Plea Agreements in War Crimes Cases: A Critical Analysis of Negotiated Justice in Bosnia and Herzegovina's Transitional Context

Acordos sobre a sentença em casos de crimes de guerra: uma análise crítica da justiça negociada no contexto de transição da Bósnia e Herzegovina

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Abstract: Considering all the transformations of state regimes in the last forty years and all the conflicts that became past and lasting ones, without any doubt, transitional justice has and will have an essential role in the legal systems of the countries of the world. Establishing the truth and reconciliation are critical tasks. This article correlates transitional justice to the criminal justice procedural institute of "plea agreement" and tests how this institute within one of its mechanisms may become an obstacle in achieving its goals. A case study of its application in the cases of war crimes in Bosnia and Herzegovina will be conducted to test if and how plea agreements have been applied in the cases of those gravest criminal offenses and if its application may achieve the goals of criminal law in one hand, and transitional justice on other. Normative, historical, and comparative scientific methods, in addition to the case study, will be used.

Keywords: criminal law; war crimes; genocide; transitional justice; plea agreement; Bosnia and Herzegovina.

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Resumo: *Tendo em vista a totalidade das transformações dos regimes estatais nos últimos quarenta anos e dos conflitos que se tornaram passados e duradouros, sem dúvida, a justiça de transição tem e terá um papel essencial nos sistemas jurídicos dos países de todo o mundo. Estabelecer a verdade e a reconciliação são tarefas essenciais. Este artigo correlaciona a justiça de transição com o instituto processual da justiça criminal do "acordo sobre a sentença" e testa como esse instituto, como um dos seus mecanismos, pode se tornar um obstáculo para alcançar os seus objetivos. Realiza-se um estudo de caso da sua aplicação nos casos de crimes de guerra na Bósnia e Herzegovina para testar se e como os acordos sobre a sentença foram aplicados nos casos das infrações penais mais graves e se a sua aplicação pode alcançar os objetivos do direito penal, por um lado, e da justiça transicional, por outro. Como método científico, o artigo se utiliza dos métodos normativo, histórico e comparativo, além de estudo de caso.*

Palavras-Chave: *direito penal; crimes de guerra; genocídio; justiça de transição; acordos sobre a sentença; Bosnia e Herzegovina.*

1. Introduction

The *plea agreement* is not a new criminal justice procedural institute, as some of its elements were traceable in the earliest days of Common law (Alschuler, 1979, p. 214) and it has become a firm and commonly used institute with which 90% of the cases are being solved nowadays (Pajčić and Bonačić, 2021, p. 258)[2]. The plea agreement is neither

[2] Interestingly, Italy was the first among European countries to have introduced it in its criminal procedure law. According to Oliver (2021), patteggiamento appeared in 1980, and after the recommendation on negotiated

recognizable institute relatable only to the Common Law legal family, as it is being transplanted into the continental legal family and particularly from the 70'es onwards, it has become part of the criminal legislation and practice (Jovović, n.d., p. 77). It is true, though, that in academic circles, two of its models differ: the plea agreement from the anglosacsonic legal tradition and the plea agreement from the continental legal tradition. Regardless of the details that differ them, their nature is the same.

The plea agreement is defined as „the statement of the accused that is being made based on the agreement with the prosecutor, with which the criminal procedure is being completed" (Pajčić and Bonačić, 2021, p. 256), with potential benefits being accomplished for the accused. Langbein (1979, p. 261) defines it as a „non-trial mode of procedure, "while in the Merriam-Webster Dictionary, it is defined as „an agreement reached the conclusion of plea bargaining." Jovović (n.d., p. 80) offers the fullest definition, who, by describing its legal nature, describes the institute to its finest. "It is a 'sui generis' agreement made by the accused and prosecutor, to complete the legal case without the main trial. The agreement is being offered to the court for its deliberation. The accused may be punished with a sanction below the legal minimum or may have an opportunity to be conditionally released" (Jovović, n.d., 80).

Plea agreements offer benefits for both parties of the criminal procedure: potentially lower sanction for the accused and brief completion of the case without long-lasting criminal procedures for a prosecutor. Plea bargaining (the process) and plea agreement (result) are some of the facultative short procedures in the criminal justice system. As already mentioned, they have roots in the American criminal justice system and fully fit its adversary (accusative) model[3] of the criminal procedure. In it, the court plays a passive role and is not allowed to establish facts beyond the prooves offered by the parties (Pajčić and Bonačić, 2021, p. 256).

justice was given by the Council of Ministers of the Council of Europe, it also appeared „in France, the plaider coupable; in Germany, the Absprache; in Spain, the conformidad" (Oliver, 2021)

[3] The continental system enables judge with active role, judge freely decides on the evidence but is also allowed to offer its own evidence. When receives the plea agreement, the court is authorized to evaluate it and to decline it if necessary.

There are three types of potential agreement: upon-charge bargaining, fact bargaining, and sentence bargaining[4]. It was popular in the US's far history, but interestingly, it was highly avoided in the Middle Ages. Many would justify it with the fact that the procedures at the time were very effective and lasted for just a few days, so there was no need to shorten the procedure by diverting from the main trial (Langbein, 1979, p. 261). Moreover, Alschuler (1979, p. 213) emphasizes that they were so uncommon that even when the guilty plea was given, „courts were hesitant to receive it". Potential reason for that may have been the fear that the plea was not voluntary, but that it arose from fear, or durres (Alsahuler, 1979, p. 217). In addition, the exclusion of the criminal trial in which both parties would present their evidence, and the jury would decide seemed to violate the Fifth Amendment's provision (Wan, 2007, 33) which stipulates „the right to be trialed by jury"[5]. However, the

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[4] In the Continental approach, mostly the sentence bargaining is being applied.

