



# The Disappearing Trial

Towards a rights-based approach  
to trial waiver systems

Fair

Trials



## About Fair Trials

Fair Trials is an international human rights organisation with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Our work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives being ruined by miscarriages of justice, and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused. Fair Trials' work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

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Please get in contact with us if you have questions or information to share, if you disagree with our analysis or want to discuss further.

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## **The Disappearing Trial**

**The trial is the archetype of criminal justice. It has captured the public imagination. Just think of the dominance of courtroom drama in film, TV and literature: the intense personal drama of the trial for the defendant, whose life hangs in the balance. The public drama of the trial: after the shadowlands of police custody, the evidence and the actions of police and prosecutors are exposed to the bright light of scrutiny. The public sees the rule of law in action, witnesses real time the search for truth and justice.**

But the trial is starting to disappear. In many parts of the world, trials are being replaced by legal regimes that encourage suspects to admit guilt and waive their right to a full trial. Of the 90 countries studied by Fair Trials and Freshfields, 66 now have these kinds of formal “trial waiver” systems in place. In 1990, the number was just 19. Once introduced, trial waivers can quickly dominate. In Georgia, for example, 12.7% of cases were resolved through its plea bargaining system in 2005, increasing massively to 87.8% of cases by 2012.

The drama of the contested trial is being overtaken by “deals” struck behind closed doors. The personal drama, of course, is no less intense. As a defendant, you have a single life-changing decision to make. Confronted with the overwhelming power of the state and often in detention, your options probably don’t look particularly appealing: plead guilty and get convicted, albeit with a shorter sentence; or gamble on your chances in court where, if convicted, you’ll be sentenced more harshly.

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. Giving people an incentive to plead guilty and give evidence can crack a case wide open. Contested trials can also be expensive, time-consuming and traumatic. Many countries simply can’t afford the rigours of a fair trial. The result can be a cycle of impunity and lawlessness – the breakdown of the rule of law. More commonly, people continue to get arrested but, with underfunded courts incapable of processing cases, the justice system grinds to a halt. Detainees fester, forgotten for months or years in prison just waiting for their day in court.

Trial waiver systems certainly have advantages but they are not without risks. When it comes to criminal justice reform, the reality is that there are no “silver bullet” solutions.

When “incentives” to plead guilty become too extreme, they can persuade innocent people to admit crimes they did not commit. “I’d never plead guilty to something I didn’t do” – you may think this, but going to trial is a gamble and the stakes can be exceedingly high: defendants may plead guilty to avoid the threat of the death penalty or life without parole. In federal drug cases,

mandatory minimums have contributed to a system in the US where defendants convicted of drug offences received sentences on average 11 years longer by going to trial rather than pleading. To provide more context for this statistic, in the United States, 65 out of the 149 people exonerated of crimes in 2015 had pleaded guilty (44%).

Guilty pleas can also hide gross human rights abuses from scrutiny in open court. In a country where torture in police custody is a daily reality, imagine the combined effect of this with the threat – “plead guilty now or...!” If convictions become too easy to secure, they can also facilitate over-criminalisation and over-incarceration of all or, more commonly, part of the population.

Those of us who care about justice, need to wake up to the new and emerging reality of criminal justice, because trial waivers without safeguards can pose major risks to human rights and the rule of law:

- 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. Many domestic constitutions and the post-war human rights framework were defined at a time when formal trial waiver systems were rare. Courts charged with interpreting and enforcing these standards have failed adequately to address trial waivers.
- A comparative study of this breadth can only ever scratch the surface but it is abundantly clear that countries developing trial waiver systems should not do so in a bubble. They must of course address local needs and realities – cut and paste justice reform doesn’t work – but countries should draw on the wealth of international experience to help mitigate risks.

Whatever you see on TV, criminal justice is about more than trials. 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 because fair and effective criminal justice systems are too important to the secure, safe and prosperous societies we all want to live in.

## Acknowledgements

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## Terminology

1. This report examines practices falling within the following definition: “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 sentences.” In this report, we have referred to practices falling within this definition as “trial waivers” and the mechanisms that permit them as “trial waiver systems”.
2. There are many different names for the very varied practices falling within this definition including “plea bargaining”, “guilty pleas”, “summary procedures” and “abbreviated trials”, among others. What these systems have in common, however, is the agreement by the defendant to waive full trial rights in exchange for a concession by the state. Hence our decision to use “trial waiver systems” as the global term, while using the terminology applied in the domestic context when referring to specific jurisdictions. Nonetheless, we recognise that even the term “trial waiver systems” is imperfect, given that some such mechanisms may formally take place within the context of what is understood locally to be a trial, if abbreviated or simplified.
3. This report does not examine related practices that fall outside the given definition, including penal orders, diversion programmes, restorative justice programmes, and some varieties of drug courts and cooperation systems that do not require admissions of guilt or divert people away from prosecution altogether. For example, in certain jurisdictions charges may be dropped upon payment of a fine, fulfilment of certain conditions, or conclusion of a settlement between the offender and the victim. As these forms of alternatives to trial do not result in a criminal conviction, they are not included in this study. Nonetheless, they are likely to pose some of the same challenges and opportunities that have been identified in relation to trial waiver systems. Furthermore, the report only addresses trial waiver systems as they apply to individuals, not, for example, any such systems that might be in place for corporate entities (non-prosecution agreements, etc.).
4. Other forms of trial waiver systems that did not meet the threshold of the given definition include sentencing regimes that permit judges to mitigate punishment on a discretionary basis in recognition of a guilty plea, confession, or expression of remorse. This type of mitigation is available in the vast majority of jurisdictions surveyed. Where the potential mitigation for plea or cooperation takes a very discretionary form, such that it is not a reliable outcome on which defendants could make rational decisions to plead or cooperate, it did not fall within the definition of a trial waiver system. This was the case, for example, in Thailand, Sweden, Saudi Arabia, Angola, Democratic Republic of Congo, Madagascar, Mongolia and Namibia, none of which are characterised as trial waiver systems for the purposes of this research.
5. These simple mitigation regimes can be distinguished from those forms of trial waivers involving reliable, consistent, systematic and predictable reductions of sentence offered in exchange for a waiver of trial or cooperation. In other systems, including Australia, Canada, England and Wales, and New Zealand, sentence incentives are technically applied on a discretionary basis by the judicial authority, but in practice have become virtually guaranteed and can be anticipated with a degree of accuracy. These systems have therefore been characterised as trial waiver systems featuring sentence incentives.

## 6. Glossary of Key Terms:

- a. **Trial waiver systems:** 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 sentences.
- b. **Trial waivers:** Individual instances of use of the trial waiver procedure in a particular case.
- c. **Sentence incentives:** The type of punishment and/or the length of sentence may be reduced in exchange for a concession by the defendant.
- d. **Fact incentives:** The facts of the case may be presented in a manner that is beneficial to the defendant and/or certain facts may not be introduced into evidence in exchange for a concession by the defendant.
- e. **Charge incentives:** Charges against the defendant may be reduced and/or terminated in exchange for a concession by the defendant.
- f. **Cooperation agreements/crown witness systems:** The defendant agrees to assist with the investigation and/or prosecution of offences (including, but not limited to, by testifying against others), in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences.

# Executive Summary

## Trial Waiver Systems:

There is a common view, reflected both in law and in the public consciousness, that the trial is the key safeguard which guarantees the fairness of criminal convictions. In reality, however, many convictions are imposed without a full trial ever taking place as a result of systems which incentivise suspects to waive their right to a trial. Taking various different forms across the globe, including plea bargaining, abbreviated trials and cooperating witness procedures, this growing practice has considerable implications – both good and bad – for human rights and the rule of law.

It is easy to see the benefits of these trial waiver systems, which include helping to tackle impunity and to reduce long case processing times and related over-reliance on pre-trial detention. However, this shift away from the full guarantees of a trial also poses challenges to rights protection and the rule of law. The domestic and international normative frameworks to regulate this new practice has, however, failed to keep up with the growth in use of trial waivers, with surprisingly little guidance or jurisprudence on this rapidly expanding practice.

## Research:

Fair Trials and its pro bono partner Freshfields have collected information on the existence and operation of trial waiver systems in 90 jurisdictions internationally in order to better understand the scope of the practice and its potential implications for human rights and rule of law protection. Surveys circulated to lawyers sought to collect basic information on whether a trial waiver system exists, and if so: what laws and/or policies govern the system; when the trial waiver system was introduced; the reasons for introduction of the trial waiver system; how commonly the trial waiver system is used; and how the trial waiver system works in practice. More detailed analysis was then carried out in eight jurisdictions.

## Findings:

Of the 90 jurisdictions for which information was collected, trial waiver systems were identified in 66. A variety of types of trial waiver systems were identified, including: (a) sentence incentives; (b) charge incentives; (c) fact incentives; and (d) cooperation agreements/crown witness systems.

## Growth:

The formalisation, adoption and use of trial waiver systems has clearly increased dramatically in the last 25 years. Before 1990, only 19 of the 90 jurisdictions studied here featured trial waiver systems in law. By the end of 2015, the number had grown to 66, reaching all six major continents and changing practice across a variety of different legal systems and traditions. Limited data collection and sharing by governments on the operation of trial waiver systems makes a comprehensive understanding of their use difficult, but it is clear that in some jurisdictions, trial waivers come to largely replace trials (for example, concluding 97% of federal cases in the US), a process which in some jurisdictions has taken place rapidly over the course of just a few years.

## Opportunities:

Trial waiver systems are adopted for a variety of reasons, efficiency being the most prominent. Many jurisdictions have strategically implemented cooperation agreements in efforts to tackle corruption, complex and organised crime. Trial waiver systems are frequently created in the context of broader legal reforms to modernise and reform national criminal justice codes and introduce adversarial elements of criminal procedure. Human rights concerns, including lengthy case processing times, excessive use of pre-trial detention, and impunity for corruption, are prominent motivators for the adoption of trial waiver systems in many jurisdictions.

**Risks:**

At the same time, the diminishing use of trials can threaten human rights protection and the rule of law by sidestepping procedural safeguards and risking coercion, and undermine the rule of law by reducing public scrutiny of police and prosecutorial practices and rights violations. When conducted without sufficient transparency and regulation, trial waivers can reduce public faith in the system, and potentially undermine anti-impunity and anti-corruption efforts. Furthermore, although trial waivers may be adopted with the aim of reducing detention or public spending, their use in some jurisdictions to obtain convictions en masse risks over-incentivising criminalisation and conviction, with unintended and potentially costly effects on incarceration downstream.

**Safeguards:**

The types of trial waiver systems in place are diverse, and many contain features that can safeguard procedural rights. These include: (a) enhanced protection of procedural rights; (b) regulation of benefits offered in exchange for trial waivers, for example by limiting sentencing discounts; (c) limitations on the types of cases or defendants for which trial waivers may be used; and (d) greater judicial oversight over procedural and evidentiary requirements.

**International legal framework:**

Despite the widespread use of trial waiver systems around the world and their potential impact on the procedural rights of the accused, the presumption of innocence and freedom from torture, the international human rights framework has yet adequately to address this phenomenon. The few relevant cases from international and regional tribunals and guidance from human rights bodies that do exist are insufficient to provide a comprehensive framework for human rights protection in trial waiver systems.

**Recommendations:**

Detailed reforms will necessarily be jurisdiction-specific, given the wide variety of practices documented by this report. In general, there are four broad recommendations for jurisdictions to ensure trial waivers operate effectively.

- a. Legal Framework: International and regional human rights bodies must develop a legal framework to effectively govern the use of trial waiver systems.
- b. Human Rights Audit: National authorities should conduct an audit of human rights protections in trial waiver systems, which should ensure that: (a) procedural rights of defendants are fully maintained; (b) undue coercion is not caused by harsh sentencing or pre-trial detention regimes; and (c) sufficient judicial and public oversight of police and prosecutorial activity is maintained.
- c. Data Collection: States must monitor the impact of trial waiver systems through improved data collection, including information on the impact of trial waiver systems on rates of arrest, prosecution, conviction, and incarceration; use of pre-trial detention; sentence length; and impact on vulnerable groups.
- d. International Knowledge Exchange: Examples of good and bad practice, risks and safeguards to human rights protection should be shared by stakeholders across international jurisdictions, and should involve stakeholders from across affected government and civil society sectors.

