Plea Agreements in Bosnia and Herzegovina:

Practices before the Courts and their compliance with international human rights standards

OSCE
Mission to Bosnia and Herzegovina

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EXECUTIVE SUMMARY

Plea agreements have become one of the core mechanisms within the criminal procedure of Bosnia and Herzegovina since its introduction in 2003. As part of the extensive reforms of the criminal justice system, this common law based mechanism allows prosecutors and defendants to negotiate aspects of sentencing, provided the defendant admits fully to the crime and agrees to give up certain key rights, such as the rights to public trial and to appeal. Following nearly two years of monitoring plea agreement proceedings, the Organisation for Security and Cooperation in Europe's Mission to Bosnia and Herzegovina ("OSCE") believes that developments in the application of this mechanism deserve a full and thorough analysis. This thematic report looks specifically to discuss the degree to which the implementation fully complies with fundamental international human rights standards, including the right to a fair trial, as embodied in Article 6 of the European Convention on Human Rights. In this regard, the Report aims to assist practitioners in identifying problem areas in its implementation and possible solutions, as well as to provide the public with greater information on the process.

Overall, the judiciary has quickly adapted to the use of plea agreements and embraced their use in all manner of cases, from the most minor trespassing offences, to crimes against humanity. Plea agreements are designed in theory to maximise scarce judicial resources thereby enhancing the fair administration of justice for all. Although termed a "shortened proceeding" in the national legal framework, there should be no curtailing of the respect for fundamental human rights.

Trial monitoring has documented several emerging practices that raise concerns as to the respect for the right to a fair trial in the context of plea negotiations. For example, trial monitors have observed that defendants were often not fully informed of their right to *ex officio* defence counsel, and/or defence counsel was not appointed, despite clear demonstrations of need. Such patterns raise serious questions as to the equality of arms within the context of such negotiations and whether defendants have had a fair chance to present their cases. Likewise, it is worrisome that in some cases suspects have been signing plea agreements prior to confirmation of the indictment, at which point full access to prosecutorial evidence is limited. Defendants have also been allowed to negotiate plea agreements after having already made their guilty plea raising questions as to what is being bargained on and on what basis are defendants bargaining. Both of these practices, the latter being quite common, do not allow accused persons the full benefit of the equality of bargaining power with prosecutors. Judges have also been observed encouraging defendants to engage in plea negotiations, raising significant concern as to the presumption of innocence in such proceedings.

Appropriate judicial control over plea agreements is essential to ensure that no miscarriage of justice occurs as a result of the process. In spite of this, there have been many instances in which judges have failed to provide that necessary degree of oversight. For example, judicial deliberations on plea agreements with defendants in court has often been lacking, raising doubts as to whether defendants fully understood the proceedings, rights waived, and future consequences. In particular, in cases requiring a degree of cooperation on the part of the defendant, these elements were rarely reviewed in court with the defendant. Inconsistent practices have been observed as to whether judges may reject agreements if dissatisfied with the proposed and agreed upon sentence. Also, review of the evidence supporting the guilty plea is inconsistent or, at times, completely lacking.

Usage of cooperation clauses within plea agreements are designed as a highly useful tool for obtaining information about and testimony against other suspects in serious criminal cases. Despite their potential advantages, such clauses are rarely used in the most serious of cases such as war crimes, trafficking in human beings, etc. Likewise, the Report acknowledges the critical lack of basic mechanisms to enforce cooperation clauses effectively, and calls for an urgent re-assessment of the positive legislation to craft an adequate solution to the enforcement of cooperation clauses.

International human rights standards assert the right of injured parties to obtain compensation for damages within criminal proceedings. Trial monitoring shows that prosecutors and judges regrettably display a largely passive attitude towards the inclusion of property claims in plea negotiations, or in rulings at the time of sentencing, and fail to use these opportunities to protect injured parties' rights to have access to proceedings that are expeditious, fair, inexpensive and accessible. Changes both in the legislative framework and in the practical approach of judges and prosecutors are needed to redress such shortcomings.

OSCE has identified divergent practices with respect to sentences issued following plea agreements. Fair administration of justice requires consistency in sentencing. Prosecutors should seek to ensure a more uniform approach in sentence negotiations by respecting the principles enshrined in the criminal codes, and by coordinating efforts among Prosecutors' Offices to establish harmonised internal guidelines. Again, judges play the key role to ensure that proposed sentences are in accordance with the positive provisions of the criminal code.

Undoubtedly plea agreements are a useful and efficient mechanism to resolve criminal cases in an efficient manner. Given the novelty of this institution and its relative youth in the context of domestic practice, clearly judges and prosecutors have made advancements in their usage of and comfort with the mechanism. Regardless of such progress, there remains much to be done to improve the plea negotiation process. Findings from OSCE's trial monitoring suggest that certain amendments and a change in some practices are needed to ensure that the proceedings do not jeopardize the full respect for fundamental human rights. Targeted recommendations to this effect are included at the end of each section, and are summarised below. OSCE's Mission to Bosnia and Herzegovina remains committed to aiding the local judicial authorities in developing effective and human rights compliant practices with respect to the implementation of the new criminal procedure codes. These recommendations are designed as a technical tool for doing just that in the coming year.

RECOMMENDATIONS

JUDGES AND PROSECUTORS (LEGAL PRACTITIONERS)

- Judges should inform defendants of their right to counsel and ensure that defence counsel is appointed as required by the interests of justice to preserve the equality of arms between the parties in the context of plea agreements.

- Judges should seek to preserve the presumption of innocence by informing defendants of the plea negotiation possibility prior to entering the plea of guilty, or not guilty. Judges should never appear to suggest or discourage plea negotiations.

- Prosecutors should always convey in a detailed manner the provisions on appointment of defence counsel prior to initiating negotiations with defendants.

- Prosecutors should be wary of negotiating with suspects prior to confirmation of the indictment, particularly unrepresented suspects. To ensure the highest respect for suspects' rights, prosecutors should adopt a general policy of not signing plea agreements prior to confirmation of the indictment.

- Prosecutors should inform defendants who agree to cooperate of the availability of witness protection measures. Judges should also remain vigilant to the need to apply such measures. Defense counsel should be present at all stages of negotiation involving cooperation clauses.

- Prosecutors should take all steps to resolve injured parties' property claims within plea negotiations, and should keep injured parties informed of the outcome of negotiations.

- Judges must exercise strong judicial control over plea agreements to ensure consistency in sentencing, as well as provide particular and specific reasons for any given sentence in the verdict.

JUDICIAL AND PROSECUTORIAL TRAINING CENTERS AND THE HIGH JUDICIAL AND PROSECUTORIAL COUNCIL

- Training should emphasize the proper application of plea negotiations and warrant for pronouncement of the sentence proceedings, which could include the distribution of a handbook providing guidance on the appropriate use of these two mechanisms.

- Training, and any standardised training material developed on plea negotiating, should include reference to fair trial standards which must be preserved in the context of plea negotiating, such as the right to counsel, the principle of equality of arms, and the presumption of innocence.

- The Judicial and Prosecutorial Training Centres, or the High Judicial Prosecutorial Council, should issue a standard guide of questions to be posed to the accused when deliberating on the plea agreement.

- Trainings should emphasise the distinct judicial and prosecutorial responsibilities with respect to defendants, and their right to fully understand the plea agreement process and its consequences.

- The Judicial and Prosecutorial Training Centers or the High Judicial Prosecutorial Council, in cooperation with the Prosecutors' Offices, should issue sample plea agreements showing how to effectively incorporate cooperation clauses into plea agreements.

- Trainings should emphasize the judicial obligation to ensure that defendants consciously entered plea agreements and cooperation clauses by reviewing all terms of the plea agreement in court.

- Training should highlight the international human rights standards supporting the victims' role and rights in criminal proceedings.

- Trainings should emphasise the distinct role of prosecutors and judges with respect to sentence negotiation and imposing sentences. Standardised training material developed on plea negotiating should include a statistical overview of the agreements reached with the respective sanction imposed to serve as general reference tool.

LEGISLATIVE BODIES AND THE CRIMINAL CODES IMPLEMENTATION ASSESSMENT TEAM

- A legislative amendment should harmonise the divergent practices as to whether the individual judge can deliberate on plea agreements and pronounce sentences for crimes within the competency of the panel. Further, a legislative amendment should reduce the crimes for which a panel is required.

- A legislative amendment should make clear that the establishment of enough evidence against the defendant requires the judge to review in detail all of the obtained evidence. Judges should *ex officio* ensure that evidence supporting plea agreements was not obtained illegally.

- A legislative amendment should clarify that the judge may reject the agreement based on an inappropriate criminal sanction, *i.e.*, a sanction that is not compatible with the positive provisions of the criminal code.

- A legislative amendment to Article 400 of the BiH CPC, "Procedure to Revoke the Suspended Sentence", should include non-compliance with plea agreements as a ground to revoke suspended sentences.

- The Criminal Codes Implementation Assessment Team should re-assess the positive provisions of the BiH CPC in light of the need to establish an enforcement mechanism for cooperation clauses and propose an adequate solution in the form of a legislative amendment or guidance to practitioners.

- A legislative amendment should require the court to invite injured parties to plea agreement deliberation hearings, and the summons should include instruction on the right to file property claims.

PROSECUTORS' OFFICES

- State, Entity, and Brčko District Prosecutors should seek to harmonize their practices through increased cooperation and the issuance of common guidelines on when to apply the warrant proceedings or use the plea negotiation process.

- State, Entity, and Brčko District Prosecutors should issue internal guidelines specifying the general prosecutorial policy of not engaging in plea negotiations after a guilty plea has been entered. This policy should be made known to defence counsel.

- Internal guidelines from Prosecutors' Offices should mandate that cooperation clauses should always be submitted to the court in writing.

- State, Entity, and Brčko District Prosecutors should foster cooperation and coordinate efforts to harmonize sentencing policies, and issue instructions by way of guidance.

INTRODUCTION

I. Background

Plea negotiating is, arguably, one of the most significant changes introduced in the criminal justice system in 2003.[1] The introduction of this mechanism accompanied the shift to a broadly adversarial criminal justice system where—in contrast to the previous judge-led mixed system—the trial is moved forward by the prosecutor and the defendant, and the judge represents the neutral arbiter of the disputed issue. Plea negotiating has been the subject of a great deal of attention by both practitioners and citizens, and met with a degree of doubt about its application, particularly from the public.

The adaptation of the judiciary and defence counsel to plea agreements, and the overall assessment of the implementation of this mechanism can generally be described as positive. In just two years, plea agreements are now used fairly systematically, appreciated by the judiciary, and reduced the number of cases burdening already overloaded courts. This achievement has been reached notwithstanding the public's general mistrust, and the objective lack of reference material to guide practitioners. Nevertheless, a number of problematic issues have been identified and remain of concern, both from a procedural perspective as well as regarding substantive fundamental human rights protections.

II. Aims and scope of Report

In December 2004 the Organisation for Security and Cooperation in Europe Mission to Bosnia and Herzegovina ("the OSCE") published its first Trial Monitoring Report on the implementation of the 2003 criminal procedure codes ("CPCs") in the courts of Bosnia and Herzegovina. Among other things, plea negotiating was addressed, and recommendations issued, such as the need to clarify via legislative amendments the court's authority to reject plea agreements, and clarifications in the deliberation and pronouncement of sentence process. Developing standardised training materials on plea negotiating procedures was recommended, as well as the development of sentencing guidelines. Further trial monitoring, however, has made clear that the plea negotiation process requires additional attention. The present Report intends to follow up by providing greater in-depth analysis of the issues facing the judiciary with respect to plea negotiating, and in particular highlighting human rights concerns identified in its implementation. Recommendations are included at the end of each section. As well a range of figures and statistics are included to serve as a reference tool for the judiciary and policymakers. This Report also seeks to inform the public and those facing the criminal justice system about the plea negotiating process in a comprehensible and accessible manner.

Section 1 addresses the general notion of plea negotiating, and the general contours of the mechanism in Bosnia and Herzegovina. The remainder of the Report discusses more specific issues in relation to the implementation of this mechanism. Section 2 focuses on fundamental fair trial rights that must be preserved in the context of plea negotiations, such as the equality of arms between the parties and the presumption of innocence. Section 3 highlights the judicial role in deliberating on plea agreements and the elements judges must assess in deliberating on agreements to ensure that miscarriages of justice do not occur. Section 4 looks at the use of cooperation clauses within plea negotiations, and particular issues that may arise as a result. Section 5 addresses the rights of the injured party, or victim, to seek damages or restitution in the context of plea negotiations. Finally, Section 6 looks at emerging sentencing practices in relation to verdicts issued following plea agreements.

III. Monitoring methodology and reporting

OSCE's trial monitoring program focuses on assessing the implementation of the criminal procedure codes, in order to identify obstacles and barriers impeding respect for fundamental human rights, in particular the right to a fair trial as embodied in Article 6 of the European Convention on Human Rights ("the Convention"). This Report is based on an extensive number of hearings observed in the context of the trial monitoring program.

[1] It should be noted that the Brcko District adopted a criminal procedure code in late 2000 similar to the codes adopted in the rest of the country in 2003. Thus, as of January 2001 the Brcko District has employed plea agreements (Law on Criminal Procedure of the Brcko District of Bosnia and Herzegovina, Official Gazette of the Brcko District nos. 7/00 and 1/00).

In the firm belief that a free and independent judiciary is the primary prerequisite in establishing the rule of law, cases monitored are subject to a rigorous non-intervention policy requiring Court Monitors to avoid any participation in, or comment on, the proceedings. Court Monitors observe cases from the confirmation of the indictment until sentencing by attending hearings and reviewing court files available in the court's registry. After each hearing, Court Monitors document the proceedings in a specially designed database that permits further analysis and review by Legal Advisors. The database also allows analysis of a range of comparative statistics to assess patterns and trends in the implementation of the criminal procedural codes.

A. Number of plea agreement hearings monitored

Between January 2004 and August 2005, the OSCE has monitored a total of 3,045 hearings, including 1,660 cases in 51 courts throughout Bosnia and Herzegovina. Of these 305 are regarding plea agreement deliberation hearings. Courts monitored include the State Court, all Cantonal/District Courts, and 30 Municipal/Basic Courts. The table below shows the total number of monitored plea agreement deliberation hearings per court. It should be noted that at each hearing, multiple plea agreements may have been deliberated on if the case involved multiple defendants. In addition, information relevant to plea agreements may have been observed at plea hearings, main trial hearings, *etc.*, thus, this Report reflects findings of an even greater quantitative nature than is shown below.