[5] In the literature, the case *Brady v. USA*, is the commonly mentioned when it comes to this thought. In this case Brady v. USA (397 U.S.742, 1970), the U.S. District Court for the District of New Mexico did find that a plea guilty caused great pressure on an accused's Fifth Amendment right to not plead guilty and Sixth Amendment right to a trial by jury (oyez.org), but that his plea was voluntary. Namely, Robert M. Brady pleaded not guilty to kidnapping, a criminal offence that was at the period severely punishable. The death penalty could have been given only if recommended by the jury. When Mr. Brady learned that his co-perpetrator pleaded guilty and would testify against him and that he may avoid the death penalty, he pleaded guilty. He was, consequently, punished with 50 years of imprisonment. However, later, he appealed to the Court, stating that he was innocent and that his plea was the result of his fear of the death penalty. The court established that his plea was not coerced. This decision was confirmed by the Supreme Court. It found that plea agreement is part of the criminal justice system of the USA and that it improves judicial efficiency (Gagula, p. 96). In addition, it was concluded that "a guilty plea is not unconstitutionally compelled when a defendant pleads guilty because they would prefer a certain or probable lesser penalty to the risk of a greater penalty", and that "The only situations in which a plea may be involuntary and unconstitutional under the Fifth Amendment are if it is the product of physical harm, a threat of physical harm, or mental coercion. Misrepresentations or bribes may make a plea invalid. The defendant benefited from a plea that allowed him to avoid a charge that carried the death penalty, and this is the type of mutually beneficial arrangement that the plea-bargaining system is designed to encourage" Further reading: (Brady v. United States, 397 U.S. 742 (1970), https://supreme.justia.com/cases/federal/us/397/742/).

approach towards the plea agreement started changing in the last decades of the nineteenth century, and during „the prohibition period, " it was re-discovered, as in the increasing number of cases, faster procedure, and lesser criminal offenses charges with lighter sanctions, seemed appealing for the legislator and the judicial system. The practice showed that it did help decrease the costs of the procedure and time of the resolution of the case (Jovović, n.d.,79). Those results became appealing for the continental legal system, which was faced with numerous, lengthy, and costly procedures, and through legal reforms, it is nowadays part of most European criminal justice legislation (Jovović, n.d., 79). However, the criminal procedure system in the continental law gives the judge a more proactive role. The judge is the one who may even offer their own evidence, actively evaluate the presented evidence, and relate to this institute; the final decision about its acceptance or dismissal is in the hands of the judge to whom the plea agreement is submitted for deliberation.

The second side of the coin, observed by the accused, also seems appealing. Namely, the sanction may be reduced. However, judges should observe the prescribed sanction, the purpose of punishment, and mitigating and aggravating circumstances when evaluating the proposal of the agreement (Bajović, 2015, p. 180)[6].

At this point, it is vital to question if this benefit is justified and whether it is consistent with the substance of the criminal law and the aim of punishment. That is one of the items that will be discussed in this paper. In addition, it will be correlated with the prosecutions of the heaviest crimes (observed in the case study of Bosnia and Herzegovina) and with transitional justice and its aims. Is this institute universally recommendable for criminal justice, regardless of the criminal offenses, or should the legislator be more observant when it comes to the nature of criminal offenses, their graveness, and whether the potential of the reduction of the sanction should always be explored, or carefully considered and decided in every separate case. The idea of prevention, correlated with the potential of establishment of the truth and reconciliation, is highly

[6] The state of origin of this institute (USA) has a clear Book of rules on punishment and an Agency with jurisdiction to determine all the elements of the case and to correlate them with the sanction. Further reading: Bajović, 2015, p. 186.

dependable. Thus, we will test if the application of this institution in the war crimes cases may be a challenge for the establishment of the goals as mentioned above of transitional justice.

This paper falls into four parts. After the first introductory part, where the notion of plea agreement, its brief history and nature, and the pros and cons of its general application will be presented, the second part is aimed at presenting the idea of transitional justice and the importance of punishment to achievement of its goals. The third part is the case study on the war crimes cases prosecuted by the International Criminal Tribunal for Former Yugoslavia and courts in Bosnia and Herzegovina, which have been completed with the plea agreement. The types of war crimes that are prescribed and given sanctions will be observed. The final, fourth part is the conclusion. Normative, historical, and comparative scientific methods will be used, accompanied with the case study and data analysis.

1.1 Two sides of a coin: pros and cons of the plea agreement

The situation in which the accused and prosecutor bargain about the plea and that results in the agreement in which all the critical points are solved (pleading guilty, thus taking responsibility for the criminal offense, proposing the sanction (which may be more lenient than the one prescribed for the criminal offense), establishing the free willingness in the process, dealing with the secondary items (right on appeal, property claims), given to judge to decide, without need to proceed with the main trial (if accepted by the judge) would be an ideal situation. It is quite reasonable why plea agreements are popular among practitioners. There is an evident saving in material and human resources (Pajčić and Bonačić, 2021, 259), and the establishment of the facts is eased to its finest. The application of this institute contributes to the individualization of the case since it is being approached to the case and the agreement separately in every situation. Henderson (2022, pp. 2-3) recognizes the benefit even for the victim since the case resolution is being achieved without the need for the victim to confront the perpetrator or go through the critical event again within its testimony. Yet, the agreement will have a clause with which the (potentially stated) property claim will be solved.

