

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No. IT-00-41-PT

IN THE REFERRAL BENCH

Before Judge Alphons Orie, Presiding  
Judge O-Gon Kwon  
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Date Filed: 23 December 2008

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

*PUBLIC FILING*

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PROSECUTOR'S FINAL PROGRESS REPORT

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The Office of the Prosecutor

Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL  
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**PUBLIC**

**PROSECUTOR'S FINAL PROGRESS REPORT**

1. The Prosecutor hereby files his tenth and final progress report in the *Ljubičić* case. The case had been transferred in accordance with the "Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*"<sup>1</sup> of 12 April 2006 ("Decision on Referral"). On 19 June 2008 the verdict in this case became final..
  
2. The Prosecutor's ninth progress report in the *Ljubičić* case was filed on 19 September 2008.<sup>2</sup> On 3 October 2008, the Prosecutor filed Notice of Written Verdict in the *Ljubičić* case ("Notice"), and also informed the Referral Bench that as soon as the Office of the Organisation for Security and Co-operation in Europe's Mission to Bosnia and Herzegovina (the "OSCE") provides an assessment of the verdict it will be provided to the Referral Bench.<sup>3</sup>
  
3. The Prosecutor received the OSCE's report on 22 December 2008.<sup>4</sup> As OSCE had indicated earlier,<sup>5</sup> this report provides a summary overview of the verdict and also comments on a number of general issues such as
  - Charge bargaining and its compliance with the domestic legal framework;

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<sup>1</sup> *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, 12 April 2006.

See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Prosecutor's Ninth Progress Report ("Ninth Progress Report"), 19 September 2008.

<sup>3</sup> *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Notice of Written Verdict in the *Ljubičić* case, 3 October 2008, p. 2.

<sup>4</sup> OSCE Ninth Report in the *Paško Ljubičić* Case Transferred to the State Court Pursuant to Rule 11 *bis*, December 2008 (hereinafter "Report").

<sup>5</sup> Ninth Progress Report, para. 6.

- Timelines of plea agreements and the waiver of rights under the applicable law; and
  - Efforts by the Court to investigate the financial status of defendants.<sup>6</sup>
4. In the summary of verdict the OSCE notes that the amended indictment contained considerably less charges than the original indictment.<sup>7</sup> It contained only one count of War Crimes against Civilians for aiding and abetting the planning and execution of crimes occurring in the village of Ahmići on 15 and 16 April 1993, as well as, by virtue of his superior position for the crimes perpetrated by his subordinates over whom he had effective control. The amended indictment was filed on 24 April 2008 by the Prosecutor's Office of BiH as the basis for the plea agreement.<sup>8</sup>
5. The Court accepted the plea, finding that Ljubičić had entered into it consciously and aware of the consequences of such actions.<sup>9</sup> As reported earlier, the Court sentenced Ljubičić to ten years imprisonment taking into account his admission of guilt, his expression of remorse, his agreement to cooperate and disclose further information as well as the fact that he is the father of underage children as mitigating circumstances.<sup>10</sup>
6. With regard to the general issues raised in the Report, the Prosecutor notes that the OSCE mentions important legal issues, which should be discussed among the domestic legal practitioners. This discussion could potentially be of great value for them, especially taking into consideration the differences among legal practitioners, when it comes to the legal definition of plea bargaining, as reported by the OSCE.<sup>11</sup> The Prosecutor understands and gives due regard to the issues identified by OSCE in the Report, however, the Prosecutor considers that these issues do not appear to have affected Paško Ljubičić's right to a fair trial.

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<sup>6</sup> Report, p. 2.

<sup>7</sup> See also Prosecutor's Eight's Progress Report, filed on 19 June 2008 ("Eight's Progress Report"), para. 7

<sup>8</sup> Report, p. 2.. The original indictment of 15 December 2006 charged Ljubičić with Crimes against Humanity, War Crimes against Civilians, and Violating the Laws and Practices of Warfare under theories of direct perpetration, command responsibility, and joint criminal enterprise. It alleged that the accused committed these crimes throughout Central Bosnia in the areas of Vitez, Busovača, Ahmići, Nadioci, Pirići, and Šantići.