# Introduction:





## Background

### Learning from the United States' experience

- A. Waivers of rights without sufficient procedural safeguards*
- B. Discrimination: juveniles, people with disabilities, and racial and ethnic minorities*
- C. Innocence and miscarriages of justice*
- D. Lack of oversight of police and prosecutorial conduct*
- E. Over-charging, over-criminalisation and over-incarceration*

## Background

7. There is a common view that the trial is the key safeguard which guarantees the fairness of criminal convictions. In reality, however, many convictions are imposed without a full trial ever taking place as a result of systems which incentivise suspects to waive their right to a trial. Taking various different forms across the globe, including plea bargaining, abbreviated trials and cooperating witness procedures, this growing practice has considerable implications – both good and bad – for human rights and the rule of law.
8. Trial waiver systems – defined for the purpose of this report as creating “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 sentences” – have the potential to enhance human rights protection in criminal proceedings due largely to the removal of the burdens which full trial procedures impose on criminal justice systems. Trial waiver systems can provide a solution to endemic case backlogs that contribute to excessive pre-trial detention, by reducing the time and resources necessary to adjudicate cases. These systems can also be employed, for example, to combat corruption and complex criminal networks, to reduce prison sentences and the over-reliance on incarceration and to improve the protection of the rights of victims.
9. In addition to these benefits, however, human rights and rule of law concerns can also result from the decreasing incidence of full trials as the means of administering criminal justice around the world. Trial waiver systems usually substitute confessions and waivers of procedural rights in place of the procedural and evidentiary rigours of the trial, removing many of the key points at which police and prosecutorial activity is made public and scrutinised. This lowered threshold of scrutiny can exacerbate and reduce accountability for human rights abuses that occur during arrest and the pre-trial period. It can also unsettle the balance of power between actors in the criminal justice system and overly incentivise the use of criminal sanctions to address social problems, with potentially far-ranging impacts on the rule of law.
10. In recent years, Fair Trials’ network members from within the European Union (EU), and partners and colleagues from countries throughout the Western Balkans, Caucasus, and Latin America have reported the introduction of trial waiver systems, often inspired by the US model and sometimes directly supported by US development funds and technical assistance. Lawyers frequently express concern about the impact these new systems have on the rights of defendants, and were not comforted by the example of plea bargaining in the US, which they understood to be the birthplace of modern trial waiver systems but which has been criticised by lawyers and human rights advocates in recent years.
11. By 2015, Fair Trials had begun to identify that trial waiver systems were a growing global phenomenon with the potential for both advancing human rights protection in criminal proceedings, but also threatening the integrity of due process. Despite the growing reliance on these systems in place of full trials, and their clear impact on human rights (for better or for worse), we were concerned by the lack of a legal and human rights framework to regulate their use. Colleagues in and beyond Europe reporting the introduction of trial waiver systems often noted that there seemed to be insufficient consideration by law makers of the potential impact of the widespread avoidance of trials on systemic rule of law concerns, such as the openness of investigations and criminal proceedings, the relative power of prosecutors and judges, and the due process rights of defendants.
12. Fair Trials therefore set out to gather information on the breadth and forms of trial waiver systems, in order to better understand the scope of their use, and their potential impact on human rights protection and the rule of law. In that effort, together with pro bono partner Freshfields, Fair Trials has spent the last two years engaged in an investigation into the global use of trial waiver systems. This report presents the results of that research, analysing the drivers of this phenomenon, assessing the legal and human rights implications and providing recommendations for the development of a rights-based approach to trial waiver systems. We hope that it serves as the basis for both deeper analysis and reform efforts on a jurisdiction-specific level, as well as prompting greater international collaboration and joint efforts toward a greater understanding, leveraging, and regulation of the human rights impacts of trial waiver systems.

## Learning from the United States' experience

13. Across the world, whenever Fair Trials engaged in conversations with practitioners about trial waiver systems, the example of the US was raised. Indeed the US is without a doubt the world leader in the use of plea bargaining (the term commonly accepted in the US), where guilty pleas account for 97% of convictions at the federal level,<sup>1</sup> a percentage which has remained stable for the past two decades,<sup>2</sup> after a period of growth in the 1980s and 1990s.<sup>3</sup> From 1986 to 2006, the ratio of pleas to trials in the US nearly doubled.<sup>4</sup> Given the immense scale of US criminal prosecutions (where about 12 million people are admitted to jail every year), the US unquestionably administers more trial waivers than any other country. As a result of this vast experience, the diversity of practice between states and local jurisdictions within the US, and due to the advanced state of academic criminology as a field of study in the US, the state of debate about the procedure is more developed in the US than in many other countries. For these reasons, Fair Trials began its investigation into trial waiver systems by examining the practice in the US.
14. In general, plea bargaining in the US<sup>5</sup> is remarkably unregulated compared with the trial waiver systems found in other countries. It can be used in any type of criminal case, including those frequently exempted in other systems, such as death penalty cases<sup>6</sup> and prosecutions against juveniles. Negotiation takes place directly between prosecutors and defenders out of court. There are no legal limits (though guidelines for prosecutorial policy and practice vary between jurisdictions within the US) on what can be negotiated between individual prosecutors and defendants: facts and charges may be altered, cooperation agreements may be struck, recommended sentences can be agreed between the parties, and terms and conditions of agreements and negotiations may differ widely between cases.
15. As is typical of the US criminal system, with its adversarial and common law tradition, judges have a passive role in the negotiations and in some jurisdictions are prohibited from involvement in them. While judges may reject plea deals or alter sentences agreed upon by the parties, in practice this rarely happens. The relatively unregulated nature of plea bargaining in the US has led to a critical view of the practice amongst many legal professionals around the world, who often associate it with the overzealous prosecution, rights violations and the mass scale of criminal convictions considered by many to typify the US criminal justice system.<sup>7</sup>
16. The US model is often seen as the ideological inspiration for adoption of trial waiver systems worldwide.<sup>8</sup> The US has also worked actively to support other countries in developing trial waiver systems to pursue a range of rule of law and human rights objectives. This has been done through the provision of development funding and technical support for rule of law projects, often taking the form of US experts (e.g. prosecutors primarily through the Office of Overseas Prosecutorial Development and Training (OPDAT)) travelling to train foreign judges and lawyers in US models of adversarial practice, including trial waiver systems.<sup>9</sup>

1. United States Sentencing Commission's 2016 Sourcebook of Federal Sentencing Statistics. Available at: <http://www.ussc.gov/research/sourcebook-2016>
2. Devers, L., "Plea and Charge Bargaining: Research Summary", U.S. Department of Justice (Jan. 24, 2011). Available at: <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.
3. Rakoff, J. S., "Why Innocent People Plead Guilty", *The New York Review of Books* (Nov. 20, 2014). Available at: <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.
4. Opper, R. Jr., "Sentencing Shift Gives New Leverage to Prosecutors", *The New York Times* (Sept. 25, 2011). Available at: <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>.
5. Please note that due to the fact that the US is a federal system, featuring 50 separate state legal systems, county and municipal practices, as well as a separate federal criminal system, there is substantial variation in law and practice governing plea bargains. The survey commissioned for this research paper covers only the US federal jurisdiction. However, trial waivers have been a feature of the system in all 50 states as well as the federal jurisdiction, and is responsible for well over 90% of all criminal adjudications across all US state and federal jurisdictions. See Opper, "Sentencing Shift Gives New Leverage to Prosecutors", *supra* at n. 4.
6. *Brady v. US*, 397 U.S. 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. Available at: <https://supreme.justia.com/cases/federal/us/397/742/case.html>.
7. See, e.g., Tae-jong, K., "Rights agency opposes US-style plea bargaining", *The Korea Times*, (Apr. 1, 2011). Available at: [http://www.koreatimes.co.kr/www/news/nation/2016/10/117\\_84321.html](http://www.koreatimes.co.kr/www/news/nation/2016/10/117_84321.html). See also Tolaj, K., "The Institutionalization of Plea Bargaining in Kosovo", *JURIST* (Apr. 15, 2012), available at: <http://www.jurist.org/dataline/2012/04/kushtrim-tolaj-kosovo-plea-bargaining.php>, citing a now-unavailable American Bar Association Legal Reform Index for Kosovo in 2009 that stated, 'there is still considerable resistance [in Kosovo] to the use of plea bargaining from judges, prosecutors, and advocates.'
8. Langer, M., "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", from *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*, Thaman, S. C., ed., Carolina Academic Press, Durham, NC (2010), pp. 3–80. Please note that Langer describes both the influence of the US system internationally, as well as the diverse forms the practice actually takes worldwide, many of which share little in common with the US model.
9. See, e.g., "INL Guide to Justice Sector Assistance", US Department of State, Bureau of International Narcotics and Law Enforcement Affairs (Nov. 2013), p. 23, which identifies a project in Colombia to assist with the introduction of plea bargaining, and p. 29, in relation to a similar project in Thailand. Available at: <https://www.state.gov/documents/organization/222048.pdf>.

17. Given the unique role that plea bargaining plays in the US, and the serious concerns that have been raised about its effects there, the value of exporting a US-style model of trial waiver system has been questioned.<sup>10</sup> Even where the US has not provided specific technical support to encourage the use of trial waiver systems in other countries, it nonetheless often serves as an inspiration for such efforts.<sup>11</sup>
18. Due to the dominance of plea deals in US criminal proceedings, the relatively unregulated nature of the plea bargaining system, and its global influence, Fair Trials commenced its exploration of the impacts of trial waiver systems on human rights protection with a focus on the US. In November 2015, Fair Trials hosted a roundtable of US experts on criminal procedure to discuss plea bargaining in the US (the Washington roundtable). Experts at that meeting, and further conversations and research undertaken by Fair Trials, identified a number of challenges to human rights protection in the US posed by the operation of plea bargaining, each of which are explored below and which have informed Fair Trials' understanding of the general threats to human rights and the rule of law that may be posed by trial waiver systems.
20. US experts at the Washington roundtable commented on the minimal attention to due process guarantees attending many plea deals in jurisdictions across the US, particularly in many misdemeanour and municipal cases. Defendants in these minor cases may in some jurisdictions negotiate and enter pleas without legal representation.<sup>13</sup> Though the right to legal representation exists, in reality few defendants have access to a lawyer in the immediate period post-arrest, and prosecutors may offer plea deals before a defendant has the opportunity to engage one. Even those that do have legal representation may well be represented by overworked, under-resourced public defenders with minimal time to spend on each case. Defendants frequently accept plea deals, particularly in misdemeanour cases, in order to obtain release from pre-trial detention.<sup>14</sup> It is worth noting in this context that money bail is the dominant form of pre-trial release in many US jurisdictions, meaning that defendants can be detained on the basis of their inability to pay bail, rather than for public safety reasons.

#### A. Waivers of rights without sufficient procedural safeguards

19. The essence of US plea bargaining is a waiver of the rights (at least) to silence, against self-incrimination, to a trial, to put the government to its burden of proof, to

10. See, e.g., Alkon, C., "Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?", *Transnational Law & Contemporary Problems*, Vol. 19 (2010). Available at: <http://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1267&context=facscholar>. See also McLeod, A., "Exporting U.S. Criminal Justice", *Yale Law & Policy Review*, Vol. 29, Iss. 1, Article 3 (2010). Available at: <http://digitalcommons.law.yale.edu/ylpr/vol29/iss1/3>.

11. See, e.g., Jimeno-Bulnes, M., "American Criminal Procedure in a European Context", *Cardozo Journal of Int'l and Comp. Law*, Vol. 21, No. 2 (2013), pp. 454–459.

12. *Brady v. US*, *supra* at n. 6.

13. Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts", National Association of Criminal Defense Lawyers (Apr. 2009), pp. 14–18. Available at: <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdIdentifier=id&ItemID=20808>. 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 misdemeanour cases, despite the fact that most defendants 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.

14. In the US, release from pre-trial detention is typically achieved through the posting of cash bail, which has the effect of making release impossible for many poor defendants. See Bibas, S. et al., "Improving Fairness and Addressing Racial Disparities in the Delaware Criminal Justice System", Quattrone Center for the Fair Administration of Justice (Sept. 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.' Available at: <http://courts.delaware.gov/supreme/docs/ttroneCenterMemorandumDERacialDisparities.pdf>. See also "Bail Fail: Why the U.S. should end the practice of using money for bail", Justice Policy Institute (Sept. 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). See also Rakoff, "Why Innocent People Plead Guilty", *supra* at n. 3. See also Kellough, G. and Wortley, S., "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions", *Brit. J. Criminol*, Vol. 42(1) (2002), pp. 186–210. See also Heaton, P., Mayson, S. and Stevenson, M., "The downstream consequences of misdemeanour pre-trial detention", *Stanford Law Review*, Vol. 69 (2017). Available at: <https://www.law.upenn.edu/live/files/5693-harriscountybail>. See also Stevenson, M., "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. See also Johnson, G., "Cash Bail System can be Unjust, Penn Law Study Finds", *PennCurrent* (Oct. 20, 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 misdemeanour defendants in Harris County (Texas) who were unable to make bail were 25% more likely to plead guilty than those released on similar charges.