Court	Number of monitored plea agreement hearings
Trebinje Basic Court	55
Banja Luka Basic Court	32
Prijedor Basic Court	31
Brčko Basic Court	17
Mostar Municipal Court	12
Sarajevo Cantonal Court	11
Tuzla Municipal Court	11
Doboj Basic Court	10
Bihać Cantonal Court	8
Sokolac Basic Court	8
Zvornik Basic Court	8
Sarajevo Municipal Court	7
Banja Luka District Court	7
Čapljina Municipal Court	7
Bijeljina Basic Court	6
Novi Travnik Cantonal Court	6
State Court	6
Zenica Cantonal Court	6
Zenica Municipal Court	5

Court	Number of monitored plea agreement hearings
Široki Brijeg Municipal Court	5
Bihać Municipal Court	5
East Sarajevo District Court	4
Gorazde Municipal Court	4
Konjic Municipal Court	4
Široki Brijeg Cantonal Court	4
Orašje Municipal Court	3
Basic Court Sokolac Branch in East Sarajevo	3
Vlasenica Basic Court	3
Bijeljina District Court	3
Bugojno Municipal Court	2
Livno Cantonal Court	2
Livno Municipal Court	2
Mostar Cantonal Court	2
Srebrenica Basic Court	2
Travnik Municipal Court	1
Tuzla Cantonal Court	1
Novi Grad Basic Court	1
Foča Basic Court	1
Total:	**305**

B. Other sources of information

In addition to monitored hearings, the OSCE also obtained information regarding plea agreement practices from other sources, such as the Local Implementation Groups ("LIGs") and Judicial and Prosecutorial Training Centers' ("JPTCs") trainings. The LIGs are OSCE-facilitated regional workshops for judges, prosecutors and defence counsel to raise concerns and discuss practices related to the implementation of the codes. Observations and findings from LIGs inform this Report. The JPTCs are established by law to provide ongoing legal training to sitting judges and prosecutors, as well as induction training for new judges and prosecutors. The OSCE attends JPTCs trainings, where various practical problems in the implementation of the CPCs are raised and elaborated on, with attendees and trainers often engaging in a fruitful dialogue on best practices.

This Report is also informed by international human rights principles, particularly the European Convention on Human Rights. Practices from jurisdictions outside of Bosnia and Herzegovina may be mentioned, but are not considered authoritative. Ultimately, bearing in mind the principle that laws are a unique product and expression of each society, it is for the national judiciary to establish its own practices and approaches to the implementation of plea agreements, provided such practices are compliant with the fundamental guarantees of a right to a fair trial to which Bosnia and Herzegovina is bound. This Report hopes to inform and guide practitioners in this process, using basic human rights principles as the essential starting point.

C. Article 231 of the BiH Criminal Procedure Code

For ease of use, this Report will make exclusive reference to the provisions in the BiH Criminal Procedure and Criminal Codes. Each Entity and the Brčko District have distinct criminal procedure and criminal codes, with some variations, which will be mentioned as relevant. As a reference, the text of Article 231 on plea negotiating from the BiH CPC[2] is included below:

(1) The suspect or the accused and the defense attorney, may negotiate with the Prosecutor on the conditions of admitting guilt for the criminal offense with which the accused is charged.
(2) In plea bargaining with the suspect or the accused and his defense attorney on the admission of guilt pursuant to Paragraph 1 of this Article, the Prosecutor may propose an agreed sentence of less than the minimum prescribed by the Law for the criminal offense(s) or a lesser penalty against the suspect or the accused.
(3) An agreement on the admission of guilt shall be made in writing. The preliminary hearing judge, judge or the Panel may sustain or reject the agreement in question.
(4) In the course of deliberation of the agreement on the admission of guilt, the Court must ensure the following:
    (a) that the agreement of guilt was entered voluntarily, consciously and with understanding, and that the accused is informed of the possible consequences, including the satisfaction of the claims under property law and reimbursement of the expenses of the criminal proceedings;
    (b) that there is enough evidence proving the guilt of the suspect or the accused;
    (c) that the suspect or the accused understands that by agreement on the admission of guilt he waives his right to trial and that he may not file an appeal against the pronounced criminal sanction.
(5) If the Court accepts the agreement on the admission of guilt, the statement of the accused shall be entered in the record. In that case, the Court shall set the date for pronouncement of the sentence envisaged in the agreement referred to in Paragraph 3 of this Article within three (3) days at the latest.
(6) If the Court rejects the agreement on the admission of guilt, the Court shall inform the parties to the proceeding and the defense attorney about the rejection and say so in the record. Admission of guilt given before the preliminary proceeding judge, preliminary hearing judge, the judge or the Panel is inadmissible as evidence in the criminal proceeding.
(7) The Court shall inform the injured party about the results of the negotiation on guilt.

SECTION 1

PLEA NEGOTIATING AND ITS IMPLEMENTATION IN BOSNIA AND HERZEGOVINA

I. What is plea negotiating?

Although there is no one definition, plea negotiating is generally understood as a bargaining process between the defendant and prosecutor in which the defendant admits having committed a crime, and the prosecutor agrees to some concession in exchange. The agreement is then submitted to the court in order to avoid trial proceedings. Within this general concept, quite significant nuances exist from legal system to legal system, such as the regulation of various types of plea agreements, the permitted procedural phase in which negotiations may occur, and the involvement of the injured party in the process. The common underlying principle, however, is that an agreement is reached between prosecutors and defendants in which each part gives some concessions in return for correspondent benefits.

[2] Official Gazette of Bosnia and Herzegovina nos. 3/03, 32/03, 36/03, 63/04 and 13/05.

Both parties to the negotiation enjoy advantages by resolving the case in an expeditious and certain manner. The prosecution agrees to a milder punishment, (or where permitted, to drop or lower a charge) in exchange for avoiding main trial and possible appeals saving time and the costs of trial. It may also save vulnerable witnesses the trauma that main trial proceedings can cause. Prosecutors might also obtain defendants' cooperation in testifying or providing information about other crimes or alleged criminals that could not otherwise be acquired.

Defendants give up the possibility to be acquitted for the charges in exchange for a more lenient punishment than if found guilty at trial. Defendants may also have to waive the right to appeal the imposed sentence. Defendants may strengthen their bargaining power by offering to the prosecution additional information about co-perpetrators or other crimes. Both parties benefit from the legal certainty the plea negotiation process provides.

The plea agreement is *not* a mechanism by which the state, as represented by the prosecutor, surrenders to the person responsible for the given crime. Rather, the state offers to mitigate the punishment in exchange for the defendant's surrender. In the end, both parties should obtain a benefit proportional to what was offered.

II. Implementation of plea agreements in Bosnia and Herzegovina

Plea negotiating as a legal phenomenon takes many forms, among the most common are: (1) charge bargaining, involving negotiations to drop or reduce charges; (2) sentence bargaining, involving negotiations on the nature and length of the imposed criminal sanction; and, (3) fact bargaining, involving negotiations on which facts can be brought to the court's attention. This mechanism as crafted in Bosnia and Herzegovina generally falls into the sentence bargaining category, and many practitioners and legal experts argue that the present positive provisions of the criminal procedure codes prevent charge and fact bargaining.

From the very text of Article 231(1) and (2) of the BiH CPC, practitioners find support for the premise that charge bargaining was not envisioned. Paragraph 1 provides that the defendant, defence attorney and prosecutor may negotiate, "*on the conditions of admitting guilt for the criminal offence with which the accused is charged*." Paragraph 2 provides that the prosecutor may propose a lesser sentence than the minimum prescribed by law. Moreover, the principle of the legality of prosecution set forth in Article 17 of the BiH CPC prescribes that prosecutors are obliged to initiate criminal prosecution in each case when there are grounds of suspicion that the criminal offence may have been committed, unless a discretionary power to decide whether to prosecute is explicitly provided for, which is only in two exceptional circumstances.[3] The Commentary to the BiH Criminal Procedure Code[4] also affirms that the subject of the negotiation should be limited to the type and duration of the criminal sanction. Trial monitoring shows that charge bargaining has been used in only a very limited number of hearings monitored, and those mainly before the State Court and involving international prosecutors. Practitioners largely appear to have adopted the stance that the negotiation process does not include negotiations on charges or facts.

Judges, upon sustaining the agreement, issue the sentence contained in the agreement. Most practitioners also agree that it is not possible for judges to sustain the agreement and issue a sentence other than the one agreed upon, due to the wording in Article 231(5), "…*the Court shall set the date for the pronouncement of the sentence envisaged in the agreement*…" Defendants waive the right to appeal the verdict with respect to the sentence imposed. Another unique plea agreement feature in Bosnia and Herzegovina is that it can be, with one exception in the Republika Srpska, availed through the appellate proceedings; thus, there could be a main trial, *and* a final resolution via a plea agreement.

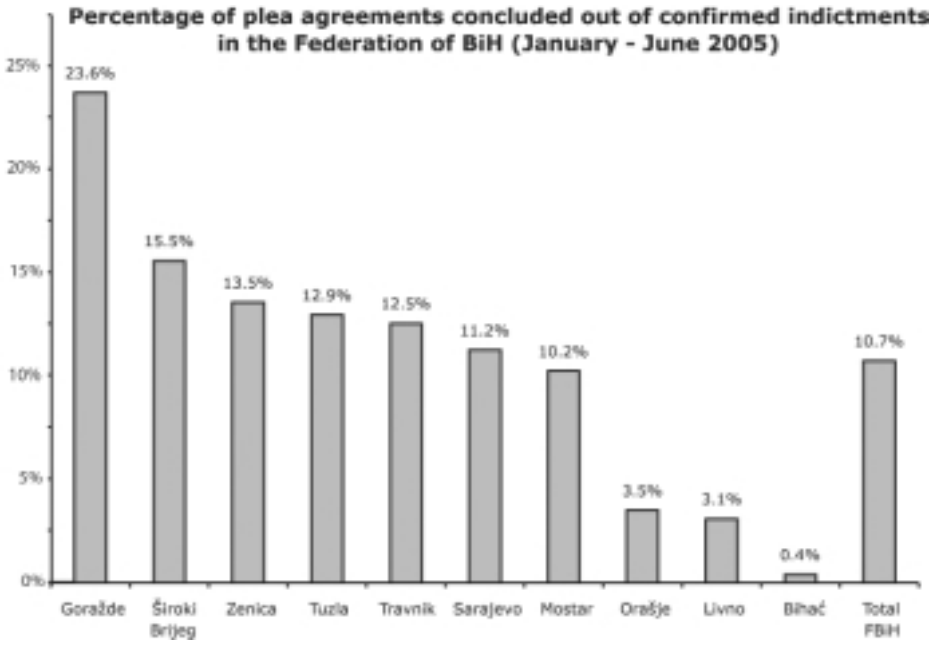
III. Frequency of use of plea agreements

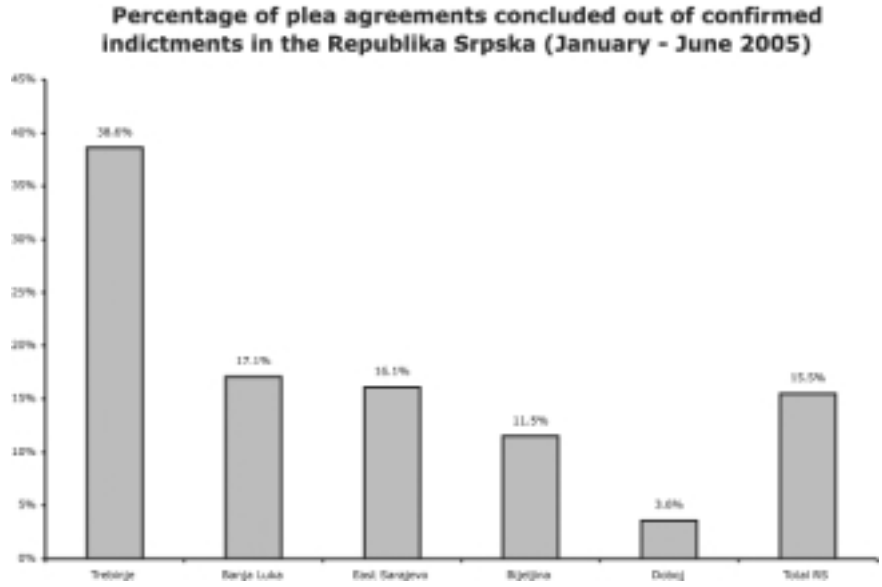
As a starting point, the very use of plea agreements must be examined, and it is notable that this varies significantly, as the following charts outline. The statistics below are based on information obtained from the

[3] The only legally foreseen exceptions to this principle are the provisions on granting immunity to the witness in accordance with Article 84(3) and (4) of the BiH CPC, as well as in proceedings against juveniles in accordance with Article 352 of the BiH CPC (principle of opportunity).

[4] The Commentary to the BiH CPC was published in 2005 by the Council of Europe/European Commission, and co-authored by national legal experts. The publication is the first to comprehensively address the new Criminal Procedure and Criminal Codes, and it serves as an essential point of reference for practitioners. It will be referenced throughout this Report.

relevant Federal and District Prosecutors' Offices. These statistics reflect the organizational structure of the Prosecutors' Offices, which are divided by Entity, and further divided by ten Cantonal Prosecutors' Offices in the Federation of BiH, and five District Prosecutors' Offices in the Republika Srpska.





In the Brčko District the percentage of plea agreements concluded out of confirmed indictments between January and mid-August 2005 is approximately 28%.[5] Even recognizing circumstances that might affect these figures, plea negotiating is clearly used with varying degrees. Although a variety of factors may explain this, one apparent reason is the disparate use of the companion proceedings to the plea agreement, the warrant for the pronouncement of the sentence. The warrant proceedings permit prosecutors to propose specific sanctions in indictments, and may only be used for offences where the maximum prescribed sentence is five years or less. The proposed sentence is limited to a fine, a suspended sentence, or forfeiture of material gain or property.[6] Both the warrant proceedings and plea negotiations are termed "shortened proceedings" by practitioners. It appears that Prosecutors' Offices which prefer warrants use plea negotiations less, and vice versa. The significant range between the highest and lowest points of implementation, however, raises doubts as to whether similarly situated defendants are treated in the same manner.

[5] Worth noting as well is that this figure follows nearly five years of implementation in the Brcko District, perhaps indicating a more settled practice.

[6] The provisions on the warrant proceedings are in Articles 334-339 of the BiH CPC.

IV. Conclusion

The judiciary has clearly embraced plea agreements and affirmed its use in all manner of cases. The varied use of plea negotiations depending on the Prosecutors' Offices, however, underscores the need to harmonise practices regarding the use of this mechanism.

Recommendations

- Judicial and prosecutorial trainings should emphasize the proper application of plea negotiations and warrant proceedings, which could include the distribution of a handbook providing guidance on the appropriate use of these two mechanisms.
- State, Entity, and Brčko District Prosecutors should seek to harmonize their practices through increased cooperation and the issuance of common guidelines on when to apply the warrant proceedings or use plea negotiations.

SECTION 2

EQUALITY OF ARMS AND THE PRESUMPTION OF INNOCENCE

I. Introduction

Article 6 of the Convention guarantees the right to a fair trial in both civil and criminal proceedings. In the context of criminal cases, the rights enshrined in Article 6 of the Convention generally apply once charges have been brought against a person. The European Court has given an autonomous and wide meaning to the term "charge", often defined as, "*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*…."[7] Thus, within the context of the national legal framework, Article 6 rights apply once the person has been informed of the charges the prosecutor seeks to press, regardless of whether the indictment has been confirmed yet. Specifically this section will examine how current practices in the context of plea negotiating comply with two essential notions of a fair trial—the principle of the equality of arms between the parties and the presumption of innocence which the accused enjoys.

