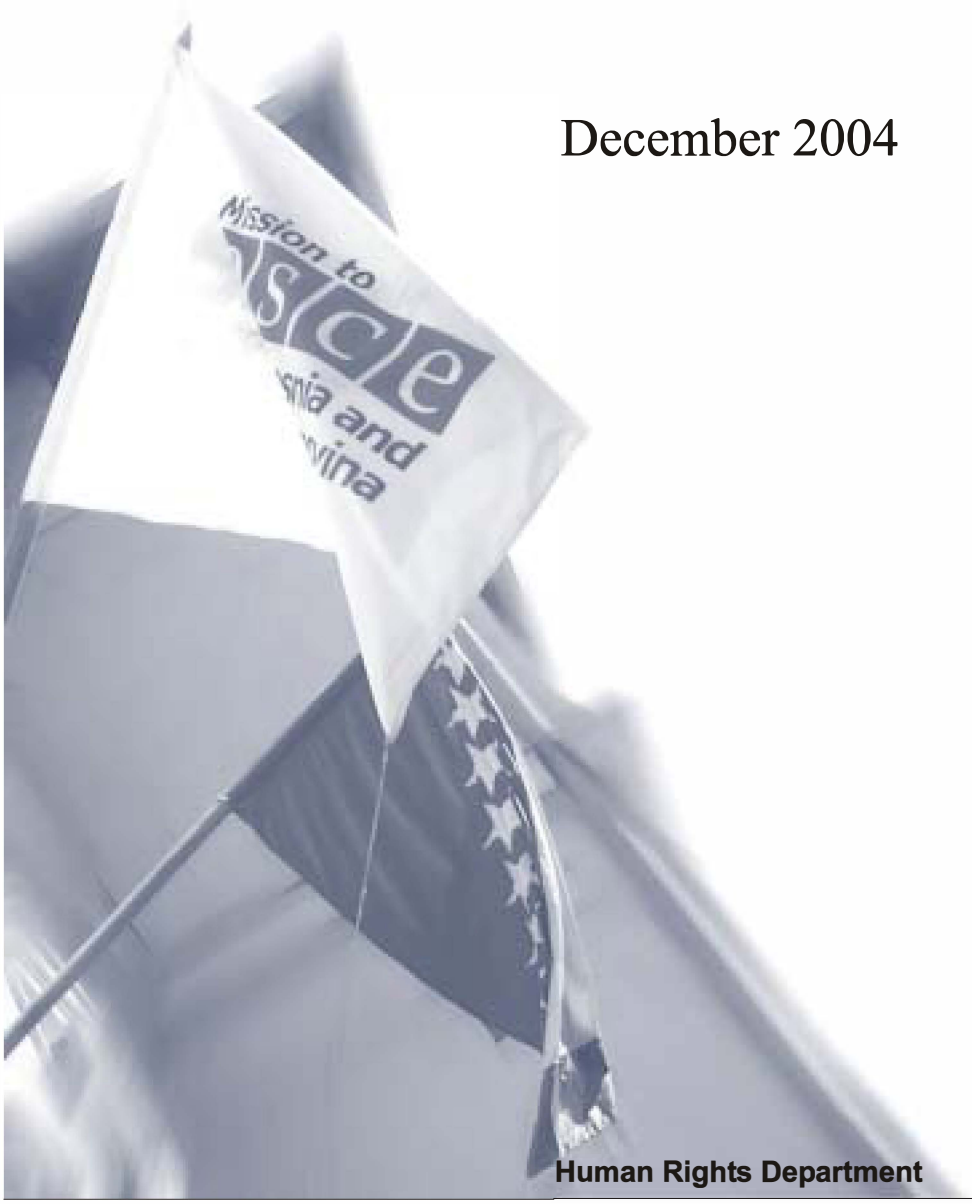
# OSCE Trial Monitoring Report

## on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina

December 2004




Human Rights Department

osce
Mission to Bosnia and Herzegovina

**Acknowledgement**

This report would not have been possible without the dedication, commitment, and hard work of the OSCE's team of trial monitors and legal advisors. Over the last year, this team monitored over 1,500 hearings throughout all of Bosnia and Herzegovina, including more than 1,000 hearings collected in this report. The Mission would like to thank and acknowledge these individuals.

# Introduction

## *A New System of Criminal Law in Bosnia and Herzegovina*

In early 2003, a new criminal procedure code was introduced in Bosnia and Herzegovina (BiH) as part of comprehensive legislation initiated by the High Representative (HR) to reform the criminal justice system. The new criminal procedure code affected fundamental change to the procedures governing criminal investigations and the administration of justice in the courts. Among the most significant of changes were the elimination of the investigative judge, the shift to an adversarial trial procedure, and the introduction of new procedures, such as plea bargaining. These fundamental changes anticipated that new procedures would need to be adopted, new roles and skills would need to be developed, and that institutional capacities would need to be strengthened. The purpose of the new criminal procedure code was to strengthen the rule of law and establish a criminal justice system that would ensure that "justice is efficient, available, and equal."

The rule of law requires public confidence that the application of the criminal law will be certain, fair, and consistent. When a new law is introduced into any legal system, it takes time to achieve its uniform and consistent application. When a law as complex as an entire criminal procedure code is introduced, this process may be lengthy. With the legal framework in place by 2003, the challenge for the courts in 2004 and ahead, is the implementation of the new law in a manner that is consistent with the goal of strengthening the rule of law.

## *The Scope and Purpose of the Report*

This report is the first of its kind by the Rule of Law Section of the Human Rights Department of the OSCE Mission to Bosnia and Herzegovina (MBiH). It presents findings and conclusions on the implementation of the new procedure code as monitored in the courts between January 2004 and August 2004. In this period, OSCE monitored 1,032 post-indictment criminal hearings - in 38 designated courts - in all criminal jurisdictions of BiH. All types of cases in all stages of post-indictment proceedings were monitored to provide a comprehensive overview of the implementation of the new criminal procedure codes throughout BiH.

With the completion of the reforms, the BiH courts and legal institutions have the competency to oversee and guide the direction of the implementation of the new laws. The purpose of this report is to support the courts and legal institutions by making a wide range of information on implementation practices directly available for assessment and action where needed. To assist BiH institutions in continuing the process of reform, recommendations are also provided, including amendments to the laws, areas for professional training, and other measures to enhance the effective and fair administration of criminal justice in the courts.

## *The Structure and Content of the Report*

This report is structured to present findings on important thematic issues impacting the effective and fair administration of justice in the courts. Since a criminal procedural code represents a complex system of interrelated rules that function as a whole, there is no precise way to divide a code up into separate and independent areas. The chapter divisions therefore occasionally coincide with specific parts of the code, whereas in other cases

relate to general issues, such as the "right to defence" which is applicable during the entire criminal proceeding. New types of proceedings, such as plea bargaining, have also been analysed as discrete implementation areas unto themselves.

Chapter One reviews the background of the criminal law reform in BiH, including the major changes to the criminal procedure, as well as other significant legal reforms and conditions affecting implementation. Chapter Two provides an overview of OSCE's trial monitoring methodology and describes the types and number of hearings monitored in each individual court.

Chapter Three presents information related to the right to a defence attorney, the frequency of appearance of defence attorneys during post-indictment proceedings, as well as court practices on appointing *ex-officio* attorneys. A related issue, the provision of instructions to the accused on their rights in the criminal proceeding, is also addressed.

Chapters Four, Five and Six discuss findings related to the new criminal procedures introduced in BiH. Chapter Four presents observations and findings related to the new procedure of plea bargaining, while Chapter Five addresses practices related to the warrant for pronouncement of sentence procedure. Chapter Six provides observations and findings related to the implementation of the new main trial procedures by prosecutors, defence attorneys, and courts. In addition, court practices relating to how the accused presents his/her statement at the main trial are also reviewed.

Chapter Seven addresses the frequency and causes of delays and postponements, and provides an overview of the progression of cases through the courts. Finally Chapter Eight presents findings on other significant implementation issues including: 1) those related to the procedures applicable in cases involving mental incapacity, 2) ensuring the dignity of the court, and 3) the lack of recording equipment in the courts.

At the end of each substantive chapter, conclusions and recommendations, representing the assessment of the OSCE MBiH, are provided. These conclusions also appear at the beginning of the report in summary form, with recommendations collected in summary fashion at end of the report addressed to specific BiH institutions.

## Table of Contents

## Summary of Findings and Conclusions

This summary of findings and conclusions derives from the monitoring data and analysis provided in the body of the report. For more detailed discussions, please refer to the page number(s) below.

### *On the Right to a Defence Attorney and Related Issues*

● Legal representation was available to a significant majority of defendants during post-indictment proceedings. Defence attorneys were present at 59% of plea hearings and 76% of trials. The ratio of private to *ex-officio* attorneys monitored was approximately 2:1. *(page 9)*

● Courts were reluctant to appoint *ex-officio* attorneys to indigent defendants even when an attorney was requested and the poor financial situation of the defendant was made clear to the court. Appointments "in the interests of justice due to the complexity of the case or due to a mental condition" were also rarely made. The failure to appoint *ex-officio* attorneys in appropriate circumstances is an essential violation of the code and constitutes grounds for appeal. *(pages 10-12)*

● Close to 70% of preliminary hearing judges provided sufficient instruction to the accuseds at the plea hearing on their rights and the consequences of their plea. This may be viewed as a positive development given the novelty of the plea hearing procedure. However, there is still a need to improve court practices, especially relating to the duty of the court to advise defendants on their right to an attorney if they cannot afford one. *(pages 12-14)*

### *On Plea Bargain Practices*

● Plea agreements were widely used in almost all BiH courts, with 24% of cases being resolved by plea agreement. *(page 16)*

● Plea agreements were a highly efficient method of resolving cases. In almost 50% of all plea bargain cases, a verdict was pronounced within 60 days from confirmation of the indictment. In 73% of plea bargain cases, the court never had to schedule the main trial or summon a single witness. *(page 16)*

● Sentences proposed by prosecutors in plea agreements were low in relation to the range of sentence prescribed in the criminal code for individual offences. In 90% of plea agreements, the sentence proposed was below the minimum sentence prescribed in the criminal code. *(pages 17-19)*

● Court practice is not to reject plea agreements on the basis of the length or type of sentence contained in the agreement. This practice contributes to low sentencing and undermines the ultimate sentencing authority of the court. *(page 19)*

● Almost 50% of all plea agreements between the prosecutor and the defendant were entered into *after* the accused pleaded guilty at the plea hearing, raising the question of what was negotiated in these agreements. *(pages 19-20)*

### *On Warrant for Pronouncement of Sentence (WPS) Practices*

● The WPS procedure was widely used by prosecutors in over 50% of all cases involving offences that carry a maximum sentence of 5 years or less. *(page 22)*

● WPS cases achieved a high level of efficiency. In 83% of cases where the accused pleaded guilty, the WPS case was resolved within 60 days from confirmation of the indictment. *(page 23)*

● WPS procedures were regularly used in cases involving offences carrying a minimum term of imprisonment under the criminal code. In these and other cases, however, no basis for proposing and approving lower sanctions was provided, although standards for the provision of lower sanctions are set forth in the criminal code. *(pages 23-24)*
● Not a single *ex-officio* attorney was appointed for an accused in a WPS case, constituting an essential violation of the code in many cases. *(pages 24-25)*
● Prosecutors were passive during the WPS proceeding, allowing the court to present the indictment and evidence against the accused. In some courts, prosecutors did not even appear at the hearing. *(page 25)*
● Conflicting obligations of the court, as set forth in the codes, made it difficult for judges to conduct the WPS hearing and also respect the rights of the accused. *(pages 25-26)*

***On Main Trial Procedures***

● Over 70% of judges, prosecutors, and defence attorneys have affected a shift in their roles at the main trial and are implementing the new adversarial trial procedures consistent with their new responsibilities, as set forth in the codes. *(pages 28-32)*
● The practices of courts were extremely different with respect to how the accused presents their statement during the trial. These different practices impact upon the rights of the accused, including the right to present a defence and the right to silence. Some of these practices also resulted in inconsistencies with the procedures governing the remainder of the main trial proceeding. *(pages 32-34)*

***On Postponements, Delays, and the Progression of Cases***

● Postponements and delays were frequent occurrences in criminal cases. Almost one-quarter (23%) of all post-indictment criminal hearings were postponed. *(pages 35-36)*
● Courts were accepting of delays and were reluctant to exercise their sanction powers, especially during the trial phase of proceedings when duly summoned prosecutors, defence attorneys, and witnesses failed to appear. *(pages 36-37)*
● Staggered trial hearings were a regular occurrence. Cases would be resolved faster if better scheduling practices were introduced by the court. *(pages 37-38)*
● In 77% of cases, the plea hearing was scheduled within 60 days from confirmation of the indictment. In over 50% of these cases, the main trial was scheduled within 60 days of the plea hearing. *(pages 38-39)*

***Other Significant Implementation Issues***

● Mental Incapacity Issues: The procedures relating to mental incapacity require renewed attention; implementation problems exist with respect to the ability of the body for social welfare to handle the responsibilities granted to it; and there is a lack of secure treatment facilities in BiH for defendants who are found to be mentally incapacitated. *(pages 40-42)*
● Ensuring the Dignity of the Court: The vast majority of judges in criminal cases demonstrated a high level of professionalism and properly ensured the dignity of the court, but there was a small minority who did not. *(pages 42-43)*
● Audio Equipment: Lack of audio recording equipment in courts negatively impacted the implementation of the criminal procedure codes. This condition also decreased the protection afforded to defendants and reduced their ability to present an accurate record on appeal. *(pages 43-44)*

# CHAPTER ONE

# ESSENTIAL BACKGROUND

## I. Passage of the New Criminal Procedure Laws

By decision of the High Representative (HR) on 24 January 2003, a new criminal procedure code was imposed in Bosnia and Herzegovina (BiH) as part of a comprehensive crime fighting package.[1] The code was the product of a drafting team comprised of BiH legal and professional experts. The purpose of the code was to establish a new criminal law framework for the entire justice system that would ensure that "justice is efficient, available and equal".[2]

To harmonise the criminal procedure codes in all jurisdictions, the reforms contemplated that the Federation of Bosnia and Herzegovina (FBiH), Republika Srpska (RS), and Brčko District (BD) enact similar legislation. On 23 May 2003, BD adopted a Law on Criminal Procedure, effective 1 July 2003.[3] On 27 June 2003, the National Assembly of the Republika Srpska adopted a Law on Criminal Procedure of the RS, effective 1 July 2003 (RS CPC).[4] On 28 July 2003 the Federation BiH Parliament adopted a Law on Criminal Procedure of FBiH, effective 1 August 2003 (FBiH CPC).[5] As a result of these legislative activities, the provisions of all four criminal procedure codes ("criminal procedure codes" or "codes") were made nearly identical,[6] essentially harmonising the criminal procedure in all BiH jurisdictions and courts.

## II. Overview of the Changes to Criminal Procedure in BiH

With the introduction of the legislative changes in 2003, the criminal procedure codes were described as a "positive combination of both BiH legal tradition and modern European methods of investigation and efficient Court procedures".[7] Academic debate has ensued among national legal scholars and international experts who have alternatively described the new procedures as a "hybrid", "adversarial", or "mixed" system. For practitioners however, the theoretical debate does little to solve the practical implementation issues that arise in administering justice under the codes. Given the convergence of criminal law practices among European states, even for academics the utility of this exercise is questionable.[8]

Whatever legal categorisation is ultimately assigned to the new BiH criminal law system, the reforms have affected major changes to the administration of justice and the practice of criminal law. The changes require new procedures to be adapted, new roles and skills to be

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[1] BiH Criminal Procedure Code, Official Gazette of Bosnia and Herzegovina (BiH OG) 36/03.
[2] OHR Press Release, 24 January 2003, High Representative Enacts Crime Fighting Package. Available at www.ohr.int.
[3] Official Gazette of the Brčko District 10/03.
[4] Official Gazette of the Republika Srpska (RS OG) 50/03.
[5] Official Gazette of the Federation of Bosnia and Herzegovina (FBiH OG) 35/03.
[6] As a result of legislative action as well as technical errors, a few articles of the codes enacted by the FBiH and RS included some minor deviations from the BiH criminal procedure code. In addition, the RS adopted a different organization for the articles resulting in cosmetic, but not substantive, differences.
[7] OHR Press Release, 24 January 2003, High Representative Enact Crime Fighting Package. Available at www.ohr.int.
[8] See *European Criminal Procedures*, edited by Mireille Delmas-Marty and J.R. Spencer, Cambridge University Press, 2002. "Although there are unquestionably two different legal traditions [accusatorial and inquisitorial], the borrowings between the two have been so extensive, it is no longer possible to classify any of the criminal justice systems in Western Europe as wholly accusatorial or inquisitorial."

developed, and institutional capacities to be strengthened. The changes also affect criminal procedures at all stages, from those governing the criminal investigation through the appeals process. While a complete list of reforms is prohibitive, any summary of the major structural and conceptual changes to the system of criminal procedure would likely include the following:

- The elimination of the investigative judge and the establishment of the prosecutor as the party with primary responsibility for conducting the investigation of criminal suspects and supervising the investigative activities of the police.