21. Some who accept plea deals which result in a non-custodial sentence do not fully understand that doing so leaves them with a conviction,<sup>15</sup> which will often have long-term impacts on their ability to find employment, receive benefits and services, or sustain legal immigration status, and which may result in longer sentences in the case of later convictions. Lack of adequate legal representation inevitably means the defendant has a lack of information (about both their rights and the implications of accepting the plea deal) which would be necessary to ensure that any waivers are voluntary and intelligent.
22. In many cases, defendants are routinely required to agree to excessive waivers. For example, in many US jurisdictions, it is a common practice for prosecutors to require waivers not only of the right to trial, but the right to appeal, even on the grounds of ineffective legal assistance.<sup>16</sup> A case currently before the Supreme Court of the United States queries whether acceptance of a plea deal signifies an inherent waiver of the right to challenge the constitutionality of the underlying criminal statute.<sup>17</sup> These waivers compound the lack of judicial scrutiny to which cases involving plea deals are subject.
23. There is also substantial variation in the scope of evidence the prosecution discloses prior to negotiating a plea deal, meaning that by waiving the right to trial, defendants are also waiving the right to confront the evidence against them, and indeed to appreciate the likelihood of conviction at trial. The normal rules of disclosure are linked to trial, and there is no established baseline of evidence that must be disclosed prior to a plea deal being concluded. Often, plea deals offered by prosecutors are made contingent upon the defendant accepting them within a short time frame (for example, so-called “explosive” plea offers that expire within 24 hours, with the benefits offered diminishing thereafter),<sup>18</sup> limiting the time available for full disclosure by the prosecution or investigation by the defence.
- B. Discrimination: juveniles, people with disabilities, and racial and ethnic minorities**
24. The US permits the use of plea bargaining (as opposed to diversion) in cases involving juvenile defendants. The Supreme Court of the United States has accepted,<sup>19</sup> and research has demonstrated,<sup>20</sup> the cognitive limits of juvenile defendants which seriously inhibit their decision-making skills in the face of interrogation and prosecution. Research has further demonstrated that juveniles are routinely unable to understand fully the consequences of a plea deal, not only in terms of the punishment they receive but also in relation to their waiver of rights.<sup>21</sup> The problem becomes compounded when a juvenile is transferred from specialised juvenile or family courts to adult criminal court (as is possible in some jurisdictions, often according to the age of the defendant and the type of offence alleged), where the stakes are higher, and a plea deal can become more tempting.<sup>22</sup> The transfer of juveniles to adult court significantly shifts the balance of power to the prosecutor because of the increased chance of a juvenile accepting a plea deal.<sup>23</sup>

15. Olson, T. M., “Strike One, Ready for More?: The Consequences of Plea Bargaining ‘First Strike’ Offenders under California’s ‘Three Strikes’ Law”, *California Western Law Review*, Vol. 36, No. 2 (2000), pp. 545-570. Available at: <http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1230&context=cwlr>.

16. The practice of requiring waivers of certain constitutional and statutory rights has been limited somewhat in the federal jurisdiction both by case law and by US Department of Justice policy. See guidance here: <https://www.justice.gov/USM/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law>. However, the practice remains in some states and localities.

17. *Class v. US*, 16–424. Available at: <http://www.scotusblog.com/case-files/cases/class-v-united-states/>.

18. See, e.g., Zottoli, T. M., Daftary-Kapur, T., Winters, G. M. and Hogan, C., “Plea discounts, time pressures, and false-guilty pleas in youth and adults who pleaded guilty to felonies in New York City”, *Psychology, Public Policy, and Law*, Vol. 22(3) (Aug. 2016), pp. 250–259.

19. *Roper v. Simmons*, 543 US 551 (2005) (prohibiting the use of the death penalty against juvenile defendants), and *Miller v. Alabama*, 567 US (2012) (prohibiting the use of mandatory life without parole for juveniles), oral arguments and written judgments available at: <https://www.oyez.org/cases/2011/10-9646>.

20. Steinberg, L. and Scott, E. S., “Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty”, *Am. Psychologist*, Vol. 58(12) (Dec. 2003), pp. 1009–1018.

21. Shteynberg, R. V. and Redlich, A. D., “To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions”, *Law and Human Behavior*, Vol. 40, No. 6 (Dec. 2016), pp. 611–625 (finding that juvenile defendants are more likely to plead guilty when they are assumed innocent and less likely to consider the consequences of the decision to plead guilty).

22. Dougherty, J., “Negotiating Justice in the Juvenile System: A Comparison of Adult Plea Bargaining and Juvenile Intake”, *Fed. Probation*, Vol. 52(2) (Jun. 1988), pp. 72–80. See also Letourneau, E. J. et al., “Sex Offender Registration and Notification Policy Increases Juvenile Plea Bargains”, *Sexual Abuse: A Journal of Research and Treatment*, Vol. 25, No. 2 (Apr. 2013), pp. 189–207. Available at <http://journals.sagepub.com/doi/pdf/10.1177/1079063212455667>.

23. Zimring, F. E., “The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s”, *Louisiana Law. Rev.*, Vol. 71(1) (2010).

25. Some examples of good practice and safeguards for juveniles in the context of plea bargaining can, however, be identified in certain (though certainly not all) jurisdictions within the US. These include: (a) mandatory representation; (b) special training for juvenile defenders;<sup>24</sup> and (c) more extensive enquiry<sup>25</sup> (in the US, called a colloquy or allocution) between the judge and the defendant, using age-appropriate language to ensure that the defendant has full knowledge of the consequences of his or her decision to plead guilty,<sup>26</sup> and limitations on the timing of guilty pleas (for example, refusing to accept plea offers at arraignment/charging) or the kind of cases in which plea deals can apply (for example, only to those facing the possibility of incarceration).
26. There are also similar concerns about the use of plea bargaining in cases involving adult defendants with psycho-social or intellectual disabilities, because their competency to waive their rights and enter into a plea deal may be questionable.<sup>27</sup> People with such disabilities are more likely to falsely plead guilty than those without.<sup>28</sup>
27. There is widespread concern about racial discrimination in the US criminal justice system, including in relation to plea bargaining. For example, research has found that prosecutors are more likely to offer Black and Latino defendants plea deals in misdemeanour drug cases that feature jail or prison time, as opposed to white defendants who are more frequently offered a plea deal involving a non-custodial sentence in such cases.<sup>29</sup>

### C. Innocence and miscarriages of justice

28. The phenomenon of innocent people pleading guilty has been most extensively documented in the US,<sup>30</sup> where, for example, 65 out of the 149 exonerations in 2015 followed guilty pleas (44%).<sup>31</sup> Furthermore, many examples of innocent people pleading guilty will never result in exoneration, particularly in misdemeanour and low level felony cases for which “there is no cheap, reliable test for guilt or innocence” and exoneration is therefore rarely achieved.<sup>32</sup> As a core underlying goal of criminal procedure is to convict the guilty and acquit the innocent, this is clearly a major cause for concern and points to the need for better safeguards.
29. It has been suggested that the coercive element of plea bargaining is strongest where there is a disproportionately high perceived benefit to pleading guilty, usually in the form of a high sentence differential between those pleading guilty and those proceeding to trial, as in the case of *Brady v US*,<sup>33</sup> which involved the threat of the death penalty. In the US, where sentencing discounts are not capped, this differential is referred to as the “trial penalty,” and it is particularly severe in the context of the relatively long “mandatory minimum” sentences which result from many convictions. Analysis of the trial penalty varies widely according to different models, but typical drug defendants for example face an average sentence three times higher following conviction after trial than they do following a plea deal.<sup>34</sup>

24. See Hertz, R. et al., “Trial Manual for Defense Attorneys in Juvenile Delinquency Cases”, American Bar Association (2016), pp. 400–410 (outlining the best practices for advising the client on the plea as well as preparing the client for the in court plea colloquy). See also Smith, A., “‘I Ain’t Takin’ No Plea’: The Challenges in Counseling Young People Facing Serious Time”, *Rutgers L. Rev.*, Vol. 60, No. 1 (2007). See also Alschuler, A. W., “The Defense Attorney’s Role in Plea Bargaining”, *Yale Law Journal*, Vol. 84, No. 6 (May 1975).
25. Shepherd, R. E. Jr., “Plea Bargaining in Juvenile Court”, *Criminal Justice*, Vol. 23, No. 3 (Fall 2008).
26. Redlich, A. D. and Bonventre, C. L., “Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas”, *Law and Human Behavior Journal*, Vol. 39, No. 2 (2015), p. 164, which states that ‘regarding the abilities of juvenile defendants specifically, developmental theory and previous research findings lead to the prediction that minors will be significantly less likely to understand the plea process compared to adults.’
27. Redlich, A. D. et al., “Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness”, *Law and Human Behavior Journal*, Vol. 34(1) (2010). See also Gross, S. R. et al., “Exonerations in the United States, 1989 Through 2003”, *Journal of Criminal Law and Criminology*, Vol. 95(2) (2005), pp. 523–560.
28. Bonnie, R. J., “The Competence of Criminal Defendants with Mental Retardation to Participate in their Own Defense”, *Journal of Criminal Law and Criminology*, Vol. 81, Iss. 3 (Fall 1990), pp. 439–440.
29. Kutateladze, B., Tymas, W. and Crowley, M., “Race and Prosecution in Manhattan”, Research Summary, Vera Institute of Justice (Jul. 2014). Available at: <http://archive.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-research-summary-v2.pdf>.
30. For some prominent cases of exonerations following guilty pleas, see: <http://www.innocenceproject.org/when-the-innocent-plead-guilty/>, and companion site <http://guiltypleaproblem.org/>.
31. 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.
32. *Ibid.*, p. 11.
33. *Brady v. US*, *supra* at n. 6. See <https://www.oyez.org/cases/1969/270> for more details.
34. Human Rights Watch analysis of the U.S. Sentencing Commission’s FY 2012 individual datafiles, found in Fellner, J., “An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty”, Human Rights Watch (Dec. 5 2013). Available at: <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>.

30. However, other benefits may also be responsible for innocent people pleading guilty, including the excessive use of pre-trial detention pending trial,<sup>35</sup> and the high financial costs of proceeding to trial. The dominance of money bail in many jurisdictions in the US places pre-trial release out of reach for poor defendants, and has been identified as a key driver of plea deals in minor offences. A 2015 New York Times Magazine report on the cash bail system observed:

*“New York City courts processed 365,000 arraignments in 2013; well under 5 percent of those cases went all the way to a trial resolution. If even a small fraction of those defendants asserted their right to a trial, criminal courts would be overwhelmed. By encouraging poor defendants to plead guilty, bail keeps the system afloat.”<sup>36</sup>*

35. National Registry of Exonerations, *supra* at n. 31, p. 10. See also Dobbie, W. et al., “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges”, the National Bureau of Economic Research, NBER Working Paper No. 22511 (Aug. 2016).

36. Pinto, N., “The Bail Trap”, NY Times Magazine (Aug. 13, 2015). Available at: [https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?\\_r=0](https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0) See the case background described in detail here: <https://theintercept.com/2016/02/05/mahdi-hashmi-metropolitan-correctional-center-manhattan-guantanamo-pretrial-solitary-confinement/>; <http://www.nydailynews.com/new-york/nyc-crime/terrorist-sympathizers-sentenced-11-years-prison-article-1.2498473>; <https://news.vice.com/article/this-four-year-saga-shows-how-the-us-became-the-global-cops-in-the-war-on-terror>; and <https://www.thebureauinvestigates.com/2014/04/19/stripped-of-his-uk-citizenship-now-mahdi-hashmi-is-in-solitary-confinement-in-new-york/>.

## Case study: Mahdi Hashi

In a 2015 case before the federal district court in New York,<sup>37</sup> the validity of a plea deal entered into by Mahdi Hashi was considered. Hashi had previously been stripped of his British citizenship, apprehended in Djibouti and tortured there in incommunicado detention for three months.<sup>38</sup> He was then rendered without legal process to the US where he was held in solitary confinement for three years facing charges of material support to a terrorist organisation, which carried a potential sentence of 30 years to life. He finally accepted a plea deal to a charge of conspiracy to provide material support for terror.<sup>39</sup>

In 2014, the year before the deal was made, then United Nations (U.N.) Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, Juan Mendez, gave an interview about Hashi's solitary confinement touching on the relationships between pre-trial detention, solitary confinement, torture and trial waiver systems, saying:

*"[Solitary confinement] in pre-trial detention is particularly objectionable because the pain and suffering of a mental or psychological nature that the person suffers prepares him psychologically to either confess or make statements against his interests, or even plead guilty...It seems to me that in terrorism cases, at least, that's a very deliberate policy of the United States. I've seen cases in which people are held in solitary confinement for three or four years, and then they either go to trial or they plead [guilty] — mostly, they plead...And it seems to me that's a coercive practice; it violates not only the right to be free from cruel, inhuman, and degrading treatment, but also due-process rights in trial."*<sup>40</sup>

While prosecutors requested a sentence of 15 years,<sup>41</sup> Judge John Gleeson sentenced Hashi to a term of nine years, saying at sentencing that the case was "complicated" and accepted that Hashi had sought to join al Shabaab not to engage in violent attacks but because he thought the group could restore peace to war-torn Somalia.

There are a number of troubling aspects of this case that deserved deeper judicial scrutiny than was possible absent a trial. The procedural history raised serious questions about the lawfulness of the assertion by US officials of jurisdiction over a foreign national who had no intent to carry out any criminal activity in relation to the US;<sup>42</sup> the allegations of US involvement in kidnap, torture and rendition; the constitutionality of Hashi's extended incommunicado solitary confinement pre-trial; and the extent of Hashi's involvement in the conspiracy. Unfortunately, the plea deal foreclosed the possibility of judicial scrutiny of these troubling pre-trial rights abuses.

37. See the case background described in detail here: <https://theintercept.com/2016/02/05/mahdi-hashi-metropolitan-correctional-center-manhattan-guantanamo-pretrial-solitary-confinement/>; <http://www.nydailynews.com/new-york/nyc-crime/terrorist-sympathizers-sentenced-11-years-prison-article-1.2498473>; <https://news.vice.com/article/this-four-year-saga-shows-how-the-us-became-the-global-cops-in-the-war-on-terror>; and <https://www.thebureauinvestigates.com/2014/04/19/stripped-of-his-uk-citizenship-now-mahdi-hashi-is-in-solitary-confinement-in-new-york/>.