II. Equality of arms

One of the leading cases of the Strasbourg Court addressing the principle of the equality of arms within civil proceedings provides the following definition:

> "…that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent…"[8]

Plea negotiating requires two persons to negotiate the plea and sentence, the prosecutor armed with evidence and the indictment, and the defendant ready to admit guilt for the crime in exchange for a lower sentence and the certainty of not having to endure trial. The parties have very different bargaining powers, the prosecutor arguably being in a position of clear advantage. The accused enjoys, nevertheless, the right to be treated equally with regard to the prosecutor. Although the Strasbourg Court's case-law on the equality of arms principle focuses on the right to obtain and review evidence from the opposing party, the right to call one's own witnesses and the right to question witnesses, the underlying principle is a general one—all parties must be treated equally. In the context of plea negotiating, this principle has implications for the degree to which there is an equality of bargaining power between the prosecutor and suspect or accused. In practice, the best way to equalise the position of the parties is for the accused to have the assistance of defence counsel in the negotiating process. Further, concluding plea agreements only after the confirmation of the indictment, but prior to a guilty plea, also bolsters the equality of bargaining power between the parties.

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[7] *Deweer v. Belgium*, judgement of 27 February 1980, Series A no. 35, paragraph 46.

[8] *Dombo Beheer B.V. v. the Netherlands*, judgement of 27 October 1993, Series A no. 27, paragraph 33.

A. Appointment of counsel

This section does not intend to provide a full review of the right to defence counsel, but rather will look at the presence of defence counsel in negotiating on plea agreements, and as a by-product of this examination, the provisions on defence counsel will be considered. The right to defend oneself in person or with the assistance of counsel is defined in Article 7 of the BiH CPC, "*the suspect or accused has a right to present his own defence or to defend himself with the professional aid of a defence attorney of his own choice*." It should also be noted that Article 231(1) on plea negotiating includes language that a minority of practitioners initially interpreted to mean that a defence attorney must be present during plea negotiations, namely, "*The suspect or accused **and** the defence attorney, may negotiate with the Prosecutor…*" (emphasis added). The Commentary to the BiH CPC, however, specifies that the provisions on appointment of defence counsel apply in the context of plea negotiating in the same manner as in all other proceedings, that is to say that Articles 45 and 46(1) of the BiH CPC on provision of defence counsel should be applied.[9] While the letter of Article 231 indicates that defence counsel is required for plea negotiations, the provisions on defence counsel do not provide as such.

Court monitors have observed numerous cases where plea agreements were reached without the assistance of counsel, which, given the specific circumstances of individual cases, may raise issues as to the fairness of the negotiation process. In 27% of plea agreement deliberation hearings monitored no counsel was present, while in 29% *ex officio* appointed counsel was present, and in 44% privately hired counsel was present. It is questionable whether nearly 30% of these unrepresented defendants were able to negotiate competently the conditions on pleading guilty.

Monitored hearings indicate a trend among the judiciary that defence counsel is viewed as unnecessary during plea negotiating and plea agreement deliberation hearings. While the lack of appointment of counsel is prevalent in all types of proceedings observed, as discussed in the previous Trial Monitoring Report, it is particularly striking in plea negotiating due to the significance of the rights waived. For example:

> On 6 September 2004 at a plea agreement deliberation hearing before the Prijedor Basic Court, the accused stated that he wished to hire a defence attorney but that he could not afford one. The Judge informed him that he was not obliged to hire a defence attorney and that mandatory defence was not applicable. The Judge did not inform him of the possibility of the appointment of an *ex officio* defence counsel. In the further course of the proceedings, the Judge asked him if he signed the agreement voluntarily and whether he was aware of all of the legal consequences of signing the plea agreement. The accused stated that he had pleaded guilty under pressure and that he had to sign the agreement. The Judge asked for clarification of this statement, and the accused repeated the same statement. The Prosecutor explained to the Judge that the preliminary hearing judge equally had difficulties in getting the accused to state his plea (he finally pleaded guilty at that time). The Judge went on with the proceedings and the verdict was issued the same day.[10]

This case illustrates that particular care is not given to inform defendants of their right to defence counsel, particularly the right to *ex officio* defence counsel on the basis of financial need. Due to the potential complexity of the negotiation process, prosecutors should be rigorous in informing defendants of their right to counsel in the "interest of justice", and the manner in which defendants can obtain the appointment of counsel before initiating plea negotiations. Judges must as well instruct defendants on their right to defence counsel, and ensure that *ex officio* defence counsel is appointed if the "interest of justice so requires." The equality of arms between the parties should weigh in favour of appointing *ex officio* defence counsel if there is any indication that defendants need counsel to understand or participate in the plea negotiation process.

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[9] Article 45(1) At the first questioning if suspect is mute or deaf, or when long term imprisonment may be pronounced; Article 45(2) At the time of pre-trial custody and throughout the pre-trial custody; Article 45(3) At the time the indictment is delivered for an offence where ten years or more custody may be pronounced; Article 45(5) In the interests of justice, due to the complexity of the case or the mental condition of the accused; Article 46(1) At the request of the indigent accused if three or more year sentence may be pronounced, or if the interests of justice so require.

[10] This example is also concerning in that the defendant appears to not have understood the plea agreement process, and indicated that he was under pressure to sign it, while the judge failed to adequately clarify these statements. The judicial role in determining that the agreement was entered voluntarily and consciously will be addressed in Section 3.

It would appear that some judge and prosecutors view counsel as unnecessary because defendants do not appear to be damaged by the lack thereof. In several cases it was quite apparent that the prosecutor was trying to protect the interests of the unrepresented defendant. The adversarial system, however, requires a different approach. Judges should not rely on prosecutors "assisting" unrepresented defendants, but should rather serve to protect defendants' rights by ensuring that defendants understand their right to counsel, and appoint *ex officio* counsel as necessary.

B. Equality of bargaining power between prosecutor and suspect

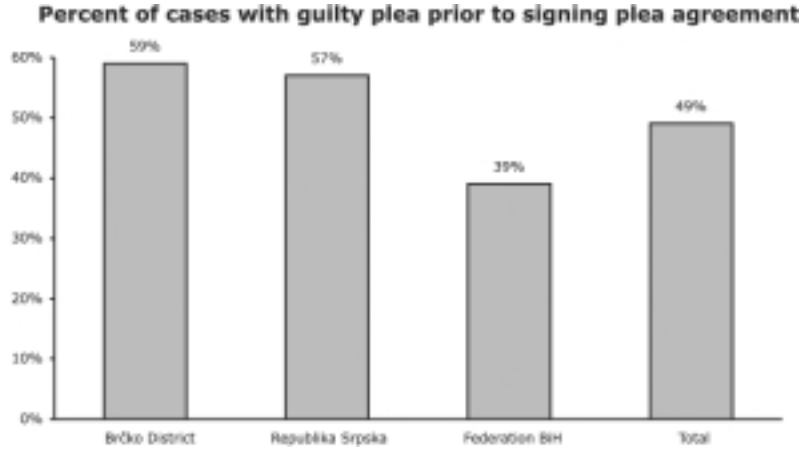
In approximately 5% of the monitored cases, plea agreements were concluded prior to the confirmation of the indictment. The wording of Article 231 of the BiH CPC does not indicate that this practice would be forbidden. Prosecutors in Mostar, Prijedor, Zenica, Banja Luka, Čapljina and Tuzla have, in a limited number of cases, signed plea agreements at this stage, and submitted to the court together with the indictment. Although the charges are not formalised yet in the confirmed indictment, the charges cited in the decision opening the investigation form the basis of negotiation.

Clearly suspects are in a potentially disadvantaged position in negotiating with prosecutors before the indictment is confirmed, due primarily to the lack of familiarity with the prosecutorial evidence. The equality of bargaining power between the parties at this stage of the proceedings is highly disputable. It is possible that sufficient evidence has not even been collected at the time of negotiating, or is in the process of being collected. In one monitored case, the unrepresented suspect signed the plea agreement 71 days before the indictment was confirmed. In fact, among the 17 suspects who concluded plea agreements prior to confirmation of the indictment, approximately half did not have counsel.

It should be emphasized that the suspect is only that—a suspect. A judge has not yet confirmed that a "grounded suspicion" exists against the person sufficient to confirm the indictment. Legal uncertainty regarding the charges should caution suspects against negotiating and signing plea agreements prior to the confirmation of the indictment. If the suspect wishes to negotiate on the conditions of pleading guilty, the advice of competent counsel should be sought to assist in the negotiation process and reviewing the evidence obtained to the extent the law allows. Although not required by law, in the interest of fair play and full disclosure, prosecutors should disclose all of the evidence against the suspect if the suspect wishes to sign the agreement prior to the confirmation of the indictment. In case the indictment is not confirmed, and the plea agreement had already been signed, the plea agreement would cease to be valid, and the guilty plea of no consequence in the further proceedings. From the suspect's perspective, however, there will rarely be an advantage to concluding a plea agreement prior to confirmation of the indictment, although preliminary negotiations may be underway.

C. Bargaining power after plea hearing

Plea agreements are most often negotiated following plea hearings, but prior to main trial—in 77% of the pleas monitored this was the case. Logically, the plea negotiation should follow a "not guilty" plea. Trial monitoring has observed, however, the concerning practice of defendants first pleading guilty, and then negotiating the plea agreement with the prosecutor.



As noted in the previous Trial Monitoring Report, this practice calls into question what defendants are bargaining on, and clearly significantly reduces defendants' bargaining power. It should be noted that the out of the total 49% of guilty pleas prior to signing the agreement, 52% of these defendants had no counsel. The general attitude of the parties, and even defence counsel, appears to see no harm in this practice. For example, at one plea agreement deliberation hearing, the Prosecutor stated in open court that he negotiated with the defendant because he pleaded guilty.

Encouraging departures from this practice have been noted in some areas. For example, trial monitoring in Bihać Municipal and Cantonal Courts shows that not one plea agreement was deliberated on after a guilty plea was entered. In Orašje Municipal Court and Zenica Municipal Court the Prosecutors' Offices have decided not to engage in plea negotiations when the defendant has already pleaded guilty, apparently based on oral instructions of the Chief Federal Prosecutor. In one case before the Orašje Municipal Court it was noted that the Prosecutor, prior to entering the court room for the plea hearing, informed defence counsel that he had been instructed not to enter into plea negotiations after a guilty plea. While this approach is commendable, a more systematic and transparent policy should be encouraged. State, Entity, and Brčko District Chief Prosecutors should formalise this policy in writing and distribute to all Prosecutor's Offices in their respective jurisdictions, as well as counterparts at the Bar Associations. Departures from this policy may certainly be warranted in exceptional circumstances, but generally, the equality of negotiating power between the two parties requires that defendants not give away their primary negotiating chip.

III. Presumption of innocence

Article 6(2) of the Convention provides that, "*Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law*." Similarly, Article 3 of the BiH CPC provides that, "*A person shall be considered innocent until guilt has been established by a final verdict*." This principle prevents the judicial authorities from saying or doing anything which might indicate that they believe that the person is guilty of an offence. Trial monitoring has documented a disturbing trend of judges violating this presumption in relation to plea agreement deliberations. Two such cases include:

> In a hearing before the Tuzla Municipal Court on 5 August 2004, the Judge first asked the unrepresented defendant, who had already pleaded not guilty, if he had discussed a plea agreement with the Prosecutor. The Judge then realised that he had been present at the crime scene investigation (apparently in the capacity of an investigative judge), which the Prosecutor confirmed. The Judge informed the accused that he can not preside over this hearing unless he reaches a plea agreement with the Prosecutor, which he advised him to do. A recess was called while the Prosecutor and defendant reached an agreement. Upon resumption, as there was no written plea agreement, the Prosecutor dictated the agreement to the Judge who wrote it in the minutes.[11]

> In a hearing on 28 September 2004 before the Prijedor Basic Court, the Judge asked the accused, who had pleaded not guilty at a previous hearing, whether he wished to change his plea and sign a plea agreement with the Prosecutor (as his co-defendant in the case had done). The accused agreed and the hearing was postponed.

These cases reveal a concerning practice of judges proposing to defendants to plea negotiate. Although these suggestions may be well-intentioned, they raise doubts about whether the judge has preserved the presumption of innocence which must be guaranteed to each defendant.

Mere sharing of information related to the possibility of engaging in plea negotiations may be done in a manner that protects the presumption of innocence:

> On 14 July 2005 at the opening of a plea hearing before the Bihać Cantonal Court, the Judge informed the accused of all of the various consequences of the guilty and not guilty plea, and as well informed the accused of the possibility of reaching a plea agreement with the Prosecutor.

This example shows that even-handedly informing the accused about the possibility to negotiate on the plea, at the same time as giving other instructions on rights prior to entering the plea, protects the appearance of the presumption of innocence. The judicial role is to inform defendants of their rights at the appropriate time, and not to encourage or discourage plea negotiations.

[11] This example also reveals other concerns, such as the propriety of such speedy negotiations without counsel, and that the agreement was not reduced to writing as required by law. It is questionable whether the defendant fully understood the plea agreement; similar issues such as these will be explored in Section 3.

IV. Conclusion

Judges and prosecutors should seek to ensure the right to a fair trial in the context of plea negotiating and deliberating on agreements. Trial monitoring reveals a disturbing trend of not informing defendants' of their right to counsel at plea agreement deliberation hearings, and/or, not appointing *ex officio* defence counsel, despite clear needs. This raises serious questions as to the equality of arms within the context of such negotiations and whether defendants had a reasonable opportunity to present their case. Judges must be particularly cautious in deliberating on plea agreements when defendants do not have counsel, and ready to appoint counsel as a need is identified. Signing plea agreements prior to confirmation of the indictment poses many risks for the suspect, and should be avoided. Negotiating plea agreements after already pleading guilty should also be avoided. Judges must exercise caution to not violate the presumption of innocence by proposing plea negotiations. Although often termed a "shortened proceeding", there should be no curtailing of essential fair trial rights, particularly with respect to the equality of arms and the presumption of innocence.

Recommendations

- Prosecutors should always convey in a detailed manner the provisions on appointment of defence counsel prior to initiating negotiations.
- Judges should inform defendants of their right to counsel and ensure that defence counsel is appointed as required by the interests of justice to preserve the equality of arms between the parties in the context of plea agreements.
- Prosecutors should be wary of negotiating with suspects prior to confirmation of the indictment, particularly unrepresented suspects. To ensure the highest respect for suspects' rights, prosecutors should adopt a general policy of not signing plea agreements prior to confirmation of the indictment. If a suspect insists on concluding a plea agreement, a full disclosure of the evidence against the suspect would be required to preserve the principle of equality of arms.
- State, Entity, and Brčko District Prosecutors should issue internal guidelines specifying the general prosecutorial policy of not engaging in plea negotiations after a guilty plea has been entered. This policy should be made known to defence counsel.
- Judges should seek to preserve the presumption of innocence by informing defendants of the plea negotiation possibility prior to entering the plea of guilty, or not guilty. Judges should never appear to suggest or discourage plea negotiations.
- Judicial and prosecutorial training, and any standardised training material developed on plea negotiating,[12] should include reference to fair trial standards which must be preserved in the context of plea negotiating, such as the right to counsel, the principle of equality of arms, and the presumption of innocence.

