

OSCE Mission to Bosnia and Herzegovina

The image shows a white flag with the OSCE logo and the text 'Mission to Bosnia and Herzegovina' printed on it. The flag is slightly tilted and appears to be part of a larger display of flags.

THE PRESUMPTION OF INNOCENCE:

INSTANCES OF VIOLATIONS OF
INTERNATIONALLY RECOGNISED HUMAN RIGHTS STANDARDS
BY COURTS OF BOSNIA AND HERZEGOVINA

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Introduction

A defendant's right to be presumed innocent is one of the cornerstones of the right to a fair trial. Already present in the "Declaration of the Rights of Man and the Citizen" of 1789,¹ the presumption of innocence is today enshrined in Article 6(2) of the European Convention of Human Rights (ECHR), which provides that "*everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law.*" The same principle is also incorporated in Article 14, Paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads: "*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*" In essence, the presumption of innocence means that a person charged with a criminal offence must be treated and considered as not having committed an offence until found guilty with a definitive verdict by an independent and impartial tribunal.

The mandate of the OSCE Mission to Bosnia and Herzegovina (hereinafter "the OSCE Mission" or "the Mission") includes monitoring the adherence to international fair trial standards in the country's criminal justice system. Within this mandate and in order to assist the judiciary in better complying with these international standards, this report analyses a selection of problematic instances in which respect for the right to be presumed innocent may have been compromised. The OSCE Mission is concerned that in some cases, in particular during the phase of entering a plea, Bosnia and Herzegovina's (BH) courts, largely at municipal and basic court level, fail to respect the right of defendants to be presumed innocent, which may result in unfair trials. This report also puts forward recommendations to relevant actors on how to address the concerns identified here.

The Presumption of Innocence in the Law

Bosnia and Herzegovina is a State Party both to the ECHR² and to the ICCPR, which represent two of the most important international instruments in the protection of the presumption of innocence.³ Moreover, according to the BH Constitution, the rights and freedoms set forth in the ECHR apply directly in BH and have priority over all other law.⁴

The presumption of innocence is incorporated into domestic legislation by Articles 3 of the BH, Republika Srpska (RS), the Federation of Bosnia and Herzegovina (FBH) and the Brèko Criminal Procedure Codes (CPC), all of which provide that: "*A person shall be considered innocent until guilt has been established by a final verdict.*"

International Human Rights Case Law

¹ Article 9 of the Declaration of the Rights of Man and the Citizen provides: "*As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.*"

² BH ratified the ECHR on 24 April 2002 and the ECHR entered into force as of 12 July 2002.

³ BH became a succession State Party to the ICCPR as of 1 September 1993.

⁴ Article 2, Constitution of Bosnia and Herzegovina, The General Framework Agreement for Peace in Bosnia and Herzegovina (initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995), Annex IV.

The European Court of Human Rights (the ECtHR) has examined a number of alleged violations of the presumption of innocence and consequently established standards for the practical application of this presumption. By stressing its crucial role within the right to a fair trial, the ECtHR has clearly spelled out that the presumption of innocence “*requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.*”⁵

The presumption of innocence applies throughout criminal proceedings, regardless of their stage. If the presumption of innocence is violated, in particular by an officer of the court, the entire notion of a fair trial becomes devoid of meaning.⁶ The principle of the presumption of innocence also comes into play when the accused refuses to enter a plea of guilty or not guilty and thus declines to declare his innocence or guilt. In that situation, the court should enter a plea of not guilty on behalf of the accused in order to preserve the presumption of innocence. This principle is implied in Article 65 of the ICC Statute as well as in Article 229(1) of the BH CPC⁷, which seek to balance the interest of efficient justice with the presumption of innocence and which seek to ensure that an innocent person does not erroneously plead guilty, even if such a provision is not part of the ICCPR or ECHR.

In an important case, *Minelli V. Switzerland*, the ECtHR found a violation of the presumption of innocence when a defendant was sentenced to pay court costs and compensation for expenses even though the case had been discontinued on account of time limitations, because the decision of the national Court concluded that in the absence of statutory limitations the case would “*very probably have led to the conviction*”⁸ of the applicant. The ECtHR deemed that the presumption of innocence would be violated if:

*“[...]without the accused’s having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.”*⁹ [emphasis added]

The ECtHR deemed the presumption of innocence so important that it ruled that this presumption should be respected not only by the judges, **but by all public officials**. In that regard, the ECtHR has noted:

“The Court recalls that the presumption of innocence [...] will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court

⁵ *Barbera, Masegosa and Ibarido v. Spain*, ECtHR judgment of 6 December 1988, para. 77.