38. Although prosecuting authorities asserted that 'local authorities' in Djibouti arrested Hashi, there was speculation of US and UK complicity in his apprehension. See, e.g., Stahl, A., "How a British Citizen was Stripped of His Citizenship, Then Sent to a Manhattan Prison", *The Nation* (Feb. 28, 2014). Available at: <https://www.thenation.com/article/how-british-citizen-was-stripped-his-citizenship-then-sent-manhattan-prison/>. See also Judd, T., "UK accused of role in rendition as missing 'Briton' faces US charges", *The Independent* (Dec. 23, 2012). Available at: <http://www.independent.co.uk/news/uk/home-news/uk-accused-of-role-in-rendition-as-missing-briton-faces-us-charges-8430600.html>.

39. See defendants' joint sentencing memorandum, *United States v. Ahmed, Hashi, and Yusuf*, Eastern District of New York, No. 12 Cr. 661 (JG). Available at: <https://assets.documentcloud.org/documents/2704809/334-Defendants-Joint-Sentencing-Memorandum.pdf>.

40. Ross, A. K., "Stripped of his UK citizenship, now Mahdi Hashi is in solitary confinement in New York", *The Bureau of Investigative Journalism* (Apr. 19, 2014). Available at: <https://www.thebureauinvestigates.com/2014/04/19/stripped-of-his-uk-citizenship-now-mahdi-hashi-is-in-solitary-confinement-in-new-york/>.

41. Government's sentencing letter. Available at: <https://www.documentcloud.org/documents/2704916-Mahdi-Hashi-339-Government-Sentencing-Letter.html>

42. For a comprehensive discussion of the question of the extra-territorial reach of US jurisdiction in this case see Kelly, B. M., "Due Process, Choice of Law, and the Prosecution of Foreign Nationals for Providing Material Support to Terrorist Organizations in Conflicts Abroad", *Harvard Law School Addison Brown Student Winning Prize* (May 2015). Available at: <https://dash.harvard.edu/bitstream/handle/1/16645037/Due%20Process,%20Choice%20of%20Law,%20and%20the%20Prosecution%20of%20Foreign%20Nationals%20for%20Providing%20Material%20Support%20to%20Terrorist%20Organizations%20in%20Conflicts%20Abroad.pdf?sequence=1>.

#### D. Lack of oversight of police and prosecutorial conduct

31. The procedural guarantees of the trial do not only protect individual rights; they also provide one of the few opportunities for judicial and public oversight of police and prosecutorial practices. Where police have engaged in prohibited activity, including unlawful stop, search, arrest and seizure, fabrication of evidence, torture, inhuman or degrading treatment or other rights violations, the primary legal remedy in the US is exclusion of evidence tainted by the unlawful act. When a trial does not occur, these abuses may well not come to light, and are much less likely to be remedied. Furthermore, evidence of mistreatment made public through criminal trials can form the basis of collateral claims for compensation of victims or prosecution or civil liability of abusers. These, too, may become more difficult to prove without the public airing of evidence and trial record. In extreme cases, plea deals may be used to “cleanse” or “launder” cases too tainted by torture and other human rights abuses to take to trial.<sup>43</sup> In less extreme cases, which are much more voluminous and systematic, plea deals may be used to win convictions in cases that may otherwise have ended in dismissal or acquittal due to procedural rights violations or lack of evidence.<sup>44</sup>
32. Besides examples of outright rights violations, such as those illustrated by the case of Mahdi Hashi, experts at the Washington roundtable expressed concern that a diminishing incidence of trials may be having a deleterious effect on the overall quality of investigations. Investigators do not have to be concerned that the evidence and the procedures undertaken would be thoroughly tested at trial.<sup>45</sup> These concerns have been borne out in repeated scandals in which defendants have accepted plea deals in relation to charges supported by evidence that has gone untested by prosecuting authorities. For example, in Houston, Texas, hundreds of convictions following plea deals in drug cases have been questioned in recent years, following the discovery that they were based on false positive results of unreliable roadside drug tests considered sufficient to establish probable cause to arrest, but not accurate enough to be used as evidence at trial due to high error rates.<sup>46</sup> Despite their innocence, the now-exonerated defendants all accepted plea deals before the evidence was properly tested.<sup>47</sup>

43. *United States v. Ali Yasin Ahmed, Madhi Hashi, Mohamed Yusuf*, No. 12 Cr. 661, 2012 WL 6721134 (E.D.N.Y. Nov. 15, 2012); 18 U.S.C. § 2339B (2012).

44. Federal data from the US documents a reduction in the percentage of cases that are dismissed by prosecutors, as well as those ending in acquittals. See Oppel, “Sentencing Shift Gives New Leverage to Prosecutors”, *supra* at n. 4.

45. This concern is also expressed in Fellner, “An Offer You Can’t Refuse”, *supra* at n. 34, which states that ‘Human Rights Watch believes (the) historically low rate of trials (referring to the 3% of federal drug cases that are tried rather than pled out) reflects and unbalanced and unhealthy criminal justice system.’

46. See, e.g., Gabrielson, R. and Sanders, T., “Busted”, ProPublica/The New York Times (Jul. 7, 2016). Available at: <https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives>. The article also notes that plea deals are accepted by prosecutors on the basis of similar unreliable roadside drug tests in a number of other states and jurisdictions. These cases and the work of the Harris County Conviction Integrity Unit are also discussed in the National Registry of Exonerations report, *supra* at n. 31.

47. See also Hollandsworth, S., “Snow Job”, *Texas Monthly* (Apr. 2002), available at: <http://www.texasmonthly.com/articles/snow-job/>, for more detail on the so-called Texas Sheetrock Cases. This involved 53 people who were prosecuted for cocaine trafficking on a tip from an informant as part of his own plea deal. Prosecutors pressured the defendants to plead guilty before the drug tests came back from the lab, which took 6-8 weeks, and many of them did, some of whom were then deported to Mexico. Two defendants demanded the seized material be tested, after which it turned out the “cocaine” was actually Sheetrock after all, but it was too late for the co-defendants who had already been convicted and deported.

33. In some jurisdictions, plea deals are openly used to win convictions in cases where evidence is weak and may not suffice to convict the defendant at trial.<sup>48</sup> There are numerous US cases in which prosecutors have entered into plea deals with full knowledge that a defendant is factually innocent. The so-called Alford plea,<sup>49</sup> in which a defendant accepts a conviction without admitting the factual basis of the charges, demonstrates that courts are willing to accept the constitutionality of convictions explicitly accepted for pragmatic purposes, rather than in acceptance of true responsibility for the charges.<sup>50</sup> This type of functional plea deal was used, for example, in the case of the so-called “West Memphis Three”.<sup>51</sup> In that case, three young men were wrongfully convicted following a full trial for the rape and murder of three eight year old children. After years of litigation, an appeals court remanded the case to the trial court for further evidentiary hearings that doubtless would have led to exoneration. Given the fragile health of one of the defendants, all three agreed to accept Alford pleas to sentences of time served rather than remain detained during further lengthy proceedings to prove their innocence.<sup>52</sup>
34. Cooperating witnesses, while clearly key to investigations of complex and organised crime, can also threaten the quality of investigations. Participants in the Washington roundtable expressed concern about the reliability of testimony by witnesses who are incentivised with discounted sentences and immunity for certain charges.<sup>53</sup> Indeed, 45.9% of death row exonerations in the US since the 1970s involved convictions based on testimony by cooperating witnesses, according to the Center on Wrongful Convictions.<sup>54</sup> Beyond concerns about cooperating witnesses providing untrue, incomplete or misleading evidence, over-reliance on cooperation agreements can also have a corrosive effect on the ethical and procedural compliance of prosecutors and investigators.<sup>55</sup>
35. However, establishing evidence of poor practice in relation to investigations is particularly difficult in the context of trial waiver systems, which do not produce an extensive evidential and procedural record in the way that trials do, and which severely limit the availability of appeals or other post-conviction review or relief. Therefore concerns about the effect of plea bargaining on the quality and reliability of prosecutions remain speculative – pointing again to the lack of transparency associated with trial waiver systems as opposed to open trials.

48. See Turner, J. I., “Prosecutors and Bargaining in Weak Cases: A Comparative View” (Aug. 31 2011), from *The Prosecutor in Transnational Perspective*, Luna, E. and Wade, M., eds., Oxford University Press (2012). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1862161](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1862161).
49. *North Carolina v. Alford*, 400 U.S. 25 (1970). Alford faced the death penalty were he to be convicted at trial on a murder charge. He strategically pleaded guilty to second degree murder to avoid the possibility of a death sentence at trial, while denying responsibility for the crime as a factual matter. He later appealed against his initial guilty plea, saying he was coerced by the threat of receiving the death penalty were he convicted at trial, but the court held that even if the defendant would not have pleaded guilty “but for” the threat of the death penalty, a guilty plea remained valid as long as evidence existed to support the prosecution and the defendant pleaded guilty in order to avoid the harshness of sentencing (though note the dissenting opinion by Justice Brennan, who stated that the conviction should have been vacated because the plea was not voluntary, but was given under duress due to the threat of the death penalty, which he considered to be unconstitutional).
50. See also Blume, J. H. and Helm, R. K., “The Unexonerated: Factually Innocent Defendants Who Plead Guilty”, Cornell Law Faculty Working Papers, Paper 113 (2014). Available at: [http://scholarship.law.cornell.edu/clsops\\_papers/113](http://scholarship.law.cornell.edu/clsops_papers/113).
51. Moriarty, E., “48 Hours Mystery: Unusual Plea That Freed the ‘West Memphis 3’”, CBS News (Aug. 10 2012). Available at: <http://www.cbsnews.com/news/48-hours-mystery-unusual-plea-that-freed-west-memphis-3/>.
52. Shargel, G. L., “How the West Memphis Three Got Out”, *The Daily Beast* (Aug. 22 2011). Available at: <http://www.thedailybeast.com/articles/2011/08/21/west-memphis-three-freed-using-rare-alford-legal-plea.html>.
53. See Warden, R. et al., “Jailhouse Snitch Testimony: A Policy Review”, *The Justice Project* (2007) for discussion of safeguards for such testimony. Available at: [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death\\_penalty\\_reform/illhouse20snitch20testimony20policy20brief.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/illhouse20snitch20testimony20policy20brief.pdf).
54. “The Snitch System”, Center on Wrongful Convictions, Northwestern University School of Law (2005), p. 3. Available at: <https://www.aclu.org/other/center-wrongful-convictions-snitch-system?redirect=center-wrongful-convictions-snitch-system>.
55. See Baer, M. H., “Cooperation’s Cost”, *Washington University Law Review*, Vol. 88, Iss. 4 (2011), p. 931: ‘Prosecutors and agents will become less vigilant and cease monitoring each other when they rely on cooperation as a means of encouraging defendants to refrain from filing motions to suppress illegally obtained evidence. The failure to follow procedural rules, moreover, may undermine law enforcement’s legitimacy, force prosecutors to enter into agreements with suboptimal cooperators, and increase the overall likelihood of unchecked corruption and abuse within law enforcement agencies, all of which may lead to an increase in criminal conduct and a decrease in the prosecution of guilty actors.’ Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol88/iss4/3](http://openscholarship.wustl.edu/law_lawreview/vol88/iss4/3).

### E. Over-charging, over-criminalisation and over-incarceration

36. Plea bargaining in the US demonstrates the ways in which trial waiver systems, if insufficiently regulated, can undermine rights protection and drive growth in the criminal justice system that may work against many of the reasons for its adoption; i.e. efficiency and reduction of excessive use of detention both pre-trial and in sentencing. Due to the impact of the US as a model and sponsor for trial waiver systems worldwide, its experience with plea bargaining – both positive and negative – is of relevance to countries around the globe considering the adoption of similar practices.
37. Despite the perception that trial waiver systems promote efficiency in the criminal justice system, their use can have a net-widening effect. By permitting prosecutors and courts to process cases rapidly and even en masse, systems may respond to the advent of trial waivers not by reducing backlogs and court dockets, but by prosecuting more cases. There is some evidence from the US that the explosion in prison population in recent decades is not in fact due to longer sentences being administered, but primarily due to decisions by prosecutors to charge more crimes as felonies,<sup>56</sup> leading to a higher number of plea deals and a higher overall conviction rate. For this reason, plea bargaining could be operating as a driver of over-charging and the resulting mass incarceration and mass criminalisation of Americans, one in three of whom is estimated to have been arrested by age 23,<sup>57</sup> and more than 2 million of whom are behind bars.<sup>58</sup>
38. In the US, the relationship between long “mandatory minimum” sentences and plea bargaining has been well-documented. By way of example, in 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years.<sup>59</sup> In one typical case exemplifying the risks to defendants of not pleading guilty to drugs charges in the US federal system, Sandra Avery was arrested and charged with possession of 50 grams of crack cocaine with intent to deliver, an offence then carrying a mandatory minimum sentence of 10 years. Refusing a plea deal that offered no less than 10 years, she was convicted at trial and sentenced to life in prison (there is no parole in the federal system).<sup>60</sup>
39. Prosecutors have been open about the use of harsh sentencing regimes to win plea bargains. When then-US Attorney General Eric Holder in 2014 supported legislation relaxing mandatory minimum sentences, prosecutors responded with a letter to Mr Holder that stated in part that “mandatory minimum sentences are a critical tool in persuading defendants to cooperate.”<sup>61</sup> In a later letter to the US Sentencing Council opposing retroactivity of a more relaxed sentencing regime, the same prosecutors argued that “allowing an individual sentenced under a plea agreement to have his sentence reduced retroactively prevents the government from obtaining benefits gained through concessions during bargaining.” In this scenario, plea bargaining becomes the *raison d’être* of the sentencing regime – the “tail wagging the dog” in the words of one of the participants at the Washington roundtable.
40. Where prosecutors have this kind of power to induce plea deals due to long sentences, there may be less filtering of worthy cases at the outset, since the vast majority of defendants will plead guilty regardless of the strength of the evidence against them, simply to avoid the severe trial penalty. In the US system it is a key role of the prosecutor to use their discretion to filter out weak or otherwise unworthy cases. Participants at the Washington roundtable also pointed to the failure of the federal grand jury system in the US to effectively filter out weak cases, meaning that at no point in most criminal proceedings are weak or unworthy cases being effectively diverted from the system. Without the procedural rigours of trial, cases that would otherwise have been dropped for want of prosecution are instead able to proceed to conviction. Indeed, the percentage of dismissed cases was substantially higher in earlier years, before harsher sentences increased the percentage of felony cases resolved by plea deals three times over, which may suggest that there is a relationship between increased use of plea bargaining and decreased filtering of cases.<sup>62</sup>

56. Pfaff, J. F., “The Causes of Growth in Prison Admissions and Populations”, *Fordham Law Review*, (2012). Available at: [http://web.law.columbia.edu/sites/default/files/microsites/criminal-law-roundtable-2012/files/Pfaff\\_New\\_Admissions\\_to\\_Prison.pdf](http://web.law.columbia.edu/sites/default/files/microsites/criminal-law-roundtable-2012/files/Pfaff_New_Admissions_to_Prison.pdf).