<sup>9</sup> Report, p. 3


<sup>10</sup> *Ibid.* See also Eight's Progress Report, para. 9.

<sup>11</sup> Report, pp. 5-7.

7. This is the Prosecutor's final report regarding monitoring of proceedings in the *Ljubičić* case. The OTP informed OSCE that OTP's monitoring activities regarding this case and the obligation to submit reports to the Referral Bench has come to an end.
  
8. Attached to this report and marked as Annex A is a copy of the Report.

Word Count: 1,035

*S. Faell*  
for Serge Brammertz  
Prosecutor



Dated this twenty-third day of December 2008  
At The Hague  
The Netherlands

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

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THE PROSECUTOR

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PUBLIC

ANNEX A  
TO  
PROSECUTOR'S FINAL PROGRESS REPORT



**Organization for Security and Co-operation in Europe  
Mission to Bosnia and Herzegovina**

**Ninth Report in the  
*Paško Ljubičić* Case**

**Transferred to the State Court pursuant to Rule 11*bis***

**December 2008**

## EXECUTIVE SUMMARY

Pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE), the *Paško Ljubičić* case was the fourth transferred from the ICTY to the BiH State Court. This constitutes the ninth report in this case that the OSCE Mission to Bosnia and Herzegovina (“OSCE BiH” or “Mission”) delivers to the ICTY Prosecutor, covering the period from September to December 2008.

On 29 April 2008, the Trial Panel found Paško Ljubičić (hereinafter also “Convict” or “Defendant”) guilty of War Crimes against Civilians and sentenced him to 10 years’ imprisonment based on the Agreement on the Admission of Guilt between the Prosecutor and the Convict (“*Ljubičić* Agreement”). The Trial Panel issued its written first-instance verdict on 28 May 2008 (the “Verdict”). No appeals were filed and the Verdict became final on 19 June 2008. On 2 September 2008, the Convict began serving his prison sentence at the semi-open Penal-Correctional Facility in Mostar.

As requested by the ICTY Prosecutor’s Office, this Report provides a selection of comments on the Verdict, whose English translation was issued during this period.<sup>1</sup> After providing a summary of the Verdict, this Report addresses specific issues, which may form the basis of further legal discussion. They include:

- Charge bargaining and its compliance with the domestic legal framework;
- Timeliness of plea agreements and the waiver of rights under law; and
- Court efforts to investigate the financial status of defendants, relating to the obligation to pay criminal proceedings’ costs.

## SUMMARY OF THE VERDICT

Originally the indictment of 15 December 2006 charged Ljubičić with Crimes against Humanity, War Crimes against Civilians, and Violating the Laws and Practices of Warfare under theories of direct perpetration, command responsibility, and joint criminal enterprise.<sup>2</sup> This indictment alleged that the accused committed these crimes throughout Central Bosnia in the areas of Vitez, Busovača, Ahmići, Nadioci, Pirići, and Šantići.

On 24 April 2008, the Prosecutor’s Office of BiH submitted a motion to file an amended indictment against Ljubičić as the basis for the referenced plea agreement.<sup>3</sup> This amended indictment contained only one count of War Crimes against Civilians for aiding and abetting the planning and execution of crimes occurring in the village of Ahmići on 15 and 16 April 1993, as well as, by virtue of his superior position for the crimes perpetrated by his subordinates over whom he had effective control.<sup>4</sup> No crimes occurring in other locations, referenced above, were mentioned.

<sup>1</sup> The English translation became available on 29 September 2008.

<sup>2</sup> Pursuant to Article 172(1) BiH CC in conjunction with items (a), (h), (e), (f) and (k) (murder, persecution, imprisonment, torture, and other inhumane acts); Article 173 BiH CC in conjunction with items (a) and (f) (attacks on civilians and civilian objects, and destruction and looting of property); and Article 179(2) BiH CC in conjunction with item (d) (destruction or deliberate damaging of establishments devoted to religious purposes) respectively. Each in conjunction with Articles 29, 31, 35, and 180(1) & (2) BiH CC.

<sup>3</sup> Motion to File an Amended Indictment against Paško Ljubičić, with Amended Indictment attached, dated 24 April 2008.

