Rehabilitating Charge Bargaining

Nancy Amoury Combs
William & Mary Law School, ncombs@wm.edu

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Nobody likes plea bargaining. Scholars worldwide have excoriated the practice, calling it coercive and unjust, among other pejorative adjectives. Despite its unpopularity, plea bargaining constitutes a central component of the American criminal justice system, and the United States has exported the practice to a host of countries worldwide. Indeed, plea bargaining has even appeared at international criminal tribunals, created to prosecute genocide and crimes against humanity—the gravest crimes known to humankind. Although all forms of plea bargaining are unpopular, commentators reserve their harshest criticism for charge bargaining because charge bargaining is said to distort the factual basis of the defendant’s ultimate conviction. Commentators apply this criticism to charge bargaining whether it is used to obtain guilty pleas for domestic crimes or international crimes.

This Article shows, however, that the criticisms leveled at domestic charge bargaining have been inappropriately transplanted wholesale to the international context. Through a comprehensive empirical analysis of international criminal indictments and a series of in-depth interviews with international prosecutors, this Article shows that international prosecutors routinely charge their defendants with only a subset of their criminal acts. That is, this Article’s empirical analysis reveals that international criminal convictions obtained without charge bargaining suffer from the primary flaw afflicting convictions that are obtained as a result of charge bargaining—factual distortion—yet they gain none of the advantages that charge bargaining can provide. This insight necessarily alters our normative assessment of charge bargaining, so this Article develops a new normative framework by which to evaluate charge bargaining. Specifically, this Article shows that the desirability of charge bargaining in international criminal prosecutions has nothing to do with the contestations surrounding its practice domestically and almost everything to do with one of the most sharply contested normative controversies in all of international criminal law—the controversy surrounding the appropriate breadth of criminal charging.

* Ernest W. Goodrich Professor of Law, Director Human Security Law Center, William & Mary Law School. I presented this Article at the American Society for International Law mid-year meeting, the ICC Scholars’ Forum, and the 2019 William & Mary Law School Scholarship Slam and received valuable feedback. This Article has benefited from the insightful comments of Jeff Bellin, Jay Butler, Evan Criddle, Caroline Davidson, Yvonne Dutton, Adam Gershowitz, Barbora Hola, Dov Jacobs, Eric Kades, Matthew Kane, Patrick Keenan, Linda Malone, Howard Morrison, Joseph Powderly, Leila Nadya Sadat, Elies van Sliedregt, Milena Sterio, and Jennifer Trahan. I am also grateful to Dorothy Canevari, Melanie Dostis, Darja Meskin, Yasmine Palmer, Heather Pearson, and Sean Tenaglia for excellent research assistance. Any errors are my own.
INTRODUCTION

Nobody likes plea bargaining. Scholars from around the world have excoriated the practice, calling it coercive, unjust, and a host of other pejorative adjectives. Despite its unpopularity, however, plea bargaining has constituted a central component of the American criminal justice system for nearly a century. Born as a means of avoiding increasingly complicated and time-consuming criminal procedure rules, plea bargaining has become an entrenched feature of American criminal justice. About 90% of American criminal convictions are obtained through guilty pleas, virtually all of which are obtained through plea bargaining. Moreover, in recent decades, the United States has exported its reliance on plea bargaining to other countries where the practice was previously unknown.

dissimilar as Germany, Colombia, and Poland now employ a variety of incentives to encourage their criminal defendants to waive their rights to trial. Indeed, plea bargaining is so attractive a means of expediting prosecutions that it has even appeared at international criminal tribunals, created to prosecute genocide and crimes against humanity—the gravest crimes known to humankind.

Prosecutors practice plea bargaining in a variety of ways, and although all of its manifestations are unpopular, commentators reserve their harshest criticism for one particular form of plea bargaining: charge bargaining. Charge bargaining occurs when prosecutors withdraw well-founded charges or agree not to bring well-founded charges in exchange for the defendant’s guilty plea to a reduced set of charges. Critics accuse charge bargaining of being both factually distortive and coercive. Charge bargaining is factually distortive, it is said, because “the offense of conviction


does not match either the charges the state filed or the reality of the offender’s behavior. And charge bargaining is coercive, according to commentators, because it encourages prosecutors to over-charge defendants—by charging them with crimes that prosecutors do not expect to be able to prove—so as to pressure them into pleading guilty to crimes the defendant actually committed. It is for these reasons that charge bargaining is considered the most distasteful form of a highly distasteful practice.

Indeed, commentators criticize charge bargaining whether it is used to obtain guilty pleas for domestic crimes or international crimes. However, whereas charge bargaining is justifiably criticized in the domestic context, this Article shows that it should be viewed entirely differently—and far more favorably—when it is employed by international criminal courts. This Article maintains that the criticisms leveled at domestic charge bargaining have been inappropriately transplanted wholesale to the international context. Specifically, criticisms of domestic charge bargaining presuppose certain principles and practices that simply do not exist when international crimes are prosecuted at international tribunals. Indeed, this Article demonstrates that even when they are not engaged in charge bargaining, international prosecutors already employ many of the same practices that characterize domestic charge bargaining, and they consequently generate many of the same disadvantages that accompany domestic charge bargaining. Yet because those practices constitute the norm of international criminal charging, prosecutors accept those disadvantages

10. Wright et al., supra note 8, at 33.


12. See infra notes 49–51 and accompanying text. At the same time, charge bargaining may also be the most entrenched and persistent form of plea bargaining. Recent decades have seen numerous reform efforts aiming to eliminate plea bargaining in various criminal justice systems. These efforts have generally failed, but even those that were marginally successful did not substantially reduce charge bargaining. For instance, Alaska was home to arguably the most comprehensive effort to eliminate plea bargaining when, in 1975, the state’s Attorney General prohibited his prosecutors from employing the practice. Michael L. Rubinstein & Teresa J. White, Alaska’s Ban on Plea Bargaining, 13 Law & Soc’y Rev. 367, 367 (1979). Four years into the ban, sentence bargaining had been virtually eliminated, but charge bargaining had only been reduced. See id. at 369–71. Moreover, by 1985, widespread and explicit charge bargaining had returned to most of the state. Teresa White Carns & John A. Kruse, Alaska’s Ban on Plea Bargaining Reevaluated, 75 Judicature 310, 317 (1992); see also Richard H. Kuh, Plea Bargaining: Guidelines for the Manhattan District Attorney’s Office, 11 Crim. L. Bull. 48 (1975) (banning sentence bargaining but not charge bargaining); Raymond I. Parnas & Riley J. Atkins, Abolishing Plea Bargaining: A Proposal, 14 Crim. L. Bull. 101, 109–10 (1978) (observing that while the United States Attorney for the Southern District of California prohibited sentence bargaining, charge bargaining may have continued).
without question and without gaining any of the advantages that charge bargaining would produce.

This Article proceeds in four Parts. The first is analytical and descriptive. The second is empirical, and the final two are normative. Part I begins by recounting the primary criticisms leveled at domestic charge bargaining, and it shows that those same criticisms have been deployed against charge bargaining in the international context. Recent commentators have excoriated international charge bargaining for producing dishonest results in just the same way that their predecessors criticized domestic charge bargaining. Part I reveals, then, that charge bargaining is even less popular at the international tribunals than it is in domestic criminal justice systems, and it is disliked for all the same reasons.

Part II goes on, however, to show that those criticisms are largely misplaced when they are leveled at international charge bargaining. Specifically, Part II presents an empirical analysis of international criminal indictments and details a series of in-depth interviews that I conducted with international prosecutors. This body of evidence demonstrates that international prosecutors routinely charge their defendants with only a subset of their criminal behavior. Convictions at international courts, therefore, like convictions by domestic criminal justice systems employing charge bargaining, are factually distortive in that they frequently understate their defendants’ criminal conduct. Part II reveals, then, that international criminal convictions obtained without charge bargaining suffer from the primary flaw afflicting convictions that are obtained as a result of charge bargaining—factual distortion—yet they gain none of the advantages that charge bargaining can provide.

Part II, thus, shows that that most-criticized aspect of that most-criticized criminal procedure mechanism in fact stands as the norm of international criminal justice. Specifically, it shows that the predominant criticisms leveled at domestic charge bargaining have no salience in the international context. This insight necessarily alters our normative assessment of charge bargaining, so Part III develops a new normative framework—one that is grounded on the empirical reality of international prosecutions, not on largely irrelevant domestic practices and principles. To be sure, the fact that a practice employed in one context cannot be subject to the devastating criticisms that apply to it in another context does not serve to justify it in the first context. But Part III suggests that the core transaction of plea bargaining—trading leniency for efficiency—can be justified in the international criminal context, particularly at this moment in time, when the International Criminal Court (ICC) has suffered a series of misfortunes that have sharply highlighted its need to enhance its performance and efficiency. Part III goes on to show, in particular, that the desirability of charge bargaining in international criminal prosecutions has almost nothing to do with the conflicts and contestations surrounding its practice in domestic criminal justice systems and almost everything to do with one of the most sharply contested normative controversies in all of international criminal law: the controversy surrounding the appropriate breadth of international criminal charging. Some international prosecutors have brought broad-based indictments that encompass the majority of their defendants’ criminal activity, whereas others have

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13. See infra text accompanying notes 117–19; see also Prosecution Refuses to Cut Down the Haradinaj Indictment, SENSE TRANSITIONAL JUST. CTR. (Feb. 14, 2007),
targeted a far narrower range of criminal behavior in order to highlight salient issues and conserve resources for future prosecutions. Each practice garners outspoken fans and critics, who highlight the benefits of their preferred model. Part III, however, suggests that there is no one-size-fits-all model for international criminal charging; rather, a host of salient factors—which include financial, political, structural, and temporal considerations—should influence the prosecutors' choice of charges in any given case.

That said, narrow indictments are desirable in many contexts, and to the extent they are advantageous in particular circumstances, charge bargaining presents a valuable means of obtaining those advantages in addition to the resource and efficiency benefits that guilty pleas routinely provide. Part III, then, concludes by advancing a novel normative vision of charge bargaining that highlights both the core and the constructive role that it can play in modern international criminal prosecutions. Desirable or not, employing charge bargaining in the international context presents challenges unknown to domestic prosecutors, so Part IV elucidates those challenges and suggests ways of adapting the practice to render it effective in the unique international setting. Specifically, Part IV details a series of conditions that must exist for prosecutors to employ charge bargaining efficiently and effectively in international prosecutions.

I. CHARGE BARGAINING AND ITS DOMESTIC AND INTERNATIONAL CRITICS

In Anglo-American countries, guilty pleas developed in response to increasingly complex and time-consuming criminal procedures. Guilty pleas were wholly unnecessary during the late seventeenth and early eighteenth centuries because the Anglo-American criminal trials of that day were so quick and summary that London's Central Criminal Court, the Old Bailey, could process between twelve and twenty felony cases each day. Not surprisingly, those quick, summary trials were also lacking basic fair trial protections, such as legal representation and evidentiary exclusions designed to ensure defendants' rights. As criminal justice systems added


14. See infra Sections II.C.2.a, II.C.3.


17. See Feeley, supra note 15, at 188; Langbein, Short History, supra note 15, at 263 ("The most important factor that expedited jury trial was the want of counsel."); Langbein, supra note 16, at 282; see also id. at 307–08 (describing the reasons justifying the prohibition on defense counsel).

18. Langbein, Short History, supra note 15, at 264; see also Langbein, supra note 16, at 300–06 (acknowledging that prejudicial evidence was admitted in Old Bailey proceedings); John H. Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 3, 10 (1978) ("[T]he exclusionary rules of the law of criminal evidence"] were still primitive and
these procedural protections, they safeguarded defendants' rights, but they also dramatically lengthened criminal trials and increased their costs. The guilty plea, then, was born in response to these developments as an alternative, more efficient case disposition method. That is, as trials became more complex and time-consuming, guilty pleas became an increasingly popular means of avoiding those trials. In modern times, guilty pleas serve the same function. Guilty pleas are particularly prevalent in the United States; in fact, they constitute the method by which approximately 90% of American criminal convictions are obtained.¹⁹

Accused criminal defendants are not usually concerned about the length or cost of their criminal trials, so if prosecutors want defendants to waive their trial rights and thereby produce cost savings for the government, then prosecutors must provide those defendants suitable incentives. Plea bargaining, thus, can be roughly defined as the provision of incentives to a defendant in exchange for his or her guilty plea. The incentives in question typically consist of sentence reductions, and the bargaining in question comes in two forms: sentence bargaining and charge bargaining. Prosecutors who sentence bargain promise to recommend to the court a reduced sentence or sentencing range, which both parties expect the court to impose, in exchange for the defendant's guilty plea.²⁰ Prosecutors who charge bargain decline to charge the defendant with certain crimes, or they dismiss charges already brought in exchange for the defendant's guilty plea on a reduced set of charges.²¹

Charge bargaining itself can be practiced in at least two ways. In what some call "horizontal charge bargaining," the prosecutor declines to charge certain factually uncharacteristic.

¹⁹. See Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (estimating "that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty"); Fisher, supra note 1, at 910 (noting that in modern American courtrooms, "guilty-plea rates above ninety or even ninety-five percent are common"); see also Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979, 1993 (1992) ("[E]ighty to ninety percent of defendants currently plead guilty . . ."); LAFAVE ET AL., supra note 9, at 19 (observing that, in many large counties, as few as 2% of felony cases proceed to trial).

²⁰. See LAFAVE ET AL., supra note 9, at 1194 (explaining that a prosecutor may "promise a certain sentence upon a guilty plea" and that the possibility is slight that the trial judge will not follow his recommendations); see also Albert W. Alschuler, The Trial Judge's Role in Plea Bargaining, Part I, 76 COLUM. L. REV. 1059, 1165 (1976) ("[J]udges almost automatically ratify prosecutorial charge reductions and sentence recommendations."); id. at 1063–64 (noting that five of the six felony judges in Houston, Texas, followed the prosecutor's sentence recommendation in almost every case, while the sixth judge followed the prosecutor's recommendation in 90% of the cases); Donald G. Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. ILL. L. REV. 37, 68 ("[R]egardless of the articulated standard, courts rarely intervene in plea agreements.").

²¹. E.g., LAFAVE ET AL., supra note 9, at 1195 (explaining that an "on-the-nose" guilty plea to one charge may be exchanged for the prosecutor's agreement to drop other charges). In many cases, the dismissed charges carry mandatory sentences higher than the range of sentences available for the remaining charges, so the dismissal of the more serious charges necessarily results in a reduced sentence. See id.; Michael Bohlander, Plea-Bargaining Before the ICTY, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 151, 151 (Richard May et al. eds., 2001).
distinct crimes for which there is sufficient evidence. Let's say, for instance, that the evidence suggests that the defendant burglarized two homes: one on Elm Street and one on Main Street. When engaged in horizontal charge bargaining, the prosecutor would decline to charge the defendant with the Elm Street burglary in exchange for his guilty plea to the Main Street burglary. The second form of charge bargaining has been termed “vertical charge bargaining,” and it refers to a negotiation process in which the prosecution initially charges the defendant for all of the crimes that appear to reflect his criminal activity but then withdraws some of those charges and replaces them with less serious charges to which the defendant pleads guilty.

Assume, for instance, that the evidence suggests that the defendant purposefully killed the victim. Initially, the prosecutor might charge the defendant with intent-to-kill murder, but if engaged in vertical charge bargaining, she might reduce the charge to unintentional manslaughter in exchange for the defendant’s guilty plea to that crime. Both forms of charge bargaining, like sentence bargaining, are designed to lead to a reduced sentence of imprisonment for the defendant who pleads guilty.