⁶ As demonstrated by some of the cases quoted in the instant Report, the presumption of innocence is closely related to other rights of the defendant, such as the right to silence and the right not to incriminate oneself. However for the purposes of this report, the OSCE Mission will not elaborate on those rights.

⁷ Article 229(1) of the BH CPC reads: “If the accused fails to enter a plea, the preliminary hearing judge shall, *ex officio*, record that the accused enters a plea of not guilty.”

⁸ *Minelli v. Switzerland*, ECtHR judgment of 25 March 1983, para 37.

⁹ *Id.*

emphasizes the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.”¹⁰

In this case, the ECtHR found a violation of the presumption of innocence in the oral statement given by the director of the Paris criminal investigation department during a press conference, in which it was stated that “[t]he haul was complete and the people involved in the case were under arrest”. France, as the respondent State, was therefore found responsible and ordered to pay the equivalent of BAM 600,000 (in 1995) to the applicant in compensation of the pecuniary and non-pecuniary damages caused by the contested statement.

The ECtHR has in fact deemed the presumption of innocence so important that it has ruled it inappropriate even for the police to make statements implying that an individual is guilty of a crime before the guilt had been established in a due process. The actions of judges are, however, of particular importance since, in addition to their obligation to observe the presumption of innocence, they are also under an obligation to preserve the appearance of impartiality. To maintain public confidence in the fairness of a trial, judges must avoid even the *appearance* of bias versus the defendant.¹¹

Court Practice in BH

Warrants for the pronouncement of sentence and plea hearing mechanisms were introduced into BH criminal justice system to satisfy the requirement for speedy and cost-effective proceedings. Their use, however, was not meant to result in breaches of internationally established fair trial guarantees. Hence, the application of these institutions requires judges to strike a difficult balance between the requirements of procedural efficiency and the presumption of innocence. The Mission has observed some cases where the practice of the courts in Bosnia and Herzegovina appeared not to have achieved this difficult balance and thus to have fallen significantly below the ECtHR standards outlined above.¹² Concerns have arisen in particular with the conduct of plea hearings and hearings on warrants for the pronouncement of the sentence.

The Mission’s trial monitors have observed several attempts by judges to persuade defendants to plead guilty with the argument that it is in their best interest, that it would conclude the case in a speedy manner, and that the defendants would receive a milder punishment compared to the one they would receive if the case were to go to trial. In some extreme circumstances, the monitors have reported that judges were going through the

¹⁰ *Allenet De Ribemont v. France*, ECtHR judgment of 23 January 2005, para 35 and *Daktaras v. Lithuania*, ECtHR judgment of 10 October 2000, para 41. See also General Comment on Article 14 of the ICCPR, 13/21, & 7; the Committee stressed the duty on all public authorities to refrain from prejudging the outcome of a trial.

¹¹ In *Kyprianou v. Cyprus*, (ECtHR judgement of 15 December 2005, para 120), the ECtHR summarised its practice:

*“The Court has held for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. [...] Thus, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant’s case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused’s fears as to his impartiality (see *Buscemi v. Italy*, cited above, § 68). On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the matter on the basis of the subjective test (*Lavents v. Latvia*, no. 58442/00, §§ 118 and 119, 28 November 2002).”*

¹² The issue has already been partially presented in the OSCE Mission to Bosnia and Herzegovina report “Plea Agreements in Bosnia and Herzegovina: Practice before the Courts and Compliance with International Human Rights Standards”, published in January 2006.

evidence and expressing the opinion that the guilt of the defendant was clear and therefore that there was no real chance of acquittal at the main trial. Such pressure convinced the defendants to plead guilty. Excerpts from cases reported below illustrate the main concerns highlighted by the Mission's court monitors.

First, during a hearing for the warrant of the pronouncement of sentence in a basic court in eastern BH, the presiding judge offered seemingly coercive and incorrect advice to the defendant.

In the course of the hearing, the judge informed the unrepresented defendant that in the event he pleaded guilty, the procedure would be immediately terminated but that, on the contrary, in the event he pleaded not guilty, he would have to prove his innocence in the continuation of the criminal procedure.

In this case, owing to the undue pressure this statement created, suggesting that the burden of proof had shifted from the prosecution to the defence, the defendant entered a guilty plea. He was sentenced to three months imprisonment suspended for one year.

During another hearing for the warrant of the pronouncement of sentence in a municipal court in the northwest of the country, the judge influenced the defendant before he entered his plea.

Although the actual hearing did not take place because of the absence of the prosecutor, the judge proceeded to inform the unrepresented defendant about the criminal sanction proposed in the warrant and instructed him on the consequences of pleading not guilty. The judge repeated several times that the defendant should think well before pleading because the prosecution was in possession of evidence on the basis of which "you do not seem to be really not guilty".

