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## Introducing Plea Bargaining into Post-Conflict Legal Systems

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**RESEARCH MEMORANDUM**

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**Introducing Plea  
Bargaining into Post-  
Conflict Legal Systems**

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**MARCH 2014**

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**Drafted By:**

Cynthia Alkon, Associate Professor, Texas A&M University School of Law  
with Ena Dion, Program Officer, United States Institute of Peace

**RESEARCH MEMORANDUM**

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**Introducing Plea Bargaining into  
Post-Conflict Legal Systems**

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**MARCH 2014**

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**INPROL**

**Submitted By:**

Hans Sachs

**Drafted By:**

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**Note:**

All opinions stated in this consolidated response have been made in a personal capacity and do not necessarily reflect the views of particular organizations. INPROL does not explicitly advocate policies.

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# **I. Introduction And Overview**

## **a. Goal of this Guide**

Post conflict countries often consider introducing plea bargaining to address serious problems of case backlogs and prolonged pretrial detention. This memorandum is based on a query to the INPROL community seeking best practices and lessons learned from countries that have introduced plea bargaining into existing legal systems. Specifically, the query sought information on:

- Advantages and disadvantages of plea bargaining
- The legislative drafting process including who should lead and be included in the process;
- The content of legislation;
- Implementing legislation including training and education requirements and challenges encountered; and
- Monitoring and adjustments including how best to detect and solve problems in operationalizing plea bargaining

## **b. Introduction**

Criminal justice systems around the world face overwhelming caseloads and ever-increasing pressure to handle more. This pressure can be even more serious in post-conflict countries that face additional problems such as limited resources and fragile political environments. In overloaded criminal justice systems it may be difficult, if not impossible, to hold trials for every accused person in a timely way. As a result, countries are increasingly looking to alternative processes to handle criminal cases beyond traditional formal trials. Plea bargaining is frequently considered as a possible solution to problems of case backlogs, long periods of pretrial detention, and to help address other serious human rights abuses resulting from a poorly functioning criminal justice system. Plea bargaining may help to alleviate some of these problems. However, in countries that have not previously used plea bargains, this kind of reform is a serious change in the legal system and should be carefully considered in the overall context of the existing criminal justice system.

To aid post-conflict countries that are considering reforming their criminal procedure to allow for shortened processes, the memo will (1) define plea bargaining and another commonly used shortened process, abbreviated trials (2) explain the advantages of plea bargaining (3) discuss the disadvantages of plea bargaining including examples of unintended negative consequences of introducing plea bargaining (4) discuss best practices in the legislative drafting process, including the need for thorough assessment before engaging in legislative reform and specific legislative provisions drafters should

consider in the legislative drafting phase (5) this memorandum will conclude with a discussion of the importance of monitoring plea bargaining after adoption which may lead to possible further legislative reforms adjusting the law to respond to concerns arising from how plea bargaining is working in practice.

## II. Plea Bargaining and Abbreviated Trials

### a. Plea Bargaining

Plea bargaining is a process to negotiate the resolution of a criminal case without a trial, most often carried out between the prosecution and defense. Comparative analysis of plea bargaining illustrates a diverse array of practice. Plea bargaining may include charge bargaining, where the prosecution may agree to dismiss or reduce the criminal charges in exchange for a plea of guilty. Plea bargaining can also include sentence bargaining where the prosecutor will agree to a certain sentence which may include a fine or prison time, in exchange for a plea of guilty. Some plea bargaining systems allow both sentence and charge bargaining and some limit it to sentence bargaining. In addition to requiring the defendant plead guilty, some systems allow the prosecution to ask the defendant to cooperate in the investigation and prosecution of other crimes in return for reductions to the charge or sentence. While plea bargaining is often a process negotiated between the prosecution and defense, the judge usually needs to agree to the plea deal, and in some systems the victim of the crime may need to be informed. Furthermore, some systems allow plea bargaining directly between the defense and the judge, without prosecutorial involvement. If this type of plea bargaining is allowed the plea bargain is generally limited to a sentence bargain. Depending on the seriousness and complexity of the case, plea negotiations can be simple and fast or complex and drawn out.

#### *United States: Almost Anything Goes*

*The United States has used plea bargaining since the time it was a British colony. Plea bargaining came into use in a significant number of cases in the 20th Century, and by the 21st Century well over 90% of all resolved criminal cases in the United States are resolved through plea bargains. There are very few rules surrounding the use of plea bargaining either in individual states or at the federal level. The United States does not limit the kind of case that can be plea bargained, allowing it for the most minimal misdemeanor up to the most serious felony, including potential death*

*penalty cases. In general, a guilty plea must be voluntary and intelligent. This means a defendant should understand what they are doing in agreeing to a plea bargain, should agree to accept the plea deal, and acceptance should not be due to physical coercion or prosecutors promising a deal and then changing the terms after the defendant has agreed and entered a plea of guilty. There are also rules regarding how guilty pleas should be entered in court, specifying which rights a defendant must waive and the process of entering the plea. For example a defendant must state clearly on the record that they understand they are giving up their right to a trial. For all practical purposes there are no rules surrounding how plea deals are negotiated. Individual prosecutors may be limited by their office's or supervisor's policies, but these limits are not binding or generally applied. Prosecutors and defense attorneys are required to follow an ethical code of conduct, but these codes tend to be broadly worded and do not address plea bargaining directly. As a result, U.S. prosecutors enjoy wide latitude and power in the plea bargaining process and can agree to dismiss a case outright, or dismiss charges, allow an alternative sentence, such as a fine or community service, or negotiate a deal that includes a substantial amount of time in prison.*

## **b. Abbreviated Trials**

Another common other alternative process that allows for quicker case resolution in lieu of a trial is an abbreviated trial. An abbreviated trial is a shortened procedure whereby the defendant agrees to plead guilty; the judge reviews the evidence, including the defendant's guilty plea, and gives the defendant a statutorily determined reduced sentence upon a finding of guilt. What distinguishes the abbreviated trial from plea bargaining is that the law does not provide for or require negotiation between the prosecutor and the defense regarding either the charge or the sentence. Instead, in abbreviated trials, the criminal procedure code states what sentence reduction is given in exchange for a guilty plea and the defendant's waiver of his right to a full trial. Countries that allow for abbreviated trials often restrict the use of this process to less serious offenses.

### *Russia: Abbreviated Trials*

*Russia uses a system of abbreviated trials. The 2001 Russian Criminal Procedure Code (CPC) limited abbreviated trials to*

*defendants facing a maximum of five years imprisonment.<sup>i</sup> Russia seems to have adopted abbreviated trials due to concern that newly reintroduced jury trials for more serious crimes would require more court time and further crowd the courts.<sup>ii</sup> In 2003, the Russian legislature amended the CPC and expanded the list of cases that would be eligible for abbreviated trials to include charges with a maximum punishment of up to ten years imprisonment.<sup>iii</sup> The Russian CPC allows a judge to sentence the defendant to a maximum of two-thirds of the sentence allowable under the law if the case is resolved through an abbreviated trial.<sup>iv</sup> If the defendant, prosecutor, victim, or judge objects to an abbreviated trial, it will not proceed.<sup>v</sup> Officially there is no negotiation under the Russian abbreviated trial system, however it is likely some unofficial negotiation takes place to secure the approval of all parties to the use of an abbreviated trial in the particular case.*

## **IV. Advantages of Plea Bargaining**

Plea bargaining offers advantages in addition to the often-stated hope that it will reduce case backlogs and increase efficiency in the criminal justice system. Although this section will examine the advantages of plea bargaining in isolation, plea bargaining is rarely discussed as a stand-alone reform. Because of the way plea bargaining works and how interconnected it is to the rest of the criminal justice system, it is better if the question of whether to adopt plea bargaining is considered not in isolation but as part of the other proposed or already adopted changes to the criminal justice system. This holistic analysis of whether to adopt plea bargaining in a given country should include human rights concerns and the particular goals of the reform package. That being said, there are generally three major advantages to plea bargaining: it can ease docket overcrowding and case backlogs; it is a useful tool for complex prosecutions; and it allows for more creative, individualized, and possibly noncustodial sentences.

