

# The Disappearing Trial: The global spread of incentives to encourage suspects to waive their right to a trial and plead guilty

New Journal of European Criminal Law

2017, Vol. 8(3) 309–322

© The Author(s) 2017

Reprints and permissions:

[sagepub.co.uk/journalsPermissions.nav](http://sagepub.co.uk/journalsPermissions.nav)

DOI: 10.1177/2032284417722281

[njecl.sagepub.com](http://njecl.sagepub.com)



**Jago Russell**

Fair Trials, UK

**Nancy Hollander**

Associate Tenant, Doughty Street Chambers, UK

## Abstract

A common view exists, reflected both in law and in the public consciousness, that the trial is the key safeguard guaranteeing the fairness of criminal convictions. In reality, many convictions are imposed without a trial because suspects often waive their right to trial by pleading guilty. Legal systems incentivise defendants to do this (by, for example, offering lower sentences or charges in different ways). This practice (most often associated with US plea bargaining) has spread across the globe over the past 25 years. It is easy to see the benefits of trial waivers, which include helping to tackle impunity and to reduce long case processing times and related over-reliance on pretrial detention. However, this shift away from the full guarantees of a trial can also pose serious challenges to the protection of rights, due process and the rule of law. The domestic and international normative frameworks on fairness in criminal justice have failed to keep pace with the growth in the use of trial waivers.

## Keywords

Plea bargain, joint waiver, fair trial, due process, procedural rights

---

## Corresponding author:

Jago Russell, Fair Trials, UK.

Email: [jago.russell@fairtrials.net](mailto:jago.russell@fairtrials.net)

## Introduction

All too familiar with the challenges arising from plea bargaining in the United States, we were concerned to hear increased reports of the use of trial waiver systems in jurisdictions across the globe. In 2016, Fair Trials embarked on a project to map the global use of trial waiver systems with pro-bono support from the global law firm Freshfields Bruckhaus Deringer. The research examined the adoption and use of trial waiver systems in jurisdictions worldwide, analysed the various forms such systems take, identified safeguards different jurisdictions are employing to protect due process rights and highlighted examples of good and bad practices. Some of the key findings and conclusions are discussed here. A detailed report 'The Disappearing Trial: the global spread of incentives to encourage suspects to waive their right to a trial and plead guilty' was published in April 2017.<sup>1</sup>

### *What is a trial waiver system?*

The classic version of this is the US plea bargaining system where guilty pleas account for 97% of convictions at the federal level.<sup>2</sup> Guilty pleas are also used extensively throughout the states. Because the United States is a big and diverse country, plea bargaining takes a variety of forms. It can be used in any type of criminal case, from petty crimes through death penalty cases.<sup>3</sup> The negotiations are often informal, between prosecutors and defense counsel, without any involvement by the court. Criminal defense lawyers must be skilled negotiators more frequently than skilled trial lawyers.

Speak to lawyers in most countries about 'plea bargaining' and they'll tell you they don't have this US practice. However, use a more neutral term such as 'trial waivers' and the findings are fascinating. Fair Trials defined 'trial waivers' as 'a process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentence'.

### *Methodology*

The first phase of Fair Trials' research involved asking lawyers from 100 countries to respond to a survey requesting high-level information on the law and practice of trial waiver systems in their respective jurisdictions: lawyers from 90 jurisdictions across six continents responded to questions regarding the existence, introduction, prevalence and practical application of trial waiver systems.<sup>4</sup> The second phase of the project involved an in-depth review of the trial waiver systems in eight

---

1. Available at [www.fairtrials.org](http://www.fairtrials.org) (accessed 19 July 2017).

2. United States Sentencing Commission's 2016 Sourcebook of Federal Sentencing Statistics. Available at: <http://www.ussc.gov/research/sourcebook-2016> (accessed 17 July 2017).

3. *Brady v. United States*, 397 US 742 (1970) established that deep sentencing discounts, including departure from the threat of the death penalty, did not invalidate or render involuntary a plea bargain.

4. Albania, Angola, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Canada, the Cayman Islands, Chile, China, Colombia, Congo DR, Costa Rica, Croatia, the Czech Republic, Denmark, Egypt, England and Wales, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Jersey, Kazakhstan, Kenya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, the Philippines, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Scotland, Senegal, Serbia, Singapore,

jurisdictions (Georgia, Germany, Mexico, New Zealand, Russia, Serbia, Singapore and South Africa) via detailed surveys sent to experts in the field in each country.

## Findings

### *Proliferation of trial waiver systems*

Formal recognition, legalization and regulation of trial waivers have increased dramatically in the last 25 years. The number of trial waiver systems worldwide has increased nearly 300% since 1990. According to our research from 90 jurisdictions, 19 had a trial waiver system prior to 1990. By the end of 2015, trial waiver systems existed in 66 jurisdictions. This number is continually increasing; according to the survey responses, trial waiver systems are currently under consideration in 5 more of the 90 countries.