<sup>4</sup> Article 173(1)(a) & (f) BiH CC in conjunction with Articles 29 and 35(2). Article 180(1) in conjunction with (3) BiH CC.

On 29 April 2008, the Court of BiH accepted the *Ljubičić* Agreement, finding that the Convict entered into it consciously and aware of the consequences of such action. On the same day, the Court pronounced a verdict in the case based on the amended indictment, finding the Convict guilty of War Crimes against Civilians as stipulated in the plea agreement. The Court sentenced him to ten years of imprisonment.

In the Verdict, the Court considered the Convict's admission of guilt, his expression of remorse, his agreement to cooperate and disclose further information, and the fact that he is the father of underage children as mitigating circumstances.

In addition, the Court relieved the Convict of his duty to pay the costs of the proceedings because of his financial status and referred injured parties to civil proceedings to settle any compensation claims. Furthermore, the Verdict stated that the criminal proceedings in this case did not provide a reliable basis upon which those compensation claims could be assessed.



## ISSUES RELATED TO THE VERDICT ON THE PLEA AGREEMENT

The plea agreement reached in the *Ljubičić* Case is among the first concluded in war crimes cases at the State, Entity, and Brčko District levels.<sup>5</sup> It is a structured document which can be of great assistance to practitioners in terms of how to write a plea agreement in a form that is clear and comprehensible for both lawyers and the public. In this context, justice system actors may wish to consider certain issues that are presented in this Report, each raising matters in relation to domestic law and practice and/or human rights standards. Issues include the practice of charge bargaining and the defendant's rights regarding plea agreements, both of which the Verdict does not discuss. This Report also touches upon the issue that the Court appears to conduct no investigation or merely superficial investigation into the financial status of defendants, which is necessary for a well-justified decision on whether those defendants should pay for the costs of criminal proceedings if convicted.

By raising these issues, this Report aims to elicit further discussion among practitioners on the principles that govern plea agreements in the BiH legal framework. Courts are also invited to address these matters more clearly in their decisions and thereby help to develop a harmonised approach to plea agreements. In addition, courts are invited to investigate thoroughly the financial status of defendants and clearly justify their decisions on whether those defendants should pay criminal proceedings costs. Lastly, this Report wishes to bring these issues to the attention of ICTY practitioners who are involved in sharing their experiences and best practices with domestic actors.

### I. Compatibility of Charge Bargaining with Domestic Framework

Given its novelty, the plea agreement in the *Ljubičić* Case raises the issue of whether domestic law allows for practices generally known as "charge bargaining." State Court judges and prosecutors have seemingly accepted such a practice as the *Ljubičić* Agreement is an example where it was apparently used. By contrast, many Entity practitioners as well as some noted national and international scholars generally maintain that the domestic criminal law, as presently interpreted, does not allow for it. There are both issues of law and policy that underlie this position. The following section provides an overview of this issue.

#### Relevant Facts:

Under the original indictment in this case, confirmed by the ICTY and accepted by the State Court, the Convict faced numerous counts of Crimes against Humanity, War Crimes against Civilians, and Violations of the Laws and Practices of Warfare under the theories of direct perpetration, command responsibility, and joint criminal enterprise for crimes occurring in the areas of Vitez, Busovača, Ahmići, Nadioci, Pirići, and Šantići. On the other hand, the amended indictment underlying the *Ljubičić* Agreement charges the Convict with only one count of War Crimes against Civilians for crimes that occurred in Ahmići. Neither the plea agreement nor the amended indictment provide any explanation as to why charges were omitted from the amended indictment. It is obvious, however, that the Prosecution makes the acceptance of the amended indictment dependent upon the Court's acceptance of the plea

<sup>5</sup> As of this writing, plea agreements have been concluded against the following defendants: Todorović, State Court No. X-KR-06/180-1, Oct 2008; Šakić, State Court No. X-KR/05/41-1, Sept 2008; Fuštar, State Court No. X-KR-06/200-1, April 2008; Sipić, State Court No. X-KR-07/457, Jan 2008; Bjelić, State Court No. X-KR-07/430-1, March 2008; Kalajdžija, Banja Luka District Court, Case No. 11-0-k-000-004-0-8-K, July 2008; Sakrak, Sarajevo Cantonal Court No. K-112/03, Nov 2003; Hota, Sarajevo Cantonal Court No. K-119/03, Dec 2003; Rodić, Sarajevo Cantonal Court, Case No. K-65/04, July 2004; Pantić, Tuzla Cantonal Court No. 003-0-K-06-000026, May 2006; Simonović, Brčko District Court No. Kp-218/05, Oct 2005.