In the United States, once plea bargaining was introduced, it took hold, and it continues to remain firmly entrenched. The same appears true for the civil law countries that have more lately embraced negotiated dispositions of criminal cases. By contrast, international criminal tribunals have had a more tempestuous relationship with case negotiations. In particular, when the first modern international court—the International Tribunal for the former Yugoslavia (ICTY)—was established, there was little need for guilty pleas and even less interest in procuring them. At that time, there were few defendants in the dock, and international attention was focused on arresting and publicly trying vicious mass murderers, not expediting their proceedings. Admittedly, the ICTY’s first defendant, Dražen Erdemović, did

23. Id.
24. See, e.g., Luzon, supra note 4, at 601-03 (“In Germany, informal settlements have been used regularly for a long time, and a practice similar to plea bargaining has been introduced into the German criminal procedure.”). Similarly, Italy amended its criminal code in 1989 to increase efficiency, including by introducing a guilty plea analogue. William T. Pizzi & Mariangela Montagna, The Battle to Establish an Adversarial Trial System in Italy, 25 Mich. J. Int'l L. 429, 437-39 (2004). By 2012, bargaining had “taken root” such that 34% of all Italian criminal cases involved bargained-for-justice. Vitiello, supra note 3, at 262. And the Republic of Georgia introduced a form of plea bargaining into its Criminal Procedure Code in 2003 and saw a rapid increase in its use in 2006 and 2007. Alkon, supra note 3, at 366-67.
25. Indeed, when the ICTY was being created, the United States proposed including a procedural rule that would have authorized the prosecution to grant defendants full or partial testimonial immunity in exchange for their cooperation, but the proposal was rejected. As then-ICTY President Cassese described it: “The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhuman 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.” Michael P. Scharf, Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg 67 (1997).
plead guilty, but he did so without promise of leniency, and no plea bargaining took place at the ICTY or its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), for several years. Eventually, facing pressure from the United Nations Security Council to complete their caseload, tribunal prosecutors did begin to practice plea bargaining—both sentence and charge bargaining—so as to expedite proceedings. From 2001 to 2007, the ICTY and ICTR disposed of twenty-three cases by means of guilty pleas. The Special Panels for Serious Crimes in East Timor

26. COMBS, supra note 7, at 60–61.

27. Id. at 59–62 (describing early ICTY guilty pleas that were not obtained through plea bargaining); id. at 92–94 (describing the ICTR’s first guilty plea in which the defendant claimed that he was orally promised leniency, but the prosecution recommended the harshest sentence the tribunal could impose).


embraced negotiated settlements even more enthusiastically during their years of existence, and prosecutors there obtained approximately half of their convictions through admissions of guilt.\textsuperscript{30}

Although some international defendants admitted guilt without benefiting from a reduced sentence, most did gain sentencing benefits, either as a result of sentence bargaining or charge bargaining. At the same time, the nature and intensity of that bargaining evolved over time. In particular, early ICTY and ICTR defendants appeared to receive relatively modest sentencing reductions following their guilty pleas.\textsuperscript{31} Later, however, when tribunal prosecutors began facing increased pressure to resolve their cases expeditiously,\textsuperscript{32} they offered more generous sentencing concessions—concessions that were designed to (and did) motivate larger numbers of defendants to plead guilty. Indeed, ICTY prosecutors obtained a spate of guilty pleas in 2002 and 2003, and most of these were “paid for” by extremely lenient sentence recommendations, particularly in comparison to previous ICTY cases, even those involving defendants who pled guilty.\textsuperscript{33}

Prosecutors’ treatment of charges in ICTY and ICTR guilty plea cases followed a similar trajectory. In particular, although in some early cases prosecutors withdrew charges when the defendant agreed to plead guilty, these early withdrawals did not fundamentally alter the scope of the criminal activity to which the accused admitted.\textsuperscript{34} However, in later cases—again under pressure to speed proceedings—prosecutors began withdrawing charges in ways that both eliminated criminal activity and redefined the nature of that activity. In the ICTR’s \textit{Bisengimana} case, for instance, the prosecution concluded a plea agreement in which Bisengimana admitted to crimes far less serious than those for which he had initially been...


\textsuperscript{31} Id. at 71–73.


\textsuperscript{33} For a detailed description of these guilty pleas and the sentence bargaining that generated them, see COMBS, supra note 7, at 73–76.

\textsuperscript{34} In \textit{Todorović}, for instance, ICTY prosecutors withdrew twenty-six out of the original twenty-seven counts after Todorović agreed to plead guilty, but they folded all of these facts into the remaining charge of persecution as a crime against humanity. \textit{Id.} at 63.
charged. In other cases, prosecutors withdrew charges in ways that did not alter the factual bases for the convictions but that redefined those facts in ways favorable to the accused. In particular, prosecutors withdrew genocide charges in several cases in which genocide almost certainly could have been proven. Bisengimana and Serugendo were two such cases at the ICTR. At the ICTY, prosecutors withdrew genocide charges against defendants pleading guilty to involvement in the Srebrenica massacres. In the one previous case involving Srebrenica killings, ICTY defendant Radislav Krstić had been convicted of genocide after trial and sentenced to a forty-six-year prison term. By contrast, after ICTY prosecutors withdrew genocide charges against Momir Nikolić and Dragan Obrenović and permitted them to plead guilty merely to crimes against humanity for their involvement in the Srebrenica massacres, prosecutors recommended sentences of between fifteen and twenty years’ imprisonment for each defendant. Such sentence recommendations would have been unthinkably lenient if the defendants had been convicted of genocide.

Despite the well-recognized efficiency gains of plea bargaining, its use declined dramatically at the ICTY and ICTR after the early 2000s, and the ICC obtained its first (and only) admission of guilt only after the court had been in operation for approximately fourteen years. The reasons for plea bargaining’s popularity decline are many, but arguably one important factor was the sustained criticism that the practice attracted from victims, commentators, and the tribunals’ judiciary.

35. Most notably, whereas the indictment had charged Bisengimana with actively planning and executing the raping and killing sprees that were at the center of the indictment, the plea agreement portrayed him merely as a passive observer. id. at 101–03.
36. Id. at 106–08.
40. ICTR defendant Michel Bagaragaza did plead guilty in 2009, but he did so only after an ICTR Trial Chamber rejected the agreement Bagaragaza made with the prosecution to transfer his case to the courts of Norway. Prosecutor v. Bagaragaza, Case No. ICTR-05-86-S, Sentencing Judgment, ¶¶ 1–8, 11 (Nov. 17, 2009).
41. Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, (Sept. 27, 2016) [hereinafter Al Mahdi Judgment].
42. One contributing factor, for instance, was the proclivity of some Trial Chambers to sentence outside the range recommended by the prosecution in guilty plea cases. COMBS, supra note 7, at 76–80; Alex Whiting, Encouraging the Acceptance of Guilty Pleas at the ICC, POST-CONFLICT JUST. (Feb. 11, 2015), http://postconflictjustice.com/encouraging-the-acceptance-of-guilty-pleas-at-the-icc/ [https://perma.cc/FTG2-876J]; see infra Part IV.
In the United States, plea bargaining simultaneously holds an exalted and debased status. It is exalted because it stands as a necessary and vitally important component of the American criminal justice system. Even plea bargaining's harshest critics acknowledge that the American criminal justice system—as currently constituted—requires the use of plea bargaining to dispose of its cases within reasonable periods of time. At the same time, plea bargaining is reviled for a host of reasons almost too lengthy to delineate. Scholars, commentators, and court watchers almost uniformly decry plea bargaining for being theoretically indefensible, for impairing defendants' rights, for leading to unconscionable results, and for undermining penological goals, among many other sins.

43. See Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea negotiations is . . . an essential part of the [criminal] process . . . .").

44. Craig M. Bradley, The Convergence of the Continental and the Common Law Model of Criminal Procedure, 7 Crim. L.F. 471, 474 (1996) ("Given the limited resources available to the criminal justice system and the high cost of jury trials, the majority of cases must be resolved without a trial."); Langbein, Controlling Prosecutorial Discretion, supra note 15, at 446 ("The system as now practiced depends on the prosecutor's exclusive authority to grant concessions in order to induce waivers of the right to jury trial."); Steven S. Nemerson, Coercive Sentencing, 64 Minn. L. Rev. 669, 725 (1980) (noting that there "are insufficient quantities of judicial and other necessary trial resources to provide a trial in more than a small percentage of cases"); Jerome H. Skolnick, Social Control in the Adversary System, 11 J. Conflict Resol. 52, 55 (1967) ("Among those in the system, it is generally believed that if the trial model were to become the routine mechanism for settling issues of criminality, the system would conceivably break down from overuse—there would be too many cases for too few courts."); Gordon Van Kessel, Adversary Excesses in the American Criminal Trial, 67 Notre Dame L. Rev. 403, 408 (1992) ("This system requires that the accused be subjected to threats of increased punishment for going to trial."); George P. Fletcher, With Justice for Some: Protecting Victims' Rights in Criminal Trials 191 (1996) ("In the American system, plea-bargaining seems to be inevitable. If all those who now plead guilty insisted on a jury trial, the system would collapse under the burden."); LAFAVE ET AL., supra note 9, at 1200–01.

45. Kenneth Kipnis, Criminal Justice and the Negotiated Plea, 86 Ethics 93, 105 (1976) ("[B]argains are out of place in contexts where persons are to receive what they deserve."); Lloyd L. Weinreb, Denial of Justice 71–86 (1977) (considering plea bargaining a "reversal" of the purported theoretical model of all criminal process).

46. See, e.g., Gifford, supra note 20, at 56–57; Langbein, Short History, supra note 15, at 261–62 (arguing that plea bargaining has been allowed to "subvert[] the design of our Constitution" and eliminate the opportunity to "present defenses and have . . . guilt proved to a jury beyond a reasonable doubt"). In particular, plea bargaining is said to encourage innocent defendants to plead guilty. Alschuler, supra note 11, at 60; John Baldwin & Michael McConville, Plea Bargaining and Plea Negotiation in England, 13 L. & Soc'y Rev. 287, 298 (1979); Thomas W. Church, Jr., In Defense of "Bargain Justice", 13 L. & Soc'y Rev. 509, 510 (1979); Schulhofer, supra note 19, at 2000; U.S. Nat'l Advisory Comm'n on Crim. Just. Standards & Goals, COURTS 48 (1973).

47. Gifford, supra note 20, at 55–56.

Plea bargaining’s domestic critics target all forms of the practice but, as noted in the Introduction, the form that generates the harshest criticism is charge bargaining. 49 Some commentators maintain that charge bargaining leads to more arbitrary results or is more disadvantageous to defendants than is sentence bargaining. 50 However, the primary and most prominent criticism leveled at charge bargaining is that it results in inaccurate—indeed dishonest—proceedings. 52 Specifically, charge bargaining is alleged to distort the truthfulness of either the prosecutor’s initial charges or the defendant’s ultimate conviction. For instance, if the prosecution charges the defendant with all the crimes that the evidence suggests he committed, then the prosecutor will have to withdraw some of those otherwise-provable charges if she wants to employ charge bargaining to induce the defendant to plead guilty. The defendant’s ultimate conviction after such a charge bargain is inaccurate because it understates his actual criminal liability. Alternatively, if the prosecutor is committed to convicting the defendant for the crimes he actually committed, yet still wants to engage in charge bargaining, then she must overcharge the defendant; that is, she must charge the defendant with more or more serious crimes than she believes will likely be provable at trial. 53 Doing so, the prosecution hopes, will induce the defendant to plead guilty to a reduced set of charges, but one that in fact represents his actual criminal liability. Charge bargaining virtually always leads to one of the above two scenarios, and it is for this reason that it is accused of producing dishonest results.

These criticisms are advanced even more stridently in civil law jurisdictions. 54 Negotiated justice came much later to civil law jurisdictions, yet in the last few

49. Frase, supra note 8, at 227, 231–32 (identifying charge bargaining as one of the “worst types” of plea bargaining); Wright et al., supra note 8, at 111–13 (arguing that charge bargains are less honest and accessible than sentence bargains and generally do more harm); Ronald Wright & Marc Miller, Honesty and Opacity in Charge Bargains, 55 STAN. L. REV. 1409, 1410–12 (2003) (arguing that charge bargains are less transparent than sentence bargains).

50. Alschuler, supra note at 20, at 1144–45 (“Although sentence recommendation bargaining permits a precise adjustment of the concessions that a guilty-plea defendant will receive, charge-reduction bargaining must proceed by leaps from one charge to another, and the size of each leap depends upon how much less serious each ‘reasonably related’ or otherwise available offense is than the offense that has been charged.”).


52. Alschuler, supra note at 20, at 1141; Frase, supra note 8, at 227, 231–32; Frase, supra note 11, at 621; Wright et al., supra note 8, at 111–13; HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT 37 (1982).

53. For a discussion of overcharging, see Alschuler, supra note 11, at 85–87; Covey, supra note 11, at 1254–55; Gifford, supra note 20, at 47–48; Wright et al., supra note 8, at 33, 85; Kyle Graham, Overcharging, 11 OHIO ST. J. CRIM. L. 701, 704–05 (2014); Miller, supra note 11, at 1703–4; Wright et al., supra note 8, at 33, 85.

54. Turner, supra note 3, at 229 (“Charge bargains are typically disfavored in civil law systems [because they are viewed as inconsistent with the rule of mandatory prosecution that still prevails in many civil law countries, as well as with the court’s duty to establish the truth of the case.”).
decades, civil law country after civil law country has begun employing negotiated dispositions as a means of expediting case resolutions. Yet although these jurisdictions permit analogues to American sentence bargaining, many have prohibited charge bargaining. The German Civil Code, for instance, expressly authorizes sentence bargaining and just as expressly bans charge bargaining. The German Civil Code, for instance, expressly authorizes sentence bargaining and just as expressly bans charge bargaining. Italy, Poland, Russia, and Colombia likewise allow sentence but not charge bargaining. In these countries, charge bargaining is particularly reviled because it is considered inconsistent with both the principle of mandatory prosecution that prevails in many civil law jurisdictions and with a civil law court’s obligation to establish the truth of the case. As Roza Pati put it: “Charge bargaining in continental Europe is considered a greater legal sin, [because it] compromises the very raison d’etre of criminal trial to establish the material truth ...” For this reason, charge bargaining is viewed as “bruising continental legal sensibilities.”

Given the criticism leveled at domestic plea bargaining in general and domestic charge bargaining in particular, it should come as no surprise that international criminal law’s brief employment of plea bargaining likewise proved controversial. As in the domestic context, all forms of international plea bargaining have been subject to considerable criticism, including allegations that the bargaining harms

55. See supra note 3.
56. FAIR TRIALS, supra note 3, at 44–49 (maps showing which countries have sentence bargaining analogues but no charge bargaining); see also Alemu Meheretu, The Proposed Plea Bargaining in Ethiopia: How it Fares with Fundamental Principles of Criminal Law and Procedure, 10 MIZAN L. REV. 400, 409–10 (2016) (noting that charge bargains are generally outlawed in civil law criminal justice systems).
58. Langer, supra note 3, at 50; Pizzi et al., supra note 24, at 438; Vitiello, supra note 3, at 260–61.
59. Roclaw ska et al., supra note 6, at 8; Tokarczyk, supra note 3.
60. Meheretu, supra note 56, at 405.
63. Pati, supra note 3, at 287 (emphasis in original).
64. Id.
victims, harms defendants, corrupts the historical record, and undermines the tribunals’ legitimacy and their ability to advance their penological goals. However, just as in the domestic context, charge bargaining is the most disfavored of a set of highly disfavored bargaining practices.

Indeed, the criticisms leveled at international charge bargaining mirror those that have been deployed against domestic charge bargaining for decades. For one thing, just as in the domestic context, international charge bargaining is generally considered more problematic than international sentence bargaining. Civil law commentators launch the complaint just mentioned—that international charge bargaining, like domestic charge bargaining, conflicts with the civil law duty to prosecute. Moreover, just as in domestic criminal justice systems, scholars, commentators, and even the judiciary excoriate international charge bargaining primarily because it undermines truth telling and distorts the historical record of the

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67. Cook, supra note 66, at 495–501 (arguing that defendants pleading guilty at the international tribunals often fail to receive adequate representation); Rauxloh, supra note 66, at 7–10.


71. Stephanos Bibas & William W. Burke-White, International Idealism Meets Domestic-Criminal-Procedure Realism, 59 DUKE L.J. 637, 687–88 (2010) (“But if one must bargain, the best plea bargains are sentence bargains, which offer sentence discounts without distorting the facts or the charges. Charge bargains are much worse, because lowering the charges often distorts the historical record and lies to the public about what actually happened.”); Michael P. Scharf, Trading Justice for Efficiency, 2 J. INT’L CRIM. JUST. 1070, 1075, 1080–81 (2004) (“As plea-bargaining before international tribunals goes, sentence bargaining is far less controversial than charge bargaining . . . .”); Rauxloh, supra note 66, at 5 (“One practice of plea bargaining which is most contested for undermining the principles of justice is charge bargaining.”); Turner, supra note 3, at 229 (“Charge bargains have been more controversial because of concerns that they may obscure the true facts of the case and the full extent of the defendant’s culpability.”).

