Plea bargaining as a human rights question

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Abstract: The right to a fair hearing is a basic norm in international human rights law, which envisages a fair trial where the accused is presumed innocent until proven guilty. However, contemporary criminal justice accommodates pleas of guilt subject to guilty plea standards under plea bargain agreements, where the accused are assumed to have voluntarily waived full trials, primarily for judicial expediency and efficiency. Human rights law has embraced the legitimacy of plea bargaining, subject to the minimal standards of a voluntary, informed, unequivocal, and fact-based plea of guilt, to validate the proceedings as a fair hearing. This article seeks to examine the human rights concern of whether or not a plea bargain entered by an accused is truly voluntary, in light of the larger question of the right to a fair hearing, which right is non-derogable. This article argues that the accused may, in some cases, enter into plea bargaining involuntarily, primarily in pursuit of expedited release or to escape pre-trial indeterminate detention, among other unsurmountable coercive circumstances they might be going through at the time. It recommends a procedural cocktail solution to ensure that plea bargaining operates fairly. These can comprise: statutory timeliness through systemised bargain processes’ deadlines; a robust state-funded legal aid; use of non-coercive means during negotiations; judicial oversight and independence; statutory preservation of the accused’s rights against self-incrimination, appeal or judicial review to protect due...
process; and a sealed official record of the terms of the plea agreement to ascertain procedural validity for appeals or judicial reviews.

**Subjects: Criminal Law & Practice; Human Rights Law & Civil Liberties; International Law - Law; Jurisprudence & General Issues; Legal Theory**

**Keywords: plea bargaining; fair hearing; full trial; guilty plea standards; voluntary plea deals**

1. **Introduction**

The Universal Declaration of Human Rights (Universal Declaration of Human Rights (UDHR), 1948) was the first official declaration and document to guarantee human rights. It was adopted in 1948, shortly after the end of World War II. One of the rights set out in the declaration is the right to a fair hearing (UDHR, 1948, preamble & Arts.10–11(1–2)). This right, along with several others, has subsequently been entrenched in the framework of normative, binding human rights law in the International Covenant on Civil and Political Rights (UN General Assembly, 1966, Art.14(c)) and other regional human rights instruments Council of Europe, 1950, Art., p. 6); African Charter on Human Rights and Peoples’ Rights [Banjul Charter], 1982, Art. 7(1)—(2); Organization of American States (OAS), 1969, preamble, Art 8(1)—(2), and (5); League of Arab States, 2004, Arts.16, & 45). The right to a fair hearing prescribes other in-built fair trial rights, such as the right to a speedy trial, to balance the protection of the accused until proven guilty with the state’s retributive responsibility and society’s reconciliatory needs. Thus, a fair hearing should reflect the equality of arms by way of participation by all parties in parity to a trial, which includes the accused, who is key in the trial.

Plea bargaining has evolved in contemporary criminal justice as a procedure whereby an accused pleads guilty to end a trial subject to the consent of the state prosecutor, the victims of the offence in cases where they participate in the process, and, primarily, with the judge's oversight on the appropriate sentence before the agreement is sealed. While plea bargaining envisages the right of the accused to a speedy trial, it raises a general concern as to whether the accused enters into a plea bargain and pleads guilty to the charged offence voluntarily or not. The voluntariness of this plea deal appears to be defined more from state and institutional perspectives than from the perspective of the accused. Some states like Uganda defend plea bargaining as instituted to decongest court and improve court efficiency, and has resulted in the reduction of cases aged over three years old from 24% in 2017 to 17% in 2019 (Uganda's Budget Speech, 2020, para. 24).

A key informant for this research reported that in the period from 2014–2018, the High court circuit court under their jurisdiction resolved cases that it would have ordinarily resolved in ten or more full trial criminal sessions and that this was a greater output than before plea bargaining was introduced (Anonymous, transcript, JAJ3 (n.2). 6 March 2019, MASAKA. HCT, personal communication, 6 March 2019). However Uganda's data reporting system does not categorise the plea bargained completed cases from other completed criminal cases to document this specific claim. The Hon Outgoing Chief Justice of Uganda, Justice Katureebe, hailed plea bargaining “for being cheap with a high case clearance rate of 95 per cent per session” (The Observer, Uganda News, 2016). In a training conference that I attended, the Ugandan Judiciary claimed that since plea bargaining's inception in April 2014 to its rollout in December 2016, the courts bargained 5,000 cases and that this saved the state 427, 050,000 Ugandan Shillings (UGX—approximately 114,688.359 USD as of 1 July 2020) by June 2014 (Khauka, 2016). However, none of the above affirmations interrogates why the accused hastily enter into plea bargains for lenient sentences in the sacrifice of their right to a full trial and whether their agreements are voluntary. The emphasis is, instead, on how the procedure is expedient to the state because of the volumes of resolved cases and financial savings.
Recent literature has underlined the need to rethink whether pleas of guilt are a consequence of voluntary waivers of the right to trial (Bachmaier, 2018, p. 238) from insurmountable coercive forces that confront the accused during the plea bargaining process. However, this literature has not resolved the dilemma of how to mitigate these coercive forces that attenuate the voluntariness of this process to validate the fairness of the plea bargaining process for the accused. Subsequently, this article examines whether the waiver of the rights to a fair trial by the accused while entering into a plea bargaining arrangement is truly the result of a voluntary choice within the echelons of the normative right to a fair hearing.

This article is divided into five sections. First, in the present section, the right to a fair hearing as a norm in human rights law, which contemporary criminal justice plea bargaining practices contravene, has been briefly introduced. The second section describes the materials and methods used in this study. The third section delves into the discourse of a fair trial and plea bargaining. Finally, the paper derives analytical findings and draws a conclusion.

2. Materials and methods
This research uses a mixed research method of doctrinal legal research on selected international, regional, national practices around plea bargaining, illustrative Ugandan field study interviews, and general case law jurisprudence. Synthesised doctrinal legal research lends itself most effectively to this study because it anchors the plea bargaining debate into the echelons of the normative right to a fair hearing. Nonetheless, the mixed methods approach also helps to identify the minimum standards for entering a plea bargain and investigate the standard of voluntariness involved in plea bargaining. The article qualitatively traces this standard in doctrinal, theoretical analyses, court jurisprudence, and comparative plea bargaining practice to examine how voluntary plea bargaining operates.

The article considers the Ugandan plea bargaining experience out of a concern that despite Uganda's having legislated the right to a fair hearing as a non-derogable right (Constitution of the Republic of Uganda, 1995, Art., p. 44), Uganda has, in practice, followed the plea bargaining model used in the US, which raises a challenge to the right to a fair hearing. Under The Sixth Amendment to the United States Constitution (1791), a fair hearing envisages that in all criminal prosecutions, the accused enjoys the right to a speedy and public trial by an impartial jury, should be informed of the nature and cause of the accusation, should be confronted with the witnesses, and has a right to call witnesses in defence. However, because of the strict bill of rights standard outlined in the above Amendment, which court actors found complicated and time-consuming, it has been argued that the US introduced plea bargaining as a judicial procedural efficiency tool, to save time and cost and not to resolve caseload pressures (Alschuler, 1979).

In the legal system in the US, plea bargaining is “an essential component of the administration of justice” where there are “scarce judicial and prosecutorial resources” (Brady v. US, 1970, p. 752). It is constitutional for the accused to voluntarily bargain away their trial rights (State v. Hinners, 1991, p. 843). In the US, plea bargaining applies to all crimes and has two plea agreements types, a conditional plea of guilt and a Nolo Contendere plea (“I do not wish to contend”) on court’s consent. In a Nolo Contendere plea, the court considers the parties’ views and the public interest; in the “conditional” plea bargain, the accused pleads guilty with the consent of the government and accepts the sentence, but the court reserves the accused’s right to appeal Federal Rules of the Criminal Procedure 2010, as amended, (Federal Rules of the Criminal Procedure 2010, as amended, 2014, r. 11 (a) (2-3)). Some commentators (Reimelt, 2010, p. 873; Ross, 2006) have lauded this US model for its 90% conviction rate and the parties’ control of the process’s outcomes without compulsion.

Nevertheless, as Alschuler (1979) argued, this US model was devised to dislodge delayed caseloads; subsequently, it is not an accused’s rights-oriented model, but the state’s machinery tool for efficiency. Thus, this article draws on US jurisprudence for the availability of data rather than with reference to human rights compliance.
The Ugandan plea bargain model features a concession as a win-win situation between the accused and the state as a way of ending the criminal trial process faster than ordinary full trials, but also specifically legislates for the involvement of the victim in this process (Lubaale, 2016, r., p. 3). Drawing this legitimate negotiated position that is considerate of the accused's voluntariness in the process is intricate to devise under this law. It calls for a holistic overview when using primarily the lens of the acceptable standards in international human rights law of a guilty plea, in particular, a voluntary accused's guilty plea. This is not to underrate the other requisite standards of a guilty plea that comprise an unequivocal, informed, and factual based plea that all together provide the basic minimum fair guilty plea guaranties. It is from the contextual, analytical view of the voluntary standard that the article relies on illustrative excerpts from interviews being conducted during my ongoing doctoral legal studies.

In that study, I examine approximately 150 quota-sampled Ugandan interviewees on “whether plea bargaining, in addressing trial delays, promotes the accused's right to a fair hearing, or if it is an accused self-conviction to end a trial”. The interviewees are convicts who entered into a plea bargain from 2014 to 2018, and other purposively selected key justice actors in the Ugandan criminal justice system. The latter participate in the plea bargaining processes in one of the 13 Uganda High Court centres. They include: circuit judges, court registrars, state attorneys, state brief counsel, prison officers, selected leaders or key informant members of the public, and, wherever possible, victims of charged offences. All of the participants, including those used to extrapolate this article's conclusions, have been anonymised to maintain their confidentiality. The field study was approved by Uganda's National Council of Science and Technology, vide UN CST Registration number SS4712, and by Makerere University. The full data collected is available upon request provided it does not raise complications about the anonymity of the participants.

3. Literature review

3.1. Fair trial theories

Contemporary literature illustrates that a fair trial is a dynamic phenomenon that affects parties to a trial differently. For example, Jackson (2009) traced the evolution of fair trial standards in Europe in the nineteenth century back to the development history during the eighteenth century in Europe, France, Germany of a fair and legitimate basis for accurate jury decisions (as cited in Summers, 2007). This fair trial tracking helps to explain the guarantee of rights, such as the right to an impartial and independent tribunal and the right to a public hearing, which are all critical components of a fair trial norm. Specifically, Jackson (2009, p. 2) argued that fair trial rights had been normatively portrayed as a matter of individual autonomy, which spells out the accused's entitlements as a human being in due the process of law that constrains the state to punish the accused inconsiderately. This perception causes conflicts between the individual's due process and the state's "crime control" concern or punitive interest, and this gap needs to be plugged to achieve a trial that is fair to all parties involved in the trial process. It could also perhaps explain the other diverse theories used to triangulate the fair trial norm further into all trial processes, including plea bargaining. Jackson noted another fair trial theory (Duff et al., 2007) that underlined the need of the accused to account for the wrongs committed to society through a full trial, thereby triangulating the fair trial norm into individual rights, autonomy, and the responsibility of the accused with respect to the criminal trial system. This triangulation lends itself well to this plea bargaining discourse that the accused should voluntarily account for the wrongs they committed toward society as a key participant in the plea bargaining process to validate the bargain the accused enters into as a fair trial.