[12] At the time of writing, the High Judicial and Prosecutorial Council, in collaboration with the Judicial and Prosecutorial Training Centers of the Federation of BiH and the Republika Srpska, are developing standardised modules on a variety of topics within criminal proceedings. One module addresses plea negotiating.

SECTION 3

DELIBERATING ON PLEA AGREEMENTS

I. Introduction

The judicial role with regard to plea agreements begins at the moment the written plea agreement is submitted to the court, whereby the court schedules a plea agreement deliberation hearing. This section will look at who deliberates on plea agreements, as well as how plea agreements are deliberated on. A concerning number of divergent practices have arisen with regard to the judicial authority competent to deliberate on plea agreements, the manner of deliberating on the required elements, as well as the judicial authority to reject the agreement based on an unsatisfactory sanction.

II. Competency of the individual judge vs panel

Article 6(1) of the Convention provides that everyone has a right to a fair and public hearing before an independent and impartial tribunal established by law. Case-law of the European Court on the term "established by law" indicates that this is meant to ensure that the judicial organisation of a country is not based on executive discretion, but rather on parliamentary laws.[13] The organisation and functioning of the courts must have a legal basis, but the interpretation and proper application is largely left to the national courts, particularly the appellate courts.[14] Within the the context of plea agreements, the judiciary is presently divided as to who can deliberate on plea agreements.

By way of background, the national legal framework provides in Article 2(3) of the BiH CPC provides that,"*A criminal penalty with respect to the criminal offenses over which the Court has jurisdiction may be pronounced only by this Court...*" Article 24(2) of the BiH CPC on composition of the court provides that, "*An individual judge shall try all criminal cases for which the principal punishment of a fine or an imprisonment sentence of up to five (5) years is prescribed by law*." Different interpretations of these provisions, particularly the latter, have led to a fragmented practice nationwide with regard to whether preliminary hearing judges can deliberate on plea agreements and pronounce sentences when the crime falls under the functional competency of the panel.

A portion of practitioners holds that the preliminary hearing judge may deliberate on the plea agreement, and pronounce the sentence, regardless of whether the crime is within the competency of the panel. One of the more extreme examples was where a plea agreement on a charge of crimes against humanity (carrying a minimum sentence of ten years) was deliberated on by the preliminary hearing judge, and the verdict pronounced by the same judge. The proponents of this approach argue, among other things, that the correct application of the plea agreement provisions must be interpreted in light of one its fundamental purposes—to ensure the efficiency of the proceedings; therefore, one judge should oversee the plea agreement from beginning to end. Moreover, the small number of judges in most courts in Bosnia and Herzegovina makes it, in practical terms, difficult to form panels for plea deliberations. This approach, however, may raise a legitimate question as to whether the individual judge is competent under the national legislation to hear and pronounce the sanction. It appears that such challenge has not been raised to the appellate courts.

Other practitioners hold that the preliminary hearing judge can deliberate on the plea agreement, *i.e*., sustain it, but only the panel is competent to pronounce the sentence. This approach is an attempt to meet the requirements of the above cited Articles 2(3) and 24(2) of the BiH CPC, that is, to ensure that the criminal penalty is pronounced by the court which has jurisdiction over the criminal offence. This approach, however, is particularly illogical and cumbersome, as the substantive decision on sustaining the plea agreement has already been taken. The purpose of forwarding the case to the panel for sentencing is questionable, and may also raise questions as to the independence of the panel, given that the panel is in essence only rubber-stamping the decision to sustain the agreement of the preliminary hearing judge.

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[13] *Zand v. Austria*, application no. 7360/76, Commission's Report 12 October 1978, Decisions and Reports 15.

[14] *Bulut v. Austria*, judgement of 22 February 1996, Reports 1996-II, Vol. 5, para. 29.

A third approach, and more rare, preserves the competencies of the single judge and panel by requiring the panel to deliberate on agreements when the crime is within its competency. This means that if the plea agreement is submitted to the preliminary hearing judge together with the indictment, the judge should deliberate on the indictment in the usual manner, and then decide whether to deliberate on the plea agreement depending on if the crime is within the competency of a single judge or panel. If the latter, the judge should forward the case to the panel for deliberation and sentencing.

A further mechanism to ensure that the preservation of the functional competencies of the individual judge and panel does not unduly burden or delay the plea agreement process would be to reduce by law the instances where the panel is required. In this direction the OSCE has submitted a proposal to the Criminal Codes Implementation Assessment Team on Article 24(2) of the BiH CPC, which provides that the individual judge would be competent to deliberate on crimes where the sentence is up to *ten years*, as is presently the case in the Brčko District, where it has proved efficient.[15] If Article 24(2) were amended, panels would only be required to deliberate on the most serious crimes, such as aggravated murder, aggravated rape, genocide, and so forth. In the context of plea agreements, this amendment would further support the logic of the third approach by allowing individual judges to deliberate and sentence in the majority of plea agreements. Panels would only deliberate on plea agreements involving the most serious, and sensitive crimes, such as crimes against humanity, where arguably, a panel of three professional judges can guarantee the highest standards of impartiality.

III. Elements of deliberation

A. International and national legal background

The right to a fair trial as guaranteed by Article 6 of the Convention includes an integral right to participate effectively in the proceedings. Within the context of plea agreements, this means that defendants must understand the nature of the agreement, the rights given up, the obligations they may be bound to in the agreement, and the possible extenuating consequences of the plea agreement. Judges carry a great responsibility to ensure that no miscarriage of justice occurs by the resolution of the case via plea agreement.

Article 231(4) of the BiH CPC sets forth the elements judges must consider in deliberating on plea agreements, which are: that the agreement was entered voluntarily, consciously and with understanding; that the accused was informed of the possible consequences including satisfaction of the property claim and reimbursement of the costs of criminal proceedings; that there is enough evidence proving the guilt of the accused; and, that the accused understands that he waives the right to trial and may not file an appeal against the sanction. These elements can only be determined by establishing a dialogue between the judge and defendant which allows the judge to thoroughly explore all of the above elements. Trial monitoring shows that these elements are often not fully established.

B. Article 231(4)(a) and (c): Voluntarily, consciously and with understanding of all possible consequences

Trial monitoring has revealed an extremely divergent practice in relation to the manner of establishing the elements in Article 231(4)(a) and (c) of the BiH CPC, that is whether the accused entered the agreement voluntarily, consciously and with understanding of the possible consequences. The type of questioning and explanations provided to defendants range from very detailed, to quite sparse and lacking.

1. Comprehensive dialogue

In a limited number of cases, trial monitors observed judges establishing a comprehensive dialogue with defendants by posing a lengthy series of questions accompanied by the necessary explanations, and the resulting answers demonstrate that defendants completely understood the nature of the plea agreement and consequences. The series of questions, for example, includes inquiries into the person's mental state at the time of signing the agreement, whether the person was under the influence of any drugs or

[15] The Criminal Codes Implementation Assessment Team is a group of practitioners appointed by the BiH Ministry of Justice as the central body responsible to assess anad make recommendations on the implementation of the criminal law reforms.

alcohol at the time, whether the person was well-rested at the time of signing the agreement, whether the person consulted with an attorney prior to signing the agreement, whether the person wishes to presently consult an attorney, whether the person was under any pressure to sign the plea agreement, and so forth. Some judges at the Sarajevo Cantonal Court ask over 20 specific questions to establish that the accused understands the elements in Article 231(4)(a) and (c). For example:

> On 8 October 2004 at a plea agreement deliberation hearing before the Sarajevo Cantonal Court, the defendant, upon detailed questioning, responded in a confused manner as to whether he admitted to having committed the crime as described in the indictment. The Panel retired to deliberate on the agreement. Upon re-adjournment, the *ex officio* defence counsel insisted that the only problem was that the accused was confused and illiterate, but that the agreement is clear. The Panel decided to reject the agreement, explaining that the accused did not admit to having committed the crime as described in the indictment.

Positive practices such as the above are correct and consistent with the right to a fair trial. Following such detailed questioning, judges are able to establish with the greatest certainty that defendants have understood the full implications of the judicial process they confront. The practice of reading the plea agreement out loud, in addition to detailed questioning, has also been observed as a positive practice which leaves no doubt that defendants are familiar with its terms. Unfortunately, this detailed manner of questioning was rarely observed.

2. Average amount of dialogue

The most typical practice observed falls into an average category, where the essential questions are posed to defendants, however, in a rather mechanical and hasty manner. In these cases it is less certain that defendants have entered the agreement voluntarily and fully understands its implications. For example:

> On 31 August 2005 at a plea agreement deliberation hearing before the Bihać Municipal Court, the Judge asked the accused if he entered the agreement voluntarily and consciously. The accused replied positively. The Judge asked whether he was aware that he waived his right to trial, that he could have to reimburse the costs of the proceedings, and that no appeal against the criminal sanction is allowed. The accused responded affirmatively to all questions.

Here the judge did not engage the defendant in a dialogue, nor establish sufficient rapport with the defendant to ensure his full understanding of the process and its implications. In the above series of questions, it is notable that there was no question asked regarding the defendant's mental state at the time of signing the plea agreement, whether he was pressured in any way to sign the agreement, whether he had read the agreement before signing it, and so forth. The questions posed do not necessarily establish the required elements. This type of questioning may appear to fulfil the requirements of Article 231(4)(a) and (c), but serious doubts remain as to whether the defendant truly understood the plea agreement and its consequences. Trial monitors have also observed that judicial questioning and explanations tend to be less complete when the defendant is represented by counsel.

3. Little or no dialogue

In a certain number of monitored cases the questioning of the defendant was either incomplete or clearly showed that the accused had not understood the consequences of the plea agreement. For example:

> On 23 February 2005 before the Trebinje Basic Court, the Judge asked the accused if he concluded the plea agreement voluntarily, consciously and with understanding all possible consequences. The accused responded that it was reached voluntarily, but that he thought that it was a guarantee for his appearance at trial. The Judge did not ask the accused any further questions to clarify his response. He asked the accused if he needed a defence attorney. The accused said no. The Judge sustained the agreement and pronounced the sentence the same day.

> On 11 April 2005 before the Sokolac Basic Court, the Judge failed to ask the accused whether the agreement had been concluded voluntarily, consciously and with understanding, but entered anyway in the record that the accused answered positively. The agreement was sustained and the sentence pronounced the same day. The deliberation hearing and sentencing lasted twenty minutes, with the unrepresented accused not having uttered one word during the proceedings.

These examples reveal the most concerning practice, where the questioning was patently incomplete or responses indicated that the accused may not fully have understood the process and the consequences of the plea agreement.

C. Sufficient evidence

The plea agreement process risks that although innocent, defendants, for any number of reasons, may be induced to plea guilty. Judicial review of the evidence should serve as a safeguard to prevent this. Article 231(4)(b) of the BiH CPC requires that there is "enough evidence" proving the guilt of the suspect or accused. A similar standard is also contained in Article 230 of the BiH CPC regulating the guilty plea deliberation. This "enough evidence" standard is open to significant variations in interpretation. As a result, trial monitoring shows a varied approach from judge to judge. The "enough evidence" standard requires, at a minimum, for judges to review the collected evidence, and evaluate the evidence as sufficient. To preserve the equality of arms, judges must also ensure that defendants are familiar with the evidence.

A practice identified as effective requires judges to request prosecutors to present all the evidence, review and evaluate the documentation after presentation, then question defendants whether they are familiar with the evidence and whether they have any objections to the presented evidence. In other cases, prosecutors submit the evidence to the judge who reviews and evaluates the evidence in open court and summarises each piece of evidence.

Some of the most concerning practices observed include not reviewing the evidence at all prior to sustaining the agreement, or at least giving no indication in court that the evidence was reviewed, or mere reading of the evidence listed in the indictment, or not clarifying whether the defendant is familiar with the evidence. The following illustrates a concerning example:

> On 2 February 2005 before the Brčko District Basic Court, the Judge asked the defendant whether he was familiar with the evidence gathered by the Prosecutor. The defendant said that he was not familiar with the evidence and that he did not have defence counsel. The Prosecutor insisted that he was familiar with the evidence based on fact that the evidence was similar as in other criminal proceedings conducted against him where he was also present and where the evidence was presented. The Judge asked the defendant to give a statement with regards to the evidence. The defendant stated that he admitted to everything in the indictment. The defendant was not given the opportunity to review the evidence at the deliberation hearing. The criminal sanction was pronounced the same day.

It is highly unlikely that judges can determine that plea agreements were entered consciously when defendants appear not to be familiar with the collected evidence. While prosecutors should disclose the collected evidence during the negotiation phase, judges must ensure that defendants are familiar with the evidence at plea agreement deliberation hearings.

It would be remiss to not address whether the evidence supporting plea agreements must be legally valid. As a general principle, Article 10 of the BiH CPC provides that it is forbidden to extort any statement, and forbidden that any court decision is based on evidence obtained through a violation of human rights or evidence obtained through an essential violation of the Criminal Procedure Code. Consequently, a verdict following a plea agreement must also not be based on illegally obtained evidence.

For all of these reasons, a legislative amendment is necessary to ensure that judges review and assess all of the collected evidence to ensure that the Prosecutor has put forward enough legally valid evidence to ascertain the guilt of the accused. The equality of the arms between the defendant and the prosecutor requires the disclosure of evidence, and in this phase, this burden rests with the judge at the deliberation hearing.

IV. Judicial discretion

Judges have developed divergent practices as to whether they can reject plea agreements based on reasons other than those enumerated in Article 231(4) of the BiH CPC, such as, if they are not satisfied that the proposed sentence is appropriate for the criminal act. While a number of judges hold that they can reject the agreement if the criminal sanction is not appropriate for the crime, others assert that they can not interfere

in the sentence agreed upon by the prosecutor and defendant, and if the other positive provisions of Article 231 are fulfilled, they are obliged to sustain the agreement. This latter interpretation arguably infringes on the notion of the independence of the judiciary.

Judicial discretion requires that judges have the ability to reject a plea agreement for any grounded reason, including if the sentence is deemed not appropriate for the criminal act and perpetrator, or not in conformance with the positive provisions of the applicable criminal code. This is particularly important in light of the present provision on plea agreements requiring the judge to sentence the defendant as per the plea agreement—there is no possibility to, at sentencing, mete out a sentence other than the one contained in the agreement. Finally, it should be noted here that the plea agreement may include a precise sentence, or an agreed upon sentence range. Arguably the use of sentence ranges increases judicial discretion to sentence the defendant in the most appropriate manner in accordance with the purpose of sentencing. In practice, sentence ranges are rarely used in plea agreements.