Countries are also extending the application of trial waiver systems to broader categories of offence and introducing wider ranges of incentives for people to plead. The frequency of use of these systems has also grown markedly in many countries. Despite poor data collection practices, there are striking examples of how trial waivers can quickly come to dominate criminal proceedings at the expense of traditional trials. In Georgia, 12.7% of cases were resolved via trial waivers in 2005, which ballooned to 87.8% of cases in 2012. Similarly in Russia, use of trial waivers shot up from 37% in 2008 to 64% in 2014. However, once introduced or formalized, trial waivers do not always come to dominate criminal procedure. For example, Italy has utilized trial waivers ('*patteggiamento*') since 1989, although only about 4% of criminal cases are resolved through this system.

It is worth noting, however, that not all of the jurisdictions surveyed have trial waiver systems. In 24 of the 90 jurisdictions surveyed, no practice falling within the definition was identified. In Portugal, after trial waivers (known as '*negotiated sentence agreements*') had been tolerated for some time, in 2013, the Supreme Court overtly prohibited these as unconstitutional.<sup>5</sup>

### *Types of trial waiver system*

This definition of trial waivers covers a range of practices, which take place within different legal frameworks.

The first distinction is between formal and informal systems. Fair Trials' research reflected primarily formal trial waiver systems recognized by statute or in case law but informal negotiation, particularly around facts and charges, also takes place in many countries.

Formal trial waiver systems may include:

- *Sentence incentives*: The nature or length of a sentence may be reduced in exchange for a concession by the defendant.
- *Fact incentives*: The facts of the case may be presented in a manner that is beneficial to the defendant in exchange for a concession.

---

South Africa, South Korea, Spain, Sweden, Switzerland, Tanzania, Thailand, Turkey, the United Arab Emirates, Ukraine, the United States, Vietnam, Zambia and Zimbabwe.

5. Crown Court: *Decisão Soanes*, 1948; *Caso Coward*, 1979. Tribunal De Recurso No Caso *Hollintong And Emmens*, De 1986. Tribunal Constitucional Alemão: - Nstz 87, 419.

- *Charge incentives*: Charges against the defendant may be reduced or terminated in exchange for a concession by the defendant.
- *Cooperation agreement/crown witness system*: The defendant agrees to assist with the investigation or prosecution of offences involving other defendants in exchange for some benefit from the state.

Approximately 68% of jurisdictions with trial waiver systems permit sentence incentives, 44% permit charge incentives and 12% permit fact incentives. In addition, around half of jurisdictions provide for crown witness systems or cooperation agreements. These are not always cleanly defined and separable categories: in practice, it is difficult to have, for example, charge incentives without some level of fact negotiation, or sentencing incentives that do not involve some ability to drop or amend charges. Many countries also have more than one type of system. Three jurisdictions allow for all four types – the United States, England and Wales and Australia – and give prosecutors a largely unfettered ability to negotiate directly with defendants. At the other end of the spectrum, 20 of the surveyed jurisdictions allow trial waivers as ‘part of the full criminal trial’. Within each category, substantial variation can also exist: for example, there are major differences in the sentencing incentives for people who waive their trial rights.

In the United States, plea bargaining is generally for the purpose of limiting or reducing exposure to jail. That is the bottom line for most defendants. This is accomplished by reducing the charges in some cases, agreeing to testify against another defendant in some cases, limiting the facts that will be used against the defendant in some cases. The variations are practically unlimited.

Some commentators have drawn a strong distinction between sentence or charge incentives as practised in many common law jurisdictions, and the abbreviated trials more often associated with European systems (with Germany as the most frequently cited example). In the abbreviated trial model, which featured in 17 of the studied jurisdictions (though it was not the exclusive form of trial waiver system in each one), the waiver of rights generally involves less negotiation between parties, more regulated sentencing discounts and greater judicial oversight.

### *Reasons for introduction of trial waiver systems*

Fair Trials examined why trial waiver systems were introduced.<sup>6</sup> This most often related to efficiency.

*Efficiency.* Many countries have justified using trial waiver systems as a means to clear long-standing case backlogs, which often create intolerable delays. This is a serious concern for countries which regularly violate defendants’ right to a speedy trial. Finland, for example, adopted a trial waiver system in 2015<sup>7</sup> in response to concerns about the number of European Court of Human Rights (‘ECtHR’) cases in which Finland was found to have violated the right to a trial within a reasonable period of time. The Council of Europe has itself recommended using simplified judicial proceedings including trial waivers (which it refers to as ‘guilty pleas’) and other

6. The phase 1 survey asked why trial waiver systems were introduced. In phase 2 of the research, the surveys further solicited the opinions of experts as to the systemic benefits of trial waivers in practice and sought input on the perceptions of court actors of the justifications for the use of trial waivers.

7. This includes a process incorporating pretrial guilty pleas (known as ‘tunnustamismenettely’) and a post-investigation plea bargaining procedure (known as ‘syyteneuvottelu’).

forms of abbreviated proceedings, along with increased prosecutorial discretion to dismiss charges.<sup>8</sup> The survey from Macedonia specifically cited the influence of the Council of Europe's recommendation as part of the government's adoption of a trial waiver system.