Jackson proposed other two fair trial philosophies: fair trial as an expression of the individual autonomy of the accused in participating in the trial, and as an expression of systematic public interest justice based on adversarial findings of truth (Jackson, 2009, pp. 4–5). The implications of these philosophies are, first, that both the accused and the society have interests that should be reflected by any trial process, including plea bargaining, to justify that trial process as a fair
trial; second, that the equality of arms is fundamental in any trial process, which processes include plea bargaining, as otherwise, the lack of parity in the treatment meted out to the parties to a trial can affect the voluntariness of the accused in that trial process. However, parity of treatment in the trial process can also be difficult to attain. The accused's interest in a plea bargain to achieve a speedy trial could be achieved through delineating plea bargain process timelines. While this could ideally induce the accused to enter plea bargaining voluntarily as a fair trial process, there are other necessities such as effective legal representation.

A voluntary plea bargain can be inferred by a court from the legal representation of the accused that a court could deem effective where the defence counsel is given the right to contact and freely communicate with the accused. The underlying assumption of the court's oversight of the process could be that the lawyers are disclosed with enough information regarding the whole evidence in the case and its consequential penalty's implications. The European Court of Human Rights (ECtHR) jurisprudence (Can vs. Austria, 1986; S vs. Switzerland, 1992, para. 48; Brennan v. UK, 2002, para. 58; Öcalan v. Turkey, 2003, para. 146), for example, has explained access and communication as a constructive tool for promoting the equality of arms (in essence that all the parties to a fair trial have equal negotiating power) under the Council of Europe (1950, art. 6(3) (b)) for a fair trial. This communication flow would allow a lawyer to fully advise the accused to enter a plea bargain or not, but it is not true for all cases that the prosecution's evidence or the true accused's conduct in the alleged crime are disclosed to the lawyers to advise the accused effectively.

Additionally, other lawyers might lack effective bargaining advisory competencies. Jackson (2009, p. 11) reiterated Weigend's (2008) findings to confirm that the plea bargaining practice has been accommodated across legal traditions irrespective of the strict civil law jurisdictions that limit parties during plea bargaining to dictate the outcome of their cases and subject plea bargaining trials to inquisitorial proof. Therefore, the voluntary participation of the accused during this trial process is key in both common and civil law traditions given the overall physical and psychological factors, among the other accused's' bargaining contexts, to render the procedure a fair trial.

3.2. Plea bargaining phenomenon
Commentators such as Jung (1997, pp. 114–115) have noted that consensual justice inter parties to end a dispute is an old phenomenon that diverse jurisdictions have used. This justice model, over time, became soft law (as non-binding non-codified law) with new trends, namely, abbreviated trials that are closely related to charge and sentence plea bargaining, and also to mediation in specified offences. Primarily, these shortened trial processes dislodge caseloads, but without necessarily obviating the accused persons' fair trials. Abbreviated trials permeated the entire defence system in criminal law by the end of the nineteenth century, finally ending in statutory laws, especially in civil law jurisdictions.

Spain, for example, legislated abbreviated trials, which are informal bargains by the state with the accused for statutory minimum discounts. The courts terminate trials in exchange for a guilty plea (similar to the Italian patteggiamento, which translates as “plea bargain”), or on the expression of conformity (a conformidad meaning without disputing the charges' content) and sometimes courts practice inter-party mediation. In Spain, a judge can enter a judgement of conformity when the accused pleads guilty to crimes with six years' maximum imprisonment, but the procedure is based on a voluntary, informed, and fact-based admission of guilt by the accused. Under Spain's Criminal Procedure Law, however, the court is not bound by this agreement and can proceed to a full trial except “... If, from the description of the facts accepted by all the parties, the Judge understands that the accepted offence grade is correct ... “, (Spain: Criminal Procedure Law, 1882, Art.787 (2–3)); and if the penalty legally befits the qualification, and the accused freely consents to the agreement with knowledge of its consequences. In case the court is in doubt about the conformity, the party that submitted the most serious indictment is
obligated to ratify that indictment or not, but this modification does not bind the court to discontinue a trial.

Under the Criminal Code of Procedure, Neuquén, Argentina (1993, ss. 503-04), an accused can enter a conformidad in offences with two years’ maximum penalty. Under the Criminal Code of Procedure Decree, Honduras (1983, s. 404, para. 4), an accused can negotiate a sentence discount that is a quarter of the maximum penalty of the conformed charges. Under the Criminal Procedure Law of the Republic of Latvia (2005, s. 410 (1)), proceedings may be terminated against the accused for having assisted in the substantial disclosure of a crime that is more serious or dangerous than a criminal offence that the accused committed. The Criminal Code of Procedure of the Republic of Colombia, Act 906 (2004, s. 37) allows the accused to negotiate a sentencia anticipada—anticipated sentence’—of a discount of a sixth of the original sentence after the accused has been charged but before trial.

The Code of Criminal Procedure, Lithuania (2002, ss. 440(1) and s. 544 (2) (3), permits Lithuanian courts to discount the accused’s sentence by a third to two-thirds of the maximum penalty for the offence that the accused is charged. Frase and Weigend (1995, p. 345) traced charge and sentence bargaining in confessions of the accused with prior charges in economic offences in Germany, primarily because of the increase in financial and drug cases that involved international conspiracies and would require complex documentary evidence, expense, and sometimes evasive witnesses in the case of a full trial. However, the German court does not engage in this negotiation between the accused and the prosecution until when the accused’s extracted confession to the crime is registered before the court, nor do these confessions obviate the need for a trial.

This implies that the extracted negotiations are not binding by the court. The court continues and makes a fact-based conviction based on the confession, and if it is detailed enough, and none of the parties offers any other evidence on it, the court might not call additional evidence. This saves German courts the costs of further proof-taking and abridges the accused’s trial process, which could otherwise take months or years.

Generally, these consensual justice processes related to plea bargaining arose due to the complicated economic and environmental crimes that had been committed by increasing numbers of accused parties and to states’ limited resources. Bargained sentence sanctions became handy as preventive/backup measures to achieve accused’s future compliance with laws in general.

Jung (1997, p. 118) contended that consensual justice circumvents long or indefinite trials and that an abbreviated trial complies with a fair trial under Article 6 of the Council of Europe (1950), although the degree of leniency the accused expects in return for a guilty plea is unpredictable. This argument can be critiqued, in that in an abbreviated trial, the accused walks free, while full trials drag on without an end in sight. Nonetheless, the fear of a pending full trial often influences the accused to enter into a plea bargain because of its expedited progress, and thus, to steer clear of the indeterminate course of the mainline criminal justice process. I argue that this leniency, veracity, and fear sends alarms to the accused to enter a plea bargain because the alternative full trial could be much worse under the circumstances, and so such a plea bargain is in essence no longer voluntary. This situation contravenes the ideal fair trial that Article 6 of the Council of Europe (1950) envisages.

Primarily, plea bargaining aims to end the trial for the accused by prioritising its procedural expediency, and some of its supporters, such as Green et al. (1975, p. 501) argue that charge bargaining protects the accused from the stigma attached to the original charge or crime category that the prosecution would have likely pressed against the accused. However, while expediency is the most plausible justification for plea bargaining for the states that practice it, the position of the accused in this process is difficult to assess. This is because, besides the accused’s intention to pursue a speedy trial conveniently, the accused waives other cognitive fair trial rights
such as the right to contest the prosecution's evidence at the cost of a non-tested conviction. All fair trial rights are equally important and are non-severable from each other to attain a fair hearing. While it can be argued that it is the legal right of the accused to admit to their guilt and waive their right to a full trial to end the trial at the earliest, seeking this waiver should be voluntary so that the bargain that is entered by the accused is seen by all parties in the trial process as a fair one.

Further, courts should caution themselves against enforcing the mere right to achieve an expeditious closure of a trial process when it is only in the accused's favour, to the detriment of the victim, who also loses the right to question the accused and/or to seek the case's closure. Restorative justice, for example, through compensation orders to the victims and public apologies to offended communities, can cater to all parties' interest in the plea bargaining process; still, it remains debatable whether the waiver of basic fair trial rights through plea bargaining renders the process voluntary at all in terms of providing a fair hearing to the accused in states with major trial delays such as Uganda.

Bibas (2004, p. 2466) argued that plea bargaining allows the criminal justice system to concentrate its resources on the most serious criminals with the strongest evidence of guilt. It arguably “helps prevent backlogs and assists in decreasing the already long delays in getting matters to trial” by closing the accused’s' cases (Di Luca, 2005, pp. 24, 30). However, while this benefit might not always be achievable in the short term, it may be achieved in the long term, given the high numbers of pre-trial detainees in some state detention centres as the case could be for Uganda. Ugandan law (Constitution of the Republic of Uganda, 1995, Arts. 28(1), 28(3) (a) & 44; see also (Magistrates Courts Act, 1971), s.133; (Trial on Indictments Act, Cap 23, 1971), ss. 64–83; (Evidence Act, 1909, s.101) guarantees the right to a fair hearing, in line with expected standards under international human rights law. The conviction of an accused for an offence is complete only after they are proven guilty or have pleaded guilty to the offence, subject to all fair trial rights. Therefore, Uganda, like other contemporary jurisdictions, has also embraced plea bargaining, under the (Lubaale, 2016). Under this law, plea bargaining centres on enhancing the efficiency of the criminal justice system for the orderly, predictable, uniform, consistent, and timely resolution of criminal matters; enabling the accused and the prosecution, in consultation with the victim, to reach an amicable agreement on appropriate punishments; facilitating the reduction of case backlogs and prison congestion; providing rapid relief from the anxiety induced by criminal prosecution; encouraging the accused to admit criminal responsibility; and involving the victim in the adjudication process (Lubaale, 2016, r. , p. 3). In its entirety, Uganda’s plea bargaining process is a tool of judicial efficiency to dislodge caseloads.

Uganda’s pursuit of plea bargaining as a means of criminal case disposal to address criminal trial delays should not come as a surprise. (The Report of the Judiciary National Court Case Census, 2016), noted that Uganda had a backlog of 52,221 criminal cases (45.49%) that year, and this census record has not been updated. This delay in criminal trials has caused prison congestion. The World Prison Brief (WPB) indicates Uganda’s prison population in 2018 as 49,322 inmates, or 293.1% of the official prison capacity occupancy level, which is supposed to be 16,680 inmates. These inmates include pre-trial detainees (World Prison Brief [WPB], 2018). According to the Foundation for Human Rights Initiative report titled, Human Rights and Poverty: Eradicating Extreme Poverty in Uganda, (Human rights and poverty: Eradicating extreme poverty in Uganda, 2016, p. 14), trial delays are the result of slow investigations, leaving the accused to spend anywhere between eight months and six years in pre-trial detention. Uganda’s aim with the incorporation of plea bargaining is to reduce case backlogs and prison congestion expeditiously. It is critical, however, to first distinguish a plea-bargained guilty plea from an ordinary guilty plea to better understand how plea bargaining operates.