### **a. Overcrowded Dockets and Case Backlogs**

The most often cited reason for adopting plea bargaining is that it allows for efficient handling of cases. Trials, whether by jury or not, can take considerable time and resources. Plea bargaining can decrease the need for countless court appearances, hearings, and the days spent in trial. In some systems, such as in the United States, a plea bargain can be reached on the same day that the charges are filed. In the United States this first court appearance and the filing of charges often happens within forty-eight hours



of arrest. This represents a significant savings of time and resources to the court system, prosecutors, and individual defendants.

Greater efficiency not only saves resources, but can contribute to increased access to justice and greater public trust in the legal system. Justice delayed can be justice denied if defendants and victims are waiting for years for their “day in court,” particularly in less serious cases. Reducing court time spent on each case can reduce overall court backlogs and mean that the cases can be heard more quickly. People are more likely to respect and to use a justice system when they know their case will be resolved in a timely manner.

Moreover, increasing court efficiency can improve human rights practice. Overcrowded courts can create serious human rights problems, particularly in countries without developed bail systems or other procedures to release defendants from custody pending trial.<sup>vi</sup> In many systems the average criminal case takes months or years to go to trial, leaving the average defendant to spend that time in custody, even where the charges are not serious. This can lead to serious human rights violations on two fronts. First, where charges against the accused are minor, time spent in prison awaiting trial may exceed the maximum possible sentence for the alleged crime. Second, pretrial detention facilities in many countries have notoriously poor conditions such as overcrowding, poor hygiene, poor nutrition, disease, and lack of physical safety<sup>vii</sup> – all of which are made worse by large numbers of pretrial detainees. Processing cases more quickly can reduce the amount of time defendants spend in pretrial detention and ultimately the amount of time they spend in detention overall. This can have a substantial impact on reducing excessive detention, lightening the load on overburdened prison systems, improving poor prison conditions and reducing the time defendants spend waiting for trials.

*Republic of Georgia: The Fix May not be Quick:*

*Adopting plea bargaining is not necessarily a quick fix to the problem of case backlogs and prolonged pre-trial detention. The experience of the Republic of Georgia illustrates that it may take years to see reductions in case loads and backlogs. In 2003, Georgia amended its Criminal Procedure Code (CPC) to introduce plea bargaining as part of a package of anticorruption legislation. Under this law, pleas were used solely in corruption cases. This approach limited the impact that plea bargaining had on reducing case backlogs as well as leading to serious criticism of the practice. The press in Georgia actively*

*reported on the early cases, which included large payments by defendants to avoid criminal convictions. These high-profile cases created a perception that pleas were another form of corruption in an already corrupt legal system. This perception was extremely damaging to public confidence in plea bargaining. Georgia responded to these concerns with amendments to the law in 2004, and again in 2005. The amendments expanded the use of plea bargaining to other offenses and provided additional human rights protections. The revised law allowed prosecutors and defendants to engage in charge or sentence bargaining.*

*Today, the CPC does not limit plea bargaining to particular types of offenses or set a limit on maximum possible sentences. In 2005 the law was amended to prevent officials from accepting payments of fines alone to terminate criminal prosecutions. In the first two years after adopting plea bargaining 12.7% of criminal cases were resolved through plea bargaining. This number increased to over 50% five years after plea bargaining was adopted. Now, over ten years after its initial adoption, plea bargaining reportedly resolves 95% of all criminal cases, helping to reduce case backlogs and prison overcrowding.*

## **b. Tool for Complex Prosecutions**

Plea bargains can be a useful tool in fighting complex crimes - like corruption and organized crime - that so often paralyze post-conflict legal systems. Organized crime and corruption cases can be difficult to prosecute as many layers of lower-level players often shield ringleaders. If a prosecutor can convince a lower-level player to agree to testify against those in charge, the prosecutor may be able to gather enough evidence to successfully prosecute people higher up the chain of command. Where the law allows, plea bargains can be one of the most effective ways to encourage a lower-level player to testify. Following an arrest prosecutors can offer a reduced sentence or to drop the charges entirely in exchange for incriminating testimony, information, or other forms of cooperation. For example, U.S. sentencing guidelines allows cooperating witnesses to get a reduced sentence in exchange for cooperation,<sup>viii</sup> and a significant number of defendants in the federal system take advantage of this.<sup>ix</sup>

Where plea bargaining laws make this tool available, prosecutors may be slow to use it. For example, laws adopted in Bosnia and Herzegovina and

Georgia allowed prosecutors to offer better deals to defendants who agreed to cooperate. In both countries prosecutors were initially hesitant to use plea bargaining in this way, but its use grew over time. In Bosnia, use increased as prosecutors gained familiarity with the advantages of using cooperating witnesses to build complex cases.<sup>x</sup> Georgia, as in many places, faced the additional barrier of a cultural bias against “snitching.” However, in recent years, Georgia seems to have overcome this bias. This may be due, in part, to changes in the law that limited possible non-custodial sentences. This has meant agreeing to cooperate is often the only way for defendants to avoid prison time.

### **c. Creative, Noncustodial, and Individualized Sentences**

The third reason for introducing plea bargaining is one that is rarely discussed but is perhaps its greatest value: it may provide greater flexibility in sentencing, allowing the prosecution and defense to construct more individualized sentences through the informal negotiation process. If the specific plea bargaining system does not limit the negotiation parameters, and if the particular legal system allows for it, it is possible that those within the criminal justice system will be able to use plea bargaining as a way to innovate and use alternative sentencing.

#### *United States: Innovative Sentencing through Flexible Plea Bargains*

*Due to the lack of formal rules in plea bargaining, all that is needed to try a new approach in the U.S. criminal justice system is for professionals in the system agree to it. This means that professionals can agree to try a new approach without waiting to have the law changed to specifically allow for it. The best example of this is the development of problem-solving courts such as drug courts, veterans’ courts, and mental health courts. Problem solving courts are a combination of counseling and punishment.<sup>xi</sup> The first drug court started in Dade County, Florida, in 1998 out of the collective frustration of several judges, prosecutors and the public defender with the traditional criminal justice system’s response to drug addiction. Currently, drug courts are the fastest growing form of alternative dispute resolution within the U.S. criminal justice system. These courts would not have been able to develop as easily without the flexibility allowed by plea bargaining. Due to plea bargaining, there was no need to wait for new legislation before starting the first*

*drug court. Being able to try new approaches without legislation has also made the process of passing legislation easier as these courts often have established a track record that can then be brought to the state legislature to explain the value of establishing of drug courts or other problem solving courts. This advantage may not be so easily realized in systems with sentencing guidelines or that mandate prison sentences or otherwise limit the possibility of using alternative sentences.*

Increasing flexibility in sentencing has clear benefits, discussed in more detail in the Potential Penalties section below. However, it may be a poor fit in some legal cultures. Some legal systems, including many civil law systems, place a high value on treating defendants consistently. These systems may intentionally allow less variation and actively discourage individualized sentencing. Where this is true, it is likely that advocating plea bargaining on the grounds that it will allow for creativity in sentencing, or a more holistic approach to punishment, will be viewed with great suspicion by legal professionals.

## **V. Disadvantages of Plea Bargaining**

In general, arguments against plea bargaining do not claim that the above stated advantages are overstated or incorrect, but rather that there are possible serious, negative unintended consequences that may arise if plea bargaining is introduced. Plea bargaining cannot be separated from the legal and political system into which it is introduced and the informal, unregulated nature of plea negotiation makes the practice vulnerable to abuse in the context of weaker legal systems. Countries facing larger governance and rule of law deficits like widespread corruption, poor respect for human rights, or lack of independence in the judiciary may find that plea bargaining reflects, and in some cases amplifies these problems.