57. Friedman, M., “Just Facts: As Many Americans Have Criminal Records as Have College Diplomas”, *Brennan Center for Justice* (Nov. 17 2015). Available at: <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>.

58. “Americans With Criminal Records”, *The Sentencing Project*. Available at: <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>.

59. Rakoff, “Why Innocent People Plead Guilty”, *supra* at n. 3. See also Fellner, “An Offer You Can’t Refuse”, *supra* at n. 34.

60. Fellner, “An Offer You Can’t Refuse”, *supra* at n. 34.

61. Statements by US Attorneys Regarding Mandatory Minimum Sentences, Jan 24, 2014. Available at: <http://www.naaUS.org/site/index.php/resources/misc/77-aUSs-on-mandatory-minimums/file>

62. Oppel, “Sentencing Shift Gives New Leverage to Prosecutors”, *supra* at n. 4.

# Global Research:



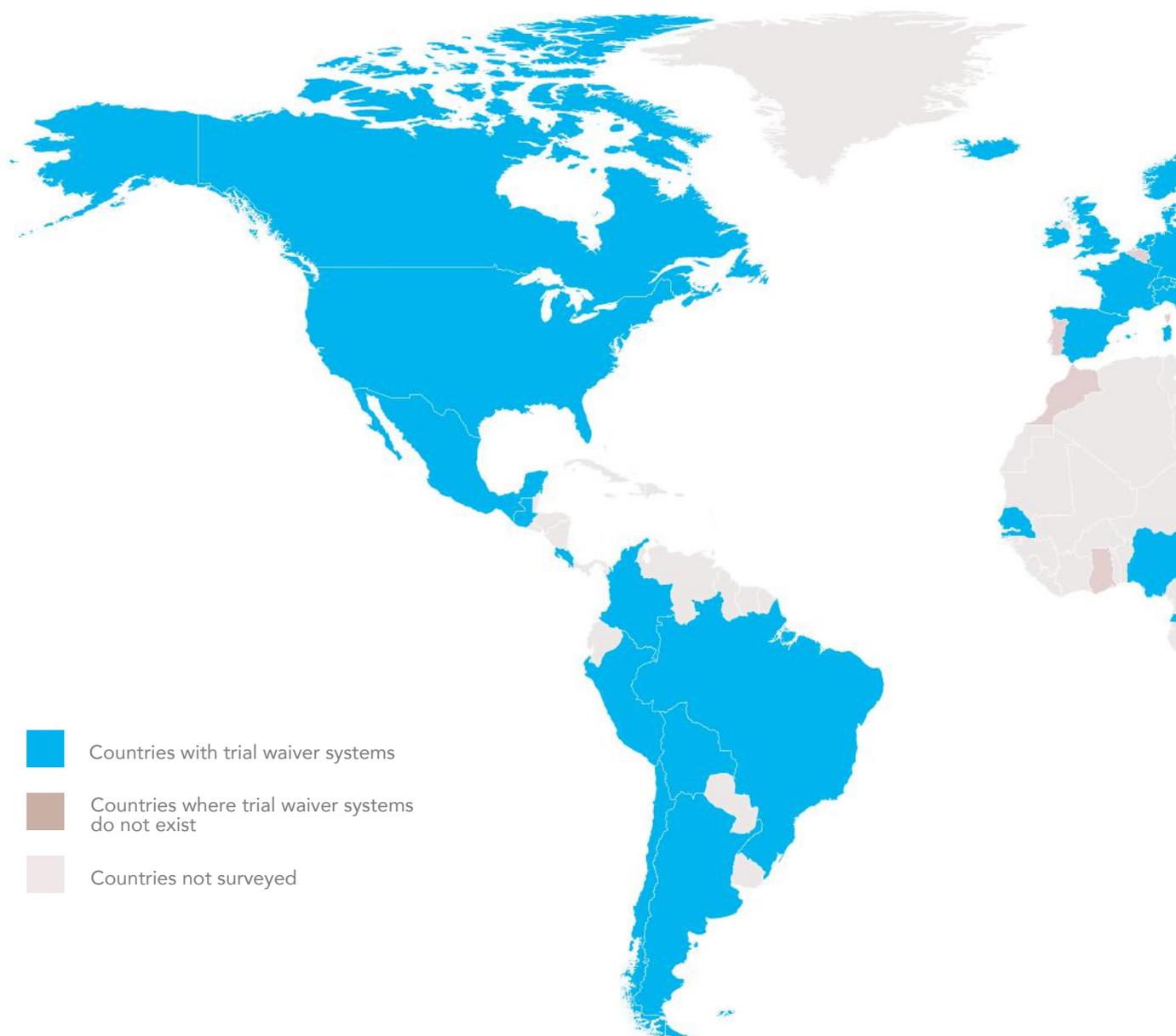


## Methodology

## Findings

- A. Proliferation of trial waiver systems*
- B. Increasing use of trial waivers*
- C. Reasons for introduction of trial waiver systems*
- D. Types of trial waiver system*
- E. Jurisdictions without trial waiver systems*
- F. Safeguards*

## Countries with trial waiver systems



- Countries with trial waiver systems
- Countries where trial waiver systems do not exist
- Countries not surveyed

Albania  
Angola  
Argentina  
Armenia  
Australia  
Austria  
Bahrain  
Belarus  
Belgium  
Bolivia  
Bosnia & Herzegovina

Botswana  
Brazil  
Canada  
Cayman Islands  
Chile  
China  
Colombia  
Congo DR  
Costa Rica  
Croatia  
Czech Republic  
Denmark

Egypt  
England & 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



41. Given the increased reports by network members of the use of trial waiver systems in jurisdictions across the globe, and in light of the human rights challenges identified as arising from the operation of plea bargaining in the US, Fair Trials embarked in 2015 on a project to map the global use of trial waiver systems. The research sought to examine the adoption and use of trial waiver systems in jurisdictions worldwide, to analyse the various forms such systems take, to identify the safeguards that different jurisdictions are employing to protect human rights and to highlight examples of good and bad practice. Working together with its pro bono partner Freshfields, Fair Trials has gathered information on trial waiver systems in 90 jurisdictions, covering all six major continents.

## Methodology

42. The research commenced in July 2015, and was conducted in two phases. The first phase involved asking lawyers across the globe to respond to a survey requesting high level information on the law and practice of trial waiver systems in their respective jurisdictions. From July 2015 to March 2016, questionnaires were distributed to local lawyers in over 100 countries with responses received from 90 jurisdictions spanning six continents.<sup>63</sup>

43. The survey circulated in Phase 1 included questions on whether a trial waiver system (as defined) exists, and if so:

- what laws and/or policies govern the system;
- when the trial waiver system was introduced;
- the reasons for introduction of the trial waiver system;
- how commonly the trial waiver system is used; and
- how the trial waiver system works in practice.

44. The second phase of the project involved conducting an in-depth review of the trial waiver systems in eight jurisdictions (Georgia, Germany, Mexico, New Zealand, Russia, Serbia, Singapore, and South Africa) by sending detailed surveys to experts in the field in each jurisdiction. The jurisdictions were selected based on the results of the Phase 1 questionnaire responses and to ensure that different types of trial waiver systems and legal systems, as well as a wide geographical spread, were captured. Further, Phase 2 surveys were obtained in relation to Poland, Spain, the Czech Republic, Greece, Lithuania, and Hungary using Fair Trials' own network of fair trial experts in the EU. Interviews were also conducted with experts in a number of other jurisdictions, including Georgia, Ukraine, and Brazil.

63. Albania, Angola, Argentina, Armenia, Australia, Austria, Bahrain, Belarus, Belgium, Bolivia, Bosnia & Herzegovina, Botswana, Brazil, Canada, the Cayman Islands, Chile, China, Colombia, Congo DR, Costa Rica, Croatia, the Czech Republic, Denmark, Egypt, England & 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, South Africa, South Korea, Spain, Sweden, Switzerland, Tanzania, Thailand, Turkey, the United Arab Emirates, Ukraine, the US, Vietnam, Zambia and Zimbabwe.

## Findings

### A. Proliferation of trial waiver systems

45. The data collected makes clear that formal recognition, legalisation and regulation of trial waivers has undoubtedly increased dramatically in the last 25 years. The existence of trial waiver systems worldwide has increased nearly 300% since 1990. According to our research from 90 jurisdictions, 19 jurisdictions were identified as having a trial waiver system prior to 1990. Between 1990 and 1999, 13 more jurisdictions adopted a trial waiver system through legislation or case law and a further 22 countries introduced trial waiver legislation between 2000 and 2009. From 2010 to the end of 2015, trial waiver systems spread to 12 further jurisdictions. And this number is continually increasing; according to the survey responses, trial waiver systems are currently under consideration in 5 countries which currently have no such system in place. In other jurisdictions, expansions of current trial waiver systems, or the introduction of different types of trial waiver systems, are being considered.
46. Despite their recent, rapid growth, trial waiver systems are not a new phenomenon. Scholars have long-tracked their historical use to varying extents in England and Wales and the US,<sup>64</sup> and some have sought to compare them to ancient practices such as the payment of *weregild* (blood money) in medieval German legal traditions,<sup>65</sup> as well as in some jurisdictions today, such as Saudi Arabia. Customary justice systems sometimes feature practices resembling trial waiver systems, such as apologies, and payments to the victim.<sup>66</sup> Even in systems that formally disallow trial waivers, informal practices of negotiation over charge or sentence are often common and well-entrenched.<sup>67</sup>
47. Comprehensively and systematically identifying where trial waiver systems exist uncodified, as an informal practice, has not been possible within the scope of this research, though some such practices were identified (as in Botswana,<sup>68</sup> for example). Nonetheless, it is evident from the Phase 1 survey responses that although trial waiver systems have existed in a small number of jurisdictions for many years, the practice became much more wide-spread and prevalent from 1990 onwards. The vast majority of countries identified as adopting trial waiver systems post-1990 have done so formally through statute.<sup>69</sup> In some cases, this legislation formalises or regulates a previously existing informal or even unlawful practice, as in Germany.<sup>70</sup>
48. Categorising the responses by the date that trial waiver systems were introduced in each jurisdiction revealed trends in the global spread of such systems.<sup>71</sup> This information is depicted in the following maps.

64. See, e.g., Alschuler, A. W., "Plea Bargaining and its History", *Columbia Law Review*, Vol. 79, No. 1 (Jan. 1979).

65. Thaman, S. C., "A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial", from *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*, Thaman, S. C., ed., Carolina Academic Press, Durham, NC. (2010), p. 298.

66. Alkon, C., "Introducing plea bargaining into post-conflict legal systems", *International Network to Promote the Rule of Law (INPROL)* (Mar. 2014), pp. 19–20. Available at: [http://inprol.org/sites/default/files/publications/2014/introducing\\_plea\\_bargaining\\_0.pdf](http://inprol.org/sites/default/files/publications/2014/introducing_plea_bargaining_0.pdf).

67. See, e.g., Rauxloh, R., "Plea bargaining in national and international law", Routledge, New York (2012), p. 2, which identifies practices of informal plea bargaining in Germany in the 1970s and 80s, even in the face of formal prohibition.