Not surprisingly, two months later when the warrant for the pronouncement of sentence was rescheduled, the still unrepresented defendant pleaded guilty and was sentenced to three months imprisonment suspended for two years.¹³

In the following plea hearing before a basic court in northern Bosnia, concerns emerged with regard to the information provided by the judge to the defendant and her suggestion that the defendant should reach a plea agreement with the prosecutor.

The accused clearly stated several times that he was not guilty and that he could not plead guilty if he had not committed the criminal offence in question. In spite of that, the judge on several occasions tried to convince him to plea otherwise, by explaining that the easiest and simplest way to finish the procedure was to enter a guilty plea, in which case a suspended sentence would be likely imposed on him. The judge even read the statement of one of the witnesses for the prosecution and then informed the accused that at the main trial, the court might confront him with other witnesses for the prosecution. The judge also stated that a prison sentence could be imposed on him if he decided to go to the main trial.

In this case, the judge's insistent interventions seemed calculated to dissuade the defendant from continuing to contest the charges against him. Following prolonged negotiations the prosecutor and the defendant reached an agreement on a sentence of five months imprisonment suspended for one year.

¹³ In most cases involving warrants for the pronouncement of sentence the defendant would be without legal representation as the criminal offences for which defendants are charged do not require mandatory defence.

In other cases, judges and prosecutors appear to be collaborating in order to ensure that defendants reach plea agreements. The following is one such case registered in a basic court in northern BH.

After the defendant had pleaded not guilty, the preliminary hearing judge informed the defendant of the possibility of reaching a plea agreement with the prosecutor. The judge stated that if he signed a plea agreement he could be punished by a less severe sanction. Since the accused stated that he would not change his plea, the prosecutor also tried to convince him and advised him that, taking into consideration the evidence at her disposal, it would be better for him if he approached her office and negotiated on the conditions for pleading guilty.

Under the CPC, judges have the obligation to instruct defendants as to the legal possibility of entering into plea agreements and the consequences thereof. The CPC does not, however, specify at which moment during the procedure the judge should deliver such an instruction. In this particular case it is unclear whether the efforts of the judge and the prosecutor were truly co-ordinated in order to convince the defendant to plead guilty or whether the judge's statement was an attempt to instruct the defendant about the available legal options and to ensure that the proceedings would end quickly and efficiently. Regardless of the intention, this case and other similar instances create an impression that the defendant's options are very limited and that pleading not-guilty to a particular offence is nothing more than futile gesture. In that context, if the judge had opted to instruct the defendant on his rights, including the possibility of reaching a plea agreement at the very beginning of the hearing and before the latter entered a not-guilty plea, the impression of improper intervention could have been avoided.

The OSCE Mission monitors have also noted several judges formulating the request to plea in a biased manner. In some instances the incitement to plead guilty appeared very clear and explicit, while in other cases it was only implied in the words of the judge. In the following example from north-western BH, rather than requesting that the accused plead guilty, a municipal court judge formulated the question in a manner clearly meant to prompt the accused to do so.

During a plea hearing, the judge dictated the following sentence into the record of the proceedings: "I admit that I am guilty," and thereafter asked the accused: "Is it so?" The defence counsel --but not the defendant, who remained silent-- agreed with the statement. The defendant was sentenced to six months imprisonment suspended for two years.

Some judges also appear to be using arguments of judicial economy or the personal financial indemnity of defendants upon conviction to dissuade them from 'not guilty' pleas. Such violations of the presumption of innocence seemingly occurred in the following municipal court case from northern BH:

During a hearing for the warrant for the pronouncement of sentence, after the defendant had entered a 'not guilty' plea, the judge explained in detail all possible negative consequences of holding a main trial, such as bearing the cost of criminal proceedings and the possibility of receiving a more severe sentence than the one proposed in the warrant. Following these explanations the defendant asked the judge whether, in the event he pleaded guilty the case would be concluded within the same day. The judge replied affirmatively. Hence, the judge dictated into the record that the defendant had changed his mind and pleaded guilty. The verdict (a BAM 600 fine) was then pronounced the same day.

In this particular case there was no actual change of plea by the unrepresented defendant. The judge merely presumed that the defendant had changed his plea to 'guilty' because of his question whether a guilty plea would result in an expeditious conclusion of the case.

In all these cases, the judges' ambiguous intentions --presumably intended to make the best use of limited resources or to offer "good advice" to defendants-- combined to push the defendants to enter a guilty plea in an attempt to conclude the cases as quickly as possible. Such an "encouraging" approach occurs with greater frequency --though not exclusively-- in cases where either a fine or a suspended sentence is imposed on the defendant, possibly in the belief that no real and substantial harm would effectively occur. Such approach, however, is in clear contradiction with the presumption of innocence, for it effectively re-apportions the burden of proof from the prosecution to the defence.