Experience in other countries has identified several specific unintended consequences resulting from adopting plea bargaining, including disparate sentencing; penalizing defendants who go to trial; violations of defendants' rights; encouraging coercion of confessions; contributing to a negative public perception of the legal system; plea bargaining's failure to focus on truth-telling; possible failures to implement the new process; and how plea bargaining may work alongside informal justice processes. Serious consideration should be given to which unintended consequences are most likely given the conditions in the particular country and what measures can

be taken to minimize the negative unintended consequences if plea bargaining is introduced.

### **a. Disparate Sentencing**

Plea bargaining is based on informal negotiations. For plea bargaining to function, prosecutors need to have the discretion to decide when to offer plea bargains and what the offer should include. This can lead to different legal outcomes for otherwise similarly situated defendants. Some variation in sentencing is inevitable, even where all parties have followed the law and acted in good faith in negotiating pleas. However, plea bargaining can be used to cover disparate sentencing due to systemic problems like political interference in the legal system or corruption.

Regardless of the underlying causes, discrepancies in sentencing can give rise to perceptions of an unfair or unjust legal system. This is especially problematic in post-conflict countries where divisions between groups are deep and tensions among them are high. If individuals from powerful groups get better plea deals than those in less powerful groups it can cause the less powerful groups to see the justice system as biased against them or unfair. Where disparate sentencing is a concern, legislation can reduce prosecutorial discretion by limiting the amount that sentences may be reduced, or limiting plea bargaining to sentence bargaining alone, rather than allowing prosecutors to negotiate charges.

### **b. Trial Penalty**

Where criminal codes contain high potential sentences, a defendant who chooses to reject a plea deal and go to trial faces a substantial risk that, if convicted, they will receive a significantly heavier penalty than if they had taken the plea deal. This “trial penalty” is a common criticism of plea bargaining as practiced in the United States. While supporters of plea deals consider a lower sentence to simply be a justifiable “inducement” or “reward” to encourage defendants to plead guilty, critics say it creates a coercive atmosphere for plea bargaining. This is particularly worrisome for innocent defendants who may be discouraged from exercising their right to have their case heard in a full trial.

The potential for coercion and other problems posed by a trial penalty may be addressed at least in part in the legislative process. For example, plea bargaining legislation could limit how much prosecutors can reduce a sentence as part of a plea bargain. This is similar to the approach taken by countries that have adopted abbreviated trials rather than plea bargaining. Limiting use of plea bargaining to less serious offenses that carry lower

possible sentences would also help to prevent the trial penalty. Another approach could be for plea bargaining legislation to require that the sentence offered in a plea negotiation act as a cap, setting the maximum possible sentence at trial.<sup>xiii</sup> However, reformers should be aware that attempts to remedy “trial penalties” may themselves have unintended consequences. Using a plea bargaining offer as a sentence caps, for example, may reduce in practice how much the discount prosecutors offer in negotiations, as they know that plea offer will become the maximum sentence after trial.

### **c. Violations of Defendants’ Rights**

Post-conflict countries can find it challenging to guarantee basic trial rights to criminal defendants. Countries introducing plea bargaining risk further entrenching currently existing bad practices unless the introduction is done with a full understanding of the most commonly violated defendants’ rights and with a realistic plan and procedures in place to ensure those rights are not further violated through the plea bargaining process. Pitting trained prosecutors against defendants with little legal knowledge in an informal plea negotiation can put a defendant in a vulnerable position. Recognizing this, most plea bargaining legislation contains some protections for defendants’ rights – most commonly requiring judges to ensure that defendants understand and voluntarily agreed to the plea.

However, for a variety of reasons from unfamiliarity with the law to political interference, judges and prosecutors may not carefully observe these protections. For this reason, it is important that defendants are represented by a lawyer in the plea bargaining process. Protections should be included in legislation and resources should be put into place to guarantee the right to a lawyer and that the lawyer has a meaningful role in the plea bargaining process.

Although plea bargaining can be practiced in a way that respects defendants’ rights it is important to note that even the best written plea-bargaining legislation and access to defense counsel cannot correct systemic problems. It is unrealistic to expect a criminal justice system that marginalizes defense counsel or fails to adequately protect defendants’ rights at other stages of the proceedings to not have the same problems in the plea bargaining stage. There is no reason to expect safeguards written into plea bargaining legislation alone to protect defendants in criminal justice systems suffering from these systemic problems.

*Bosnia and Herzegovina: Rights Violations in Plea Bargaining*

*In 2003, Bosnia and Herzegovina adopted a new Criminal Procedure Code (CPC) moving from an inquisitorial system to an adversarial system, thereby changing the role of lawyers and judges.<sup>xiii</sup> The drafters of the new CPC apparently added plea bargaining primarily to address case backlogs and court overcrowding. Article 231 of the CPC specifically allows negotiation between the accused, the defense lawyer, and the prosecutor on the “conditions of admitting guilt.” Article 231(2) of the CPC allows the prosecutor to “propose a sentence of less than the minimum prescribed by the law.” Article 231(4)(a) of the CPC requires the court to “ensure” that there is sufficient evidence and that the accused enters into the plea “voluntarily, consciously and with understanding.” The Code did not limit plea bargaining to any particular offenses but did limit it to sentence bargaining. The court was also required to notify the victim about the plea deal.*

*As the new code was implemented, monitoring of plea bargaining revealed that problems present in the larger criminal justice system carried over into plea bargaining. These problems included unequal bargaining power between the prosecution and the defense, a failure to preserve the presumption of innocence, and lack of access to defense counsel. Three years after plea bargaining was adopted a monitoring report indicated that 27% of defendants entered a guilty plea without a lawyer.<sup>xiv</sup> The report further noted “a trend among the judiciary that defense counsel is viewed as unnecessary during plea negotiating and plea agreement hearings.”<sup>xv</sup> This was an outgrowth of the general legal culture, particularly among judges, who looked to prosecutors to help unrepresented defendants rather than recognizing the role of a strong defense in an adversarial system. Defendants in 49-60% of cases entered a guilty plea before they knew what the sentence would be.<sup>xvi</sup> This meant there was no negotiation, and the guilty pleas were not the result of a “plea bargain.” The failure to guarantee the right to a lawyer, the failure to negotiate, and the power imbalances in the process all reflected existing problems and attitudes in the legal system. Plea bargaining merely continued existing practices and attitudes in the context of a new process.*

#### **d. Encouraging Coerced or False Confessions**

Related to the concern about violating defendants' rights is the concern that plea bargaining could encourage continued routine coercion of confessions. Many post-conflict legal systems rely heavily on confessions by the defendant as evidence in a criminal trial. Paired with a history of routinely heavy-handed government tactics in securing confessions, plea bargaining may at best fail to encourage any change in the existing legal culture to prohibit or stop coerced confessions. At worst, it could encourage the continued reliance on confessions regardless of the method used to obtain them. In encouraging continued use of coerced confessions, plea bargaining could reinforce to a skeptical public the idea that the government continues to routinely violate basic rights.

Even where coercion is not a concern, plea bargaining offers an incentive for defendants to admit guilt regardless of whether they committed the crime charged. As mentioned in relation to trial penalties, the offer of decreased charges or sentencing may be enough to convince innocent defendants to plead guilty, particularly in countries with high conviction rates or harsh punishments. In addition, where prosecutors offer a deal in return for cooperation, defendants may offer exaggerated or falsified information to get a better plea agreement.

#### **e. Public Perceptions of Plea Bargaining**

Plea bargaining itself can also contribute to a public perception that the legal system is corrupt and that powerful people are not bound by the law. Plea bargaining is most often an informal negotiation behind closed doors and with little transparency. From the outside, this process can look like the same informal, extralegal practices commonplace in countries that are highly corrupt.

This perception can be made worse when plea bargaining is introduced close in time to the introduction of previously unknown or unused alternative sentences. Although creative sentencing can be a positive aspect of plea bargaining, where plea bargaining commonly results, or is perceived to result, in little or no jail time, it can look like defendants are negotiating their way out of criminal responsibility. The risk is particularly high where pleas are first introduced in high profile cases, such as corruption cases, and where defendants agree to pay fines in return for drastically reduced jail time or charges, or dismissal of the case altogether. Introducing plea bargaining in this way may create the impression that pleas allow defendants to "pay their way" out of jail. This can have a serious impact on overall perceptions of the legal system, helping to reinforce existing lack of trust in legal institutions



and working against the development of the rule of law.