72. See, e.g., Petrig, supra note 66, at 17–18.
Stephanos Bibas and William Burke-White, for instance, consider charge bargains particularly "troubling in the international arena because they undercut restoration and setting the historical record straight." In a similar vein, Jenia Turner views international charge bargains as "especially problematic" because they will lead "[t]he public . . . to wonder . . . whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record." Janine Clark likewise maintains that "the ICTY practice of charge bargaining means that the 'truth' that is established is often only an incomplete truth."

These very same concerns appear in several ICTY judgments, where Tribunal judges heaped their own criticisms on charge bargaining. In *Momir Nikolić*, the defendant—a Bosnian Serb who actively participated in the Srebrenica massacres—pled guilty to crimes against humanity after the prosecution withdrew genocide charges. The ICTY had previously and subsequently found the Srebrenica killings to constitute a genocide, so the withdrawal of genocide charges against Nikolić appeared to confer on him a substantial benefit. When sentencing Nikolić, the Trial Chamber comprehensively considered whether plea bargaining "was appropriate" for international crimes. In doing so, the Trial Chamber identified a host of benefits delivered through guilty pleas and plea bargaining, yet it urged "extreme caution" in cases where charges are withdrawn lest the resulting charges distort the historical record. Specifically, the Trial Chamber warned that:

> If the Prosecutor make [sic] a plea agreement such that the totality of an individuals [sic] criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal

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73. Burens, supra note 61, at 329; Mirjan Damaska, *Negotiated Justice in International Criminal Courts*, 2 J. INT’L CRIM. JUST. 1018, 1031–33 (2004); Ford, supra note 66, at 198–99 (2015); Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245, 271–72 (2006); Petrig, supra note 66, at 15–16; Scharf, supra note 71, at 1081 ("[P]lea-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.").
74. Bibas et al., supra note 71, at 687.
75. Turner, supra note 3, at 245.
76. Clark, supra note 66, at 424.
77. Combs, supra note 7, at 65.
79. Momir Nikolić Judgment, supra note 29, ¶ 74.
80. Id. ¶¶ 67–73.
81. Id. ¶ 65.
REHABILITATING CHARGE BARGAINING

conduct of the accused and whether it establishes a credible and complete historical record.82

The presiding judge in the ICTY’s Deronjić case articulated the same concerns but even more forcefully.83 These will be discussed in detail in Section II.D, which highlights the judiciary’s dramatically different treatment of charge bargaining, on the one hand, and narrow charging policies, on the other.

It is not only the international judiciary and other scholars who have criticized charge bargaining. I too have hurled harsh words at the practice. In my book, Guilty Pleas in International Criminal Law, I advanced a restorative justice model of guilty pleas and plea bargaining. Central to that model was the need for every guilty plea to present full and complete truth telling.84 Specifically, I argued that guilty pleas that meet restorative justice requirements—including by providing a comprehensive accounting of all of the defendants’ criminal activity—have the potential not only to reduce costs and thereby increase the number of prosecutions that can take place, but also to advance aims that are more conventionally associated with truth commissions and reparations schemes, such as forgiveness and reconciliation.85 Because accurate and complete truth telling was a fundamental component of my restorative-justice guilty plea system, I strenuously criticized charge bargaining, deeming it to “virtually always distort[ ] the factual basis upon which a conviction rests.”86 I went on to maintain that the inaccurate convictions resulting from charge bargaining “undermine truth-telling and reconciliation efforts.”87

On the one hand, the criticisms that I and so many others have leveled at charge bargaining are entirely accurate. When prosecutors withdraw provable charges or decline ever to bring provable charges in order to obtain a guilty plea, they render the factual basis for the resulting conviction inaccurate. And when the factual basis for the resulting conviction is inaccurate, the tribunal fails to achieve some of its legitimate penological aims. Establishing a historical record is one of international criminal law’s primary objectives,88 and it is an objective that is unquestionably undermined by charge bargaining. The tribunals’ deterrent and retributive functions are also undercut when charge bargaining leads defendants to be punished for only a subset of their criminal activity. For these reasons, I neither recant my own previously expressed views on charge bargaining, nor do I contest the criticisms that others have voiced.

However, the following Part will show that although our critique of charge bargaining is theoretically compelling, it is also idealistically beside the point.

82. Id.
84. COMBS, supra note 7, at 141–43.
85. Id. at 136–54.
86. Combs, supra note 3, at 144.
87. Id. at 207.
because it ignores the reality of current international prosecutions. In particular, Part II will show that many current international criminal prosecutions are characterized by factual distortions whether or not they employ charge bargaining. That insight, I argue, should fundamentally alter our normative assessment of charge bargaining.

II. CRITICIZED FOR ALL THE WRONG REASONS: THE CHARGE BARGAINING OF INTERNATIONAL CRIMES

Charge bargaining is problematic, commentators maintain, either because it is coercive or because it distorts the factual basis of a defendant's criminal conviction. Section A makes short work of the "coercion" criticism in the international context by showing that there is little reason to expect international prosecutors to charge crimes they do not believe they can prove.

Sections B and C turn to the "distortion" criticism. There, I concede that in virtually all cases of international charge bargaining—just as in domestic charge bargaining—the defendant "gets away" with some criminal activity because the prosecution withdraws or declines to pursue provable charges in exchange for the defendant's guilty plea. Thus, guilty pleas obtained through charge bargaining almost always understated the defendant's actual criminal conduct.

This criticism of charge bargaining is therefore accurate, but Sections B, C, and D will show that the criticism has little force when it comes to international criminal convictions because a large proportion of international criminal convictions—following trial—also understated the defendant's criminal liability such that he "gets away" with some criminal conduct. Section B explains how and why so many international criminal convictions understate their defendants' actual criminal conduct. Section C presents my empirical findings that flesh out and expand upon Section B's exposition. Finally, Section D compares two very similar international criminal cases: an ICTY case where, via a charge bargain, the defendant was convicted of crimes occurring during a one-day attack and an ICC case where, via narrow charging, the defendant was convicted of crimes occurring during a one-day attack. These three Sections show that the international criminal justice system currently incurs most of the costs but generates none of the benefits of charge bargaining.

A. The Uncoercive Nature of International Criminal Charging

As noted in Part I, domestic prosecutors are routinely accused of coercing defendants to plead guilty to the crimes they committed by initially overcharging them. That is, domestic prosecutors are believed to charge defendants with some crimes that are likely unprovable so as to pressure them into pleading guilty to the crimes that are provable—or, said differently, the crimes the defendants actually committed. Such coercive practices are unquestionably undesirable.

However, this valid criticism of domestic charge bargaining is almost certainly inapplicable in the international context simply because international prosecutors have no reason ever to overcharge. As Section B will delineate, one of the primary challenges confronting international prosecutors is that most of their defendants have committed far more crimes than international tribunals have the resources to prosecute. Thus, international prosecutors would have no reason to charge crimes
that they did not consider provable in order to induce a defendant to admit guilt simply because they could so easily charge the defendant with additional crimes that they did consider provable.

That said, Part IV will acknowledge the possibility that international prosecutors practicing charge bargaining may be forced to charge defendants with more provable crimes than they would like to prosecute, given available resources. But charging a larger set of provable crimes in order to motivate the defendant to admit guilt to a smaller subset of those provable crimes is not coercive because prosecutors in fact believe the defendant to have committed the charged crimes. Said differently, it is not coercive to charge defendants with the criminality we actually believe them to have perpetrated even if we may not have the resources to hold them accountable for all of that criminality. International defendants have no inherent right to benefit from the resource constraints that bedevil international criminal tribunals. For defendants to do so, indeed, would be to obtain a windfall—a windfall that, as the following two Sections show, a large percentage of international defendants do in fact obtain.

B. The Distorted Factual Bases of Most International Criminal Convictions

As noted, charge bargaining almost always distorts the factual basis of a criminal conviction. As a theoretical matter, that fact renders the practice highly undesirable in any context. As a practical matter, however, international prosecutions differ from domestic prosecutions in one particularly relevant way; therefore, our normative assessment of charge bargaining in the two contexts also should differ. Specifically, in the domestic context, it is typically both expected and possible to charge and convict defendants for all of the serious crimes they commit. Such comprehensive charging is ostensibly required in civil law jurisdictions that feature mandatory prosecutions for serious crimes. Common law jurisdictions, such as the United States, do not statutorily require prosecutors to charge every chargeable crime, yet it is nonetheless expected even in these jurisdictions that prosecutors will charge all serious chargeable crimes. Thus, if an American defendant rapes two women, we want him to be charged and convicted of both rapes. Likewise, if an American defendant commits armed robbery, we expect him to be charged and convicted of armed robbery, not unarmed theft. To be sure, for the sake of efficiency, some American mass murderers are charged with a subset of their criminal activity, but that typically occurs only when conviction on that subset renders the defendant eligible for the maximum punishment the jurisdiction permits. Thus, when, through


90. See 63C Am. Jur. 2D Prosecuting Attorneys § 20 (2019) ("A prosecutor has broad discretion in deciding both whether to charge and which charges to file against a defendant . . . .")

charge bargaining, American defendants are convicted of only a subset of their
criminal activity, we justifiably condemn charge bargaining for dishonestly
distorting the factual bases of the defendants’ criminal convictions.

However, that foundational principle—that defendants can and should be
charged for all of the crimes they committed—does not exist when it comes to international
criminal prosecutions. To understand why, one must understand certain facts about
international crimes, about the conflicts that become subject to international criminal
prosecutions, and about the international bodies that are created to impose criminal
accountability following those conflicts.

First, international crimes: A core feature of most international crimes is that they
envisage—and in some cases require—a large quantity of criminal behavior. For
instance, the actus reus of crimes against humanity includes the requirement that the
act be part of a large-scale or systematic attack against a civilian population.92
Similarly, the crime of genocide requires proof of an intent to destroy an entire people
in whole or in part.93 Concededly, just because a crime against humanity requires
large-scale criminality does not mean that every defendant who commits a crime
against humanity has himself engaged in large-scale criminality; however, it does
mean that that defendant’s crimes are surrounded by a large number of similarly
serious crimes. And that brings us to the conflicts that become subject to international
criminal prosecutions; specifically, these conflicts typically feature large numbers of
international crimes. As noted, prosecutors could not charge crimes against
humanity, for instance, unless a large number of crimes had occurred. Further, the
international community would not incur the political and economic expense of
creating a tribunal, nor would the ICC open a situation, unless the conflict in question
was sufficiently widespread and serious. And in fact, the conflicts on which
international attention has been focused—in Yugoslavia, Rwanda, Sierra Leone,
Cambodia, the Democratic Republic of the Congo (DRC), Uganda, and Kenya
among others—have virtually all featured large-scale atrocities resulting in
thousands, if not tens or hundreds of thousands, of victims. Finally, international
criminal prosecutions are expensive,94 and because each prosecution costs so much
and each conflict features so many crimes, the international tribunals have the

additional federal and state crimes when it became clear that prosecution under Virginia law
was likely to result in the imposition of the death penalty. See Andrea F. Siegel, Murder Trial
for Malvo Set to Start in November, BALT. SUN (Jan. 29, 2003, 3:00 AM),
://perma.cc/FW4U-9ASR].

92. See, e.g., Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187
U.N.T.S. 3 [hereinafter Rome Statute].

93. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide,

94. Nancy Amoury Combs, From Prosecutorial to Reparatory: A Valuable Post-Conflict
SCSL, ECCC, and the STL had spent a whopping $6 billion to prosecute a mere 285
defendants.”).
resources to prosecute only a tiny proportion of the criminal behavior that occurred during the relevant conflicts.\textsuperscript{95}

These three facts are well known and uncontested; consequently, it is likewise well known and uncontested that international criminal tribunals can target for prosecution only a relatively small number of defendants from a much larger pool of offenders.\textsuperscript{96} The ICTY, for instance, indicted 161 offenders\textsuperscript{97} out of a population of at least 10,000.\textsuperscript{98} Yet, even that low prosecution-to-offender ratio proved too costly for the international community, and subsequent tribunals were permitted to prosecute an even smaller proportion of offenders. Specifically, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were given jurisdiction only over those bearing the greatest responsibility for the crimes that occurred during the conflict.\textsuperscript{99} As a consequence, the SCSL prosecuted a grand total of ten defendants\textsuperscript{100} for the more than two million nonfatal offenses and tens of thousands of civilian deaths that occurred during Sierra Leone's decade-long civil war.\textsuperscript{101} The ECCC, for its part, will close after prosecuting only
three offenders for the four years of Khmer Rouge atrocities that claimed approximately two million Cambodian lives. Finally, the permanent ICC prosecutes, at most, only a few offenders for each situation it addresses. Selectivity in defendants is thus a well-known and necessary feature of international criminal justice.

In recent years, however, the three facts delineated above have led not only to selectivity in defendants, as just described, but also to selectivity in crimes. That is, resource constraints forced international prosecutors not only to prosecute a small proportion of international offenders but also to prosecute those offenders for only a subset of their criminal activity. Indeed, the following Section, containing comprehensive empirical analyses, shows that a substantial percentage of international criminal convictions after trial understate the defendants’ criminal liability and present a distorted factual picture of the defendants’ crimes. That is, most international criminal convictions—after trial—suffer from the primary disadvantage of charge bargaining.

C. The Distorted Factual Bases of Most International Criminal Convictions: Empirical Proof

1. Methodology

This Section presents the results of my empirical analysis of the charging practices of the ICTY and ICC. I selected the ICTY because it prosecuted more cases than any other international tribunal, and it is unquestionably considered the most successful of the ad hoc tribunals. I selected the ICC because, as a permanent institution with


103. Khmer Rouge: Cambodia's Years of Brutality, BBC NEWS (Nov. 16, 2018), https://www.bbc.com/news/world-asia-pacific-10684399 [https://perma.cc/V56Z-P8CS]. To be sure, other factors, including the defendants’ advanced ages and Cambodia's intense political interference, also worked to reduce the number of defendants prosecuted by the ECCC. But the court’s restricted jurisdiction ensured that only a small number of defendants would be prosecuted even if circumstances had been more favorable to prosecutions. See Seeta Scully, Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia, 13 ASIAN-PAC. L. & POL'y J. 300, 323–25 (2011).


potentially global jurisdiction, it is the world’s preeminent international criminal body and arguably stands as the future of international criminal justice. As for my methodology, I examined every ICTY case that went to trial and every ICC case that either went to trial or that did not because the Pre-Trial Chamber declined to confirm charges. For purposes of this empirical analysis, I sought to determine for each case whether prosecutors had withdrawn charges of ostensibly provable crimes, declined to charge the defendants with ostensibly provable crimes, or otherwise purposefully understated the defendants’ criminal liability. As should be evident from my phrasing of the research question, my analysis did not end with a finding that prosecutors had withdrawn charges. Rather, if I ascertained that prosecutors had withdrawn charges, I additionally considered whether those charges were likely provable. For instance, if I learned that prosecutors withdrew charges because witnesses had become unavailable or for other reasons of evidentiary insufficiency, then I did not conclude that prosecutors had withdrawn charges of ostensibly provable crimes or otherwise had understated the defendant’s criminal liability.

To make these determinations for ICTY cases, I looked for charge withdrawals, crime site withdrawals, and/or decisions not to bring ostensibly provable charges by (1) comparing early indictments with the operative indictment for trial; (2) reviewing the procedural history of each case; (3) reviewing every relevant pre-trial document, including pre-trial briefs, motions to amend indictments and responses thereto, and pre-trial and status conference transcripts; (4) searching for discussions of the charges in a variety of secondary sources; and (5) interviewing prosecutors assigned to the cases when it was unclear whether prosecutors had withdrawn or declined to bring provable charges or had otherwise understated the defendant’s criminal liability. In many cases, prosecutors resisted withdrawing charges and did so only when ordered by Trial Chambers that were seeking to reduce the length and cost of trials. In these cases, it was easy to conclude that the charge withdrawals stemmed not from evidentiary concerns but from efficiency concerns.

