International Journal of Humanities and Social Science Review; Vol. 9 No. 1; August 2023
ISSN 2415-1157 (Online) ISSN 2415-1335 (Print)
Published by Research Institute for Progression of Knowledge

Implementing Admissions of Guilt before the International Criminal Court Under Article 65 of the Rome Statute

Daniel N. Huck, Ed.D., J.D., LLM
Associate Professor,
Law, Ethics & Society
W.R. Gruver Chair in Global Leadership Studies
Berea College
Berea, Kentucky, USA 40404

Abstract

This article focuses on how using the "Admission of Guilt" (AOG) mechanism provided in Article 65 of the Rome Statute would support and enhance – not diverge from – the overriding purposes of that document's goals and structural designs. A move by the International Criminal Court (ICC) to implement AOG would provide the Office of the Prosecutor of the ICC (OTP) an important practice tool for developing mode-of-liability evidence sufficient to meet the chambers' demanding proof requirements for "organization" in assessing criminal culpability. With AOG enabled at the Court, the OTP could begin to negotiate the cooperation of defendants as part of agreements for individual admissions of guilt using the Article 65 mechanism. While each defendant admitting guilt would be protected by the substantial review procedures available in Article 65(4)(a), a regular AOG practice would put the OTP in a position to convert those defendants into proof-of-organization informants. This redirection by the OTP toward implementing consensual procedures would place its prosecution policies well within the boundaries of AOG usage as presently manifested in both civil law (inquisitorial) and common law (adversarial) jurisdictions. The "next steps" suggested at the end of this article focus on the OTP gathering further information about how AOG is implemented by various Assembly of State Parties (ASP) members and major non-members, how AOG has functioned at the other major international tribunals, and how the OTP's existing policies regarding Article 65 admissions of guilt could encompass a more regular use of consensual procedures.

Introduction[*]

The ICC came into operation in 2002 to seek the prosecution of perpetrators of genocide, crimes against humanity, war crimes, and aggression.[1] More than 20 years have passed with little success if measured as the number of successful prosecutions by the OTP of potentially culpable defendants, leading some observers to question whether the ICC can continue in its present format.[2]

[*] The author was a Visiting Professional during 2013 at the ICC in the OTP and worked on the initial investigative stages of the *Al Mahdi* case referenced in this article. The author heads the Law, Ethics & Society program and holds the W.R. Gruver Chair in Global Leadership Studies at Berea College in Berea, Kentucky USA.

[1] *See generally*, UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, https://www.refworld.org/docid/3ae6b3a84.html [accessed 1 December 2023]; *see also*, William A. Schabas, *An Introduction to the International Criminal Court* (6th ed. 2020).

[2] *See*, Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 Case W. Res. J. Int'l L. 467 (2020), https://scholarlycommons.law.case.edu/jil/vol52/iss1/21; see also, Douglas Guilfoyle, *Part I - This is*

With the close of calendar year 2023, the OTP can claim only three convictions resulting from the full trial of defendants for the core substantive crimes against humanity or war crimes over its two decades of operation (and none for genocide).[3] The OTP can claim another five convictions for administration-of-justice auxiliary offenses under Article 70 as part of its Central African Republic case.[4] Finally, and most relevant to the analysis in this article, the OTP has achieved a fourth conviction against Ahmad Al Faqi Al Mahdi for a substantive "war crime" under Article 8(2)(e)(iv) of the Rome Statute.[5] This fourth substantive law conviction was pursuant to an AOG agreed to by Mr. Al Mahdi under Article 65 of the Rome Statute, providing for the interesting statistic that 25% of the OTP's non-administrative convictions to date have resulted from a process of negotiating a voluntary plea by a defendant.

The present analysis considers the reconciliation of the presumptions of criminal law professionals within inquisitorial, civil law systems that procedures like an Article 65 AOG should not be used, and the regular usage of such consensual procedures by similar professionals trained within common law traditions. These professionals from the two types of systems come together in the ICC structure and attempt to implement the Rome Statute, which itself blends by design the various criminal justice presumptions from each approach.[6] In fact, this article proposes the inquisitorial presumptions of many ASP and non-ASP states already have moved in the contemporary era toward the increasing use of consensual mechanisms like the AOG provided in the Rome Statute. In particular, the present analysis will focus on three key inquiries:

- **What is the general history of consensual resolution mechanisms in the inquisitorial and adversarial traditions of domestic criminal law?**
- **What contemporary models of consensual resolution (similar to the AOG) do ASP members – and major states that are not yet ASP members – presently use to resolve their domestic criminal cases?**
- **What are the particular requirements of the AOG framework under the Rome Statute, and how does it compare with the contemporary use of consensual criminal case resolutions among ASP members and major states that are not yet ASP members?**

While the present analysis ultimately recommends a more thoroughgoing implementation of an AOG process under Article 65, several key counter observations are worth briefly noting that are not fully addressed here. First, many observers object to the overall concept of consensual resolutions of guilt when considering the nature of the mass atrocity crimes at stake under the Rome Statute.[7] While that larger epistemological issue may be worth revisiting when considering possible consensual resolutions with some defendants before the ICC, the original drafters and the subsequent ASP membership have chosen to keep the AOG alternative available to the OTP.

Not Fine: The International Criminal Court in Trouble, EJIL:TALK! (12 March 2019), https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/; see also, Thijs Bouwknegt, *Gbagbo – an Acquittal Foretold*, justiceinfo.net (31 January 2019), https://www.justiceinfo.net/en/40156-gbagbo-an-acquittal-foretold.html.

[3] *IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN*, ICC-02/04-01/15 A2 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07148.PDF**;** *IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO*, ICC-01/04-01/06 A 4 A 6 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_09849.PDF; *IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA*, ICC-01/04-02/06 A3, https://www.icccpi.int/sites/default/files/CourtRecords/CR2021_03030.PDF.

[4] *Case Information Sheet - The Prosecutor v. Jean-Pierre Bemba Gombo, Aims Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fiddle Babala Wandu and Narcisse Arido*, INT'L. CRIM. CT., https://perma.cc/5PP7-ATUK

[5] *IN THE CASE OF THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI*, ICC-01/12-01/15, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF; Uzma S. Bishop-Burney, American Journal of International Law , Volume 111 , Issue 1 , January 2017 , 126 – 132, https://doi.org/10.1017/ajil.2017.8.