3.2.1. An unequivocal guilty plea and a plea-bargained guilty plea
An ordinary plea of guilt and a plea bargaining plea of guilt are both admissions of the guilt of the accused in their own right. Both pleas end in convictions when the accused waives their right to
a full trial in preference for shorter procedures whose trial processes are limited to allocutus and mitigation hearings and prior sentencing. However, these pleas are also different from each other in certain ways.

3.2.2. A plea of guilt under plea bargaining
A plea of guilt occurs under plea bargaining when the accused pleads guilty to the charge in exchange for a prosecutor’s concession(s). It is these concessions in the plea agreement that inform the decision of the accused to plead guilty. These concessions include the recommendation of a lighter sentence to the court (a sentence bargain); the dismissal of additional or potential charges or preference of lesser charge (charge bargain); a prosecutor’s promise of no affirmative action beyond the prosecution of the offence in question; and the recommendation of a punishment of the accused’s choice. Second, the accused waives other fair trial rights, except those against the undue delay of the trial (Green et al., 1975, p. 496). Third, a plea of guilt under plea bargaining attracts a sentence that is, while not strictly statutory, deemed legal.

A plea-bargained plea of guilt can result from an implicit or explicit plea bargain. The latter is usually recorded and is normally binding on the parties, and, at times, on the court. An implicit plea bargain can be an untraceable undertaking that is based on the hearsay confirmation of a prosecution’s promise to the accused in exchange for a plea of guilt; this promise is usually not fulfilled to the satisfaction of the accused and lacks redress, as it is not binding on the parties (Green et al., 1975, p. 497). Arguably, this laxity is an expression of the unfairness of the plea bargaining process itself. The laxity is indicated by the deals where promises are not kept, in failed bargains, misunderstood promises, double-dealings, and other manifestations of criminal justice’s systematic inefficiencies and inequalities (Green et al., 1975, p. 503).

3.2.3. Ordinary plea of guilt
First, while an ordinary “guilty plea constitutes a waiver by the (accused) of the right to a trial and to put the prosecution to proof” (Ashworth & Redmayne, 2010, p. 293), it does not necessitate that the accused agrees to concessions with the authority to whom such a plea is made or pleads guilty in return for a discounted sentence that might not necessarily reach the extent of arrangements the accused wishes, such as a plea of guilt under plea bargaining.

Second, an ordinary plea of guilt attracts a non-consensual statutory sentence on the conviction of the accused that is influenced by either an early or late registration of a plea of guilt. While the timeliness with which the accused registers a guilty plea can apply to plea bargaining too, depending on the court’s discretion, as a mitigating or aggravating factor for clemency or harshness by the judge to the accused during sentencing, plea-bargained sentences lack statutory binding thresholds because of the consensual dimension that is inherent in a plea bargain. Further plea-bargained sentence deadlines could be negotiated to the accused’s disadvantage, especially in circumstances that I argued earlier and further examine in the next section that causes the accused to plea bargain involuntarily. Conversely, an ordinary sentence in response to a plea of guilt is usually governed by the sentencing guidelines of the state, such as the Uganda Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions (2013), which stipulate minimum and predictable sentence thresholds for specific offences.

3.3. Examining concessions under plea bargaining with its other determinants: How voluntary is a “voluntary bargain”?
The literature posits that an accused who enters a plea bargain may not do so voluntarily because of concessions that arise out of incentives (as highlighted earlier). Jung (1997, pp. 119–120) argued that it is probable that plea bargaining should be tolerated in court settings where the voluntariness of the accused is achievable without disproportionate alternatives that can reflect coercion. The accused should not succumb to pressure to plead guilty because of the common interest in a speedy trial for both the state and the defence counsel; rather, the accused should be legally advised on the available sentence discounts to embrace the bargain voluntarily.
Jackson (2009, p. 11) confirms that some lawyers in some cases get drawn into bargaining situations for the best deals in return for guilty pleas for expediency even where a wrongful conviction can be mitigated by appropriate legal representation. It is not clear if this does or does not happen in Uganda’s brief funded cases. In any case, where the prosecution’s evidential statements on file are not tested through cross-examination, it is difficult for courts to validate that evidence. Ashworth and Redmayne (2010, pp. 288–289) argued that a prosecution’s incentives, based on their degree, contravene the right of an accused to a fair hearing.

In addition to the concessions that the prosecution offers as incentives, the choice to bargain can also be influenced by other diverse factors: the defence counsel’s conduct; other justice actors roles during plea bargaining; judicial discretion; mood swings; the publicity the case attracts; the accused’s economic status, gender, age and confidence levels; the nature of the crime the accused committed; the accused’s negotiation competencies; flexibility by all the parties during the negotiation process; and the complicated legalese that the accused may not appreciate. Past studies such as Alschuler (1976, pp. 1125–1126) demonstrated that plea bargaining could be influenced by factors such as the cordiality of the defence attorney’s relationship with the court and other court users, the defence attorney’s actions, the jurisdictional levels of the courts (such as the High Court as compared to the magistrates’ district courts) and prosecutors, the arbitrary exercise of judicial discretion, the prosecutor’s mood, and the case publicity. Bibas (2004, p. 2468) added that the “wealth, sex, age, education, intelligence, and confidence” of the accused could influence the accused to enter into a plea bargaining arrangement or not.

Jung (1997, p. 116) observed that the resolution of economic crimes by plea bargaining increases existing inequality and selectivity in a criminal justice system. Hiding under plea bargain deals that are made within the law, the wealthier accused remain predominant in organised crime circles at the cost of the weaker poor, who opt for full trials, contrary to the maxim of equal justice for all. Bringing further to the fore the issue of unlawful scheming, Jung (1997, p. 117) argued that the accused’s cooperation with the prosecution to admit guilt perpetuates the prosecution’s authority. This prosecution’s authority hinders the accused’s presumption of innocence when the accused (who are more likely the weaker poor) simply succumb to it and admit guilt out of fear. In addition, the unpredictable flexibility of the parties during these negotiations and the accused’s often weak bargaining competency not only contravene the principle of foreseeability that obligates criminal law and justice’s procedural aspects and consequences to be statutory and non—negotiable but also limit the accused’s critical decision making. This is because the outcome of the plea bargain might appear to both the accused and the offended society as an accidental negotiation product that is largely dependent, among other factors, on the indeterminable “bargaining competence” of the accused outside the existing legal procedural margins of a criminal justice system (Jung, 1997, pp. 116–117). The inflexibility of the parties in such circumstances, coupled with the possibility that the accused will make an ill-informed decision to reduce the voluntariness of the whole plea bargaining process. Persaud (2008, p. 149) also cautioned that plea bargaining’s “complicated legalese” nomenclature frustrates the accused’s common sense, which makes it hard for them to appreciate plea bargaining fully.

It is not an overstatement that when the accused are condemned unheard, they lose autonomy over their consequential fate after pleading guilty. Henham (2004, p. 207) illustrated this loss in his argument that the prevalence of plea bargaining in both common and civil law jurisdictions distorts the specific roles of the state, the accused, and society under social contract theory. Plea bargaining reinforces the existing social-structural imbalances between the accused and the state. Imbalances reflected by the incarceration of the accused when unheard, the common socio-economic levels of the accused, and the pluralistic cultural contexts of the dispute as evident in the diverse ethnicity of accused citizens in countries such as Uganda, explain the perceptions of the gravity of the crimes and penalty expectations. Therefore, the accused may exploit these imbalances to hasten a trial, as a subjugated citizen without clear guidelines against a backdrop of socio-cultural misconceptions pertaining to the entire plea bargaining process.
The heavy emphasis on the “quick win” advantage of plea bargaining also compromises its voluntariness and leads to the question of whether a plea bargain hearing is a fair hearing at all. This is because an accused’s desire for an expedited process is often deemed by the courts as a willingness to plead guilty even when the accused is innocent. Like in Uganda, Lubaale (2016, pp. 153–156) raised, inter alia, this concern regarding whether a speedy trial as vouched in the Lubaale (2016) with emphasis on speed, takes precedence over many other constitutional rights under the Constitution of the Republic of Uganda (1995, Art. 28). Lubaale critiqued the fact that the disclosure of evidence under the The Judicature (Plea Bargain) Rules, SI 43 (2016, r. 7) has limited relevance to an accused in plea bargaining procedures. It is a common practice in Uganda for the prosecution to fail to avail the accused with the state’s intended evidence in the accused’s case in its entirety or in time to allow the accused to make an informed decision voluntarily.

Consequently, the accused, who in Uganda is usually represented by an unprepared state-brief-allocated lawyer instead of a competent counsel, and then only when this accused is charged with a capital offence or that punishable by life imprisonment, lacks the legal expertise to critically analyse the disclosed information to fill the gaps (Lubaale, 2016, pp. 159–160) and make the right choice. Uganda has no statutory state-funded legal aid independent body despite the guarantee of the accused’s choice of legal representation by the Ugandan Constitution’s Article 28, among other fair trial rights. The accused’s right is not absolute but is limited to a state-funded brief counsel in capital and life imprisonment punishable offences.

Turner (2017, pp. 9–10) confirmed that various factors contribute to the perception of the unfairness of plea bargaining, such as limited time and resources, especially for investigations by the defence counsel, principal-agent problems on both the defence and prosecution sides, and the limited scope of judicial review. These factors individually minimise the fairness of the process. First, the limited resources reduce the chance for the accused to undergo a full trial in a timely way, and the accused may then opt for expediency to end the trial. Second, the defence counsel can, unfortunately, be unprepared and fail to interrogate the gaps in the prosecution’s evidence properly. Third, the state and defence attorneys’ primary goal is to fulfil their senior principals’ interests, in essence, a conviction on behalf of the state and a lenient sentence but not an acquittal for the accused. These attorneys’ interests do not aim at fairness for the accused (procedural or otherwise) but are simply institutional interests.

Further, on sealing the plea agreement, the chances are minimal for a judicial review of the convict’s guilty plea, as the process is deemed voluntary. The foregoing and other related factors, such as the limited understanding of the law and fear of long pre-trial detention, do not enable the accused to weigh the advantages of entering a plea bargain sufficiently. Some accused may gullibly plead guilty to inaccurate charges that allege more serious, less serious, or different crimes when unsupported by the prosecution’s available but non-disclosed evidence to the accused at the cost of the state’s expediency of revered situational convictions, for example, with state security-related offences such as terrorism to save further investigation costs. In such circumstances, the accused would consequently receive undeservedly harsh or lenient punishments unfairly.