My methodology for ICC cases was more varied. For each case, I reviewed the Document Containing Charges, as I had done with ICTY indictments, and I also reviewed other relevant ICC documents, including Confirmation of Charges decisions and relevant portions of the judgments. However, ICC prosecutors who understated their defendants’ criminal liability were more likely to charge narrowly in the first place than to charge broadly and then withdraw provable charges during the course of the proceedings. Thus, to ascertain whether ICC charges in fact understated a defendant’s criminal liability, I had to compare ICC charges with descriptions of the defendant’s likely criminal liability appearing in the reports of human rights bodies, nongovernmental organizations, the press, and other secondary sources. Although these sources provided sufficient information to make a determination in the cases that went to trial, they were not as informative in the cases in which charges were not confirmed; thus, in those cases, I could not reach certain conclusions.

2. Understatement of Criminal Activity at the ICTY

My review of all of ICTY cases that went to trial showed that in 44% of them prosecutors purposefully understated the defendants’ criminal liability in order to
This statistic tells only part of the story, however, because the data shows a considerable evolution in ICTY prosecutorial charging practices. In particular, prosecutors understated criminal liability in a much smaller proportion of early cases than later cases. Specifically, in cases for which trial judgments were released from the years 1997 to 2007, 29% featured purposeful understatement of criminal liability. By contrast, in cases in which trial judgments were released from the years 2008 to 2018, a whopping 69% featured such understatement. Graph 1, appearing next, shows that the percentage of cases that featured purposeful understatement of criminal liability trended upward significantly throughout the ICTY's lifespan.

Similarly, the chart below shows the percentage of cases that featured purposeful understatement of criminal liability by year and provides details of that understatement in the footnotes.  

106. Such understatement occurred in at least nineteen out of forty-three ICTY cases that went to trial.

107. An appendix citing the trial chamber judgments in each of these cases appears at the end of this article.
<table>
<thead>
<tr>
<th>Year of Trial Chamber Judgment</th>
<th>Number of Trial Chamber Judgments Issued During This Year</th>
<th>Names of the Cases (N= no understatement; Y=understatement)</th>
<th>Percentage of Cases This Year Featuring Understated Criminal Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>1</td>
<td>Tadić (N)</td>
<td>0%</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
<td>Mući et al. (N)</td>
<td>50%</td>
</tr>
<tr>
<td>1999</td>
<td>1</td>
<td>Furundžija (Y)</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Aleksovski et al. (N)</td>
<td>0%</td>
</tr>
<tr>
<td>2000</td>
<td>2</td>
<td>Kupreškić et al. (N)</td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Blaškić (N)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Kunarac et al. (N)</td>
<td>0%</td>
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<tr>
<td></td>
<td></td>
<td>Krstić (N)</td>
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<td>2001</td>
<td>4</td>
<td>Kordić &amp; Čerkez (N)</td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Kvočka et al. (N)</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>2</td>
<td>Knrojelac (Y)</td>
<td>50%</td>
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<tr>
<td></td>
<td></td>
<td>Vasiljević (N)</td>
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<td></td>
<td></td>
<td>Naletilić &amp; Martinović (N)</td>
<td></td>
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<tr>
<td>2003</td>
<td>4</td>
<td>Stakić (N)</td>
<td>25%</td>
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<td></td>
<td></td>
<td>Galić (Y)</td>
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<td></td>
<td></td>
<td>Simić (N)</td>
<td></td>
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<tr>
<td>2004</td>
<td>1</td>
<td>Brdanin (N)</td>
<td>0%</td>
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<tr>
<td>2005</td>
<td>5</td>
<td>Strugar (Y)</td>
<td>40%</td>
</tr>
</tbody>
</table>

108. In Furundžija, prosecutors withdrew charges alleging Grave Breaches of the Geneva Convention invoking “the interests of justice, of a fair and expeditious trial and, the judicial economy of the Trial Chamber.” Prosecutor v. Furundžija, Case No. IT-95-17/1-PT, Prosecutor’s Response to Defence Motions to Dismiss Count 12 of the Indictment for Failure Adequately to Plead International Armed Conflict and to Dismiss Counts 12, 13 And 14 for Defects in the Form of the Indictment, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia March 6, 1998).


110. In Galić, prosecutors sought to add a provable incident, but the Trial Chamber denied its request because it would delay the proceedings. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶ 776 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

111. Strugar prosecutors first eliminated charges alleging Grave Breaches of the Geneva Convention. Prosecutor v. Strugar et al., Case No. IT-01-42-PT, Prosecutor’s Amended Indictment and Application for Leave to Amend, ¶ 19 (Int’l Crim. Trib. for the Former Yugoslavia July 26, 2002); see also Prosecutor v. Strugar et al., Case No. IT-01-42-PT, Decision on the Prosecution’s Amended Indictment and Application for Leave to Amend (Int’l Crim. Trib. for the Former Yugoslavia Mar. 17, 2003). A year later, the prosecution sought to dramatically reduce the time period that the indictment covered in order to “expedite the trial” and “enable the Tribunal to meet its obligations under the completion strategy.” Prosecutor v. Strugar, Case No. IT-01-42, Prosecution’s Motion for Leave to Amend the Indictment of 31

112. In compliance with the Trial Chamber’s Rule 73bis order, the Slobodan Milošević prosecution eliminated numerous crimes and incidents from its Bosnia and Croatia indictments. See Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Public Version of the Confidential Decision on the Prosecution’s Motion to Grant Specific Protection Pursuant to Rule 70 (Int’l Crim. Trib. for the Former Yugoslavia July 25, 2002); Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Scheduling Order Concerning Amending the Croatia and Bosnia Indictments (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2002); Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Second Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia July 27, 2004).

113. In Hadžihasanović et al., prosecutors dropped two counts of war crimes and nine counts of grave breaches of the Geneva Convention to promote judicial economy. Prosecutor v. Hadžihasanović et al., Case No. IT-01-47-PT, Prosecutor’s Amended Indictment Cover Letter, ¶ 4 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 11, 2002); Prosecutor v. Hadžihasanović et al., Case No. IT-01-47-PT, Amended Indictment, ¶ 3 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 11, 2002).

114. Prosecutors in Mrkić eliminated Grave Breaches charges in order to “shorten . . . the trial.” Prosecutor v. Mrkić, Case No. IT-95-13/1/PT, Prosecution’s Motion for Leave to File an Amended Indictment, ¶ 8 (August 29, 2002). Later, prosecutors additionally removed the imprisonment count, reducing the total number of alleged counts to eight. Prosecutor v. Mrkić, Case No. IT-95-13/1/PT, Prosecution’s Motion for Leave to File a Consolidated Amended Indictment, ¶ 8 (July 21, 2003).

115. After the Trial Chamber invited the Dragomir Milošević prosecution to reduce the scope of the case pursuant to Rule 73bis, see Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Scheduling Order Varying Time-Limits with Regard to the Commencement of Trial and Request to Prosecution to Reduce the Scope of its Case, ¶ 3 (Nov. 23, 2006), the Prosecution eliminated eight sniping and eight shelling incidents. Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Prosecution’s Response to Pre-Trial Chamber's "Invitation to Prosecution to Reduce the Scope of its Case, ¶ 3 (Dec. 5, 2006); Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Decision on the Amendment of the Indictment and Application of Rule 73bis (D) (Dec. 12, 2006).

116. In Delić, the Prosecution was refused leave to add three crime sites because the Trial Chamber did not want to delay the start of the trial and prolong its course. Prosecutor v. Delić,
2009 2 Šainović (Y)\textsuperscript{117} 100%
2010 1 Lukić & Lukić (Y)\textsuperscript{118} 0%
2011 3 Popović (N)\textsuperscript{119} 67%
2013 3 Dordević (Y)\textsuperscript{119} 100%
2012 1 Perišić (Y)\textsuperscript{120} 0%

Case No. IT-04-83, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defense Motion Alleging Defects in Amended Indictment, paras. 23, 74 (June 30, 2006).


119. Dordević was initially joined to Milutinović, so when Milutinović prosecutors withdrew charges pursuant to Rule 73bis, they did the same in Dordević. Prosecutor v. Dordević, Case No. IT-05-87-1-PT, Decision on Prosecution Motion to Amend the Third Amended Joinder Indictment, ¶ 45 (July 7, 2008).

120. In Perišić, the Pre-Trial Chamber invited the Prosecutor to reduce the number of counts by one-third, which the Prosecution declined. Prosecutor v. Perišić, Case No. IT-04-81-PT, Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment (Nov. 20, 2006). Prosecutor v. Perišić, Case No. IT-04-81-PT, Prosecutor’s Response to Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, ¶ 3 (Dec. 4, 2006). Subsequently, the Chamber ordered the Prosecution to lead no evidence on “terror” in relation to the Sarajevo counts in order to reduce the scope of the case. Prosecutor v. Perišić, Case No. IT-04-81-PT, Decision on Application of Rule 73bis and Amendment of Indictment, paras. 16-17 (May 15, 2007).

121. In Gotovina et al., the Trial Chamber requested the Prosecutor reduce the scope of the indictment by one-third to ensure expeditious proceedings. Prosecutor v. Gotovina, Case No. IT-06-90, Request to the Prosecution Pursuant to Rule 73bis (D) to Reduce the Scope of its Case, 2–3 (Dec. 13, 2006). The Prosecutor declined this invitation but suggested that it would, if ordered, reduce the number of municipalities from twenty to fourteen and further reduce the temporal scope of its case. Prosecutor v. Gotovina, Case No. IT-06-90, Prosecution’s Response to Trial Chamber’s Request Pursuant to Rule 73bis (D), ¶¶ 1, 8–10 (Jan. 22, 2007). The Trial Chamber ordered the Prosecutor to reduce the indictment accordingly. Prosecutor v. Gotovina, Case No. IT-06-90, Order Pursuant to Rule 73bis (D) to Reduce the Indictment, 4 (Feb. 21, 2007).

122. Throughout the Stanisić & Župljanin proceedings, the prosecution eliminated large numbers of crimes and incidents. See Status Conference Transcript at 63–64, Prosecutor v. Stanisić & Župljanin, Case No. IT-08-91-PT (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2009); see also Prosecutor v. Stanisić, Case No. IT-04-79-PT, Invitation Pursuant to Rule 73bis (D) (Int’l Crim. Trib. for the Former Yugoslavia May 8, 2008); Prosecutor v. Stanisić, Case No. IT-04-79-PT, Prosecution’s Response to Trial Chamber’s Invitation Pursuant to Rule
The next two subsections (1) explore the evolution in charging practices that occurred over time at the ICTY and (2) delve more deeply into that data to elucidate the various normative implications that emerge.

a. ICTY Charging Practices Over Time

As just described, my empirical analysis shows that prosecutors rarely reduced or declined to bring provable charges during the ICTY’s early years, but they did so more frequently as the tribunal approached its conclusion.

73bis (D), with Confidential Annexes, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia May 20, 2008).

123. The Stanisić & Simatović prosecutors resisted reducing the indictment, claiming that doing so would create an inaccurate historical record. The Trial Chamber nonetheless ordered the prosecution to substantially reduce the indictment. Prosecutor v. Stanisic and Simatovic, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis (D), ¶¶ 18, 20-21 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 4, 2008).

124. The Šešelj Trial Chamber invited the Prosecution to reduce the scope of the indictment pursuant to Rule 73bis, which the Prosecution initially declined, arguing that such reductions would render the case unrepresentative. Prosecutor v. Šešelj, Case No. IT-03-67-PT, Prosecution’s Response to Trial Chamber’s “Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment,” ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 12, 2006). When the Trial Chamber insisted, the prosecution eliminated a large number of counts and crime sites. Prosecutor v. Šešelj, Case No. IT-03-67-PT, Prosecution’s Submission of Proposals to Reduce the Scope of the Indictment (Int’l Crim. Trib. for the Former Yugoslavia Sept. 21, 2006).

125. In Karadžić, at the Trial Chamber’s insistence, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Order to the Prosecution under Rule 73bis (D), ¶¶ 5-7 (Int’l Crim. Trib. for the Former Yugoslavia July 22, 2009), the Prosecution substantially reduced the scope of its indictment by, among other things, eliminating more than 50% of the municipalities in which crimes had initially been charged. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Prosecution Submission Pursuant to Rule 73bis (D), ¶¶ 10–15 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 31, 2009); see also Prosecutor v. Karadžić, Case No. IT-95-5/18, Decision on the Application of Rule 73 bis ¶¶ 5–6 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2009).

126. In Mladić, pursuant to the Trial Chamber’s Rule 73bis (D) request, prosecutors reduced the scheduled crimes from 196 to 106, removed two killing sites related to Srebrenica, removed six sniping incidents, and removed eight shelling incidents. Prosecution v. Mladić, Case No. IT-09-92-PT, Decision Pursuant to Rule 73bis (D), ¶¶ 4, 6, 13–14 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2011).
increasingly and routinely as the years passed. This increase in charge reductions correlates with other changes in the ICTY’s practices over time. Specifically, at the ICTY’s outset, prosecutors were unable to obtain custody over defendants who were at large, so they targeted their early indictments against defendants who were already in custody in other jurisdictions. Bill Schabas cuttingly described this strategy as ICTY prosecutors settling “for any villain they could get their hands on.” Many of these early villains, unsurprisingly, were low-level offenders whose criminal behavior involved relatively few victims and crime sites. Consequently, because the earliest ICTY cases involved defendants who committed comparatively few crimes, and because prosecutors had comparatively few defendants in the dock, prosecutors possessed the necessary resources to charge those defendants with all or most of the crimes they believed those defendants to have committed. That is, for these reasons, early ICTY prosecutors had no need to limit charges or decline to bring provable charges.

Soon, however, the ICTY began focusing prosecutorial attention on more culpable senior political and military leaders. Scholars and commentators had sharply criticized the ICTY’s prosecutions of low-level offenders, maintaining that international tribunals should use their limited resources to prosecute more culpable senior military and political leaders. Moreover, in the early 2000s, the Security Council became concerned about the costs of international criminal prosecutions, so it began pressuring the ICTY and ICTR to formulate a completion strategy to bring their work to an end. In response, the ICTY adopted a multi-pronged

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129. Id. For instance, Anto Furundzija was initially indicted in 1995 for idly standing by while another soldier in his command interrogated and then raped a Muslim civilian. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 262–69 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).
131. See, e.g., Ray Murphy, Gravity Issues and the International Criminal Court, 17 CRIM. L.F. 281, 283 (2006); Nizich, supra note 130, at 359.
approach that included both plea bargaining to resolve cases expeditiously and abandoning prosecutions of low-level offenders\(^{134}\) in order to focus remaining prosecutions on senior military and political leaders.\(^{135}\)

The ICTY’s change of focus in favor of prosecuting senior offenders required it to make concomitant changes to its charging practices. Specifically, because high-level offenders typically commit broad-based crimes that span lengthy time periods and wide geographical regions, ICTY prosecutors seeking to complete their work more expeditiously were often forced to limit the charges against these defendants to a subset of the defendants’ criminal behavior. The need to bring more narrowly tailored indictments when targeting senior leaders became all the more clear following the mammoth trial of Slobodan Milošević, the former President of Yugoslavia. Because Milošević was notoriously believed to be responsible for wide swaths of death and destruction throughout Bosnia, Croatia, and Kosovo,\(^ {136}\) ICTY prosecutors understandably sought to charge him with a relatively comprehensive set

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Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State) ("We have and are urging both Tribunals to begin to aggressively focus on the end-game and conclude their work by 2007-2008 . . . "); Press Release, Int’l Crim. Trib. Former Yugoslavia, Address by the Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Mrs. Carla del Ponte, to the United Nations Security Council (Oct. 30, 2002), [hereinafter Del Ponte 2002 Address] (referring to “the completion strategy targets and the deadlines . . . expected of us”).

134. The ICTY began withdrawing the indictments of suspects considered not sufficiently high-level. See ICTY Bulletin, No. 21, July 27, 1998, at 4; Press Release, Int’l Crim. Trib. Former Yugoslavia, Indictment Against Zoran Marinić Withdrawn (Oct. 4, 2002) (withdrawing indictment on the ground that the suspect was “a low-level indictee” whose prosecution no longer corresponded to the Prosecutor’s strategy); see also Sean D. Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93 Am. J. Int’l L. 57, 74-75 (1999) (describing withdrawn indictments).