[6] *See generally*, Giovanni Chiarini, *Negotiated Justice in the ICC: Following the* Al Mahdi case*, a Proposal to Enforce the Rights of the Accused* (2021), 5 PKI Global Justice Journal 13.

[7] *See, e.g.*, Alex Whiting, *Is a Plea Agreement for Dominic Ongwen a Good Idea?*, POST-CONFLICT JUST. (Feb. 10, 2015), https://perma.cc/CA6L-S682; Jenia Tontcheva Turner, *Plea Bargaining and International Criminal Justice*, 48 U. PAC. L. Rev. 219, 219-20 (2017).

In that regard, although again beyond the scope of the present article, one could explore the fact that consensual resolutions with defendants were a regular component of prosecutor activity at both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).[8] Second, this article employs terms such as "consensual" to broadly describe the AOG mechanism, given the actual language of Article 65 of the Rome Statute, but inevitably this analysis draws a comparison to "plea bargaining" in common law legal systems and so that term, albeit contractual in nature, will remain prominent throughout the discussion below. More to the point, plea-bargaining remains within a broader spectrum of various types of consensual procedures available across a wide horizon of contemporary human legal systems to defendants and criminal prosecutors who agree on an early resolution of individual liability in criminal cases through the consent of the accused.

Analysis

The ICC remains, *prima facie*, a blend of the common law and civil law criminal justice traditions of those states that negotiated the Rome Statute.[9] In terms of both process and substance, the Rome Statute borrows in part from the inquisitorial traditions of the civil law, especially as historically practiced in continental Europe, and in part from the adversarial legacy of the Anglo-American common law system.[10] Yet, any serious review of the recent evolution of consensual procedures in contemporary domestic criminal systems – both civil law and common law – would recognize that the Rome Statute's structure for such case resolutions is a hybrid of those two traditions. That is, the approach to consensual outcomes in the Rome Statute should be seen neither as a strict adherence to the inquisitorial model, nor as part of some growing movement to adopt the "bargaining" model of contemporary adversarial systems. Notwithstanding the "Americanization" thesis – the general theory that the criminal law system of the United States of America (USA) has been overtaking the justice systems of the rest of the world[11] – most contemporary scholarship reveals that such ascendancy does not in fact generally exist.[12]

While it is fair to say that the USA, its criminal courts jammed with huge caseloads, continues its unique domestic commitment to ubiquitous and unfettered bargaining between prosecutors and defendants, it is equally true that most other states have begun an intrinsic process over the past three decades of adopting their own forms of AOG for disposing of criminal cases. Stated differently, while the designers and negotiators of the Rome Statute choose to include within its provisions a consensual procedures framework for resolving ICC cases, that inclusion reflected (and continues to reflect) a similar and growing domestic criminal law trend among states that already are members of the ASP and those who are major non-member states. This trend reveals itself most clearly when viewed against a brief general summary of the separate civil law and common law traditions.

1. What does a comparative history of consensual case resolution demonstrate as between inquisitorial and adversarial traditions within contemporary domestic criminal law systems?

Within the common law criminal tradition, consensual resolution of criminal cases has been practiced for an extended period, with the best known and most predominant form of such practices represented by "plea bargain" as used in the United States for more than 150 years.[13]

[8] *See*, Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT'L L. 415, 416 (2009).
[9] Schabas, at 24-25.
[10] *Ibid.*
[11] *See, e.g.*, D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', *in* A. Santos and D. Trubek (eds), *The New Law and Economic Development: A Critical Approach* (2006).
[12] *See, e.g.*, Langer, M., "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", *in* Thaman, S. (ed.), *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial* (2010).
[13] For purposes of this memorandum, the term "consensual resolution" (or similar forms) and the "AOG" abbreviation are used to recognize the broad scope of alternative resolutions to a criminal trial that are available, but only when a defendant agrees to such a resolution. In that sense, decisions by a prosecutor not to initiate, or to discontinue, a case, often captured in the concept of *nolle prosequi*, are not the subject of the present analysis because they do not require the consent of the accused defendant.

Plea-bargaining subsequently also came into regular use in the criminal justice systems of the United Kingdom and other common law states, including Australia, Canada, New Zealand, Nigeria, and South Africa.[14] Unlike a criminal defendant in the civil law tradition, the defendant and prosecutor in a common law criminal matter face the prospect of a long period of adversarial discovery, including procedural challenges, followed by (almost always) an adversarial trial before a lay jury serving as the triers of fact. The "truth" of the matter of "guilt" emerges from the defense and the prosecution contesting the evidence, with the judge remaining a neutral referee, and neither the judge nor the jury given the power to seek further proof beyond what is offered in the trial.

Faced with the inherent uncertainties of the adversarial system, the typical common law plea bargain takes the form of a state prosecutor offering to reduce the number of charges ("*charge bargaining*") and/or to propose to the judge reductions in sentence ("*sentence bargaining*") in exchange for a defendant's plea of "guilty" to an agreed list of remaining charges. Such agreements are formally recognized and regulated by modern common law systems, with typical protections built in to ensure that a court inquires of the defendant whether a plea is voluntary and informed, whether the defendant understands the rights forfeited and the range of penalties available, as well as whether the plea is based in fact.[15] Once having exhausted these inquiries, a judge retains full discretion to accept or reject the plea agreement, including the prosecutor's recommended sentence. These agreements often include a defendant's waiver of the right to appeal, so they are rarely tested as a matter of human rights law or domestic constitutional law.[16]

Various claims are made for the efficacy of the plea agreement as a consensual procedure in both its forms (*charge bargaining* and *sentence bargaining*) by its advocates in common law systems. The chief advantage cited in support of plea-bargaining relates to the tremendous conservation of resources generated by this consensual resolution mechanism. By eliminating the need for a full trial of the matter, the defendant's agreement to plead guilty to some portion of the original (or alternative) charges saves the costs associated with a full criminal trial and allows those resources to be applied to other criminal litigation.[17] A second major benefit argued by advocates of plea-bargaining as a consensual procedure relates to its usefulness in obtaining evidence of criminal organizations or networks. That is, if a prosecutor can offer a sentence and/or charge bargain to a co-conspirator or accessory in a criminal enterprise, then the defendant's portion of that *quid pro quo* can include providing evidence of what took place inside the criminal organization.[18] A third, and more ambiguous, claim centers on the idea that plea bargaining, employed in the midst of the overburdened and strained criminal justice systems that have emerged in most modern states, actually protects the due process rights of a defendant.[19] This approach conceives the delays in acting on cases inherent in a crowded system as cutting against the ideal of a fair trial because justice for each accused will be delayed if full trials are held in every matter. Witness testimony and other evidence in particular cases will degrade during such delays, and victims will begin to perceive such delays as a failure in the system and signal to consider the need for self-help measures.[20]

Within the civil law tradition, consensual resolution of criminal felonies was not allowed and therefore not employed by state prosecutors and judges until just the past three decades of domestic practice.