- The introduction of new main trial procedures governing the order of proceedings and the presentation of evidence and testimony. These procedures, aimed at shifting responsibility to the prosecutor and defence attorney for the presentation of their respective cases, have been described as a shift to a more adversarial system of trial. This new system places greater control in the hands of the parties, while eliminating the judge as a dominant inquisitor of witnesses, experts, and the accused (when the accused elects to testify).

- New procedures that make criminal proceedings more efficient, such as plea bargaining and the warrant for pronouncement of sentence procedures.

- New appeal procedures that eliminate re-trials by the court of first-instance and require the second-instance to finally determine a case if appealed.

## III. The Context of Legal Reform and Other Conditions Affecting the Implementation of the Codes

The criminal law reforms that took effect mid-year in 2003 were part of a series of legislative activities and other reforms affecting significant changes to the legal and judicial institutions of BiH. Any analysis of the implementation of the codes during 2004 must be made with these reforms and changes in mind. To provide this context, some of the most significant reforms and changes are briefly discussed below.

***Court and Prosecutorial Restructuring.*** By decision of the HR, dated 1 November 2002, the legislative framework for court restructuring was established through amendments to the existing Laws on Courts.[9] The legislation reduced the number of first instance courts in both entities from 78 to 47. Beginning with the merger of the Konjic, Jablanica and Prozor-Rama Municipal Courts in September 2003, court mergers continued through March 2004, requiring transfers of files and consolidation of court offices.[10] Legislation restructuring the Offices of the Entity Prosecutors was passed on 21 August 2002.[11] The restructuring established offices at the canton and district levels and eliminated offices at the municipal and basic levels, thereby further centralising the prosecutorial offices.

***Reappointment and Training of all Judges and Prosecutors***. Shortly after the entry into force of the BiH Criminal Procedure Code, in March 2003 the Entity High Judicial and

[9] Law re-amending the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, BiH OG 35/02; Law on Amendments to the Law on Courts and Judicial Service of the Republika Srpska, RS OG 77/02.
[10] Information obtained from interview with Advisor to the Secretariat of the HJPC.
[11] Law on the Prosecutors Offices of the Republika Srpska, RS OG 55/02, Law on the Federation Prosecutors Office of the Federation of Bosnia and Herzegovina, FBiH OG 42/02.

Prosecutorial Councils (HJPC) opened 874 judicial and prosecutorial posts in the FBiH cantonal and municipal courts and the RS district and basic courts for reappointment.[12] Staggered reappointment of individual judges and prosecutors began in April 2003 and continued throughout the remainder of 2003, with the majority of reappointments occurring in late 2003.[13] By March 2004, the HJPC had reappointed 91% of all judges and prosecutors, approximately 80% of whom, were incumbents.[14] With every round of staggered reappointments, each judge and prosecutor underwent a training organised by the European Union (EU) and United States Department of Justice (US). This training focused on the underlying concepts of the codes and the implementation of new procedures such as the plea hearing, plea bargaining, and other adversarial practices.[15] As a result, during this period, there was constant flux in judicial and prosecutorial personnel, and many sitting judges were not trained on the codes. On 1 June 2004, the Councils were merged into a single High Judicial and Prosecutorial Council.[16]

***Judicial and Prosecutorial Training Centres*** **(JPTC).** By decision of the HR dated 23 May 2002, the JPTCs were established. The JPTCs held a first training seminar on criminal law issues on 17 January 2004. Through October 2004, 21 seminars were held by the JPTCs on criminal procedure issues. These seminars were structured around the reappointment trainings conducted by the EU and US trainers and the content of seminars has developed over the year. As of November 2004, no standard curriculum for criminal procedure trainings has been developed.

***Transitional Provisions of the Codes.*** Under Chapter XXXIV of each of the criminal procedure codes, transitional provisions establish rules for phasing-in the codes. These provisions include the continued application of the old criminal procedure codes in cases where the indictment was confirmed on or before the date of entry of codes. For cases in which the indictment was not confirmed before the date of entry, the codes apply. This transition has made the shift to the new procedures a graduated process.

***Criminal Code Implementation and Assessment Team (CCIAT).*** In March 2003, the Ministry of Justice of BiH established the CCIAT as the central legal body responsible for assessing and making recommendations on the implementation of the criminal law reforms.[17] The Ministry of Justice of BiH appointed 18 members, each representing a BiH or entity executive, legislative and judicial institution with an interest in criminal law reform. During the period covered by this report, CCIAT adopted the position that a period of transition was required to permit the courts sufficient time to apply the new laws and for court practices to develop before amendments to the codes would be considered. As of November 2004, CCIAT was in the early stages of considering the first proposed amendments to the codes.

***Commentary Project*****:** This project, established by the Council of Europe (CoE) in August 2003, involves a team of 5 BiH experts in drafting legal commentaries to the criminal procedure codes. When published, the commentaries will serve as a collection of specific cases and legal references that will provide guidance to courts and practitioners in interpreting the codes.

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[12] HJPC Periodic Report #1, 1 January 2003-31 March 2003. Available at www.hjpc.ba
[13] HJPC Periodic Report #5, 1 October 2003-31 December 2003. Available at www.hjpc.ba
[14] HJPC Periodic Report #6, 1 January 2004-31 March 2003. Available at www.hjpc.ba
[15] Training Materials, United States Department of Justice Overseas Prosecutorial Development, Assistance and Training and EU.
[16] BiH OG 25/04.
[17] The Ministry of Justice of BiH, Decision No. 01/1-46/03, on Appointment of Criminal Codes Implementation Assessment Team (CCIAT).

***Local Implementation Groups (LIGs):*** Facilitated by the OSCE, the LIGs function as regional workshops for judges and prosecutors to raise issues of concern and discuss practices related to the implementation of the codes and issues affecting the administration of justice in the courts. Since November 2003, over 200 practitioners have regularly attended the approximately 90 meetings organised locally. In August 2004, the OSCE released a Criminal Law Implementation Report providing a summary of the issues raised by the LIGs.

Looking toward the future of the criminal law reform process, the courts and new institutions have the competency and authority to guide the direction of criminal law practices in BiH. The recommendations offered in this report aim to assist these domestic bodies in continuing this process.

## CHAPTER TWO

## OSCE'S MONITORING METHODOLOGY AND OVERVIEW OF THE COURTS, HEARINGS AND CASES MONITORED

### I. Overview of OSCE Trial Monitoring Methodology

### A. Timeframe, Courts and Cases Generally

The information provided in this report was collected over an eight-month period through the OSCE's Trial Monitoring Program of the criminal courts of BiH. Between January 2004 and August 2004, 24 OSCE court monitors provided full-time, systematic monitoring of 38 designated courts throughout BiH.[18] The courts included 22 first-instance criminal courts at the municipal or basic level, 15 cantonal and district courts with first-instance jurisdiction for the most serious offences, as well as the Court of BiH (BiH Court).[19] As a result, the implementation of the criminal procedure code was observed in a wide selection of criminal courts in the major cities as well as small municipalities of both entities and BD. In each court, cases involving all types of criminal offences were selected for monitoring to provide information on practices in a full range of pending criminal matters.

### B. Monitoring Methodology and Reporting

The monitoring of criminal cases consisted of two activities: court file review and observation of court hearings. The combination of these activities provided OSCE monitors with both the procedural history of a case and contemporaneous observation of court practices. Although file review often provided necessary context for a hearing, in many cases observation of a hearing was sufficient to extract the necessary information.[20] Monitors then prepared standardised hearing reports detailing their observations and analysis, from which the findings in this report were compiled.

As the focus of monitoring was to observe the implementation of the codes in the courts, cases were monitored only after the procedural stage, beginning with confirmation of the indictment by the court.[21] Once a case was selected for monitoring and the initial hearing was observed, monitors would seek to follow the case through to the verdict. One complicating

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[18] To prepare for this task, OSCE selected and trained a team of specialized criminal court monitors on internationally recognized court monitoring techniques and standards. The specialized team was then specifically trained on the codes by a US Department of Justice expert who trained BiH judges after reappointment. Further training and ongoing oversight support was then provided, during the period of monitoring, by national legal experts familiar with both the codes and old criminal procedure codes, and all cases were monitored according to comprehensive written guidelines providing a systematic method of case monitoring and reporting.

[19] Criminal jurisdiction in the FBiH municipal courts ranges from petty offenses to crimes carrying up to 10 years of imprisonment, with the first instance jurisdiction of the cantonal courts beginning for crimes carrying sentences of 10 years and over. In the RS, basic courts have jurisdiction for crimes with imprisonment up to 20 years, and the district courts have jurisdiction for crimes carrying sentences of 20 years and over. The BiH Court also has first instance criminal jurisdiction over specific offences as enumerated in the Law on the Court of BiH.

[20] For example, with respect to observing issues related to the adequacy of courts instructions to accuseds, case file review was often irrelevant as the monitor could observe first hand the adequacy of the instruction. However, to obtain information related to pre-trial custody, case file review was often critical to collecting procedural information regarding the length, basis, and status of investigative custody at the time of the hearing.

[21] More specifically, monitoring began the date indictment was confirmed under Article 243 FBiH CPC and Article 235 RS CPC, at the time when the preliminary hearing judge determined "grounded suspicion" exists.

factor was the absence of a centralised, hearing notification system within each court and as a result, monitors did not always have advance notice of a hearing.[22] The findings presented in this report were not affected by this circumstance, but this obstacle did limit the information that could be collected in certain cases.

All cases monitored by the OSCE were subject to a strict policy of non-intervention, requiring the OSCE monitor to avoid any participation in, or comment upon the court proceeding. This policy was strictly enforced under the principle that for a justice system to establish independence, courts must remain free from external interference and remedies must be provided from within. Consistent with this policy, and given that many of the cases discussed in this report are still ongoing, the cases in this report are only referenced by the name of the court and the date of the monitored hearing.

## II. Courts and Number of Hearings Monitored

This report collects information from 1032 post-indictment criminal hearings monitored in 38 designated courts. These courts ranged in size from the Sarajevo Municipal Court with 17 full-time criminal judges, to the Zvornik, Srebrenica, and Foča Basic Courts and Goražde and Orašje Municipal Courts, with 4 judges handling both criminal and civil matters. *Table 1.1* sets out the courts and number of hearings monitored in each court.

*Table 1.1 Hearings Monitored by Court Location*

**Federation BiH Courts**

| Court | Municipal | Cantonal | Total |
|---|---|---|---|
| Bihać | 14 | 35 | 49 |
| Čapljina | 9 | n/a | 9 |
| Goražde | 25 | 4 | 29 |
| Konjic | 18 | n/a | 18 |
| Livno | 29 | 2 | 31 |
| Mostar | 43 | 25 | 68 |
| Orašje | 43 | 0 | 43 |
| Sarajevo | 59 | 75 | 134 |
| Tuzla | 34 | 8 | 42 |
| Travnik | 7 | 15 | 22 |
| Široki Brijeg | 29 | 5 | 34 |
| Zenica | 28 | 24 | 52 |
| Others | 13 | n/a | 13 |
| **TOTALS** | **351** | **193** | **544** |

**Republika Srpska Courts**

| Court | Basic | District | Total |
|---|---|---|---|
| Banjaluka | 76 | 24 | 100 |
| Bijeljina | 29 | 6 | 35 |
| Doboj | 46 | 3 | 49 |
| Foča | 22 | n/a | 22 |
| Prijedor | 56 | n/a | 56 |
| Sokolac | 44 | n/a | 44 |
| Lukavica | n/a | 11 | 11 |
| Srebrenica | 17 | n/a | 17 |
| Trebinje | 38 | 1 | 39 |
| Zvornik | 23 | n/a | 23 |
| Others | 29 | n/a | 29 |
| **TOTAL** | **380** | **45** | **425** |

**BiH Court**

| Court | Trial | Appellate | Total |
|---|---|---|---|
| BiH Court | 28 | 0 | **28** |

**Brčko District**

| Court | Basic | Appellate | Total |
|---|---|---|---|
| Brčko | 35 | 0 | **35** |

## III. Hearings and Cases

[22]During the period of monitoring, it was the practice in most courts that individual judges, once assigned a criminal matter from the Court President, did not regularly report to the central registry on their court hearing schedule. At the time this report was completed, pending adoption is a new FBiH and a new RS Book of Rules on the Internal Operation of the Courts that will require courts to post public notices of all hearings.

A wide selection of court hearings were monitored to observe practices at various stages of proceedings and the implementation of new procedures related to specific hearings. The following types of court hearings were monitored:

- 179 warrant for pronouncement of sentence hearings
- 247 plea hearings (including deliberation hearings)
- 96 plea bargain deliberation hearings
- 445 main trial hearings
- 37 other hearing types including appellate and juvenile hearings.[23]

The court hearings above involved 678 different cases.

## IV. Types of Offences

Case selection for monitoring was structured to provide observations of a wide range of criminal offences from minor crimes to serious felonies, including war crimes. A complete list of each offence monitored is prohibitive, but the most frequent ones are provided in *Table 1.2.*

*Table 1.2 Most Frequent Offences Monitored*

| **Type of Offence** | **Number of Cases Monitored** |
|---|---|
| Endangering Public Traffic; Endangering Public Transportation; Grave Offences against Safety of Traffic; and Grave Offences against Safety of Public Transportation | 51 cases |
| Aggravated Theft | 46 cases |
| Murder; Attempted Murder; First Degree Murder; and Manslaughter | 44 cases |
| Forging Documents; Counterfeiting Documents; and Falsifying or Destroying a Public Document | 42 cases |
| Robbery, Aggravated Robbery; Armed Robbery; and Aggravated Cases of Theft in the Nature of Robbery or Robbery | 40 cases |
| Theft; Petty Theft, Embezzlement and Fraud | 33 cases |
| Illegal Possession of Weapons or Explosive Substances | 30 cases |
| Bodily Harm; Minor Bodily Harm; and Light Bodily Harm | 28 cases |
| Abuse of Office or Official Authority; and Abuse of Official Authority | 26 cases |
| Domestic Violence | 21 cases |
| Unauthorised Production and Sale of Narcotics | 16 cases |
| Attacking an Official in the Execution of Duties; and Attacking an Official while Carrying Out Security Work | 14 cases |
| Violent Behaviour | 12 cases |
| War Crimes[24] | 8 cases |

[23] Totals here do not include 28 hearings monitored at the BiH Court.

[24] In this period, OSCE monitored a total of 23 war crimes cases in entity courts. However, since 13 cases were progressing under the old criminal procedure codes, they are not included in this report. Additionally, 2 cases were monitored in the investigative stage. A full treatment of war crimes cases monitored by the OSCE in BiH is the subject of a separate report.

## CHAPTER THREE

## THE RIGHT TO A DEFENCE ATTORNEY AND FINDINGS RELATED TO THIS RIGHT

### I. Background

The right to a defence attorney throughout the entire course of criminal proceedings, from the first questioning of a suspect through to the final appeal, is a fundamental right accorded by the codes, as well as protected by Article 6 of the European Convention on Human Rights (ECHR).[25] To protect this right, the codes specifically require the police, the prosecutor, and the court to advise the suspect or accused on the right to have a defence attorney present during the criminal proceeding.[26]

In specific circumstances, the police, the prosecutor, and the court, also have an additional duty to ensure the appointment of a defence attorney, at different stages in the proceedings. Such appointments are referred to as *ex-officio* appointments. The Articles of the respective entity codes providing for such appointments are as follows:

FBiH 59(1)/RS 53(1): At the time of questioning when the suspect is mute or deaf or when a criminal offence involving long-term imprisonment is suspected;
FBiH 59(2)/RS 53(2): At the immediate assignment to pre-trial custody and thereafter;
FBiH 59(3)/RS 53(3): At the time the indictment is delivered for an offence with a prison sentence of 10 years or more;
FBiH 59(5)/RS 53(5): In the interests of justice, due to the complexity of the case or mental condition of the accused; and
FBiH 60(1)/RS 54(1): At the request of the indigent accused when a sentence of 3 or more years may be pronounced or if the interests of justice so require.