135. Del Ponte 2002 Address, supra note 133 (“I have drastically prioritised our investigative objectives, for both Tribunals, and further focused our efforts on ‘the main civilian, military and paramilitary leaders’”) (emphasis in original); Rep. of the Int’l Crim. Trib. for the Prosecution of Perss. Responsible for Serious Violations of Int’l Humanitarian L. Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/57/379 ¶ 6 (Sept. 4, 2002) (observing the ICTY’s efforts to further “focus[ ] . . . [its] mission on trying those crimes which most seriously violate international public order”). Jorda Oct. 2002 Report, supra note 32 (then-ICTY President Jorda noting that the Security Council “expressly mandated us to concentrate our work on the trial of the main civilian, military, and paramilitary leaders, in particular, so as to be able to complete our trial activities by around 2008”). Indeed, ICTY judges were so concerned with ensuring that indictments targeted only high-level offenders, they amended the Tribunal’s Rules of Evidence and Procedure to authorize the judges themselves to determine, before confirming the indictment, whether it “concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.” ICTY R.P. & Evid. 28 (2004) [hereinafter ICTY RPE]; see also Daryl A. Mundis, The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals, 99 Am. J. Int’l L. 142, 147–50 (2005); Rachel S. Taylor, Judges Change the Rules, Inst. War & Peace Reporting (Nov. 9, 2005), https://iwpr.net/global-voices/judges-change-rules [https://perma.cc/28W8-NK96].

of crimes that reflected his criminal conduct throughout the entire region.\(^{137}\) Prosecutors likewise sought to bring all of the charges in one trial.\(^ {138}\) Doing so, they believed, would prove most efficient\(^ {139}\) and, even more importantly, would ensure that all of Milošević’s crimes were in fact prosecuted. As particularly relevant here, prosecutors feared that if Milošević were initially convicted of just a subset of his crimes, then the international community might later be unwilling to provide the resources necessary to prosecute the remainder.\(^ {140}\) That is, the Milošević prosecutors specifically sought to avoid understating Milošević’s criminal liability and distorting the historical record.\(^ {141}\) It is for this reason that they prosecuted him under a massive sixty-six-count indictment that contained multiple charges of genocide and crimes against humanity for hundreds of crime sites throughout Bosnia, Croatia, and Kosovo.\(^ {142}\)

Certainly, the desire to prosecute Milošević for all of his criminal activity was admirable, but it resulted in a four-year trial that ended without a verdict when Milošević died from the medical difficulties that had plagued him throughout the proceedings.\(^ {143}\) Although an in-depth examination of the Milošević trial indicated that its long length stemmed primarily from the defendant’s poor health and his insistence on self-representation,\(^ {144}\) prosecutors nonetheless were harshly criticized for charging Milošević with so many crimes in the first place.\(^ {145}\) Human Rights Watch spoke for many when it scolded the prosecution for seeking to “provide a comprehensive account of an individual’s role in a conflict” when that individual is “a high-level defendant.”\(^ {146}\) Instead, Human Rights Watch advised the prosecution to narrow similar future cases by focusing on the worst of the charges. It maintained that “presenting a case representative of the most serious crimes committed should

140. Id. at 52.
143. HUM. RTS. WATCH, supra note 139, at 13, 60–61.
144. Id. at 60–62.
146. HUM. RTS. WATCH, supra note 139, at 55–56.
be the primary objective of a prosecutor in cases like these." 147

Indeed, the comprehensive Milošević indictment was so widely condemned that it ushered in lasting changes in prosecutorial charging practices, both at the ICTY and later at the ICC. 148 At the ICTY, judges responded to the Milošević case by revising their procedural rules to provide Trial Chambers with broad powers to limit the scope of trials. 149 Revised Rule 73bis, in particular, authorized Trial Chambers to fix the number of crime sites or incidents for which the Prosecution could present evidence. 150 In addition, it permitted Trial Chambers to call upon the prosecution to reduce the number of counts charged in an indictment. 151 Prosecutors strenuously resisted these measures, largely for the same reasons that commentators criticize charge bargaining. In particular, ICTY Judge O-Gon Kwon described the concerns in this way:

the Prosecutor, many human-rights groups, and much of the public consider that one of the central duties of the Tribunal is to do justice to every single victim of the Balkan wars of the 1990s. Proceeding to trial on an indictment that is less than fully comprehensive of all the crime sites associated with a particular accused could be seen as denying justice to the victims of atrocities carried out at the crime sites not included. Second, the Prosecutor and many human-rights groups seem to believe that it is one of the Tribunal's main duties to actively foster the reconciliation of the various ethnic groups in the region, as well as to compile a complete historical record of the war and determine the truth of what actually happened, both of which would ostensibly require the trial to proceed on charges that are as comprehensive as possible. 152

Despite prosecutorial resistance, however, the empirical results summarized above showed that ICTY judges employed these expanded powers frequently and vigorously, 153 and in doing so, they led prosecutors to narrow their indictments substantially prior to trial. For instance, after Rule 73bis was revised, in ten of the eleven cases where prosecutors reduced charges, they did so at the insistence of the Trial Chamber. 154

147. Id. (emphasis added).
148. See BOAS, supra note 136, at 112.
151. Id. at 73bis (E).
152. O-Gon Kwon, The Challenge of an International Criminal Trial as Seen from the Bench, 5 J. INT’L CRIM. JUST. 360, 372-73 (2007) (noting that “the most effective measure for tackling the problem of lengthy trials would be to limit the number of charges in the indictment themselves”).
154. See Prosecutor v. Mladić, Case No. IT-09-92-PT, Decision Pursuant to Rule 73bis (D) (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2011); Prosecutor v. Mićo Stantišić, Case No. IT-04-79-PT, Invitation Pursuant to 73bis (D) (Int’l Crim. Trib. for the Former Yugoslavia
b. The Nature of the Charge Reductions and Their Normative Implications

As noted, prosecutors reduced or declined to bring provable charges in approximately half of all ICTY cases that went to trial and in 69% of ICTY cases that went to trial during the last half of the Tribunal’s life. But these reductions took more than one form, and in order to understand fully the different ways in which international prosecutors can understate criminal liability, we must explicate these different forms and consider any implications that emerge. One difference, for instance, is that international prosecutors can understate criminal liability either by eliminating or declining to bring specific crime charges, or they can do so by eliminating or declining to prosecute specific incidents included within the charges. This distinction needs some explanation because it does not arise in the context of domestic crimes. For instance, a domestic defendant who intentionally killed ten people would most likely be charged with ten counts of murder, and if prosecutors wished to charge bargain with that defendant, they would have to withdraw some of the murder counts. The crime against humanity of murder, by contrast, is defined as the killing of a human being in the context of a widespread or systematic attack directed against any civilian population. For this reason, prosecutors can charge the defendant with one count of murder as a crime against humanity whether the defendant killed one person or 1000 people. Thus, when international prosecutors wish to reduce charges either as part of a charge bargain or to reduce the length and cost of the trial, they can either eliminate charges (for instance by withdrawing charges of rape as a crime against humanity but retaining charges of murder as a crime against humanity), or they can eliminate incidents that comprise the charges. For instance, prosecutors who initially charge a defendant with murder as a crime against humanity on the basis of ten massacre sites can eliminate five of those sites and continue to charge murder as a crime against humanity, but on the basis of a reduced set of incidents.

May 8, 2008); Prosecutor v. Đorđević, Case No. IT-05-87/1-PT, Decision on Prosecution Motion for Leave to Amend the Third Amended Joinder Indictment, ¶ 45 (Int’l Crim. Trib. for the Former Yugoslavia July 7, 2008); Prosecutor v. Milutinović, et al., Case No. IT-05-87-T, Decision on Application of Rule 73bis, (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2006); Prosecutor v. Perišić, Case No. IT-04-81-PT, Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 20, 2006); Prosecutor v. Gotovina et al., Case No. IT-06-90-PT, Order Pursuant to Rule 73bis (D) to Reduce the Indictment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 21, 2007); Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73bis (D) (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2006); Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-PT, Request to the Prosecution Pursuant to Rule 73bis (D) to Reduce the Scope of the Indictment, 2-3 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 9, 2007); Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on the Application of Rule 73bis (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2006); Prosecutor v. Karadžić, Case No. IT-95-5/18, Decision on the Application of Rule 73bis (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2009).

My data set contains examples of both kinds of reductions. For example, in Lukić,156 Delić,157 and Strugar,158 among other cases, prosecutors eliminated or declined to charge specific crimes as a means of reducing the length and cost of the trial. By contrast, in Dordević,159 Šainović et al.,160 and Perišić,161 among other cases, prosecutors retained their initial charges but eliminated large numbers of crime sites and incidents likewise as a means of reducing the trial length and cost. Overall, in 55% of the cases in which prosecutors purposely understated criminal liability, they eliminated charged crimes,162 whereas in the remaining 45%, prosecutors eliminated crime sites and other incidents but retained the original criminal charges.163

A second distinction can be drawn between charge reductions that alter the factual basis of the conviction and those that do not. This distinction arises because the same set of facts often can be charged as more than one international crime. That is, the execution of 200 civilians in the midst of an international armed conflict can be charged as the war crime of willful killing in violation of the Geneva Conventions, and it also can be charged as murder as a crime against humanity, as well as extermination as a crime against humanity. International prosecutors routinely charge defendants with multiple crimes for the same set of facts, and when they seek to reduce the length and cost of trial, they sometimes withdraw one or more of those crimes but retain a crime that encompasses the same facts as the withdrawn crimes.

With these distinctions in mind, we might wish to explore whether certain kinds of reductions are more problematic than others; however, only the briefest consideration reveals that few certain conclusions can be drawn. For example, at first glance, it might seem that prosecutors who withdraw ten crime sites understate criminal liability more problematically than prosecutors who withdraw three crime sites, but even that seemingly straightforward proposition is contestable, because the ten withdrawn crime sites might feature fewer victims or less serious crimes than the three withdrawn crime sites. Indeed, the Milutinović and Dordević Trial Chambers required prosecutors to eliminate only a few crime sites, but the withdrawals were highly significant because one of them was at Racak,164 the site of the notorious massacre that led NATO to launch a humanitarian intervention in Kosovo.

156. See supra note 117.
157. See supra note 115.
158. See supra note 110.
159. See supra note 118.
160. See supra note 116.
161. See supra note 119.
162. Prosecutors eliminated or declined to charge crimes in Mladić, Stanišić & Župljanin, Lukić & Lukić, Mrkšić et al., Furundžija, Krnojelac, Strugar, Hadžihasanović, Slobodan Milošević, Šešelj, and Karadžić.
163. Prosecutors eliminated or declined to include crimes sites and incidents in Dordević, Šainović et al., Perišić, Gotovina, Delić, Galić, Brdanin, Dragomir Milošević, and Stanišić & Simatović.
Similarly, we might unreflexively assume that withdrawals that alter the factual basis of a defendant’s criminal liability are more distortive and thus more problematic than withdrawals that eliminate charges but retain other crimes featuring the same facts. For example, in order to eliminate the need to prove that the underlying conflict was “international,” prosecutors in *Furundžija* and *Krnojelac* withdrew charges of Grave Breaches of the Geneva Conventions, which apply only during international armed conflicts. However, relying on the same factual assertions, they maintained charges of violations of the laws and customs of war, which also apply during non-international armed conflicts.165 Concededly, crimes that take place during international armed conflicts are different from—and arguably more serious than—crimes that take place in non-international armed conflicts.166 Yet, other withdrawals have generated tremendous opposition even when the factual basis for the conviction remained the same. For instance, prosecutors who, in the course of a charge bargain, withdrew genocide charges against Momir Nikolić and Dragan Obrenović were roundly criticized for distorting the factual basis of the defendants’ convictions166 even though they convicted the defendants on the same facts for crimes against humanity.

Finally, one might think that eliminating particular crimes would prove more distortive than eliminating incidents within crimes, but that conclusion is also contestable. For instance, when Perišić judges forced prosecutors to reduce the scope of the trial, the prosecutors and judges disagreed on the optimal way to do so. Prosecutors advocated eliminating crimes167 whereas the Pre-Trial Chamber required incidents be eliminated instead.168 Additionally, in *Mladid*, prosecutors withdrew crime counts that seemed to form only a small and insignificant aspect of the case,169 but when the Trial Chamber forced prosecutors to reduce their presentation of evidence, they withdrew large numbers of crime sites that were both factually significant and dramatically limited the scope of their case.170

169. For instance, prosecutors removed counts of cruel treatment or inhumane acts from the Sarajevo crime base, but retained them in Prosecution v. Mladid, Case No. IT-09-92-1, Decision on Amendment of Indictment, ¶ 6 (Int’l Crim. Trib. for the Former Yugoslavia May 27, 2011).
170. See Prosecutor v. Mladid, Case No. IT-09-92-PT, Prosecution Submission on
3. Understatement of Criminal Activity at the ICC

My empirical study of ICC cases reveals that ICC prosecutors have been even more inclined than their ICTY counterparts to charge defendants in a way that understates their criminal liability. Indeed, in every one of the seven ICC cases that has gone to trial, prosecutors charged defendants with only a subset of their probable criminal activity.\footnote{171} This should come as no surprise particularly for the ICC’s early cases because early ICC charging was significantly influenced by later ICTY charging. Specifically, the Milošević debacle and the ICTY’s overall experience with broad indictments led the ICC’s first Prosecutor, Luis Moreno-Ocampo, to adopt a narrow, “focused” investigations and charging policy whereby prosecutors selected a “limited number of incidents” for each prosecution.\footnote{172} Targeting only a small number of incidents, Moreno-Ocampo maintained, would allow the prosecution “to carry out short investigations” and conduct “expeditious trials while aiming to represent the entire range of criminality.”\footnote{173} In adopting this narrow charging policy, ICC prosecutors expressly disavowed the production of a comprehensive historical record as one of the ICC’s goals.\footnote{174} Instead, ICC prosecutors intended the focused investigations and charging policy to highlight a sampling of each defendant’s criminality that reflects the gravest incidents and the main types of victimization.\footnote{175} Said differently, the ICC’s initial prosecutorial strategy intentionally sought to understate ICC defendants’ criminal liability so that prosecutors could conduct brief, expeditious investigations and trials. And my empirical research shows that ICC prosecutors wholly fulfilled that intention.

For instance, ICC prosecutors charged two of the court’s earliest defendants, Thomas Lubanga and Bosco Ntaganda, only with enlisting and conscripting child
soldiers, despite considerable evidence that each had committed many other serious crimes, including crimes of sexual violence. Similarly, for the ICC’s second trial, prosecutors charged the defendants, Germain Katanga and Mathieu Ngudjolo, with crimes confined to one attack during one day in one village, although both defendants likewise were implicated in far broader criminality. Indeed, we know that ICC prosecutors could have charged Katanga with many more crimes because, just when he was set to be released from prison after serving his ICC sentence, domestic Congolese prosecutors charged him with numerous additional crimes that occurred well before his ICC prosecution. Similarly, prosecutors


179. Indeed, at the time ICC prosecutors charged Katanga with crimes during the one-day attack, he had already been charged with a broader set of crimes in Congolese domestic courts, see DR Congo: ICC Convict Faces Domestic Charges, HUM. RTS. WATCH (Dec. 23, 2015), https://www.hrw.org/news/2015/12/23/dr-congo ICC-convict-faces-domestic-charges [https://perma.cc/NL8S-H8WZ]; Pascal Kambole, The ICC and Lubanga: Missed Opportunities, AFR. FUTURES, March 16, 2012, https://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/ [https://perma.cc/H97A-VP5K], and there was evidence that he helped lead one of the largest massacres in the region, one in which approximately 1200 civilians were killed. DR Congo: Army Should Not Appoint War Criminals, HUM. RTS. WATCH (Jan. 13, 2005), https://www.hrw.org/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals [https://perma.cc/V7H4-YBY8]; Moshe Zvi Marvit & Michelle Olson, Prosecutor v. Thomas Lubanga (Update) & Prosecutor v. Germain Katanga, 8 CHI.-KENT J. INT’L & COMP. L. 1, 2 (2008). As for Ngudjolo, although he was charged only with crimes occurring on one day in Bogoro, even more evidence existed of his involvement in the attacks on the Congolese cities of Mandro and Bunia. Kambole, supra, at 195.

initially charged Lord’s Resistance Army (LRA) commander Dominic Ongwen only with crimes that took place at one IDP camp,\(^\text{181}\) despite the prosecutor’s claim that the LRA was responsible for 850 attacks and that Ongwen was among the group’s core members.\(^\text{182}\) Finally, charges in other early ICC cases that did not proceed to trial were similarly narrow. In the Garda and Banda cases, for instance, prosecutors charged the defendants only with crimes involving one attack during which twelve African Union peacekeepers were killed.\(^\text{183}\)

Eventually, ICC prosecutors began charging more broadly, but they expanded their charges, not because their narrow charging had distorted the defendant’s convictions or overall historical record, but because their narrow charging had not resulted in a satisfactory number of convictions. Specifically, ICC Pretrial Chambers had declined to confirm charges in a series of early cases, finding that prosecutors had not presented sufficient evidence of the defendants’ criminality.\(^\text{184}\) Trial Chambers acquitted another early defendant after trial,\(^\text{185}\) and even when they convicted two others, they criticized the prosecution for its evidentiary insufficiencies.\(^\text{186}\) Those disappointing results led commentators to call into question

\(^{181}\) Prosecutor v. Ongwen, Case No. ICC-02/04, Warrant of Arrest for Dominic Ongwen (July 8, 2005).