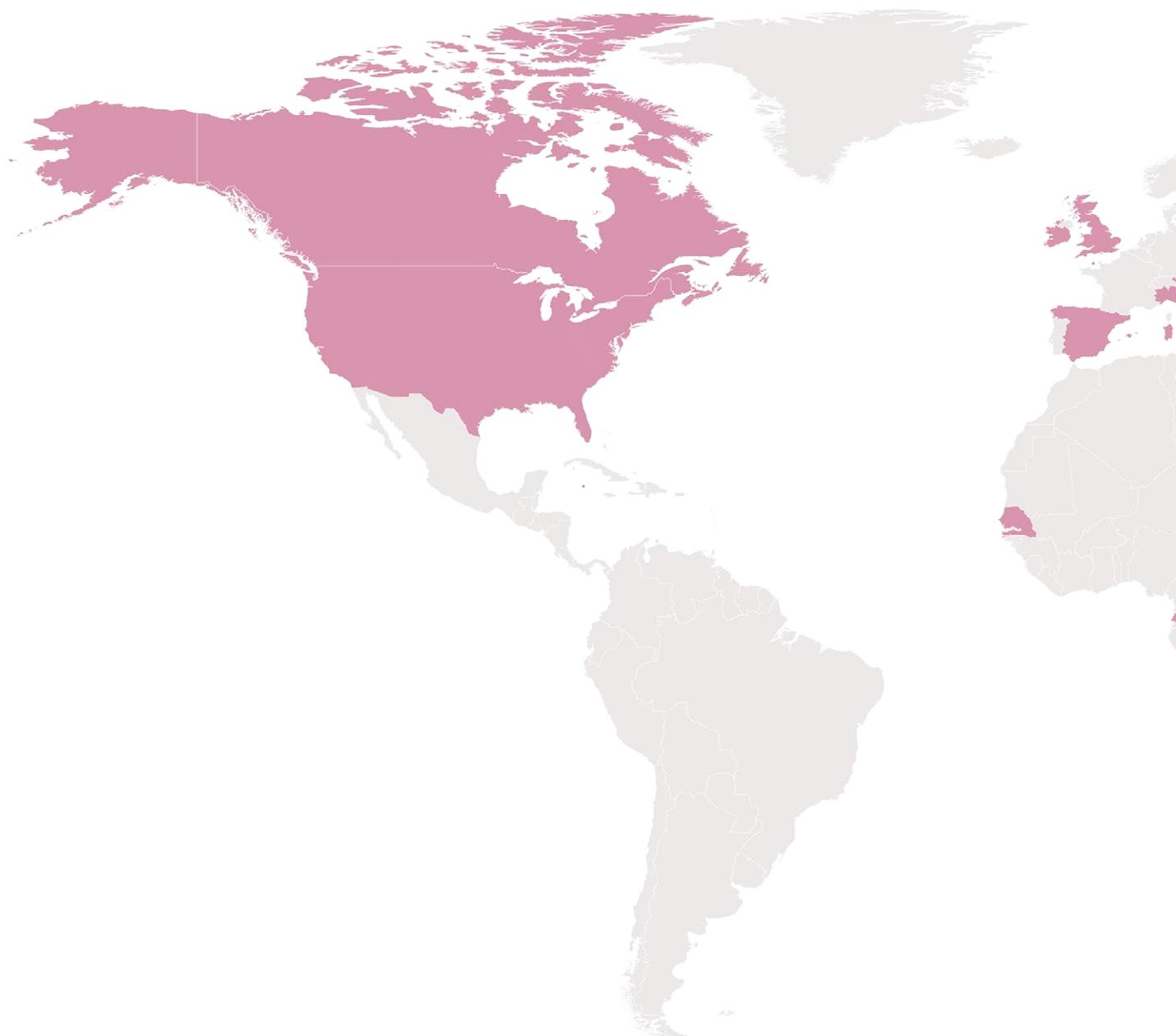
68. The survey response in relation to Botswana indicated that, while no legislation or formal principles establish or regulate trial waivers there, mention is made in several cases of informal plea bargaining in practice.

69. C.f. *State v. Porosanta* (2011) 2 BLR 717 HC in Botswana, a country which we have identified as formally recognising trial waivers (known as "plea bargains") through case law from 2011. In this case, Judge Motobi recognises that the practice has existed informally for some time, but for which formal legislation still does not exist.

70. Beck'scher Kurzkommmentar zur StPO, Sec. 257c.

71. It was not always possible to identify the exact date of introduction of trial waiver systems into law through the administered surveys and complementary desk research. Therefore, rather than categorising the responses by the precise year in which the trial waiver system was introduced, we categorised them according to the following date ranges: pre-1990; 1990 to 1999; 2000 to 2009; and 2010 to 2016.

## Date of introduction of trial waiver systems



**19**  
countries

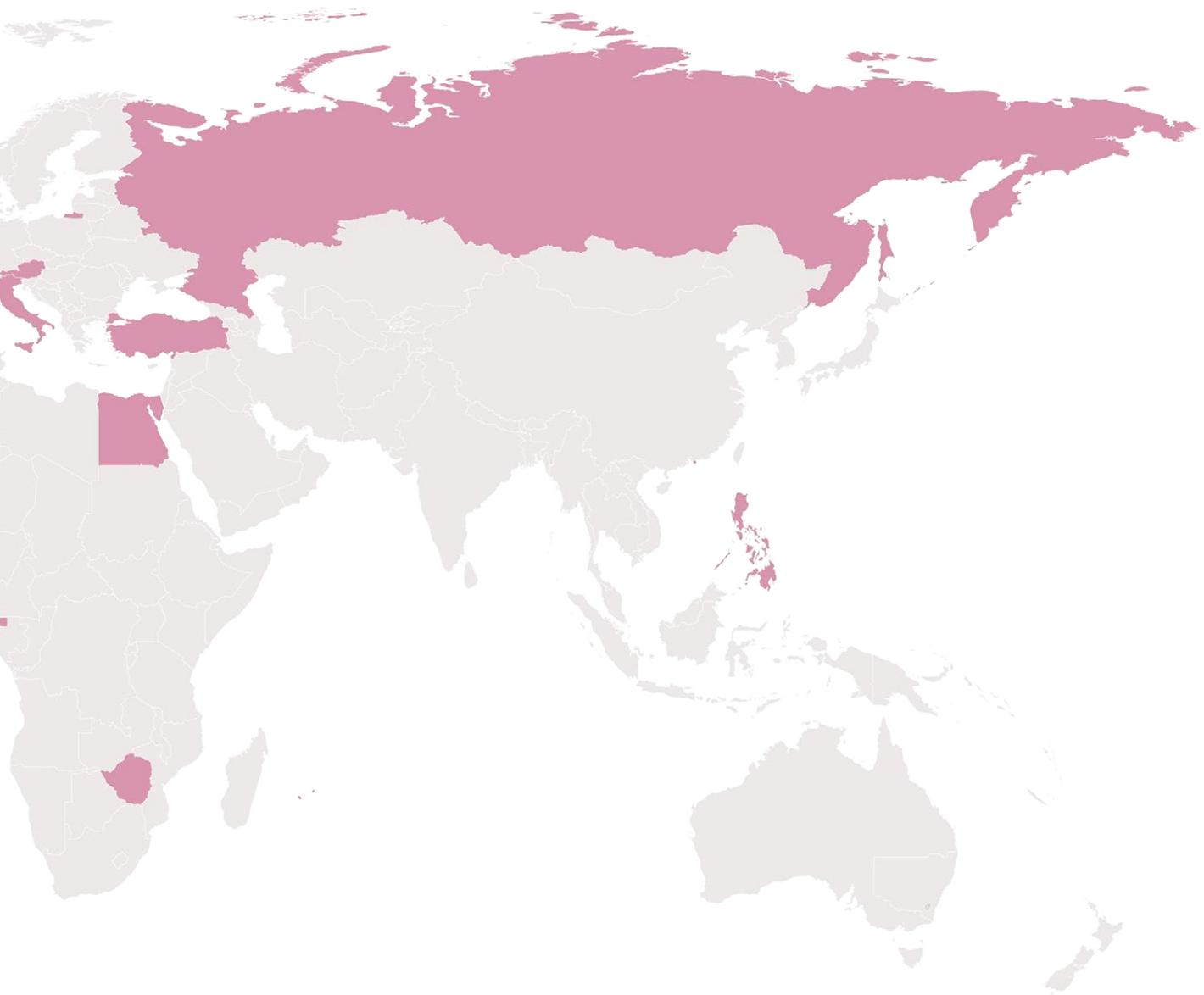
**AUSTRIA  
CANADA  
CAYMAN ISLANDS  
EGYPT  
ENGLAND & WALES  
EQ. GUINEA  
HONG KONG**

**IRELAND  
ITALY  
JERSEY  
MAURITIUS  
PHILIPPINES  
RUSSIAN FEDERATION  
SCOTLAND**

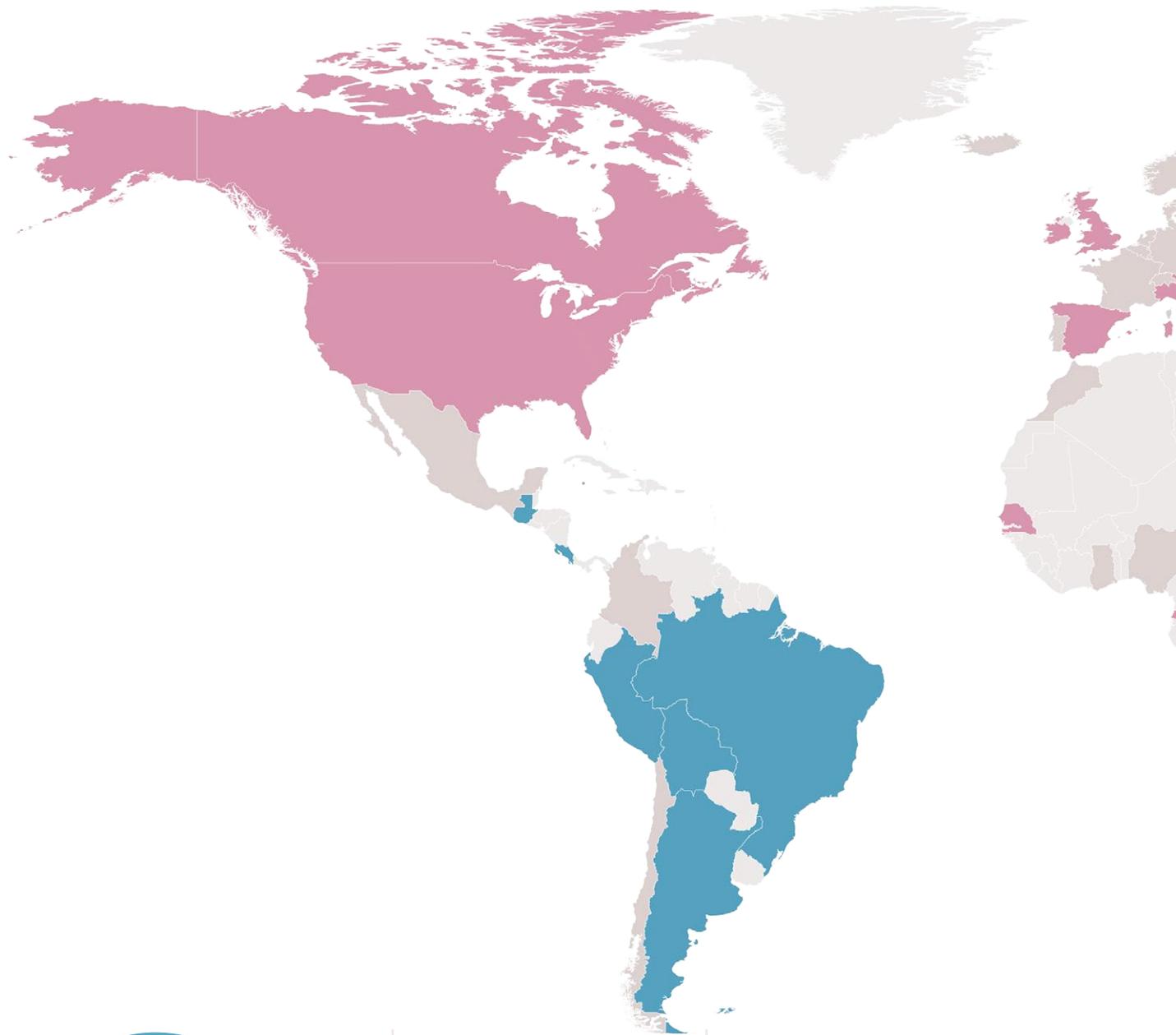
**SENEGAL  
SPAIN  
TURKEY  
USA  
ZIMBABWE**

## Pre-1990

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## Date of introduction of trial waiver systems