Twenty-three jurisdictions identified savings in public spending as the driving factor behind the introduction of trial waiver systems. Little data are collected to establish what savings, if any, have been made, nor is it clear what the parameters of a cost/benefit analysis of the efficiency of trial waiver systems would look like. Adopting trial waiver systems can impose further costs on the criminal justice system, due to increased capacity to prosecute high volumes of cases and unforeseen changes to sentencing. For example, a resource assessment in England and Wales concluded that a change in policy designed to encourage earlier guilty pleas could result in an additional cost of £20 to £50 million because of a potential increase in the number of prison beds required.<sup>9</sup>

*Facilitating increased prosecutions/tackling impunity.* Another reason for adopting trial waiver systems is to improve conviction rates. One prosecutor in South Africa specifically stated trial waivers (known as 'plea and sentence agreements') were useful in boosting performance rates 'in courts where judges tend to acquit'. This justification is sometimes framed as the need to use trial waivers to combat impunity. Obviously, this raises serious due process issues for defendants.

Many respondents believed trial waiver systems allow straightforward cases to be resolved quickly, freeing up time for contested cases. Some trial waiver systems, particularly those which take the form of abbreviated trials or other summary proceedings, are designed primarily for minor crimes. This is evidenced in many countries where trial waivers are limited to offences carrying certain maximum sentences. Using trial waivers to deal specifically with minor crimes is usually related to efficiency goals. However, it is not always clear these goals are being achieved depending on the indicator of efficiency used because an increase in the ease of processing minor cases allows for a greater number of such prosecutions.

At the other end of the spectrum, trial waiver systems are introduced to aid the effective detection and prosecution of complex crimes. Trial waivers, usually in the form of cooperation agreements or crown witness systems, are often used in cases where informants are necessary to build a case against other defendants. The kinds of investigations usually cited were financial crime, environmental crime, corruption and drug trafficking. In the United States, for example, the first defendant in a drug or financial case to become an informant gets the best 'deal' in return for testifying against the other defendants.

*Broader reform to criminal procedure codes.* Trial waiver systems are often introduced as part of a package of reforms to overhaul an entire criminal procedural code, in post-conflict countries, in transitions to democracy, and as part of movements from inquisitorial to adversarial systems. This is the case, for example, for many countries in Latin America, the Western Balkans and South Africa.<sup>10</sup> Several EU jurisdictions have recently adopted trial waiver systems as part of a move to include more adversarial practices. Italy crafted its system of 'patteggiamento' as part of a 1989

---

8. Recommendation no. R (87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice, adopted on Sept. 17 1987, Council of Europe: Committee of Ministers, at part III, at paras 7–9.

9. 'Consultation Stage Resource Assessment: Reduction in Sentence for a Guilty Plea', the Sentencing Council, at paras 4.1–4.9.

10. Ibid.

Criminal Procedure Code, which adopted certain adversarial elements in pursuit of efficiency and due process.<sup>11</sup> Romania included a trial waiver system in its 2014 Criminal Procedure Code. In these situations, the introduction of trial waiver systems is part of a larger ideological and political project towards changes to procedure or legislation. These reforms are generally associated with a more democratic, transparent and inclusive legal system with better access to justice for victims and defendants.

*Victims' interests.* Many jurisdictions justify trial waiver systems as a way to spare victims the trauma of testifying or enduring lengthy proceedings with uncertain conclusions. England and Wales have recently introduced changes to its trial waiver system to incentivise defendants to plead guilty upon first appearance in court in part so:

victims and witnesses can be reassured that the offender has accepted responsibility for the offence and that they will not have to worry about having to go to court. In addition, victims will also benefit from seeing a more consistent approach to determining sentence reductions.<sup>12</sup>

The Cayman Islands, Croatia, New Zealand, Norway and South Africa similarly cited the desire to avoid victims being re-traumatized by trials as a motivating factor for introducing trial waiver systems. Some victims, however, object to the reduction in sentence and to the perceived loss of the public, truth-seeking function of criminal trials.<sup>13</sup> This also presents serious due process issues for defendants who would benefit from a trial that puts an alleged victim to the test.

### *Human rights and rule of law concerns – and possible safeguards*

Trial waiver systems provide many possible benefits, including the potential to make a positive impact on human rights protection in criminal proceedings.<sup>14</sup> As a consideration of practice in the United States demonstrates, however, reliance on trial waivers is not without risks.

*Lessons from the United States.* In the United States, when a defendant agrees to plea bargaining, it means giving up many of the rights guaranteed under US law, including the right to remain silent, to protection against self-incrimination, to a trial, to put the government to its burden of proof, to contest evidence and adduce additional evidence and to appeal on many grounds. The test as to whether such a waiver is effectively made is whether it is 'voluntary' and 'intelligent'.<sup>15</sup> The defendant should have a lawyer to assist in this process. However, in some minor crimes, the defendant may have to negotiate and enter pleas without legal representation.<sup>16</sup> Also, although the

11. Langer, *supra* note, p. 60.

12. 'Reduction in Sentence for a Guilty Plea Guideline: Consultation', the Sentencing Council (11 February 2016), p. 7.