*Nigeria: Negative Public Perceptions of Plea Bargaining*

*Nigeria provides an example of the importance of considering public reactions in deciding how to first introduce the use of plea bargaining. In Nigeria, plea bargaining was first widely used in the context of a highly publicized anti-corruption campaign. Beginning in 2005, a series of high level corruption cases were prosecuted during which plea deals were struck that allowed the defendants to have their charges withdrawn or reduced in exchange for pleading guilty and returning some of the stolen property. These cases were widely criticized in the press due to the use of plea bargaining and the case outcomes. One commentator decried the use of plea bargaining in these cases as it allowed defendants to escape prosecution by “sharing their loot with the state,” arguing that outcomes like this create an incentive “for more theft.”<sup>xvii</sup> Commentators also contrasted the treatment of wealthy defendants who were accused of high-level corruption and escaped with no jail time with that of poor defendants convicted of low-level theft crimes who were serving time in prison. These high level corruption cases introduced plea bargaining to the public and left the impression that plea bargaining was a tool for the wealthy and powerful to avoid justice and not a process that could be more widely used across the legal system to address problems such as case backlogs and long waits in pre-trial detention.*

**f. Pleas Do Not Focus on “Truth-Telling”**

Criminal trials in civil law countries are often viewed as a truth-telling process. Plea bargaining may not fit well in a legal culture that looks to formal trial processes to determine the truth of the events underlying a criminal case. At most, a plea bargain determines the charge and punishment. It rarely contributes to a deeper understanding of the “truth” of the events of the crime itself. Although a defendant may admit guilt, it may be for a variety of reasons, such as the desire to escape further jail time. The defendant’s choice may have nothing to do with what actually happened, or even if the defendant actually committed the crime. One of the key advantages of plea bargaining, that it shortens the process, may be seen as an important disadvantage in such legal cultures as plea bargaining may skip

important steps that contribute to the truth-telling function of the criminal process. Policymakers in legal cultures that place a premium on the truth-telling function of trials may want to consider limiting plea bargaining to less serious offenses or look at alternative procedures, such as abbreviated trials, which include judicial review of the evidence in addition to the guilty plea itself.

Plea bargaining's shortened process may also be a problem for countries emerging from conflict. For many post-conflict countries establishing the truth about past crimes through the justice system is an important part of reconciliation. Using plea bargains in international and domestic courts trying serious conflict-related crimes may mean the justice system fails to fulfill this important role, which may delay or impede larger goals for societal reconciliation.<sup>xviii</sup>

### **g. Failure to Implement**

Efforts to reconstruct or reform legal systems following conflict often include passing a number of new laws, many of which will be only partially implemented, if they are implemented at all. Failure to implement laws can happen for a variety of reasons. Two common reasons are a lack of support for the law among those who will need to implement it, such as legal professionals, and passing the law without providing for the necessary resources for implementation, such as salaries for new personnel.

Lack of resources can be a major obstacle to implementation. For new plea bargaining laws this problem frequently takes the form of insufficient access to defense lawyers. Some plea bargaining laws require a defense lawyer to negotiate the deal and be in court when the plea of guilty is taken. If large numbers of defendants are unrepresented in criminal cases due to a shortage of defense lawyers, or a lack of funding to pay for their services, this can prevent plea bargains from being widely used. In South Africa, the practice of plea-bargaining was legally formalized in 2001.<sup>xix</sup> The law requires that the accused have legal representation when entering plea and sentence agreements.<sup>xx</sup> Five years later, observers found this requirement, coupled with a lack of available legal aid attorneys made it impossible to use plea bargains in many cases.<sup>xxi</sup> Besides preventing use of pleas, lack of defense counsel can lead to wide-spread violations of the protections written into the law, as seen in Bosnia and Herzegovina.

Failing to build support for plea bargaining laws prior to implementation can also create serious problems. In countries with no previous experience negotiating criminal cases, plea bargaining requires an important change in legal culture and the roles judges, prosecutors and lawyers play. Plea

negotiations require prosecutors and defense lawyers to meet on a more equal footing to discuss how to resolve a particular case. Plea bargaining also relies on the judge to act as a check on the prosecution, by examining plea deals to ensure defendants' rights were protected. This is a dramatic change for prosecutors used to recommending a particular sentence and having the judge routinely follow those recommendations in full. If judges are still "rubber stamping" prosecutors' recommendations, prosecutors will have little motivation to negotiate meaningfully with the defense. Instead, they can simply offer what they would have asked for after the trial, knowing that they will get what they want in the end. From the defendant's perspective, if the prosecutor does not offer a better deal in exchange for the guilty plea, the defense may have no incentive to avoid a full trial. A defense lawyer who knows that offers made during plea negotiations are essentially what the defendant will get after trial, and that the plea deal doesn't offer any other advantages such as release from pre-trial detention, is unlikely to recommend that their client accept the deal.

For plea bargaining to work, individual professionals within the system need to be ready and willing to change how they do their jobs. Otherwise, the new laws will be ignored, or partially implemented in a way that allows professionals to avoid major changes to their roles. It is far more likely that legal professionals will make these changes if they had knowledge of and supported plea bargaining reforms before they become law. Past efforts to introduce plea bargaining have included appropriate stakeholders such as judges, prosecutors, and defense lawyers in the reform process through trainings, debate, and the legislative drafting process. This will be discussed further in the Legislative Drafting section. It is also important to recognize that implementation cannot be divorced from the larger political environment. If powerful political actors have an interest in maintaining a weak judiciary or defense bar, or where roles are deeply ingrained, involving stakeholders in training and debate may have little effect in improving implementation of plea bargaining.

#### *Serbia: Failure to Implement*

*In 2009 Serbia introduced plea bargaining for war crimes. In 2011 a new criminal procedure code entered into force, which allowed plea bargaining in all criminal cases. The Criminal Procedure Code, in Articles 313-317, details what must be included in the plea agreement, the judge's role in accepting the plea agreement, and the grounds to reject a plea agreement. Article 313 requires a defense lawyer to be*

*present “during the conclusion of the agreement.” However, plea bargaining is not yet widely used in Serbia. Reportedly, one problem is that there is still not a “culture of negotiation and direct communication” between prosecutors and defense lawyers.<sup>xxii</sup> NGOs and international organizations have held trainings and round-tables to try to work with prosecutors and defense lawyers to encourage greater use of this new process.*

### **g. The Informal Justice Sector**

Post-conflict countries with a tradition of using customary justice processes for criminal cases may face additional challenges in adopting and implementing plea bargaining. Often the use of customary justice processes signals that the general public, or a significant part of the general public, does not trust the formal justice sector. The formal justice sector may be viewed as corrupt, as removed from local sensibilities and solutions, and as failing to act due to chronic inefficiency. By contrast, local customary justice actors such as village councils, chiefs, or elders, may be able to convene quickly, handle the cases in ways that the local culture finds appropriate, and be trusted for their integrity by local residents. If plea bargaining is introduced it may be viewed as another example of the failure of the formal justice system, especially if the plea deals are seen to be out of step with how cases are handled in the customary justice system. The question to consider is whether the informal justice sector helps to build legitimacy for the formal justice sector or whether it reinforces the existing lack of trust.

A related concern is whether plea bargaining would be used as a way to justify taking cases out of the formal justice system and placing them in the informal sector in a way that causes harm to individual defendants. There are circumstances where diverting cases out of the formal justice system may help individual defendants by allowing them to avoid a criminal record and prison. However, customary justice processes can fail to adequately protect the rights of the accused, particularly women and minorities. Customary processes often use “creative” sentencing which may include apologies, or payments to the victim of money or livestock. However, informal justice sector processes have also ordered punishments that are themselves human rights violations, such as corporal punishment, or the most extreme examples of ordering gang rape.