---

[14] *See generally*, Criminal Code Act 1995 (Australia); R.S.C., 1985, c. C-46 (Canada); Crimes Act 1961 (New Zealand); Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria 1990 (Nigeria); Criminal Law Amendment Act 1 of 1988 (South Africa).

[15] For example, see the Federal Rules of Criminal Procedure of the United States at Rule 11, http://www.uscourts.gov/uscourts/rules/criminal-procedure.pdf . See also, The Code for Crown Prosecutors (2018), sections 7 and 9, https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf

[16] While both common law and civil law traditions include other types of bargained-for criminal case resolutions, such as *diversion* and *restitution*, the present memorandum does not address these mechanisms since they typically are triggered quite early in a criminal matter (often even before the filing of a criminal charge or the defendant's initial plea), and they often apply only in minor cases of criminal mischief which are matters quite different in social harm magnitude from the concerns of the Rome Statute.

[17] American Bar Association, *2023 Plea Bargain Task Force Report*, at 6.

[18] *Ibid*, at 6-7.

[19] R. Roxlaugh, *Plea Bargaining in National and International Law* (2012), at 2.

[20] *Ibid*.

In fact, most civil law jurisdictions only began adopting the first forms of consensual procedures for resolving criminal matters in the 1980s and the 1990s, with an expansion of such usage over the ensuing 20 years.[21] Rather than adopting consensual resolution models, the criminal justice systems of civil law states historically relied upon the "inquisitorial" model of prosecution. In the traditional form of this model, the judge in a criminal matter plays an active and leading role in trying the case.[22] Although the lay jury as trier of fact is generally absent from the inquisitorial model, this role is filled by active judicial inquiry from the bench aimed at establishing the truth of an alleged crime. The government prosecutor in the inquisitorial system conducts a thorough investigation, thereafter providing a detailed case file or dossier to the judge and the defense.

Notwithstanding the dossier, a judge at trial in the inquisitorial tradition is able to question witnesses, expand or bring in expert testimony, and generally request the development of any additional evidence that might help establish the truth of the case. In procedural terms, if the parties overlook or attempt to avoid certain evidence, the judge can intervene to ensure such facts are added to the record. In the traditional inquisitorial system, the judge also retains significant power to establish, amend, and dismiss the charges brought against a defendant. Judges have the authority to decide whether the initial charges should be changed to reflect the facts, and whether charges can be dismissed by a prosecutor once filed. In some inquisitorial models this charging authority of the judge even extends to decisions on whether a prosecutor can refrain from charging a defendant in the first instance.[23] Finally, at the end of the trial, a judge in the civil law tradition has full authority to assess the verdict and to sentence the accused.

The advocates of the traditional inquisitorial model cite its precepts and mechanisms as a superior and necessary form of criminal law process. They raise the key point that the purpose of a criminal trial is to arrive at the truth of the matter, not to support a crime control model[24] of criminal justice (even if the application of that model contains a strong due process framework, such as in the United States).[25] For instance, in the German tradition, the Code of Criminal Procedure of 1877 requires the judge to conduct a full inquiry into the facts, and to ensure the production at trial of all relevant evidence needed to determine the truth of the matter, even in the face of a full confession by the defendant.[26] Proponents of the traditional inquisitorial model argue that this commitment to uncovering the precise truth of the matter serves as the only adequate protection for the human rights of the defendant, especially in terms of due process.[27] These civil law purists reject the idea that "efficiency" or "cost-benefit" considerations can come into consideration in a criminal matter, as with the Anglo-American model, because such utilitarian or "economic" goals are inimical to basic, trial-related human rights requirements.[28] The confidence of that rejection rests in no small part on the inquisitorial model's reliance on the integrity of the functionaries of the state – whether police officer, prosecutor, or judge – in performing their criminal justice tasks. This confidence is reinforced by the professional training, including formal mentoring systems, that new judges receive in most civil law systems, and by the conception of the public prosecutor in most such states as a member of the judiciary who also trains on a professional and non-partisan track, and who remains responsible to the greater justice ministry administration of the government.[29]

While the Anglo-American tradition of using consensual resolution for criminal matters, especially in the *charge bargaining* and *sentence bargaining* varieties of the *plea bargain*, has persisted and remained unabated at high levels over time, the civil law tradition that resisted such negotiated case outcomes for so long has begun over the past two decades to adopt in great measure various consensual resolution procedures.

---

[21] J. Turner, "Plea Bargaining", in L. Carter and F. Pocar, *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (2013), 34 at 38.
[22] *See generally*, Harry Dammer and Jay Albanese, *Comparative Criminal Justice Systems*, (5th ed. 2014).
[23] J. Turner, *Plea Bargaining Across Borders* (2009), 76-77.
[24] The "crime control model" posits a theory of criminal justice emphasizing crime reduction in society and the protection of individuals through prioritizing the power of the government to protect society, especially by increasing police and prosecutorial powers.
[25] T. Weigand, "The Decay of the Inquisitorial Ideal: Pleas Bargaining Invades German Criminal Procedure", in J. Jackson et al., *Crime, Procedure and Evidence in a Comparative and International Context* (2008), 39, at 43-44.
[26] *Strafprozessordnung* (the German code of criminal procedure) (1 February 1877), ¶ 244, § 2.
[27] Philip L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach* (7th ed. 2017) at 35.
[28] *Ibid.*
[29] *See*, *Studiecentrum Rechtspleging*, http://www.ssr.nl/.