However, together with the identification of the benefits of the plea agreements, practitioners and scientists determined its shortcomings as well. Heumann and Loftin (1979, p. 393) correctly agreed on „the increasing concern about the discretion accorded to prosecution in plea negotiation and judges in the sentencing decision". Namely, there is a constant fear that the wish to complete the case, which presents the success of the prosecutor or the judge, prevails in professionalism and ethics and in the goal of establishing the truth and achieving justice. That refers to turning to this institute too frequently, even in situations that ethically should not be dealt with in the plea agreements. We say ethically, since for many jurisdictions, there are no constraints related to the heaviness of the criminal offense or the perpetrator's character, for the institute to be used or not. In addition to that, there is that old fear related to the truthfulness of the confession and the potential coercion that can be psychologically made by the prosecutor in achieving it (Beenstock et al., 2019, 29). Another thing, the result of the fake confession is wrongful conviction, which is the biggest concern of all the subjects of the criminal procedure, and it directly contradicts the concept of justice. Further, Pajčić and Bonačić (2021, p. 259) question the constitutionality of this institute, as the most crucial role in solving the case and even in creating the sanction proposal is in the hands of the prosecutor, not the court whose role it should be within its judicial power. Judicial sentencing and individualization of the sanction are some of the most important and complex elements of that power (Bajovic, 215, p. 179). The same author, in addition to that, state also that in practice, there is evident administrative misconduct in the application of this institute, but there is not that visible impact on the courts' workload (2021, p. 259). Many authors also find its application to be the erosion of the contraction principle in criminal procedure since there is no means to contradict it as there is no main trial. Last but not least, they question the efficiency of the sanction in diversion from criminal offenses in the future (preventive function[7]). So, there is a reasonable question if the sanction agreed in

[7] Preventive function of the criminal law refers to two types of prevention: special and general prevention. Punishing an individual for the perpetrated criminal offence should prevent them from committing new criminal offences. The suffering felt by the sanction which is the response of the society to

the plea agreement, which is below the legally prescribed minimum, makes an individual understand that perpetrating criminal offenses is forbidden and that they will suffer from that through the sanction, or would this make them understand the plea agreement as a safe option for the future as well, so that once they again perpetrate criminal offense they can count on plea bargaining with the prosecutor and get away from the criminal offense with very symbolic sanction. Henderson (2022, p. 2) correctly notes that victims do not achieve the justice they deserve with that approach. He also mentioned the absence of the public in the whole process, which is quite opposite to the modern criminal procedure principles, where the public is involved in the flow of the process as the control mechanism. They are present at the trials, and with the absence of the trial, there is a lack of control over the legality of the procedure. Wan (2007, p. 41) perceives plea agreements as a way to undermine the criminal justice, Brunk (1979, p. 533) sees them as an unfair advantage given to the perpetrator, while Callan (1979, pp. 327-328) thinks it brings distrust into the system and inequality of the justice as a whole. Strang (n.d., 32) finds its usage as the Americanization of criminal justice and return to show trials.

2. Intersection between plea agreements and transitional justice

The negative observations about the plea agreements, which are quite numerous, when critically observed, make us wonder whether criminal justice should continue with its application. Its existence in criminal justice is quite reasonable, but the application by the prosecutors and judges should be better controlled, and additional conditions for its applications should be set so that it does not lose its value.

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their wrongdoings, should have such an impact on the individual so that they never commit new criminal offence. At the same time, while being incarcerated, they are being observed, thus physically disabled of committing new criminal offences. That is the concept of special prevention. General prevention refers to the general population being diverted from committing criminal offences, by seeing that particular example of punishment for a criminal offence which sends the message that the same would happen to them if they commit a criminal offence. Further reading: Tomić, 2006, p. 56.

Apart from criminal justice, it is important to test its impact on transitional justice, as criminal justice is one of its mechanisms. However, before we proceed with our discourse about the impact of the plea agreement on the achievement of justice and transitional justice, we will briefly present the basic thought of transitional justice in this part of the article. Only then can we understand their relation and potential impact.

Transitional justice is not a type of justice. It is „a response to systematic or widespread violations of human rights" (ICTY, 2023). Popović (n.d., p. 12) sees it as a new discipline in the theory and the practice of preventing violation of human rights. It is relatable for all the transitional periods one country may be facing, regardless of whether it is a transition from one (abusive) regime to another or conflict and post-conflict society challenges. So, Kora (2010) correctly says that "transitional justice is an instrument of broad social transformation, and rests on the assumption that societies need to confront past abuses to come to terms with their past and move on." "It seeks recognition for victims and promotion of possibilities for peace, reconciliation, and democracy" (ICTY, 2023). Although its traces could be seen even during the Ancient period[8] (so many call it a timeless construct (Arthur, 2009, 328), and then also after the World War II when its mechanisms were applied through the trials of the responsible individuals for war crimes (Popović, n.d., 13), it can be said that it has been developed with the events of 80'es of the last century, that took place in Latin America and the Eastern Europe[9]. As most of the regimes were transiting toward democracy, and there was a need to address human rights violations during the events, the concept (response) itself is called "transitional justice"[10]. Its essence is explained by Popović (n.d., 13), by stating that "transition justice is a method

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[8] Lawther et al. (2017, p. 11) exemplifies that "Elster traces the origins to the transition to democracy in ancient Athens in 411 and 403 BC".

[9] Transitional justice as a concept is to be observed in Europe (the events and legal activities after WWII such are Nazi trials, then after fall of Communism the transition in the former Soviet countries and Balkans, the war in Bosnia and Herzegovina), dictatorships or regimes fall in Latin America (Argentina, Chile), Africa (genocide in Rwanda, events in South African Republic), Asia (i.e. Bangladesh and prosecutions by the ICC), etc.

[10] The term was first time used in a Boston *Herald* article about the *Charter 77 Foundation's 1992 conference in Salzburg*, named "Justice in Times of

applied in societies burdened by difficult, mass and systematic violations of human rights and international humanitarian rights and is an answer to the violations, as establishing the rule of law should be established, implementing activities towards facilitation of the consequences of crimes committed and create conditions for Promoting peace and democracy (reconciliation?), to prevent reiterating the past". Therefore, it can be said that it explores the past but also is directed towards the future, to prevent past violations in the future. According to Werle and Vorbaum (2022), the classical approach of understanding the Transitional justice sees it as a toolkit of the transiting societies.