Diverting cases out of the formal criminal justice system may also be done in a way that fails to protect victims. For example, in some countries sexual assault cases are referred out of the formal criminal justice system and into

customary processes. Unfortunately it is still all too common that police and prosecutors do not treat sexual assault or domestic violence cases as seriously as other violent crimes such as robbery. Allowing diversion of criminal cases to informal processes can provide a convenient way for prosecutors, judges, or police officers, to avoid cases that are unpleasant or that they don't consider to be serious offenses.<sup>xxiii</sup>

As will be discussed below, if plea bargaining is adopted in countries with active informal justice sectors legislation should specifically address limiting or preventing plea bargaining cases out of the formal justice sector and into these customary processes. This might also be an area to focus media or public information campaigns to explain to the general public the difference between plea bargaining and the informal justice sector.

## **VI. Drafting Plea Bargaining Legislation**

The first step in any legislative drafting process should be to determine whether new laws or changes to existing law are necessary. Only after the assessment and a determination to proceed should a country move into the actual legislative drafting phase. As has been discussed above, plea bargaining is generally discussed as part of a larger package of criminal procedure reforms and should be considered in the context of the legal and political system as a whole.

### **a. Assessment**

Before beginning any legislative drafting process it is important for both domestic policymakers and international rule of law development assistance providers to first carefully assess how the criminal justice system works, including the current state of the laws. An important part of this process is to define the goals of reform and understand the reasons that these goals have not yet been reached. It is also important to assess public attitudes towards the legal system to avoid adopting a version of plea bargaining which will reinforce existing public mistrust of the formal legal system.

The assessment should examine why plea bargaining is being proposed and if plea bargaining will help to achieve the intended goals. Often the first and only reason offered for plea bargaining is to reduce case backlogs. This reason is sometimes given without a thorough assessment of the cause of the case backlogs. Is the problem that defendants are not being brought to court or investigations are not being completed? Or is it that everything is ready and there is just no court time for trials? If case backlogs are due to delayed investigations, introducing plea bargaining may not remedy the problem, as the investigation should be complete before the case is plea bargained.

The assessment should also try to determine if key stakeholders have other goals. For example, do prosecutors want to use plea bargaining to assist in complex prosecutions? Do defense lawyers and human rights NGOs want to use plea bargaining to encourage use of alternative sentencing? Do key stakeholders, including rule of law assistance providers, hope that plea bargaining will help to further develop rule of law in the country? Understanding these various goals is important in understanding what type of plea bargaining legislation to consider and whether plea bargaining will help the justice system achieve the desired outcomes.

Related to assessing the goals of key stakeholders is assessing the attitudes of the general public towards the legal system. As examples from the Republic of Georgia and Nigeria illustrate, if the general public's distrust of the legal system is not recognized and addressed, it can make the introduction of this new process more difficult. Additionally, if customary justice processes are widely used, the assessment should examine attitudes towards these processes and how they relate to trust or lack of trust in the formal legal system. Conducting this assessment can be tricky. Opinion surveys can reach inaccurate conclusions depending on what questions are asked and how the survey is conducted. This can be even more complicated where it is hard to conduct opinion surveys due to poor communication systems or where people may not give honest answers due to distrust of the survey process. One simple way to assess public attitudes may be to assess how the media reports on the criminal justice system. If the media focuses on stories of corruption it is likely this is having an impact and that the general public may view the criminal justice system as corrupt. If the country has an active civil society, it may also help to survey or meet with NGOs to assess their opinions of the criminal justice system. The goal should be to make an effort to understand the attitudes of the general public as part of the process of deciding what type of plea bargaining, if any, it makes sense for the current criminal justice system to adopt and to be aware of how taking one approach may help or hinder developing trust in the formal criminal justice system.

The assessment should next strive to gather data about the number of cases going through the criminal justice system including the categories of offenses. A key question in drafting plea bargaining legislation is whether plea bargaining will be limited to only certain kinds of offenses or available more widely. Before deciding which cases should be eligible for plea bargaining it is important to know what kinds of cases constitute the largest percentage of cases going through the criminal justice system. In most criminal justice systems the vast majority of cases concern less serious offenses, such as lower level theft offenses and drug possession. If that is the

situation, then introducing plea bargaining for a limited class of offenses, such as high-level corruption cases, will likely have little effect on reducing case backlogs. Although it can be difficult to get good data in post-conflict criminal justice systems, it is important to have a clear idea of what is happening in the system and how plea bargaining can, or won't, help before the process of legislative drafting begins. Gathering data before plea bargaining is adopted is also important as collecting this kind of data gives a baseline for comparison. Without baseline data it is difficult to accurately monitor or evaluate the impact of a new plea bargaining law.

## **b. Legislative Drafting**

Drafting new legislation is usually the first stage of adopting plea bargaining or abbreviated trials. Legislative drafting should ideally involve bringing key stakeholders into the discussion process and giving them an opportunity to provide meaningful input. Conferences, roundtables, and other events can give stakeholders including defense lawyers, NGOs, judges, and prosecutors an opportunity to discuss the advantages and disadvantages of introducing plea bargaining. Organizing events to discuss plea bargaining may delay the legislative process, but ultimately result in legislation that is more likely to be implemented as the new process has not been "forced" on the legal system but instead has been more carefully drafted to reflect the legal culture and stakeholder goals.

After plea bargaining got off to a rough start in Nigeria, a series of workshops and conferences were held to consider reform. A wide cross section of the Nigerian legal community, including Judges, NGOs, legal associations, and academics attended these events. The Nigerian government also held public hearings and debates through the Law Reform Commission. This two year process ended, in October 2013, with the passage of a new Criminal Justice Act which included major changes to plea bargaining.

For reforms to last it is also important to include a wide cross section of the legal and NGO community. As time passes, political power may change hands. Including only those currently in power may ultimately delay or derail the reform process. Georgia began discussions, roundtables, and trainings five years before the law was changed. The process included a broad range of actors from the legal and NGO community. Following the 2003 Rose Revolution, leadership in key government offices changed hands. However, many of those who assumed positions in the new government were former NGO leaders who had been included in the earlier process. This meant they had a thorough understanding of plea bargaining and were willing and able to continue on with the existing reforms.

## **c. Specific Legislative Provisions**

### ***i. Seriousness of the Charge***

Some countries specifically limit the use of plea bargaining or abbreviated trials to less serious offenses. This approach may make sense in countries where much of the court over-crowding is due to less serious offenses. It may also be useful in countries where the public is concerned about excessive leniency in more serious crimes. As has been discussed, countries that have introduced plea bargaining via more serious and high profile cases, such as corruption cases or war crimes, have faced negative public reactions and, often, from the legal community itself. Limiting pleas to lower-level offenses may help reduce perceptions that pleas allow powerful elites to escape justice through corruption or influence.

### ***ii. Potential Penalties***

Although it is possible to have plea bargaining without using alternative, non-jail sentences, there are good reasons to introduce alternative sentences.<sup>xxiv</sup> Using alternative sanctions can help to relieve overcrowded jails and prisons, improving human rights conditions. Alternative sanctions may also be more effective in preventing recidivism and helping defendants to address whatever problem led to the commission of the crime. They may be seen as more “fair” and help to build trust and legitimacy in the formal legal system. For example, fines or community service may be better received by the public than prison for less serious offenses. Alternative sentencing can include fines, community service, restitution or compensation, drug or alcohol rehabilitation, mental health treatment, probation (either supervised by a probation officer or directly by the court), and suspended prison sentences.<sup>xxv</sup>

While the ability to offer sentences other than jail time can be a benefit of plea bargaining it carries with it certain risks. As the examples in Georgia and Nigeria illustrate, introducing alternative sentencing at the same time as plea bargaining can lead to plea bargains being widely seen as another form of corruption. Ideally, alternative, non-custodial sentences should be introduced into a legal system well in advance of plea bargains. This can help to prevent the general public from viewing these two changes as connected to each other.