While the present analysis does not seek to review in detail all (or even most) such recent adoptions by civil law states, some important examples of that trend are available. For instance, Germany had been viewed as a bulwark against consensual resolution usage during most of the modern era, resisting the common law's trend toward ever-increasing negotiated outcomes in criminal matters.[30] However, that staunch resistance was undermined during the 1980s and 1990s by the growing informal and officially unsanctioned use of *Absprachen* as a form of consensual resolution within the German criminal justice system[31] *Absprachen* was eventually approved within Germany after the Bundesgerichtshof (the German federal supreme court for criminal matters) ruled the procedure constitutional in 1997,[32] with the *Strafprozesordnung* specifically amended to allow *Absprachen* in 2009.[33] Added to this unexpected shift was a rapid and radical movement during the post-Cold War period by the civil law systems of the former USSR and various Latin American regimes away from the inquisitorial model and toward the adversarial criminal paradigm.[34] The reasons assessed for this general movement toward the increasing use of consensual resolution of serious criminal charges in most contemporary human legal systems are varied and complex (and beyond the limits of the present memorandum) but that shift has added to the dramatic increase of consent-based procedures on a worldwide basis. What emerges from even a generalized review of such changes, however, is a clear spectrum of consensual mechanisms that have evolved within and across the various domestic criminal law systems of most modern states. A review of that range of accepted AOG approaches provides an important context for the ICC to consider whether to begin using AOG on a regular basis.

2. What contemporary models of AOG do ASP members – and major states that are not yet ASP members – presently use to resolve their domestic criminal cases?

Each of the consensual resolution models summarized below finds wide and accepted use in contemporary criminal law systems (both civil law and common law), although no one of them is universally accepted in all current domestic systems. Indeed, while some of the generic labels for these procedures might allow them to be discerned in many state systems, such markers must be thoroughly tested since the many unique domestic traditions of criminal law can produce unusual adaptations in any particular jurisdiction. Nonetheless, one clear conclusion from a review of consensual procedures used in current domestic law systems is that some form of bargained-for resolution of serious social harms is present and growing as a phenomenon within the criminal justice systems of most modern states. Importantly, in terms of the present analysis, many of those same states were the original primary authors of the Rome Statute and/or members of the current ASP, and so their growing adherence to consensual mechanisms indicates important potential support for any policy decision by the OTP in inaugurating a more aggressive use of AOG at the ICC.

- Mediation and Conciliation between Victims and Offenders

Certainly, any serious observer of comparative law and international law can identify the increasing role of victim-offender mediation and conciliation in resolving criminal matters. These efforts find their philosophical core in a contemporary movement aimed at "restorative justice", while historians of customary law would find a foundation in the *wergild* and other forms of traditional compensation.[35] In various modern criminal law systems, the mediation/conciliation approach is not only recognized but often required for misdemeanor offenses all the way up to the level of physical battery.[36]

---

[30] *See*, J. Langbein, "Land Without Pleas Bargaining: How the Germans Do It", (1979) 78 Mich. L. Rev. 204.

[31] This usage expanded from white-collar and drug cases to the present inclusion of organized crime, sexual crimes, and sometimes in homicide cases. J. Turner, "Judicial Participation in Pleas Negotiations: A Comparative View", (2006) 54 Am. J. Comp. L. 199, at 217.

[32] "Entscheidungen Des Bundesgerichtshof" in *Strafsachen*, 195-212 (1998).

[33] *Strafprozesordnung*, **§§** 257b - 257c.

[34] *See*, C. Thaman, "The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy", in Jackson, J., et al., *Crime, Procedure and Evidence in Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (2008), 99-118; *see also*, M. Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas From the Periphery*, 55 Am. J. Comp. L. 617 (2007).

[35] C. S. Chattopadhyay, "The Law from Wergild to the Postmodern: Thinking of Restorative Justice", https://philpapers.org/archive/SUBTLF.pdf.

[36] *See, for example*, Criminal Code, Publication State Gazette No. 26/02.04.1968 (Bulgaria), §24(11)(4)(3); Código Procesal Penal, Ley 19,696, 29 September 2000 (Chile), §241(2); The Official Gazette of the Republic of Croatia Narodne Novine, No. 110 of 21 October 1997 (Croatia), §§443-444; Código Procesal Penal de la Republica de Nicaragua, Ley No. 406 (Nicaragua),

While generally limited to minor offenses, it requires involvement of both victim and offender, with substantive interaction between these parties. In that sense, mediation or conciliation should be distinguished from restitution as a form of criminal case resolution since that alternative requires only the payment of damages. Mediation or conciliation, if included as a species of AOG, must include a form of agreement to proceed with the process and a form of consent by the accused to ultimately resolve a criminal allegation in this form.

- The Penal Order

The mechanism of the "penal order", known most widely in the civil law tradition, refers to a written document provided by a state prosecutor to a defendant with suggested charge(s) and punishment(s).[37] Typically the defendant is then given a short period within which to either accept or reject the suggested outcome without amendment, and if the defendant rejects the penal order, then the criminal case proceeds through the normal procedures toward trial.[38] Even if accepted by the defendant and then presented as such by the prosecutor to the bench, the judge in most systems may reject the penal order if it appears unsupported by the evidence, although in some states the judge must accept the order as agreed between the prosecution and accused.[39] Some states also limit acceptance of the penal order to situations wherein the defendant has confessed guilt or the evidence clearly demonstrates guilt.[40] While, as a matter of form, the penal order is a take-it-or-leave-it offer from the prosecutor to the defendant, there is anecdotal evidence from various jurisdictions that suggests the presence of informal negotiation of penal order provisions.[41] More importantly, the offer of most penal orders early in the development of a case investigation leaves a reviewing judge with an incomplete dossier on which to consider the penal order. This incomplete picture of true criminal culpability resulting from the penal order procedure has led to continuing criticisms that this mechanism subverts various human rights of the defendant, including the due process right to be heard in open court and the right to judgment based on a trial of the facts.[42] Nonetheless, the use of the penal order has been generally accepted as essential to resolving the exploding number of minor offenses in most modern criminal systems.