As established by the ECtHR practice, the principle of the presumption of innocence necessitates that all the actors within the criminal procedure, and in particular the judge, refrain from any kind of behaviour or action that might suggest or hint at a pre-formed opinion of the guilt of the accused.

In evaluating what might influence the defendant, judges should also take into due consideration all the various circumstances of a case, including the personality of the individual facing trial. Such circumstances might include the following: whether the defendant was represented by a defence attorney; the level of education and the age of the individual facing charges; and the individual's previous experience in criminal proceedings. The moment which a plea is entered represents a stage when the risk of influencing the defendant unduly by persuading him to plead guilty is at its highest. If the judge creates the appearance of believing that the defendant is guilty, an unrepresented and inexperienced individual could view the possibility of pleading guilty to a crime and of receiving a suspended sentence or fine as preferable to facing a trial and to running the risk of being convicted and sentenced to a more severe punishment, regardless of whether the defendant had in fact committed the crime. Such cases underline the need to insist on the fairness of proceedings and the presumption of innocence as a means of instilling confidence in verdicts. Enforcing legal safeguards and insisting that fair trial standards are met is an absolute prerequisite to ensuring that the criminal justice system is truly capable of meting out justice to the real perpetrators of crimes.

In another recent case before a cantonal court in central BH, the accused was charged with fraud. After confirmation of the indictment, he had signed a plea agreement that provided for suspended sentence of one year's imprisonment as well as for the compensation of damages amounting to nearly BAM 400,000. At the deliberation hearing, however, the accused decided to withdraw his guilty plea, thus cancelling the plea agreement. Subsequently, the court recorded a 'not guilty' plea and scheduled the main trial. Upon the completion of the main trial, a guilty verdict was issued and the accused was sentenced to nine months imprisonment. At the sentencing hearing, the judge provided a brief oral explanation of the motivation of the verdict, stating that "[t]he signed plea agreement only confirms that the accused person's intent to commit the crime existed at the time of the commission of the offence".

By explaining that the defendant was found guilty because of a guilty plea that had been already withdrawn, the judge implicitly confirmed that the conviction was, at least partially, **not** based on the evidence presented during the main trial in the manner prescribed by the law. This constitutes a direct violation of the ECtHR standard. The judge's verbal

explanation of the verdict contravenes the explicit domestic legal provision prohibiting the admissibility of the guilty plea under such circumstances¹⁴.

Conclusions

These cases are representative of a larger problem and a worrisome trend. Violations of the principle of the presumption of innocence are serious because of the adverse effect they can have on the right to a fair trial. Adherence to this principle is not only a necessary and unavoidable condition for guaranteeing the right to fair trial, but it is also a fundamental tool for inspiring trust in the rule of law.

Behaviour by judges and prosecutors calculated to prompt guilty pleas in order to conclude cases more swiftly and painlessly for the defendant should be avoided, for this undermines the confidence of the defendant in the possibility of receiving a fair trial and in possibly even being acquitted of the charges. All parties involved in criminal proceedings should therefore take the greatest possible measure of care to avoid giving any indication or impression that an opinion on the guilt of the defendant has been reached before the verdict is final and binding. Particular attention must be given to the vocabulary that judges and prosecutors employ when approaching or advising defendants. This is especially important in the most delicate procedural phase, when the accused is requested to make a plea.

Recommendations

- Judges should at all time refrain from taking any action or making any statement implying guilt on the part of the defendant.
- During plea hearings or warrants for the pronouncement of sentence, judges should exercise due care while instructing defendants on the possibility of entering a guilty plea and its legal consequences. Judges should also be mindful while formulating the request to enter plea and avoid any kind of formulation that might encourage the entry of a guilty plea. Actions such as threatening a harsher sentence if the case goes to trial should be avoided.
- Judicial and Prosecutorial Training Centres (JPTCs) should develop standardized educational materials on plea hearings and warrants for the pronouncement of sentence, including clear reference to the necessity to preserve the presumption of innocence by avoiding any pressure during entering the plea. The JPTCs should also explore the possibility of developing a module on international human rights standards applicable in criminal proceedings, with special emphasis on the relevance of the principle of the presumption of innocence.
- The High Judicial and Prosecutorial Council (HJPC) should investigate cases where judges may have breached the presumption of innocence and ensure that the standards set forth in the Codes of Ethics for Judges and Prosecutors relating to respect of international human rights norms are properly maintained.

¹⁴ Article 231(6) BIH CPC reads: “Admission of guilt given before the preliminary proceedings judge, preliminary hearing judge, the judge or the panel is inadmissible as evidence in the criminal proceedings.”