With the shift to a more adversarial criminal procedure that places the responsibility in the hands of the defence to investigate, present evidence, and challenge the prosecution's case, the presence of a defence attorney takes on even greater importance. The awareness of the accused of this right is therefore critical. In cases, where the right to defence is not respected, this constitutes an essential violation of the codes and provides grounds for appeal.[27]

To provide a broad picture of the right to an attorney in the BiH courts, this chapter first presents findings on the frequency of appearance of private and *ex-officio* defence attorneys throughout post-indictment proceedings.[28] Next, findings on court practices in appointing *ex-officio* attorneys are presented, including appointments to the indigent accused and appointments in the interests of justice. Finally, court practices in instructing the accused on their rights, as observed at plea and warrant hearings, are addressed.

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[25] See Article 53(1) FBiH CPC and Article 47(1) RS CPC; Article. 7(1) FBiH CPC and RS CPC; and Article 6(3)c of the ECHR.
[26] See Article 13; 92(2)(b), and 234(3) FBiH CPC and Article 12; 142(2)(b); and 219(3) RS CPC.
[27] See Article 312(1)(d) FBiH CPC and Article 304(1)(d) RS CPC.
[28] As OSCE monitoring only commenced following the confirmation of the indictment, this report does not address how the suspect's right to a defence attorney has been dealt with in the investigation stage of criminal proceedings during questioning or while in police detention.

## II. Findings of Trial Monitoring

### A. The Presence of Defence Attorneys in Post-Indictment Court Proceedings

The information in *Table 3.1* provides a positive picture of the frequency of legal representation .

*Table 3.1 Presence of a Defence Attorney*

| Type of Hearing | Total Number of Cases Monitored[29] | Number of Cases at which Defence Attorney was Present | Type of Attorney[30] | |
|---|---|---|---|---|
| | | | Private | *Ex-Officio* |
| Warrant Hearing | 120 | 10 (8%) | 10 | 0 |
| Plea Hearings | 189 | 112 (59%) | 78 | 32 |
| Plea Bargains | 91 | 68 (73%) | 36 | 31 |
| Main Trial | 226 | 171 (76%) | 113 | 53 |

As set out in *Table 3.1,* monitoring revealed that a significant majority of accuseds are represented during post-indictment proceedings. It also becomes more likely that an accused will be represented in the latter stages of proceedings, with the highest percentage of accuseds being represented at the main trial hearing.[31] Notably, the ratio of private to *ex-officio* attorneys monitored was approximately 2:1.

### B. Overview of the Bases for Appointments of Ex-Officio Attorneys

Whereas *Table 3.1* above provides an overall picture of the availability of legal representation, *Table 3.2* below presents a breakdown of the specific legal bases under Articles 59 and 60 FBiH CPC and Articles 53 and 54 RS CPC, for the *ex-officio* appointments monitored.

*Table 3.2 Bases for Ex-Officio Appointments by the Court at Monitored Hearings*

| Type of Hearing Monitored (and total cases) | Number of *Ex-Officio* Appointments (from *Table 3.1*) | Basis for Ex-Officio Appointment (when known)[32] | | | | |
|---|---|---|---|---|---|---|
| | | Pre-trial Custody | Offence carrying 10 or more years | Indigent | In the Interests of Justice Due to | |
| | | | | | Complexity of case | Mental Condition |
| Warrant Hearing (120) | 0 | n/a | n/a | 0 | 0 | 0 |
| Plea Hearings (189) | 32 | 13 | 9 | 5 | 2 | 2 |
| Plea Bargains (91) | 31 | 16 | 7 | 5 | 0 | 1 |
| Main Trial (226) | 53 | 16 | 11 | 4 | 0 | 7 |

[29] Figures do not include cases when the hearing was postponed.
[30] In 7 cases, the type of attorney was not identified.
[31] The infrequent representation of accuseds in warrant hearings is discussed in more detail in Chapter 5.
[32] In 18 cases, the reason for *ex-officio* appointment was not identified.

As evident from *Table 3.2*, the vast majority of *ex-officio* appointments occurred in cases where pre-trial custody was ordered by the court or cases involving offences carrying a punishment of 10 or more years. *Ex-officio* appointments for other reasons were relatively infrequent.

For additional perspective on the infrequency of *ex-officio* appointments to indigent accuseds, it should be noted that in a total of 265 cases the accused was not represented (from *Table 3.1*). Compared with this number, however, in only 14 cases was an *ex-officio* attorney appointed to an accused on the basis of being indigent.[33] Likewise, in only two cases did a court determine that an *ex-officio* attorney should be appointed "in the interests of justice due to the complexity of the case".

## C. Reluctance of Courts to Appoint Ex-Officio Attorneys for the Indigent Accused

Article 60(1) FBiH CPC and 54(1) RS CPC provide that, at the request of the indigent accused, the court shall appoint an attorney where the accused faces a sentence of three or more years or where the appointment is in the interests of justice. The failure of the court to appoint a defence attorney to an indigent accused in appropriate circumstances is an essential violation of the codes and the ECHR.

In addition to the low statistical frequency of *ex-officio* appointments to indigent accuseds noted above, monitoring revealed that courts were reluctant to appoint an attorney in individual cases, even when the accused explained their poor financial condition and specifically indicated a need for one. Specifically, in 12 out of the 77 plea hearing cases (16%) where no attorney was present (from *Table 3.1*), sufficient information was raised in the hearing to indicate that appointment should have been seriously considered. A few examples of such cases follow:

> **Case** On 4 May 2004, the accused appeared for a plea hearing in Sokolac Basic Court involving the offence of the illegal possession of weapons and explosive substances, carrying a range of sentence from 6 months to 5 years. During the hearing, the accused stated that he could not afford to hire an attorney, but would like to have one present. The court requested that he prove his poor financial status. When the accused tried to respond with evidence, the judge ignored his efforts and entered in the record that the accused had been informed of his rights.

> **Case** During a plea hearing in the Prijedor Basic Court on 29 July 2004 involving the offence of forest theft, the accused advised the court that he wanted to hire an attorney, but could not pay for one. Consistent with other cases monitored, the preliminary hearing judge opted not to respond to the request and did not enter the request in the record. At the end of the hearing, the accused decided to plead guilty to the offence which carries a sentence of 1 to 5 years.

> **Case** During a plea hearing in the Mostar Municipal Court on 31 August 2004 in which the accused pleaded not guilty, the accused stated that he had recently lost his job and did not have the money to hire a lawyer. In addition to the fact that the judge did not advise the accused of his right to an attorney if indigent, the judge also interrupted the accused while speaking about his financial circumstances and warned him against discussing this issue during the hearing.

[33] In addition, 5 of these 14 cases were reported from the Brčko Basic Court.

While not all cases present such drastic examples of courts ignoring requests for an attorney, the above statistics likely underestimate the number of indigent accuseds who would be entitled to an attorney. This is because, as discussed in Section V below, some accuseds are not informed of their right to an attorney if they cannot afford one, and hence, do not even raise the issue.

The reluctance of courts to appoint an attorney to the indigent accused cannot be explained simply by lack of familiarity with the provisions of the codes. Similar provisions existed in the old criminal procedure code. Obstacles to the proper implementation of these provisions also result from the poor financial conditions under which the courts are operating, including the high attorney tariffs established by the Bar Associations, and approved by the Entity Ministries of Justice.[34] At the current tariffs, *ex-officio* defence attorneys are entitled to a rate of 600 KM for a single municipal panel hearing, 900 KM for a cantonal hearing, and 1200 KM for a hearing at the BiH Court regardless of case complexity.[35] In sum, since the costs of *ex-officio* attorneys are paid from the court's budget, the reluctance of courts to appoint *ex-officio* attorneys cannot be attributed only to lack of familiarity with legal standards for indigent appointments, but also to the additional financial burden placed upon the court's budget when *ex-officio* attorney appointments are made.

## D. Infrequent Appointments under the Mandatory Defence Provisions of Article 59(5) FBiH CPC and 53(5) RS CPC

Monitoring revealed that courts also routinely failed to apply the mandatory defence provisions of Article 59(5) FBiH CPC and Article 53(5) RS CPC which provide for court appointment of an attorney "in the interests of justice, due to the complexity of the case or mental condition." Such failures again constitute an essential violation of the codes and grounds for appeal.

### *1. Appointment in the Interests of Justice due to the Complexity of the Case*

Under ECHR case law, in determining whether an appointment is "in the interests of justice," the court must weigh factors including the potential for incarceration and the complexity of issues in relation to the ability of the accused to present a defence.[36] Under the codes, however, no specific standard or test for application of Article 59(5) FBiH CPC and Article 53(5) RS CPC is provided.

As set out above, the court appointed a defence counsel, "in the interests of justice due to the complexity of the case", in only 2 cases. However, in 7 cases out of the 77 plea hearings monitored (9%), sufficient information was raised to indicate that appointment should have been seriously considered.

> **Case** On 6 September 2004, an accused appeared for a deliberation hearing on a plea bargain agreement in the Prijedor Basic Court, involving the offence of grievous bodily harm, carrying a potential sentence of 6 months to 5 years. The accused expressed confusion about the nature of the agreement and stated

[34] When the situation relating to indigent appointment was raised in one meeting with the judiciary, it led to the statement of a judge in the RS to an OSCE legal advisor, that instructions had been given to RS courts only to appoint *ex-officio* attorneys in the most extreme of cases.
[35] See tariff schedule, published in FBiH OG 22/04.
[36] Parks and others v. the United Kingdom, 12 October 1999 (European Court of Human Rights).

that he felt pressured to sign it. Despite learning that the accused was illiterate and could not have read the agreement, and was not equipped to understand the proceedings, the court nevertheless confirmed the agreement, sentencing the accused to a suspended sentence of 6 months imprisonment with 1 year probation.

### *2. Appointment in the Interests of Justice due to Mental Condition*

With respect to appointments "in the interests of justice due to mental condition", the codes again do not define the relevant standard that is to be applied. Monitoring revealed, however, that the courts more regularly appointed defence attorneys to accuseds on the basis of their mental condition. In 10 of 20 cases (50%), involving an accused who demonstrated an observable mental condition, the court appointed an *ex-officio* attorney. These appointments on the basis of mental condition, were made for various reasons, including: suspicion of mental incapacity[37], Down syndrome, old age, and mental illness. In these cases, appointments were made at both plea hearings and trials. In the following case, the court appointed an attorney at the main trial, when evidence of the mental condition became first apparent:

**Case** In a main trial hearing in Sarajevo Municipal Court on 9 April 2004, in response to the questionable behaviour of the accused during the cross-examination of a witness and also realising from his record that he had previously received treatment in a mental institution, the court adjourned the trial to appoint defence counsel on the basis of Article 59(5) FBiH CPC.

As was the situation in the above case, *ex-officio* appointments "in the interests of justice due to mental condition" were more frequent than those "in the interest of justice due to the complexity of the case". Still, in half of cases involving an accused demonstrating a mental condition that adversely affected their ability to defend themselves, the accused was not provided an attorney.

## E. Practice of the Courts Instructing Accuseds on Their Rights at the Plea Hearing

Article 13 FBiH CPC and Article 12 RS CPC set forth the duty of the court, as well as other parties, to instruct the accused on their rights. These Articles provide as follows:

> "the Court, Prosecutor and other bodies participating in the proceeding shall instruct a suspect or the accused, or any other participants in the criminal proceedings, who could, out of ignorance, fail to carry out a certain action in the proceeding or fail to exercise his rights, on his rights under this Code and the consequences of such failure to act."

Despite this obligation, the accused's rights are not specifically enumerated in any one article of the codes. Instead, they are found in several articles in various sections of the codes. With the elimination of the investigative judge in the codes, the plea or warrant hearing is the first time that most accuseds will come into contact with the court. Therefore, these hearings are the first opportunity for the court to discharge its duty and ensure that the accused understands their rights and the nature of the criminal proceedings.

[37] See also Chapter 8, Section I, *infra,* Issues related to cases involving mental incapacity.

### *1. Informing Accuseds on their Rights at the Plea Hearing*

Monitoring revealed that the majority of courts provided sufficient instructions to the accused on their rights in connection with the criminal proceeding at the plea or warrant hearing consistent with the general obligations set forth in Article 13 FBiH CPC and Article 12 RS CPC. In 117 of 169 cases (69%), the monitor observed that the instruction was "substantially complete," that is, the courts instructed accuseds on both their basic rights[38] and the consequences of their plea.[39] Below is a case in which the preliminary hearing judge provided especially comprehensive and effective instructions:

> **Case** On 25 May 2004, the accused appeared for a plea hearing in the Siroki Brijeg Municipal Court for the offence of violent behaviour. After establishing the identity of the accused, the preliminary hearing judge carefully instructed the accused on: the option of pleading guilty or not guilty; the right to speak with a defence attorney prior to making the plea and the right to have one appointed by the court if he cannot afford one; the right to remain silent and that he was presumed innocent until proven guilty which was the prosecutor's burden; the right to trial including the right to inspect all evidence, call witnesses who are compelled to appear before the court, and present evidence in his favour; that a not guilty plea would not have a negative effect if the final verdict was guilty; and that upon a guilty plea, in addition to a criminal sanction, the accused may be responsible for the victim's property claim and the cost of the proceedings. The judge then confirmed that the accused understood his rights and tried to establish that the accused understood the indictment which the accused stated he had not read. The judge read the indictment and the accused acknowledged that he understood the charges. After clarifying that the accused did not want a defence attorney, the judge sought the accused's plea and the accused pleaded not guilty.

On the other hand, in 52 of 169 cases (31%), the courts instructions were "unsatisfactory." In 10 cases, the court failed to instruct the accuseds on their basic rights; in 24 cases, the court failed to instruct the accuseds on the consequences of their plea; in 15 cases, accuseds were neither advised on their basic rights nor the consequences of their plea; and in 3 cases, the instructions were unclear.[40]

In summary, with respect to advising accuseds on their rights, monitoring revealed that over 30 percent of accuseds were not given adequate instructions at the plea hearing or warrant hearing. However, given the novelty of the plea hearing institution and the absence of specific guidance as to how such hearings are to be conducted, it should be concluded that while further attention to this area is necessary, courts have made significant strides in developing good practices on the content of instructions.

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[38] These basic rights included the right to an attorney; right to silence; the presumption of innocence; and right to a trial when the accused may present evidence and witnesses against the charges.

[39] The consequences of a plea included an explanation by the court as to the nature of the charges by the prosecution; consequences of guilty plea including deliberation on sentencing, obligations of the accused to pay for costs associated with the proceeding and possible property claim; and instruction that a plea of not guilty would not adversely affect the accused in the event the accused was ultimately found guilty at trial.

[40] Similar statistics on the adequacy of instructions provided by preliminary proceedings judges were made at warrant hearings.

### *2. Two Additional Observations Related to Court Practices on Instructions at the Plea Hearing*

*a. Manner of Providing Instructions:* In some cases, it was observed that the court read the defendant his rights from a list without engaging the accused personally. This method failed to allow the court to determine whether the accused understood the instructions. One illustrative case follows:

> **Case** On 25 May 2004, an accused appeared before the Tuzla Municipal Court for a plea hearing for the offence of violent behaviour. The judge read the accused his rights from the codes in a low and unintelligible voice and failed to explain the difference between a guilty and not guilty plea. Upon noticing that the accused did not know what to do, the prosecutor suggested that the court further explain the proceedings to the accused.

Rather than approaching instructions in a formal manner, as was done in the foregoing case, courts have a duty to confirm that the accused actually understand their rights. Only where the accused knowingly elects to proceed without an attorney, with full knowledge of their rights and the consequences of their plea, should the court accept the plea.

*b. Instructions in Summons as a Supplemental Method of Providing Instructions:* The inclusion of instructions with the summons is a straightforward method for accuseds to be advised of their rights in advance of the hearing. While written instructions do not substitute for the court's instructions at a hearing, they may provide an opportunity for the accused to seek an attorney in advance of the hearing and educate those that may be too intimidated to ask questions at the hearing.

All courts monitored provided some type of instruction to the accused with the summons and indictment. However, these instructions varied widely between courts and even amongst judges within individual courts. In 29 courts, the instructions contained only basic information relating to the Indictment Procedures in Chapter XX of the FBiH and RS codes, advising the accused of: 1) the obligation to appear at court and enter a plea, 2) the right to submit a preliminary motion or present evidence, and 3) the consequences of failing to appear.