13. 'Reduction in Sentence for a Guilty Plea Guideline', *supra* note. 12 at p. 9.

14. Crowded court dockets create bottlenecks in case processing leading to excessive periods of pretrial detention, a serious and widespread human rights abuse.

15. *Brady v. United States*, 397 US 742 (1970).

16. 'Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts', National Association of Criminal Defense Lawyers (April 2009), pp. 14–18. Available at: <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>, accessed on July 17, 2017. This report found that more than 28% of jail inmates charged with misdemeanors reported having no lawyer. 'In North Dakota, the observer noted that counsel was not appointed or present at arraignment for misdemeanor cases, despite the fact that most defendants

right to counsel exists, prosecutors may offer plea deals before a defendant has a lawyer. Even where a defendant has a lawyer, the plea deal may be open only for a limited time before the defendant even gets the discovery in the case. Unfortunately, defendants sometimes accept quick plea deals, particularly in minor cases, to obtain release from pretrial detention.<sup>17</sup> Even in serious cases, a defendant may bargain, even if innocent, out of fear of a conviction. For example, 65 of the 149 exonerations in 2015 followed guilty pleas (44%).<sup>18</sup>

*A global perspective.* These concerns do not apply in the same way across all state and federal courts in the United States. Neither are they unique to the United States: similar concerns were identified through Fair Trials' research in many countries. One of the key conclusions, however, was that countries implement trial waiver systems in different ways, which can feature important safeguards against the kind of abuses and unintended consequences of plea bargaining in the United States.

*Mandatory access to a lawyer.* While there is nearly universal recognition of the right of access to a lawyer in criminal proceedings, there are few, if any jurisdictions in which this right is fully realized. Even in jurisdictions considered to have robust legal aid systems, indications exist that defendants agree to waive their right to a trial without having had access to a lawyer due to practical problems in appointing lawyers (particularly in cases where the defence is publicly funded) at early stages in the proceedings, or because defendants waive their right to a lawyer.

---

pled guilty at that hearing and many were sentenced to jail time'. While some were never informed of their right to a lawyer, others waived their right (knowingly or unwittingly). In some jurisdictions, defendants felt pressured to move forward without counsel because none were currently available to handle their case.

17. In the US, release from pretrial detention is typically achieved through the posting of cash bail, which has the effect of making release impossible for many poor defendants. See S. Bibas et al., 'Improving Fairness and Addressing Racial Disparities in the Delaware Criminal Justice System', Quattrone Center for the Fair Administration of Justice (September 2015), which states, 'Detained people regularly face the choice of fighting their case from jail or accepting a guilty plea and release, with a sentence of probation or time served. With jobs, homes and children on the line, most people will choose the latter, regardless of the strength or propriety of the case against them'. See also 'Bail Fail: Why the US Should End the Practice of Using Money for Bail', Justice Policy Institute (September 2012). Available at: [http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail\\_executive\\_summary.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail_executive_summary.pdf). accessed on July 17, 2017. Rakoff, 'Why Innocent People Plead Guilty', *supra* at n. 3. See also G. Kellough and S. Wortley, 'Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions', *British Journal Criminol* 42(1) (2002), pp. 186–210. P. Heaton, S. Mayson and Stevenson, M., 'The Downstream Consequences of Misdemeanor Pre-trial Detention', *Stanford Law Review* 69 (2017). Available at: [https://www.law.upenn.edu/live/files/5693-harriscounty\\_bail](https://www.law.upenn.edu/live/files/5693-harriscounty_bail). M. Stevenson, 'Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,' University of Pennsylvania Law School (Working Paper) (2016). Available at: [https://www.law.upenn.edu/cf/faculty/research/details.cfm?research\\_id=14047#](https://www.law.upenn.edu/cf/faculty/research/details.cfm?research_id=14047#), finding that defendants unable to pay bail were 30% more likely to plead guilty. G. Johnson, 'Cash Bail System can be Unjust, Penn Law Study Finds', *PennCurrent* (20 October 2016). Available at: <https://penncurrent.upenn.edu/research/cash-bail-system-can-be-unjust-penn-law-study-finds>, describing research (publication forthcoming) finding that that misdemeanor defendants in Harris County (Texas) who were unable to make bail were 25% more likely to plead guilty than those released on similar charges.
18. The National Registry of Exonerations: Exonerations in 2015. Available at: [https://www.law.umich.edu/SPECIAL/EXONERATION/DOCUMENTS/EXONERATIONS\\_IN\\_2015.PDF](https://www.law.umich.edu/SPECIAL/EXONERATION/DOCUMENTS/EXONERATIONS_IN_2015.PDF). The term used in the National Registry of Exonerations is 'guilty plea', so it is not possible to know whether these involved plea bargaining as such. As the Registry Report for 2015 explains, a large percentage of these exonerations are in relation to drug possession, due to a committed Conviction Integrity Unit in Harris County, Texas, which was single-handedly responsible for 73 drug crime exonerations in 2014 and 2015, for convictions in which defendants pleaded guilty on the basis of unreliable roadside drug tests, accessed on July 17, 2017.