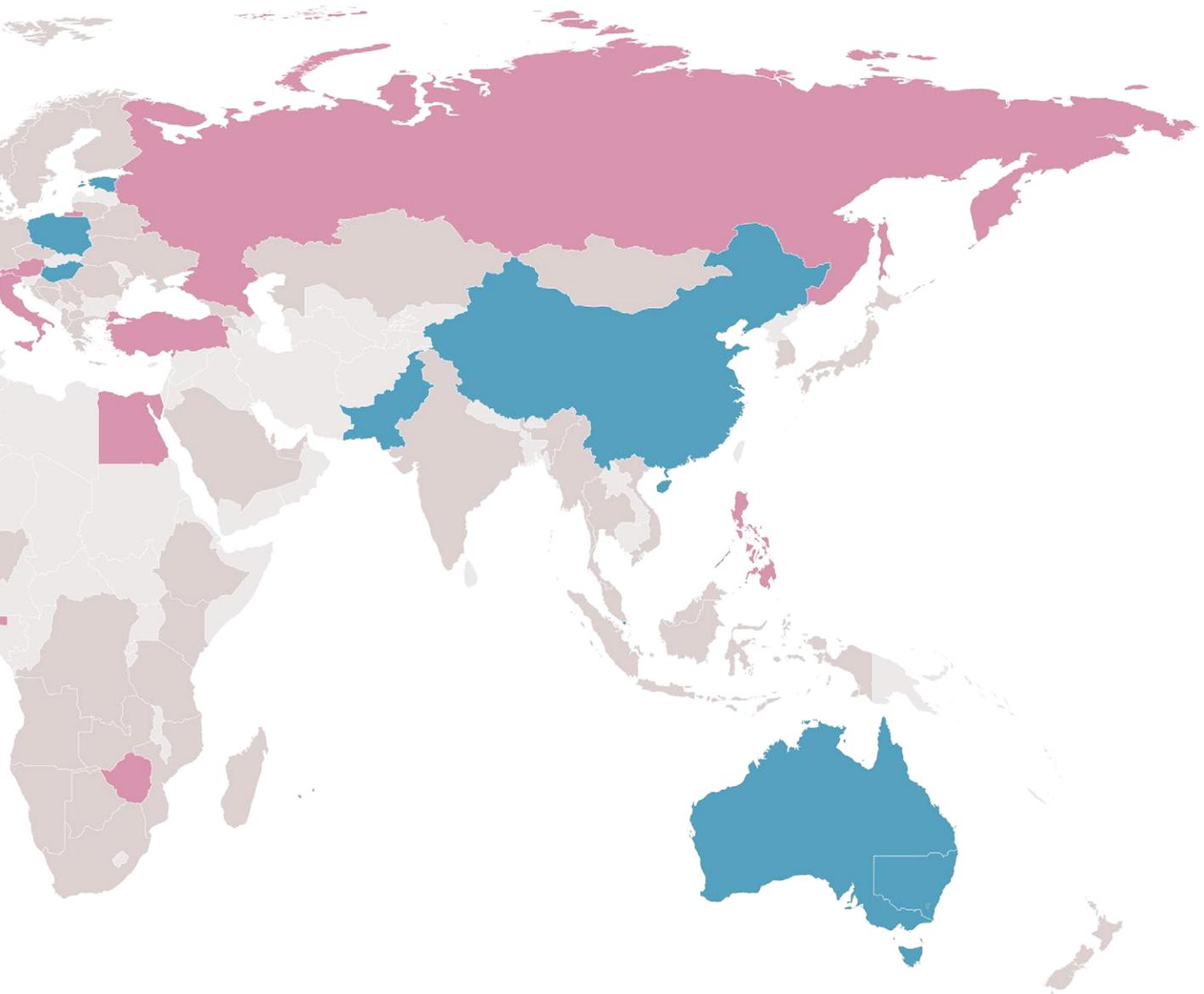
**13**  
countries

**ARGENTINA**  
**AUSTRALIA**  
(NEW SOUTH WALES)  
**BOLIVIA**  
**BRAZIL**  
**CHINA**  
**COSTA RICA**

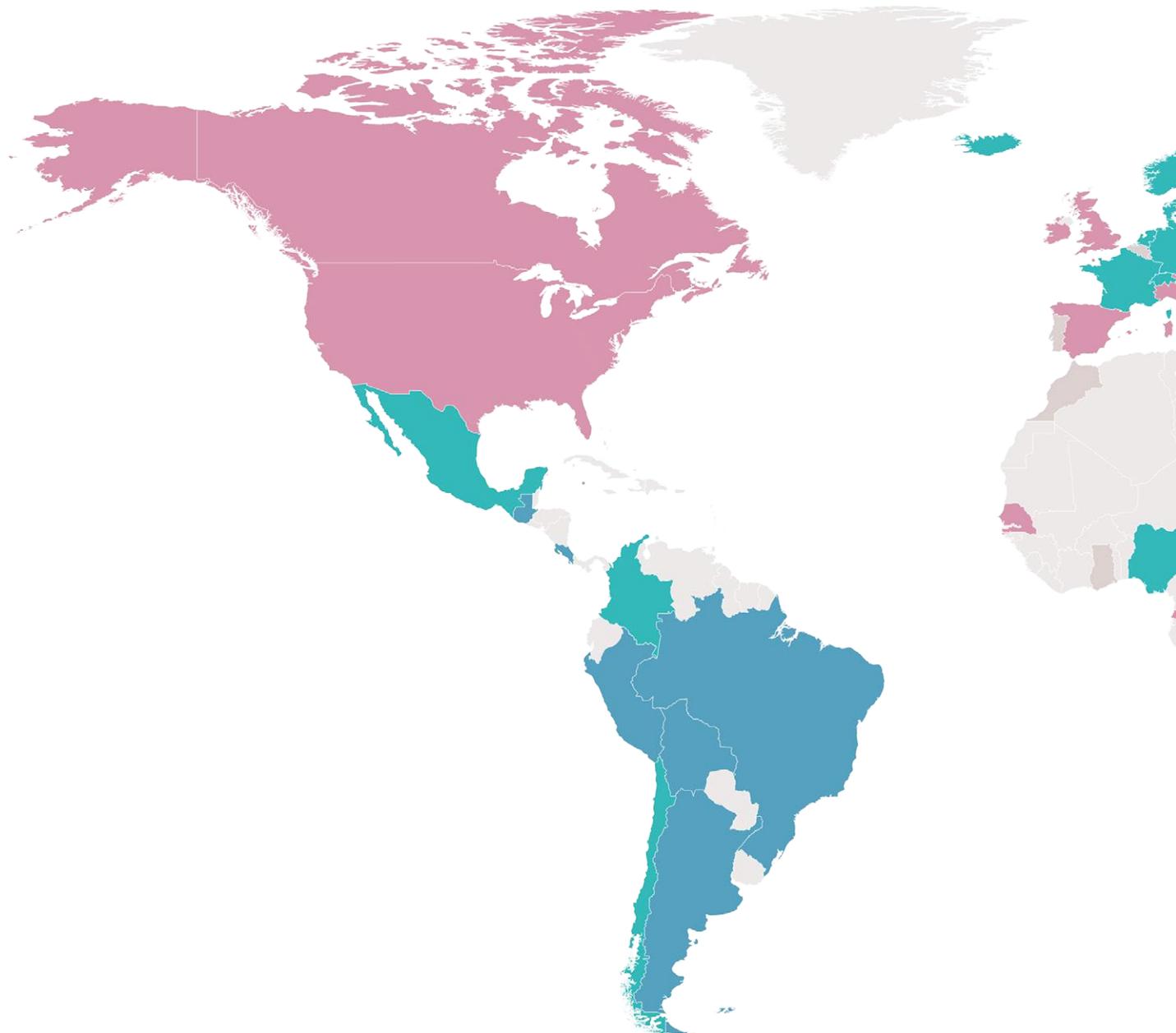
**ESTONIA**  
**GUATEMALA**  
**HUNGARY**  
**PAKISTAN**  
**PERU**  
**POLAND**  
**SINGAPORE**

## 1990 to 1999

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## Date of introduction of trial waiver systems



**22**  
countries

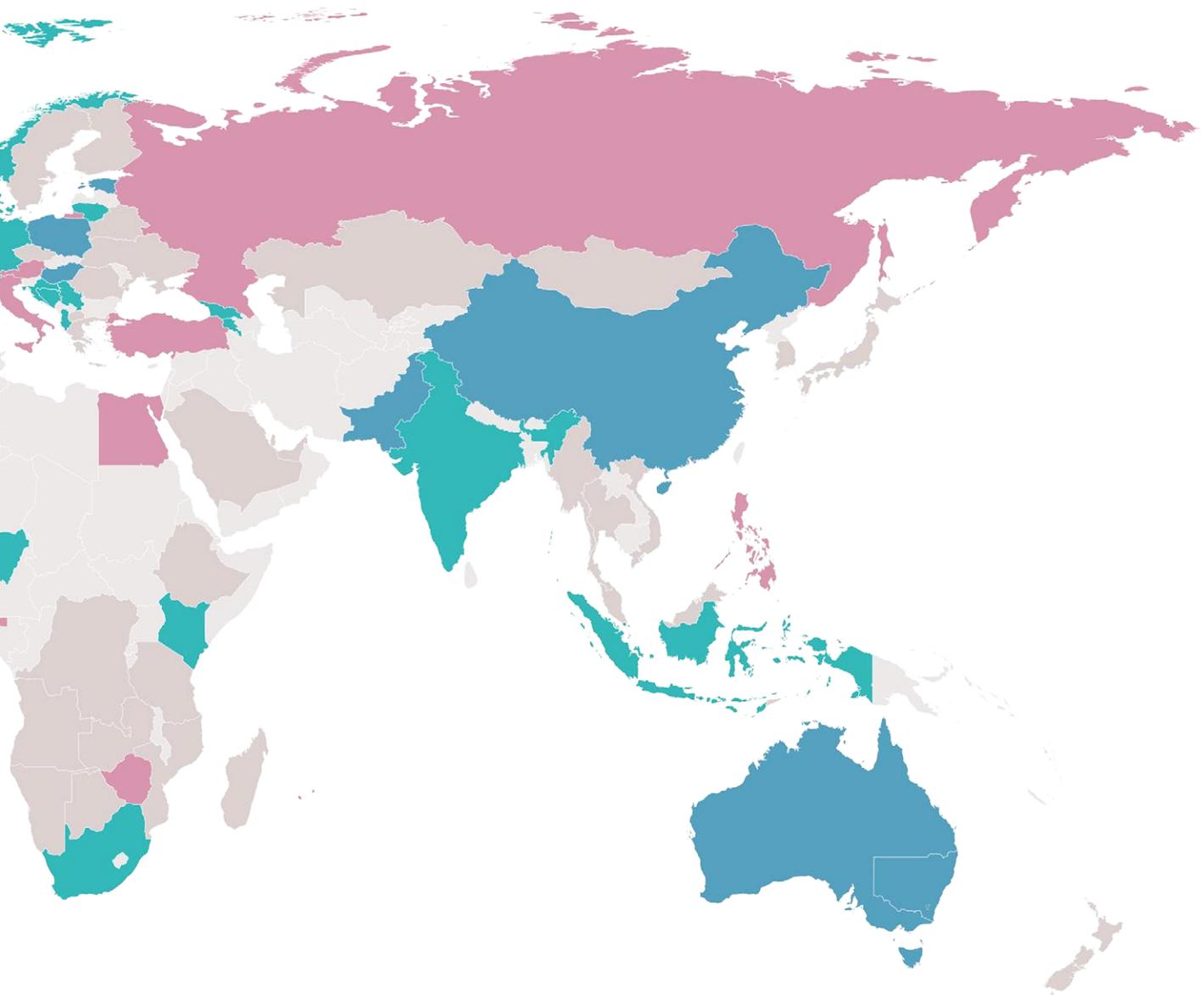
ALBANIA  
ARMENIA  
BOSNIA &  
HERZEGOVINA  
CHILE  
COLOMBIA  
CROATIA  
DENMARK