If it is not possible to introduce alternative sentencing before introducing plea bargaining, policymakers can take steps to off-set the negative consequences of introducing these changes concurrently. One option is to have a public information campaign that explains plea bargaining and alternative sentencing. Another is for the prosecuting agency to promulgate



clear guidelines explaining when non-custodial sentences will be offered as part of a plea deal, and to stick to those guidelines in practice. Guidelines can help to bring greater transparency to the process, which can help to prevent perceptions that non-custodial sentences are used only for defendants who make pay-offs or who have powerful connections. It is also important to make it clear where fine payments go. A lack of transparency around fines risks perceptions that fines end up in the judge or prosecutor's pocket, or that pleas are being used simply as a source of revenue for the state

### ***iii. Requiring Defense Counsel***

Most post-conflict countries struggle to guarantee the right to a lawyer to those facing criminal charges. Despite this challenge, countries that have more recently introduced plea bargaining, such as Bosnia and Herzegovina and Serbia, guarantee the right to a defense lawyer in the plea bargaining provisions of the criminal procedure code. The challenge is making sure this is a right in practice as well as under the law. Legislative drafters and policymakers should be aware of on-going problems with guaranteeing the right to a lawyer and consider addressing funding or other issues that may be the underlying reasons defendants lack access to a lawyer.

### ***iv. Confidentiality of Plea Negotiations***

One concern for defendants in deciding whether or not to engage in plea bargaining is how that might be used against them if they ultimately do not conclude a deal and proceed forward to trial. Defendants may be concerned that the fact that they asked for a plea bargain or that they or their lawyer engaged in back and forth negotiations with the prosecutor regarding a possible plea of guilty could be introduced as evidence against them in the trial. This could be a particular concern for defendants who have not made any incriminating statements to the police and do not want the fact of a plea negotiation to be used as a type of incriminating statement in subsequent court proceedings. Evidence codes in the United States routinely prohibit any evidence involving case settlement discussions being introduced at trial (in both civil and criminal cases). Slovenia addressed this concern and specifically wrote into their Criminal Procedure Act a provision whereby if the prosecution and the defense do not reach an agreement than all documents from these negotiations are excluded from the files.<sup>xxvi</sup> The goal of such legislative provisions is to encourage negotiation to resolve cases as it protects both sides from having to worry that this information will be used at trial.

### ***v. Role of the Judge***

Plea bargaining rules generally require judges to approve the plea deal. Some require that judges evaluate the evidence to determine that there is a factual

basis for the plea. In countries where judges have traditionally been subservient to prosecutors and where prosecutors have wielded more power, writing specific provisions into the law to give judges more power in plea bargaining can help to make the judge's role clear. However, as with other aspects of plea bargaining, it may take time before judges start to assert more independence regardless of whether the law calls for it.

***vi. Limit what can be Negotiated***

When the Republic of Georgia first introduced plea bargaining, human rights groups and international organizations criticized the Georgian government for using plea bargains to coerce defendants to give up their right to file torture complaints in exchange for reduced sentences.<sup>xxvii</sup> The government responded to these criticisms by amending Article 679(1)(7)(1) of the Criminal Procedure Code to make it “inadmissible to conclude a plea agreement if it limits the defendant’s constitutional rights to request criminal prosecution against persons involved in torture, inhuman and degrading treatment of the defendant.” The 2005 amendments to Article 679(3)(2)(1) of the CPC also required the court to “hear directly from the defendant” that he or she has “not been subject to torture, inhuman or degrading treatment by a police officer or other law enforcement representative.” Practices reportedly improved after this amendment.<sup>xxviii</sup> Given this experience, legislative drafters might consider adding a provision into the law to prevent plea deals being contingent on waiving complaints of human rights violations including torture and ill-treatment.

Another possible limit, as discussed above, might be for plea bargaining legislation to specifically prohibit plea deals that refer cases to customary justice processes. Alternatively, legislative drafters may consider limiting the types of cases that can be referred to less serious cases, such as theft cases, and, where cases are referred, to specifically require oversight by the court to ensure that the customary justice tribunal respects the rights of defendants in both the process and the punishment.

***vii. Role of the Victim***

Some countries require a level of victim involvement in plea bargains. Georgia, under Article 679(8) of the Criminal Procedure Code, requires the victim be notified of any plea deal, but does not require that the victim agree to the deal. Russia goes further, requiring under Article 314(6) of the Criminal Procedure Code, that the victim agree to the defendant resolving the case through an abbreviated trial. On the other extreme are many jurisdictions within the United States that do not require the victim to be notified in any way before or after the plea bargain.

In deciding whether to require victim notification, legislative drafters and policymakers should consider what role victims are given in criminal prosecutions under existing law. Where victims play a more active role or have broader rights it may be appropriate to allow them a corresponding role in the plea bargaining process. Another consideration in deciding whether victims should be notified is the possible impact on public opinion. The absence of a notification requirement could be seen as another example of a lack of transparency and accountability in the criminal justice system. Finally, lawmakers should look at practical considerations such as the difficulties communicating with victims due to poor infrastructure. If basic communication is difficult, requiring victim notification or agreement before concluding a plea deal, could create additional delays in the process. In these circumstances it might be better to require victim notification after the plea deal is concluded, if at all.

Requiring victim agreement, as Russia does with abbreviated trials, can create a number of problems including delays in contacting the victim and disparate treatment of defendants depending on victim agreement. Requiring victim approval could also create a situation where victims are subjected to pressure or coercion to secure their agreement. This could be of particular concern in organized crime cases or cases with more vulnerable victims, such as sexual assaults.

#### **d. Publication and Publicizing**

After a country passes new plea bargaining legislation for the new law should be published so that legal professionals including judges, prosecutors, and defense lawyers have easy access to the complete text. In some countries this can be done electronically. In other countries, hard copies of the new law should be distributed. If there are newspapers, including legal newspapers, the text of the new law should be published in the newspaper. This should be done before the new law enters into force.

In addition, before the new law enters into force, a public information campaign should publicize plea bargaining to the general public. The public information campaign should at a minimum explain what plea bargaining is and the rules are surrounding its use. This can help to reduce or avoid problems of widespread public distrust of plea bargaining. The process of publicizing the new law should include a wide variety of media outlets including radio, television, print media, and social media. Often the best way to explain a new law is with individual stories. Depending on the country, this could mean giving examples of defendants who have languished for years in pre-trial detention for minor offenses and how plea bargaining can address these kinds of human rights violations.

Efforts to publicize the new law should address current public attitudes towards the formal justice system and try to address any expected negative reactions to plea bargaining. This may mean directly addressing concerns about the informal justice sector and how it will work with plea bargaining. Post-conflict countries may also have to respond to negative public attitudes towards plea bargaining shaped by the use of plea bargaining in international war crimes tribunals. In Bosnia and Herzegovina, the International Criminal Tribunal for the Former Yugoslavia and the domestic War Crimes Chambers used plea bargaining before it was introduced more broadly. Significant portions of the public viewed the plea bargained sentences in war crimes cases as too lenient. There was also public concern that the guilty pleas were insincere and that defendants were taking an easy way out by not fully acknowledging their crimes when they plead guilty. Some of the victims were upset that they were not consulted in the process.

## **VII. Monitoring and Adjustment**

### **a. Monitoring**

Monitoring should be a part of any criminal justice reform process. The only way to know if a law is being implemented as intended, or what might need to be amended, or what training might be useful is through monitoring the actual processes.

Bosnia and Herzegovina provides a clear example of the value of comprehensive monitoring. The Organization for Security and Cooperation in Europe wrote a series of monitoring reports that gave legal professionals and policymakers a clearer picture of how plea bargaining was being practiced, and identified areas of concern such as lack of access to lawyers and a frequent lack of meaningful negotiation in the process.<sup>xxix</sup> Having this kind of information will allow for better recommendations to improve pleas in law and practice, enabling them to have their intended beneficial effects.