- Bargained-for Pleas of "Guilty" by the Defendant Before Trial[43]

The guilty plea as a substitute for the full criminal trial has evolved to its most extreme form in the domestic criminal justice system of the United States of America (USA). While the historical roots of the mechanism are disputed, the so-called "plea bargain", involving negotiation between criminal defendant and prosecutor, was endorsed by the United States Supreme Court as a matter of domestic US constitutional law more than 50 years ago.[44] If the affected defendant knowingly and voluntarily enters his guilty plea, having properly waived his rights to remain silent, to confront and cross-examine witnesses, and to be tried by a lay jury, then that plea does not violate the defendant's protected rights in the American system.[45]

§56; The General Civil Penal Code, Straffeloven (Norway), §71(a); Código Procesal Penal, 8 July 1998 (Paraguay), §311; Kodeks karny, 6 June 1997 (Poland) §55(3), §60(2), and §66(3); The Criminal Code of the Russian Federation No.63-Fz of 13 June 1996 (Russia), §25; and, Criminal Code of the Republic of Uzbekistan 22 September 1994 (Uzbekistan), §84(5).

[37] *See generally,* Thaman, S. C., "The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?", *The Prosecutor in Transnational Perspective*, E. Luna & M. Wade, eds. (2012), 156-175.

[38] *Ibid.*

[39] *See, The Official Gazette of the Republic of Croatia Narodne Novine*, No. 110 of 21 October 1997 (Croatia), §446(1); *Codice Di Procedura Penal*, Norma 9-99-E (Italy), §459(3); *Criminal Code of the French Republic* (France), §525(3); and, *Strafgesetzbuch* (Germany), §408(2)-(3).

[40] *Straffeloven - Bekendtgørelse af straffeloven* (Denmark), §832(1).

[41] K. Altenhain, "Absprachen in German Criminal Trials", in S. Thaman ed., *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial* (2010), 157 at 158.

[42] Thaman, S. C., "The Penal Order…" *supra* at 161.

[43] The plea of *nolo contendere* is a particular form of the consent-based plea, available in some domestic jurisdictions, which generates outcomes similar to a plea of "guilty" in consensual resolution situations. For purposes of the present memorandum, the "nolo" plea is considered identical to the guilty plea.

[44] *See generally,* Boykin v. Alabama, 395 U.S. 238 (1969); United States v. Brady, 397 U.S. 742 (1970); *and,* Santobello v. New York, 404 U.S. 257 (1971).

[45] Santobello, 404 U.S. at 261.

Over time, the "plea bargain" has come to be an ubiquitous feature of the USA's municipal, state and federal criminal systems, being applied equally for minor infractions as for more serious cases, including those triggering the death penalty.[46] The parameters of such bargains in the USA are now memorialized in specific statutory schemes, often modeled after the federal courts' procedural rules governing the matter.[47]

To fully consider the "plea bargain" as a form of consensual resolution, however, it should be understood that such plea agreements take on one of two distinct sub-forms of "charge bargaining" and "sentence bargaining", or a combination of both in any particular case. In the case of charge bargaining, the prosecutor and defendant negotiate to add, drop, and/or restate the formal statement of crimes in the indictment as part of the arrangement producing a guilty plea from the defendant. The obvious weakness of this form of plea-bargaining is the potential for misrepresenting the truth of the underlying social harm at issue, and for skewing the theoretical foundations of punishment in a criminal justice system.

The second form of the plea-based agreement, sentence bargaining, emerges when the defendant bargains for a guilty plea in exchange for the prosecutor's recommendation of a reduced sentence that the presiding judge will then consider in disposing of the case. While sentence bargaining is less controversial *per se*, since it does not undercut the original case statement of the cause of action against the bargaining defendant, this second form of plea-bargaining still has the potential to distort the deterrent and retributive features of criminal law.[48] At a minimum, the potential for the plea bargain to undermine foundational features of modern criminal justice systems has led the authors of controlling domestic statutes to require detailed review of such agreements. Nonetheless, these same legislators also leave to the judge's discretion whether to accept the plea while fully implementing the bargain, to accept the plea while modifying the bargain, or to reject the plea.

The acceptance of the guilty plea in bargained form, as a phenomenon in contemporary criminal law systems, has not been limited only to the USA or other states in the common law, Anglo-American tradition. While civil law jurisdictions traditionally rejected the plea bargain as a violation of a defendant's process-based human rights, and of the principle that criminal judgments must be delivered by a judge based a full consideration of the evidence at trial, significant exceptions have existed over time within the inquisitorial tradition. For instance, since the late nineteenth century in Spain an accused has been allowed to end any further proceedings in his criminal trial and trigger sentencing through the "conformidad" whereby the defendant states his agreement with the charges in the indictment.[49] The contemporary embodiment of this acceptance first came with the recommendation of the Committee of Ministers of the Council of Europe in 1987 for its member states – the overwhelming majority of which adhered to the civil law tradition – to introduce measures for simplifying criminal trials, especially the innovation of the guilty plea.[50] This policy suggestion was then followed by the major innovation in the Italian criminal law system of the "patteggiamento" (literally translated as "plea bargain") wherein the parties to a proceeding could apply to the chamber for the rendering of punishment.[51] The Italian model has subsequently been highly influential in the development of post-Soviet criminal codes of the successor states of the USSR.[52]

While many such European criminal law systems limit the plea bargain to crimes with punishment ranges from three to six years, the trend has been toward extending such agreements to cases with penalties as high as ten years.[53]

---

[46] See, Bureau of Justice Affairs, United States Department of Justice, at https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf

[47] Rule 11, United States Federal Rules of Criminal Procedure.

[48] More detailed critiques of the plea bargain mechanism, including the potential for coercion of defendants by prosecutors and the inadequate involvement of judges at the negotiation stage of such agreements, are important for consideration but beyond the boundaries of the present analysis.

[49] *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (*Criminal Code of Spain), at sec. 655. https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf.

[50] Committee of Ministers, Council of Europe, *Recommendation of 18 September 1987*, R. (87) 18.

[51] *Codice Di Procedura Penal*, Norma 9-99-E (Italy), §§459-464.

[52] *See e.g.*, *The Official Gazette of the Republic of Croatia Narodne Novine*, No. 110 of 21 October 1997 (Croatia), §190(a); *see also*, *The Criminal Code of the Russian Federation* No.63-Fz of 13 June 1996 (Russia), §314.