On the other hand, in 8 individual courts, the summons also included specific instructions on the right to a defence attorney.[41] Further, the Čapljina Municipal Court also included instructions to the accused on the right to be provided an attorney, at no cost, if the accused was unable to afford one. Standardisation of court instructions with the summons is an important first step in advising the accused of his/her rights.

## III. Conclusions

1. Defence attorneys were regularly present during a significant majority of criminal proceedings indicating that the basic protection of legal representation is available to most defendants in the post-indictment stages of proceedings. The ratio of private to *ex-officio* representation observed is approximately 2:1.

[41] These courts included: Bihać Cantonal and Municipal Courts, Brčko Basic Court, Čapljina Municipal Court, Mostar Municipal Court, Tuzla Cantonal and Municipal Courts, and Zvornik Basic Court.

2. Courts were reluctant to appoint *ex-officio* attorneys to indigent defendants even when legal assistance is requested and the poor financial situation of the accused is presented to the court. Appointments "in the interests of justice due to the complexity of the case" were also rare. Appointments "in the interests of justice due to mental condition" were more frequent, but again, not always made. Such failures to appoint *ex-officio* attorneys are essential violations of the codes and constitute grounds for appeal.

3. Approximately 70% of preliminary hearing judges provided sufficient instructions to the accuseds on their rights and the consequences of their plea. This may be viewed as a positive development given the novelty of the plea hearing institution. However, there is still a need to improve court practices, especially relating to the duty of the court to advise defendants on their right to an attorney if they cannot afford one.

**Recommendations**

○ Amendments or By-laws: The CCIAT should develop and propose clear legal standards and criteria to determine eligibility for the appointment of an *ex-officio* attorney to the indigent accused under Article 60 of the FBiH CPC and Article 54 of the RS CPC, and for appointments in the "interests of justice due to the complexity of the case or mental condition" under Article 59(5) FBiH CPC and Article 53(5) RS CPC. International partners may offer support with developing an "indigent test" and other legal standards for such *ex-officio* appointments.

○ Training: Mandatory JPTC training seminars, using a standardised curriculum, should be required for all judges handling criminal cases, on:

1) The standards and procedures applicable to the appointment of defence attorneys for indigent accuseds and to accuseds "in the interests of justice".
2) The manner and content of instruction to the accuseds on their rights. Emphasis should be placed on engaging the accuseds in discussion and ensuring that the decision of accuseds to proceed without a defence attorney has been made with full knowledge of their rights and the potential consequences of their plea.

○ Review *Ex-Officio* System and Attorney Tariffs: Attention and study must be immediately given to the system of court appointed attorneys and attorney tariffs by the Bar Associations, HJPC, and Entity Ministries of Justice. International partners may offer support with the assessment, including feasibility studies of the current tariff structure and consideration of other potential systems of providing legal representation, such as establishing legal aid funded by a budget separate from the court.

○ Standardisation of Court Instructions With Summons: The Entity Ministries of Justice and Entity Supreme Courts should develop standardised instructions for all courts to provide to accuseds with the summons.

# CHAPTER FOUR

# PLEA BARGAIN PRACTICES

## I. Background

Of all the new procedures and concepts introduced with the reforms, the introduction of plea bargaining has probably generated the most attention and raised the greatest number of questions. Plea bargaining permits a defendant to negotiate a guilty plea with the prosecutor, in exchange for a specific sentence, without the necessity of a trial. In criminal systems that have adopted plea bargaining, the institution is a useful tool for the efficient administration of justice. It also provides a way for the prosecutor and the defence to obtain certainty in the outcome of a case on terms that are acceptable to both. The procedures governing plea bargaining are found at Article 246 FBiH CPC and Articles 238 and 239 RS CPC.

## II. Findings of Trial Monitoring

### A. Frequency of Use

Monitoring revealed that the institution of plea bargaining is regularly used by prosecutors and the courts to resolve criminal indictments. Of 342 cases monitored in the stages following the plea hearings, plea agreements resolved 81 cases (24%).[42] In other words, in almost one-quarter of cases, the indictment was resolved using a plea agreement, rather than by a main trial or court deliberation on a guilty plea.

Overall, plea agreements were made and confirmed in 21 of the 22 municipal and basic courts, and 12 of the 15 canton and district courts that were monitored. Furthermore, with the exception of the Livno Municipal Court, the 3 courts that did not utilise the institution had low caseloads.

### B. Court Efficiency

The plea bargain cases monitored also achieved a high level of efficiency and resulted in relatively abbreviated proceedings. Of 81 cases where the plea agreement was confirmed, the following was observed with respect to efficiency:

- In 37 of 81 cases (46%), a verdict was pronounced within 60 days from confirmation of the indictment.
- The average verdict was reached within 70 days from confirmation of the indictment (in most cases, the agreement was signed even earlier with time elapsing before the deliberation hearing was scheduled).
- In 59 of 81 cases (73%), the plea bargain resolved the case without the court having to schedule a main trial hearing or summon a single witness.

[42] The 342 cases do not take into account 168 municipal and basic court proceedings where a warrant for pronouncement of sentence was requested by the prosecutor. This procedure constitutes a second, independent institution for resolving certain offences without necessity of trial. See Chapter 5, Warrant for Pronouncement of Sentence.

## C. Offences and Sentences Generally

The monitored plea bargain agreements involved a wide range of offences, from aggravated robbery to petty theft. In the Entity courts, prison sentences ranged from 1 month and 15 days for attacking a public official (shortest) to 3 years and 3 months for aggravated robbery (longest).[43] Overall, 49 accuseds (61%) received prison sentences, 26 accuseds (32%) received suspended sentences, and 6 accuseds (7%) received fines. *Table 4.1* provides an overview of the plea bargain agreements monitored with their corresponding sentences. The offences are organised in descending order from length of maximum sentence as prescribed under the criminal codes.

*Table 4.1 Selected Plea Bargain Cases Monitored in Entity Courts with Offences, Range of Sentence and Information Related to Sentencing Practices*[44]

| **Offence** | **Cases monitored** | **Range of Sentence in Criminal Code**[45] | **Sentences Given in Plea Bargain Cases** | | |
|---|---|---|---|---|---|
| | | | **Lowest** | **Highest** | **Average** |
| Aggravated Robbery | 16 cases | 5 years to 15 years | 6 months | 3 years and 3 months | 1 year and 10 months |
| Robbery | 2 cases | 5 years to 15 years | 2 years and 8 months | 3 years and 3 months | 3 years |
| Extortion | 1 case | 2 years to 12 years | 1 year and 6 months | 1 year and 6 months | 1 year and 6 months |
| Rape | 1 case | 5 years to 10 years | 1 year | 1 year | 1 year |
| Manslaughter | 1 case | 1 year to 10 years | 6 months | 6 months | 6 months |
| Money Laundering | 1 case | 1 year to 10 years | 1 year | 1 year | 1 year |
| Abduction | 1 case | 1 year to 10 years | 1 year, suspended | 1 year, suspended | 1 year, suspended |
| Attempted Rape | 1 case | 1 year to 10 years | 2 years, suspended | 2 years, suspended | 2 years, suspended |
| Unauthorised Production and Sale of Narcotics | 5 cases | 1 year to 10 years | 8 months | 1 year | 9 months |
| Illegal Possession of Weapons or Explosive Devices | 4 cases | 6 months to 10 years | 5 months, suspended | 3 months | 22 days |
| Embezzlement in Office | 2 cases | 1 year to 8 years | Fine 3000 KM | 1 year and 6 months | 9 months |
| Endangering Public Traffic | 5 cases | 1 year to 8 years | 4 months, suspended | 2 years | 5 months |
| Aggravated Theft | 9 cases | 6 months to 8 years | 1 month | 1 year and 6 months | 7,5 months |
| Grave Offences Against Safety of Public Transportation | 4 cases | 6 months to 8 years | Fine, 2000 KM | 8 months | 2,5 months |

[43] The longest prison sentence under a plea bargain agreement monitored was confirmed on 12 March 2004 at the BiH Court. The agreement provided a term of imprisonment of 9 years for multiple offences, including: trafficking in persons, organized crime, international procuring of prostitution, and conspiracy to perpetrate a criminal offence.

[44] Plea bargains in 9 cases involving offences with maximum sentences of less than five years are not included in this chart. As discussed in Chapter 5, supra, for such offences, the warrant for pronouncement of sentence procedure was more often utilized as the favored method by the prosecutor to resolve the case.

[45] This range encompasses differences in the specific sentence ranges of the cases monitored, including: differences in the paragraph of the offense charged, different sentence range between entity criminal codes, and different sentencing range under old criminal code cases adjudicated under the codes.

| | | | | | |
|---|---|---|---|---|---|
| Enticing into Prostitution | 1 case | 1 year to 5 years | 5 months + 4000 KM | 5 months + 4000 KM | 5 months + 4000 KM |
| Forest Theft | 1 case | 1 year to 5 years | 1 year, suspended | 1 year, suspended | 1 year, suspended |
| Attacking an Official in the Execution of his Duties | 4 cases | 6 months to 5 years | 6 months, suspended | 2 months | 26 days |
| Abuse of Office or Official Authority | 1 case | 6 months to 5 years | 2 months | 2 months | 2 months |
| Violent Behaviour | 2 cases | 6 months to 5 years | 2 months, suspended | 2 months | 1 months |
| Grievous Bodily Injury | 1 case | 6 months to 5 years | 4 months, suspended | 4 months, suspended | 4 months, suspended |
| Smuggling | 1 case | 6 months to 5 years | 1 month, suspended + Fine 700 KM | 1 month, suspended + Fine 700 KM | 1 month, suspended + Fine 700 KM |
| Causing Public Danger | 2 cases | 6 months to 5 years | 1 year, suspended | 3 months | 1,5 months |
| Obstructing an Official in the Execution of His Official Duty | 1 case | 3 months to 5 years | 4 months | 4 months | 4 months |
| Grave Offences Against Personal Safety and Property | 1 case | 3 months to 5 years | 4 months, suspended | 4 months, suspended | 4 months, suspended |
| Counterfeiting of Documents | 3 cases | 3 months to 5 years | 4 months, suspended | 4 months | 3,5 months |
| Possessing and Enabling Another to Enjoy Narcotics | 2 cases | 0 to 5 years | Fine 500 KM | 2 months suspended | 2 months suspended |

## D. Low Sentences Observed in Plea Bargain Agreements in Relation to the Range of Sentences Prescribed in the Criminal Code

### *1. Low Sentences Proposed by Prosecutors*

Article 246(2) FBiH CPC and 238(2) RS CPC provide that the prosecutor may propose a sentence of lesser term than the minimum prescribed by law for the criminal offence(s) in the plea agreement. Other than this provision, no other provisions in the criminal procedure codes specifically govern the content of sentences under plea agreements.

Although the criminal procedural codes allow for plea agreement sentences below the minimum for the individual offence, monitoring revealed that it is the practice of prosecutors to almost always propose, or agree to, such lower sentences. In 73 of the 81 completed plea bargain cases (90%), monitoring found that the proposed sentence in the plea agreement was below the minimum sentence prescribed in the criminal code for the individual offence. In the 8 remaining cases where the proposed sentence was within the range for the specific criminal offence, the sentence was at, or very near, the minimum.

In addition to low sentencing generally, prosecutors frequently do not give specific reasons for proposing lower sentences in the plea agreement. Under the criminal codes, given "highly extenuating circumstances," a court may reduce the sentence below the minimum for the individual offence. In this regard, Article 51 FBiH CC and Article 39 RS CC establish rules

for such reductions called "Limitations on Reduction of Punishments".[46] However, in the 73 cases where the sentence proposed in the plea agreement was below the minimum sentence, the nature or existence of "highly extenuating circumstances" was not raised by the prosecutor. The result of this practice may be the perception that the lesser sentence agreed to by the prosecutor was not justified.

*2. Practice of Courts Not to Reject Plea Bargains Based Upon the Sentence*

Article 246(3) FBiH CPC and Article 238(3) RS CPC permit the court to sustain or reject a plea agreement entered into by the prosecutor and the accused. However, in only 1 case monitored did a court reject a plea bargain based upon the proposed sentence.[47]

> Case> On 20 January 2004, the Sarajevo Cantonal Court rejected a plea agreement in which the prosecutor and defence attorney agreed to a 10 month sentence for attempted rape, an offence carrying a range of sentence between 5 and 10 years, with a minimum reduction on punishment of 1 year under Article 51(1)(b) FBiH CC. Subsequently however, on 23 January 2004, the parties revised the agreement to provide a 1 year prison sentence. Thereafter, the court confirmed the agreement.

The failure of courts to reject plea agreements on the basis of the sentence may be partially explained by possible ambiguity related to the language of Article 246(4) and Article 238(4) RS CPC, which sets forth criteria for the court's deliberation upon the plea agreement. This provision, however, only sets forth minimum criteria that must be met for confirmation, and does not set a limit on the authority of the court to reject a plea agreement for other reasons, such as disapproval of the sentence.

Court reluctance to review and reject the sentences in plea agreements contributes to low sentencing practices in plea bargain cases. As courts are solely responsible for pronouncing the criminal sentence, a restrictive view of their ability to reject plea agreements places unnecessary and undue limitations on their ultimate sentencing authority.

In exercising their sentencing authority, the courts must review the nature of sentence and exercise discretion in deciding whether to sustain or reject the agreement. As noted previously, the criminal codes provide standards at Article 51 FBiH CC and Article 39 RS CC for reduction of sentences, which will provide guidance to the courts in the review of plea agreement sentences.

## E. Plea Bargain Agreements Regularly Made after the Guilty Plea

Article 244(2) FBiH CPC and Article 236(2) RS CPC provide that after a guilty plea, the preliminary hearing judge must forward the case to trial judge. The trial judge will then deliberate on the conditions for acceptance of the plea and later pronounce the sentence.

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[46] These rules permit reduction below the minimum sentence for the individual offence upon "the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment." As an example, the range of sentence for aggravated theft under Article 287(3) FBiH CC is between 1 and 8 years imprisonment. Under Article 51(1) (d) FBiH CC, a crime with this range of sentence, may be reduced to three months of imprisonment when "highly extenuating circumstances" are shown.

[47] In 3 cases monitored the court rejected the plea agreement based upon its finding that the agreement was not entered into "voluntarily, consciously, and with understanding" as required under Article 246(4)(a) FBiH CPC and Article 238(4)(a) RS CPC.

One unanticipated finding was the common practice of prosecutors to enter into the plea bargain agreements *after* the accused pleaded guilty. In 39 of 81 cases (48%), the plea bargain agreements were made after the accused pleaded guilty but prior to the court deliberation. This often happened with the court's encouragement:

> **Case** On 27 January 2004, the accused pleaded guilty at the plea hearing before the Čapljina Municipal Court to the crime of grave offences against safety of transportation, carrying a sentence of 6 months to 5 years. After the guilty plea, the court advised the accused that he should now speak with the prosecutor and try to arrange a plea bargain.

Furthermore, some courts advised the accused before the plea that an agreement with the prosecutor may be reached after a guilty plea. Such practices raise additional questions about whether the court has respected the presumption of innocence to which the accused is entitled throughout the proceeding:

> **Case** On 15 June 2004, the Banja Luka Municipal Court advised the accused before taking the plea, about the possibility of pleading guilty and entering into a plea bargain agreement with the prosecutor. The judge implicitly encouraged such a plea by indicating that the accused would receive a lenient sentence from the prosecutor. The accused then pleaded guilty to the offence of forging documents, carrying a sentence of 3 months to 5 years.

Whenever the prosecutor negotiates the sentence after a guilty plea is made, this practice raises questions about what is being negotiated in the agreements, given that the accused by pleading guilty, has already eliminated his bargaining power. This bargaining power is a pre-condition for negotiation. The practices above should be contrasted with the case described below:

> **Case** On 22 March 2004, the accused appeared with his defence attorney before the Banja Luka District Court to enter his plea on charges of attempted murder. The prosecutor and defence attorney announced that they were trying to reach a plea agreement but needed time to reduce it to writing. The court granted a short postponement for the parties to enter into a plea agreement. When the parties came back to the court on 31 March 2004, however, they had still not entered into the plea bargain. When the accused became reluctant to enter a plea, the court entered a "not guilty" plea "*ex-officio,*" as provided under Article 236(1) RS CPC. In doing so, the court noted that a "not guilty" plea did not preclude a plea bargain agreement and that the case must proceed.