The concerning phenomenon of unrepresented defendants entering trial waivers tends to arise more often in the context of minor offences, despite the long-term impact of convictions for minor offences. To address these concerns, some jurisdictions insist on the participation of a defence lawyer for a trial waiver to be valid.<sup>19</sup>

*Enhanced disclosure.* The risks of wrongful convictions and poor investigations are addressed in some jurisdictions by the requirement for prosecutors to provide more extensive disclosure of evidence before the trial waiver that may have ordinarily occurred at the pretrial stage. Luxembourg, for example, has a specific provision permitting a defendant who has indicated interest in a trial waiver ('jugement sur accord') to be granted access to the full criminal file held by prosecuting authorities. In Germany and Spain, survey respondents indicated that defendants receive a copy of all evidence intended to be used at trial before they decide to waive their right to a full trial.

*Timing of waivers.* Whether defendants have sufficient access to information, evidence and legal advice depends in part on timing. Many jurisdictions, including England and Wales, provide greater benefits for trial waivers exercised earlier in the proceedings. The thinking behind this policy is clear: the earlier the agreement, the greater the potential resource savings. By contrast, in Germany's system, the trial waiver is not entered until the (abbreviated) trial begins. Problems can also arise due to the time defendants are given to decide whether to waive their right to a full trial. In Spain, for example, lawyers reported that prosecutors often offered a reduced sentence in exchange for an accelerated procedure just moments before trial, leaving the defendant little time to consider it.<sup>20</sup>

*Judicial involvement.* At the heart of the concept of a fair criminal justice decision is the involvement of an 'independent and impartial tribunal'. The role of the independent judge in a trial waiver context is, however, different to his/her role in a full trial. There are a variety of ways of retaining a role for the independent judge in trial waivers.

- Many jurisdictions prohibit the judge from independently scrutinising the evidence supporting the conviction. Others require judicial authorities to satisfy themselves that the conviction is supported by evidence beyond the defendant's admission of guilt. Judicial scrutiny of evidence tends to be more comprehensive in systems utilizing abbreviated trials.<sup>21</sup> In these systems, guilty pleas or confessions may constitute one piece of evidence that may be considered by the judge. How meaningful this scrutiny is differs substantially between and within jurisdictions.<sup>22</sup>

19. These include Argentina, Australia, Brazil, Croatia, Estonia, France, Georgia, Ireland, Luxembourg, Macedonia, South Africa, Switzerland and Zambia.

20. In response, the Madrid Bar has circulated among its lawyers a sample request for additional time for consideration of trial waiver offers.

21. Such as Finland, Germany, Romania and Russia.

22. In Serbia, one respondent complained that evidence admitted in relation to trial waivers (known as 'plea agreements') was not subject to the same standards as it would be to establish guilt in trial; the court may hear the statements of co-defendants without allowing cross-examination. In Romania, the trial waiver system (known as the 'abbreviated trial') is described in the survey as a largely formalistic process of validating the conviction rather than an independent evaluation of the sufficiency of the evidence. Conversely, in Germany, judges in cases involving trial waivers (known as 'Absprachen') may take a more active role in examining evidence to verify the confession of the defendant.

- In many systems, judges take a limited role in negotiations about the ‘deal’ or are prohibited from becoming involved. In some civil law systems, however, notably in Germany, trial waiver systems are formed through negotiations involving all parties – defendants, prosecutors and judges. Even in adversarial systems where it is typical for judges to play no part in negotiations between the parties, examples of judicial involvement can be found. In Hong Kong and New Zealand, where sentencing is at the discretion of the judge, the parties can seek an indication from the judge prior to a trial waiver.
- It is common for systems to require some level of judicial scrutiny over the procedure, most often through a mechanism by which judges assure themselves a trial waiver is given voluntarily. This can be achieved through US-style allocution, in which the judge may directly question the defendant. In many jurisdictions, the judge has a duty, either explicit or established through constitutional or other constraints, to be satisfied the trial waiver is being entered into voluntarily, but no specific mechanism for ensuring this is provided for in practice.

In the United States, most judges read a prepared statement that has the purpose of ensuring the plea is entered voluntarily and intelligently. It usually includes asking the defendant if he/she is on any medication, has read the charges, is satisfied with the lawyer’s advice and understands the potential sentence. It also includes explaining all the trial and appellate rights the defendant is giving up by entering the plea. The judge might ask the defendant, ‘what did you do that makes you think you are guilty?’ Or the judge might ask the prosecutor for a factual basis for the plea. Finally, the judge will ask defence counsel if he/she is confident that the defendant understands the plea.

*Appeal rights.* An additional opportunity for scrutiny of trial waivers lies in the possibility of appealing against convictions following trial waivers on procedural grounds. In some jurisdictions, the ability to do so is somewhat or entirely limited. However, many jurisdictions allow for complaints of some nature after a trial waiver. Waivers of appeal rights are considered unlawful in Germany and can be overcome on appeal.