[53] *See*, *The Criminal Code of the Russian Federation*, *supra* at §314; *see also*, *Ley de Enjuiciamiento Criminal*, 14 September 1882 (Spain) §655.

Whether the legislatively ascribed sentence should be reduced on an *ad hoc* basis, subject to the plea negotiations in each particular case, or whether a standard set of statutorily defined sentence reductions should be applied once a chamber accepts a plea, remains an unsettled question among those systems that have adopted consensual resolution of criminal matters. A limited survey of current domestic statutory frameworks demonstrates a strong tendency generally to recognize a reduction in sentence within a range of one-third to two-thirds if the prosecution and defense reach a pre-trial plea bargain.[54] French courts are required, in cases with sentences up to five years, to sentence defendants who plead to no more than one year of incarceration.[55] Even under a strict application of the federal sentencing guidelines in the USA, plea bargains are not supposed to generate more than a one-third reduction in the possible sentence after trial, but the effective reduction on average is much closer to two-thirds.[56]

Perhaps the most significant trend arising from the widening use of the plea bargain among both common law and traditionally civil law jurisdictions is the increasing use of the so-called "cooperation agreement". A mainstay of the arguments for the typical plea bargain, without further cooperation, has been the argument for judicial economy promoted by the resource savings associated with avoiding a full trial in a criminal matter as the central reason for considering the cooperation agreement. The argument in favor of the plea bargain is fundamentally different, however, when it encompasses an agreement by the defendant to further cooperate with the prosecution. In this form of the plea bargain, the defendant agrees to work with the state in successfully prosecuting others, especially by way of providing evidence against members of larger criminal organizations or conspiracies. In the federal sentencing guidelines of the USA, such cooperation can generate sentence reductions to levels well below the minimums required by sentencing statutes, although the prosecutor retains complete discretion to determine the relative value of a defendant's bargained-for assistance.[57] Other states, especially those adopting plea-bargaining over the past two decades, also have provided for the cooperation agreement as a mechanism to reward with a sentence reduction a defendant who provides evidence of a larger organization or network of criminal activity.[58]

- Summary Proceedings Based on a Confession by the Defendant

To state the obvious for purposes of analytical clarity, a plea of guilty by a criminal defendant (bargained-for or otherwise) is not a confession of guilt. In the sense of this distinction, domestic criminal law systems always have differentiated a "confession" as the defendant's accepting not only liability for the crime charged, but also providing some supporting recitation of the facts underlying culpability for the alleged social harm. Especially in the civil law tradition, this exposition of the crime by the defendant responds to the core tenet of that tradition which requires a full trial of the facts to establish the truth of the case. Customarily in a civil law system, even the defendant's confession was not enough to summarily end the matter in terms of truth-finding, and so the responsible chamber continued with a minimum proofing process to test the veracity of the proffered confession.[59] Whether offered in the midst of the investigative stage of the matter, with development of the dossier still pending, or whether it came in the midst of trial, the confession has been the main vehicle for expediting a criminal proceeding outside of the Anglo-American common law tradition.[60]

Even within this civil law tradition, however, a defendant's credible pre-trial confession has allowed for an abbreviated investigation and trial process in most contemporary domestic systems evolving from that tradition. These confessions then can be recognized as the core elements of agreements between the state and a defendant for which a judge can provide a lesser sentence.

---

[54] *See*, *Ley de Enjuiciamiento Criminal*, *supra* at §795 and §801.
[55] *Criminal Code of the French Republic*, §495-498.
[56] J. Turner, "Judicial Participation in Pleas Negotiations: A Comparative View" Am. J. Comp. L. (2006) 199 at 205.
[57] 18 U.S.C. §3553(3) (USA federal code).
[58] *See*, *Criminal Code of Georgia*, No. 2287-rs, 22 July 1999 (Georgia) §679-1; *see also*, *Law on the Approval and Entry into Force of the Criminal Code***,** 26 September 2000, No VIII-1968 (Lithuania), §210; *and see*, *The Criminal Code of the Russian Federation*, No.63-Fz of 13 June 1996 (Russia), §317.
[59] J. Sevier, *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCH. PUB. POL'Y & L. 212, 215 (2014), https://ir.law.fsu.edu/articles/121.
[60] *Ibid*, at 216.

For instance, in Norway the pre-trial confession "without reservation" allows for the expedited trial of the matter before a professional judge and the foregoing of a formal indictment and most evidence-taking.[61] The confession in Denmark allows for a similar abridgement of investigation and trial after a recitation of the facts by the defendant and concurrence by the prosecutor with the expedited process.[62] In both these systems, however, and in most such domestic examples, the expedited procedures for accepting and testing a pre-trial confession are linked to the potential for a reduced sentence.[63] In Norway, the pre-trial confession also can be considered as a mitigating factor in determining a sentence, although bargaining *per se* is not authorized.[64] In Denmark, a defendant's full confession may be considered in mitigation of a statutory sentence, along with other factors surrounding the defendant's circumstances.[65]

The criminal procedures of various civil law jurisdictions also account for the possibility of confession once the investigative phase has ended and the trial has begun. A confession would typically come from the defendant during the first procedural step in the standard civil law tradition of reading the indictment at the commencement of trial, with the defendant expected then to enter his plea to each of the charges. In the contemporary criminal justice frameworks of many such domestic systems, the defendant offers a plea of guilty in formal response to the charges, which then triggers a series of procedural steps to ensure a basis for the confession. These steps can range from an additional but limited period of evidence-taking, or an immediate hearing of closing statements with submission based on the investigative dossier, or even the consideration of the case by the chamber without any additional input from the parties.[66]

As with the plea bargain form of consensual resolution, confession-based procedures are subject to the same criticisms by those who defend the philosophical foundations of the civil law tradition. Even though a judge reviewing a confession has more evidence available for assessing guilt than would be the case in the essentially fact-less circumstances of a common law plea bargain, the limited evidence supporting a lower sentence may be viewed by its critics as violating a confessing defendant's basic human rights. According to this critique, a confessing defendant's rights to equal protection of the law, the presumption of innocence, and a fair trial still would be at risk if this form of consensual procedure abbreviates a trial of the facts. In addition, the confession-driven resolution of criminal cases could be viewed as subverting the indispensable principles of official investigation and imposition of judgment based on evidence, both key pillars of the criminal trial in the civil law tradition. Especially if the confession was later withdrawn or found inadequate to support the early disposition of the case, one could argue the inevitable tainting of the trial judge if they have conducted a summary proceeding based on the confession.