In the above case, rather than encouraging a plea bargain, thereby indicating a preference that the accused plead guilty, the court merely facilitated a negotiation process already taking place. When the parties did not present the agreement at the next hearing as proposed, the court efficiently moved the case forward without pressuring the accused to plead guilty. On the other hand, in cases where the accused does plead guilty, the court's obligation, as set forth in the codes, is to deliberate upon the guilty plea and pronounce the sentence.

## F. Competence of the Preliminary Hearing Judge to Deliberate and Pronounce the Sentence for Plea Bargaining

A final issue that has caused much debate in the courts with respect to plea bargain practice is whether the preliminary hearing judge, who handles post-indictment preliminary proceedings, is competent to pronounce the sentence. In 15 of 81 cases (19%), after deliberation by the preliminary hearing judge, the case was referred to the trial panel to pronounce the sentence. Although this practice was only monitored in a minority of cases, it occurred most often in cases involving offences carrying a sentence of 10 or more years of imprisonment. This minority practice may derive from the traditional separation of judicial functions between judges at different stages in the proceedings. On the other hand, given that the code does not provide any authority to the judge that pronounces the sentence to reject the plea agreement, most preliminary hearing judges pronounced the sentence following confirmation of the plea agreement. It is important that the courts take a consistent approach to this practice.

## III. Conclusions

1. The institute of plea bargaining was widely used by prosecutors and courts throughout BiH to resolve criminal indictments, with 24% of cases being resolved by plea bargains.
2. Plea bargain agreements were a highly efficient method of resolving cases. In almost one-half of all plea bargain cases, a verdict was pronounced within 60 days from confirmation of the indictment. In 73% of plea bargain cases monitored, the court never had to schedule the main trial or summon a single witness.
3. Sentences proposed by prosecutors were low relative to the range of sentence prescribed in the criminal code. In 90% of plea agreements, the sentence was below the minimum sentence prescribed in the criminal code.
4. Courts practice is not to reject plea agreements during deliberation on the basis of the sentence in the agreement. This practice contributes to low sentencing in plea agreements and undermines the ultimate sentencing authority of the court.
5. Plea agreements between the prosecutor and the defendant were regularly made in many courts *after* the accused has already pleaded guilty at the plea hearing, raising questions about what is negotiated in these agreements.

**Recommendations**

○ Amendments: The CCIAT should propose amendments to the provisions of the codes involving plea bargaining to clarify the court's authority to reject plea agreements and to clarify the procedures for the deliberation and pronouncement of sentences for plea agreements under Article 246 FBiH CPC and Article 238 RS CPC.

○ Training: All judges and prosecutors should be required to attend mandatory JPTC training seminars, using a standard curriculum, on plea bargaining procedures, including the importance of exercising discretion in proposing and reviewing plea bargain sentences.

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

# CHAPTER FIVE

# WARRANT FOR PRONOUNCEMENT OF SENTENCE

## I. Background

The procedure for issuance of a Warrant for Pronouncement of Sentence (WPS) is another new institution that was introduced in the codes to increase the efficiency of the administration of justice. In cases involving offences carrying a maximum sentence of five years imprisonment or less, the WPS procedure allows the prosecutor, at his discretion, to propose a specific sanction or measure in the indictment ("the warrant request"). To qualify for the WPS, the warrant request must be limited to a fine, suspended sentence, or forfeiture of material gain or property. Therefore, if the offence carries a maximum sentence of more than five years or the prosecutor seeks any period of imprisonment for the offence, the WPS procedure is not appropriate.

Upon receipt of an indictment containing a warrant request, the court is required to make two decisions. First, as always, it may confirm or reject the indictment. Second, under the WPS procedure, if the indictment is confirmed, the court must either approve or disapprove the warrant request made by the prosecutor. If the court approves the warrant request, the case goes forward under the WPS procedures. If the court disapproves of the prosecutor's warrant request, a plea hearing is scheduled on the indictment as if the warrant request never existed. In cases where the warrant request is accepted by the court, the accused then appears at the warrant hearing to answer the indictment and is advised of the specific criminal sanction that will be imposed by the court. Similar to a plea hearing, the accused is asked to plead guilty or not guilty. In the warrant hearing, however, the accused is made aware in advance of the sanction he will receive if he pleads guilty.

The WPS, like plea bargaining, is premised upon the agreement of both parties to a verdict that is acceptable to each. There are significant differences, however, especially with respect to the court's role. In plea bargaining, negotiation first takes place between the parties and the court's role is to review and deliberate upon the agreement after the plea agreement is made. In the WPS procedure, the court approves the sentence proposed by the prosecutor before knowing whether the accused will accept it. As will be discussed in Section II(G), this difference had implications for how the court conducts a warrant hearing. The provisions governing the WPS procedures are found in Articles 350-355 FBiH CPC and Articles 340-345 RS CPC.

## II. Findings of Trial Monitoring

### A. Frequency of Use

Monitoring revealed that the WPS procedure was widely used by prosecutors in over one-half of all cases involving offences with a maximum sentence of 5 years or less. In 168 of 310 cases (54%) monitored involving offences with maximum sentence of 5 years or less, prosecutors opted to file the indictment with a warrant request. Furthermore, in some courts, the WPS procedure was used automatically by prosecutors in every case involving a crime that carries a maximum sentence of 5 years or less.

## B. Court Efficiency

The WPS cases monitored achieved a very high level of efficiency and resulted in abbreviated proceedings. With respect to efficiency, in the cases where the accused pleaded guilty and accepted the proposed sentence, the following was observed:

- Of the 92 cases in which the accused pleaded guilty and accepted the proposed sentence, 58 cases (63%) were resolved within 30 days from confirmation of the indictment.
- Of these same 92 completed cases, 76 cases (83%) were resolved within 60 days from confirmation of the indictment.
- When delays occurred, this was most often due to the fact the summons was not delivered to the accused.[48]

## C. Offences and Criminal Sanctions

The 168 WPS cases monitored involved a wide variety of offences. *Table 5.1* provides an overview of the most frequent types of offences, the criminal code range of sentence, and warrant request information.

*Table 5.1 Most Frequently Indicted Offences in 168 WPS Cases Monitored, including Criminal Sanctions Requested by Prosecutors and agreed to by Court*

| **Offence** | **Number of Cases** | **Range of Sentence in Criminal Code for Offence[49]** | **Average Sentence Proposed in Warrant Request** |
|---|---|---|---|
| Endangering Public Traffic; Endangering Public Transportation | 21 (12% of total) | Fine or 0-3 years | Suspended sentence of 4 months (8 cases) or 1200 KM (12 cases) |
| Theft; Petty Theft, Embezzlement or Fraud; | 19 (11%) | Fine or 0-1 year | Suspended sentence of 2 months |
| Forging Documents; Falsifying or Destroying a Public Document | 18 (10%) | 3 months-5 years | Suspended sentence of 3 months |
| Illegal (or Illicit) Possession of Weapons or Explosive Substances | 17 (10%) | 6 months-5 years | Suspended sentence of 4 months |
| Domestic Violence | 15 (8%) | Fine or 0-3 years | Suspended sentence of 2 months |
| Possessing and Enabling Another to Enjoy Narcotics | 9 (5%) | 0-1 year | Suspended sentence of 3 months |
| Removing or Damaging an Official Seal or Sign | 8 | Fine or 0-1 year | Suspended sentence of 2 months |
| Bodily Harm | 7 | Fine or 0-2 years | Suspended sentence of 3 months |
| Minor Bodily Harm; Light Bodily Injury | 7 | Fine or 0-1year | Suspended sentence of 2 months (3 cases) or 900 KM (4 cases) |
| Causing Public Danger; Causing General Danger | 5 | 0-1 year | Suspended sentence of 4 months |
| Forest Theft | 5 | 0-3 years | Suspended sentence of 4 months |

In addition, in requesting warrants, a clear preference of prosecutors was found for the suspended sentence over a fine. Of the 84 cases where both a suspended sentence and fine was available, in 57 cases (68%), the prosecutor requested the former rather than the latter. In the 27 cases (32%) where a fine was proposed, the average sum was 900 KM, ranging from

[48] See Chapter 7 for a discussion on postponements generally.

[49] This range encompasses differences in the specific sentence ranges of the cases monitored including: differences in the paragraph of the offense charged, different sentence range between entity criminal codes, and different sentencing range under old criminal code cases proceeding under the codes.

200 KM in a domestic violence case to 2000 KM in several cases involving the crimes of minor bodily harm, illicit commerce, endangering public traffic, and forging documents.

## D. Lack of Criteria Provided by Prosecutors and Courts to Support Reduced Criminal Sanctions

Article 350 FBiH CPC and Article 340 RS CPC provide that the prosecutor may seek a lower criminal sanction in the warrant request, than the sentence prescribed in the criminal code for offences carrying a maximum sentence of 5 years or less. However, like the institution of plea bargaining, no other provision of the codes govern what criminal sanction should be applied.

In determining whether to impose a suspended sentence under the criminal code, however, Article 62(2) FBiH CC and Article 47(2) RS CC provide:

> "In deciding whether to impose a suspended sentence, the court shall, taking into account the purpose of the suspended sentence, pay special attention to the personality of the offender, his conduct in the past, his behaviour after the commission of the criminal offence, the degree of criminal responsibility and other circumstances under which the criminal offence has been committed."

As reflected in *Table 5.1*, many offences for which the WPS procedure was commonly used require some minimum term of imprisonment under the range of sentence prescribed in the criminal code. Of the 168 total cases where the WPS procedure was used by the prosecutor, in 49 cases (29%) the offence carried a range of sentence with a minimum of 3 months of imprisonment. These offences included: forging documents, illegal possession of weapons and explosive devices, aggravated theft, and grievous bodily injury.

Similar to the confirmation of sentences in plea agreements, in no WPS case did the court make a finding that specific circumstances existed under Article 62(2) FBiH CC or 47(2) RS CC, in approving the lower criminal sanction. In exercising its authority to approve a WPS request, there is no reason why criteria appropriate to sentencing generally, should not be applied by the court in approving the prosecutor's warrant request under the WPS procedure. This is especially important when the offence is one for which a minimum term of imprisonment would ordinarily be imposed.

## E. Failure to Appoint an *Ex-Officio* Attorney to an Accused at the WPS

In the 120 completed WPS hearings monitored, in no case (0%), did a court appoint an *ex-officio* attorney to the accused. In at least 16 out of 120 cases (13%), the court should have appointed a defence attorney to the accused based upon circumstances that came to light during the hearing.[50] The failure of the court to appoint a defence attorney in these cases is an essential violation of the codes and grounds for appeal.[51]

As set forth in Chapter Three, *infra*, courts were reluctant generally to appoint *ex-officio* attorneys to indigent accuseds. Similarly, mandatory appointments under Article 59(5) FBiH

[50] In these 16 cases, the basis for appointment was identified as follows: indigent (13), interests of justice or complexity of case (1), and mental condition (2).

[51] Again, these numbers likely underestimate the number of accuseds entitled to *ex-officio* appointments as these are only cases where specific facts supporting appointment came to light during the hearing. The numbers do not reflect cases where the court did not provide adequate instruction to the accused on the right to be provided an attorney if they could not afford one.

CPC and Article 53(5) RS CPC are infrequent. However, the failure of any court to make a single *ex-officio* appointment in a single WPS case raises an additional concern with how the court exercises its obligations with the WPS institution.

The duty of the court in WPS proceedings to instruct accuseds on their rights and appoint *ex-officio* attorneys is identical to the court's duty in the plea hearing. While application of the standards for *ex-officio* appointment may not result in appointment in the same frequency as in plea hearings, given a lesser likelihood of imprisonment associated with some offences, the same right to a court appointed attorney exists. However, the findings of monitoring reveal that court practice in WPS cases is not to apply these standards to the accused at all. The failure of the court to appoint a defence attorney in many of these cases is an essential violation of the codes and grounds for appeal.

## F. Practice in Some Courts that Prosecutor Does Not Appear at Warrant Hearings

Of 120 completed WPS hearings monitored, in 16 cases (13%) the prosecutor was not present at the hearing on the WPS. In most courts, the prosecutor's attendance was sporadic. However, in both the Široki Brijeg and Tuzla Municipal Courts, it is regular practice that the court conducts the WPS without the prosecutor, who is not expected to attend. Even in the majority of courts where the prosecutor is present, monitoring revealed that the prosecutor is largely passive, permitting the judge to present the indictment and evidence against the accused. As described below, this finding has important implications related to the conflicting duties of the court in WPS cases.

## G. Problems with the Court's Multiple Roles at WPS Hearings

Under Article 352(2) FBiH CPC and Article 342(2) RS CPC, the court has the following obligations in the WPS hearing:

> At the hearing the judge shall:
>
> a) ensure whether the right of the accused to be represented by the defence attorney is honoured;
> b) ensure whether the accused understands the indictment and the prosecutor's request for a certain sentence or certain measures to be pronounced;
> c) present the accused with the evidence gathered by the prosecutor, and call upon the accused to make a statement regarding the evidence presented;
> d) call upon the accused to enter a plea of guilty or not guilty;
> e) call upon the accused to make a statement upon the requested sentence or measure.

These obligations however, particularly those set forth in paragraph c), require the court to take on conflicting responsibilities at the WPS hearing, which are difficult, if not impossible, to execute. Specifically, the court has the broader obligation, described in Chapter III of this report, to instruct the accused on his rights under Article 13 FBiH CPC and Article 12 RS CPC. These rights include the right to silence and the presumption of innocence. At the WPS hearing, however, the court is required under paragraph c) above, to "present the accused with the evidence gathered by the prosecutor and call upon the accused to make a statement regarding the evidence". Simply put, how can the court execute all these functions credibly?

This conflict may be more broadly understood as a problem resulting form the fact that the codes assign the court the responsibility for the presentation of the case against the accused.

In the remaining portions of the code, such as sections applicable to the main trial, this responsibility has been transferred to the prosecution. With the WPS procedure, however, the accused is confronted at the hearing with a judge who: 1) has already approved the criminal sanction, 2) presents the evidence against the accused directly, and 3) calls for a response to the evidence. While such a process would not be problematic under the old system of criminal procedure, the multiple and conflicting duties of the court in the WPS procedure creates a conflict with the other procedures in the codes, including the responsibility of the prosecution to present the case against the accused and the responsibility of the judge to protect the accused's right to silence.

## III. Conclusions

1. The WPS procedure was widely used by prosecutors in over 50% of all cases involving offences having a maximum sentence of 5 years or less.
2. WPS cases achieved a high level of efficiency. In 83% of cases where the accused pleaded guilty the WPS case was resolved in less than 60 days from confirmation of the indictment.
3. WPS procedures are regularly used in cases involving offences having a minimum term of imprisonment under the criminal code. In these and other cases, however, no basis for proposing and approving such lower sanctions were articulated, although standards are set forth in the criminal code.
4. Not a single *ex-officio* attorney was appointed for an accused in a WPS case constituting an essential violation of the codes in some cases.
5. In the cases monitored, prosecutors were passive during the proceeding, allowing the court to present the indictment and the evidence against the accused. In some courts, prosecutors do not even appear at the hearing.
6. Conflicting obligations of the court in the codes make it difficult for the court to conduct the WPS hearing and also respect the rights of the accused.

**Recommendations:**

○ Amendments: the CCIAT should propose amendments eliminating the duties required of the court at the WPS hearing under Article 352(2)(c) FBiH CPC and Article 342(2)(c) RS CPC, and transferring the duty to present the evidence at the WPS hearing to the prosecutor.

○ Development of Sentencing Guidelines and Policy: The Entity Prosecutors Offices must develop internal guidelines on the type of criminal sanctions that may be proposed to accuseds for specific crimes under WPS procedures to provide consistent treatment for similar offences and accuseds. The Entity Prosecutors Offices should instruct all prosecutors to adhere to these guidelines to ensure consistency and fairness in offering lesser criminal sanctions.

○ Training: Mandatory JPTC training seminars, using standardised curriculum, must be required for:

1) all judges on the standards and procedures applicable to the appointment of defence attorneys for the indigent accused and in the interests of justice, and the manner and content of instructing the accused during the WPS proceeding,

2) all prosecutors in relation to their responsibilities at the WPS hearing, including: a) presenting the indictment, b) presenting the evidence supporting the indictment, and c) presenting the warrant request and the basis for lesser sanction proposed with the indictment.