According to the International Centre for Transitional Justice, its legal basis was the decision of the Inter-American Court of Human Rights in the case of Velasquez Rodriguez v. Honduras (1988), in which "the court found that all states have four fundamental obligations in the area of human rights. These are: To undertake steps to prevent human rights violations; To conduct investigation of violations if those events occur; To impose suitable sanctions on those responsible for violations; To ensure reparations for victims of the violations. (ICTY, 2023). Those are, at the same time, the principles of transitional justice. Just as Lawther et al. (2017, p.13) calls on the thought of Kerr et al. (2007, p. 3) that Transitional justice has been defined as 'the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and violations of international humanitarian law,' it applies those mechanisms to achieve the said principles. The theory and the practice identified those mechanisms as criminal justice, reforms, reparations, and truth-telling (Popović, n.d. 14). All these mechanisms are correlated and contribute to preserving future violations. Criminal justice enables the responsible individuals of violations to be prosecuted and punished[11], truth telling[12]

Transition." The reporter addressed it to be "the first in a year-long series of meetings on transitional justice. Further reading: (Arthur, 2009, 329).

[11] Apart from the national criminal courts, the immense role in the achievement of the Transitional Justice goals is in the International Criminal Court. Further reading: (Gallen in Lawther et al., 2017, p. 305-328).

[12] The most notorious example is Truth Commissions. They are widely present in Africa and show a great example of the core idea of the truthtelling process. Further reading: (Lawther in Lawther et al., 2017, p. 342; etc.). However,

is partially achieved through the trials, but through wider historical documents and programs enables the members of society to understand the wrongdoings, their content, scope, and perpetrators. Reparations, which may vary from monetary compensation to apology, bring symbolic gestures towards victims and recognize them as an important subject in the reconciliation process. Finally, institutional reforms ensure that institutions do not breach human rights. These mechanisms, either applied alone or in combination, strive to accomplish the transition from atrocities to peace and reconciliation. And those are not the only objectives of transitional justice. The US Institute for Peace (2008, p.1) summarized the objectives as "establishing the truth about what happened and why; acknowledging victims' suffering; holding perpetrators accountable; compensation for past wrongs; preventing future abuses; promoting social healing." However, these objectives and application of the mechanisms are not universally accomplishable, and they vary from one country to another, as in their application, the culture, history, customs, religion, and other social and economic factors play immense roles.

2.1 Applicability of the plea agreements in the pursuit of (transitional) justice

In the concept that it is essential to prosecute the perpetrator of human rights violations and to establish the truth and cherish the integrity of the victim, trials of war criminals after World War II were one of the most important events that represent the essence of the symbiosis of the transitional justice mechanisms in accomplishment of its goals. It is important to wonder if plea agreements were applied then. Article 24 (b) and (j) of the Charter of the International Military Tribunal (Nuremberg), referring to the procedure before the Tribunal, prescribed that „The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty," and that the "Defendant may make a statement to the Tribunal." This refers to the defendant's plea, not the plea bargaining and agreement. So, it can be said that the Charter neither prescribes it

the verdicts themselves as truth found and written have a great role in the truth-telling process and are valuable documents for future generations.

nor prohibits it. In the Charter of the International Military Tribunal for the Far East (1946), articles 15 (b) and (j) prescribe the identical rights of the defendant as the Charter mentioned above. Therefore, it can be said that the plea agreement was not mentioned and thus not prohibited. However, it was not applied.

The first time it was applied for war crimes was before the International Criminal Tribunal for Former Yugoslavia. The truth is that its procedural rules are a unique combination of Anglo-Saxon and continental law, so there was the potential for its usage. Judge Casseze in 1994 stated that the plea agreement should not be applied because the Tribunal trials for the heaviest crimes and no one should have immunity, regardless of how beneficial their statement would be (Pajčić and Bonačić, 2021, 261). However, with the flow of time and the high burden of cases, the evident benefits of the plea agreement became the solution for the numerous, lengthy, and expensive trials before the ICTY.[13] Therefore, the plea agreements were also applied at the ICTY. In the next part of the paper, we will discuss the number of cases and their particularities.

The Rome Statute (2009) in article 65 refers to the situations when the accused admits the guilt. The Court shall evaluate whether the admission was voluntary, whether the accused understands the nature and consequences of the admission, and whether the Prosecutors' evidence supports the admission. If the court evaluates these elements exist, then the court shall convict the accused (art. 65, par one a), b), c) and part 2 of the Rome Statute). Pajčić and Bonačić (2021, p. 260) correctly understand the nature of these provisions, and they find that the plea may be used as proof, but the court is not obliged to accept it if would not be in the interest of justice[14]. Although not often used in practice of this Court,

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[13] Pajčić and Bonačić (2021) call on Scharf who stated that in 10 years, ICTY spent 650 million dollars and solved 18 cases.

[14] This institute is not often seen in the practice of the ICC. One of the cases that did result with plea agreement before this court was the case of Ahmad Al Faqi Al Mahdi, who pleaded guilty for the destruction of mausoleums in Timbuktu, which is one of the acts of war crime of attacking protected objects (Art.8 (2)(e)(iv) of the Rome statute, and he was sentenced with 9 years of imprisonment, which fell in the scope of the Prosecutorial Proposal of the sanction (9-11). See: https://www.ejiltalk.org/guidelines-for-agreements-regarding-admission-of-guilt/.

the procedural regulations related to this institute were brought in 2020. Namely, the Guidelines for Agreements Regarding Admission of Guilt set particular rules on the specification of Article 65 of the Rome Statute, including rules on which factors should be observed for its application. "These factors include consistency with the Rome Statute (para. 18); the need for deference to the confirmed charges to avoid excessively distortive bargains and the withdrawal of charges referring to under-prosecuted crimes (para. 20); the significance of obtaining detailed and thorough statements of corroborating facts (para. 23); respect for the interests of victims and witnesses (paras. 25-26); the timeliness of the admissions of guilt (para. 27)" (Biazzati, 2020).