agreement. The *Ljubičić* Agreement stipulates that if the Court rejects the agreement, the Prosecutor will eschew the amended indictment, instead proceeding with its original indictment and all counts therein.<sup>6</sup>

On 29 April 2008, the Court issued its oral verdict accepting the *Ljubičić* Agreement based on the amended indictment. But the Court made no mention in its oral or written verdict of the fact that most of the charges were dropped. Nor did it render a decision dismissing the dropped charges with prejudice, as required by Article 283 BiH CPC. Further, the Verdict does not discuss the clauses of the plea agreement foreseeing that the original charges would be pursued if the Court did not accept the agreement.

#### Terminology:

First, it may be useful to clarify relevant terminology as “plea bargaining” does not have a standard definition. It can take different forms depending on the element of negotiation and agreement between a prosecutor and defendant. In general, it can be characterised as either sentence bargaining or charge bargaining.<sup>7</sup>

Sentence bargaining involves negotiations on the nature and length of the imposed criminal sanction. In sentence bargaining, the prosecutor agrees to recommend that the court impose a specific sentence or a narrow range of sentences in exchange for the defendant’s guilty plea and/or further cooperation.

In charge bargaining, the prosecutor agrees to dismiss select charges – usually the most serious ones – with the expectation that the defendant will receive a lower sentence as a result. This can be achieved through negotiation on the legal qualification of an act, for example when parties agree to qualify the underlying offence of murder as a war crime rather than genocide, or through a negotiation on facts, for instance when the parties agree to reduce or drop certain facts that constitute criminal offences.<sup>8</sup>

Typically, in jurisdictions where sentence bargaining is practiced, courts follow prosecutorial recommendations or, as in BiH, courts are bound to render sentence as agreed by the parties. Scholars have argued that when court practice is such or when courts have broad discretion to impose sentences, charge bargaining is neither efficacious nor necessary.<sup>9</sup>

#### Analysis:

Whether prosecutors can charge bargain largely depends on the discretion that the law affords them in managing charges. For instance, prosecutors in the USA may drop provable charges (principle of opportunity), while prosecutors in civil law systems are usually obliged to prosecute a crime if evidence of

<sup>6</sup> See *Ljubičić* Agreement, paras 34 & 18. Paragraph 34 states: If the Court rejects the Defendant’s agreement as set forth herein, the Prosecutor will withdraw his motion made pursuant to Article 275 BiH CPC for the Court to accept the Amended Indictment and the matter shall proceed on the original Affirmed Indictment. Paragraph 18 states: Should the Court accept the Defendant’s plea of GUILTY to the Amended Indictment, the Prosecutor will drop the Affirmed Indictment with prejudice.

<sup>7</sup> Plea bargaining is also different from confession. In confessions (also sometimes referred to as “implicit” plea bargaining), no bargaining takes place; but, defendants plead guilty on the expectation that the court will sentence them more leniently.

<sup>8</sup> Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 *Vanderbilt Law Review* 69 (2006), p. 75-79.

<sup>9</sup> *Id.* Professor Combs explains that charge bargaining developed as a practice in response to the fact that courts deviated from the sentence or the sentence-range agreed by the parties or in response to courts having to comply with mandatory sentences for certain crimes. She also notes, however, that certain accused persons may be unwilling to plead guilty to particular charges because of ideological disagreement or to avoid undermining the legal position of their fellow accused.

such offences exists (principle of legality of prosecution). Where evidence does not exist or is not forthcoming, however, prosecutors generally would not prosecute.