# CHAPTER SIX

# MAIN TRIAL PROCEDURES AND TREATMENT OF THE ACCUSED AS WITNESS

## I. Background

### A. Overview of Changes to the Procedures Governing the Main Trial

A central area of change in the codes is the introduction of new main trial procedures governing the order of proceedings and the presentation of evidence and testimony. These procedures set forth new responsibilities and obligations of the judge, prosecutor, and defence attorney in connection with the presentation and examination of evidence at the main trial. These changes, aimed at shifting responsibility to the prosecutor and defence attorney for the presentation of their respective cases, have been described as a shift to a more adversarial system of trial. This system places greater control of the trial in the hands of the parties, while eliminating the judge as a dominant inquisitor of witnesses, experts, and the accused (when the accused elects to testify).

The main purpose of this chapter is to present an assessment of how the court, prosecutor, and defence attorney have discharged their new responsibilities and implemented the new procedures governing the main trial. In order to give the necessary context to this assessment, Section I(B) first sets forth the main provisions related to the direction and order of trial proceeding and presentation of evidence. Section II(A)-(E), provides the criteria for performance assessment and the findings of monitoring. Finally, the additional issue of how courts treated the accused's right to present a defence is discussed in Section II(F).

### B. Provisions of the Codes Related to the Direction and Order of Trial Proceedings, and Presentation of Evidence at the Main Trial

Chapter XXI of the FBiH and RS codes sets forth the procedures governing the main trial. The following Articles in each entity code provide the basic procedures governing the progression of the trial and outline the duties of the court and parties during the trial.[52]

*Duties of the Judge or Presiding Judge*

FBiH 254(1)/RS 246(1): The judge shall direct the main trial.

FBiH 254(3)/RS 246(3): The judge shall rule on motions of the parties and the defence attorneys.

FBiH 254(4)/RS 246(4): The decisions of the judge shall always be announced and entered in the record of proceedings with a brief summary of the facts considered.

*Reading of the Indictment and Statement of Evidence*

FBiH 275(1)/RS 267(1): The trial shall commence by reading the indictment.

FBiH 275(2)/RS 267(2): The prosecutor shall then make an opening statement after which the judge shall confirm that the accused understands the charges.

FBiH 275(3)/RS 267(3): At their option, the defence and/or the accused may make an opening statement [see also, FBiH 6(3)/RS 6(3) below].

[52] The full provisions have been summarized in the interests of conserving space.

*Presentation of Evidence*

FBiH 276(1)/RS 268(1): The parties and defence attorneys are entitled to call wit nesses and to present evidence.

FBiH 276(2)/RS268(2): Unless the judge, in the interests of justice, decides otherwise, the evidence at the main trial shall be presented in the following order: evidence of the prosecutor, evidence of the defence, rebuttal evidence of the prosecutor, evidence in reply to prosecutor's rebuttal evidence, evidence whose presentation is ordered by the judge, all relevant information that may help the judge in determining appropriate criminal sanction if the accused is found guilty on one or more counts of the indictment.

*Direct Examination, Cross-Examination, and Additional Examination of Witnesses*

FBiH 277/RS 269: For each witness presented at any stage in the trial, the party that called the witness shall directly examine the witness. During direct examination, leading questions shall generally not be permitted. Upon completion of direct examination, cross-examination shall be permitted of every witness by the other party on all matters relevant to the direct testimony. After completion of cross-examination, re-direct examination by the party calling the witness shall be permitted. At any time, the judge of members of the panel may pose questions.

*The Right of the Court to Disallow a Question or Evidence*:

FBiH 278/RS 270: The Court may forbid inadmissible questions or the repetition of irrelevant questions or reject the presentation of evidence for various reasons.

In addition, the following articles and general principles have direct application at the main trial:

*Presumption of Innocence*

FBiH 3/RS 3: A person shall be considered innocent of a crime until he is proven guilty by a finally binding verdict.

*Rights of a Suspect or Accused*

FBiH 6(3)/RS 6(3): The suspect or accused shall not be bound to present his defence or answer any questions posed to him.

*Right to Defence*:

FBiH 7/RS 7: The suspect or accused has a right to present his own defence or to defend himself with the professional assistance of a defence attorney of his own choice.

## II. Findings of Trial Monitoring

### A. Methodology Assessing Performance of the Parties

As stated in Chapter I, the focus of OSCE court monitoring was not on the merits of individual cases but the observation of specific court practices in relation to the provisions of the codes. Consistent with this approach, the measuring stick to assess the performance of the court and parties at trial were the provisions of the codes governing the main trial and how they carried out their new obligations and responsibilities as set forth therein.

A total of 226 different cases involving 445 hearings were monitored in the main trial stage of criminal proceedings. To assess performance with respect to the new codes, positive and negative criteria were developed to reflect adherence to the new procedures. Using these criteria, the performance of each actor at the main trial was then determined as either: "accomplishing a shift to the new adversarial trial procedures" or "not accomplishing a shift".

In making a final assessment of the court, prosecutor, or defence attorney, care was taken to assure that sufficient information was available from which to make a reliable assessment.[53] As a result, in approximately 20% of all cases, no assessment was made of a judge, prosecutor, or defence attorneys' performance, as not enough information was collected to form a reliable conclusion. Likewise, in approximately 10% of all cases, the court or parties' performance was identified as a mixture of both old and new practices.

## B. Performance of Prosecutors

*Table 6.1* below sets forth the criteria applied to assess the performance of each prosecutor during the main trial. These criteria were developed according to objective factors relating to the ability of the prosecutor to execute his/her duties under the provisions of the codes.

*Table 6.1 Criteria and Observations to Assess the Performance of the Prosecutor*

| Positive Criteria | | Negative Criteria | |
|---|---|---|---|
| + | presentation of witnesses and evidence were well structured to prove necessary elements of criminal offence | - | reliance upon the judge to ask questions of the witnesses and tendency to inappropriately shift responsibility to the court to examine witnesses |
| + | demonstrated skill upon direct examination of prosecution witnesses, including ability to elicit relevant testimony from the witness | - | lack of skills during direct or cross-examination, including inability to formulate clear questions and/or not having any clear objective for the questions posed to the witness |
| + | demonstrated skill during cross-examination of defence witnesses, including ability to call into question testimony of the witness | - | lack of familiarity of the CPC including lack of familiarity with trial procedures and lack of confidence during proceeding, including poor opening and/or closing arguments |
| + | demonstrated knowledge of the CPC, including properly objecting to leading questions by the defence attorney | - | lack of preparedness and familiarity with the case |
| + | presentation of a clear opening or closing argument | | |

Overall, 123 cases permitted a qualification of the prosecutor's performance. Of these 123 cases, in 88 cases (72%) the performance of the prosecutor was assessed as "accomplishing a shift to adversarial procedures" and in 35 cases (28%) the performance was assessed as "not accomplishing the shift." To illustrate the differences in performance, two examples are provided.

[53] Notably, monitors did not make the final assessment of performance. This assessment was made by senior attorneys in OSCE based upon the objective observations of monitoring and application of specific criteria as will be more particularly described.

The first is an example of a case, observed in the Banja Luka Basic Court, involving the offence of non-payment of taxes and contributions, in which the prosecutor accomplished a shift to adversarial procedures under the codes. After monitoring 14 hearings at the main trial, the OSCE trial monitor concluded that:

> **Case** 'the prosecutor was very well prepared for all hearings, presented a good clear direct examination of his witnesses, engaged in excellent cross-examination of the details of the testimony including using a power-point presentation to expose mistakes of the defence expert in his previous work and timely objected to leading questions posed by the defence attorney.'

On the other hand, although less frequent, an example of a performance involving a passive prosecutor who did not accomplish a shift to adversarial procedures was observed in the Doboj Basic Court where it was reported that:

> **Case** 'at the main trial hearing, the prosecutor did not object when the defence attorney presented the findings of the defence expert instead of the expert himself, and the prosecutor was unprepared to cross-examine the defence expert on the findings of his expert report. At the end of the hearing, the prosecutor also became aware of an eye-witness to the incident for the first time, only because the son of the victim happened to be in the courtroom and informed the court that there was a person who saw the incident.'

Although these examples provide extreme illustrations of practices, they are representative of the differences in the types of performances monitored.

## C. Performance of Defence Attorneys

A second set of criteria was applied to the performance of each defence attorney during the main trial. Similarly, these criteria, set forth in *Table 6.2*, reflected the ability of the defence attorney to execute his/her duties under the codes.

*Table 6.2 Criteria and Observations to Assess the Performance of the Defence Attorney*

| Positive Criteria | | Negative Criteria | |
|---|---|---|---|
| + | demonstrated familiarity with case and well prepared | - | lack of familiarity with case and poorly prepared |
| + | demonstrated skill upon direct examination of defence witnesses, including ability to elicit relevant testimony from the witness | - | lack of skills during direct or cross-examination, including inability to formulate clear questions and/or not having any clear objective for the questions posed to the witness |
| + | demonstrated skill during cross-examination of prosecution witnesses, including ability to call into question testimony of the witness | - | extreme passivity during the case including not objecting to clearly leading questions by the prosecutor and repeatedly failing to take advantage of the opportunity to cross-examine witnesses when cross-examination was necessary and appropriate |
| + | demonstrated knowledge of the CPC, including properly objecting to leading questions or evidence introduced by the prosecutor | | |
| + | making motions, including seeking those to terminate the custody of the accused or | - | lack of familiarity of the CPC including lack of familiarity with trial procedures |

| | | | |
|---|---|---|---|
| + | challenge evidence<br><br>presentation of a forceful opening or closing argument | | |

Overall, 109 cases permitted a qualification of the defence attorney's performance. Of these 109 cases, in 79 cases (72%) the performance of the defence attorney was identified as "accomplishing a shift to adversarial practice," and in 30 cases (28%) the performance was assessed as "not accomplishing the shift."

One example of a performance by a defence attorney who accomplished the shift was observed in the Bijeljina Basic Court in a case involving attempted rape. As noted by the trial monitor:

> **Case** 'The defence attorney (ex-officio) was well prepared, highly efficient, acquainted with CPC provisions, very active during cross-examination, and resisted panel interference in questioning reminding panel on their role in the adversarial procedure. In addition, the attorney was successful during the trial in terminating custody and successful in excluding some evidence proposed by the prosecutor. Finally, following a detailed and precise cross-examination of the injured party, the attorney convinced the prosecutor to change indictment from attempted rape to theft.'

Although less frequent, a case involving a defence attorney who did not accomplish a shift was also observed in the Bijeljina Basic Court in a case involving attempted murder. As noted by the trial monitor:

> **Case** 'the defence attorney was not familiar with the CPC, largely left the questioning of witnesses to the judge, and when attempting to cross-examine prosecution witnesses, did not appear to have a clear strategy or purpose.'

## D. Performances of Judges

Finally, a third set of criteria, set forth in *Table 6.3*, was applied to the performance of the judge at the main trial.

*Table 6.3 Criteria and Observations to Assess the Performance of the Judge*

| Positive Criteria | | Negative Criteria | |
|---|---|---|---|
| + | instructing the accused on their rights and explaining the trial procedure to the unrepresented accused | - | failing to instruct accuseds on their rights and failing to clarify trial procedures to unrepresented accuseds |
| + | respecting the presumption of innocence | - | putting pressure on the accused to plead guilty |
| + | directing the trial according to the rules relating to the order of presentation of evidence | - | taking an active role in the presentation of evidence and questioning of witnesses instead of allowing the parties to control the proceedings |
| + | allowing the parties to take the primary role of presenting evidence and witnesses and ensuring equal opportunity to both sides to challenge testimony and | - | failing to decide promptly at trial on motions made by the parties |

| | | | |
|---|---|---|---|
| | evidence<br><br>+ ruling and deciding motions within a reasonable time when presented with the objections or motion of a party | - | respecting the rules of presentation of evidence |

With respect to the performance of the judge, 124 cases permitted a qualification of the judge's performance as either positive or negative. In 90 of these 124 cases (73%), the performance of the judge was assessed as "accomplishing a shift to adversarial procedures", and in 34 cases (27%) the performance was assessed as "not accomplishing the shift".

For illustrative purposes, below is an example of positive performance by a judge observed in the Brčko Basic Court, in a case involving allegations of abuse of office or official authority. As noted by the trial monitor:

> **Case** 'the judge respected adversarial procedures sometimes asking questions for additional clarification but never assuming role of prosecutor and as a result maintained the appearance of impartiality. The judge also promptly ruled on motions, proposals and objections, showed strong initiative to move case forward including willingness to work after the regular working time, and scheduled hearings on a weekly basis organising the appearance of witnesses consistent with the code while avoiding adjournments in the case.'

Although less frequent, a case involving a judge who did not accomplish a shift was observed in the Zvornik Basic Court in a case involving allegations of forging documents. As noted by the trial monitor:

> **Case** 'the judge did not direct the trial in accordance with adversarial procedures related to the presentation of evidence, took a lead role in posing questions to accused instead of letting the prosecutor meet the burden of proving the guilt of defendant. In addition, the judge accepted a forensic report without calling the expert to testify in person as required by the code.'

## E. Summary of Findings on Performance of Prosecutors, Defence Attorneys and Courts

In sum, monitoring of main trial hearings in courts throughout BiH revealed that a significant majority (over 70%) of prosecutors, defence attorneys, and judges are implementing the new adversarial procedures and assuming their new responsibilities as set forth in the codes. While within these groups there are varying degrees of proficiency, it is clear that a significant, identifiable shift in the conduct of the main trial, toward a more adversarial trial system, has occurred in the courts.

## F. Different Practices Relating to How the Accused Presents His Defence at the Main Trial

Monitoring also revealed significant differences in court practices relating to how the accused's right to present a defence is treated. Such differences require discussion given the importance of this right and the different procedures adopted by the courts on how and when the accused presents their statement.

The right to present a defence, protected by Article 6 of the ECHR, is also provided at Article 7 FBiH CPC and Article 7 RS CPC. These Articles state that:

> "The suspect or accused has a right to present his own defence…"

In connection with this right, the codes further provide, under Article 274 FBiH CPC and Article 266 RS CPC, that the court must advise the accused at the commencement of trial of his right to:

> "…present facts and propose evidence in his favour…question co-defendants, witnesses and experts and offer explanations regarding their testimony."

Furthermore, Articles 276 and 277 FBiH CPC and Articles 268 and 269 RS CPC provide specific rules regarding the presentation of evidence, which were generally followed by the courts monitored. (For example, these rules include directing the trial such that the defence presents "facts and evidence" after the prosecution, as provided by Article 276 FBiH CPC and Article 268 RS CPC.) Similarly, the majority of courts permitted the defence to "question co-defendants, witnesses and experts" through cross-examination, as provided by Article 276 FBiH CPC and Article 268 RS CPC.

Monitoring revealed, however, that with respect to the accused's right to "offer explanation", as set forth in Article 274 FBiH CPC and Article 266 RS CPC above, court practices varied on how and when the accused might exercise this right. This had important implications for whether the accused's right to silence was fully protected and whether an opportunity was provided to prosecutors to cross-examine the accused in cases when the accused waived the right to silence.

First, some courts permitted the accused to be directly examined as a witness during the direct presentation of evidence when requested by the defence. Such practice was observed at the Sarajevo Cantonal Court, Banja Luka District Court, Mostar Cantonal Court, Travnik Cantonal Court, Travnik Municipal Court, Bijeljina Basic Court, and Sokolac Basic Court. These courts also allowed cross-examination by the prosecutor. Monitoring revealed that in these cases, the presentation of the accused's statement was orderly, and always respected the accused's right to silence, as the examination only commenced at the request of the accused.

Second, in courts that did not clearly provide for the examination of the accused during the defence's case, there was no consistent procedure for how or when the accused's statement was given. For example, in some cases, the accused presented his side of the case in the opening statement, in some cases after the testimony of each witness, and in some cases during closing arguments. Moreover, cases in which the accused presented a statement before the prosecutor's case was completed, the order of presentation of evidence was reversed. The situation was especially problematic in cases when the judge turned the accused's opening statement or subsequent statement into an examination. An example of such a case follows:

> **Case** On 6 April 2004, two accuseds appeared for the first hearing of the main trial in the Široki Brijeg Municipal Court in a case involving the allegation of attempted aggravated theft. Neither accused was represented by an attorney. After the opening statement of the prosecutor, the first accused began to provide his description of the event. At some point during the statement, the judge told the accused not to summarise and began asking the accused specific questions (i.e. "How come you were there?", "Did you have any tools?", Why

did you enter the yard?", etc.). It appeared that all the questions asked by the judge were aiming to determine the guilt of the accused before the prosecution had even presented any evidence.