Apart from these initial steps and the international approach to the use of plea agreements, many countries recognized the positive aspects of the plea agreement and introduced it in their legislation. For example, in Montenegro, the Criminal Procedure Code (2009) prescribes the potential use of the plea agreement and observes it as an agreement about the sanction, and costs of the procedure and denounces of the right to appeal related to the sanction. Although its use is not excluded for the heaviest crimes (Jovović, 2017, p. 89), according to Nenezić (2020, p. 9) from 2009-2015 it had been applied in criminal procedures for criminal offences with prescribed sanctions of imprisonment up to 10 years. The same author (2020, pp. 8-14) notes that the plea agreement in this country is a written formal act, that has to consist of all legal elements to be discussed, and which can be accepted only if the injured parties' rights are not violated with its application. A similar approach is accepted in Serbia, which prescribed it as an option in 2009. The proposal for a plea agreement should have absolutely determined sanctions, which implies that the burden of estimation of sanction is in the hands of the prosecutor, not the court (Bajović, 2015, p. 180). Croatia also recognizes this institute, and relates it with the indictment confirmation stage (Nenezić, 2020, p. 16), while in Germany this institute is observed only related to negotiations about legal consequences of criminal offence, criminal sanction, while it is not negotiable about the criminal offence nor security measures as a criminal sanction (Nenezić, 2020, p. 17). It is of noteworthy that the court is not bonded with the prosecutorial proposal of sanction, thus the court may set the sanction beyond the proposal given.

When it comes to the practice of the European Court for Human Rights, the case *Natsvlisjvili and Togonidza vs. Georgia* (2014) is of immense importance in the observation of this institute, as this case was testing the compatibility of this institute with Article 6 of the European Conventions for Human Rights (right to fair trial). The conclusion of the Court is that the application of this institute in that particular case did not violate Article 6, "since the agreement was made free-willingly, the parties had their legal representatives, the proposal was made by the parties, court deliberated and established that the conditions for application of this institute existed" (Nenezić, 2020, pp. 18-19).

3. Application of the plea agreements in cases of war crimes in Bosnia and Herzegovina

Aggression on Bosnia and Herzegovina[15] left devastating consequences, and it can be said that this country is in the process of transitional justice. More accurately is to say that it is struggling with many challenges that appeared on the path towards transitional justice. From issues of slow justice (some cases not being prosecuted even thirty years after the war finished), which brings to the questions of efficiency of criminal justice, questions of truth establishment in the country where in the books of history three different „truths" are being narrated, to the genocide denial and glorification of war criminals, are just an illustration to mention. The war crimes that had been perpetrated in Bosnia and Herzegovina were trialed initially by the International Criminal Tribunal for Former Yugoslavia (ICTY), and then, following the 11 bis rule of the ICTY Statute are continued to be trialed before the domestic courts, predominantly the State Court of Bosnia and Herzegovina.

Criminal Procedure Codes, all four of them that are applied in Bosnia and Herzegovina, only in different levels of authority (respectively Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika

[15] It was an aggressive war, that started in 1992 and ended in 1995 with signing the Dayton Peace Agreement. „At least 95,940 people were martyred (Tokača, 2012, p. 107), 1.4 million people were displaced, and 1.2 million people became refugees (Teksen, 2019: 200)" (Kazić Çakar, 2025, 87).

Srpska and Brčko District) prescribe the institute of Plea Agreement (Art. 231 CCBH, Art 246 CCFBH, Art. 231 CCBDBH, Art. 246 CCRS). This is one of the rare institutes where all four codes are harmonized in its regulation. When observed regarding restrictions in the use of the plea agreement, the only two restrictions are related to the timeframe until when the agreement can be achieved and the type of plea. That is until the end of the main trial or the hearing before the second-degree court, and when the accused pleaded guilty respectively. There is no restriction regarding the type of criminal offence or duration of the sanction. Consequently, it is eligible to be used for war crime cases as well. The crucial part of this institute, which makes it quite attractive for the defendants is the potential of the prosecutor to propose a sanction that is lower than the legal minimum prescribed by the Criminal Code (par. 3 of Art. 231 CCBH, Art 246 CCFBH, Art. 231 CCBDBH, Art. 246 CCRS). Once the agreement is achieved between the prosecutor and the defendant, in written form, it is given to the preliminary hearing judge to be evaluated. The hearing for evaluation of this agreement will be organized, with the aim that the judge directly evaluates the merits of the agreement (are there enough evidence, is the plea given freely, does the defendent understand the consequences of the plea, particularly regarding the right to apeal, costs of the procedure, etc.).

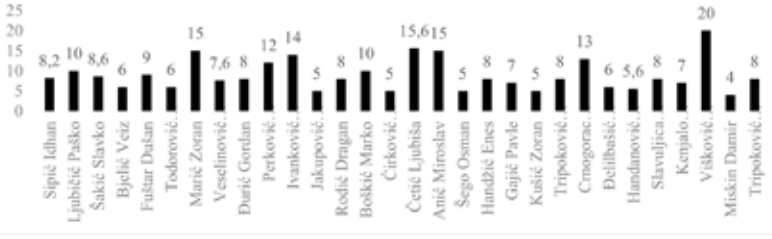
3.1 *And how this institute works in cases of war crimes in Bosnia and Herzegovina?*

For the interest of this article, we have collected data on all cases of war crimes that have been proceeded before the State Court of Bosnia and Herzegovina from its establishment (2002) nowadays. From the data delivery from the State Court of Bosnia and Herzegovina, it is visible that, in total, 35 cases of war crimes had been completed based on the plea agreement. From the evaluation of the cases, six of them had been trialed based on the Criminal Code of the Socialist Federative Republic of Yugoslavia for the criminal offense of War Crimes against Civilians (article 142). For that criminal offense, the sanction prescribed is imprisonment, a minimum of five years, or the death penalty. Those cases are S1 1 K 018201 15 Kri Radivoje Soldo, who was punished with five years of imprisonment; S1 1 K 002859 15 Kri Damir Lipovac, punished with seven years of imprisonment; S 1 1 K

023594 16 Kri Mićo Jovičić, punished with five years of imprisonment, S1 1 K 026886 17 Kro Miroslav Perić, punished with one year of imprisonment and S1 1 K 007448 18 Kro Goran Pavković, also punished on one year of imprisonment. While in the cases Soldo and Jovičić, the defendants have been punished with the minimum of the prescribed sanction, and Lipovac case whose sanction falls in the scope of legal minimum and maximum of the sanction, for the remaining cases it is visible that the court followed the potential in decreasing the sanction below the legal minimum, and went quite below it, punishing them to sanction of one year.