3. What is the AOG framework under the Rome Statute, and how does it compare with the use of consensual procedures among members of the Assembly of States Parties (ASP) and major states that are not yet ASP members?

If the ICC undertakes an initiative to begin using AOG in its situations and cases, then the Court certainly will face criticism from those who continue to resist the general movement worldwide toward using such consensual mechanisms. Such critics will argue that, whatever the need in domestic systems for preserving resources by negotiating early pleas, or for "flipping" some "lesser" defendants into cooperating on criminal organizations, such priorities are not the focus of the ICC's structure of international criminal justice. Instead, they will argue for the Court's *sui generis* mission, including the need to document the history of mass atrocity and to focus on those most responsible for such crimes.[67] From this perspective, negotiating a plea or confession with an accused or defendant before the Court will be seen as unseemly at best, and at worst a perversion of the ICC justice framework.

---

[61] *The Criminal Procedure Act*, 22 May 1981 No.25 (Norway), §sec.248.
[62] *The Administration of Justice Act* (Denmark), §831.
[63] *See, Código Procesal Penal*, Ley 19,696, 29 September 2000 (Chile), §388-395 ("procedimiento simplificado"); *see also*, the "giudizio immediate" in Italy and the "beschleunigtes verfahren" in Germany, both discussed in S. Thaman, *Comparative Criminal Procedure: A Casebook Approach* (2008), at 167.
[64] *The General Civil Penal Code*, Straffeloven (Norway), §59.
[65] *Straffeloven* - Bekendtgørelse af straffeloven (Denmark), §82.
[66] *See, for example, Criminal Code*, Publication State Gazette No. 26/02.04.1968 (Bulgaria), §§371-372; *The Administration of Justice Act* (Denmark), §831; *and Law on the Approval and Entry Into Force of the Criminal Code***,** 26 September 2000, No VIII-1968 (Lithuania), §261.
[67] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, ("Preamble"), *supra* at 1.

Yet, a first important step toward considering the implementation of AOG at the Court requires revisiting the actual language of the Rome Statute to understand that these critiques stem in part from misinterpretations of the Statute's language and intent.

For instance, there is no language in the preambular policy statement of the Rome Statute that requires the Court to focus on a full recitation of the facts for the purpose of historical memorialization in a case.[68] In addition, the text of the Preamble does not support the often-repeated misinterpretation that the Rome Statute mandates the prosecution of "those most responsible" for international crime.[69] In fact, the Preamble's clear statement of policy focuses on "the most serious crimes of concern to the international community" (paragraph four), giving the Court "jurisdiction over the most serious crimes of concern to the international community as a whole" (paragraph eight).[70] As such, this "concern" and "jurisdiction" of the Rome Statute is directed at particular combinations of *actus reus* and *mens rea*, not at the *reus corporis* of the most responsible offenders. At most, the Preamble's policy directives toward individuals can be found in the requirement, "to put an end to impunity for the perpetrators of these crimes", but in no part does the Rome Statute attempt to rate or qualify who should be targeted for participation in the "most serious crimes".[71]

An important second step toward considering the implementation of AOG at the Court is to recognize that the Rome Statute clearly provides a mechanism for ending a case early based on the consent of a defendant. While the Rome Statute's structure neither proposes the use of a common-law-inspired "guilty" plea nor a civil-law-inspired confession of guilt, it does provide for AOG under Article 64(8)(a) in the form of an "admission of guilt" at the commencement of the trial. This admission of guilt by an accused does not immediately end the trial, but instead permits the chamber to "consider" that admission as an "essential fact" for proving the crime and convicting the defendant.[72] Before accepting this response to the charges, the trial chamber must determine whether the accused "understands the nature and consequences" of his admission, whether he makes the admission "voluntarily" following "sufficient consultation with defence counsel", and whether the admission of guilt is "supported by the facts" in the charges brought by the OTP, any supplemental "materials" presented by the OTP and accepted by the accused, and "any other evidence" presented by either side.[73]

As part of the process of considering the factual predicate on which to either accept or reject the defendant's admission of guilt, the chamber may either, (1) limit its consideration to the existing record and convict the defendant based on the admission,[74] or (2) reject the admission and continue the "ordinary" trial of the case.[75] As a third option, the chamber also may order abbreviated proceedings "for a more complete presentation of the facts" during which the OTP (but not the defense) can present "additional evidence".[76] Prior to initiating this third option under Article 65(4)(a), however, the trial chamber in the matter may "invite the views" of the OTP and defense counsel on whether to proceed using this abbreviated procedure,[77] and once having invited those views the chamber must thereafter give a reasoned decision on the record for its decision on how it will proceed.[78] The regulations of the OTP also require that Court organ to conduct a detailed and independent "assessment" of any admission of guilt, as well as a review of any "evidence and materials" that support the accused's admission of guilt.[79]

---

[68] *Ibid*.
[69] For an example of this misinterpretation, *see* R. Roxlaugh, *Plea Bargaining in National and International Law* (2012), at 234-241.
[70] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, ("Preamble", ¶3 and ¶4), *supra* at 1.
[71] In fact, the alternative modes of liability defined in Article 25(3) of the Rome Statute belies any focus on those who are somehow "most responsible" for those crimes having been committed, and instead attaches liability to *any* individual who commits a "most serious" crime under the Rome Statute, no matter what his or her position in a relevant chain of command. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, (Article 25), *supra* at 18.
[72] *Ibid* (Article 65(2)), *supra* at 42.
[73] *Ibid* (Article 65(1)(a)-(c)).
[74] *Ibid* (Article 65(2)).
[75] *Ibid* (Article 65(3) and 65(4)(b)).
[76] *Ibid* (Article 65(4)(a)).
[77] International Criminal Court, Rules of Procedure and Evidence, Rule 139(1). https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf [accessed 1 December 2023].
[78] *Ibid*, Rule 139(2).
[79] International Criminal Court, *Regulations of the Office of the Prosecutor*, (Regulation 62) at 13.