In sum, the right of the accused to present his defence is a critical protection afforded by the codes under Article 7 FBiH CPC and Article 7 RS CPC and protected by Article 6(3)(c) of the ECHR. However, the practices of the courts reveal much divergence related to the procedures for how and when the accused presents his statement at the time of trial. This divergence is not surprising given the inquisitorial model of the old criminal procedure code and lack of explicit guidance in the codes on procedures related to how the accused's statement should be presented. However, consistent practices on how and when the accused testifies are necessary to ensure that the right to present a defence is provided, while also: 1) protecting the accused's right to silence, and 2) maintaining consistency with the adversarial procedures governing the remainder of the trial proceeding.

## III. Conclusions

1. Monitoring of main trial hearings revealed that a significant majority (over 70%) of prosecutors, defence attorneys, and judges have affected a shift in their roles at the main trial and are implementing the new adversarial trial procedures consistent with their new responsibilities as set forth in the codes.
2. The practices of courts are extremely divergent with respect to how the accused presents a statement during the trial. These different practices impact upon the rights of the accused, including the right to present a defence and right to silence, and result in inconsistency with the procedures governing the order of presentation of evidence in the main trial proceeding.

**Recommendations**

- Amendments: CCIAT should propose amendments to clarify the main trial provisions of the codes related to the right of the accused to present a defence, as provided generally by Article 7 FBiH and RS CPC in a manner consistent with the order of presentation of evidence in the main trial under Articles 276 and 277 FBiH CPC and Articles 268 and 269 RS CPC. Such procedures should also clearly protect the right of the accused to silence under Article 6 FBiH and RS CPC.

- JPTC Training: Mandatory JPTC training seminars, using standardised curriculum, for all judges and prosecutors on:
    1) the procedures governing the main trial, including presentation of evidence, direct and cross-examination, and other adversarial procedures;
    2) the procedures governing the main trial, including skills training on direct and cross-examination, and other adversarial main trial procedures.

- Training of the Defence Attorneys**:** Training of defence attorneys on the provisions of the criminal procedure codes relating to the conduct of the main trial, including skills training on direct and cross-examination and other adversarial techniques.

## CHAPTER SEVEN

## POSTPONEMENTS, DELAYS, AND THE PROGRESSION OF CRIMINAL CASES GENERALLY

### I. Background

Postponements and delays in proceedings occur in every criminal system. When delays are significant, they may impact upon the accused's right to a fair trial as protected by Article 6 of the ECHR. Most often, however, postponements and other delays simply result in wasted time, repetitive procedures, and additional costs associated with rescheduled hearings. In addition, the manner in which courts respond to the causes of delays also affects the perception of the judiciary and the seriousness with which the administration of justice is seen to be taken.

The main purpose of this Chapter is to present information related to the frequency and causes of postponements and delays in the BiH courts and to identify how the courts have responded to the specific problems causing delays. In addition, the common practice of the courts to stagger trial hearings is also addressed. Finally, statistical information is provided on the progression of cases with reference to the procedural time periods set forth in the codes.

### II. Findings of Trial Monitoring

**A. Frequency and Reasons for Postponements:** Monitoring revealed that close to one-quarter (23%) of all scheduled criminal hearings were postponed on the date of the hearing. Although the reasons for postponement differed depending on the stage of the proceedings, postponements of scheduled hearings were prevalent in all stages of post-indictment proceedings. *Table 7.1* provides an overview of the frequency and most common reasons for postponed hearings for individual hearing types.

*Table 7.1 Frequency of Postponed Hearings and Reason for Postponement*

| Type of Hearing | Number of Total Hearings Monitored [54] | Number of Postponed Hearings Monitored (% of total) | Reason for Postponement | | | |
|---|---|---|---|---|---|---|
| | | | Failure of Service of Summons | Failure of the Accused to Appear | Failure of Prosecutor, Defence Attorney, or Witness to Appear | Other |
| Plea Hearing | 212 | 48 (23%) | 8 | 21 | 6 | 13 |
| Plea Deliberation | 35 | 10 (29%) | 3 | 2 | 1 | 4 |
| Warrant Hearing | 179 | 59 (33%) | 29 | 24 | 0 | 6 |
| Plea Bargaining | 96 | 8 (8%) | 1 | 2 | 1 | 4 |
| Main Trial | 445 | 102 (23%) | 10 | 21 | 35 | 36 |
| **Totals** | **967** | **227 (23%)** | **51** | **70** | **43** | **71** |

As indicated in *Table 7.1*, the two most frequent reasons for postponing plea and warrant hearings were: 1) failure of service of the summons, and 2) failure of the accused to appear

[54] Totals do not include BiH State Court hearings or hearings designated as "others." See Chapter Two, *supra.*

despite receipt of the summons. Other, less frequent reasons included the filing of a motion, the request of the accused for a defence attorney, or other request, including time to enter into a plea agreement.

Although postponement of main trial hearings was equally common, the reasons were different. Delays due to failure of service or failure of the accused to appear were less frequent as most accuseds were already located by the court. Despite fewer problems in these areas, other reasons for delays increased. The most common reason for postponement at the main trial was the failure of the duly summoned prosecutor, defence attorney, or witness to attend the trial hearings. This occurred in 35 cases monitored.

## B. Court Responses to the Causes of Postponements

The frequency of postponements merits a closer examination of the courts' responses to delays. In making this assessment, it is necessary first to distinguish the stage of the proceeding and to identify the cause of postponement, as these circumstances determine the options and powers available to the court to deal with the causes of delays.

First, with respect to the failure of service of a summons, common causes at all stages in the proceedings involved incorrect or old addresses for accuseds or witnesses, unspecified failures of the post-office to serve the summons, and occasional problems in the RS due to the cut-off of postal service as a result of unpaid bills.[55] As a result, in the majority of postponements resulting from failed service, the problems appeared to be outside the immediate control of the court. In these cases, the courts would identify the reason for service failure, re-institute service, and reschedule the hearing.

With respect to the second major cause of postponements, namely the failure of the duly summoned accused to appear, courts had an additional option to move the proceedings forward. This option was the issuance of an order of apprehension under Article 139(1) FBiH CPC and Article 182 RS CPC when "the accused duly summoned has failed to appear without justification."

Of the 49 cases involving the failure of a duly summoned accused to appear at the non-trial hearing (from *Table 7.1* above), in 32 cases (65%), the court ordered the apprehension of the accused. Similarly, the court ordered the apprehension of the accused in 13 of 21 (62%) cases when the accused failed to appear at the main trial. In the remainder of cases, the court opted not to order apprehension and re-serviced the summons.[56]

The cause of postponements at the main trial and the courts' responses were much more varied and warrant further discussion. As set forth in *Table 7.2*, the most frequent cause of postponements of the main trial was the failure of the duly summoned prosecutor, defence attorney, or witness to attend. In total, 35 postponements, over 34% of all 102 main trial postponements, were caused by the failure of one or more of these parties to appear.

Under Articles 260 and 263 FBiH CPC and Articles 252 and 255 RS CPC, following the absence of the prosecutor or defence attorney at trial, the court is required to inquire as to the reasons for the absence. When the absence is not justified, the court may sanction the prosecutor or attorney with a fine up to 5,000 KM. Similarly, the court is empowered to

[55] In 5 cases, it was observed that failure of service was caused due to court error including the failure to attach the indictment to the summons.

[56] In deciding whether to order apprehension or re-serve the summons on the accused, it should be noted that courts seldom expressed the reasoning for its decision.

sanction both witnesses and experts with fines under Article 264 FBiH CPC and Article 256 RS CPC or order apprehension, for similar failures to appear.

As illustrated by *Table 7.2*, in only 2 of the 35 cases involving the failure of a prosecutor, defence attorney, or witness to appear did the court take any affirmative action. In these 2 cases, the court ordered apprehension of a witness. However, in no case did the court exercise its power to fine the offending party.

*Table 7.2 Reasons for Postponement of Main Trial Hearings and Court Response*

| **Primary Reason For Postponement** | **Number of Cases** | **Court Response to Circumstances** |
|---|---|---|
| Accused failed to attend (duly served) | 21 | Order of Apprehension (13); Accused re-summoned (8); |
| Defence Attorney failed to attend | 15 | Rescheduled (14); Other (1) |
| Witness failed to attend (duly served) | 10 | Re-summons (8); Order of apprehension (2); |
| Prosecutor failed to attend | 5 | Rescheduled (5) |
| Multiple parties failed to attend | 5 | Rescheduled (5) |
| Failure of service of summons | 11 | Re-summons (8); Police to find exact address of accused (1); Order of apprehension (2) |
| Judge failed to attend | 9 | n/a (9) |
| DA asked for time to prepare defence/consult with defendant/new witnesses | 5 | Request granted |
| Accused requests an attorney | 3 | Request granted |
| Lack of audio-video recording equipment | 2 | Rescheduled |
| Lack of Judges to form a panel | 3 | Rescheduled |
| Possibility of entering into plea bargain agreement | 4 | Rescheduled |
| Motion for disqualification of Judge/Prosecutor | 6 | Rescheduled |
| Other | 3 | n/a |

The courts' acceptance of the failure of prosecutors, defence attorneys and witnesses to appear for hearings is problematic given the delays caused and the powers available to the court to respond appropriately. A case where the court may have considered sanctions, but did not impose any, follows:

> **Case** The hearing scheduled for 12 May 2004 was the fourth attempt to hold the main trial in the Novi Grad Basic Court. At the hearing, the accused, the defence attorney and the medical expert failed to appear without any justification for their absence. Although duly summoned, the medical expert had previously failed to appear on three prior occasions. The only individual present was the victim. Again however, no sanctions or order of apprehension was made, and the hearing was again rescheduled.

Of course, not all absences of prosecutors, defence attorneys, and witnesses are unjustified. Nor do courts need to sanction every instance of unjustified absence. However, the complete lack of any sanctions for the failure of attorneys and witnesses to attend as scheduled contributes to court inefficiency and erodes the authority of the court.

**C. Staggered Trial Hearings:** Under Article 266(3) FBiH CPC and Article 258(3), if an adjournment of the trial lasts longer than thirty (30) days, the trial shall commence from the beginning and all evidence shall be presented again. This rule is meant to expedite and consolidate trial proceedings, a practice essential to trials based upon the open presentation of

evidence requiring the court to assess the credibility of testimony presented before it.[57] To achieve this result, hearings should be scheduled on consecutive days and cases should be completed without long delays once commenced.

Monitoring revealed, however, that most courts continue to schedule subsequent trial hearings only upon completion of the last hearing. The common practice is to confer with the parties after each hearing and to select the witnesses proposed by the parties to summon for the next hearing. This lack of planning leads to staggered hearings, often occurring weeks apart, depending on the availability of the prosecutor, the defence attorney, and the witnesses.[58]

In contrast to these practices, it was observed that at times a pre-trial status or "preparatory conference" is held by some courts.[59] In addition, one judge in the Sarajevo Cantonal Court regularly holds such preparatory conferences prior to scheduling the main trial.[60] The purpose of such preparatory conferences is to identify scheduling problems, including the availability of the witnesses, prosecutor and defence attorney to enable the court to plan multiple, consecutive hearings at once.[61] Ultimately, while no court can guarantee the elimination of all delays, preparatory conferences will help to eliminate foreseeable problems in scheduling trial hearings.

## D. Hearings Conducted within Procedural Time Periods

As required by every procedural code, the codes provide procedural time periods within which certain events or hearings are to take place. With respect to the post-indictment procedures assessed in this report, the two most significant time periods are: 1) the fifteen-day period for holding the plea hearing upon service of the indictment to the accused under Article 243(3) FBiH CPC and Article 235(4) RS CPC, and 2) the 60 day period for holding the main trial following the completion of the plea hearing under Article 244(4) FBiH CPC and Article 236(4) RS CPC.[62]

The occurrence of longer time periods for these hearings does not constitute an essential violation of the codes, nor does it necessarily impact any individual accused's right to trial in a reasonable time. Nevertheless, breaking down the progression of cases into discreet time periods provides a useful gauge to measure the efficiency of proceedings. *Table 7.3* below presents an overview of the progression of cases through the preliminary phase of the court procedures.

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[57] Stated another way, to render a verdict based upon the evidence presented in open court and not a case file, the court must rely on its recollection of testimony and weigh the entirety of the testimony of witnesses during the trial.

[58] The ad hoc manner in which the court schedules main trial hearings also negatively impacts the order of presentation of evidence under Articles 276(2) FBiH CPC and Article 268(2) RS CPC, under which the prosecutor is required to first establish the case against the accused through the presentation of witnesses and evidence. Instead, courts often call to testify whatever witness are available at the time the next hearing is scheduled, whether they support the prosecution or the defense.

[59] On 19 May 2004, Konjic Municipal Court held a preparatory conference to establish the anticipated number of witnesses anticipated to be called in a case involving narcotic related offenses and 5 accuseds.

[60] Information obtained through interview with judge of Sarajevo Cantonal Court by OSCE Legal Advisor.

[61] Such conferences were recommended at the reappointment trainings as a useful method to efficiently schedule trial hearings. See Training Materials, BiH Judicial Re-Appointment Training, United States Department of Justice Overseas Prosecutorial Development , Assistance and European Unions.

[62] This time period may be extended to 90 days upon "exceptional circumstances." Article 244(4) FBiH CPC and Article 236(4) RS CPC.

*Table 7.3 Progression of Cases Monitored*

| Time period[63] | Total Number of Cases Where Information Collected | Number of Cases Where Hearing Scheduled within Timeframe | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | Under 15 days | Under 30 days | Under 60 days | Under 90 days | Under 120 days | Under 150 days | Over 150 days |
| Days from Indictment to Plea Hearing | 398 | 73 | 116 | 114 | 4 | 16 | 18 | 19 |
| Days from Indictment to Warrant Hearing | 167 | 29 | 73 | 38 | 19 | 3 | 4 | 1 |
| Days from Plea Hearing Until Trial | 208 | n/a | n/a | 110 | 39 | 25 | 13 | 21 |

The above table indicates that in 303 of 398 (76%) cases, the court scheduled the plea hearing within 60 days after the indictment was confirmed. For warrant hearings, this statistic is 84%. With respect to the main trial, in 53% of cases the first hearing was scheduled within 60 days from the plea hearing.[64] The longest delays, those over 120 days in all cases, were often the result of failures of service, pending preliminary motions, the accused being at large, court restructuring, and/or the re-appointment process.

## III. Conclusions

1. Postponements and delays are frequent occurrences in the courts. Close to one-quarter (23%) of all scheduled criminal hearings are postponed.
2. Courts are too accepting of delays, and are reluctant to exercise their sanction powers, especially during the trial phase of proceedings when duly summoned prosecutors, defence attorneys and witnesses fail to appear.
3. Staggered hearings are still a regular occurrence during most trials and slow cases that may be resolved faster with better scheduling.
4. In 76% of all cases monitored, the plea hearing was scheduled within 60 days from confirmation of the indictment. In over 50% of these cases, the main trial is scheduled within 60 days of the plea hearing.

**Recommendations**

○ Amendments: The CCIAT should propose amendments to the codes extending the sanction provisions related to the main trial proceedings when parties cause delays, to all court hearings.

○ Court Responsibility: Courts must take responsibility for case management through:
   1) exercising its sanction powers in appropriate cases when parties fail to attend hearings without a justified excuse;
   2) developing the practice of scheduling preparatory conferences in advance of the main trial.

○ Training: Mandatory JPTC Seminars, using standardised criteria, must be required for judges on procedures and techniques for case management and avoiding delays.

[63] Time periods to plea and warrant hearings are measured from the date of the confirmation of the indictment, not the indictment "delivery date" due to the difficulty in obtaining detailed information on the date of delivery of the summons.

[64] Note that the statistics here refer to the first scheduled hearing. Cases were sometimes then delayed for various reasons as set forth earlier in this chapter.

## CHAPTER EIGHT

## OTHER SIGNIFICANT IMPLEMENTATION ISSUES

### I. Issues Related to Cases Involving Mental Incapacity

Article 410 FBiH CPC and Article 400 RS CPC govern court procedures in cases of mental incapacity. Paragraph One of these Articles provides that:

> (1) If the suspect committed a criminal offence in the state of mental incapacity, the prosecutor shall propose in the indictment that the court should find that the accused committed a criminal offence in the state of mental incapacity and that the case be referred to the body responsible for social welfare for the purpose of commencing the appropriate procedure.

Monitoring of the implementation of this provision revealed two significant problems: 1) lack of clarity regarding the procedures defining the court's role in determining mental state, and 2) lack of secure psychiatric facilities and other problems related to the capacity of the body responsible for social welfare.