For the remaining twenty-nine cases, the Criminal Code of Bosnia and Herzegovina was the main legal source. Perpetrators had been convicted for Crimes against humanity (art. 172 par. 1) in 15 cases, Crimes against civilians (art. 173 par. 1) in 10 cases, and four cases for Crimes against war prisoners (article 175, out of which number two were i n concurrence with Crimes against civilians). Criminal sanctions for all three criminal offences is imprisonment from minimum 10 years of long term imprisonment[16].

Figure 1. Review of punishment based on Plea Agreement before the State Court of BH (Source: data delivery by the HJPC BH to the author)



[16] Those are cases Sipić Idhan, Ljubičić Paško, Šakić Slavko, Bjelić Veiz, Fuštar Dušan, Todorović Vaso, Marić Zoran, Veselinović Rade, Đurić Gordan, Perković Stojan, Ivanković Damir, Jakupović Elvir, Rodić Dragan, Boškić Marko, Ćirković Milivoje, Četić Ljubiša, Anić Miroslav, Šego Osman, Handžić Enes, Gajić Pavle, Kušić Zoran, Tripković Novica, Crnogorac Dragan, Đelilbašić Šaban et al., Handanović Rasema, Slavuljica Dario, Kenjalo Stojan et al., Višković Goran, Miskin Damir and Tripković Novica. (HJPC, 2023)

Although for all these criminal offences the sanction prescribed is a minimum of 10 years or long-term imprisonment, from the figure above, it is visible that there is a variety of sanctions given to perpetrators who participated in plea bargaining. The lowest is four years in case Miskin, which not only is lower than the minimum prescribed by the Law but much lower than its half-even. In four cases the sanction was five years, in one 5 years and six months, in three six years, in two seven years, in one seven years and six months, in seven around eight years, in one nine years. The legal minimum was adjudicated in two cases, and in the rest of the cases, the sanctions were in the scope of the minimum and maximum that are prescribed by the Code. The highest sanction was in the case Višković. However, in none of these cases, long-term imprisonment was imposed.

The particular interest of our research are bringing cases where the imposed sanction is quite below legal minimum. For example, cases Perić and Pavković. In the case Perić in the reasoning part of the verdict, the Court gave explaination on the sanction. „...the Court took into accoun that in this way the accused contributes to the efficiency and reduction of the costs of court proceedings, and what is even more important, that by concluding an agreement before the start of the main trial, the need to constantly and repeatedly invite victims to testify in other cases and before other courts. In the end, the Court finds that the imposed sentence is an adequate and proportionate criminal sanction to the severity of the criminal offence and the degree of criminal responsibility of the accused who committed the crime, but who admitted his guilt and sincerely repented“ (Verdict S1 1 K 026886 17 Kro, 2017).

In the abovementioned case of Goran Pavković (IT-03-70), the accused was sentenced one year of imprisonment based on the plea agreement, although he was charged for War crimes against civilians, more precisely for torturing civilians (i.e. using electricity and burning their naked parts of the body), and later on the sanction was substituted with money fine, as the law in Bosnia foresees that quite a questionable option, which is obviously applicable even in cases of war crimes. From the explanation part of the verdict, in paragraph 73 the purpose of the punishment and both general and special prevention would be accomplished with the sanction of one year. The court found mitigating

in the case the fact the accused agreed to enter in the plea agreement, valorized family status and age as mitigating circumstances (pars. 68 and 69), and in addition to that stated that this agreement brings the efficiency and economy to the trial and excludes the need for victims to attend the trials and „awaken the sad memories from the war" (par. 70). The sanction given was one year, although the minimum prescribed is 5 years, and even that to the minimum mitigated sanction was converted to a money fine in the amount of 36 000 KM. The question indeed is whether the victims would be satisfied with that approach.

Interesting is the Courts' opinion on how plea agreement contributes transitional justice n the verdict of Jakupović Elvir (X-KR-10/906, 2010), who was tried for War crimes against civilians, more particularly for killing one person, although he was previously convicted, the Court took his family status (father, married) and repentance as the grounds to pronounce the sanction of five years, which is double lower than the prescribed minimum. Moreover, the Court stated that it is aware the sanction is low, however, the important point was pleading guilty, and taking responsibility for the act, and that is what this court found as a ground for truth establishing and reconciliation (X-KR-10/906, 2010, p. 10)[17]. The court found the fact that accused pleaded guilty, thus took the responsibility over their act, not questioning the pureness of that intention and if the decrease of sanction actually lays behind. However, when observed from the point of the victim, the question may be posed whether the reconciliation may be achieved and how victim (secondary) observes that low sanction.

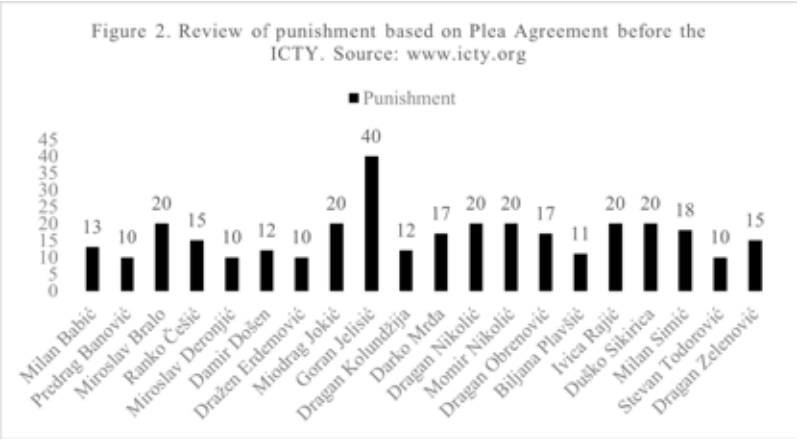
From the table it is visible that among heaviest sanction was pronounced to Goran Višković (S1 1 K 039714 21 Kro, 2021), who was also accused for War Crimes against civilians, more precisely 20 acts, that he participated in „murders, other severe deprivations of physical liberty contrary to the fundamental rules of international law, and other inhumane acts of a similar nature committed with the intent to cause great suffering or serious physical or psychological injury or harm to health, and the enforced disappearance of persons" (S1 1 K 039714 21 Kro). He was convicted with

[17] Almost identical is the explanation related to the sanction in the case of Mirivoj Ćirković, X-KR-10/1029, 2010 and Damir Miskin, S1 1 K 041911 21 Kro.