While some State-level officials have either engaged in or implicitly accepted charge bargaining, most Entity practitioners and legal scholars have stated that only negotiations on the sentence are appropriate in BiH. In support of their position, the latter cite the principle of legality of prosecution (Article 17 BiH CPC) and the provision on plea bargaining (Article 231 BiH CPC), which they believe, when taken together, do not allow prosecutors to drop seemingly provable charges.<sup>10</sup>

Under the principle of legality of prosecution, prosecutors are obliged to initiate prosecution if there is evidence that a criminal offence has been committed, unless the law allows for discretion. In law, only a few exceptions are prescribed and they do not relate to plea agreements.<sup>11</sup> The Commentary on this article adds that Prosecutors must file criminal charges against any violation within their jurisdiction without regard to their personal opinions on the matter.<sup>12</sup> Article 231(1) BiH CPC on plea bargaining provides that an accused may negotiate on the conditions of admitting guilt “for the criminal offence with which the suspect or accused is charged.”<sup>13</sup> The Commentary reiterates that “the subject of the agreement is the terms under which the suspect, i.e., the accused admits guilt, and they are primarily related to the type and length of criminal sanction.”<sup>14</sup> Plea agreements in BiH have also included secondary matters such as an obligation to cooperate and to testify.<sup>15</sup>

As noted above, the Prosecutor dropped the majority of charges against the Convict, after he procured the latter’s guilty plea to the single charge that made up the amended indictment. The reason for dropping the other charges was not made explicit. What was made explicit is that the charges were dropped only in the context of the plea agreement. If the Court rejected the charges, the Prosecution intended to continue prosecution on all charges of the original indictment.

If the Prosecution dropped the charges inspite of having evidence to support them, then its actions would seem to contradict the principle of legality of prosecution. By contrast, if this principle was respected, then the evidence supporting the dropped charges would need to be considered insufficient. If the latter is true, however, then it may be puzzling that the *Ljubičić* Agreement provides for withdrawing the amended indictment should the court not accept the plea agreement. In such an event, the Agreement states that the prosecutor will continue the main trial proceedings based on the original “affirmed indictment”.<sup>16</sup> On the one hand, the legal basis for such a procedure does not appear to exist anywhere in the domestic criminal

<sup>10</sup> See OSCE BiH Report, *Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their compliance with international human rights standards* (May 2006), p. 8.

<sup>11</sup> They include the prosecutor’s discretion to grant immunity (Article 35 BiH CPC) and to not initiate prosecution for lesser gravity criminal offences in juvenile cases (Article 352 BiH CPC).

<sup>12</sup> Hajrija Sijercic-Colic, Malik Hadziomerovic, Marinko Jurcevic, Damjan Kaurinovic, Miodrag Simovic, *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Council of Europe/European Commission, Sarajevo, 2005), Article 17, pp. 78-79.

<sup>13</sup> Article 231 BiH CPC was recently amended in August 2008, but this particular construction has not been altered. See *Official Gazette of BiH*, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05/ 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08.

<sup>14</sup> *Supra* footnote 12, on Article 231, pp. 621-626.

<sup>15</sup> Yet another legal procedure that suggests that charge bargaining is not allowed in BiH and the principle of legality of prosecution must be adhered to is the one on changing a confirmed indictment prior to trial. Pursuant to Article 232 BiH CPC, the Prosecution may only withdraw charges of a confirmed indictment prior to the main trial with the approval of the preliminary hearing judge who confirmed the indictment. This means that the Prosecutor is not endowed with the power to drop charges at will in order to procure a defendant’s plea of guilt prior to main trial, although this would be the most effective time to conclude a plea agreement.

<sup>16</sup> See *supra* footnote 6.

procedure code. On the other hand, its use provokes an appearance of inconsistency in the Prosecutor's position. Namely, the Prosecution is essentially stating that it does not possess the necessary evidence to support the charges within the original indictment, thereby justifying its amendment. At the same time, it intends to continue to pursue these same charges in the event that the Court rejects the plea agreement.<sup>17</sup>

#### Conclusions and Recommendations:

Charge bargaining may have benefits, such as encouraging defendants who do not want the stigma of being guilty for a certain crime such as genocide to plead guilty to lesser charges. Such circumstances can thereby contribute to the efficiency of prosecutions. Nevertheless, any advantages need to be weighed against other matters, among them the applicable legal framework, the evidence available, and the sentencing practices of the country. In addition, it is important to consider the role of the courts in establishing a historical record. In a country with a contested history such as BiH, criminal prosecution of war crimes serves an integral role in fact-finding and establishing historical truth.<sup>18</sup> Also of utmost importance are the interests and expectations of injured parties and society.<sup>19</sup>

In light of the above, it is recommended that State and Entity prosecutors, judges, lawyers, as well as academics engage in concerted dialogue on whether charge bargaining is to be an accepted practice in BiH. Should any clarifications need to be made to the legal framework, it would be advised that they are brought to the attention of the Criminal Codes Implementation Assessment Team.