#### A. Different Practices of the Court in Cases Where Mental Incapacity May be at Issue

Under Article 410 FBiH CPC and Article 400 RS CPC, it is the prosecutor's duty to raise the issue of mental incapacity in the indictment. If the issue is raised by the prosecutor, the court has two competencies: 1) the competence to order temporary custody for up to 30 days, and 2) the competence to issue a decision on the existence of mental capacity. Despite these competencies, the code does not provide authority to the court to raise the issue on its own initiative. Monitoring revealed, however, that if the issue has not been raised by the prosecutor or defence, some courts have taken an active role and engaged an expert to make this determination.

| | |
|---|---|
| **Case** | During a plea hearing in Banja Luka Basic Court on 27 April, the accused, represented by defence counsel, appeared in a disturbed mental state. In the indictment charging the accused with rape, the prosecutor did not propose mental incapacity. After questioning the accused, the court ordered a psychiatric evaluation to determine the accused's mental state at the time of the perpetration of the crime. The judge scheduled further preliminary procedure upon obtaining the results of the evaluation. |

Under the old criminal procedure code, this practice was consistent with the primary role of court to establish the case.[65] Under the codes, however, the function of the court at the plea hearing is to take the plea of the accused and no authority exists for the court to engage an expert to determine incapacity when the prosecutor or defence has not raised the issue.

When the court suspects the mental incapacity of an unrepresented accused, the court is required to appoint an *ex-officio* attorney under Article 59(5) FBiH CPC and 53(5) RS CPC.[66]

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[65] Under the old procedures such evidence would be reviewed at the main trial stage and the court was bound to summon experts or psychiatrists from a medical institution commissioned to make an expert evaluation.

[66] See discussion in Chapter 3, *supra*.

Once a defence attorney is appointed, the issue of mental capacity is the obligation of the attorney who must take all necessary steps to establish the facts and collect evidence in favour of the accused under Article 64 FBiH CPC and Article 58 RS CPC. When the court raises the issue of mental incapacity, engages the expert and determines the issue – even if well intentioned – the court undertakes either the role of the prosecutor or defence attorney.

### B. Lack of Capacity of the Body for Social Welfare

Once mental incapacity is established, Article 410 FBiH CPC and Article 400 RS CPC provide that the body for social welfare shall commence the "appropriate procedure". Relevant laws establishing the obligations of the body for social welfare, and the relevant procedures, however, do not exist or are inadequate. The result is that accuseds who have committed an offence in a state of mental incapacity may not be adequately treated:

> **Case** Following a determination that the accused was mentally incapacitated at the time of the offence, on 18 May 2004, the Banja Luka Basic Court referred the case to the body for social welfare. After noting that the court expert proposed psychiatric treatment without specifying the particular type, the body advised the court that it permitted the accused to return to his home and live with his family without any treatment.

As indicated in this case, the body for social welfare may lack the capacity to make an independent evaluation and treatment recommendation. The lack of expertise within the body is often mirrored by lack of sufficient financial means and staffing to fulfil its responsibilities, with respect to mentally incapacitated accuseds who have committed criminal offences. Therefore, the responsibility delegated to this institution is problematic.

### C. Lack of an Adequate Closed Psychiatric Institution

Before the armed conflict, the psychiatric hospital in Sokolac served as a secure psychiatric institution, providing treatment and custody for dangerous accuseds for the entirety of the Republic of BiH. However, no such institution currently exists in FBiH. This situation, combined with lack of adequate procedures for the admittance of accuseds into prison facilities, has resulted in an inability to secure and treat mentally incapacitated and potentially dangerous accuseds. This situation is highlighted by the following case:

> **Case** On 12 January 2004, the Siroki Brijeg Cantonal Court found that the accused committed murder in a state of mental incapacity and referred the case to the body for social welfare. The body for social welfare made contacts with various hospitals and institutions, however none agreed to admit him. Zenica Prison also rejected the request of the body for social welfare, as prison authorities refused to admit the accused explaining that the person can be placed there only by a court decision containing criminal sanction under the FBiH Law on Execution of Criminal Sanctions. In the end, the body for social welfare turned to the hospital in Sokolac (RS), which agreed to admit the accused upon approval from the RS Ministry of Justice. However, on 12 February 2004, upon the intervention of the FBiH Ministry of Justice, the accused was admitted to the Zenica Prison Psychiatric Ward as an interim solution to the lack of facilities and pending harmonisation of the FBiH Law on Execution of Criminal Sanctions and the FBiH Law on Protection of Persons with Mental Disorder and the codes.

In the above case, a high level intervention permitted custody of a dangerous accused. However, even when prisons are ordered to secure such accuseds, a prison facility cannot provide adequate treatment to such individuals from a medical standpoint.

## II. Issues Related to Ensuring the Dignity of the Court

Article 256 FBiH CPC and Article 248 RS CPC provide that:

> "It is the duty of the judge or presiding judge to ensure the maintenance of order in the courtroom and dignity of the court. The judge or the presiding judge may immediately upon opening the session warn persons present at the main trial to behave courteously and not to disrupt the work of the court…"

To enable the judge to discharge this duty, the codes provide the court with powers to sanction the accused, as well as any prosecutor, defence attorney, witness, or any other individual that disrupts the order of the court or disobeys the court's instruction. Under Article 257 FBiH CPC and Article 249 RS CPC, these measures include: removal from the courtroom of the offending party, a fine up to 30,000 KM, and referral of the situation to the High Judicial and Prosecutorial Council (HJPC) or Bar Association for further action.

In addition, the BiH Law on the HJPC provides independent standards of conduct for judges and prosecutors. Disciplinary offences, provided by the law, include, "behaviour in the court and out of the court that demeans the dignity of office of judge; or any other behaviour that represents a serious breach of official duties or that compromises the public confidence in the impartiality or credibility of the judiciary".[67]

Monitoring revealed that in over 90% of cases, the judge conducted hearings in a manner consistent with maintaining order in the courtroom and promoting the dignity of the court. In these cases, the judge directed the proceeding with authority and dignity, maintaining respect for all parties, while also maintaining order and promoting respect for the court by conducting the hearing in a professional manner, including sometimes warning parties when their behaviour was inappropriate.

In addition, in one case, the sanction powers provided by Article 257 FBiH CPC and Article 249 RS CPC were applied by a judge against a relative of the victim and the defence attorney.

> **Case** On 24 August 2004, the Sarajevo Cantonal Court presided over a case involving an alleged rape. During the testimony of the victim, the victim's mother repeatedly attempted to answer questions posed to the victim by the accused on cross-examination. After repeated warnings, the judge removed the mother from the courtroom when she continued to complain. Later, during the same cross-examination, the defence attorney was warned repeatedly relating to his behaviour and began to laugh after one of the responses of the victim. The presiding judge then removed the defence attorney from the courtroom and fined him 300 KM for disrupting the order of the court and disobeying the orders of the court.

In approximately 10% of cases, however, the court failed to maintain appropriate order in the courtroom, thereby lowering respect for the court. The judge either failed to take appropriate

[67] Article 56, BIH Law on High Judicial and Prosecutorial, "BIH Official Gazette" #25/04.

action to address a problem or in some cases the court's behaviour was itself the problem. These cases included:

- 12 cases in which the judge failed to respond to misbehaviour by accuseds or witnesses. Specific instances of misbehaviour included: parties shouting at one another; attorneys using cell phones during the proceeding; parties interrupting the judge and "talking over" the court.
- 9 cases in which a judge answered or used their cell phone during the proceeding.
- 4 cases in which a panel member left the courtroom during the hearing or was not present at the pronouncement of the sentence.
- 2 cases in which the judge was smoking or eating in the courtroom during the proceeding.
- 3 cases in which the judge used inappropriate and/or insulting language.

Given that the above cases involved many different courts, the issue of judicial conduct remains an issue. Such exceptions must cease as poor conduct negatively impacts the vast majority of the judiciary who are conducting cases professionally and lowers the respect accorded to all judges.

## III. Lack of Recording Equipment or Court Stenographers:

Article 268 FBiH CPC and Article 260 RS CPC, provide that:

> "A verbatim record of the entire course of the main trial must be taken down in the record of the proceedings."

Despite this requirement, for most of the period of monitoring, none of the 36 entity courts monitored had audio recording equipment.[68] Although a few courts had recently installed audio equipment at the time this report was completed, the equipment has usually only been installed in one courtroom.[69]

Monitoring revealed that the lack of recording equipment or other stenographic means to record hearings has negatively impacted the ability of the courts to implement the codes. At best, trial proceedings have been slowed in some courts, while court secretaries attempted to type the testimony of witnesses into the minutes or the judge's summary of the testimony for the record.

| | |
|---|---|
| **Case** | To ensure that all testimony is recorded "verbatim," the court is extremely proactive in formulating summaries of testimonies to be typed into the minutes. Such efforts are extremely time consuming, take the judge's attention away from procedural issues, and make it hard to achieve a proper flow of testimony, especially affecting cross-examination which becomes a slow methodical process. |

[68] Notably, two courts, the District and Basic Courts in Doboj showed initiative and found a temporary solution to the problem by renting equipment from a local radio station.

[69] At the time this report was completed, the only courts having audio equipment were: Sarajevo Cantonal Court (one courtroom); Travnik Cantonal and Municipal Courts (one courtroom each); Mostar Cantonal and Municipal Court (two courtrooms each); Konjic Municipal Court (one courtroom); Čapljina Municipal Court (one courtroom); Zenica Cantonal and Municipal Courts (two courtrooms each); Brčko Basic Court (every courtroom).

In other cases, judges do not or cannot ensure that a proper record is kept and critical testimony, objections, and other colloquy are lost. At times, judges simply enter incorrect information into the record. In the most serious instances, this was even observed to be a regular practice of the court. (See, case example, Prijedor Municipal Court plea hearing, page 10, *supra*.) As the purpose of a court record is to provide an independent account of the entire proceeding, it is critical that a method of recording independent of any party to the proceeding is put in place.

**Conclusions:**

1. The procedures relating to mental incapacity require renewed attention; implementation problems exist with the ability of the body for social welfare to handle the responsibilities granted to it under the codes, and there is no secure treatment facility in BiH for all accuseds who are found mentally incompetent.
2. The vast majority of criminal judges demonstrate a high level of professionalism and properly ensure the dignity of the court; a small minority do not.
3. Lack of audio equipment in courts negatively impacts the implementation of the codes and decreases the protection afforded to accuseds.

**Recommendations:**

○ Amendments: The CCIAT should propose amendments to the codes extending the sanction provisions related to the main trial proceedings when parties disrupt the court to all court hearings.

○ Training: Mandatory JPTC and defence attorney training on the provisions of the codes related to the obligation and duty of the prosecutor and defence attorney to obtain expert(s) on the issue of mental incapacity in appropriate cases, and the obligation and duty of the court to appoint *ex-officio* attorneys under Article 59(5) FBiH CPC and 53(5) RS CPC to accuseds where a mental condition is suspected.

○ Co-operation between all Ministries of Justice on Funding a Single Closed Psychiatric Facility for Mentally Incapacitated Accuseds: Given its size, BiH does not need multiple facilities to house and treat mentally incapacitated accuseds. The Ministries of Justice should quickly move to agree on funding and a plan to refurbish the centrally located Sokolac facility for all BiH.

○ Self-Regulation of Judges to Ensuring the Dignity of the Court: Those 90+% of judges promoting respect for the court and ensuring the dignity of court proceedings must put appropriate pressure on their colleagues to cease activities that lower the respect for all judges. In addition, JPTC training curriculum should be developed on proper judicial demeanour and the exercise of sanction powers in the criminal procedure code. If individual judges are identified as engaging in behaviour unbecoming of a judge, the HJPC must institute disciplinary proceedings appropriate to the behaviour.

○ Budgeting for Audio Equipment: The courts and Ministries of Justice must develop a budget including line items for audio equipment to permit all courtrooms handling criminal cases to be outfitted with recording equipment. This budget should be a priority .

## Recommendations

These recommendations follow upon the findings and conclusions set forth in this report and are provided to assist the competent national authorities and institutions with the continued development of effective, fair, and consistent criminal law practices in the courts.

**Ministry of Justice of Bosnia and Herzegovina and Criminal Code Implementation Assessment Team (CCIAT)** - It is recommended that these bodies propose amendments, by-laws, or administrative rules, as appropriate, that provide:

1) Clear legal standards and criteria for the appointment of an *ex-officio* attorney to the indigent accused under Article 60 of the FBiH CPC and Article 54 of the RS CPC, and for appointments in the "interests of justice due to the complexity of the case or mental condition" under Article 59(5) FBiH CPC and Article 53(5) RS CPC. International partners may offer support with developing an "indigent test" and other legal standards for such *ex-officio* appointments.

2) A clarification of the court's authority to reject plea agreements based upon the proposed sentence, and a clarification of the procedures and competencies of the court for deliberation and pronouncement of sentence under Article 246 FBiH CPC and Article 238 RS CPC.

3) The elimination of the duties required of the court at the WPS hearing under Article 352(2)(c) FBiH CPC and Article 342(2)(c) RS CPC, and transfer of the duty to present the evidence at the WPS hearing to the prosecutor.

4) A clarification of the main trial procedures of the code related to the right of the accused to present a defence as provided by Articles 7 FBiH and RS CPC in a manner consistent with the order of presentation of evidence in the main trial under Articles 276 and 277 FBiH CPC and Article 268 and 269 RS CPC.

5) The expansion of the court's express sanction powers provided in the Chapter XXI of the codes governing the main trial, to all stages of criminal proceedings, when parties cause unexcused delays or disrupt the order of the court.

**Judicial and Prosecutorial Training Centres (JPTC) -** It is recommended that these bodies develop standardised curriculum and require mandatory training seminars for:

1) All judges handling criminal cases on the standards and procedures applicable to the appointment of *ex-officio* defence attorneys to the indigent accused; and appointment, "in the interests of justice due to the complexity of the case or mental condition of the accused".

2) All judges handling criminal cases on the manner and content of instructing the accused during the plea hearing and the WPS hearing on their rights. Emphasis should be given to engaging the accuseds in discussion and ensuring that their decision to proceed without a defence attorney has been made with full knowledge of their rights and the potential consequences of their plea.

3) All judges handling criminal cases and prosecutors on plea bargain procedures, including the importance of exercising proper discretion related to the nature of the sentence in proposing and reviewing plea bargain sentences.

4) All judges handling criminal cases and prosecutors on their duties and responsibilities at the WPS hearing.

5) All judges handling criminal cases and prosecutors on issues related to the main trial, including: 1) the legal theory underlying the procedures governing the main trial including the presentation of evidence, direct and cross-examination, and other adversarial procedures; and 2) the skills used in direct and cross-examination, and other adversarial main trial procedures.

6) All judges handling criminal cases on procedures and techniques for case management, including avoiding delays, scheduling preparatory conferences, and the exercise of sanction powers.
7) All prosecutors on their obligation to obtain an expert on the issue of mental incapacity in appropriate cases.

**Bar Associations -** It is recommended that these bodies**:**

1) Organise regular trainings for defence attorneys on the provisions of the criminal procedure codes relating to the conduct of the main trial, including skills training on direct and cross-examination and adversarial techniques; and the duty, in all cases, to obtain an expert when representing an accused who may have a mental incapacity.
2) Reconsider the current tariff system in conjunction with the Entity Ministries of Justice and High Judicial and Prosecutorial Council.

**Entity Prosecutors Offices -** It is recommended that these bodies:

1) Develop internal sentencing guidelines on the type of criminal sanctions that may be proposed for specific crimes under plea agreements and WPS procedures to provide consistent treatment for similar offences to ensure consistency and fairness in offering plea agreements and WPS sanctions.
2) Provide instructions requiring the presence of prosecutors at WPS hearings. Instructions should also require prosecutors to execute the following duties at the WPS hearing: to present the indictment, to present the evidence supporting the indictment, and to present the warrant request and reason why a lesser sanction has been proposed.

**Entity Ministries of Justice -** It is recommended that these bodies:

1) Reconsider the current system of court appointed attorneys and attorney tariffs in conjunction with the Bar Associations and the HJPC. International agencies may offer support with the assessment, including feasibility studies of the current tariff structure and consideration of other potential systems of providing legal representation, such as establishing legal aid funded by a budget separate from the court.
2) Develop standardised instructions with the Entity Supreme Courts, to be delivered with the summons to the accused.
3) Co-operate on funding a single closed psychiatric facility for mentally incapacitated accuseds: Given its size, BiH does not need multiple facilities to house and treat mentally incapacitated accused.
4) Allocate monies in the next budget to purchase audio, including recording equipment for all courtrooms handling criminal cases. This budget item should be presented as a priority.