20 years of imprisonment for criminal offences in concurrence. The verdict related to those 20 counts of indictment was based on the agreement of the prosecutor and the accused and was eight years. The final number of years of imprisonment was achieved with the calculation of other verdicts that were given to him, and one joint amount was established in 20 years. Although in the prior stage of the procedure the accused pleaded not guilty, he became part of plea bargaining and the agreement was reached. Regardless to that fact, the court found as mitigating circumstance the fact accused agreed to the agreement, thus showed remorse and contributed to an efficient solution of the case (par. 117). However, paradox are the statements from the following paragraph where the court counts aggravating circumstances and states "a number of the acts perpetrated, cruelty and persistency of the accused, continuity of the acts perpetrated, consequences such are the death of male population, physical and psychological consequences for the victims, due to the acts of the accused". The court found the sanction of 8 years, which is below minimum of 10 years, suitable one to achieve the purpose of the sanction. It is evident that the reasoning for these criminal offences, although different with the number of points of indictment, are very similar, and although the aggravating circumstances in this case are quite disturbing, the fact of having the plea agreement was dominant in decreasing the sanction below the legal minimum. Even calculation of criminal sanctions in concurrence (this 8 years, and 18 from the prior conviction), seems to be mitigating, as the final sanction is again lower than the maximum sanction in concurrence that could have been given, and which is 26 years, according to the Criminal Code of BH.

When it comes to the cases before the ICTY in which the plea agreement was achieved, there were 20 cases. Those are cases Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Dražen Erdemovič, Miodrag Jokić, Goran Jelisić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajić, Duško Sikirica, Milan Simić, Stevan Todorović, Dragan Zelenović (www.icty.org, 2024).

The lowest is imprisonment of 5 years in Erdemović, 10 years in cases Banović, Deronjić, and Todorović, while the highest is of 40 years in case Jelisić, followed by 20 years in cases Bralo, Jokić, Nikolić, Rajić and Sikirica (www.icty.org).



With the case Jelisić (IT-95-10, www.icty.org, 2024), who was tried for War Crimes against Humanity and Violations of the laws or customs of war, pleaded guilty. The trial Chamber did state "One of the missions of the International Criminal Tribunal is to contribute to the restoration of the peace in the former Yugoslavia. To do so, the identification and prosecution of the principal political and military officials responsible for the atrocities committed since 1991 in the territories concerned must be a priority. However, where need be, it should be recalled that although the crimes perpetrated during armed conflicts may be more specifically ascribed to one or other of these officials, they could not achieve their ends without the enthusiastic help or contribution, direct or indirect, of individuals such as you, Goran Jelisic".

However, the Court did not just randomly accept the plea and set it as the grounds for decreasing the sanction. Quite the opposite, they stated that although he pleaded guilty, he failed to show remorse (ICTY, 2024), and that his aggravating circumstances outweighed the mitigating ones. And the aggravating ones were "*scornful attitude towards (his) victims, (his) enthusiasm for committing the crimes, the inhumanity of the crimes and the dangerous nature evidenced by (his) behavior".* And this is in our opinion what the court should do, enter in the merit of the issue and truly psychologically rule in the matter.

In contrast, in case Deronjić (IT-02-61), where the accused was trialed for Persecutions on political, racial and religious grounds (crimes against humanity, Article 5 of the ICTY Statute), he pleaded guilty, entered into the plea agreement and showed remorse. In the reasoning part the Chamber expressed satisfaction with the plea and stated "the Trial Chamber also determined that the plea not only saved the Tribunal time and money associated with a lengthy trial, but also sheltered the victims and witnesses from testifying about painful and traumatic events, thereby reopening old wounds", the phraseology frequently used before the State Court of Bosnia and Herzegovina. Apart from the plea agreement, the Court found to be of significant importance the assistance in other cases, and eventually convicted him to imprisonment of 10 years (IT-02-61).

In Erdemović case (IT-96-22), who „pleaded guilty to the count of murder as a crime against humanity, adding that he would have been killed if he had refused to participate in the murders. The Trial Chamber accepted the accused's guilty plea and dismissed the alternative count of murder as a violation of the laws or customs of war" (www.icty.org), perpetrated at least 70 killings by himself. He was sentenced to 5 years of imprisonment, while the Chamber took his plea guilty, remorse, subordinate level, and cooperation as mitigating circumstances (icty.org).

4. Discussion

The efficiency and procedure economy effects of plea agreements are an undisputable fact and its benefit. However, it is very important to question the existing application of this institute in the cases of war crimes and its impact on transitional justice. It is evident that plea agreements have been used in ad hoc tribunals, which were an important part of transitional justice. It is part of the legislation of many countries, as a legal transplant from Anglo-Saxon law. It is applicable in Bosnia and Herzegovina even in the heaviest criminal cases, which do include war crimes. The legislator set quite a wide provision which includes its application in those cases. However, war crime cases are directly correlated with the sensitive nature of transitional justice the way they are adjudicated and how society reacted to them sets important notions on the tolerability of similar crimes in the future (question of manageability and reachability of criminal prevention), including facts establishment, truth-telling, and reconciliation.

