall ask whether the defendant understands the charges, whether he/she confesses to the charges and whether he/she consents to the adjudication of the criminal matter by way of alternative proceedings. If all the necessary conditions are fulfilled, the judge commences the hearings and the participants in the court session shall rely only on the materials of the criminal file. If a judgment of conviction is made by way of alternative proceedings, the court shall reduce the principal punishment to be imposed on the accused by one-third after considering all the facts relating to the criminal offence.

A short comment on this Estonian Alternative Proceedings is the fact that the bargaining tools of the prosecutor are very scarce. He/she cannot propose a kind or a limit of penalty as long as the law previews a reduction of one-third of the punishment and this is to the disposal of the judge. This procedure does not follow a pattern of Plea Agreement in its European Continental variant but rather it is a variant of the *guilty plea* proceedings which commences during the Pre-Trial phase of the process.

#### 4.7. Georgia

The Plea Agreement was introduced in *Georgia* in 2004 and despite its statute of ex-soviet country, until then under a strong influence of the civil law system, basically the new adopted Georgian plea bargaining, in most respects, is inspired by the Anglo-American models<sup>33</sup>. It consists of an alternative and consensual way of criminal case settlement without an in-court confession of the defendant who agrees to plead guilty in exchange for a lesser charge or for a more lenient sentence or, according to the case, for dismissal of certain related charges (Article 209 of the Criminal Procedure Code of Georgia). The Georgian procedure is based on the principle of the free choice of the defendant, equality of the parties and protection of his/her rights and safeguards. The defendant has the right to reject the plea agreement at any stage of the criminal proceedings before the court renders the judgment and the use in the future of the information provided by the defendant under the plea agreement against him is explicitly prohibited. In concluding the agreement, the prosecutor is obliged to take into consideration the public interest, the severity of the penalty, and the personal characteristics of the defendant and as a guarantee of these aspects, the procedure previews the consent of the supervisory prosecutor as necessary precondition to conclude plea agreement and to amend its provisions. The court is not bound by the agreement and if the presented evidence is not sufficient to support the charges or if other requirements

---

<sup>33</sup> See, Alkon, C, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?' in *Transnational Law & Contemporary Problems*, a Journal of University of Iowa College of Law, vol. 19, Spring 2010, 363-369.

stipulated by the Criminal Procedure Code of Georgia are violated by the agreement, the judge can return the case to the prosecution, not before offering to the parties the possibility to change the terms of the agreement. If the court satisfies itself that the defendant fully acknowledges the consequences of the plea agreement, he/she was represented by the defense council, his/her will is expressed in full compliance with the legislative requirements without deception and coercion, also if there is enough body of doubtless evidence for the conviction and the agreement is reached on legitimate sentence - the court approves the plea agreement and renders guilty judgment. If any of the abovementioned requirements are not satisfied, the court rejects to approve the plea agreement and returns the case to the prosecutor. Another important aspect which deserves to be mentioned is the position of the victim in relation to the plea agreement. Under Article 217 of the Criminal Procedure Code of Georgia, the prosecutor is obliged to consult with the victim prior to concluding the plea agreement and to inform him/her about this and is, also, obliged to take into consideration the interests of the victim and as a binding rule, to conclude the plea agreement only after the damage is already compensated.

As a conclusion, we can see a very unusual and courageous legislative action from the Georgian legislator when adopting this procedure in very relative terms with the Anglo/American Plea Agreement, in spite of the judicial tradition inspired by the civil law systems and the lack of adversarial expertise in the Georgian criminal jurisprudence.

##### **5. Is the *Plea Agreement* procedure of the ad-hoc tribunals a model for the European continental legal systems?**

As we have seen in the previous chapters, the pattern of Plea Agreement adopted by the ad-hoc tribunals is very similar in most respects to those applied in the civil law judicial systems and differs from those adopted in the Common Law states. The latter states have applied the concept for several decades and it is now employed in the criminal files without restrictions on the types of crimes or their severity because it creates the opportunity to avoid the process and not only to shorten it. Moreover, in the case the agreement fails, the defendant's right of not self-incriminating does not suffer because the Anglo-American Plea Agreement does not suppose an in-court confession. So, considering these issues, we conclude that, although there is not still an outlined pattern of the Plea Agreement of the civil law countries, the ad-hoc tribunals have applied in their practice a very similar model to those applied in these countries. As the ad-hoc tribunals' practice in this regard is longest, we try to analyze whether it can be a model for the European continental states which have already adopted the concept or might it be a model of regulation for those countries which have not yet adopted Plea Agreement into their criminal legislation.