It would also be advisable for Chief Prosecutors to coordinate between themselves and issue harmonised guidelines on plea negotiations that may facilitate practitioners in their work. If charge bargaining is to become the norm, such guidelines should take into account the good practice examples provided by the Ljubcic Agreement.

In addition, it would be useful for decisions on plea agreements to address the court's views on matters agreed by the parties, particularly when charges are being dropped, and thereby assist justice system actors in developing practices in accordance with the legal framework and reasoned court interpretations. Furthermore, it is recommended that courts render decisions dismissing dropped charges with prejudice to comply with Article 283 BiH CPC.

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<sup>17</sup> Professor Combs notes in general that suggestions that the prosecution dropped charges because they were no longer persuasive are themselves unpersuasive. If that were true, the prosecution would be under the professional duty to drop unpersuasive charges regardless of any guilty plea and should be barred to continue prosecution on those charges even if the guilty plea were not accepted by the Court. See Nancy Amoury Combs, *The Plea Bargaining of War Crimes; A Comparative Analysis*.

<sup>18</sup> It is important to note that verdicts need not be convictions to serve an important truth-telling function. They can establish beyond a reasonable doubt the existence of crimes and how those crimes manifested, even while ultimately finding that an accused is not criminally liable. Similarly, when charges are dropped during a main trial, prejudice attaches and they have the effect of being acquittals on those charges. This can be contrasted with the process of case selection, which allows that future charges on unselected crimes can still be brought and which avoids distorting the historical record.

<sup>19</sup> An additional consideration is the manner in which charge bargaining can be regarded under international law. Recognising a crime as *jus cogens* carries with it a duty to prosecute. The meaningfulness of that obligation is diluted when those crimes are re-characterised as lesser crimes or simply bargained away. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), which entered into force 11 November 1970. Article 4 establishes that statutory or other limitations shall not apply to the prosecution and punishment of *jus cogens*. The prohibition of amnesty for these crimes is a necessary corollary to the abolishment of statutory limitations.

## II. Other Points of Note on Plea Agreements

### i) Waivers of rights outside the bounds of law:

In this case, the parties negotiated on the waiver of certain rights in a manner seemingly incompatible with the applicable law. Although this did not result in any violation of the rights of the Defendant in the specific circumstances, attention to these matters is made so that caution may be exercised in future plea negotiations.

Under Article 231(5) BiH CPC, defendants may not appeal the criminal sanction of verdicts against them based on plea agreements.<sup>20</sup> Other matters, however, remain open for appeal.<sup>21</sup> Moreover, not only are appeals of verdicts generally preserved, Article 294 BiH CPC forbids an accused individual from waiving the right to appeal a verdict imposing a sentence of imprisonment, until after it has been delivered to them in written form. There are no special provisions that allow for the possibility of such waiver in cases resolved through a plea agreement.

Nevertheless, the Defendant waived his right to appeal the pronounced sentence *and the verdict*, already in the plea agreement, prior to the court issuing its written decision.<sup>22</sup>

The *Ljubičić* Agreement also states that the Convict understands that he waives his right to trial *and the presumption of innocence* if the Court accepts the plea agreement.<sup>23</sup>

Yet the BiH CPC does not provide for a defendant to lose the presumption of innocent when the Court accepts their plea agreement. On the contrary, Article 3 BiH CPC provides as a general principle that a person shall be considered innocent of a crime until guilt has been established by a final verdict. In the Commentary on Article 3 of the BiH CPC, it is stipulated that the issue of guilt in plea agreement cases must be resolved by the verdict pronouncing the sentence after plea bargaining.<sup>24</sup> Pursuant to Article 178 BiH CPC, this verdict does not become legally binding until it may no longer be contested by an appeal or when no appeal is admissible.<sup>25</sup>

These provisions ensure that an accused person who has plead guilty pursuant to a plea agreement still has recourse against an arbitrary verdict or when the judicial process violates other procedural or essential rights of the accused.