a) war crimes in the legal system of Bosnia and Herzegovina, just like in legal systems of other countries are perceived as the heaviest breaches of law and violations of the most important values that had been protected by international law. Quite correctly, criminal politics sent the message to the perpetrators and to the wider public: those criminal offences should be punished with the heaviest sanctions. When observing the former applicable law, and the positive law of Bosnia and Herzegovina, both eligible to be applied in strictly prescribed cases (rule of more lenient law), the sanctions set are heavy: including the death penalty (in former law), long-term imprisonment, or imprisonment with the legal special minimum of 5 (former) or 10 years. The cases presented in the previous part of the manuscript show the tendency of strictly following legal possibility (not obligation) to decrease the sanction below the legal minimum prescribed by the Criminal law, so it is visible that both ICTY and the State Court of Bosnia and Herzegovina almost as a rule use this opportunity and decrease it below the minimum. Even ten times below the minimum, as was presented in a few cases. In some cases, that had been presented the court went a step further and substituted that low sanction given (one year) into the monetary fine. This penological aspect opens a few questions. First, everlasting questions of special and general prevention. [18]After war crimes are committed, it seems for a person's life-saving solution to enter into a plea agreement with the prosecutor, and since the practice does not show a difference, and get the sanction below the legal minimum. Psychologically we have to wonder what effect will have the plea agreement on that person, will it really make them not commit a similar criminal offence if the chance is repeated? Not to mention special prevention, as in the wider population encompassing war crimes in the same group of application of plea agreement as any other criminal offence, and eventually reaching low sanctions, not only does not demoralize individuals

[18] In his work, Slobogin discusses if plea bargaining is applicable in preventive justice. He concludes that „Plea bargaining dominates the criminal justice system, in a way that undermines the substantive and procedural goals of our criminal justice system" (Slobogin, 2016).

not to commit a criminal offence, but followed with the utilitaristic approach, trivializing sanctions may even incite them to commit criminal offences in question if the armed conflict would happen. On the other hand, low sanctions given (although are prescribed strictly) also tell that society does not find those criminal offences dangerous and society devastating. This can bring to the growth of feeling of admiration against war criminals, as that sensation many cherish, and with this issue, when the society lacks in confirmation of serosity of their acts, the cherishing sensation may grow to the war criminals glorification. And this is what is part of present in Bosnia and Herzegovina. The matter of reconciliation in that kind of ambience becomes quite challenging, even impossible.

b) At the same point, it is important to take care of the victims and their perception of how society perceives their victimization: lives lost, families lost, property lost, and future lost. A low sanction that may appear as a result of a plea agreement may be a trigger for their secondary victimization, the feeling of failure of justice, and failure of humanity, which also furthers away the potential for reconciliation, achievement of goals of criminal justice, and achievement of justice overall. Lippke (2006) in his work emphasizes that plea bargaining in overall does not go in line with the idea of retributive justice where an individual is punished based on the severity of their criminal offence.

c) ICTY sent it as a message through various of its verdicts (some of them we presented), and later on the State Court of Bosnia and Herzegovina followed, that plea agreement brings to the efficiency of the trials and economy of the procedure, and that not being obliged to give their testimony enables victims to avoid the memory on the tragic events. That is indeed the practical achievement of the plea agreements. However, in every case when the victim within the main trial gives their testimony (even though it had been given and taken into the record in the investigation), the truth and facts may be established. Those testimonies are being entered into the scripts from the trials and are being kept in the archive. That is one very important part of the truth-telling and truth-establishing process. The facts remain as testimonies of critical events, victimizations, and perpetrations. Therefore,

we do not find encouragement of the efficiency of the trial over going through those testimonies, and application of plea agreement benefit of shorter procedure as a benefit. Quite the opposite, it may harm the transitional justice processes.

d) The trial itself as a process, not observed only as legal but psychological and growth initiating process, where victim and perpetrator encounter, can have a healing impact on both. The process can produce more profound repentance than the pure statement in the plea agreement as a document. It is very important to emphasize that pure and formal agreement to be an actor in the plea agreement with the prosecutor, and a simple plea of guilt does not really mean the person regrets and takes responsibility for the acts they have committed[19]. The court noticed that in the case Jelisić was very correct. However, in the verdicts analyzed from the Court of Bosnia and Herzegovina, the feeling of the reader of the verdict is that that statement is taken formally as sufficient, even similar phraseology has been used in the verdicts when the sanction part has been argued. True repentance is the desired feeling in any procedure and taking responsibility is a factor that predicts the accomplishment of special prevention and at the end of transitional justice in a wider sense. However, in every case of war crimes court has to carefully approach the perpetrator and their statement, and the motives standing behind, particularly because of the potential for a decrease of the sanction beyond the minimum, which can be a more realistic trigger to the agreement.

5. Conclusion

A plea agreement as a procedural institute without any doubt stands as a remarkable option which has its positive and negative sights. Positive ones, dominantly efficiency, and economy of criminal procedure set it in an important part of the criminal trials worldwide. However, through history, and in particular in the observed country Bosnia and

[19] Damaška (2015) disucusses the position of prosector in the bargaining process, as an interested subject, and states that far from reaching proportionality or rependance, they are served as take it or leave it. More in: Pei, 2015.

Herzegovina, they have the potential to be applied even in the cases of war crimes. And plea agreements have been part of those procedures, just as we described and presented above.

However, due to its important element is the possibility to decrease the sanction, in the practice of the observed country, it has been used in the heaviest cases of war crimes, and sanctions in some cases are decreased far beyond the legal minimum, which questions the achievement of justice and transitional justice. In our paper, we pointed out that its application in war crimes, makes transitional justice harder to achieve, particularly the processes of truth-telling, truth establishment, reconciliation, and achievement of goals of criminal justice – special and general prevention.

Our recommendation would be to exclude war crimes as a group of criminal offences from this procedural option, for the benefit of transitional justice and criminal justice overall. If such an option could not be achieved, then the second recommendation would be to observe in every particular case a decrease of the sanction as an option, but if decreased, not to trivialize it and its purpose. Additionally, courts need to pay more attention to the honesty of pleas and repentance, as only correct and not random evaluation can help in the achievement of special prevention and satisfaction of victims.

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