*Enhanced recording/data collection.* A record of the terms of the negotiation leading to a trial waiver (where such negotiations occur) or details of resulting benefits conferred on the defendant are not always produced. Without such a record, appeals become practically difficult. A few countries employ enhanced recording to ensure the integrity of trial waiver systems. In Finland, for example, trial waivers take place in open court, and the subsequent judgment states what the sentence would have been in a full trial rather than a trial waiver.

*Limitations on benefits.* It may seem counter-intuitive to frame limitations on benefits provided in exchange for trial waivers as a safeguard for defendants, since such limitations restrict what they could gain from a trial waiver. However, conversations with US experts consistently highlight the coercive effect of the large sentencing differential between the potential sentences faced after conviction at trial as opposed to plea deals. The coercive effect of this trial penalty has been well-documented.<sup>23</sup>

---

23. See, e.g., J. Fellner, ‘An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty’, Human Rights Watch (5 December 2013). Available at: <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>, accessed on July 17, 2017

For example, a defendant in federal court can escape a long, mandatory sentence by pleading guilty and cooperating with the prosecution<sup>24</sup> or through a ‘safety valve’ if the defendant is a first-time offender and meets certain other requirements.<sup>25</sup>

Many jurisdictions control the extent of sentencing discounts either by statute or in practice. The Federal Constitutional Court of Germany has recognized a significant sentence differential between trial waiver and trial can act as an ‘illegal influence’ on the defendant’s free will.<sup>26</sup> Sentence discounts can be limited in a range of ways including in statute<sup>27</sup> and by empowering judges to determine final sentences.<sup>28</sup>

*Limitations on types of cases.* Many jurisdictions limit the types of cases for which trial waiver systems can be used. In Hungary and other jurisdictions, trial waivers are not available to juvenile defendants. Many jurisdictions limit the use of trial waivers to minor cases, though the definition of ‘minor case’ varies substantially.<sup>29</sup> Some systems require extra levels of review for the use of trial waivers in relation to certain crimes. In Croatia cases involving offences against life, body or sexual freedom for which a sentence of at least 5 years is envisaged, the state attorney is required to consult the victim regarding the content of the trial waiver prior to entering into a trial waiver with the accused.

### *International and regional standards*

Although many countries have developed their own safeguards, international and regional human rights law provides shockingly limited guidance on the minimum standards that must be met. This is concerning given that trial waivers account for most convictions in many countries. It is, however, understandable given that the international human rights framework predated the explosion of reliance on trial waiver systems. It was created at a time when trials were the norm and not the exception.

Despite this, a number of key principles, applicable to trial waiver systems, can be identified from international human rights standards. The few cases in which human rights bodies have considered trial waivers are discussed below.

### *Applicable standards*

*The importance of a fair process before imposing a conviction.* All major human rights treaties protect the right to a fair trial.<sup>30</sup> This recognizes that people are entitled to a fair legal process

24. Title 18, United States Code § 3553(e).

25. Title 18, United States Code § 3553(f).

26. Albert Alschuler, ‘Plea Bargaining and its History’, *Columbia Law Review* 79(1) (1979). See also K. Altenhain, ‘Absprachen in German Criminal Trials’, in S. C. Thaman, ed., *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial* (Durham, NC: Carolina Academic Press, 2010), pp. 169–170.

27. England and Wales has agreed to a reform to its sentencing guidelines that will establish a standard discount to be applied to all cases according to the time at which a trial waiver (known as a ‘guilty plea’) is offered (with no reference to the type of offence, strength of the evidence or other mitigating factors).

28. While some jurisdictions essentially bind judges to the sentence agreed upon by the parties (Estonia and Georgia), in many others, the parties do not agree on a specific sentence, but it is understood that a discount will be applied by the judge.

29. From a maximum sentence of 5 years in Luxembourg, 7 years in Romania and India and 10 years in Singapore.

before being convicted of a criminal offence, as well as the important role of a fair process on the rule of law. The same principles apply regardless of how the criminal conviction is imposed.

*Protections against self-incrimination.* In the context of specific protections for the presumption of innocence, some treaties explicitly recognize ‘the right not to be compelled to be a witness against himself or to plead guilty’.<sup>31</sup> According to the United Nations Human Rights Committee (UN HRC), the right not to be compelled to testify against oneself or to confess guilt, includes being free from ‘any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt’.<sup>32</sup> What constitutes psychological pressure or duress sufficient to violate this principle has not, however, been established.