A legislative amendment is required to ensure that an element of the deliberation includes determining if the criminal sanction is consistent with the applicable criminal code, including the provisions regulating the purpose of sentencing. Such amendment would reinforce the need for active judicial review and control of plea agreements.

V. Conclusion

To ensure that no miscarriage of justice occurs within the context of plea agreements, the judge, defence counsel, and prosecutor each have a distinct role to play. Defence counsel should competently and ethically inform their client of all possible consequences of the plea agreement prior to, and throughout, the negotiation process. Prosecutors should also competently and ethically negotiate with the accused and defence counsel. Concerning the judicial role, trial monitoring has registered inconsistent and often incomplete establishment of the required elements necessary to sustain plea agreements. Ultimately, the onus is on judges to ensure that defendants understand all of their rights and consequences flowing from plea agreements. Judge should also serve as the final arbiter of whether sufficient evidence exists to establish defendants' guilt, and that the agreed upon sentence is appropriate.

Recommendations

- A legislative amendment should harmonise the divergent practices as to whether the individual judge can deliberate on plea agreements and pronounce sentences for crimes within the competency of the panel. Further, a legislative amendment should reduce the crimes for which a panel is required.
- The Judicial and Prosecutorial Training Centres, or the High Judicial and Prosecutorial Council, should issue a standard guide of questions to be posed to the accused when deliberating on the plea agreement.
- Trainings for judges and prosecutors should emphasise the distinct judicial and prosecutorial responsibilities with respect to defendants, and their right to fully understand the plea agreement process and its consequences.
- A legislative amendment should make clear that the establishment of enough evidence requires judges to review and evaluate all of the obtained evidence. Judges should *ex officio* ensure that evidence supporting plea agreements was not illegally obtained.
- A legislative amendment should clarify that judges may reject plea agreements based on an inappropriate criminal sanction, *i.e.*, a sanction that is not compatible with the positive provisions of the criminal code, including the purpose of punishment.

SECTION 4

COOPERATION CLAUSES IN PLEA AGREEMENTS

I. Introduction

A plea agreement that includes an element of cooperation with the prosecutor on the part of the defendant is an often used mechanism in adversarial systems to gain greater information on other criminal suspects, and the eventual testimony against co-perpetrators and others involved in criminal activity. Although the criminal procedure codes do not regulate types of plea agreements, their very contractual nature presumes that the plea and criminal sanction may be negotiated under certain special conditions, including the defendants' cooperation. Indeed, trial monitoring reveals a number of instances of prosecutors' employing cooperation clauses, particularly in cases monitored in 2005. It is fair to suggest that the use of cooperation clauses in Bosnia and Herzegovina is on the rise as prosecutors become more familiar with this possibility and its potential advantages. The use of cooperation clauses is particularly important in serious criminal cases such as war crimes, trafficking, and organized crime. This section seeks to highlight two problematic issues observed in the use of cooperation agreements: the frequent lack of transparency of cooperation clauses, and lack of an enforcement mechanism within cooperation clauses, and more generally, plea agreements.

II. Cooperation clauses in serious crime cases

The merits of concluding plea agreements in extremely horrific and serious crimes are controversial, and a matter of much debate. Proponents of their use argue that plea agreements allow prosecutors to investigate and prosecute other criminals implicated in the same or similar crimes, as well as prevent vulnerable witnesses from having to testify. To date, plea agreements have been used in four war crimes cases prosecuted in Bosnia and Herzegovina. Among these four, at least from the information available through the written plea agreements, minutes from plea agreement deliberation hearings, and written verdicts, only one plea agreement required a degree of cooperation on the part of the accused. Plea agreements have also been used in trafficking cases, although as well with little evidence that the prosecutor obtained defendants' cooperation in other cases. Both of these types of crimes are conducive to the use of cooperation, as the perpetrator is almost never acting in isolation. Unfortunately, prosecutors appear to have missed an opportunity to obtain more information and prosecutions. Some commentators on the plea agreement process at the International Criminal Tribunal for the former Yugoslavia ("ICTY") have noted that plea agreements can have a snowball effect, with each agreement producing more evidence against others, and leading others to come forward as well. This has yet to be the case in war crimes and other serious crime cases in Bosnia and Herzegovina. Prosecutors should demand that admission to the most serious crimes committed in association with others should be accompanied by appropriate forms of cooperation in exchange for the reduced sentence.

III. Transparency of cooperation clauses and protection of defendant

Trial monitoring shows that a number of cooperation agreements were made known only orally to the court during the course of the proceedings, and never properly disclosed or submitted in writing. When cooperation clauses, or separate cooperation agreements, are not discussed in court, judges have not never verified whether defendants fully understood their obligations in connection with the cooperation clauses, and consequently, have not verified whether defendants entered the agreement "voluntarily and consciously", as required by Article 231 of the BiH CPC. This practice is extremely worrisome.

It appears that one segment of judges believes that cooperation clauses are an issue for prosecutors—their very existence, and any eventual enforcement difficulties—are solely the responsibility of prosecutors. Other judges hold that they must know of cooperation elements when determining whether to accept or reject the agreement. Both of these standpoints overlook the fundamental need for judges to establish that defendants are conscious of the full implications of the agreement, including any requirement to testify or provide information to the prosecutor. One asserted reason for non-disclosed cooperation agreements is to protect the safety of the defendant-cooperator. Plea agreement deliberation hearings, however, need not be open to the public—the prosecutor or defendant could request a closed hearing to deliberate on a sensitive plea agreement, or the part of the hearing concerning the cooperation clause could be closed for the public.

It can not be overlooked, however, that defendant-cooperators may be placing themselves at risk. In a recent Recommendation on the Protection of Witnesses and Collaborators of Justice of the Committe of Ministers of the Council of Europe member states are urged to design appropriate measures to protect witnesses and collaborators of justice.[16] The Recommendation reaffirms that defendant-cooperators should be provided with adequate support to ensure their testimony and personal safety. Prosecutors should always discuss the availability of witness protection measures as provided for in the Laws on Protection of Witneses under Threat and Vulnerable Witnesses when obtaining cooperation from defendants, particulary in sensitive criminal cases.

IV. Fulfillment of cooperation clauses

Jurisdictions which use cooperation agreements generally have the possibility of staggering the timing of deliberations on agreements and sentencing hearings, and also largely use forms of plea agreements that preserve judicial discretion as to the ultimate sentence imposed. This is not the case in the present legislation. Once the judge deliberates on the plea agreement, the law provides that within three days the sentence must be pronounced (it must be noted that the English translation is not perfectly clear on this point, and only indicates that the court must *schedule* the sentencing hearing within three days). Moreover, if the judge sustains the agreement, the prevailing interpretation of the law is that the agreed sanction must be pronounced by the judge. Thus, there is no room between the time of sustaining the agreement and sentencing for the judge to rule in a different manner, even if it came to light that the required cooperation had not occurred. As the law presently stands, there is little maneuvering room for the judiciary to ensure that cooperation clauses are fulfilled.

The lack of enforcement mechanism for cooperation clauses poses a real practical problem for prosecutors. A segment of prosecutors have adopted the approach of concluding the plea agreement with the defendant, but either not submitting it to the court, or submitting it but requesting the court to not schedule the deliberation hearing until a later date (after the cooperation clauses have been fulfilled):

> On 2 August 2004 the accused, represented by counsel, signed the agreement with the prosecutor which provided for the reduced sentence (three years suspended sentence with four years probation period), in return for his testimony against his other two co-defendants. The plea agreement included a clause that if the accused provides false testimony or violates any clause, the agreement would not be valid, and main trial proceedings would commence, and he could be additionally charged for false testimony and the disruption of justice. Upon the Prosecutor's request, the Court severed the proceedings for the defendant who had concluded the plea agreement, and he testified as the prosecutor's witness at the main trial of his former co-defendants. Following the defendant's testimony, the Court held the plea agreement deliberation hearing on 7 September 2004 and sustained the agreement.

This practice may raise several concerns. Most importantly, the judge has not sustained the agreement, and it could very well be rejected. In essence, the plea agreement is not effective, or binding on any party, until approved by the judge. The judge may well reject the agreement, despite the defendant having already provided information or testified. To counteract any misunderstanding on the part of the defendant, prosecutors must fully inform defendants of the fact that the plea agreement may not be sustained. Again, the need for defence counsel becomes even more glaring when cooperation clauses are being negotiated in the context of plea agreements. Additionally, the practice of delaying deliberation on plea agreements is only feasible when the intended cooperation should take place in a short time, as it would otherwise be inconsistent with the right to trial in a reasonable time to delay the conclusion of the case pending cooperation.

Defendants may also find themselves in a risky position if they cooperate, but the prosecutor decides that the cooperation was not satisfactory, and reneges on the plea agreement prior to the deliberation hearing. Arguably the duty of the prosecutor to maintain integrity and professionalism should prevent any misuse of the agreement, *i.e.*, to renege on the agreement in bad faith. A legitimate dispute between the prosecutor and defendant, however, may arise as to whether the defendant fully complied with the terms of the plea agreement. Although neither of the mentioned situations has been observed, both are feasible scenarios underlining the potential hazards resulting from the lack of development of this mechanism.

[16] Rec (2005)9E, adopted on 20 April 2005. A collaborator of justice is defined as any person who faces criminal charges, or who has been convicted, but who agrees to cooperate with the criminal justice authorities.

On the other hand, a real possibility exists that the defendant may not fulfill the cooperation clause once the agreement is sustained and verdict issued. Prosecutors have no grounds to appeal verdicts based on lack of enforcement of a specific provision in plea agreements, nor may the proceedings be re-opened based on these grounds. The current practice appears limited to including protective clauses in plea agreements, although with uncertainty as to how these protective clauses are enforceable:

> The Prosecutor and defendant concluded a plea agreement on 19 May 2005 that contained a cooperation clause to testify in another criminal proceeding, and a protective clause specifying that the Prosecutor would withdraw the agreement and continue criminal proceedings against the defendant if the obligations from the agreement were not fulfilled. On the same day, before the Čapljina Municipal Court, the Judge deliberated on the agreement, sustained it, and pronounced the verdict.

In what manner the Prosecutor would be able to withdraw the agreement and continue the criminal proceedings against the accused, when the plea agreement and verdict were pronounced the same day, remains uncertain, and within the present understanding of the positive provisions, unlikely.

One possible solution in cases where a suspended sentence is imposed is to allow the non-compliance with a plea agreement, *i.e.*, cooperation clauses, to be grounds to revoke the suspended sentence. Suspended sentences are imposed fairly commonly for a wide variety of crimes, as discussed further in Section 6, and according to OSCE trial monitoring findings, were used in approximately 30% of cases resolved with a plea agreement. Article 400 of the BiH CPC governing the procedure to revoke suspended sentences would have to be amended to this effect, but it could serve as a useful tool for prosecutors to ensure compliance with cooperation clauses, or other provisions of the plea agreement, such as payment of damages to injured parties.

Ultimately, a plea agreement is a contract, and an enforcement mechanism becomes particularly necessary when significant cooperation clauses are involved. Some jurisdictions which employ cooperation clauses allow criminal courts to apply basic principles of contractual law to enforce plea agreements. Over time, practitioners will need to develop enforcement mechanisms for cooperation clauses which are fair to all parties and consistent with the criminal procedure codes. Although this process may take some time and require amendments and/or additional practice guidelines, the interests of justice requires that if a defendant obtains a reduced sentence based on cooperation with the prosecutor, the court must have a mechanism to ensure that the defendant holds up his end of the bargain.

V. Conclusion

Cooperation clauses can be a valuable tool for prosecutors seeking to obtain information about and testimony against other suspects, and the infamous "big fish". Particularly in serious crimes, prosecutors should make use of cooperation clauses to the fullest. The use of these clauses, however, must also protect defendants' rights. The judicial obligation to determine that defendants have consciously entered plea agreements, and understand its full consequences, demands that cooperation clauses are an integral part of plea agreements, and subject to judicial review with defendants in court. The transparency of the plea deliberation process requires no less. Further, the judiciary should be aware of the need for defendant-cooperators to have their safety ensured through the use of witness protective measures.

The lack of enforcement mechanisms for cooperation clauses has created inconsistent practices and poses real problems for prosecutors and a great deal of uncertainty for defendants. The complexity of plea agreements with cooperation clauses underscores the need for the appointment of defence counsel in such cases. An elementary mechanism to enforce cooperation clauses is urgently needed. By increasingly using cooperation clauses in complex litigation and investigations, more sophisticated mechanisms will eventually need to be developed. Enforcement of cooperation clauses is not only a matter for prosecutors; judges as well play a key role in ensuring that defendants comply with their end of the bargain. An urgent re-assessment of the positive legislation is needed to craft an adequate solution to the enforcement of cooperation clauses.

Recommendations:

- The Judicial and Prosecutorial Training Centers or the High Judicial and Prosecutorial Council, in cooperation with the Prosecutors' Offices, should issue sample plea agreements showing how to effectively incorporate cooperation clauses into plea agreements.

- Internal guidelines from Prosecutors' Offices should mandate that cooperation clauses should always be submitted to the court in writing.
- Judicial and prosecutorial trainings should emphasize the judicial obligation to ensure that defendants consciously entered plea agreements and cooperation clauses by reviewing all terms of the plea agreement in court.
- Prosecutors should inform defendants who agree to cooperate of the availability of witness protection measures. Judges should also remain vigilant to the need to apply such measures. With plea agreements involving cooperation clauses, the presence of defence counsel should be required at all stages of the negotiations and further proceedings.
- A legislative amendment to Article 400 of the BiH CPC, "Procedure to Revoke the Suspended Sentence", should include non-compliance with plea agreements as a ground to revoke suspended sentences.
- The Criminal Codes Implementation Assessment Team should re-assess the positive provisions of the BiH CPC in light of the need to establish an enforcement mechanism for cooperation clauses and propose an adequate solution in the form of legislative amendments or guidance to practitioners.

SECTION 5

RIGHTS OF THE INJURED PARTY

I. Introduction

International human rights standard provide that the injured party should have access to proceedings to obtain redress for damages suffered in a manner that is efficient and fair. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("Basic Principles"),[17] and Recommendation (85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure of the Committee of Ministers of the Council of Europe[18] are among the most significant international documents prescribing that access to justice for injured parties in criminal proceedings must be ensured. Article 5 of the Basic Principles provides:

> "Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."

As a result, jurisdictions across the globe are increasingly focused on the role and rights of victims in the criminal justice system.[19] Bearing in mind the standards embodied in the above mentioned documents, this section will explore the injured party's position within plea negotiating proceedings, and the ability to seek and obtain compensation for damages when the criminal proceedings are resolved using plea agreements.