Oftentimes post-conflict countries, because of financial or human resource issues, cannot conduct comprehensive monitoring and do not collect good data about the functioning of their court systems. If this is the situation, rule of law development assistance providers should focus on creating monitoring programs, assuming that conditions are stable and the monitors will not be put in harm's way or targeted. Good monitoring depends on a number of factors, including strong knowledge of the local law, developing a group of local monitors, and a long-term commitment so that the monitoring is not a brief process, but extends over many years.<sup>xxx</sup>

As has been stated, plea bargaining is often part of a larger package of criminal procedure reforms. It will therefore rarely make sense to monitor plea bargaining on its own. Instead, the court system, NGOs, and international assistance providers who are conducting monitoring should include plea bargaining as part of a larger trial monitoring program. Monitoring programs can focus on particular parts of the criminal process, or how criminal cases are processed from beginning to end, collecting data on three key aspects; basic information on whether and how a law is being implemented, whether the law is being implemented as written, and whether implementation of the law violates the rights of those involved in the court process.

Court monitoring projects on plea bargaining have collected information on how frequently plea bargaining is used; the original charges filed and the resulting charges and sentence; whether and what non-custodial alternative sentences are used; how long it takes for a case to be resolved through plea bargaining; and whether plea agreements are used to gain witness cooperation. Information gathered should also make note of the jurisdiction of each case, to allow evaluators to compare implementation across jurisdictions and consistency in sentencing.

Past trial monitoring programs have identified several human rights concerns that emerged as new plea bargaining laws were put into practice. These may serve as a starting point for trial monitors, however it is important to remember that violations are not the result plea bargaining alone, but from the specifics of plea bargaining laws and the larger legal system and culture. For these reasons it is important that court monitors are familiar with the vulnerabilities of the relevant plea bargaining laws and the legal system, and carefully monitor plea deals for all potential human rights violations. Common rights violations have included; failure to provide legal counsel to the accused; failure by defense counsel to meaningfully advocate for their client; failure by the judge to ensure that the plea is voluntary, that the guilty plea is supported by sufficient evidence and that the plea deal is fair; failure by the judge to maintain the presumption of innocence; judges pressuring defendants to accept plea agreements; and failure to notify victims when required by law.

Beyond traditional court monitoring, past initiatives introducing plea bargaining make clear that it is important to monitor public opinion on the use of pleas. Identifying negative public reactions early, and taking steps to counter them either by offering more information on the plea process, or by altering practice or the law itself can help minimize further damage to trust in the legal system.

Depending on the circumstances, it might make sense to not release all monitoring reports to the public. Instead, it may be helpful to have at least one stream of reports circulated to a smaller number of professionals within the system and to relevant aid providers. In the Republic of Georgia closed monitoring allowed for more critical reports that gave professionals in the system the ability to work “behind the scenes” recommending further legislative changes without alienating justice actors by exposing the system’s faults to the public. The resulting reforms were helpful in improving how the process worked and in protecting defense rights. At the same time as the closed process, other organizations conducted an “open” monitoring program. This second stream of reports ensured the public also had access to information about how the courts were working.

## **b. Adjustment**

As was discussed, the best way to determine if a newly adopted plea bargaining law is working as intended is through monitoring. Based on information gathered through monitoring, there are several types of “adjustments” that might be made after a plea bargaining law is introduced. The first may be additional legislative reform. Countries that have more recently adopted plea bargaining, such as Georgia, have amended their laws multiple times to correct problems in implementation and with the laws themselves. As circumstances within a country change, the need to amend the law may also arise. The need for adjustments may be an additional reason to avoid introducing pleas in serious or high profile cases. Restricting pleas to lower-stakes cases, at least initially, may limit negative public opinion of pleas as initial challenges are addressed.

In addition to further legislative reform, there may be other possible ways to better implement the law. For example, in Serbia, a roundtable with prosecutors, defense lawyers, judges and government officials was held to discuss why the plea bargaining law was not being implemented. Other countries have followed up with training for specific groups, such as judges or defense lawyers.<sup>xxxii</sup> Any time a law is passed that introduces a fundamental change in the legal process there will need to be training to be sure legal professionals and judges are aware of the change and to help them to learn whatever additional skills they might need to adapt to the change. As has been discussed, plea bargaining can represent a significant change in the legal culture of a country. Judges, prosecutors, and defense lawyers may all benefit from training on how it works and on basic negotiation skills.

However, training alone will not dislodge strongly held cultural biases against changing practices or adopting practices that contradict other values.

Therefore, rule of law assistance providers should invest the time and resources into a training program only after a full assessment concludes that there is value in conducting the training. Rule of law assistance providers should also give careful consideration to the issue of who will conduct the training. If the goal is to achieve local “buy-in” to the new law, the majority of the trainers need to be from the country in question and should be trainers the audience will take seriously.

## **VIII. Conclusion**

Plea bargaining may help post-conflict countries to better manage their criminal justice systems by clearing out case backlogs and decreasing the numbers of people in pre-trial detention. However, policy-makers, lawyers, legislators, and rule of law assistance providers should understand that plea bargaining is a potentially complex change to a criminal justice system and may require serious shifts in the legal culture. Plea bargaining may magnify existing problems in the criminal justice system, such as lack of access to defense lawyers, corruption or a politicized judiciary. For this reason, plea bargaining is not a process to rush to adopt but is instead a reform that calls for careful consideration. This consideration should include assessing the goals behind adopting plea bargaining and the current state of the criminal justice system. Policymakers should also assess public attitudes towards the criminal justice system and how plea bargaining may contribute to building trust in the formal justice system. As some of the examples highlighted above illustrate, policymakers should not underestimate the potential to do harm by introducing plea bargaining in a way that reinforces existing negative public attitudes towards the formal criminal justice system. For this reason, policymakers may want to consider the option of introducing a shortened process, such as abbreviated trials, that may avoid reinforcing negative public attitudes towards the formal justice system.

Ideally, the process of considering whether to adopt plea bargaining should include a broad range of interested stakeholders and consider various approaches to plea bargaining. Among the key questions to keep in mind are whether plea bargaining should be limited to sentence bargaining or include charge bargaining; whether plea bargaining should be available for all crimes or a select group; whether the law should limit what can be negotiated as part of a plea bargain; whether to require defense attorneys and at what stages; what is the role of the judge in plea bargaining; and what is the role of the victim. If a country decides to adopt plea bargaining, the process should include publishing and publicizing the law. Once the law enters into force, it is important to monitor how or if it is used. Without monitoring, countries that adopt plea bargaining will not have clear data to guide additional

legislative action to adjust the plea bargaining law to address problems with its implementation. Countries should not expect plea bargaining to lead to changes overnight. As the example of Georgia illustrates, it may take nearly a decade for plea bargaining to enter into wide-spread use. However, in many countries plea bargaining has helped to improve the criminal justice system by providing better efficiency, enabling prosecutors to use it as a tool for complex prosecutions, and by allowing for more creative sentencing. Ultimately, under the right circumstances, plea bargaining can contribute to a stronger criminal justice system and better access to justice.



## IX. Endnotes

<sup>i</sup> See Catherine Newcombe. “Russia,” in *Criminal Procedure: A Worldwide Study*, 2nd ed. ed. Craig M. Bradley (Durham, NC, Carolina Academic Press, 2007), 450.

<sup>ii</sup> Matthew Spence. “The Complexity of Success in Russia,” in *Promoting the Rule of Law Abroad: in Search of Knowledge*, Thomas Carothers ed. (Washington D.C.: Carnegie Endowment for International Peace, 2006), 217, 232.

<sup>iii</sup> Ugolovno-Protssessual’nyi Kodeks [UPK] [Criminal Procedure Code] art. 314(1) (Russ.) translated in THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE (U.S. Dep’t of Justice 2004).

<sup>iv</sup> *Ibid.*, art. 314(7).

<sup>v</sup> *Ibid.*, art. 314(6).

<sup>vi</sup> See Jonathan L. Hafetz. “Pretrial Detention, Human Rights and Judicial Reform in Latin America.” *Fordham International Law Journal* 26 (2003): 1745.