### 5.1. With regard to the types and gravity of the crime

As we can see, the most of the European continental countries do not allow the Plea Agreement to be applied in the cases dealing with the most severe crimes, most probably because the concept is seen as a tool able only of shortening those criminal cases which do not entail a real challenge in proving the guilt of the defendants, the so called start-end criminal files, which otherwise, would uselessly require time and resources following a classic trial. Moreover, a lenient penalty for a defendant committing a serious crime, as a consequence of his/her plea agreement concluded with the prosecutor, is hard to be accepted by the justice seekers of these countries because it would be rather seen as a betrayal of the justice than a pragmatic approach of doing it. In spite of this prejudice, the RPE of the ad-hoc tribunals does not ban the concluding of plea agreement for the most serious crimes, most probably because, almost all the crimes under their jurisdiction are deemed as extremely serious. On the other hand, the range of the defendants' involvement in the crimes perpetration is the key issue in attributing the criminal responsibility and therefore, if the ad-hoc tribunals have not a wide range of offenses from which to select the less serious kinds when concluding plea agreements they have definitely much more possibilities to qualify the involvement of the defendants into the crimes commission. The ad-hoc tribunals offer a rich jurisprudence regarding the modes of attributing the criminal responsibility because in addition to the traditional modes encountered in the national jurisprudences like *direct commission*, *incitement*, *aiding* or *abetting*<sup>34</sup> we can find also the *planning*, *ordering*<sup>35</sup>, the participation to the famous *joint criminal enterprise*<sup>36</sup> and the *superior responsibility for the crimes committed by his/her subordinates*<sup>37</sup>. All these modes of criminal responsibility create a wide range of labeling the degree of the defendant's guilt according to his/her involvement into the crimes commission and therefore, not having too many choices regarding the kinds of crimes, the prosecutor has many possibilities to assess the defendant's modes of responsibility according to its involvement.

---

<sup>34</sup> See, 'Modes of liabilities: commission and participation', in OSCE-ODIHR /ICTY/UNICRI Project "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions", Developed by International Criminal Law Services, 33, 41, 69, available on [http://wcjp.unicri.it/deliverables/training\\_icl.php](http://wcjp.unicri.it/deliverables/training_icl.php).

<sup>35</sup> See, Badar, M. E., 'Participation in crimes in the jurisprudence of the ICTY and ICTR', *Routledge Handbook of International Criminal Law* (eds. William A. Schabas, Nadia Bernaz), Routledge, (2011), 246, 247-248.

<sup>36</sup> See, Cassese, A., 'The Proper Limits of the Individual Criminal Responsibility under the Doctrine of Joint Criminal Enterprise' in *Journal of International Criminal Justice* 5 (2007), Oxford University Press, 2007,109-133.

<sup>37</sup> See, Ambos, K. 'Superior Responsibility' in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, (eds. Cassese, Gaeta & Jones, 2002) J.R.W.D. Jones Publisher: Oxford University Press, 806-853; Meloni, C., 'Command Responsibility, Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' In *Journal of International Criminal Justice* 5 (2007), Oxford University Press, 619-637.

Nevertheless, it's not quite clear whether the Prosecutor's Offices of the ad-hoc tribunal really looked only for the law ranking or less involved defendants for concluding plea agreement with, like in the national jurisdictions of the civil law countries. Most probably the prosecutor didn't propose an agreement to Slobodan Milošević or Ratko Mladić due to their position and involvement in the crimes perpetration but other high ranking defendants like Biljana Plavsić, the former president of Republika Srpska have concluded such agreements. We think, therefore, that in the ad-hoc tribunals jurisprudence there is not too much scrupulosity in dissociation the group of the high ranking defendants, not eligible for negotiation from the rest of the defendants. The ad-hoc tribunals have a specific mission and a limited time to accomplish it and therefore they can't underestimate the advantages offered by a high ranking defendant's confession in the context of the evidence's scarcity or the cases' complexity.