II. National legal framework

A. General legal framework for compensating damages

The national legal framework provides that injured parties may seek compensation in criminal proceedings by filing a claim for damages within criminal proceedings, referred to as the "property claim" within the national legal framework. Chapter XVII of the BiH CPC governs claims under property law and provides that the right to claim damages in criminal proceedings belongs to a person who is authorized to realize such claim in civil proceedings. Article 193 of Chapter XVII provides:

"(1) A claim under property law which has arisen due to the commission of a crime shall be deliberated upon the motion of authorized persons in the criminal proceedings if this would not considerably prolong those proceedings.

[17] Full text of the Basic Principles is accessible at: http://www.un.org/documents/ga/res/40/a40r034.htm.
[18] Recommendation (85) 11 adopted by the Committee of Ministers of the Council of Europe on 28 June 1985.
[19] For example, among others, the European Union has adopted a Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.

"(2) A claim under property law may pertain to compensation for damage, repossession of things, or annulment of a particular legal transaction."

Property law claims are further defined in the Law on Obligations as compensation of material (pecuniary damage) and non-material damage (pecuniary and non-pecuniary).[20] This Law presumes that any person who causes damage to another is obliged to compensate such damage unless he proves that the damage was not the result of his wrongdoings.

Damage claims may be submitted to the court until the end of the main trial, or until the end of the sentencing hearing (Article 195(2) BiH CPC), and within the verdict the court shall render a decision on these claims (Article 198(1) BiH CPC). In case of a guilty verdict, the court may award the entire claim, or partial claim, and refer the injured party to civil proceedings for the remainder. If the information before the court is not sufficient to establish the property claim, the court may refer the injured party to civil proceedings (Article 198(2) BiH CPC).

Concerning the role of prosecutors and judges, Article 197 of the BiH CPC stipulates that prosecutors are obliged to collect evidence and investigate all circumstances necessary to decide on property claims, while judges must question defendants in relation to the facts concerning the submitted claims.

B. Legal framework with respect to plea negotiating

With specific reference to plea negotiating, Article 231(4)(a) of the BiH CPC provides that courts, when deliberating on plea agreements, must ensure that defendants are informed of the consequences pertaining to the satisfaction of property claims. This essentially ensures that defendants are aware that the sentence is not the only consequence of the agreement, and that the court may rule on property claims in the verdict, or refer the claims to civil proceedings.

Article 231(7) of the BiH CPC provides that, "*The Court shall inform the injured party about the results of the negotiation on guilt.*" Practitioners have expressed some confusion about the precise meaning of the terminology "results of the negotiation". Given the other constraints of the plea negotiation provisions, this is most often interpreted as delivery of the verdict to the injured party. More specifically, if the court sustains the agreement, the court has only three days to hold the sentencing hearing, which is insufficient time to inform injured parties of the results of the negotiation, or summon injured parties to sentencing hearings. Upon receipt of the verdict, the injured party may appeal based on the criminal proceedings' costs or property claim.

III. Injured parties' position in plea negotiating in practice

Trial monitoring shows that injured parties' property claims are passively approached in the plea negotiation and deliberation process. The present legal framework, as described above, also does not support the inclusion of injured parties. In most of the cases observed, injured parties were not present at plea agreement deliberation hearings, and were apparently informed that the courts sustained the agreements by receipt of the verdict. Property claims are rarely addressed in plea agreements or verdicts; rather, verdicts usually refer injured parties to civil proceedings to resolve property claims. It should also be noted that property claims are rarely addressed in verdicts following main trial proceedings.

A. Prosecutorial role

The United Nations Guidelines on the Role of Prosecutors highlights the prosecutorial obligation to consider the views and concerns of victims.[21] Recommendation (2000) 19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System also underscores this principle, as well as the obligation to "*take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.*"[22] The present criminal procedure codes

[20] Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 45/89 and 57/89; Official Gazette of the Republic of BiH nos. 2/92, 13/93 and 13/94; and also later published in both entity Official Gazettes.
[21] United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August-7 September 1990.
[22] Recommendation Rec (2000) 19 on the Role of Public Prosecution in the Criminal Justice System adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

provide no legal obligation for prosecutors to inform injured parties of developments in the criminal case nor has any standardised practice nationwide emerged with regard to plea agreement negotiations.

Some prosecutors at Local Implementation Group meetings revealed that, if plea negotiations take place during the investigation, when the injured party is examined in the capacity of witness, they attempt to obtain the opinion of the injured party prior to finalization of the agreement. Even though this practice is not legally required, prosecutors expressed that they have a moral obligation, particularly in offences against life and limb, to do so. It is clear that not all prosecutors share this view, however. In several war crimes cases where a plea agreement was concluded, the injured parties were not contacted at all regarding the resolution of the case via the plea agreement. Full respect for victims' rights necessitate victim involvement in the plea negotiation process, particularly when the most serious and sensitive crimes are in question, such as war crimes, murder, and sexual assault.

A few rare cases were observed where injured parties were clearly included in plea negotiations:

> In a case involving murder, the Prosecutor, defendant, and defence counsel concluded a plea agreement on 26 October 2004. Prior to signing the agreement, the Prosecutor met with the injured party. At the plea agreement deliberation hearing held on 11 November 2004 before the Banja Luka District Court, the Prosecutor presented minutes from the meeting with the injured party as further evidence supporting the plea agreement. The injured party's legal counsel was also present and stated that his client agreed to the terms of the agreement. The plea agreement specified imprisonment and compensation to the injured party in the amount of 30,000 KM. The Panel sustained the agreement.

This case provides an encouraging example of plea negotiations where the injured party was involved in the process, and the accused was obliged to compensate the injured party for damages. This example shows that plea negotiations can contribute to the speedy and effective resolution of property claims, without injured parties having to initiate separate actions in civil proceedings involving additional costs and delays. Unfortunately, such a positive outcome with regard to the resolution of damages via plea agreements was rarely observed.

B. Judicial role

As noted previously, judges are often passive in resolving property claims during the plea deliberation process. This passivity can be attributed to a general reluctance to prolong judicial proceedings or plea agreements. Judges believe that it is both a conflict with the general principle of judicial economy that is at the heart of the plea agreement mechanism and the natural delay to the resolution of proceedings that calling the injured party to appear in the case would create. Regardless of such delays, judges clearly need to weigh the victims' interest in proportion to the policy concerns of a faster resolution of the proceeding. In most of the cases, the rights of the injured are not given enough priority. It is good to note, however, that in some monitored hearings injured parties were present at plea agreement deliberation hearings, a practice identified as supportive of injured parties' rights. This allows judges the opportunity to inform injured parties of their rights, to query injured parties regarding property claims if already submitted, or allows injured parties the opportunity to submit property claims prior to sentencing. The injured parties' legal position in the context of plea agreements would be enhanced through a legislative amendment requiring courts to summon injured parties to plea agreement deliberation hearings. In this manner courts would be assured that injured parties were properly informed of their rights and allowed an opportunity to submit property claims before sentencing, as provided for by law.

Trial monitoring has registered few cases where judges resolved property claims independent of plea agreements. In fact, judges appear unclear of their role with respect to property claims and the plea negotiation process, that is, whether they have the authority to decide on property claims if not already enumerated in plea agreements. In a few isolated cases the judge ruled on property claims independent of the plea agreement:

> On 24 November 2004 the Brčko District Basic Court issued a verdict finding the defendant guilty of damaging another's property. The plea agreement reached earlier did not specify any specific damage compensation. The verdict ordered the accused to pay the injured party (a private individual) the value of the damaged property in the amount of 1,900.00 KM.

Clearly, judicial authority and the positive provisions on property claims permit judges to rule on property claims independent of plea agreements. Even when claims are not addressed in plea agreements, providing effective remedies for injured parties in line with international human rights standards demands that judges adopt a more proactive approach to the resolution of property claims in the verdict.

IV. Conclusion

Trial monitoring shows that prosecutors and judges display a largely passive attitude in relation to including property claims in plea negotiations, or in rulings at the time of sentencing, and fail to use these opportunities to protect injured parties' rights in the most efficient manner. This approach is not in line with the victims' rights to obtain compensation in criminal proceedings. Prosecutors should contact injured parties prior to concluding plea agreements to ensure that they are aware of the negotiation process, to inform them of their rights with respect to the property claim, and to obtain precise information on any possible property claims. Courts should ensure greater respect for injured parties in the plea deliberation process by summoning injured parties to plea agreement deliberation hearings and by ruling on property claims whenever possible, even when beyond the scope of the plea agreement. In this manner, courts guarantee that injured parties' rights have been fully respected in the criminal proceedings.

In light of the human rights standards recognizing injured parties' rights in criminal proceedings the judiciary, and, particularly, prosecutors, should take all necessary steps to include compensation for damages suffered within the context of plea negotiations. This represents the most efficient and speedy resolution of property claims, and is consistent with the right of the injured party to have access to proceedings that are expeditious, fair, inexpensive and accessible.

Recommendations

- Prosecutors should take all steps to resolve injured parties' property claims within plea negotiations, and should keep injured parties informed of the outcome of negotiations.
- Judges should develop the practice of summoning injured parties to plea agreement deliberation hearings and should deliberate on property claims whenever the circumstances allow it.
- A legislative amendment should require courts to invite injured parties to plea agreement deliberation hearings, and the summons should include instructions on the right to file property claims.
- Judicial and prosecutorial training should highlight the international human rights standards supporting the victims' role and rights in criminal proceedings.

SECTION 6

SENTENCING PRACTICES

I. Introduction

One of the most controversial knots in the implementation of plea agreements concerns the low sentences agreed to by the parties and sustained by the courts, as well as divergent sentencing practices. Prosecutors find themselves for the first time seriously negotiating defendants' sentences, without the assistance of any guidelines or expected ranges. Judges as well have not established a uniform practice as to whether they can reject the plea agreement based on an inappropriate sentence (as discussed in Section 3). Understandably, faced with an entirely new mechanism, inconsistent practices have emerged. One of the fundamental principles of justice, however, requires that like cases are treated alike. Consistency in sentencing also fosters public trust in the judiciary. Recommendation (92) 17 on Consistency in Sentencing of the Committee of Ministers of the Council of Europe ("Recommendation on Consistency in Sentencing") sets forth a number of principles that member states of the Council of Europe should strive for in sentencing. These recommendations will be referenced in this section as relevant.[23]

Monitoring of over 300 plea deliberation hearings, and the use of a specialised database, has provided

[23] Recommendation (92) 17 on Consistency in Sentencing adopted on 19 October 1992.

the OSCE with the ability to collect and analyse information on sentences. Based on this information, this section intends to provide a preliminary overview of sentences resulting from plea agreements, thereby calling attention to the varied practices which indicate that greater harmonisation is necessary in the interests of justice. Strong judicial control of plea agreements is necessary to ensure that plea agreements do not hinder the fair administration of justice.

II. Background

The previous Trial Monitoring Report identified the problem of divergent sentencing practices and recommended:

> *The Entity Prosecutors Offices must develop internal guidelines on the range of sentences that may be proposed to the accuseds for specific crimes, to provide consistent sentencing under plea agreements for similar types of accuseds. The Entity Prosecutors Offices should instruct all prosecutors to adhere to these guidelines to ensure consistency and fairness in offering plea agreements.*

The OSCE has since met with both Entity Prosecutors to obtain their views on this particular recommendation. Both Prosecutors noted the overall positive contribution of plea agreements and its increased use, despite initial reluctance by the judiciary and public mistrust. With regards to issuing binding instructions to harmonise sentencing practices, both officials manifested their preference not to do so, expressing that given the variety of circumstances that might arise in each case, it is preferred to use informal guidelines and to exercise their supervisory role through a constant dialogue with the District or Cantonal Prosecutors.[24]

III. National legal framework

A. Punishment generally

The purpose and manner of punishing convicted persons varies extensively from country to country, and the theories and reasoning supporting any criminal code are not easily reduced to a summary. Nevertheless, by way of background, a brief overview of the underlying policies and mechanisms supporting the criminal justice system is necessary to place the remaining findings in context. Article 39 of the BiH Criminal Code defines that the purpose of punishment is to express the community's condemnation, to reform the perpetrator, to deter others, and to raise the public's awareness of the danger of criminal offences and of the fairness of punishing perpetrators.

The BiH Criminal Code prescribes that courts shall impose punishment within the lawfully provided for limits and taking into account all of the mitigating and aggravating circumstances, which are, among others: the degree of criminal liability; the motives; degree of damage; past conduct of offender; his personal situation; conduct after the commission of the offence; as well as other circumstances related to the character of the offender (Article 48 of the BiH Criminal Code). The court may impose criminal sanctions of a fine, community service, or imprisonment; and security measures, such as mandatory rehabilitation or ban on carrying out a duty, as well as a suspended imprisonment sentence with a probationary period.

1. Sentence reduction

For the majority of crimes specified in the criminal codes, the codes contain a sentence range, with the lower end of the range termed the "special minimum."[25] For example, the crime of abuse of office has a sentence range of six months to five years imprisonment (Article 220(1) BiH Criminal Code). The criminal codes also provide that the court may impose a punishment below the prescribed limits when legally possibly, and when the court determines the existence of "highly extenuating circumstances", this is referred to as punishment reduction (Article 49 BiH Criminal Code). This means that the sentence range as enumerated for each criminal offence may be further reduced (*i.e.*, below the special minimum). The further reduction, however, is also limited by Article 49 of the BiH Criminal Code. For the crime of abuse of office, by using the punishment reduction provisions, the sentence may be lawfully reduced to 30 days imprisonment.

[24] Prosecutors have the legally provided for possibility to issue binding instructions, as set forth in the respective Laws on Prosecutors' Offices.
[25] In case the lower minimum is not provided for a particular offence, the "general minimum" contained in Arti-cle 42(1) of the BiH CPC applies.

2. Suspended sentences

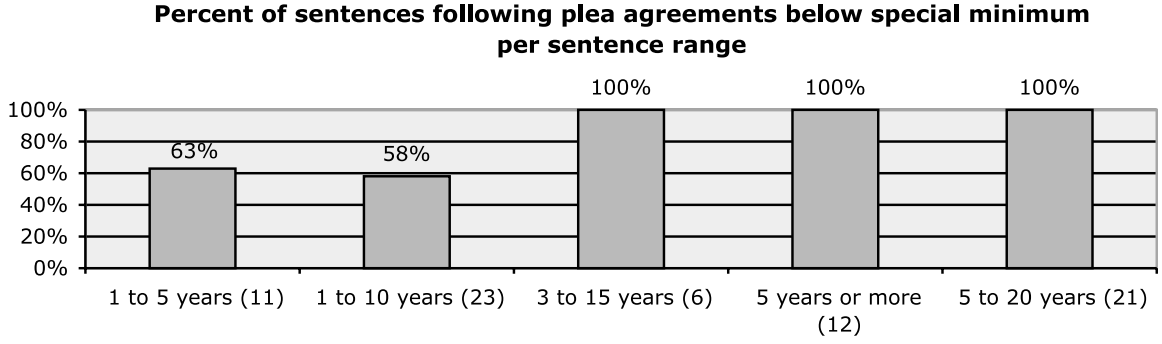
The criminal codes also provide for the possibility of a suspended sentence. The purpose of imposing a suspended sentence as identified in the BiH Criminal Code is to give to the perpetrator an admonition with a threat of punishment, which achieves the purpose of criminal sanctions by pronouncing the sentence without executing it (Article 58 BiH Criminal Code). A suspended sentence essentially creates a specified probationary period where the court issues a prison sentence but orders that it shall not be enforced if another crime is not committed in the specified period (from one year to five years range). Not all imprisonment sentences may be suspended (Article 59 BiH Criminal Code). In the above example, the crime of abuse of office may be reduced to 30-days imprisonment *and* suspended, thus, in fact, the lowest sentence possible is 30-days suspended imprisonment with a probationary period of one year.