\(^{184}\) Prosecutor v. Abu Garda, Case No. ICC-02-05-02/09, Decision on the Confirmation of Charges, ¶ 233 (Feb. 8, 2010); Prosecutor v. Mharushimana, Case No. ICC-01-04-01/10, Public Redacted Version of Decision on the Confirmation of Charges, ¶ 340 (Dec. 16, 2011); Prosecutor v. Ruto et al., Case No. ICC-01-09-01/11, Public Version of Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 293–300 (Jan. 23, 2012) (declining to confirm charges against Henry Kosgey); Prosecutor v. Muthaura et al., Case No. ICC-01-02-01/11, Public Redacted Version of Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 427 (Jan. 23, 2012). Unfortunately, due to insufficient evidence, I was unable to ascertain whether these defendants could have been charged with additional crimes.

\(^{185}\) Prosecutor v. Ngudjolo, Case No. ICC-01-04-02/12, Judgment Pursuant to Article 74 of the Statute, § XI. Disposition (Dec. 18, 2012) [hereinafter Ngudjolo Judgment].

the prosecutor's narrow charging practices. Alex Whiting, for instance, observed that:

if cases are too narrow it can be difficult to prove the criminal responsibility of the accused, particularly if that person is higher-up in the chain of command. A broad range of criminality over time often compels the inference that the crimes were organized from the top. On the other hand, if the Office presents only a narrow set of crimes on the ground, it can be easier for the accused to blame them on the rogue actions of lower-level actors.

For these and other reasons, ICC prosecutors eventually replaced their focused investigations policy with commitment to pursue “in-depth, open-ended investigations while maintaining focus.” Prosecutors likewise broadened their charging practices. As noted above, in 2005, prosecutors brought only seven charges against LRA Commander Dominic Ongwen, and those charges covered only crimes that took place at the Lukodi IDP camp. By the time the ICC finally gained custody over Ongwen in 2015, however, prosecutors were inclined to charge more broadly, so they added charges covering crimes taking place at three additional IDP camps. Prosecutors likewise added charges against Ntaganda, who was initially charged only with the enlistment and conscription of child soldiers, but eventually also faced charges of rape, murder, and persecution.
toward broader charging apparently failed to produce the desired results because in its most recent draft Strategic Plan, the Office of the Prosecutor appeared to shift back to narrow indictments, but this time targeting lower-level offenders. Specifically, in response to its failure to present sufficient evidence to sustain convictions against several senior defendants, the Prosecutor has decided to pursue "narrower cases" and to target those lower in the chain of command. In addition, although the Prosecutor will continue to conduct open-ended and in-depth investigations, it plans to opt for "narrower but stronger cases over broader cases."

Finally, the modern-day preference for narrower cases has extended to other, more recently established institutions. In its first report to the United Nations General Assembly, the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) stated:

[i]n developing its case-building policy . . . and, ultimately, constructing its case files, the Mechanism will seek to ensure that the scope of the associated cases will be manageable, in terms of both cost and time. Past experience has shown that building cases that cover too many allegations, or that focus on unnecessarily evidence-heavy categories of crime or modes of liability, does not serve the interests of justice if they take too long or consume too many resources.

4. Charge Bargaining vs. Narrow Indictments: A Distinction without a Difference

The foregoing sections described the ICTY's and ICC's move toward narrowing indictments, a move that should call into question our discomfort with charge bargaining. Parts III and IV will delve more deeply into the normative questions that my empirical study generates, but before doing so, this subsection will provide a brief case study that shows all the more clearly the similarity—indeed near indistinguishability—between cases that are charge-bargained and cases where prosecutors bring artificially narrow charges without seeking to motivate the defendant to admit guilt. Specifically, this subsection features a comparison between the ICTY's Deronjić case, where prosecutors brought narrow charges as part charge bargain, with the ICC's Katanga case, where prosecutors brought narrow charges simply so as to conduct a shorter, less costly trial. This comparison shows that the only notable difference between the two cases is the considerable time and resource savings generated by the charge bargain.

Both Miroslav Deronjić and Germain Katanga were charged with crimes taking place during one-day attacks. Deronjić was President of the Bratunac Municipal
Board of the Serbian Democratic Party of Bosnia and Herzegovina, and prosecutors charged him with persecution as a crime against humanity for the killings, destruction of property, and forcible displacement that occurred during an attack on the Bosnian town of Glogova on May 9, 1992. Katanga was a senior leader of the Patriotic Resistance Force in Ituri, DRC, and prosecutors charged him with war crimes and crimes against humanity that occurred during an attack on the Congolese town of Bogoro on February 24, 2003. Both men were convicted and received similar sentences: ten years for Deronjic and twelve years for Katanga.

As the foregoing suggests, the Deronjic and Katanga cases are similar in many respects, but the treatment they received by commentators, and even judges, differed dramatically for this reason: Deronjic was charged with only a subset of his crimes as a result of charge bargain. Deronjic had been cooperating with prosecutors for five years before he was indicted; in consideration for that cooperation and for Deronjic’s promise to plead guilty and waive his right to trial, prosecutors charged Deronjic only with the one-day attack on Glogova. However, because prosecutors brought narrow charges against Deronjic as part of a plea deal, they were sharply criticized. As noted above, ICTY Trial Chambers had criticized the factual distortions wrought by charge bargaining in other cases, and in Deronjic, the Trial Chamber’s presiding judge took particular aim at the prosecutor’s selective charging. Specifically, the information Deronjic had provided convinced Presiding Judge Schomburg that prosecutors also could have charged Deronjic with crimes relating both to the Srebrenica massacres as well as the large-scale ethnic cleansing that occurred in the Bratunac municipality as a whole. Consequently, Judge Schomburg dissented from the ten-year sentence and lambasted charge bargaining for its proclivity to distort the truth. Maintaining that “there is no justice without truth, meaning the entire truth and nothing but the truth,” Judge Schomburg announced that “[w]hen it comes to prosecuting crimes against individuals, a Prosecutor acts with the goal to stop a never-ending circle of ‘private justice,’ meaning mutual violence and vengeance. This goal can only be achieved if the entire

198. Id. ¶ 18.
199. Katanga Judgment, supra note 178, ¶ 521.
200. However, Katanga was acquitted of rape, sexual slavery, and the use of child soldiers. Id. § XII Disposition.
201. Deronjic Judgment, supra note 197, ¶¶ 277, 280.
204. See Deronjic Schomburg Dissent, supra note 83, ¶ 9. Institute for War and Peace Reporting (IWPR) also reported that “[e]vidence obtained by the tribunal and seen by IWPR corroborates that on the day that the [Srebrenica] enclave fell, [Deronjic] was named civilian commissioner of Srebrenica—a function that would put him de jure in charge of the enclave’s executed inhabitants.” Ana Uzelac, Judge Angered at Deronjic Prison Term, INST. FOR WAR & PEACE REPORTING November 9, 2005.
picture of a crime is presented to the judges." Judge Schomburg decried the prosecution’s selective charging, criticizing it for “arbitrarily present[ing] facts, selected from the context of a larger criminal plan and, for unknown reasons, limited to one day and to the village of Glogova only.” Other commentators were similarly critical of the Deronjić charge bargain.

The Katanga prosecutors, by contrast, were subjected to no such criticism for their decision to charge Katanga only with crimes occurring during the one-day attack on Bogoro, even though considerable evidence existed that Katanga was involved in other comparable or even more serious crimes. No one suggested that prosecutors had inappropriately distorted the historical record by charging only a subset of Katanga’s crimes. Indeed, if anything, the Katanga prosecutors were praised for charging Katanga with a broader range of crimes than the Lubanga prosecutors had brought.

The contrast in the treatment of the two cases is particularly perverse, given that Deronjić waived his right to trial and thereby freed up resources for other prosecutions, whereas Katanga had a trial that lasted two years and three months and that featured 54 witnesses, 643 exhibits, 409 written decisions and orders, and 168 oral decisions. Perhaps even more importantly, Deronjić not only provided prosecutors a trove of valuable information, but he testified in a record four cases and spent weeks on the ICTY stand providing prosecutors incriminating

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206. Id. ¶ 7.
207. Id. ¶ 4.
208. See Burens, supra note 61, at 329; Drumbl, supra note 70, at 594–95; Shahram Dana, Genocide, Reconciliation and Sentencing in the Jurisprudence of the ICTY, in THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE, AND CONTEXTUAL ASPECTS 259 (Ralph J. Henham & Paul Behrens eds., 2007); Petrig, supra note 66, at 20–21; Rauxloh, supra note 66, at 5–6.
209. See supra note 169.
212. Id. ¶ 21.
213. Id. ¶ 22.
214. Id. ¶ 24.
216. Deronjić testified in the Krstić appeal, see Prosecutor v. Krstić, Case No. IT-98-33-A, Transcript, 101–71 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 21, 2003); in the Milošević trial, see Prosecutor v. Milošević, Case No. IT-02-54, Transcript (Int’l Crim. Trib. for the Former Yugoslavia Nov. 26–27, 2003); in the Blagoević case, see Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Transcript, 6305–92 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 21, 2004); and in Krajinić, see Prosecutor v. Krajinić, Case No. IT-00-39-T, Transcript (Int’l Crim. Trib. for the Former Yugoslavia Feb. 12, 13, 16, 18, 19, 2004). Deronjić almost certainly would have testified in the Karadžić case had Deronjić not died prior to Karadžić’s apprehension. Deronjić’s evidence included the dramatic claim that two days before Srebrenica fell to the Bosnian Serb army, Karadžić said that everyone captured in the town should be killed. Michael Farquhar, Courtside: Deronjić, INST. FOR WAR & PEACE REPORTING (Dec. 5, 2005), https://iwpr.net/global-voices/deronjic [https://perma.cc/6LYN-SF44].
testimony. During the Milošević trial, Deronjić provided crucial information about Milošević’s involvement in Serbia’s arming of the Bosnian Serbs. In Krajšnik, Deronjić painstakingly detailed the way in which the policies promulgated by high-level Bosnian Serb politicians were implemented at the local level and led eventually to the expulsion and murder of thousands of Muslim civilians. By contrast, Katanga, having been given no incentive to provide information, testified against no one; in fact, the ICC acquitted Katanga’s co-defendant Matthieu Ngudjolo because prosecutors were unable to present sufficient evidence of his involvement in the crimes at Bogoro.

5. Summary

This Part has shown both empirically and through a case study that international criminal prosecutors have increasingly come to favor narrow indictments that charge defendants with only a subset of their criminal activity. The following Part will explore the normative implications of these narrow charging policies; suffice it to say here that this Part has highlighted the functional similarity between defendants whose convictions are factually distorted through charge bargaining and defendants whose convictions are factually distorted through prosecutorial charging policies that favor narrow indictments. Despite these similarities, narrow convictions resulting from charge bargains have been harshly criticized, whereas narrow convictions resulting from prosecutorial charging policies are either viewed as a necessary feature of international criminal justice or praised for their efficiency.

III. CHANGING THE CONVERSATION: FROM DISTORTION TO THE APPROPRIATE SCOPE OF INTERNATIONAL CRIMINAL CHARGING DECISIONS

Part II showed that factual distortion and understatement of criminal liability is a common and accepted feature of international criminal convictions following trials. Consequently, the fact that charge bargaining leads to factual distortion and understatement of criminal liability cannot be a reason to reject charge bargaining when it comes to international criminal trials because a substantial proportion of international criminal convictions will feature these same disadvantages with or without charge bargaining. At the same time, just because one criticism of a practice is not applicable in a particular realm does not mean that the practice should be


220. Ngudjolo Judgment, supra note 185, ¶¶ 490–503, 516s.
pursued in that realm. Specifically, I recognize that all forms of plea bargaining have been criticized. And, if this criticism is valid such that negotiating criminal dispositions is always to be avoided, then charge bargaining (as one form of negotiation) should likewise be avoided even if the particular criticisms most commonly leveled at charge bargaining per se are inapplicable. Said differently, factual distortion and understatement of criminal liability are not reasons to reject charge bargaining, but other good reasons to reject the practice could exist. One such reason, for instance, would be our rejection of all forms of negotiated settlements.

This Part maintains that charge bargaining is in fact appropriate in some circumstances. Section A rejects arguments for a categorical ban on negotiated settlements, while Section B contends that our normative assessment of charge bargaining should turn not on the criticisms traditionally leveled at the practice, but on our views of appropriate international criminal charging practices in a world of resource constraints. Section B's analysis suggests that because narrow charging is unquestionably appropriate in some circumstances, charge bargaining that results in narrow charges is not only also appropriate in those circumstances, but also has the potential to provide important benefits to international criminal justice.

A. Accepting the Desirability of Some Negotiated Dispositions

Although some commentators criticize all forms of negotiated justice, others, including myself, have embraced certain forms of negotiated justice for international criminal trials. So as not to repeat my own arguments or those of others that I have rejected, I will simply refer the reader to my previous scholarship where I maintained that guilty pleas, if correctly obtained, have the potential both to increase the number of international prosecutions that can be brought and to provide much-needed information both for victims in need of healing and for prosecutors in need of incriminating testimony against senior offenders. Here, I make two additional arguments against categorical opposition to negotiated justice for international crimes.

First, the creators of all of the international criminal tribunals, including the ICC, considered negotiated justice desirable at least in some circumstances, as evidenced by the fact that all of them included provisions empowering the litigants to negotiate

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221. See supra notes 45–47, 65–70.
222. See COMBS, supra note 7 (constructing a restorative justice approach to guilty pleas and negotiated settlements so as to increase efficiency while obtaining some of the benefits traditionally associated with truth commissions and other non-prosecutorial post-conflict justice mechanisms); Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY: Purpose, Effects and Propriety*, 3 J. INT'L CRIM. JUST. 666, 671–74 (2005) (identifying valuable information that is apt to be revealed only through negotiated settlements); Fabricio Guariglia & Gudrun Hochmayr, *Proceedings on an Admission of Guilt*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1219, 1221–23 (Otto Triffterer ed. 2d ed., 2008) (describing favorable arguments).
223. See Tieger et al., supra note 222, at 667 (noting that few developments in international criminal law “have been as vigorously debated or as closely examined in recent literature as the use of plea agreements.”).
224. COMBS, supra note 7, at 5–10.
criminal dispositions. The very first versions of the procedural rules of the ICTY, ICTR, and SCSL provided for guilty pleas.225 Moreover, when the ICTY’s first case involving a guilty plea showed that the initial rules had not provided the parties sufficient guidance,226 the judges immediately strengthened the system, first by adopting a rule setting forth the standards that guilty pleas had to meet,227 and later by adopting a rule that specifically authorized the prosecution to withdraw charges or recommend a reduced sentence following a guilty plea.228 As for the ICC, the International Law Commission’s (ILC) draft statute was the basis for the Rome Statute, and it also provided for guilty pleas from the very outset.229 The ILC’s guilty plea provision was revised during the Preparatory Committee meetings to incorporate more civil law elements,230 but it was always expected that the Rome Statute would permit admissions of guilt and that those admissions would either reduce the length of the trial or eliminate it entirely. That the creators of all of the modern international criminal tribunals believed negotiated settlements to be a potentially desirable option does not necessarily make them a desirable option, but it might suggest that categorical rejection of negotiated settlements is an overreaction.