Nobles and Schiff (2001, p. 916) cautioned that criminal justice institutions should not overtly justify pleas of guilt for the sake of cost savings without considering the factual truth or the fairness of the process. A plea of guilt often indicates the guilt of the accused, but it is not true that all those who plead guilty are factually guilty. Nobles and Schiff (2001) proposed that the best justification for the plea of guilt is that the accused voluntarily waives a full trial, but this justification is an unresolved complexity in human rights law.

Plea bargaining has been lauded like (often) the certainty it imparts on the judicial process. One proponent, Waby (2005, p. 155), claims that in Canada, judges in an overwhelming majority of cases agree to joint submissions of the defence counsel and the state prosecutor so as not to engender
public disaffection with the process and bring the judicial administration into disrepute. Di Luca (2005, p. 29) underlines that “perhaps one of the largest draws of plea bargaining for an accused is the certainty of outcome that follows a bargained guilty plea. By pleading guilty, the accused can avoid the all or nothing nature of the trial process as well as its inherent uncertainties”. These uncertainties, which include “the prospect of conviction, time and cost of proceedings, [and] sentence upon conviction” (Alati, 2015, p. 208), can weigh heavily on the mind of the accused.

There is also the judicial discretion (which renders independent judicial sanctions that might not necessarily conform to the plea agreements sentences)—an uncertainty on its own separate from that of a full trial. Hensham (2004, p. 194) confirms the widely known fact that the ultimate power to decide the sentence lies with the judge. The lack of transparency in the standards courts use to compute plea bargaining sentences complicates the sentencing process further for the accused who enters a plea bargain than for the accused who undergoes a full trial, and on conviction, gets a statutory sentence, even if this sentence is on the higher side of the statutory threshold. The latter, a full trial sentence, is more transparent than the former plea-bargained sentence. As Alati (2015, p. 212) observes, there is no certainty how a case will be resolved through plea bargaining.

Plea bargaining has also been defended on the ground that it can assist “in the rehabilitation of the accused in that it represents an important first step in demonstrating remorse and accepting responsibility” (Di Luca, 2005, p. 28). However, Di Luca (2005, p. 30) critiqued the Canadian courts’ tendency to apply the concept of remorse to justify sentence discounts during plea bargaining as “stunning hypocrisy” by the courts that often give parallel due to discounted sentences to the accused who insist on their right to a trial after conviction.

Conversely, Alati (2015, p. 209) confirmed that the accused’s remorse feeling is meaningful for the rehabilitation of the accused and can help heal the victim as well. This is true in jurisdictions such as Uganda, where involving the victim in the adjudication process is one of the cardinal objectives of the The Judicature (Plea Bargain) Rules, SI 43 (2016, r. , p. 3). However, it is unlikely that the victim will insist on the accused’s full trial during plea bargain negotiations. This gives credence to Heikila’s (2004, pp. 47-48) claim that plea bargaining is “victim-hostile”. Heikila argued that victims are neither notified in time nor asked to give their views on the bargain and often feel that they do not want to publicly tell their story (although they could also be true in the case of full trials). However, often in Uganda, the accused plea bargain deals are sealed without the victims’ participation contrary to the law because of the hastiness in which the process is administered during the poorly unplanned criminal sessions that target case disposals. This is unlike full trial criminal sessions, where naile proseques (meaning the state cannot prosecute the accused) are registered for lack of witnesses, and the accused is lawfully discharged of the offence that the prosecution can reinstate when the witness is found. Although the state might have lost interest in such cases, and the accused expects or knows that the victims will not appear (for example, if the victims as principal prosecution witnesses changed places of abode), the accused may opt to undergo a full trial when the chances of their acquittal are high instead of a plea bargain for a quick conviction.

The above criminal justice hurdle would benefit the accused from the relief of incarceration when unheard, but this escape would also prejudice the offended victim as an unfair process. Di Luca’s (2005, p. 35) findings confirm that some victims felt that plea bargaining led to discounted sentences that were unjustified as victims were not involved in the sentencing process and some cases lacked traceable victims.

While Di Luca (2005, p. 30) noted that plea bargaining allows the convicts to more expeditiously come to terms with their act of wrongdoing and its impact on both the victim and the society at large than in full trials, this argument is weakened by the possibility that full trials can provide the convicts more opportunity to reflect on the effects of their criminal acts. Still, Alati (2015, p. 209)
agrees with Givelber (2000, p. 1369) that the offended society is propelled by the convict’s remorse to move on and heal when the case is closed early.

A Report on Scholarship and Criminal Justice Reform in the US (Turner, 2017, p. 4) claims that plea bargaining has spread to most parts of the world because of its benefits to the state, such as the better allocation of resources from ordinary jury trials to valuable programmes that include probation and parole, as well as the swifter imposition of punishments on the accused. The report also underlined plea bargain case benefits that include supporting the prosecution in obtaining cooperation in complex cases when the informants’ pleas of guilt are discounted in exchange for the uncovering of organised crimes and sparing reluctant and vulnerable witnesses the ordeal of giving testimony during ordinary trials to quicken the closure of their cases.

Turner’s findings are not reflected in all criminal justice systems, as plea bargaining is state-specific and affected by different criminal justice system challenges from country to country. For US citizens, the general assumption is that without plea bargaining, their criminal justice system would collapse (Santobello v. New York, 1971, pp. 260–261), even if the US Supreme Court did outlaw inducements by way of threats, misrepresentations, or improper promises that are not related to the prosecutor’s business (Brady v. US, 1970, p. 755) in an attempt to steer plea bargaining in the US toward a voluntary, fair trial process. The developed economy in the US cannot be compared to Uganda’s less developed economy; however, Uganda has benchmarked the plea bargaining model in the US and legislated plea bargaining intervention to help Uganda address case backlogs. Less developed economies like Uganda’s have more basic, more pressing priorities than an expedient criminal justice system, and may not have the capacity to offer such plea bargaining benefits to the state that Turner claims exist in the US, let alone to the accused and the victims. Thus, Turner overgeneralises plea bargaining’s benefits. Based on all of these issues mentioned above, this article analyses the general doctrinal and qualitative findings around plea bargaining in the next section to explain the choice of the accused to waive a trial.

4. General findings and analysis
The above-cited arguments can be distilled into three findings. First, the tensions between a speedy or delayed and a fair trial in human rights law explain the recourse to plea bargaining. Second, unregulated pleas of guilt against the backdrop of the wider normative right to a fair hearing negate the voluntariness of entering plea bargains. Third, plea bargaining is more of an institutional tool of criminal justice management for the state than a voluntary tool for the accused to enjoy a speedy trial. I analyse these findings categorically below.

4.1. Tensions between a speedy and a fair trial in human rights law explain the recourse to plea bargaining
Justice Powel noted in Barker v. Wingo (1971, p. 521) that the right to a speedy trial as follows:

... a more vague concept than other procedural rights. It is ... impossible to determine with precision when the right has been denied ... . As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.

Sharma (2002, p. 175) noted rightly that there is a recurrent conflict of interest between a “delayed trial” and a “speedy trial” in diverse legal traditions. This conflict manifests itself in the indeterminate terms used to refer to a “speedy” trial, such as a “reasonable” or “prompt” trial, under human rights law. This sense of indefiniteness may motivate the accused to rely on the fastest process available in the justice system, a choice that might then not necessarily be voluntary. I illustrate the time gap in the prevailing human rights regime as follows.

The normative speedy trial standard under Article 14 (3) (c) of the ICCPR is “trial without undue delay”. The state parties drafting this terminology considered that all states do not have uniformly
efficient or functional systems, and so no timeline was given for a “trial without undue delay”. This provision has been adopted as it is in several International Criminal Law statutes (UN General Assembly, 1998, art. 67 (1(c); (Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993), art. 21(4) (c); (Council, U. S. Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), 1994), art. 20(4)(c); (2007), art. 16 (4) (c); (UN Security Council, Statute of the Special Court for Sierra Leone, 2002), art. 17 (4), (c); (Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2001), art. 35 new (c); (Regulation No. 2000/30 on Transitional Rules of Criminal Procedure in East Timor, UNTAET/REG/2000/30, 2000), s.6.3(f)). The United Nations Human Rights Committee (HRC) interpreted Article 14 (3) (c) such that the trial time extends from the commencement until the delivery of judgement in General comment no. 32, (UN Human Rights Committee (HRC), 2007, para. 35).

Regional human rights laws on the right to speedy trials have also left the timelines open-ended, and thus, do not offer guidance on how to gauge plea bargaining’s expediency for a fair hearing. For example, the ECtHR adopted the abovementioned interpretation of the HRC on trial time and includes appeals within its scope (Konig v. Germany, 1978; Delcourt v. Belgium, 1970; § 6, pp. 25–26). Organization of African Unity (OAU), 1982, art. 7(d)) similarly calls for trials “without undue delay”. The African Commission, established under the African Charter on Human Rights and Peoples’ Rights (Banjul Charter), 1982, art. , p. 30), also calls for a trial without delay and extends this principle to include appeals. Both the Organization of American States (OAS) (1969) and the League of Arab States (2004) do not specify a trial period. The Organization of American States (OAS) (1969, art. 8(1) refers to the trial period as a trial “within a reasonable time”, and the League of Arab States (2004, arts 16 645) only underlines that the accused should be informed of charges promptly and in the language the accused understands. None of the regional instruments mention a timeframe for speedy trials.

At the state level, the timing of the right to a speedy trial is also unclear, and examples abound. The Sixth Amendment to the United States Constitution (1791) as an anchor of all the states’ laws in the US, guarantees this right in all criminal prosecutions in the states’ laws. However, while the United States Code, as last updated by 116th Congress, 1st Session 2019(1934, cap. 208, § 3161) stipulates speedy trial time limits for various stages of criminal proceedings to ameliorate the gap, this code affixes infinite exclusions for “just cause”. State laws, such as those of California’s, have a 60-day rule after the accused has been arraigned or advised of the charges against them as the trial start time baseline unless there is “good cause” for a delay (California Code, Penal Code—PEN, cap 8, § 1382)., but this cause is at the court’s discretion.

In African criminal justice systems similar to Uganda’s, the timeline gap is still unresolved. In S v. Amujekela (Constitution of the Republic of Namibia, as amended by the Namibian Constitution First Amendment Act 34, 1998 (1991)), the Supreme court found that pre-trial detention at the whim of the Prosecutor General, pending their authority to sanction trial, contravened the constitutional trial requisite of a trial “within a reasonable time” (Constitution of the Republic of Namibia, as amended by the Namibian Constitution First Amendment Act 34, 1998 (1991), art. 12(b)). However, the Court did not fix the trial timeframe. The Constitution of Kenya (2010, art. 50(2) (e)) entitles the accused “to have the trial begin and conclude without unreasonable delay” but does not legislate the definition of an “unreasonable time”. The Constitution of Zimbabwe Amendment (No.20) Act, 2013 (2013, art. 69(1)) similarly guarantees a fair public trial “within a reasonable time”. However, in S. v. Chilimanzi (High Court, S v. Chilimanzi, 1990), the Court found a trial delayed by three-and-a-half years to be normal, contrary to the intent of the right to a speedy trial. The Court only faulted the delay in processing the appeal record as unconstitutional.