Regarding the learning from the ad-hoc tribunals' jurisprudence in doing negotiated justice in the cases involving serious crimes, we think there is at least one positive aspect to be taken in account. If the legal system does not accept a negotiated justice with the most heinous criminals, as seen in the most European continental countries, than is not necessary to prohibit through the law *de plano* negotiations with the defendants who participated in the perpetration of those crimes. It would be wiser to create the possibility to tackle the less involved or law ranking perpetrators for negotiating their guilt plea and afterward to use them as witnesses in order to secure proving the guilt of the most important perpetrators. Thus, we think when prohibiting the negotiating justice with the perpetrators of the most severe crimes it would be better for the legislators to take in account not solely the abstract gravity of the crime but also the degree of participation and the personal circumstances of the defendants and to leave a room for negotiation with the less involved perpetrators, despite the seriousness of the crime.

### *5.2. With regard to the complexity of the criminal files*

As presented in the previews sections, one of the main reasons to implement Plea Agreement procedure into the proceedings of the ad-hoc tribunals was to simplify the complex cases resolution by using the defendant guilty plea in two different aims: the quick resolution of the case in which the defendant conclude a plea agreement; the use of this defendant as witness in other criminal cases. This double role of the Plea Agreement was employed in disentangling some very complex and sensitive criminal files of the ad-hoc tribunals. Therefore, the choice of most European continental countries of not allowing this procedure in the very complex criminal cases is incomprehensible. The American commentator Jeffrey Toobin<sup>38</sup> has considered the solving of the criminal files concerning organized crimes or corporate crimes quite unimaginable without the using of the Plea

---

<sup>38</sup> See, Toobin, J., 'End Run at Enron', in *The New Yorker*, 27 October 2003.



Agreement for the law ranking perpetrators. The same positive outcome of the use of this procedure in the jurisprudence of the ad-hoc tribunals in tackling the very complex crimes under their jurisdiction, like genocide, crimes against humanity and war crimes makes us to conclude, Plea Agreement is extremely valuable in solving the crimes committed in a systemic context<sup>39</sup>. These kinds of crimes are committed by a more or less formal hierarchical structure of the perpetrators following a specific pattern: while the crime is conceived and orchestrated by the high ranking members of the group, the low rank members, in pursuing the instructions of their superiors, perpetrate the material acts of the crimes. Thus, applying the classic formulas of attributing the criminal responsibility, the high ranking members of the criminal group would never make responsible, grace of the fact, they didn't do any material act of the crime and sometimes there is even a structural remoteness between them and the place where the crime has been committed. Demonstrating their involvement in the crime's perpetration is, thus, an extremely difficult task or even impossible without the cooperation with the prosecutor of the low ranking perpetrators. As the most European continental legal systems don't give the legal possibility to do such deal with the perpetrators involved in committing the most complex crimes like those above mentioned, in spite of their low ranking position within the criminal group or of their small contribution to the crimes' perpetration, they do anything else than frustrate the prosecutors of having an extremely useful tool in prosecuting the high ranking members of the criminal group, that is, the Plea Agreement with the low ranking members.

### *5.3. The bargaining tools of the prosecutor*

In the aim of raising the interest of the defendant to conclude an agreement with the prosecutor, as a necessary precondition, the latter must have at its disposal some significant bargaining tools. Even if, in the *Nicolić Case*, the ICTY prosecutor amended the indictment by waiving the charge of complicity of genocide for Dragan Nicolić, we cannot say, as a general rule, the ICTY prosecutor has the power to waive charges in turn for the defendant's guilty plea. However, for the Prosecutors' Offices of the ad-hoc tribunals there still remain enough bargaining tools given the wide range of time for the penalties of imprisonment which can be imposed to the defendants. Actually, the statutes and the RPE of the ad-hoc tribunals don't preview limits for the penalties. Even though the Plea Agreement can be subjected of the judge's disapproval in the case he/she found an unfair leniency to the negotiated punishment, the fact that the prosecutor can propose a substantial reduction of the imprisonment time for defendant, still remains a strong bargaining tool. This is not a similar situation in the most of

---

<sup>39</sup> See, Vogel, J., 'How to determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models' (English version) in *Cahiers de Defense Sociale*, (2002), 152-169.