Second, even if we believe as an abstract matter that negotiated settlements generally should be avoided, the challenges confronting international criminal justice at this moment in its history suggest that we should consider reluctantly welcoming them. As anyone who has followed recent developments in international criminal justice knows, the field is now routinely said to be “in crisis.”231 Commentators observe, for instance, that international crimes abound in locations such as Syria and


226. The ICTY’s first set of procedural rules did not set forth any standards that guilty pleas had to meet, so it was initially up to the Appeals Chamber to articulate them. Prosecutor v. Erdemović, Case No. IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

227. Specifically, ICTY judges added to the Tribunal’s procedural rules a provision requiring guilty pleas to be voluntary, unequivocal, and supported by a sufficient factual basis. ICTY R. P. & EVID. 62bis (as revised October 20 and November 12, 1997).


Yemen, yet there is no legal jurisdiction or political willingness to bring the perpetrators of those international crimes to justice. Moreover, the heady expectations that greeted the creation of the first permanent international criminal court nearly two decades ago have long since given way to a grim realism about the court’s limited capabilities. Specifically, the ICC’s prosecution has amassed so dismal a record that its supporters—no less than its critics—now question its ability to function effectively. During the court’s eighteen-year existence, for instance, ICC prosecutors have managed to convict only four defendants of international crimes, one of whom pled guilty. By contrast, during those same eighteen years, ICC prosecutors have failed to obtain custody over twelve defendants. They have failed to convince the ICC Pre-Trial Chamber to confirm charges against four


234. Those four were Thomas Lubanga, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012) [hereinafter Lubanga Judgment]; Katanga Judgment, supra note 178; Al Mahdi Judgment, supra note 41, ¶ 106; and Ntaganda Judgment, supra note 194. Ntaganda has appealed his conviction, Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06 A, Mr. Ntaganda’s Notice of Appeal Against the Judgment Pursuant to Article 74 of the Statute (Sept. 9, 2019), so an acquittal on appeal remains possible.

They were forced to withdraw charges against two defendants, and they saw six defendants acquitted after trial or appeal. Mark Ellis contrasted early international criminal justice, as carried out in the ICTY, with today’s international criminal justice, taking place at the ICC, by stating: “History will judge the ICTY as a success in bringing to account those who committed some of the most heinous crimes during the war in the former Yugoslavia. However, the ICTY’s permanent successor tribunal—the International Criminal Court ... is struggling to sustain any perceptible notion of success.”

The ICC’s woefully disappointing record suggests that even those who, in more favorable circumstances, would oppose negotiated settlements of international criminal cases should be willing to entertain them at this point in the court’s history. Certainly, the court’s current grave challenges have forced ICC prosecutors to change course and even abandon some otherwise reasonable policies. For instance, at the micro case level, when witness intimidation caused witnesses to recant their testimony, prosecutors have been compelled to withdraw charges. Similarly, when obstruction by states and other parties have rendered investigations unsafe and


240. See Muthaura Withdrawal of Charges, supra note 237, ¶ 11 (noting that several potential witnesses had been killed and others were unwilling to cooperate); Press Release, Int’l Crim. Ct., Statement of the Prosecutor of the Int’l Criminal Court, Fatou Bensouda, on the Status of the Gov’t of Kenya’s Cooperation with the Prosecution’s Investigations in the Kenyatta Case (Dec. 14, 2014), https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014&ln=en [https://perma.cc/UX9F-8NTV].
unproductive, prosecutors have had to suspend those investigations. At the macro policy level, early ICC Trial Chambers prohibited prosecutors from preparing witnesses prior to trial. They reasoned that prepared witness testimony might lack spontaneity and “could lead to a distortion of the truth” and constitute “a rehearsal of in-court testimony.” But after a spate of witnesses were intimidated or otherwise tampered with, some ICC Trial Chambers moderated their stances and began authorizing witness proofing, concluding that the complexity of the ICC cases along with the unfamiliarity of its legal system increases the “likelihood that witnesses will give testimony that is incomplete, confused or ill-structured.”

Finally, and most relevantly to this Article, external challenges have repeatedly forced ICC prosecutors to revise their charging policies. Part II delineated the evolution in the ICC prosecution’s charging practices, but what is notable for present purposes is the Prosecutor’s most recent decision to temporarily shift focus from senior, high-level offenders to lower-level, less culpable offenders. No one would consider this policy change an optimal one, given the widespread belief that the court’s limited resources should be deployed against senior offenders who are most responsible for the charged crimes. But the Prosecutor’s repeated inability to generate sufficient evidence to convict those senior offenders led to her pragmatic revision of her charging policies to reflect more modest goals that stand a better chance of being realized.

In a similar vein, few proponents of international criminal justice would recommend negotiating to summarily conclude criminal proceedings if there existed the time, money, and evidence necessary to bring even a reasonable number of


244. Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11, Decision on Witness Preparation, ¶ 36 (Jan. 2, 2013); see also Prosecutor v. Muthaura & Kenyatta, Case No. ICC-01/09-02/11, Decision on Witness Preparation, ¶ 41 (Jan. 2, 2013); see also Tracey Gurd, When Witnesses Change Their Stories..., INT’L JUST. MONITOR (Feb. 10, 2009), https://www.ijmonitor.org/2009/02/when-witnesses-change-their-stories/ [https://perma.cc/7LEV-5NQT] (reporting that some commentators maintain that witnesses who recant or testify incoherently are a predictable outcome of the no-proofing policy).


246. Alex Whiting, ICC Prosecutor Signals Important Strategy Shift in New Public Policy Document, JUST SECURITY (May 17, 2019), https://www.justsecurity.org/64153/icc-prosecutor-signals-important-strategy-shift-in-new-policy-document/ [https://perma.cc/SW97-NRVD] (“The aim of every international criminal tribunal that preceded the ICC, and the ICC in the first years of its existence, was to focus on the most responsible perpetrators, those at the top of the chain of command.”); see supra note 134.
offenders to justice following a trial. But precisely because those resources are in dramatically short supply, most commentators warmly welcomed the ICC’s first and only admission of guilt in the *Al Mahdi* case, even though Al Mahdi is a low-level offender, and even though prosecutors—perhaps as part of a charge bargain—only charged him with a narrow set of crimes involving cultural property when he was arguably also implicated in murder and sexual violence. These suboptimal aspects of the case notwithstanding, the *Al Mahdi* admission of guilt was celebrated precisely because it was made fourteen years into the court’s existence, when, during those fourteen years, prosecutors had managed to convict only two defendants of international crimes following trials. That is, a compelling argument can be made that, at a point in history when international criminal justice professionals are expending so much (in time, resources, and political capital) to achieve so little, we need more such “successes” even if we might adopt a different definition of “success” under more favorable circumstances. Said differently, at this point in time, international criminal justice in general and the ICC in particular cannot afford to categorically eschew procedural devices—even those some consider suboptimal—if those procedural devices could pave the way for far better results than the ICC has been able to achieve without them.

**B. A Reality-Based Assessment of International Charge Bargaining**

Part II showed that our normative assessment of international charge bargaining should not relate to the factual accuracy of the criminal convictions that result from such bargaining because convictions obtained even without charge bargaining are also prone to factual inaccuracy. In this Section, therefore, I argue that our normative assessment of charge bargaining should instead turn primarily on our view of the optimal breadth of international criminal charging. In particular, if we were to determine that international criminal prosecutors should charge their defendants as expansively as the evidence allows, then we should oppose charge bargaining along with any other charging policy that serves to reduce criminal liability for non-evidentiary reasons. If, by contrast, we deem it sometimes appropriate to charge a defendant with only a subset of the crimes for which he is seemingly responsible,


then we should consider charge bargaining a potentially valuable tool to achieve that end.

In thinking about the optimal breadth of international criminal charging, we must start with the reality established in Part II, namely, that international criminal courts can prosecute only a small proportion of the crimes committed as part of any given atrocity, and that necessarily means that international courts can prosecute only a small number of offenders per conflict. But the proportion of any given defendant's crimes that can be prosecuted is not similarly mandated by resources constraints. Even assuming a fixed set of (inadequate) resources, prosecutors can choose to charge all of their defendants comprehensively, so long as they indict sufficiently few defendants, or they indict lower-level defendants who have committed relatively few crimes. With the same set of fixed resources, however, prosecutors can alternatively charge a larger number of defendants or they can target more senior defendants who have engaged in more widespread criminality, so long as they selectively charge those defendants with only a subset of their alleged crimes. We know indeed that these various policy options exist because, as Part II described, international criminal prosecutors have mixed and matched between them during the last twenty-five years. That is, at various times, ICTY prosecutors have comprehensively charged low-level offenders, and they have comprehensively charged senior offenders. At other times they, and their ICC counterparts, have selectively charged both low-level and senior offenders.

Prosecutors deciding between these different options invariably consider a host of relevant factors, some of which are highly pragmatic whereas others are more philosophical and principled. Principled factors include the purposes of international criminal law and the penological goals that prosecutions are expected to advance. Unfortunately, the goals of international criminal law, as well as their order of prioritization, are highly contested.

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251. Al Mahdi Judgment, supra note 41; Lubanga Judgment, supra note 234; Katanga Judgment, supra note 178.


competing, sometimes opposing, goals simultaneously. What is relevant for our purposes, however, is simply that any sort of prioritizing of goals necessarily influences the prosecution's charging practices. For instance, those who believe that prosecutions should contribute to the historical record of the conflict will be more inclined toward indicting and comprehensively charging senior leaders than those who view the purpose of prosecutions more modestly as adjudicating the specific facts of a particular indictment. Similarly, those who consider that prosecutions should primarily serve retributive ends will favor more comprehensive charging than those who believe international prosecutions should primarily advance expressive aims. Those who emphasize the deterrent value of international criminal prosecutions likewise are apt to opt for narrow prosecutions. Studies suggest that deterrence is better advanced by more lenient, certain penalties than by harsher but less certain penalties. So, those wishing to advance deterrence will seek to prosecute a larger number of offenders even if the charges against those defendants must be limited. Finally, one's views on the appropriate role for victims also influences the range and breadth of charging. As a general matter, once a defendant has been indicted, victims favor more comprehensive charging, so the more robust the voice of victims, the broader prosecutorial charging practices are apt to be.


255. See, e.g., Richard May & Marieke Wierda, Evidence Before the ICTY, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 249, 252–53 (Richard May et al. eds., 2001); Antonio Cassese, On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 EUR. J. INT’L L. 2, 9–10 (1998) [hereinafter Cassese, Current Trends]; Antonio Cassese, Reflections on International Criminal Justice, 61 MOD. L. REV. 1, 6–9 (1998); Momir Nikolić Judgment, supra note 29, ¶ 60 (“[T]hrough public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide[,] was to be determined, thereby establishing an accurate, accessible historical record.”).


258. See deGuzman, supra note 96. Malu notes, for instance, that the ICC Prosecutor may have adopted an expressive approach to case selection given its preference for few cases and “short investigations.” See LINUS NNABUIKE MALU, THE INTERNATIONAL CRIMINAL COURT AND PEACE PROCESSES 51 (2019).


261. ICC victims are particularly likely to favor comprehensive charging because only those who are victims of crimes for which the defendant has been convicted are eligible to receive reparations.
Unfortunately, there is no agreement on how to prioritize the potential goals of international criminal justice, but even if there were, we would still need to prosecute cases in the real world, and the real world of international criminal justice features a host of practical challenges that prosecutors invariably must consider when deciding which charges to bring. Examples of relevant pragmatic factors that influence charging decisions include the security of the crime sites, the availability of evidence, the cooperation level of the states in question, and the quantity of resources available. As Part II detailed, the first ICTY Prosecutor, Richard Goldstone, brought indictments against low-level Yugoslav offenders already in custody precisely because he had little ability to obtain custody over more senior offenders who retained political or military power. However, at the very same time, the very same Richard Goldstone, while acting as the ICTR Prosecutor, brought indictments against high-level Rwandan offenders because he was able to apprehend them, thanks to the enthusiastic assistance of Rwanda and other states. Richard Goldstone obviously adapted his charging practices in light of the real-world circumstances surrounding those practices.

Likewise, the ICC Prosecutor manifested a lengthy commitment to targeting high-level offenders but has recently been forced to change course due to the difficulty of obtaining custody over those high-level offenders and the equivalent difficulty of obtaining sufficient evidence to convict the few high-level offenders who have ended up in the dock. Similarly, ICC prosecutors have also invoked other pragmatic factors to justify narrow charging. ICC prosecutors, for instance, pointed to the instability in the DRC and concomitant difficulty of conducting comprehensive investigations in such insecure regions to justify the narrow charges they brought in the Lubanga and Katanga cases. And, prosecutors more generally point to resource constraints and evidentiary challenges to explain their inclination to charge narrowly. Indeed, although different factors combine and coalesce differently in different cases, the general practice of the international criminal tribunals suggests that the greater the evidentiary challenges, regional insecurity, resource constraints, and lack of state assistance, the more likely that prosecutors will seek to focus their investigations and prosecutions on a narrow range of criminal charges.

The previous discussion indicates that optimal targeting and charging practices are never one-size-fits-all. Rather selecting defendants and ascertaining the appropriate charging breadth is frequently case specific and always complicated. As

264. See supra text accompanying notes 193–94.
265. See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Prosecutor's Information on Further Investigation, ¶¶ 8–9 & n.20 (June 28, 2006).
266. Off. of the Prosecutor, supra note 104, ¶ 2(b).
a theoretical matter, we might always prefer to target the most culpable senior
offenders, but when apprehending them or proving their culpability becomes
problematic, we may need to compromise our principles and target lower-level
offenders. Charging decisions can be even more nuanced and susceptible to outside
influence. In a world of unlimited resources, we would certainly prefer offenders to
be prosecuted for all or at least most of their crimes, but once we acknowledge that
the vast majority of international crimes taking place during a conflict will not be
prosecuted, the appropriate charging breadth becomes a highly contested question,
precisely because the goals of international criminal law and their prioritization are
themselves so contested and not subject to definitive resolution. Whether, as a
philosophical matter, one prefers comprehensive indictments of a smaller number of
offenders or narrower indictments of a larger number of offenders depends largely
on one’s view of the purposes and reasonable aims of international criminal
prosecutions and the likelihood that those aims can be advanced. As noted above,
some goals point in favor of comprehensive charging whereas others point toward
more narrow charging, but not only is there no agreement as to which goals to pursue,
we have even less certainty about our ability to achieve those goals even if we
prioritize them. We might adopt narrow charging practices, for instance, in order to
increase deterrence, but achieving any sort of deterrence through international
criminal prosecutions is itself highly speculative regardless of the charging practices
we employ.267

Given the controversy surrounding international criminal law’s goals, it should
come as no surprise that international criminal prosecutors have not generally tied
their charging decisions to the advancement of any particular goal, but rather have
been driven largely by pragmatic considerations. And those pragmatic considerations
have led prosecutors to charge comprehensively in some cases and more narrowly in
others. These varying charging practices and the factors that influence them tell us
nothing about whether prosecutors have weighed considerations correctly in any
individual case. However, they do suggest that narrow charging is at least reasonable
and perhaps optimal in some circumstances and for some cases. Indeed, one could
consider this proposition self-evident. ICTY judges expressly endorsed the validity
of narrow charging when they began regularly calling on the prosecution to eliminate
counts and incident sites. Likewise, the ICC Prosecutor adopted and publicized a
narrow charging strategy for the better part of the court’s first decade.

Once we acknowledge that it is appropriate for prosecutors to charge some
international defendants with only a subset of their criminal behavior, then we should
not reflexively criticize prosecutors reaching that same result through charge
bargaining. Indeed, given that prosecutions take place in a world in which defendants
are highly unlikely to be prosecuted for all of their crimes in any event, charge
bargaining has the potential to provide a variety of benefits that heretofore have been
left on the table, as it were. These are the same benefits that attend most forms of
negotiated justice, but as I and others have developed, in the international context,
they can be particularly valuable. Specifically, resolving cases through guilty pleas
and admissions of guilt saves tremendous resources and can thereby enable

267. See, e.g., Julian Ku & Jide Nzelibe, Do International Criminal Tribunals Deter or
international criminal justice bodies to increase dramatically the proportion of perpetrators they can prosecute. Moreover, if prosecutors conduct negotiations appropriately, they can procure information that can be crucial to other prosecutions, particularly those of accomplices or senior offenders. Prosecutors can also procure information that is not instrumentally valuable for subsequent prosecutions but that is highly prized by victims. Such information can include details about the crime, the victims, and most notably, the locations of loved ones’ remains. Admissions of guilt and guilty pleas can also feature elements of remorse, which have the potential to enhance reconciliation and victim satisfaction. To be sure, victims also typically value comprehensive indictments that charge defendants with all of their criminality, but if comprehensiveness is impossible to achieve for other reasons, then victims—and the international criminal justice project as a whole—stands to gain from the thoughtful employment of charge bargaining.