In the *Ljubičić* Agreement, although the parties have negotiated away the Convict's right to appeal the verdict and his presumption of innocence, the Court's Verdict, implicitly ignored these seemingly impermissible waivers. The Verdict states that the Court was satisfied that Ljubičić understood that "he waived the right to trial and appeal from the pronounced criminal sanction" by virtue of the admission of guilt within his plea agreement. It also explicitly provides that appeal is generally permissible aside from an appeal of the criminal sanction, which would not be allowed because the Verdict was rendered based on a plea agreement.<sup>26</sup>

<sup>20</sup> Previously Article 231(4) BiH CPC prior to the August 2008 amendments to the BiH CPC.

<sup>21</sup> See *supra* footnote 12, on Article 231, pp. 621-626.

<sup>22</sup> *Ljubičić* Agreement, para. 25 [emphasis added].

<sup>23</sup> *Ljubičić* Agreement, para. 30 [emphasis added].

<sup>24</sup> *Supra* footnote 12, on Article 3.

<sup>25</sup> The deadline for filing an appeal against a first-instance verdict is 15 days from the date when the written verdict was delivered to all parties, unless extended by the Court. Article 292 BiH CPC.

<sup>26</sup> The Verdict states, "REMEDY: This Verdict may be appealed with the Appellate Division of this Court within fifteen days (15) after the day of its receipt. Given that the Verdict was rendered based on the Agreement to enter a Plea of Guilty, the appeal from the criminal sanction shall not be allowed."

Parties negotiating plea agreements in future cases may wish to consider the Court's reaction to these waivers and exercise care in ensuring that agreements safeguard the rights according to law. Relevant authorities may wish to discuss whether exceptions in cases of plea agreements are appropriate with regard to the waiver of appeals prior to the receipt of a written verdict and loss of presumption of innocence after admitting guilt.

## ii) Timeliness of plea agreements

Guilty pleas are most effective when they are reached as early in the proceedings as possible. Done early, they can save material resources and prevent putting witnesses and victims through the stress of testifying and unduly raise expectations. In exchange, they generally procure a reduction in the sentence that an accused would have otherwise received.<sup>27</sup> The later in the proceedings an accused pleads guilty, the fewer the benefits to the system and the public and the less credit the accused will receive.<sup>28</sup>

In this case, the Convict was transferred to BiH on 22 September 2006. The main trial in his case began on 11 May 2007. The *Ljubičić* Agreement was concluded on 29 April 2008, approximately one year after the commencement of the main trial and a year and a half after he was first transferred to BiH. By that time, the Prosecution's case was near its end, having heard the vast majority of its witnesses, and the Defence had begun its presentation of evidence. Moreover, the Convict had spent over one and a half years in custody in BiH and over six years in total, including his time at the ICTY.

Although most plea agreements in BiH are concluded at an early stage in the criminal proceedings, it is not known exactly why this plea agreement was reached so late in the proceedings or whether it could have been reached earlier.<sup>29</sup>

It may be generally recommended, however, that prosecutors and defence counsel consistently evaluate the strength of their cases throughout the criminal proceedings, including dropping any unpersuasive charges, with a view of concluding potential plea agreements as early as possible in the criminal proceedings.

## III. Decisions on paying the costs of the proceedings

War crimes prosecutions are expensive procedures and convicted persons are obliged to pay the costs of the proceedings, unless relieved of such duty by the Court because of the convicted person's difficult economic situation.<sup>30</sup> Although the obligation on the Court to conduct investigations into the financial status of accused persons is clear, those investigations appear to be rare and infrequent.<sup>31</sup> Moreover, court

<sup>27</sup> See *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Judgment (31 July 2001), paras. 80-81.

<sup>28</sup> An accused pleading late in the proceedings may still receive some credit because of the benefits derived from the accused's remorse, a willingness to cooperate, and from the contribution of the guilt admission to the historical record. See *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Judgment (13 Nov. 2001), paras. 149-150.