Under Ugandan law, while the High Court has unlimited jurisdiction, the accused on capital charges are tracked by the magistrates’ courts by way of their continuous appearance before these courts for adjournments, but without a statutory timeframe until when the accused are committed to High Court when their due trial hearings are unscheduled until an uncertain future date
(Constitution of the Republic of Uganda, 1995, art. 139; see also Judicature Act, 1996, s.14; Magistrates Courts Act, 1971, s.63; Trial on Indictments Act, Cap 23, 1971, s.1; Uganda v. Tesimana Rosemary, 1999; Bushoborazi v. Uganda, 2015). The High Court stated that the expression “speedy trial” is not defined in the Constitution (Malibano Abdul & Anor v. Uganda, 2008), nor has the Uganda Constitutional Court delineated a timeline for “… ‘reasonable’ speed measured against the overall objective of achieving a fair trial” (Uganda Law Society & Another v. The Attorney General, 2009, p. 17).

This timeline gap posits a relationship between the trial timeline and the voluntariness of the choice of the accused to either undergo a full trial or plea bargain. This choice is determined by which of the trial means is more expedient to the accused, and an indefinite or unclear timeline can confuse an accused. This then further bolsters my claim that a statutory plea bargain timeline can perhaps justify a plea of guilt by an accused as a voluntary choice within the context of a speedy trial. The bargain offer ought to be made immediately when the accused comes into conflict with the law so that the accused makes an informed decision to waive their full fair trial rights voluntarily.

4.2. Unregulated pleas of guilt in the normative right to a fair hearing negate the voluntariness of a plea bargain by the accused

Human rights law does not regulate the voluntary nature of plea bargaining. The UN General Assembly (1966, art. 14) prescribes the normative right to a fair hearing but does not address guilty pleas, and as a result, plea bargaining. The HRC, in general comment no. 32 (UN Human Rights Committee (HRC), 2007, para. 30), explained that the UN General Assembly (1966, art. 14) imposes a duty on the Court to give the accused the benefit of the doubt and noted that the prosecution bears the burden to prove the guilt of the accused beyond all reasonable doubt.

Past literature on international adjudication has demonstrated that while human rights are not strictly speaking rules of international criminal procedure, international human rights standards have impacted the definition, interpretation, and the application of the rules of procedure for international courts (Gradoni, 2013, p. 75). Notably, the International Criminal Court (ICC; established by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13, 1988, A/CONF.183/13) protects the presumption of innocence on the part of the accused and upholds the duties of the Court and the prosecutor to ensure a fair trial under the UN General Assembly (1998, art. 66). It can be argued that in general, International Criminal Law (ICL) and armed conflict present room for the application of humanitarian law, and the courts that prosecute international crimes are more focused on transitional justice than peace-time prosecution. The recognition by the ICC of the accused’s fair trial rights is in tandem with the UN General Assembly (1966, art. 14), which legislated the human right to a fair hearing.

Nevertheless, while plea bargaining in the ICC is governed by the UN General Assembly (1998, art. 65(5)), its practice is not clearly spelt out by the ICC. This statutory provision acknowledges the possibility of settlements between the prosecutor and the accused but states that these settlements do not bind the Court. This stance can be explained by noting that ICL regulates a whole different regime of grave international crimes that are distinct from ordinary domestic crimes and is complicated severely by international politics and diplomacy.

However, international diplomacy could appear more appealing than an impediment for former state leaders and political authorities who perhaps voluntarily enter into plea bargains for their international criminal charges by negotiating for amnesty on agreed deadlines. There is no specific provision under the UN General Assembly (1998) on amnesty, but the UN General Assembly (1998, preamble) recognises that grave crimes threaten the peace, security, and well-being of the World. This recognition infers that the ICC has implicit jurisdiction to allow amnesty to the accused...
charged with grave crimes, which could promote the ICC’s political and social goals of peace and reconciliation among the warring parties in ICL.

It can also be argued that the ICC can pave the way for parties to the UN General Assembly (1998) to promote amnesty to the accused over international crimes within the Court’s jurisdiction given the Court’s complementary jurisdiction (UN General Assembly, 1998, Art., p. 1). The principle of complementarity under this statutory provision restricts the Court from indicting the accused in regard to the same offences without giving the accuseds’ national courts an opportunity to prosecute the accused. The accused could explore this opportunity to enter plea bargaining arrangements, which could include dropping the charges voluntarily on conditional amnesty. However, this would not bar the ICC from exercising its inherent jurisdiction in the same matter under the UN General Assembly (1998, Art., p. 13) when the matter is again referred to it by the state party under the UN General Assembly (1998, Art., p. 14), or by the Security Council under the Charter of the United Nations, Charter of the United Nations (1945, Cap. VII), or when the ICC’s Prosecutor initiates investigations “proprio motu” (meaning on own motion) based on the information concerning the same matter under the UN General Assembly (1998, Art., p. 15). The literature indicates that neither the Security Council nor the ICC’s Pre-Trial Chamber have yet intervened on the basis of amnesty. Thus, whether the ICC might accommodate amnesty is still open to debate (Allan, 2011, pp. 244–245).

This ICC’s laxity is caused by the gap in ICL to conclusively accommodate the political and social goals of peace and reconciliation that underpin amnesties and truth commissions explicitly in the ICL instruments that govern international adjudication. Subsequently, it is still unresolved as to how the ICC can balance its dual role of facilitating peace, and punishing wrongdoing to prevent impunity. It is with this lens that it has been argued that, in the long run, the ICC might not respect amnesty to develop it as an applicable norm of ICL (Allan, 2011, pp. 287–288).

Therefore it is hard for some state parties to the UN General Assembly (1998), such as Uganda, to offer amnesty for international crimes given the ICC’s inherent and complimentary jurisdiction over these crimes when the promotion of peace is unattainable among the warring parties. In an attempt to abate internal armed conflicts, Uganda legislated blanket amnesty to those engaged in “war or armed rebellion” against the Ugandan government for acts committed between January 16th, 1986 and the expiry of the Act (Amnesty Act, 2000, s.3). This law failed to attract high-level commanders from the Lord Resistance Army (LRA) who were fighting the government at the time. As a result, the government could not restore peace and democracy to northern Uganda, where the LRA based their activities. Since 1986, the LRA militants had committed crimes against humanity and war-crimes of abduction, murder, rape, and caused displacements of people to Internal Displacement Protection (IDP) camps. They would then continuously attack the camps, torture their inhabitants, and recruit child soldiers, causing further forcible relocations. The LRA armed conflict caused the death of over 100,000 civilians, displacement of about two million civilians, and the massive conscription of child soldiers (Akhanv, 2005, p. 407; Rose, 2008, p. 349). In 2003, the Ugandan President, Yoweri Kaguta Museveni, referred the matter to the ICC, which issued arrest warrants for the LRA senior commanders on multiple charges of crimes against humanity and war crimes (Prosecutor v. Dominic Ongwen, 2005; Prosecutor v. Joseph Kony, 2005; Prosecutor v. Okot Odhiambo, 2005; Prosecutor v. Raska Lukwiya, 2005; Prosecutor v. Vincent Otti, 2005).

While Uganda promised these commanders protection of immunity from the ICC’s prosecution, the literature further indicates that in 2006 the Ugandan government sought the withdrawal of these indictments to promote peaceful negotiations. However, the ICC declined on the ground that the basis of the withdrawal contravened the Rome Statute. By 2007 the accused had agreed to submit to Uganda’s domestic jurisdiction, which caused an agreement for the establishment of the International Criminal Division—a special Uganda High court division that can handle trials of individuals who commit serious crimes that include international crimes International Criminal
Court Act, 2010, (International Criminal Court Act, 2010, 2010). Nevertheless, the ICC warrant of arrests for these commanders is still in force. These indictments could have served as efforts that helped Uganda to largely dismantle the LRA military camps, but neither the promise of amnesty nor threat of international prosecution has completely wiped out the LRA’s sporadic atrocities and attacks on Ugandans from their bases in the neighbouring north eastern Democratic Republic of Congo (Allan, 2011, pp. 279–280).

The above state of affairs confirms plea bargaining in the ICC as more rhetoric than reality. The relevant debate on the UN General Assembly (1998, art. , p. 65), which legislates plea bargaining in the ICC, is whether this statutory provision offers enough guidance, if any, by the ICC of the voluntariness of a plea bargain. For example, Schabas (2007, p. 293) argued that the UN General Assembly (1998, art. 65(5) prose is superfluous because no court can be bound by the prosecution’s recommendations beyond its mandate. However, Anna (2008, p. 10) argued that the notion that some countries are bound by plea bargaining agreements does not automatically oblige international courts in a similar manner. Henham (2004, p. 210) general recommendation that there should be a “processual integration” of the fair trial rights into “reconceptualised” justice that addresses all the parties’ interests in the dispute in the court’s enabling laws, while reasonable, does not in itself clarify how voluntary a plea bargain is if the accused undertakes it at the ICC.

However, the UN General Assembly (1998, art. 65(1) (b)) also requires the Trial Chamber of the ICC to determine if “[t]he admission is voluntarily made by the accused after sufficient consultation with defence counsel”. The limitation here is that this positive law can be hard to implement, given the uncertainty levels around counsel’s competence to defend the accused during bargaining that I discussed earlier. With such implementation challenges, it is doubtful if the accused’s declarations of guilt in these trials are sufficiently voluntary.

This dilemma is also evident at the regional level. For example, the Council of Europe (1950, art. , p. 6) and the Banjul Charter (1981, art. 7), which stipulate fair trial rights are silent on plea bargaining. Had human rights law specifically regulated pleas of guilt within the normative right to a fair hearing, the voluntariness of a plea bargain by the accused who pleads guilty would have been easier to ascertain within the fair hearing constituency, to validate that the outcome of the plea bargain was achieved fairly. With the above-noted vacuum in normative human rights law on guilty pleas, it can be argued safely that human rights law has not progressed sufficiently to guard the voluntariness of the accused’s bargainings concessions, ordinarily set by the stronger state prosecutor.

4.3. Plea bargaining’s expediency aims at the state’s judicial economy over an accused’s voluntary speedy trial

As discussed above, plea bargaining is more of an institutional tool of criminal justice management for the state than a voluntary tool for the accused to enjoy a speedy trial. The genesis of plea bargaining in international law, the plea bargaining jurisprudence trends, the accused’s contractual capacity to bargain, and the innocent accused dilemma during bargaining are some of the yardsticks that validate this finding. I expound categorically on these yardsticks below.