<sup>vii</sup> See Open Society Justice Initiatives, *Justice Initiatives: Pretrial Detention* (2008),

[http://www.soros.org/initiatives/osji/articles\\_publications/publications/pretrial\\_20080513/Justice\\_Initiati.pdf](http://www.soros.org/initiatives/osji/articles_publications/publications/pretrial_20080513/Justice_Initiati.pdf).

<sup>viii</sup> U.S. SENTENCING GUIDELINES MANUAL §5K1.1 (2012).

<sup>ix</sup> One-third of plea agreements in the federal system of the District of Columbia include an agreement to cooperate. Mary Patrice Brown & Stevan E. Bunnell, “Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia.” 43 *American Criminal Law Review* 43 (2006): 1063, 1072.

<sup>x</sup> OSCE Mission to Bosnia and Herzegovina, Mission to Bosnia and Herzegovina, *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their Compliance with International Human Rights Standards* (2006),

[http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122311061412eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122311061412eng.pdf).

<sup>xi</sup> For a description of these various courts see, James L. Nolan Jr., *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton, NJ: Princeton University Press, 2009), 7-22.

<sup>xii</sup> This is similar to the approach taken by the U.S. Military Justice System, where a pre-trial agreement between the defense and convening authority acts as a cap on the sentence that may be handed down after a sentencing hearing. See Article 64, UCMJ, 10 U.S.C. § 864; RULE FOR COURTS-MARTIAL 705(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); Criminal Law Department, The Judge Advocate General’s Legal Center and School, U.S. Army, “Pretrial Agreements and Negotiations,” chap. 20 in *Practicing Military Justice* (January 2013)

[http://www.loc.gov/rr/frd/Military\\_Law/pdf/Practicing-Military-Justice\\_Jan-2013.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Practicing-Military-Justice_Jan-2013.pdf).

<sup>xiii</sup> See generally, C. CRIM. PROC. (Bosn. & Herz.), available at [www.legislationline.org/documents/section/criminal-codes/country/40](http://www.legislationline.org/documents/section/criminal-codes/country/40) (last visited March 31, 2014).

<sup>xiv</sup> Organization for Security and Co-operation in Europe, *Plea Agreements in Bosnia and Herzegovina* 11 (see n. x).

<sup>xv</sup> *Ibid.*

<sup>xvi</sup> *Ibid.*, 12-13.

<sup>xvii</sup> Aje R. Adofikwu, “Plea Bargain: A Cat o’ Nine Tail to Nigeria’s Justice System,” *The Lawyers Chronicle*, <http://thelawyerschronicle.com/plea-bargain-a-cat-o-nine-tail-to-nigerias-justice-system/>.

<sup>xviii</sup> See Nancy Armoury Combs. “Copping a Plea to Genocide: The Plea Bargaining of International Crimes.” *University of Pennsylvania Law Review* 151, no. 1 (2002): 104-05.

<sup>xix</sup> Esther Steyn. “Plea-bargaining in South Africa: Current Concerns and Future Prospects.” *South African Journal of Criminal Justice* 20, no. 2 (2007): 206.

<sup>xx</sup> Criminal Procedure Act 51 of 1977 s.105A.(1)(a).

<sup>xxi</sup> Open Society Foundation for South Africa, *Roundtable Discussion Report on Plea and Sentence Agreements*, (August 24, 2006), <http://osf.org.za/wp/publications/PleaBargainingRoundtableReportFinalFeb2007st.pdf>.

<sup>xxii</sup> American Bar Association, *Roundtable Explores Plea Bargaining under Serbia’s New Criminal Procedure Code*, (January 2014), accessed March 25, 2014, [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/europe\\_eurasia/serbia/news/news\\_serbia\\_criminal\\_procedure\\_code\\_plea\\_bargaining\\_0114.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/serbia/news/news_serbia_criminal_procedure_code_plea_bargaining_0114.html).

<sup>xxiii</sup> See Cynthia Alkon. “Reconciliation of Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?” 8 *Pepperdine Dispute Resolution Law Journal* 8, no. 41 (2007).

<sup>xxiv</sup> See the Council of Europe’s Recommendation (92)17 Concerning Consistency in Sentencing, advising “custodial sentences should be regarded as a sanction of last resort, and should therefore be imposed only in cases where, taking due account of relevant circumstances, the seriousness of the offense would make any other sentence clearly inadequate.” Council of Europe, Comm. of Ministers, *Recommendation of the Comm. of Ministers to Member States Concerning Consistency in Sentencing*, Doc. No. R92(17), para. B5(2) (Oct. 19, 1992). For guidance on alternative sentences and their application see Vivienne O’Connor & Colette Rausch, eds., Articles 54-64 in *Model Codes of Post-Conflict Criminal Justice Volume I* (Washington DC: United States Institute of Peace Press, 2007), 139-141, <http://www.usip.org/model-codes-post-conflict-justice-/publication-the-model-codes/english-version-volume-1>.

<sup>xxv</sup> For more information on alternative sentencing see United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives To Imprisonment* (2007), [http://www.unodc.org/pdf/criminal\\_justice/Handbook\\_of\\_Basic\\_Principles\\_and\\_Promising\\_Practices\\_on\\_Alternatives\\_to\\_Imprisonment.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf); United Nations Office on Drugs and Crime, *Custodial and Non-Custodial Measures: Alternatives to Incarceration* (2006), [http://www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/3\\_Alternatives\\_Incarceration.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf).

<sup>xxvi</sup> Article 450.a of the Criminal Procedure Act, as cited by Vid Jakulin, “Simplified Forms of Proceedings in the Criminal Procedure Legislation in Slovenia,” in *Simplified Forms of Procedure in Criminal Matters: Regional Criminal Procedure Legislation and Experiences in Application*, ed. Ivan Jovanović and Miroljub Stanisavljević, 40. Organization for Security and

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Co-operation in Europe, Mission to Serbia, 2013,  
<http://www.osce.org/serbia/103129>.

<sup>xxvii</sup> See, U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Civil and Political Rights, Including: The Questions of Torture and Detention — Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to Georgia*, at 10, U.N. Doc. E/CN.4/2006/6/Add.3 (Sept. 23, 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/160/45/PDF/G0516045.pdf?OpenElement>; Human Rights Watch, *Georgia: Uncertain Torture Reform*, Human Rights Watch Briefing Paper 11–16, (April 15, 2005), <http://hrw.org/backgrounder/eca/georgia0405/georgia0405.pdf>.

<sup>xxviii</sup> Council of Europe, Comm. for the Prevention of Torture, *Report to the Georgian Government on the Visit to Georgia Carried Out by the European Committee for the Prevention of Torture or Degrading Treatment or Punishment (CPT) from 21 March to 2 April 2007*, para. 10, CPT/Inf 42 (Oct. 25, 2007), available at <http://www.unhcr.org/refworld/publisher,COECPT,,GEO,472042f02,o.html>.

<sup>xxix</sup> See Organization for Security and Co-operation in Europe, *Plea Agreements in Bosnia and Herzegovina* (see n. x); Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina, *The Presumption of Innocence: Instances of Violations of Internationally Recognised Human Rights Standards by Courts of Bosnia and Herzegovina* (2007), <http://www.osce.org/bih/110246>; Organization for Security and Co-operation in Europe, Mission to Bosnia and Herzegovina, Human Rights Department, *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina* (December 2004), [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122310535111eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122310535111eng.pdf).

<sup>xxx</sup> For a summary of how to organize trial monitoring and the issues that should be considered in establishing a monitoring program see Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, *Trial Monitoring Reference Manual for Practitioners* (2008), [http://www.osce.org/odhr/item\\_11\\_30849.html](http://www.osce.org/odhr/item_11_30849.html); International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings*, (2009), <http://www.icj.org/criminal-trials-and-human-rights-a-manual-on-trial-observation/>.

<sup>xxxi</sup> For an example of materials used to train practitioners on new plea bargaining legislation see Organization for Security and Co-operation in Europe, Spillover Monitor Mission to Skopje, *Plea Bargaining; A Guidebook for Practitioners* (December 2010), <http://www.osce.org/skopje/78150>.