The abbreviated proceeding under Article 65(4)(a) therefore anticipates the presence of circumstances surrounding an accused's admission of guilt that must be scrutinized, presumably foreseeing in part the influence of discussions between the parties.

The third, and perhaps most essential, step toward considering the use of AOG at the ICC requires accepting that the Rome Statute structure forecasts and supports the negotiation of charges and of sentencing between the OTP and an accused in ways that echo the development of consensual procedures in both contemporary civil law and common law states. The clearest signal of this acceptance of contemporary AOG approaches is found in Article 65(5) of the Rome Statute which provides, "[a]ny discussion between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court". This language echoes the same restrictions in modern statutory frameworks for consensual resolutions in both common law and civil law jurisdictions, as discussed above in this analysis. Article 65(5) clearly anticipates that such inter-party "discussion" will have taken place prior to the Article 65 process for considering an admission of guilt. More significantly, this provision does not forbid such discussion between the OTP and defendant, nor forbid the presentation to the trial chamber of the agreements reached in such a discussion. Rather, Article 65(5) simply states, by way of exclusion, that if such discussions between the OTP and an accused resulted in a bargain between those two parties as to the pending charges, the proffered admission of guilt, or the sentence to be imposed, then that agreement is not "binding" on the trial chamber.

Stated alternatively, although AOG agreements between the OTP and an accused in anticipation of an Article 65 admission of guilt are not "binding" on a trial chamber in considering the defendant's admission, there is nothing in the Rome Statute that prohibits that chamber's *taking account of* such agreements. In fact, Article 78(1) of the Rome Statute anticipates that a trial chamber at sentencing "shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person". Such language specifically anticipates a consideration of "the individual circumstances" of an accused who is convicted, which arguably would include a conviction pursuant to an AOG. That language also anticipates, by providing examples ("such as") rather than limitations, the potential to account for other "individual circumstances" applicable to an accused convicted by admission, including a negotiated conclusion to the case. Rule 145 of the International Criminal Court's *Rules of Procedure and Evidence* (RPE) on "Determination of Sentence" extends this application of individual circumstances by specifically defining "factors" that a trial chamber should consider as either "aggravating circumstances" or "mitigating circumstances" at the penalty stage.

One mitigating factor clearly stated in the RPE is "[t]he convicted person's conduct after the act, including … any cooperation with the Court".[80] Such cooperation arguably would encompass a "cooperation agreement" between the OTP and an accused (of a type similar to those used in various domestic criminal systems) that would require the accused to assist in uncovering organizational configurations generating crimes under the Rome Statute.[81] Given the absence of a clear method for enforcing such an agreement after the imposition of the penalty, the cooperation from the accused likely would have to precede the initiation of admission-of-guilt proceedings under Article 65.[82] In addition, even though the specific provisions of Article 65 do not provide for the participation of victims in the admission of guilt proceeding, the general obligation on the Court to account for the view of victims "at stages of the proceedings determined to be appropriate" and non-prejudicial,[83] as well as the Statute's provisions regarding harm and reparation to victims, suggests the need to involve victims throughout any AOG process implemented by the Court.

https://www.icc-cpi.int/sites/default/files/Publications/Regulations-of-the-Office-of-the-Prosecutor.pdf [accessed 1 December 2023].

[80] International Criminal Court, *Rules of Procedure and Evidence*, *supra* at Rule 145(2)(a)(ii).

[81] *See generally*, Y. M. Dutton, "The ICC in Action: Using Plea-with-Cooperation Agreements to Bring Government Leaders to Justice," Stanford Journal of International Law 59, no. 1 (Winter 2023): 1-34.

[82] *See*, UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, (Article 84), *supra* at 53; *see also*, International Criminal Court, *Rules of Procedure and Evidence*, *supra* at Rule 159.

[83] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, (Article 68(3)), *supra* at 44.

Conclusions

Having outlined above consensual resolution usage within contemporary domestic criminal law systems of both common law and civil law states, as well as the specific consensual procedure provisions of the Rome Statute and its implementing policy framework, the opportunity for implementing AOG agreements at the ICC becomes clear. At a minimum, the "admission of guilt" mechanism at the ICC must be seen as part of the overall ongoing and expanding synthesis of common law and civil law approaches to AOG in the contemporary era of criminal law development. While the Rome Statute's "admission of guilt" is not the abbreviated plea bargain of the common law (with its inherent limitations), the language of Article 65 of the Rome Statute explicitly recognizes that "discussions" aimed at modifying the charges and the nature of the penalty will precede a defendant's admission of guilt. Recognizing those discussions places no formal boundary on the subsequent actions of an ICC trial chamber, just as similar discussions between prosecutor and accused in contemporary domestic penal law systems have no binding effect on the judges there. Rather the Rome Statute simply recognizes the necessary presence and usefulness of such colloquies and negotiations between prosecutor and accused in modern criminal justice. Similarly, while the Rome Statute's AOG procedures do not precisely mirror the "penal order" or the confession-driven summary proceedings of the civil law paradigm, there is an expectation that an ICC trial chamber will conduct a special proceeding upon the accused's offer to admit guilt, and that this proceeding will be controlled through additional proffers by the Prosecutor.

In sum, a fair reading of the Rome Statute demonstrates that the AOG procedures explicitly detailed therein echo the consensual resolution mechanisms of the civil law tradition in perhaps more ways than they imitate the common law "plea bargain" archetype. Yet, it would be closer to the truth to say that the ICC structure of consensual procedures provides an intentional blending of the two major domestic criminal law traditions, with elements of both clearly present. The Rome Statute anticipates a negotiated AOG procedure balanced between the case priorities of the OTP and the individual rights and desires of an accused. By requiring a trial chamber to only accept an AOG based on more than the accused's due process assurances of understanding the consequences of a plea and accepting them voluntarily, the Article 65 structure avoids the weaknesses of the common law's plea bargain. Instead, an ICC trial chamber considering a defendant's AOG must undertake the type of summary review proceeding used when a confession is offered in a civil law jurisdiction, including specific findings that the available pre-trial facts (as supplemented during the review) support accepting that confession.