4.3.1. The genesis of plea bargaining in international law

International jurisprudence, such as that of the international courts, and their trial systems for adjudicating international crimes, has supported plea bargaining to resolve trials faster for various reasons, such as courts’ core mandates, peacekeeping, reconciliation, fostering accountability by the accused to the offended communities, the accused’s demonstration of honesty, and resource-saving. These reasons do not necessarily promote a speedy trial within the constraints of the right to a fair hearing. For example, Henham (2004, pp. 201–202) claimed that a guilty plea demonstrates honesty; contributes to the core mandate of international tribunals, which is to establish the truth with respect to the offence under the tribunal’s jurisdiction; and is a unique, reliable fact-
finding tool that builds peace and reconciliation in affected communities; fosters accountability and maintenance of the rule of law; saves witnesses from the traumas of the trial; and saves both public and international tribunals’ resources. These and other benefits in international adjudication underline more the international institutions’ interest to enforce faster transitional justice that was more economical to these institutional bodies and the communities within their jurisdictions than to offer the accused a voluntary speedy trial.

Scharf’s (2004, pp. 1076–1078) discourse on how plea bargaining penetrated the International Criminal Tribunal of Yugoslavia (ICTY; established by the ICTY Statute, Council, U. S. UN Security Council, 1993) supports the above finding that plea bargains were cheaper for the international institutions. Scharf observed that the ICTY found plea bargaining to be a cheaper method of prosecutorial investigations that was valuable for obtaining insider testimony against high-level accused. Scharf attributed the genesis of plea bargaining in ICTY to Judge Gabrielle Kirk McDonald, who took steps to enhance the efficiency of the ICTY. As the then-president of the ICTY and was serving in the US Federal Court, McDonald was influenced by the broader US situation where over 95% of criminal cases were settled by plea bargaining. Scharf also argued that the tribunal’s main funder, the UN Security Council, pressurised the Court to expedite its caseloads by 2008 for administrative and economic efficiency. Accordingly, the ICTY entrenched plea bargaining in ICL in Prosecutor v. Drazen Erdemovic (1997c). In this case, Justices Vohrahbeen and Macdonald noted that the immediate consequences that befell an accused who pleads guilty are the forfeitures of fair trial rights. These judges devise the minimum pre-conditions for a plea bargain:

(a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements, or promises.

(b) The guilty plea must be informed ... the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty.

(c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility (Prosecutor v. Drazen Erdemovic, Joint Separate Opinion of Judge Mcdonald and Judge Vohrah, Prosecutor v. Drazen Erdemovic, 1997a, para. 8.)

Judge Cassese added that a guilty plea by the accused must be entered only after taking full cognisance of all its legal implications, with full knowledge and understanding of the choice made. Upholding a plea that is entered into without full knowledge and understanding can distort justice and jeopardise the fundamental rights of the accused, such as the right to presumed innocence and a fair trial (Prosecutor v. Drazen Erdemovic, Appeals Chamber, Separate and Dissenting Opinion of Judge Cassese, Prosecutor v. Drazen Erdemovic, 1997b, para. 10). This appeal decision co-opted plea bargaining as an implicit accused’s right into human rights law and modelled it on the plea of admissible guilt. Consequently, international courts and international criminal courts’ rules were adjusted to align ordinary pleas of guilt with those under a plea bargaining arrangement (International Criminal Tribunal for Rwanda, 2015, rr. 62 bis & 62 ter; see also, 2015, rr. 62 B & 62 bis; (Regulation No. 2000/30 on Transitional Rules of Criminal Procedure in East Timor, UNTAET/ REG/2000/30, 2000), s. 29A(1)-(5); (UN General Assembly, 1998), art. 65; (2014). r. 62 (A) (iv); (2017), r.99–100). The standards of a voluntary, informed, unequivocal, and fact-based plea of guilt are normative components of human rights law for an admissible plea bargain. However, I limit my engagement here to the voluntary nature of the decision of the accused to enter into a plea bargaining arrangement, the extent of which voluntariness is questionable.

4.3.2. The questionable nature of voluntariness in plea bargaining
International criminal case law is persuasive to a state’s court’s decisions on the expected verification parameters of voluntariness during plea bargaining. First, in Kambanda v. Prosecutor
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(2000, pp. 20–21, paras 61–64), the ICTR emphasises the Court’s obligation to oversee the accused signing the plea agreement without any threat, inducement, or stressful circumstances, and with full knowledge that this guilty plea would not distract the Court’s discretion from granting the harshest sentence. Second, the Court should examine the accused’s mental competence, specifically whether the accused understands the consequences of taking the plea. To this end, the ICTR stated that the Court can order a psychiatric evaluation report on the accused’s general mental capacity, and can order more than one report without prejudice to the accused’s psychiatric evaluation. Third, it is cardinal that the accused consistently maintains their guilt (Prosecutor v. Drazen Erdemović, 1997c, pp. 11, par.12 (d)). All these expected verification parameters of voluntariness during plea bargaining are plausible, but the gap for this study lies in how practical they could be if individual states were to benchmark them for implementation in their sovereign plea bargaining legislation.

The ICTY Appeal Chambers in Prosecutor v. Milan Babic (2005, pp. 5–6, paras. 8–11), cautioned that it is not enough for courts to simply recount the plea agreement’s voluntary clause addressing the accused, which asks the accused whether a series of statements are read as true or not. The accused should be presented with his statement and interrogated to ascertain its truth. This Court disregarded the appellant’s contention that the defence counsel had failed to properly inform the appellant of the nature of the charges and the consequences of pleading guilty, and found that the appellant’s plea was voluntary as they had indicated at the trial that they were fully aware of both the charges against them and the consequences of pleading guilty. This Court’s finding on the accused’s clarity of their charges and the consequences of a plea of guilt is quite disturbing. How does one judge the absence of coercion, fear, and misinformation toward the accused in the process to ascertain that the accused’s plea is voluntary?

This dilemma highlights the gap in the measure of voluntariness. In Kambanda v. Prosecutor (2000, paras. 58, p. 19), the ICTR found Kambanda’s claim that “... the detention contributed to an oppressive atmosphere that compelled him to sign the Plea Agreement (sic) under conditions he found oppressive” did not render his plea agreement involuntary. Therefore, it can be inferred from these diverse patterns in the decision-making choices of the Courts on the voluntariness of a plea bargain that there is no guidance from these International Courts on how voluntary an accused’s plea bargain ought to be.

At the regional level, Deweer v. Belgium (1980) argued that the ECtHR is instructive of the fact that the prosecution’s settlements with the accused should be voluntary. The ECtHR ruled that the circumstances under which a plea agreement is obtained must be reasonable and that it must not be in exchange for a flagrant disposition. In this case, Deweer’s butcher was found selling over-priced meat, which infringed the Ministerial Decree of 9 August 1974 on “fixing the selling price to the consumer of beef and pig meat”. Deweer had not reduced their pork prices by 6.5% as required by Article 2 par. 4, and their “retail margin” for that meat was 5.95 BF over the maximum—22 BF per kilogram—permitted under Article 3 par. 1 of that Decree (Deweer v. Belgium, 1980, para. 8). The prosecution threatened Deweer with the immediate closure of their shop and a heavy fine if they opted for a trial; thus, Deweer opted for the friendly settlement of a fine instead of criminal prosecution. The ECtHR, however, found that the settlement never arose out of negotiations of a plea of guilt under a criminal charge but rather that it was an offer that no reasonable person, even if they were, in fact, innocent, would yield to and not risk electing a trial (Deweer v. Belgium, 1980, para. 51). This finding implies that the friendly settlement offer was unreasonable as, before the offer, the prosecution had threatened Deweer if they underwent a trial. This “waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint” was involuntary (Deweer v. Belgium, 1980, para. 54) and contrary to the Council of Europe (1950, art. 6(1)), as well as the right to a fair public hearing, because of the prosecution’s threat.
Similarly, in Hókansson and Sturesson v. Sweden (1990, para. 66) the ECtHR accepted the waiver of a public trial as compliant with the Council of Europe (1950, art. 6(1)) because it was voluntary, unequivocal, and the accused was informed and had understood the consequences of the right they had waived. However, in 2014, the ECtHR switched its lens on plea bargaining’s voluntariness from considering it as against the backdrop of any form of implicit or explicit coercion of the accused to adopting an institutional perception of a voluntary plea bargain. However, there seems to be no intrinsic justification for this new paradigm. This is seen in Natsvlishvili and Togonidze v. Georgia (2014b), where the ECtHR failed to consider the coercive circumstances underlying the criminal justice system that had pushed the accused into seeking a plea bargain, namely the high probability of conviction, where Georgia’s acquittals stood at 0.1% between 2007 and 2009 (Natsvlishvili and Togonidze v. Georgia, 2014b, para. 61). This conviction range could initiate a powerful strand of research on the quality of the security sector and its impact on the accused’s decision to plea bargain, and the deplorable pre-trial conditions (Natsvlishvili and Togonidze v. Georgia, Separate Opinion, Judge Gyulumyan, Natsvlishvili and Togonidze v. Georgia, 2014a). The state’s decision to recover money as a precondition for Natsvlishvili’s release could imply that the state charged Natsvlishvili so that it could get money, rather than recover money because they were charged for their wrongdoing. It is in that context that it can be argued that the state’s recovery of money from Natsvlishvili constituted an implicit inducement to Natsvlishvili to enter a plea bargain involuntarily, which is evidenced by the fact that they maintained their protest of innocence for the preferred charges in their plea agreement.

ECtHR compared the normative Council of Europe practice in other member states’ criminal justice systems, which provide the accused with the opportunity to obtain a reduced sentence in exchange for a guilty plea without a trial, with Georgian practice (Natsvlishvili and Togonidze v. Georgia, 2014b, paras. 62–75), and found that Natsvlishvili had voluntarily and knowingly, with the assistance of their counsel, entered the plea agreement in compliance with the Council of Europe (1950, art. 6(1)). The ECtHR stated that to ensure the legality of the trial waiver; first, the bargain had to be accepted while in full awareness of the facts of the case and the legal consequences in a genuinely voluntary manner; and second, its content and the fairness of how it had been reached between the parties had to be subjected to sufficient judicial review. On that basis, the Court found that this plea agreement was entered into by the accused while under judicial oversight, as provided for under Georgian law. This finding raises a jurisdictional issue of whether or not it was reasonable for Georgian law to come in question before the ECtHR.