European continental countries where not only is the withdrawal of some charges not permitted, thanks to the omnipresent principle of mandatory prosecution, but even the reduction of the punishment is not at the prosecutors' fully disposal because most of the legislations impose certain limits in reducing the penalty as result of the agreement. Moreover, some legal systems left the entire decision of penalty reduction in the hands of the judge, leaving thus almost no bargaining tool at the prosecutor's disposal. All of these aspects show us the insignificant role assigned by the civil law legal systems for the Plea Agreement procedure, that is, only for some minor criminal cases where given the willingness of the defendant to assume his/her guilt, it seems useless to spend time and resources within a classic trial.

## 6. Final remarks

Taken from the Common Law legal systems, the Plea Agreement procedure began to be implemented in continental European states especially in the last decade and is already a common practice within the ad-hoc international criminal tribunals ICTY and ICTR since 2001. Even if the models adopted in these mentioned jurisdictions differ from those encountered in the Anglo-American systems being applied until now only in minor criminal cases and not just to avoid the trial but actually to shorten it, most likely, in the future, after the assessment of its application in practice proves to be positive one, the procedure will be expanded to the cases involving serious crimes and the limits of negotiating will be allowed a wider range. So far, the issue of justice negotiation is inconsistent with certain traditional principles and institutions of the criminal proceedings in the civil law countries and is still hard to digest for some specialists.

## References:

1. G. Fisher, "Plea Bargaining's Triumph", *Yale Law Journal (YLJ)* 109, (2000).
2. M. Damaška, 'Negotiated Justice in International Criminal Courts', in *Journal of International Criminal Justice (JICJ)*, 2 (2004), Oxford University Press, 2004.
3. M. Yant 'Presumed Guilty: When Innocent People Are Wrongly Convicted' (1991), Prometheus Books, New York.
4. F. Tulkens, 'Negotiated Justice', in M. Delmas-Marty, J.R. Spenser, *European Criminal Procedures*, Cambridge University Press, Cambridge (2002).
5. V. Peskin, *International Justice in Rwanda and the Balkans*, Cambridge University Press, 2008, Kindle Edition.
6. Tieger, A. and Shin, M., 'Plea Agreements in the ICTY. Purpose, Effects an Property' in *Journal of International Criminal Justice* 3 (2005), Oxford University Press.
7. Clark, J. N., 'Plea Agreements at the ICTY. Guilty pleas and Reconciliation' in *The European Journal of International Law*, Vol. 20 no. 2 (2009) Department of International Politics, Aberystwyth University, U.K.

8. Marstone Danner, A. and Martinez, J. S. 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' in *California Law Review*, vol. 93 (2005).
9. A. Alschuler, W. 'Plea Bargaining and Its History' in *Colombia Law Review* 79 (1), (1979).
10. Borasi, Ivan, *Il patteggiamento. Approccio di sistema alle implicazioni procesuali*, Altalex Editore, Ebook format, chapters I-II
11. G. Lattanzi, E. Lupo, '*Codice di Procedura Penale*', Vol. VI, Giuffr , Milano, 1997.
12. B. Sch neman, 'Wohin treibt der deutsche Strafprozess' in *Zeitschrift f r die gesamte Strafrechtswissenschaft*, 114 (2002)
13. Alkon, C, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?' in *Transnational Law & Contemporary Problems*, a Journal of University of Iowa College of Law, vol. 19, Spring 2010.
14. Badar, M. E., 'Participation in crimes in the jurisprudence of the ICTY and ICTR', *Routledge Handbook of International Criminal Law* (eds. William A. Schabas, Nadia Bernaz), Routledge,(2011).
15. Cassese, A., 'The Proper Limits of the Individual Criminal Responsibility under the Doctrine of Joint Criminal Enterprise' in *Journal of International Criminal Justice* 5 (2007), Oxford University Press, 2007.
16. Ambos, K. 'Superior Responsibility' in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, (eds. Cassese, Gaeta & Jones, 2002) J.R.W.D. Jones Publisher: Oxford University Press;
17. Meloni, C, 'Command Responsibility, Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' In *Journal of International Criminal Justice* 5 (2007), Oxford University Press.
18. Vogel, J., 'How to determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models' (English version) in *Cahiers de Defense Sociale*, (2002).