*Pretrial due process rights.* Even within the existing legal focus on the trial, it is recognized that fairness requires procedural safeguards to be respected in the post-arrest and pretrial period, such as access to a lawyer and to disclosure.<sup>33</sup> These rights should be respected regardless of whether the criminal proceedings result in a guilty plea or trial. The challenge, however, is how to remedy non-compliance in a trial waiver context. When a case goes to trial, the cure includes exclusion or special treatment of the tainted evidence. Where there is no trial, such violations are likely to go uncured. Indeed, trial waivers are sometimes used to prevent rights violations being exposed. The UN Special Rapporteur on Torture recently indicated that national laws must take account of situations in which ‘evidence or information is obtained in violation of preventive safeguards and the accused takes a plea without trial’.<sup>34</sup>

*The validity of waivers of pretrial rights.* The standards which have developed to determine whether a defendant’s waiver of rights in criminal proceedings is valid also have relevance in the context of trial waiver systems. For example, the ECtHR has held that, in order to be effective, a waiver must be unequivocal and attended by safeguards commensurate to its importance.<sup>35</sup> This means in part that ‘[b]efore an accused can be said to have . . . waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be, . . .’.<sup>36</sup>

When it has examined whether waivers of the right to silence are made willingly and knowingly, for example, the ECtHR has considered factors such as whether a lawyer is present<sup>37</sup> and whether the accused has had sufficient information on his rights presented to him in simple, non-

---

30. For example, Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 6 of the European Convention on Human Rights (ECHR), Article 7 of the African Charter on Human and Peoples’ Rights (ACHPR) and Article 8 of the American Convention on Human Rights (ACHR).

31. Article 8(2)(g) of the ACHR and Article 14(3)(g) of the ICCPR.

32. ‘General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,’ UN Human Rights Committee (HRC), CCPR/C/GC/32 (23 August 2007). Available at: <http://www.refworld.org/docid/478b2b2f2.html>, accessed on July 17, 2017.

33. I.e. *Salduz v. Turkey*, European Court of Human Rights, App. No. 36391/02 (27 November 2008), finding a violation of Article 6.3 ECHR (right to legal assistance) where the defendant was denied access to a lawyer during interrogation in the police station, even where he was later represented by a lawyer at trial.

34. ‘Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’, United Nations General Assembly (UNGA), A/71/298 (August 2016), at para. 100.

35. *Pishchalnikov v. Russia*, App. No. 7025/04 (24 September 2009), at para. 77.

36. *Pishchalnikov v. Russia*, *supra* at n.35.

37. *Pishchalnikov v. Russia*, at para. 78.

legalistic language, with the assistance of interpretation and translation if necessary.<sup>38</sup> It has considered whether the accused had particular vulnerabilities, such as withdrawing from drugs<sup>39</sup> or having low levels of literacy,<sup>40</sup> which may have made it harder for the accused to understand and foresee the consequences of their waiver.

#### *International and regional case law*

*UN HRC – Hicks v. Australia.* The UN HRC indirectly considered a trial waiver challenge in relation to the complaint in *Hicks v. Australia*.<sup>41</sup> In 2001, Hicks was apprehended in Afghanistan and transferred to the Guantanamo Bay detention camp, where he was held uncharged for several years and subjected to torture and ill treatment. Hicks pleaded guilty to providing material support for terrorism in 2007. He was sentenced to 7 years' imprisonment and deported to Australia, where the sentence imposed in Guantanamo was to be enforced. He ultimately served 7 months of his sentence in Australia.<sup>42</sup>

The HRC recognized that Hicks had no choice but to accept the terms of the plea deal, therefore, it was incumbent on Australia to show that it had done everything possible to ensure that the terms of the arrangement did not violate the International Covenant on Civil and Political Rights (ICCPR). In the absence of such evidence, the HRC considered that by depriving Hicks of his liberty for 7 months, Australia violated his rights under Article 9(1) (protecting liberty and the security of the person) of the ICCPR.<sup>43</sup>

The *Hicks* case illustrates how trial waivers can be used to cleanse a history of human rights and fair trial rights violations that would make a successful conviction impossible. Hicks understood what the terms were and knowingly waived his right to a trial, yet his 'choice' was an illusory one. The chances of obtaining a fair trial in Guantanamo were nil; by rejecting the plea deal he would essentially be sentencing himself to an indefinite period of further detention in inhuman and degrading conditions.

*European Court of Human Rights – Natsvlishvili and Togonidze v. Georgia.* The ECtHR has only considered the lawfulness of trial waivers and their compatibility with the right to a fair trial in one case – *Natsvlishvili and Togonidze v. Georgia*.<sup>44</sup> Mr Natsvlishvili, the managing director of one of the largest public companies in Georgia, was arrested on suspicion of illegally reducing the share capital of the factory for which he was responsible and charged with making fictitious sales, transfers and write-offs, and spending proceeds without regard for the company's interests. Several

38. *Hermi v. Italy*, App. No. 18114/02 (18 October 2006), at para. 41.

39. *Plonka v. Poland*, App. No. 20310/02 (31 March 2009), at para. 38.

40. *Kaciu and Kotorri v. Albania*, App. No's. 33192/07 and 33194/07 (9 December 2013), at para. 120.

41. See 'Communication No. 2005/2010: Views adopted by the Committee at its 115th session', UN HRC, CCPR/C/115/D/2005/2010 (19 February 2016). Available at: [http://ccprcentre.org/files/decisions/2005\\_2010\\_Hicks\\_v\\_Australia.pdf](http://ccprcentre.org/files/decisions/2005_2010_Hicks_v_Australia.pdf).