Natsvlishvili and his wife Togonidze filed an application against Georgia before the ECtHR, under the Council of Europe (1950, art. 6(1)), arguing on the basis that this particular plea bargaining arrangement that the applicants underwent under Georgian law was an abuse of process and was unfair, and in breach of both the Council of Europe (1950, art. 6(1)) and Article 2 of Protocol No. 7 to the Council of Europe (1950). Natsvlishvili also alleged that the publicity given to his arrest had breached his right to be presumed innocent under the Council of Europe (1950, art. 6(2)), a critical component of the wider normative right to a fair hearing. Both applicants claimed that the state had hindered their right of individual petition, contrary to the Council of Europe (1950, art. 6(2)) and that the financial penalties that the state-imposed on them as part of the plea bargaining process breached their property rights under Article 1 of Protocol No. 1 to the Council of Europe (1950). This Article guarantees “[e]very natural or legal person ... the peaceful enjoyment of his possessions” and stipulates that they can only “be deprived of his possessions” in the public interest and that such a deprivation process should be done within the state’s legal framework and in line with “the general principles of international law”. Nonetheless, this protection does not in any way impair the right of a State to enforce such laws as it deems necessary the control of the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. Georgia, as a member state of the Council of Europe, is bound to the Council of Europe (1950) and its protocols. The Georgian state’s defence was to the effect that the forfeiture of the applicant’s various assets and the fine the applicant paid was “... a voluntary decision to reimburse the damage caused to the State by the first applicant’s criminal activity and
had formed part, in the form of a lawful and entirely proportionate measure, of the relevant plea bargain” (Natsvlishvili and Togonidze v. Georgia, 2014b, para. 108).

Natsvlishvili, the first applicant, while a managing director of Kutaisi Automotive Plant in Georgia from 1995 to 2000, was also appointed the chairman of this company’s factory’s supervisory committee in 2000. By 2002, both applicants owned 15.55% of the factory’s shares: Natsvlishvili held 12.95%, and Togonidze held 2.6%. Natsvlishvili became the principal shareholder, while the state held 78.61% of the factory’s shares. In December 2002, Natsvlishvili was kidnapped and was severely ill-treated by his abductors, who later released him in exchange for a large ransom paid by his family. In March 2004, Natsvlishvili was charged with the offence of abuse of authority by embezzling and misappropriating the property of others in violation of Article 182 of the Georgian Criminal Code. This charge attracted six to 12 years of imprisonment.

The particulars of the charge were that Natsvlishvili made fictitious sales, transfers, and write-offs and spent the proceeds therefrom without any regard for the company’s interests; in this way, he had illegally reduced the share capital of the factory, for which he had been responsible both as the managing director and chairman of the supervisory committee (Natsvlishvili and Togonidze v. Georgia, 2014b, paras. 12, p. 3). Natsvlishvili was arrested and was filmed on national media while being arrested. He protested his innocence and exercised his right to silence with the help of his lawyers throughout his pre-trial detention, which lasted four months, from March 2004 until the completion of the investigation in September 2004. During his pre-trial detention, he shared a cell with the person who had kidnapped him in 2002 and another inmate who was serving a murder sentence. Natsvlishvili remained in this cell until the Public Defender’s Office complained that he was sharing the cell with his kidnapper and a murder convict and that this was a risk to his physical and psychological well-being. He was accordingly relocated. While on pre-trial, Natsvlishvili wrote to the state expressing his readiness to forfeit the shares he owned with his wife to the state (Natsvlishvili and Togonidze v. Georgia, 2014b, paras. 19–20, p. 4).

In September 2004, Natsvlishvili was indicted for the charged offences. With his legal counsel’s assistance, he maintained his protest of innocence but confirmed his intention to cooperate with the investigation. On his indictment, the applicants transferred all their factory shares to the state. Ten other factory workers had also secured shares in the factory; these workers too filed agreements of transferring all their shares to the state ex gratia, in exchange for Natsvlishvili’s release from detention (Natsvlishvili and Togonidze v. Georgia, 2014b, paras. 22–24, p. 4).

Natsvlishvili’s sister-in-law, at the prosecution’s request and on the insistence that Natsvlishvili’s name does not appear on the payslip, also paid 50,000 GEL (estimated at 22,000 EUR at the time) to the State Development Fund to conclude his release agreement. Natsvlishvili further recorded a plea agreement stating that. In contrast, he had refused to confess to the charges, and he had cooperated with the investigation by voluntarily repairing the damage of 4,201,663 GEL (estimated at 1,765,000 EUR at the time) caused by his criminal activity by returning 22.5% of the shares in the factory (probably constituting an atonement of the loss caused by the alleged charges to the state). The prosecutor promised to request a conviction without an examination of the merits of the case from the Court and to seek a reduced sentence of a 35,000 GEL fine (estimated at 14,700 EUR at the time).

The written record of the plea agreement mentioned that it was explained to Natsvlishvili (although it is not clear by whom) that the proposed plea bargain would not exempt him from civil liability, and he stated that he had fully understood the content of the bargain and was ready to accept it. He also acknowledged that his decision to enter into a plea bargain was not the result of any duress, pressure, or undue promise and that he had signed the plea agreement with advice from his two lawyers and the prosecutor. The prosecutor filed the agreement before the Trial Court for approval, and Natsvlishvili paid the fine. During the oral hearing by the court of the filed plea agreement, Natsvlishvili agreed that he had voluntarily entered and signed the agreement, which
was confirmed by his lawyer and that had done so without any duress (Natsvlishvili and Togonidze v. Georgia, 2014b, paras. 31, p. 6). In the sentencing stage, the Trial Court noted that while Natsvlishvili did not plead guilty and had exercised his right to silence, he actively cooperated with the investigation, and voluntarily repaired the monetary damage he had caused by his criminal activity when he returned the shares to the state. Natsvlishvili was thus found guilty as charged, sentenced to the fine as per the plea agreement, and was released from detention (Natsvlishvili and Togonidze v. Georgia, 2014b, paras. 30–35, pp. 6–7).

This case gives potential safeguards to be included in an admissible trial waiver: “ ... (a) access to a lawyer; (b) understanding of the charges, waivers and the consequences of those waivers; (c) recording of the terms of the negotiation and (d) independent judicial review with additional evidence supporting the conviction” (Russell & Hollander, 2017, p. 321). However, recent literature has critiqued this decision, saying that there is a need to rethink whether pleas of guilt are a consequence of voluntary waivers of the right to trial “ ... and if, in assessing the element of willingness, other criteria should not be considered” (Bachmaier, 2018, p. 238). The criteria that include ensuring that negotiated justice is not used in a coercive way, procedural validity, judicial independence in assessing the institution where the negotiations take place, and consonant with other fair trial rights (Bachmaier, 2018, pp. 258–259). I add that when the voluntariness of plea bargaining is defined from the state’s institutional perspective rather than from the perspective of the accused, voluntariness wanes because of other insurmountable coercive forces that confront the accused during the bargaining process.

These diverse forces that compel the accused to enter into a plea bargain include the limited chance of acquittal after a full trial, public shaming, harsh pre-trial detention conditions, prosecutorial pressure, and limited judicial oversight (which justification is also relative to judicial discretion swings). These forces are, in some ways, both expected and necessary as part of an ecosystem approach to crime. The system dictates their necessity, and the parties in the trial accept the effects of the trial process, involuntarily. This involuntary surrender by the parties (be it the accused or the victim or by both of them), irrespective of whether in a full trial or plea bargain, taints that trial process with unfairness and contravenes the surrendering parties’ right to a fair hearing.

Primarily, trial processes do not balance the participants’ interests in them, which is unfair to the parties that fail to benefit from the imbalanced process. For instance, if an accused were to be acquitted after full trial because of the inefficiencies of the criminal justice system, such as poor police investigations or failure by the prosecution to summon the victim to attend court in time and incriminate the accused, it does not matter whether the accused’s trial was unfair to the victim. In the same vein, it is unfair in law (with respect to the rights of the victim) for the accused to have the choice to enter into a plea bargain without the court listening to the victim’s testimony under a full trial. It is also unfair to the accused if the accused plea bargains out of convenience when constrained by diverse forces. Thus, the extent of voluntariness of an accused plea bargain is also waiving in human rights law at the regional levels.

At the domestic state levels, the limited number of fair trial protections in the plea bargaining process can prevent the voluntariness of the accused. For example, in Brady v. US (1970, pp. 748, 755), the Court found that a threat of a significantly severe penalty (even the death penalty) upon conviction is not so coercive as to invalidate a plea of guilt. This finding does not largely hold because the fear by the accused of an anticipated harsh sentence, such as a death penalty, can naturally affect the voluntariness of the accused, who may admit guilt in return for a lenient sentence to escape the death penalty. Therefore, fear of harsh penalties after a full trial negates the voluntariness of the accused’s guilty plea causing them to plead guilty in anticipation of a lenient sentence. Courts in the US have also found that nonphysical acts such as the threat to place serious charges against the accused as long as the prosecution has probable cause to support the charge are permissible coercion (US v. Carpenter, 2004, pp. 343–44; US v. Pollard,
1992, pp. 1021–22). This finding can be explained if the accused committed another crime, and when the prosecution informs him of any other likely serious charge where there is probable evidence to support that charge, it is a fair caution that is within the law. It further warrants that the accused cannot enjoy the regular rights of a civilian without restraint because of their criminal conduct. Still, this prosecutorial caution to the accused should not be used as a bait for the accused to admit guilt to the charged lesser offence, and if so used this would amount to coercion.

The Ugandan plea bargaining law upholds the voluntariness of an accused’s choice during the plea bargaining process. However, it appears obfuscated by the requisite of a consultative pre-session plea-negotiation meeting where the judge is involved in the negotiation process by law before the plea bargain deal is sealed. (Lubaale, 2016, r. 12(4) & r. 8(2)). While the legislative intent could have been to provide room for judicial oversight of the process, in practice, the pre-session meetings are conducted at the courts among the state attorney, defence counsel, and judge over the viability of the defence offer and the prosecution’s counter-offer. Their debate centres on the aggravating and mitigating factors involved in the offence. The consultation thus appears to be a market deal over the final fate of the accused to expedite justice, where the accused is an absent commodity that is being traded for a sentence. The judge has unfettered discretion in both the negotiation process and sentencing, in that it is the judge who first sets their own expected minimum sentence that the court would grant in terms of years of imprisonment and both attorneys cannot negotiate for the final sentence below this set minimum period. While the judge, being the head of the court, is expected to make a decision, this unfettered discretion not only raises a concern as to whether the sentencing judge should be involved in the plea bargain negotiations at all but also obstructs the voluntariness of the accused’s plea of guilt.

In an interview, one Ugandan convict (Anonymous, transcript, wc2.15.02.2019, Luzira Women’s prison personal communication, 15 February 2019) said:

They cautioned us that we keep quiet in court so that the court would give us the penalty that had been agreed upon by our defence counsel and the state attorney. We were never involved in the negotiations.

A prison administrator (Anonymous, transcript, jap2.15.02.2019, Luzira Women’s prisons, personal communication, 15 February 2019) confirmed that plea agreements signed and concluded in Ugandan courts “are not voluntary since the accused are scared, anxious over the sentencing process, and they are not thinking well through the process”. This state of affairs not only insinuates the presence of coercion in plea bargaining but also props up a related issue of the contractual capacity of the accused to bargain., p. 66)

4.3.3. Contractual capacity question: a fetter on voluntary plea bargaining

It is contentious whether the accused has a contractual capacity to enter into a plea bargaining arrangement. Grossman and Katz (1983) argued that bargains allow broader discretion to the parties to maximise their interests in a free, fair, and efficient market for just and better results. The parties trade their rights for something more valuable, where the waived right constitutes a good that the accused offers in exchange for a concession by the state. The accused is more vulnerable in this exchange than the state; however, as the state’s monopolistic control over legal sanction and process destroys the balance of the free-market model. Birke (2007, p. 66) confirmed this imbalance in his argument that the accused has “a proven tendency to become risk-seeking when faced with a choice between a sure loss and a gamble that may result in either a large loss or no loss”.