<sup>29</sup> What may be of interest to recall in this Rule 11bis case is fact that the Law on Transfer, in an attempt counter possible bias on the part of national actors, required the ICTY indictment to be "adapted" to domestic law, rather than allowing the prosecutor and the court to review the evidence supporting the indictment in accordance with domestic provisions. In its early reports, the OSCE pointed to a number of problems this novel "adaptation" procedure caused. These included the potential that merely "adapting" the indictment, rather than "confirming" it, appeared to take away from the domestic authorities the power to drop charges for which evidence was no longer available, although it may have existed at the time the indictment was confirmed at the ICTY.

<sup>30</sup> Article 188 BiH CPC.

<sup>31</sup> See *International Judges Must Stay in Bosnia*, Interview with Balkan Investigative Reporting Network, 24 April 2008, available at <<http://www.bim.ba>>. This piece reports the President of the State Court, Ms. Meddžida Kreso as stating: "By law, the financial status of all indictees should be checked. But trial chambers are not making detailed

decisions on matters of indigence and payment of proceedings costs are mostly vague and stereotypical. Consequently, there is public scepticism that the State, and consequently the taxpayer, unduly assumes expenses for criminal proceedings or for *ex officio* defence.<sup>32</sup>

In the *Ljubičić* Case, the Court in its Verdict relieved the Defendant of the duty to reimburse the costs of the criminal proceedings, because it found that the Convict had spent six years and six months in custody, during which he was not employed and could not earn any income on a regular basis. No further investigation or assessment of the Ljubičić's financial situation has been evident from the Verdict or the case file. It can be noted, however, that the ICTY Office for Legal Aid and Detention Matters ("ICTY OLAD") had determined that the Convict, while at the Hague, although not personally employed, was by virtue of his property holdings and the financial situation of those with whom he habitually resided, obliged to contribute \$29,221 USD for his defence covering his time at the Hague.<sup>33</sup> The State Court does not make in its Verdict reference to this point or consider how these circumstances may have changed overtime.

According to information received from the ICTY OLAD, it has never received a request from any BiH authorities for information or guidance regarding any accused in BiH. That includes the defendants transferred to BiH pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence, even though the ICTY OLAD has conducted investigations into the financial situation of all transferred defendants, including of Ljubičić, since they were first under ICTY jurisdiction.

In light of the above, it can be recommended that courts pay due regard to their obligation to investigate the financial status of accused persons and ensure that their decisions on the matter are well-reasoned. It may be reiterated that the OSCE *Fifth Trbić Report* welcomed the fact that the Trial Panel in the *Trbić* Case made inquiries with BiH authorities into that accused's financial assets.<sup>34</sup>

Considering the experience of the ICTY OLAD, it would be useful for BiH authorities to engage its best practices and know-how. It may well be that an independent mechanism should be established in BiH to carry out financial investigations in a coordinated manner.

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checks. I have discussed this with judges, as I have noticed we pay very high trial expenses from our budget. I think the trial chamber chairmen are wrong not to check the financial status of all indictees. I have also noticed that persons misuse the right to various specialist medical examinations. I think all these *ex-officio* costs must be reconsidered."

<sup>32</sup> See *id.*

<sup>33</sup> *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Revised Decision of the Registrar (28 February 2005). In general, the ICTY OLAD has assessed 27.48 percent of accused persons (36 of 131) as partially indigent and obliged to contribute partially to the costs of their defence. One accused was also found non indigent and required to pay all costs. 58.78 percent of accused persons (77 of 131) were found to be fully indigent and incapable of providing financial contributions to their defence, while 11 accused persons did not request legal aid and 6 assessments were pending at the time of this Report. In contrast, as of 25 December 2007, only two convicted war criminals before the State Court were required to pay any costs of the proceedings. These were Abduladhim Maktouf and Gojko Janković. Erna Mackic, *Analysis: Counting the Cost of Justice*, Balkan Investigative Reporting Network, 25 December 2007, available at <http://www.bim.ba>. It is important to note that all figures must however be considered in light of the discrepancy between costs before the ICTY and BiH courts.

<sup>34</sup> See Trial Panel in the *Case against Trbić*, Letter to the FBiH Administration for geodesy and property legal affairs Zenica requesting information on the Accused's assets, dated 17 September 2008.