42. S. Joseph, 'Australia Found to Have Breached the Human Rights of David Hicks', *The Conversation* (21 February 2016). Available at: <http://theconversation.com/australia-found-to-have-breached-the-human-rights-of-david-hicks-55120>, accessed on July 17, 2017.

43. 'Communication No. 2005/2010', UN HRC, *supra* at n. 5, at para 4.10.

44. App. no. 9043/05 (29 April 2014). Available at: <http://hudoc.echr.coe.int/eng?i=001-142672>. See also 'Plea Bargain in Georgian Misappropriation Case did not Breach the Accused's Right to a Fair Trial', ECtHR Press Release (29 April 2014). Available at: <https://www.fairtrials.org/wp-content/uploads/10B-Natsvlishvili-and-Togonidze-press-release.pdf>, accessed on July 17, 2017.

aspects of the prosecution suggested political motivation. During the first 4 months of his detention, Mr Natsvlishvili was held in the same cell as the man who was charged with kidnapping him some years before, and with another man serving a sentence for murder.

Mr Natsvlishvili eventually accepted a plea agreement that required him to pay nearly €15,000 plus 22.5% of his factory's shares to the state while maintaining his factual innocence. He challenged the conviction as an abuse of process in violation of Article 6(1) of the ECtHR (which protects the right to a fair hearing before an independent court) and Article 2 of Protocol 7 of the ECHR (protecting the right to appeal).

Ultimately, the ECtHR found no violation because Mr Natsvlishvili's decision to enter into the trial waiver was 'undoubtedly a conscious and voluntary decision'.<sup>45</sup> The ECtHR stated that the safeguards necessary to ensure the legality of the trial waiver were: (a) 'the bargain had to be accepted . . . in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner' and (b) 'the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review'.<sup>46</sup>

Although disappointing, for the reasons set out in Judge Gyulumyan's dissenting opinion,<sup>47</sup> the case provides a potential set of safeguards specific to the trial waiver context including: (a) access to a lawyer; (b) understanding of the charges, waivers and the consequences of those waivers; (c) recording of the terms of the negotiation and (d) independent judicial review with additional evidence supporting the conviction.

*International criminal courts and tribunals.* Although outside of the scope of this article, it is important to note that legal standards relevant to trial waiver systems are being developed in international criminal courts and tribunals, with many of these formally codifying a trial waiver system into their founding documents or procedural rules.<sup>48</sup>

## Conclusions

The drama of the public trial remains the archetype of criminal justice. In an increasing number of countries and cases, however, this is no longer the reality. Trials are being replaced by legal regimes that encourage suspects to admit guilt and waive their right to a trial. Those of us who care about justice, need to wake up to this emerging reality.

It is easy to see the appeal of trial waivers for states. Without a suspect who is persuaded to cooperate, complex cases can be hard to prosecute. Contested trials can also be expensive, time-consuming and traumatic. Many countries simply can't afford the rigors of a fair trial. The result

---

45. *Natsvlishvili v. Georgia*, at para. 97.

46. *Natsvlishvili v. Georgia*.

47. *Natsvlishvili v. Georgia*, *supra* 'Partially dissenting opinion of Judge Gyulumyan', at para. 3. Judge Gyulumyan considered it impossible to evaluate the fairness of the negotiations without having access to a full recording, noting evidence of unrecorded informal negotiation. She pointed to '[several] shady factual circumstances of the case' that '[tainted] the presumption of equality between the parties pending the relevant negotiations', including the fact that the funds and company shares were transferred to the State before the trial waiver was negotiated and that Mr Natsvlishvili was detained in deliberately stressful conditions. She highlighted the weak bargaining power of a defendant in Georgia's criminal justice system, which recorded a conviction rate of 99.6%, as well as the weakness of the inculpatory evidence in the case.

48. For an introduction to the topic, see Fair Trials, *The Disappearing Trial*, pp. 66–69.

can be a cycle of impunity or justice systems grinding to a halt, detainees forgotten for months or years in prison waiting for their day in court.

Despite their advantages, however, trial waiver systems are not without risks. These risks need urgently to be addressed. It is not only popular culture that is still dominated by an outdated view of the trial as the guarantee of fairness in criminal justice. So, too, is the law. The post-war human rights framework was defined at a time when formal trial waiver systems were rare and there is little case law to guide states on how to apply the basic principles of fairness in the trial waiver context.

Fair Trials' comparative study merely scratches the surface of the many different approaches to trial waivers, but it makes it abundantly clear that countries developing trial waiver systems should not do so in a bubble. They must address local needs and realities – cut and paste justice reform doesn't work – but countries should also draw on the wealth of international experience to help mitigate risks to the accused.

Whatever you see on TV, criminal justice is about more than the trial. It is not realistic or indeed, desirable, to have a full trial in every case. It is certainly not efficient. We must, though, remain vigilant against sacrificing transparency and justice on the altar of efficiency.

### **Author's note**

Fair Trials is a specialist international human rights organization based in London, Brussels and Washington, DC.

### **Acknowledgements**

The authors thank Rebecca Shaeffer, Caitlin Anderson and Phaedra Papamarkakis.

### **Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.