In jurisdictions where plea bargaining is constitution-based, such as the US, courts interpret plea bargains as enforceable agreements whose “modification would impermissibly alter the bargain at
the heart of the agreement”; the accused “must take the bitter with the sweet ... all or nothing” (US v. Howle, 1999, p. 1169; US v. Wenger, 1995, p. 283). Thus, the accused plea bargains while speculating over the contractual outcomes, unwillingly, when the bargain is not based on the contractual quid pro quo principle of certainty of the return from the state.

It is also contentious as to whether a plea bargain is based on the principle of the best alternative to a negotiation (BATNA) because commentators view this principle differently. As examples: Alkon (2010, p. 386) claimed that the accused has no BATNA at all when the choice is ‘lumping it’ or walking away from the case” but still standing stand trial if the case is not dismissed; however, the “trial may not represent a BATNA for the accused due to the high post-trial sentences”. Fisher et al. (2011, pp. 104., 111) contend that “the reason you negotiate is to produce something better than [what is produced] without negotiating”, and this BATNA allows the parties “to determine what a minimally acceptable agreement is, [and] probably raise that minimum”. Thus, this BATNA discourse sheds doubt on the accused’s voluntariness to bargain.

The accused also lacks parity in plea negotiations to make meaningful offers. In Uganda, we do not have a Ugandan “Judicial authority” as one body. However, there are different justice actors within the whole criminal justice system with their different ministries, such as the Director of Public Prosecutions (DPP), police, court, and lawyers. I summarise these with the word authority for ease of following my argument. A Ugandan judicial authority actor (Anonymous, transcript, jasb1.18.02.2019, Kampala High Court, personal communication, 18 February 2019) noted:

... Truly, the accused do not have contractual capacity during the plea bargaining negotiations. I say this with a heavy heart since I am an actor in the system. Most inmates are greatly disadvantaged (sic). What transpires is that they concede to the plea bargaining process in court because of the prosecution pressure to end the trial, the tight, uncomfortable court ambience amidst a crowded court, and as a result of fear to return to pre-trial detention with a failed deal. So, it is like ‘katukimare’ (a word in the Luganda language), meaning ‘let us do away with it’.

In contract law, a contract is constituted by three basic characteristics: an offer, a consideration, and an acceptance. The contracting parties’ minds must meet on all these basic characteristics for a contract to bind the parties. It is from this perspective that I argue that a plea bargain agreement cannot legally constitute a contract if the accused enters into it when subjected to implicit or explicit coercion. Coercion limits the accused’s contractual capacity, and lack of contractual capacity by the accused limits the freedom of the accused to make informed bargain offers to the state. This limited information available to the accused about the intended terms and effects of the bargain causes another major concern of whether, during the administration of plea bargaining trials, the innocent accused do not plea bargain involuntarily. This is because plea bargaining processes lack safeguards to guide them away from making wrong trial choices. I discuss this dilemma of the innocent accused as another facet of involuntary plea bargaining in more depth in the following section.

4.3.4. The dilemma of an innocent accused: Involuntary plea bargaining
Incidentally, in this section, the most available literature that I rely on is from post studies that were conducted in the US, as the procedure was more critiqued than appreciated in the US despite its efficiency justification. This explains why in the methods section, I was quick to indicate that this article employs jurisprudence from the US because of its availability. The examined literature at least reveals that it is not in dispute that innocent accused do plead guilty, which is a generally reasonable inference that we should all note, but what is still unclear is why they do this. This study argues that the innocent accused enter into plea bargains involuntarily, without being able to exercise their conscience properly.
For instance, in 2018, the Innocence Project reported on wrongful convictions as part of false pleas, in cases such as those of Ada Taylor and John Dixon (Know the Cases, 2018). While this ought to vary from country to country, Covey (2011) had found earlier that some innocent accused admit guilt in the US under their plea agreements to resolve false charges against them, although the exact numbers of such false pleas are unknown (Howe, 2005, p. 631); Edkins (2011) confirmed that the innocent accused’s propensity to plea bargain is unpredictable. Covey (2011) agreed with Gross et al. (2004) in their diverse studies from the, p. 246) US that the innocent accused risk and are more prone than averse to falsely plead guilty when you compare their propensity to admit guilt with that of their guilty counterparts who admit guilt. While Dervan and Edkins (2013, pp. 18, 35) discounted this concern as exaggerated, they also found that the guilty accused were 6.39 times more likely to accept a plea than the innocent accused when given similar penalty choices. Psychiatrists have long cautioned that the innocent accused’s perceptions differ from what they actions (Nisbett & Wilson, 1977, p. 246), a possibility that can be triangulated to any geographical location. The import from this discourse is that false pleas of guilt are made by the innocent accused for diverse reasons, which is indicative of the fact that plea bargains are not necessarily voluntary.

In another related study from the US, Bowers (2007, p. 1178) argued that false guilty pleas are justified as a gamble by the accused who are ordinarily recidivists regarding which offences they are charged within a criminal justice system that is laced with symptomatic failures. Bowers recommended that states should conceive false pleas statutorily as legal fictions. However, Gilchrist (2011) disagreed and argued that this approach would weaken legal systems’ integrity; the legal system would not have given the accused a meaningful hearing that could confirm that this plea bargain was entered into voluntarily by the accused. This argument is generally plausible.

It is from the above context that Gilchrist (2011, p. 166, citing Tyler, 2006) contended that plea bargaining creates an incentive for dishonesty because an accused on a guilty plea, even if innocent, is compelled to lie in their plea to attract the Court’s clemency. This warrants the accused who gets away with lying to lose confidence in plea bargaining as a legitimate process due to the weak investigation competencies of the criminal justice system and to characterise legal authorities poorly. Gilchrist (2011, p. 171) found that plea bargaining has little to do with the guilt or innocence of the accused: “[t]he reasons people plead guilty after plea bargaining are numerous, and actual guilt has little bearing on the calculus”. This is a truism that exists in all jurisdictions if the emphasis of plea bargaining remains focused on quick wins rather than factual truth. It bolsters my argument that the accused do not necessarily admit guilt willingly but are constrained to plead guilty, and this renders the process unfair.

Therefore, I find Tor et al.’s (2010, pp. 98, 113) argument quite meaningful as it posits that even when the innocent accused opt for a full trial willingly after relying on their “common intuition”, their pleas of guilt under that process are opportunity costs for their innocence. While the sentences the accused receive on conviction after such pleas are equivalent to the discounted penalties the courts would offer to their other counterparts who are guilty, these pleas are conditioned on the anticipation of the likely lenient sentences, meaning they would have been entered into by the accused involuntarily.

There are also other inducements for the innocent accused to plea bargain. As Turner (2017, p. 7) observed, where the innocent accused consider their non-release on bail during their pre-trial detention, they can sentence bargain for parole rather than imprisonment, or for imprisonment where a full a trial’s conviction would lead to capital punishment. These conditions underlying the bargains indicate that the innocent accused did not truly plea bargain voluntarily. A Ugandan
convict (Anonymous, transcript, mc0.06.09.2019, lira main prison, personal communication, 6 September 2019) illustrates these dilemmas:

My lover gave me an appointment to meet her at their home. She pointed out for me a grass-thatched hut for a certain old woman as her house. I later went and called her from that hut, but she never responded. The old woman made an alarm, to which my lover and many other people responded. I was arrested for raping this old woman, yet I did not. The people proposed to cane me 100 strokes, but I refused. I was taken to the Local Council Chairperson 1 (LC1). He asked me for one million shillings, but he later reduced the amount to 500,000 shillings (134, 214 USD as of 20 June 2020) to release me, which I did not have. He forwarded me to the police post where I spent one month without release on police bond. I was later taken to court and remanded for two years, after which I was committed to the High Court for trial. While on pre-trial detention, I accepted a plea bargain because a full trial takes so long and is very difficult [and because of] the continuous digging in prison while serving hard labour on private and prison farms.

5. Conclusion
This article has focused on whether a plea of guilt obtained under plea bargaining is truly voluntary under the normative right to a fair hearing. I conclude that the accused who admits to guilt under a plea bargain might not do so voluntarily, primarily because the accused may bargain for a plea as a recourse to their delayed trial in pursuit of expedited release or to reduce uncertain detention time. There is no normative guidance on the timing of a speedy trial as against a delayed trial in human rights law. International law has not regulated guilty pleas against the backdrop of the wider normative right to a fair hearing, and this negates the voluntariness of an accused entering a bargain. Plea bargaining is more of an institutional tool of criminal justice management for the state and not with the goal of justice primarily in mind, but of managing workflow and institutional expedience, rather than an accused’s voluntary tool to enjoy a speedy trial. Under this state of affairs, plea bargaining flouts normative human rights law and the attendant ordinary guilty plea standards, which include “a voluntary guilty plea” that ought to inform a plea-bargained guilty plea.

The certainty of a speedy trial is cardinal for jurisdictions that face intolerable trial delays, such as Uganda, where fear of indeterminate pre-trial detentions is the most compelling factor for the accused to enter bargains involuntarily. It is for this reason that I strongly advocate for plea bargaining processes to be timed and delineated statutorily to conform to the parameters of a fair hearing, in which the accused see the plea bargaining process as predictable. Procedural certainty through systematic timeliness will help to monitor the accused’s process from the time of the arrest to sentencing while balancing the rights of all parties.

A well-timed bargain with systemised process statutory deadlines should, however, be accompanied by other procedural safeguards to ensure voluntariness, as the accused could be gullible about the bargain’s coercive effects. These safeguards can include a robust state-funded legal aid system to accord the accused their meaningful right to legal representation, the use of non-coercive implicit or explicit means by both the defence and state attorneys during the negotiations, judicial oversight for scrutiny to assure the accused’s voluntariness in the process, and enhanced or full disclosure of the available evidence to help the accused make informed choices. They should also include judicial independence to assess the bargain agreements impartially, a statutory provision to specifically protect the innocent accused right against self-incrimination, appeal rights or rights for judicial review on abuse of due process, and a sealed official record of the terms of the plea agreement for procedural validity to help in cases of the bargain review or appeal.

The above procedural cocktail will also legitimise the penal judicial outcomes of plea bargaining by considering all of the players’ interests in the process: the interests of the accused in the choice
of speedy process, at the cost of other trial rights; the states’ institutional economy, to control judicial backlog and prison congestion; the victims’ right to procedural fairness; and the community’s interest in accountability and reconciliation.

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