IV. Sentencing based on plea agreements

With regard to plea negotiating, Article 231 of the BiH CPC specifically provides that the prosecutor may propose a sentence less than the minimum prescribed by law or a lesser penalty. This means that the prosecutor may propose a sentence of less than the special minimum, but within the punishment reduction limitations. Prosecutors regularly negotiate sentences either below the special minimum, *and* /*or,* use suspended sentences. These two mechanisms, according to the criminal codes as well as general principles of criminal legal theory, are not necessarily interchangeable, but rather may be applied in quite distinct circumstances.

A. Sentences below special minimum

Based on trial monitoring findings, nearly 48% of sentences imposed resulting from plea agreements were below the special minimum. A case has never been identified where the sentence fell below the punishment reduction limitations. The findings also show that the percentage of plea agreements where the sentence is below the special minimum drastically increases in proportion to the length of sentence prescribed for the criminal offence. The phenomenon is reflected in the following chart, which includes verdicts issued by the State Court, Brčko District, the Federation of BiH, and the Republika Srpska, the total sample size is located in parenthesis after the sentence range:

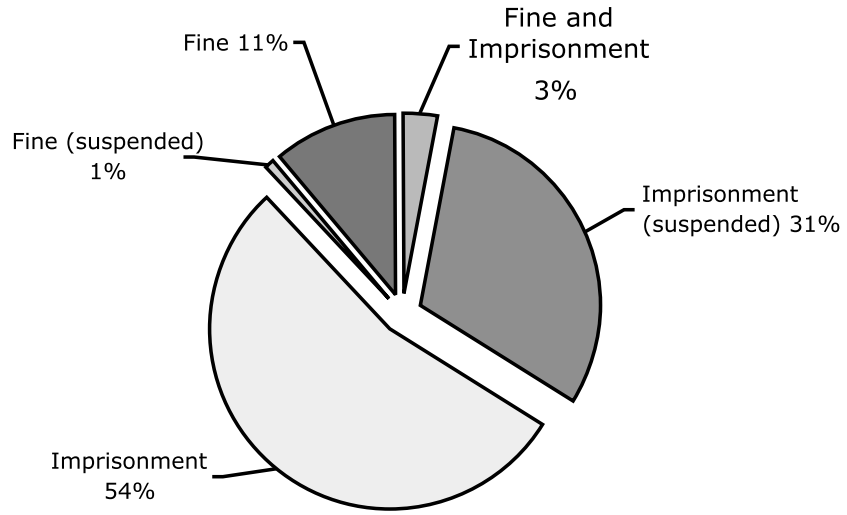


Essentially, where the sentence range in the criminal code is higher, the agreed upon sentence is more likely to be reduced below the special minimum using the reduction in punishment principle. For an overview of sentences meted out per criminal offence, please refer to the Appendix.

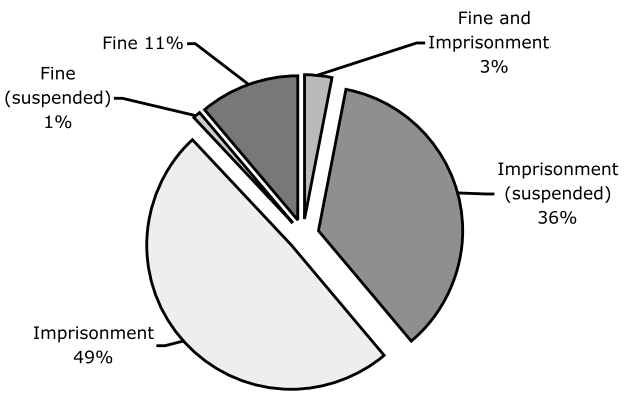
B. Use of suspended sentence

With regard to the use of suspended sentences, the figures available from OSCE trial monitoring show that 31% of the sentences imposed via the plea agreement are suspended imprisonment. The below pie graphs indicate the use of suspended sentenced in comparison with imprisonment and fine in sentences imposed as a result of plea agreements.

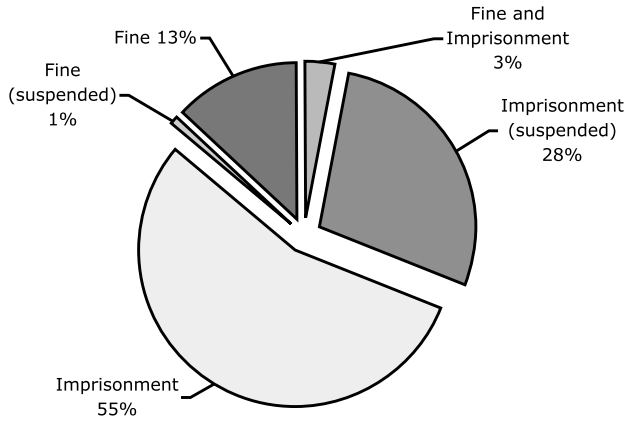
Type of penalties imposed following plea agreements including verdicts from State Court, Brcko District, Federation of BiH, and Republika Srpska



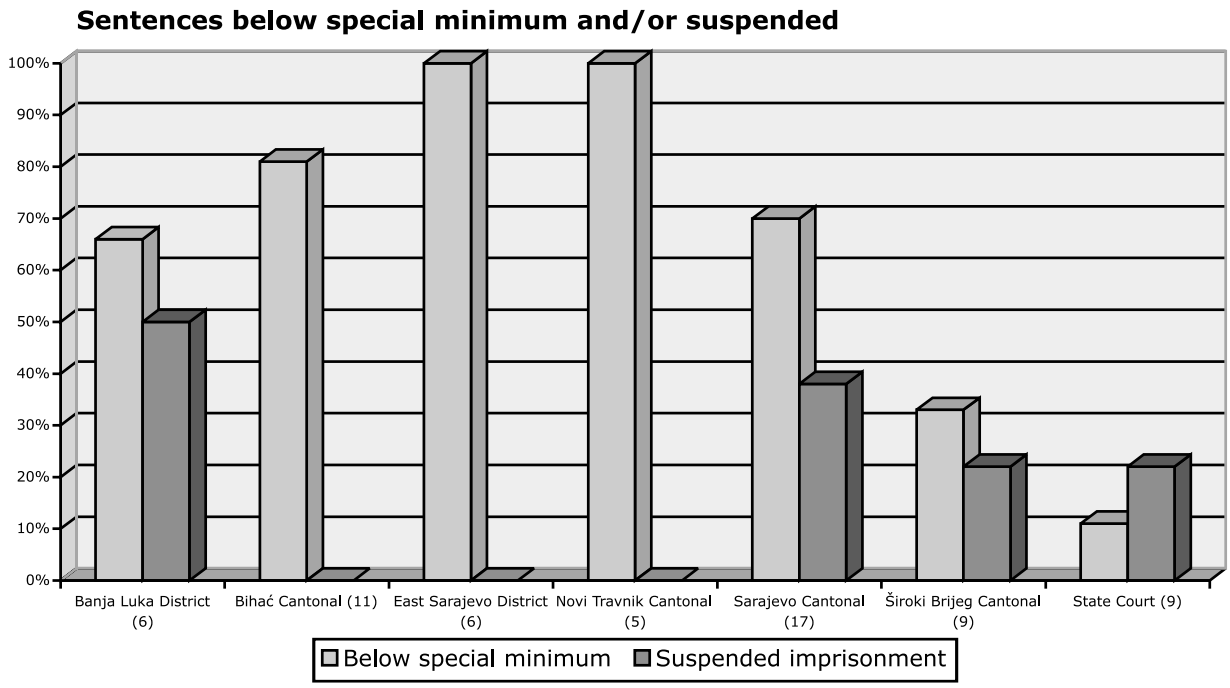
Federation of BiH

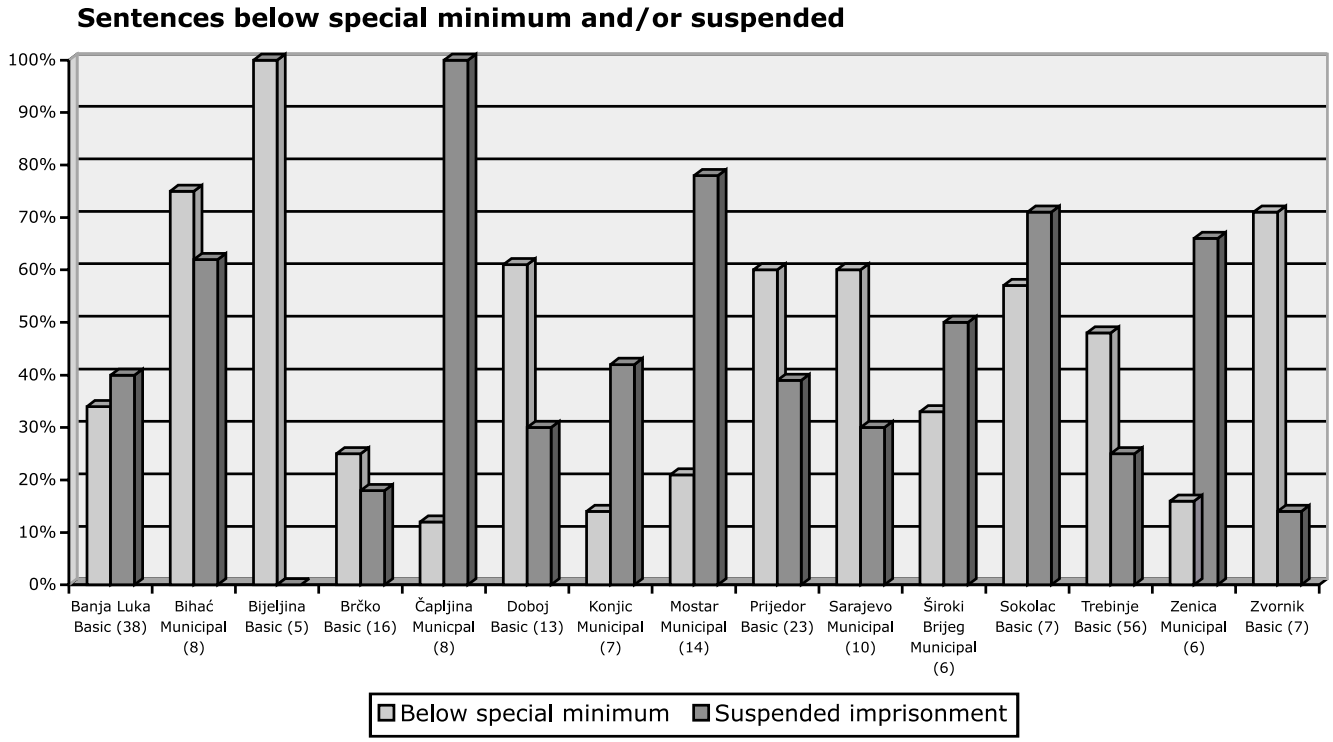


Republika Srpska



It is quite often the case that sentences reduced below the special minimum are also suspended. In the Federation, a total of 16% of sentences are both suspended and below the special minimum, while in the Republika Srpska this figure comes to 39% of sentences observed. To obtain a more comprehensive look at punishment reduction and suspended sentences, the following graphs incorporate instances where the criminal sanction may have been a sentence below the special minimum and/or suspended. The total sample size is included below the court's name.





These two graphs indicate the tendency of certain Prosecutor's Offices to either use sentence reduction, or suspended sentence in the plea negotiation process. For example, East Sarajevo District Court and Novi Travnik Cantonal Court almost exclusively used sentences below the special minimum instead of suspended sentences.

Prosecutors, in the context of plea negotiations, play a key role in creating consistency in sentencing. The Recommendation on Consistency in Sentencing urges that prosecutorial practices make a contribution to the overall consistency in sentencing. Nowhere is this Recommendation more applicable then in the context of plea negotiations in Bosnia and Herzegovina, where prosecutors negotiate the very sentence which may ultimately be imposed.

C. Judicial role

As discussed at length in Section 3, the judicial role in reviewing the agreed sentence, and the corresponding ability to reject the agreement based on an inadequate or inappropriate sentence, is vital to ensure consistency in sentencing. Despite the punishment's origin in an agreement between the defendant and prosecutor, the court is nevertheless obliged to support the verdict with reasoning, and to identify the mitigating or aggravating circumstances which lead to the imposition of the sentence, as well as the specific reasons supporting a sentence below the special minimum or the use of a suspended sentence. International standards, such as the above-mentioned Recommendation on Consistency in Sentencing, directs that courts should state concrete reasons for imposing sentences, and particularly emphasises the need to provide reasoning regarding imprisonment sentences, and sentences which go below or above the indicated range.

While the importance of this issue requires a more complete analysis, an initial assessment of the written verdicts issued following plea agreements would indicate that verdicts do not always provide a thorough justification and explanation of the reasons supporting the particular sentence imposed, and do not indicate with specificity why the sentence was below the special minimum or why it was deemed appropriate to issue a suspended sentence. Judges should take care to ensure that each verdict based on a plea agreement contains a particular and specific reasoning supporting the sentence, which may require asking additional information of the prosecutor and accused at the time of deliberation on the plea agreement.

V. Conclusion

Consistency in sentencing is a key aspect towards ensuring the fair administration of justice. Prosecutors should seek to ensure a more uniform approach in sentence negotiations by respecting the principles enshrined in the criminal codes, and by coordinating efforts among Prosecutors' Offices to establish harmonised internal guidelines. Prosecutors shall particularly seek to standardize the use of punishment reduction and suspended sentences. Judges should exercise their judicial authority in providing oversight on plea agreements by rejecting the agreement when the proposed sentence is not in accordance with the positive provisions of the criminal code, and by ensuring that verdicts issued based on plea agreements cite particular and individualized reasons for imposed sentences.

Recommendations

- Entity, State and Brčko District Prosecutors should foster cooperation and coordinate efforts to harmonize sentencing policies, and issue instructions by way of guidance.
- Judges must exercise strong judicial control over plea agreements to ensure consistency in sentencing, as well as provide particular and specific reasons for any given sentence in the verdict.
- Judicial and prosecutorial trainings should emphasise the distinct role of prosecutors and judges with respect to sentence negotiation and imposing sentences. Standardised training material developed on plea negotiating should include a statistical overview of plea agreements reached with respective sanction imposed to serve as general reference tool.