Finally, Part II’s empirical analysis of international prosecutorial practice over the last two decades shows that I and other international criminal law commentators have had it completely backwards. We deemed charge bargaining to be more problematic than sentence bargaining largely because we believed charge bargaining to introduce factual distortion into international criminal convictions. The primary revelation of this Article, however, is that a large proportion of cases that go to trial in international criminal courts feature factual distortion, so the international criminal justice system is already suffering the core disadvantage of charge bargaining. Thus, employing charge bargaining has the potential to provide substantial benefits without generating any new costs. Sentence bargaining, by contrast, introduces additional costs to obtain the same benefits. Specifically, when prosecutors use sentence bargaining to procure guilty pleas or admissions of guilt, they must promise to discount the sentence that the defendant would otherwise receive for his criminal conduct. Thus, whereas charge bargaining replicates the narrow charging that current international prosecutors favor in any event, sentence bargaining introduces sentencing reductions from which defendants would not otherwise benefit.

IV. CHARGING FORWARD: ADDRESSING THE PRACTICAL IMPEDIMENTS TO THE EFFECTIVE USE OF CHARGE BARGAINING IN THE INTERNATIONAL CONTEXT

Part III makes the theoretical case for using charge bargaining in international criminal prosecutions, but I would be remiss if I failed to acknowledge the practical difficulties that may impede its effective employment. Or, said differently, a number of conditions must exist for international prosecutors to employ charge bargaining efficiently and effectively, which this Part will canvass. Specifically, and at a minimum, defendants must find reduced charges (and the concomitant sentence benefits) sufficiently motivational to induce them to waive their trial rights. In

268. See, e.g., Roman Graf, The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment, 10 J. INT’L CRIM. JUST. 945, 946 (2012) (“The very narrow scope of these charges met with considerable criticism throughout the trial by representatives of victims . . . .”); Prosecutor v. Lubanga, ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ¶¶ 10–12 (May 22, 2009) (seeking to recharacterize charges to include inhuman and/or cruel treatment and sexual slavery).
addition, in some cases, prosecutors must be willing to understate substantially the
defendant’s criminal liability, prosecutors must perform relatively broad
investigations, and Trial Chambers must be willing to reward defendants for
admitting guilt. I will address each of these conditions in turn.

First, when it comes to domestic crimes in Western countries, we have good
reason to believe that defendants can be motivated to waive their trial rights through
the promise of reduced sentences. Reduced charges and discounted penalties
unquestionably prove motivational to many international offenders as well, but my
previous research indicates that ideological commitments and cultural beliefs can
complicate the bargaining process and impede prosecutorial efforts to procure trial
waivers. When defendants face negative external consequences for admitting guilt
or when they value a public trial as a means of bolstering their reputations back home,
they will be less inclined to admit guilt, or they will require reductions that the
prosecutor may be unwilling to provide. No one negotiating blueprint exists,
especially for ICC prosecutors who prosecute defendants from a wide variety of
countries, cultures, and conflicts. Suffice it to say, however, that prosecutors must be
keenly attuned to the background, beliefs, and desires of their defendants if they want
charge reductions to inspire admissions of guilt.

Next, prosecutors seeking to charge bargain may need to substantially understate
the defendant’s criminal liability. In particular, prosecutors must reduce charges in a
way that will provide defendants assurance that they will in fact receive a penalty
reduction. This is no simple task because Trial Chambers have broad discretion over
sentencing. At the ICC, for instance, Trial Chambers have the authority to sentence
defendants to a term of imprisonment from one to thirty years, or to life
imprisonment, and they are not subject to any mandatory guidelines or other
restrictions on their discretion. For this reason, a low-ranking defendant who
committed twelve murders is not likely to admit guilt for eleven murders in order to
obtain a lower sentence, because that defendant would have no assurance that a Trial
Chamber with virtually unlimited discretion will in fact reduce his sentence.
Providing defendants sufficient assurance of a sentence reduction may then require
prosecutors to charge defendants with considerably less criminality than the
defendants likely perpetrated. On the one hand, providing such assurance becomes
ever more difficult when prosecuting senior offenders who may have committed so
many crimes that their conviction for even a small subset could leave them vulnerable
to a lengthy sentence. At the same time, as previously detailed, ICC prosecutors
routinely and voluntarily charged defendants with only a small subset of their
criminal activity, and that precedent should indicate their willingness to do
likewise to obtain an admission of guilt.

Indeed, ICTY and ICTR prosecutors who engaged in charge bargaining
recognized the need for significant charge reductions; consequently, when
concluding plea agreements, they were willing to eliminate genocide charges or

269. Combs, Procruring Guilty Pleas, supra note 30, at 70, 79–80 (citing sophisticated plea
bargaining models that American academics have constructed premised on the assumption
that defendants seek to minimize their incarceration time by pleading guilty).
270. Id. at 137–41.
271. Rome Statute, supra note 92, art. 77(1).
272. See supra text accompanying notes 170–95.
REHABILITATING CHARGE BARGAINING

substantially recast the nature and scope of the defendants' criminal activities. Of course, the more significant the charge reductions, the more prosecutors distort the factual records of defendants' crimes. Such distortion would be a high cost to bear if prosecutors would otherwise charge more comprehensively. But, as discussed above, when narrow charging is preferred for independent reasons, then prosecutors can employ significant charge reductions as a means of gaining some benefit from the constraints under which they are forced to operate in any event.

Another necessary condition for effective charge bargaining is effective investigations and a willingness sometimes to prosecute more broadly than prosecutors might otherwise desire. This Article has maintained that prosecutors who are inclined to charge defendants with only a subset of their criminal activity can gain much-needed benefits if they can convince defendants to admit guilt to that subset of criminal activity. But defendants will not be willing to admit guilt to the subset unless they fear prosecution for a much broader range of crimes. Said differently, in order to successfully charge bargain, prosecutors must charge defendants with all or most of their criminal behavior, with the expectation that they will eliminate many of the charges if the defendant admits guilt. However, in order to charge the full range of criminal behavior—and at the ICC to have those charges confirmed—prosecutors must devote enough resources to investigations to unearth the full range of the defendant's criminal behavior. For example, once prosecutors determined to bring a focused set of charges against Germain Katanga, centering on the one-day attack in Bogoro, they had no need to investigate the other crimes Katanga allegedly perpetrated. Had they sought to use charge bargaining to obtain an admission of guilt for the attacks occurring in Bogoro, however, they would have had to investigate Katanga's other alleged crimes so as to plausibly threaten him with their prosecution. Moreover, if a given defendant refuses to admit guilt, prosecutors will likely have to bring the more comprehensive set of charges to trial. If, after negotiating unsuccessfully, prosecutors were willing to reduce charges without obtaining an admission of guilt, they would thereby send a message to subsequent defendants that they need not admit guilt in order to obtain the advantages of admitting guilt.

Obviously, broader investigations and charging can be costly, and in some cases the costs will be too high. To the extent, for instance, that the prosecutor's initial inclination to charge narrowly in the first place stems from an unstable security situation or an inability to gain credible evidence, then she might understandably be unwilling to substantially broaden her investigations in the hope of obtaining an admission of guilt, not least because the additional investigations may not procure the desired outcome. But if deployed carefully and in appropriate contexts, then the additional costs incurred as a result of charge bargaining will be more than offset by the gains. Indeed, Lubanga's trial on the narrow charges of enlisting and conscripting child soldiers lasted approximately two and a half years while Katanga's trial for the one-day attack on Bogoro lasted two and a third years. Al Mahdi's proceedings

273. See COMBS, supra note 7, at 63–71, 97–108.
274. Lubanga Judgment, supra note 234, ¶ 11.
on his admission of guilt, by contrast, lasted three days.\textsuperscript{276} Admissions of guilt unquestionably save tremendous resources; thus, the costs incurred to obtain them, if carefully considered and expended in the right circumstances, have the potential to pay exceptional dividends.

The final condition necessary for successful charge bargaining rests with the Trial Chamber. Specifically, Trial Chambers must sentence in ways that reward defendants for admitting guilt. In some ICTY and ICTR cases involving guilty pleas, Trial Chambers were not willing to sentence in accordance with prosecutorial recommendations because they considered those recommendations unduly lenient.\textsuperscript{277} This unwillingness unquestionably impaired prosecutors’ ability to convince subsequent defendants to plead guilty because the defendants had no confidence that they would receive the benefits for which they had bargained.\textsuperscript{278} Indeed, it came as no surprise that guilty pleas came to a sudden end at both the ICTY and the ICTR when Trial Chambers began rejecting prosecutorial sentence recommendations.\textsuperscript{279} Indeed, we might have even heightened concerns about ICC Trial Chambers’ reactions to admissions of guilt because the ICC has been structured to include more civil law elements;\textsuperscript{280} specifically, negotiated justice is less familiar to civil law judges,\textsuperscript{281} and civil law judges are accustomed to exercising a greater control over the trial proceedings\textsuperscript{282} and are consequently more reluctant tocede any of their discretion to prosecutors.

Although Trial Chambers are crucial to the success of any negotiated justice scheme, I believe they will play their parts. At the time that ICTY and ICTR Trial Chambers spurned prosecutorial sentencing recommendations in guilty plea cases, the tribunals were at their heights—in terms of their resources, their reputations, and their accomplishments. For this reason, the Trial Chambers could afford to behave in ways that undermined the prosecution’s ability to obtain guilty pleas. That is, the tribunals were considered generally successful,\textsuperscript{283} and while it might have been nice

\textsuperscript{276} Al Mahdi Judgment, \textit{supra} note 41, ¶ 7.
\textsuperscript{277} COMBS, \textit{supra} note 7, at 77–83.
\textsuperscript{279} Id.
\textsuperscript{281} As noted, see \textit{supra} text accompanying notes 55–61, negotiated justice came much later to civil law jurisdictions than common law jurisdictions.
\textsuperscript{282} Philippe Bruno, \textit{The Common Law from a Civil Lawyer’s Perspective, in Introduction to Foreign Legal Systems} 1, 5 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994) (“Judges are at the center of the civil law system.”); Mary C. Daly, \textit{Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems}, 2 \textit{J. Inst. Study Legal Ethics} 65, 70 (1999) (“In the civil law system, the judges—not the parties—drive the criminal process.”).
\textsuperscript{283} See, e.g., Erin Kathleen Lovall & June Ellen Vutrano, \textit{Seeking Truth in the Balkans: Analysis of Whether the International Criminal Tribunal for the Former Yugoslavia Has Contributed to Peace, Reconciliation, Justice, or Truth in the Region and the Tribunal’s Overall Enduring Legacy}, 5 \textit{L.J. Soc. Just.} 252, 310 (2015) (“While there are many valid
to expedite their proceedings, it was not essential, either to gain convictions or overall
legitimacy. The ICC, by contrast, is in an entirely different—and far less positive—
position. For that reason, it came as no surprise that the Trial Chamber sentenced in
accordance with prosecutorial recommendations in the Al Mahdi case, and we have
every reason to believe that they will continue to sentence in ways that promote
admissions of guilt when given the opportunity.

CONCLUSION

International criminal justice is surrounded by soaring rhetoric.\textsuperscript{284} Especially at
the field’s outset, scholars and commentators assumed without reflection that
international criminal prosecutions would advance a host of significant goals, including
affirming the rule of law in weak, lawless states,\textsuperscript{285} promoting peace and
assisting in the transition to democracy,\textsuperscript{286} reconciling formerly conflicting parties,\textsuperscript{287}
deterring future despots from committing similar crimes,\textsuperscript{288} and creating a historical
record of the conflict that would assist in achieving all of the previously delineated
goals.\textsuperscript{289}

The succeeding years have conclusively shown that international criminal justice
reality fails to match its rhetoric, and in no realm is that mismatch more divergent
than in the realm of international criminal charging. Charging international

complaints about the form, speed, and cost of that justice, most agree that the ICTY has been
generally successful in this endeavor and that its legacy of justice will be positive.”); Fatou
Bensouda, Theodor Meron & Abiodun Williams, \textit{The ICC and the Yugoslav Tribunal:}
(International Law Programme meeting summary).

\textsuperscript{284.} Payam Akhavan, \textit{The International Criminal Court in Context: Mediating the Global}
the judicial dawn of the ICC, much of the literature is approving, if not celebratory, in tone .
. .”).

\textsuperscript{285.} MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER
GENOCIDE AND MASS VIOLENCE 25 (1998); RUTI G. TETTEL, TRANSITIONAL JUSTICE 56 (2000);
Stephan Landsman, \textit{Alternative Responses to Serious Human Rights Abuses: Of Prosecution}


\textsuperscript{287.} See Harvey M. Weinstein & Eric Stover, \textit{Introduction: Conflict, Justice and
Reclamation, in My Neighbor, My Enemy: Justice and Community in the Aftermath of
Mass Atrocity} 1, 3–4 (Harvey M. Weinstein & Eric Stover eds., 2004) (discussing this
literature).

\textsuperscript{288.} M. Cherif Bassiouni, \textit{Searching for Peace and Achieving Justice: The Need for
Accountability}, 59 L. & CONTEMP. PROBS. 9, 18 (1996); Jaime Malamud-Goti, \textit{Transitional
Governments in the Breach: Why Punish State Criminals?}, 12 HUM. RTS. Q. 1, 12 (1990);
Diane F. Orentlicher, \textit{Settling Accounts: The Duty to Prosecute Human Rights Violations of a
Prior Regime}, 100 YALE L.J. 2537, 2542 (1991). Indeed, the Security Council established the
ICTY while the Yugoslavian conflict was still underway with the express goal of deterring
for Serious Violations of Int’l Humanitarian L. Committed in the Territory of the Former

\textsuperscript{289.} See supra note 255.
defendants with the full range of their criminality is not only intuitively appropriate but is almost certainly best placed to advance whatever penological goals one prioritizes for international criminal trials. Charging international defendants with the full range of their criminality is also utterly impossible. Prosecutors in early ICTY cases managed that feat only because they were forced to prosecute low-level offenders who had committed relatively few crimes. Once ICTY (and later ICC) prosecutors gained access to more senior defendants, they were forced to confine their charges to a sampling of the defendants’ overall criminality. At the ICTY, it was the Trial Chambers that insisted on narrow indictments, whereas at the ICC, it was prosecutors who voluntarily adopted narrow charging policies. But however these charging practices came about, this Article has shown that are now entrenched and there is little reason to expect them to change.

What is fascinating is that the same commentators who excoriated charge bargaining have accepted—and in some cases embraced—the prosecution’s narrow charging policies, despite the fact that narrow charging leads to the same factual distortions that these commentators found wholly unacceptable when they resulted from charge bargaining. Indeed, this Article has shown that the on-the-ground charging changes that Article identifies should cast charge bargaining in a whole new and far more positive light. Simply put, if, due to a range of practical limitations, international criminal prosecutors are compelled in a given case to limit their charges to a subset of the defendant’s criminal liability—and are compelled to suffer the resulting disadvantages of that narrow charging—then those prosecutors should consider using charge bargaining to gain much-needed advantages from the suboptimal charging environment in which they find themselves. Indeed, never was there a context in which we had a greater need to make lemonade from lemons.

The ICC is approaching its twentieth birthday and has achieved much less while spending much more than anyone would like. ICC prosecutors must routinely navigate among defiant states, intimidated witnesses, an idealistic NGO community, a politicized Security Council, and an Association of States Parties unwilling to provide the resources necessary for the Court to achieve what is expected of it. To be sure, charge bargaining is no panacea for these and the other grave challenges currently facing international criminal justice. At the same time, in this seemingly impossible environment, charge bargaining can be seen as low-hanging fruit. This Article has shown that current international criminal prosecutions are suffering the primary cost of charge bargaining and realizing none of its benefits. Given that, it is time to rehabilitate charge bargaining.
APPENDIX

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