Annex

With the aim of assisting the judiciary in developing more homogeneous sentencing practices across the country, this Annex contains sentences issued per crime and whether the sentence resulted from a plea agreement. The reported information has been acquired exclusively through the OSCE trial monitoring programme.

Courts in the Federation of Bosnia and Herzegovina

Verdict for Aggravated Robbery, Article 289(1); sentence range: 1-10y		
Court	**Sentence**	**Plea Agreement signed**
Široki Brijeg Cantonal Court	3y 3m	Yes
Široki Brijeg Cantonal Court	3y 3m	Yes
Sarajevo Cantonal Court	9m	Yes
Široki Brijeg Cantonal Court	4m 29d	Yes

Verdict for Aggravated Robbery, Article 289(2); sentence range: 5-20y		
Court	**Sentence**	**Plea Agreement signed**
Bihać Cantonal Court	6y	No
Bihać Cantonal Court	5y 6m	No
Novi Travnik Cantonal Court	4y	No
Široki Brijeg Cantonal Court	3y 3m	Yes
Široki Brijeg Cantonal Court	3y 3m	Yes
Livno Cantonal Court	3y	Yes
Novi Travnik Cantonal Court	2y 10m	Yes
Novi Travnik Cantonal Court	2y 6m	Yes
Sarajevo Municipal Court	2y	Yes
Tuzla Cantonal Court	1y 6m	Yes
Sarajevo Cantonal Court	1y 6m	No
Sarajevo Cantonal Court	1y 4m	Yes
Sarajevo Cantonal Court	1y 2m	Yes
Zenica Cantonal Court	1y	Yes
Zenica Cantonal Court	1y	Yes
Zenica Cantonal Court	1y	Yes
Zenica Cantonal Court	1y	Yes
Mostar Cantonal Court	1y	No
Sarajevo Cantonal Court	1y	Yes
Sarajevo Cantonal Court	1y	Yes
Sarajevo Cantonal Court	1y	Yes
Sarajevo Cantonal Court	1y	Yes
Sarajevo Cantonal Court	1y	Yes
Sarajevo Municipal Court	6m	No
Bihać Cantonal Court	6m	Yes

Verdict for Aggravated Theft, Article 287(1); sentence range: 6m-5y		
Court	**Sentence**	**Plea Agreement signed**
Široki Brijeg Municipal Court	1y	No
Livno Municipal Court	9m	Yes
Mostar Municipal Court	8m	No
Široki Brijeg Municipal Court	8m (Suspended)	No
Sarajevo Municipal Court	8m (Suspended)	No
Bihać Municipal Court	8m (Suspended)	No
Široki Brijeg Municipal Court	7m	No
Široki Brijeg Municipal Court	7m	No
Orašje Municipal Court	6m	Yes
Goražde Municipal Court	6m	No
Goražde Municipal Court	6m	No

Zenica Municipal Court	6m	Yes
Bihać Municipal Court	6m (Suspended)	No
Bihać Municipal Court	6m (Suspended)	No
Bihać Municipal Court	6m (Suspended)	No
Čapljina Municipal Court	6m (Suspended)	Yes
Čapljina Municipal Court	6m (Suspended)	Yes
Čapljina Municipal Court	6m (Suspended)	Yes
Livno Municipal Court	6m (Suspended)	No
Livno Municipal Court	6m (Suspended)	No
Livno Municipal Court	6m (Suspended)	No
Široki Brijeg Municipal Court	6m (Suspended)	Yes
Sarajevo Municipal Court	6m (Suspended)	Yes
Široki Brijeg Municipal Court	4m (Suspended)	No
Sarajevo Municipal Court	3m 15d (Suspended)	No
Livno Municipal Court	3m (Suspended)	No
Široki Brijeg Municipal Court	3m	Yes
Široki Brijeg Municipal Court	3m	Yes
Zenica Municipal Court	3m	Yes
Sarajevo Municipal Court	2m	No
Široki Brijeg Municipal Court	1m	No

Verdict for Domestic Violence, Article 222(2); sentence range: fine or 1m-3y		
Court	**Sentence**	**Plea Agreement signed**
Goražde Municipal Court	1m (Suspended)	No
Goražde Municipal Court	3m (Suspended)	Yes
Goražde Municipal Court	2m (Suspended)	Yes
Livno Municipal Court	1000KM	No
Livno Municipal Court	250KM	No
Livno Municipal Court	200KM	No
Sarajevo Municipal Court	700KM	Yes
Sarajevo Municipal Court	400KM	No
Sarajevo Municipal Court	4m (Suspended)	No
Tuzla Municipal Court	3m (Suspended)	No

Verdict for Domestic Violence, Article 222(3); sentence range: 3m-3y		
Court	**Sentence**	**Plea Agreement signed**
Zenica Municipal Court	8m	No
Bihać Municipal Court	6m (Suspended)	Yes
Mostar Municipal Court	6m (Suspended)	No
Tuzla Municipal Court	4m (Suspended)	No
Ljubuški Municipal Court	3m (Suspended)	No
Ljubuški Municipal Court	3m (Suspended)	No

Verdict for Domestic Violence, Article 222(4); sentence range: 1-5y		
Court	**Sentence**	**Plea Agreement signed**
Sarajevo Municipal Court	1y	No
Sarajevo Municipal Court	1y (Suspended)	No
Bihać Municipal Court	1y (Suspended)	No
Sarajevo Municipal Court	6m	No

Verdict for Murder, Article 166(1); sentence range: 5y or more		
Court	**Sentence**	**Plea Agreement signed**
Tuzla Cantonal Court	13y	No
Bihać Cantonal Court	13y	No
Mostar Cantonal Court	10y	No
Mostar Cantonal Court	9y	No
Zenica Cantonal Court	8y	No
Mostar Cantonal Court	7y	No
Livno Cantonal Court	6y 6m	Yes
Mostar Cantonal Court	6y 2m	No
Mostar Cantonal Court	6y	Yes
Zenica Cantonal Court	4y	Yes
Bihać Cantonal Court	2y 6m	Yes
Novi Travnik Cantonal Court	1y 6m	Yes
Sarajevo Cantonal Court	1y 3m	Yes

Verdict for Murder, Article 166(2); sentence range: 10y or to life		
Court	**Sentence**	**Plea Agreement signed**
Bihać Cantonal Court	14y	No
Mostar Cantonal Court	10y	No
Mostar Cantonal Court	10y	No
Mostar Cantonal Court	10y	No
Novi Travnik Cantonal Court	7y	Yes

Verdict for Theft, Article 286(1); sentence range: Fine or 1m-3y		
Court	**Sentence**	**Plea Agreement signed**
Orašje Municipal Court	6m	Yes
Mostar Municipal Court	4m (Suspended)	No
Sarajevo Municipal Court	3m (Suspended)	No
Sarajevo Municipal Court	3m (Suspended)	No
Čapljina Municipal Court	3m (Suspended)	No
Mostar Municipal Court	2m (Suspended)	Yes
Čapljina Municipal Court	1m (Suspended)	No
Čapljina Municipal Court	1m (Suspended)	No
Mostar Municipal Court	1m (Suspended)	No
Livno Municipal Court	3000KM	Yes
Konjic Municipal Court	1000KM	Yes
Konjic Municipal Court	1000KM	Yes
Livno Municipal Court	1000KM	Yes
Orašje Municipal Court	750KM	No
Tuzla Municipal Court	700KM	Yes
Mostar Municipal Court	500KM	No
Čapljina Municipal Court	400KM	No
Sarajevo Municipal Court	350KM	No
Mostar Municipal Court	300KM	No

Verdict for Theft, Article 286(2); sentence range: Fine or 1m-6m		
Court	**Sentence**	**Plea Agreement signed**
Orašje Municipal Court	3m (Suspended)	No
Travnik Municipal Court	3m	Yes
Čapljina Municipal Court	2m (Suspended)	No
Čapljina Municipal Court	2m (Suspended)	No
Čapljina Municipal Court	2m (Suspended)	No
Čapljina Municipal Court	2m (Suspended)	No
Konjic Municipal Court	1m (Suspended)	No
Konjic Municipal Court	1m (Suspended)	No
Zenica Municipal Court	150KM	No

Courts in the Republika Srpska

Verdict for Aggravated Robbery, Article 233 (2); sentence range: 5-15y		
Court	**Sentence**	**Plea Agreement signed**
Doboj District Court	6y	Yes
Doboj District Court	6y	Yes
Bijeljina District Court	4y	Yes
Bijeljina Basic Court	3y	No
Doboj District Court	2y 6m	Yes
Bijeljina Basic Court	2y 3m	Yes
Bijeljina Basic Court	2y 3m	Yes
Banja Luka Basic Court	2y	Yes
Bijeljina District Court	2y	Yes
East Sarajevo District Court	2y	Yes

Verdict for Aggravated Theft, Article 232(1); sentence range: 1-8y		
Court	**Sentence**	**Plea Agreement signed**
Banja Luka Basic Court	4y	Yes
Bijeljina District Court	2y 3m	Yes
Doboj Basic Court	1y 6m	Yes
Banja Luka Basic Court	1y 2m	No
Trebinje Basic Court	1y 1m	Yes
Teslić Basic Court	1y	No
Banja Luka Basic Court	1y (Suspended)	No
Doboj Basic Court	1y (Suspended)	No
Prijedor Basic Court	1y (Suspended)	No
Prijedor Basic Court	1y (Suspended)	No
Prijedor Basic Court	1y (Suspended)	No
Prijedor Basic Court	1y (Suspended)	No
Bijeljina Basic Court	10m	Yes
Prijedor Basic Court	10m	No
Prijedor Basic Court	10m	No
Trebinje District Court	10m	No
Trebinje District Court	10m	No
Basic Court Sokolac Branch in East Sarajevo	10m (Suspended)	Yes
Doboj Basic Court	7m	No
Doboj Basic Court	7m	No
Trebinje Basic Court	6m	Yes
Prijedor Basic Court	6m	Yes
Doboj Basic Court	6m (Suspended)	No
Doboj Basic Court	6m (Suspended)	No
Sokolac Basic Court	6m (Suspended)	Yes
Doboj Basic Court	5m	Yes
Doboj Basic Court	5m	No
Bijeljina Basic Court	5m	Yes
Bijeljina Basic Court	3m	No
Bijeljina Basic Court	3m	No
Bijeljina Basic Court	3m	No
Bijeljina Basic Court	3m	No
Banja Luka Basic Court	3m	Yes
Derventa Basic Court	3m	No
Derventa Basic Court	3m	No
Trebinje Basic Court	3m	Yes
Srebrenica Basic Court	2m	Yes
Trebinje Basic Court	2m	Yes
Trebinje Basic Court	2m	Yes
Trebinje Basic Court	2m	Yes
Trebinje Basic Court	2m	Yes
Trebinje Basic Court	1m 15d	Yes

Trebinje Basic Court	1m 15d	No
Trebinje Basic Court	1m	Yes
Trebinje Basic Court	1m	Yes
Trebinje Basic Court	1m (Suspended)	Yes
Trebinje Basic Court	1m (Suspended)	Yes
Prijedor Basic Court	1500KM	Yes
Prijedor Basic Court	1000KM	Yes
Prijedor Basic Court	700KM	Yes
Prijedor Basic Court	700KM	Yes
Prijedor Basic Court	700KM	Yes

Verdict for Domestic Violence, Article 208(1); sentence range: Fine or 1m-2y		
Court	**Sentence**	**Plea Agreement signed**
Prijedor Basic Court	1y (Suspended)	No
Trebinje Basic Court	6m	No
Doboj Basic Court	6m (Suspended)	No
Doboj Basic Court	5m (Suspended)	Yes
Banja Luka Basic Court	5m (Suspended)	No
Prijedor Basic Court	4m (Suspended)	No
Banja Luka Basic Court	4m (Suspended)	No
Banja Luka Basic Court	4m (Suspended)	No
Sokolac Basic Court	3m (Suspended)	No
Sokolac Basic Court	3m (Suspended)	No
Sokolac Basic Court	3m (Suspended)	No
Doboj Basic Court	2m (Suspended)	No
Trebinje Basic Court	2m (Suspended)	Yes
Trebinje Basic Court	2m (Suspended)	No
Zvornik Basic Court	2m (Suspended)	No
Zvornik Basic Court	2m (Suspended)	No
Prijedor Basic Court	700KM	No
Prijedor Basic Court	700KM (Suspended)	No

Verdict for Domestic Violence, Article 208(2); sentence range: 3m-3y		
Court	**Sentence**	**Plea Agreement signed**
Sokolac Basic Court	3m	Yes
Trebinje Basic Court	2m (Suspended)	Yes
Zvornik Basic Court	1m 15d	No
Prijedor Basic Court	2000KM	Yes

Verdict for Domestic Violence, Article 208(3); sentence range: 1-5y		
Court	**Sentence**	**Plea Agreement signed**
Banja Luka Basic Court	1y (Suspended)	Yes
Trebinje Basic Court	1y (Suspended)	Yes
Doboj Basic Court	3m	No

Verdict for Murder, Article 148(1); sentence range: 5y or more		
Court	**Sentence**	**Plea Agreement signed**
East Sarajevo District Court	14y	No
Banja Luka District Court	8y 1434KM	Yes
Trebinje District Court	7y	No
Trebinje District Court	7y	No
East Sarajevo District Court	6y	No
East Sarajevo District Court	4y 2m	Yes
Banja Luka District Court	2y 6m 30,000 KM	Yes

Verdict for Theft, Article 231(1); sentence range: Fine or 1m-3y		
Court	**Sentence**	**Plea Agreement signed**
Banja Luka Basic Court	1y 2m	No
Basic Court Sokolac Branch in East Sarajevo	10m (Suspended)	Yes
Banja Luka Basic Court	6m (Suspended)	No
Trebinje Basic Court	5m	No
Bijeljina Basic Court	4m (Suspended)	No
Banja Luka Basic Court	3m (Suspended)	No
Prijedor Basic Court	3m (Suspended)	No
Novi Grad Basic Court	3m (Suspended)	No
Srebrenica Basic Court	3m (Suspended)	No
Srebrenica Basic Court	2m	Yes
Doboj Basic Court	2m	Yes
Trebinje Basic Court	2m	Yes
Srebrenica Basic Court	1m 15d	Yes
Trebinje Basic Court	1m (Suspended)	No
Doboj Basic Court	1m (Suspended)	No
Prijedor Basic Court	1m (Suspended)	No
Srebrenica Basic Court	1000KM	Yes
Trebinje Basic Court	700KM	Yes
Mrkonjić Grad Basic Court	500KM (Suspended)	No
Trebinje Basic Court	400KM	No
Prijedor Basic Court	300KM	No

Verdict for Theft, Article 231(2); sentence range: Fine or 1m-1y		
Court	**Sentence**	**Plea Agreement signed**
Vlasenica Basic Court	3m (Suspended)	No
Banja Luka Basic Court	3m (Suspended)	No
Banja Luka Basic Court	3m (Suspended)	No
Srebrenica Basic Court	2m (Suspended)	No
Trebinje Basic Court	200KM	No