FRANCE  
GEORGIA  
GERMANY  
ICELAND  
INDIA  
INDONESIA  
KENYA  
LITHUANIA

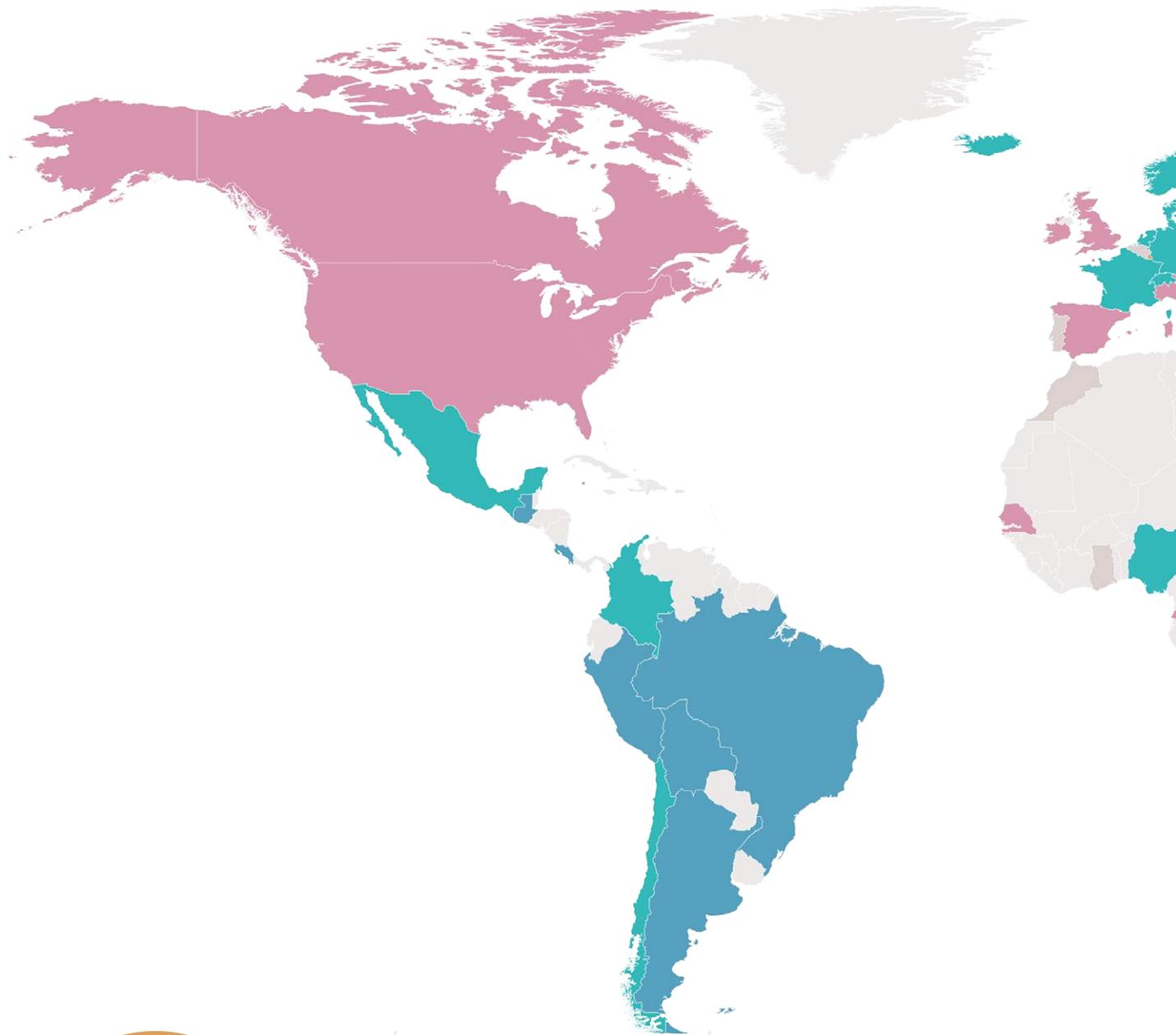
MEXICO  
NETHERLANDS  
NIGERIA  
NORWAY  
SERBIA  
SOUTH AFRICA  
SWITZERLAND

## 2000 to 2009

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## Date of introduction of trial waiver systems



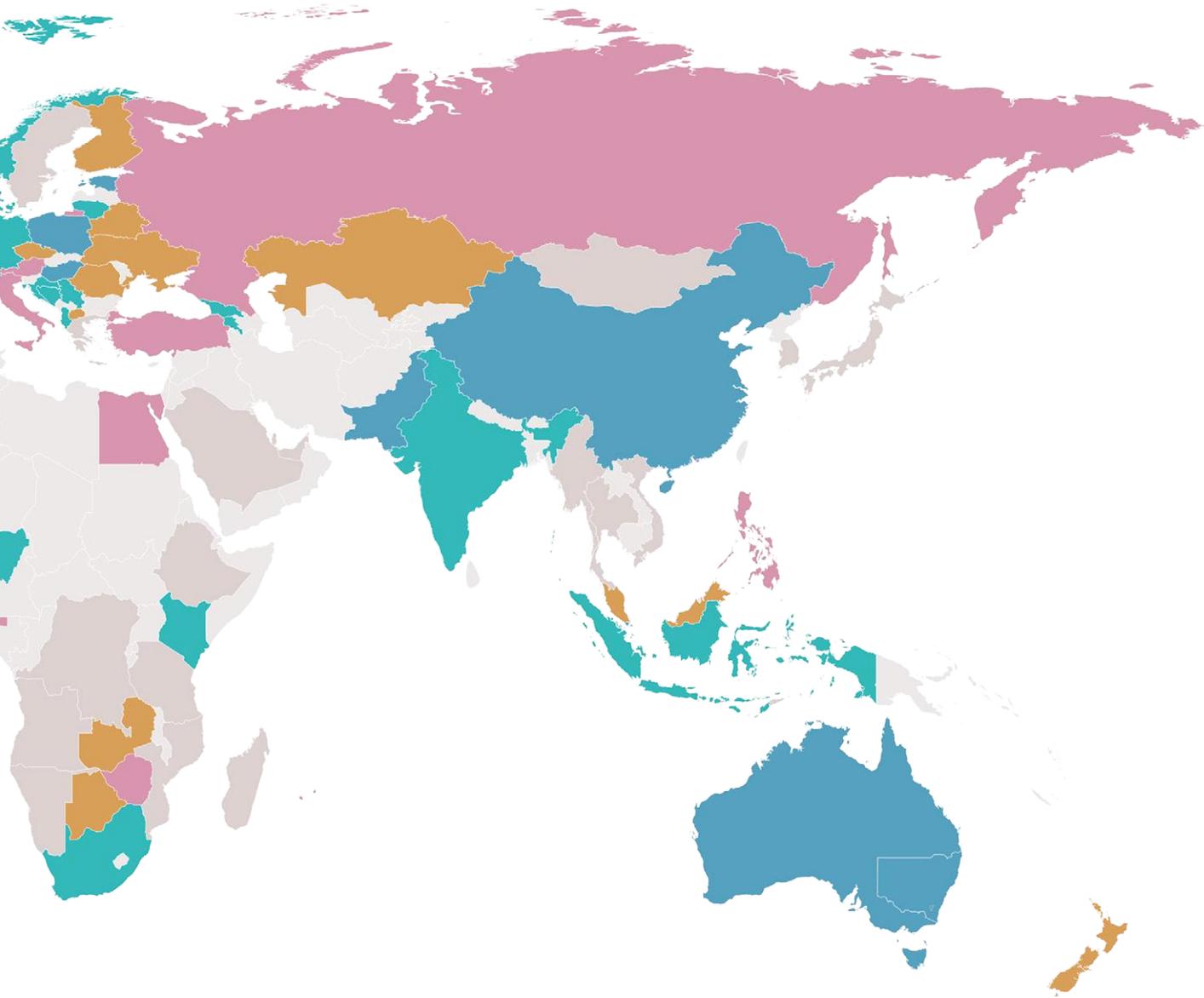
**12**  
countries

**BELARUS  
BOTSWANA  
CZECH REPUBLIC  
FINLAND  
KAZAKHSTAN  
LUXEMBOURG**

**MACEDONIA  
MALAYSIA  
NEW ZEALAND  
ROMANIA  
UKRAINE  
ZAMBIA**

# 2010 to 2016

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## B. Increasing use of trial waivers

49. Besides the growth in the number of countries formally recognising and ratifying trial waivers, the incidence of their use has also grown markedly in many countries. Data collection on the use of trial waivers is generally poor in most countries. The survey requested statistical information on the percentage of criminal cases resolved via trial waivers, but this information was not found by researchers in most jurisdictions. Even where it is available, differences and insufficiencies in data collection make comparison between jurisdictions difficult, because the basis for the statistics available is not the same.
50. For example, some statistics relate to the total percentage of cases resolved through a guilty plea, but do not necessarily consider whether the plea is part of a trial waiver (this is the case, for example, in data from the US). Other statistics may be based on several types of trial diversion, only some of which may fall within our definition of trial waiver systems, and others are limited to data from particular courts (for example, the statistics available from England and Wales relate only to Crown Court proceedings, although many trial waivers are made without data being collected in the Magistrates' Court). Therefore any comparison of statistics is necessarily imprecise. Even so, the data available demonstrates notable patterns.
51. In the jurisdictions for which data was available, reliance on trial waivers varies substantially. However, there were several striking examples of the way in which trial waivers, once introduced, can quickly come to dominate criminal proceedings at the expense of traditional trials.
52. The US famously resolves 97% of its federal criminal cases through guilty pleas.<sup>72</sup> While it is unclear, due to the lack of recording of plea negotiations, how many of these guilty pleas are entered as part of a trial waiver system, experts in US criminal justice believe it to be the overwhelming majority. The US is undoubtedly the country most extreme in its reliance on trial waivers, but it is not alone in substantial reliance on such procedures to resolve cases. In the higher courts of England and Wales, for example, in 2014 70% of all criminal cases,<sup>73</sup> and 90% of convictions,<sup>74</sup> were resolved through a trial waiver (known as "guilty plea").
53. In several countries, use of trial waivers rose rapidly in a matter of a few years. For example, in Georgia, 12.7% of cases were resolved via trial waivers (known as "plea bargaining") in 2005, which ballooned to 87.8% of cases in 2012. Similarly in Russia, use of trial waivers (through the abbreviated trial procedure) shot up from 37% in 2008 to 64% in 2014. In the first instance courts in Chongqing (one of China's major cities), the use of trial waivers (known as "summary procedure") increased from 61% in 2011, to 82% just two years later in 2013. In South Africa, where trial waivers (known as "plea and sentence agreements") only account for 13.5% of case resolutions, the National Prosecuting Authority's Annual Report for 2014-15 nonetheless reported a 33% increase from the prior year.<sup>75</sup>
54. However, it is not the case that, once introduced or formalised, trial waivers always come to dominate criminal procedure. In Italy, for example, which has utilised trial waivers (known as "*patteggiamento*") since 1989, only about 4% of criminal cases are resolved through this system. In the state of New South Wales in Australia, the percentage of persons charged who were sentenced after entering a guilty plea<sup>76</sup> has remained steady at close to 60% for the past decade – not an insubstantial number, but not apparently rising further. The paucity of reliable, comparable data on the operation of trial waiver systems makes it impossible to fully assess the scope of these widescale procedural changes.

72. United States Sentencing Commission's 2016 Sourcebook of Federal Sentencing Statistics. Available at: <http://www.ussc.gov/research/sourcebook-2016>.

73. "Crown Court Sentencing Survey Annual Publication", the Sentencing Council (2014). Available at: <http://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>.

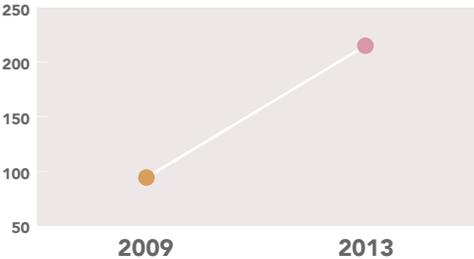
74. "Court Statistics Quarterly, January to March 2014", Ministry of Justice, Statistics Bulletin (Jun. 19 2014). Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321352/court-statistics-jan-mar-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf).

75. "Annual Report of the National Prosecuting Authority from 2014–2015". Available at: <https://www.npa.gov.za/sites/default/files/annual-reports/Annual%20Report%202014%20-%202015.pdf>

76. NB the statistics provided do not make clear what percentage of these guilty pleas were the product of a trial waiver as defined.

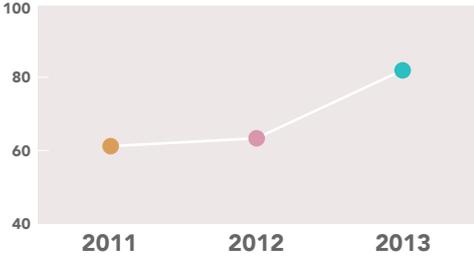
### Argentina

Number of cases disposed of using summary trial in the national federal criminal courts in the city of Buenos Aires



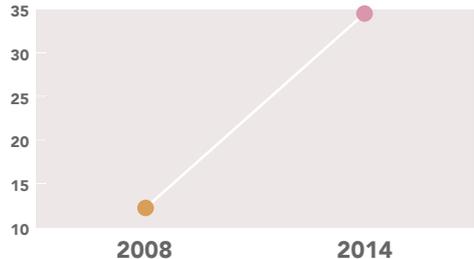
### China

Percentage of cases disposed of in the Basic People's Courts of Chongqing using Summary Procedure



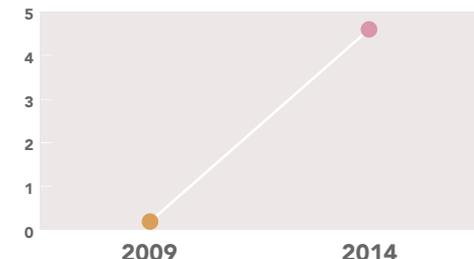
### Colombia

Percentage of cases resolved through trial waiver systems



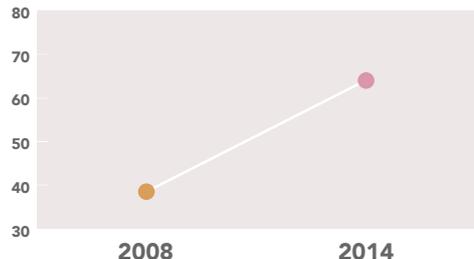
### Croatia

Percentage of cases resolved through trial waivers systems



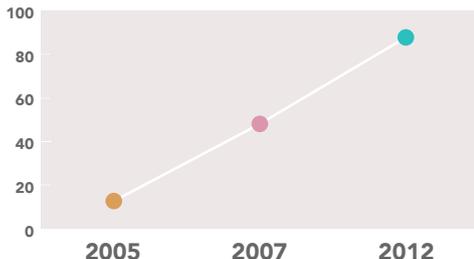
### Estonia

Percentage of cases resolved through settlement proceedings in first instance criminal court



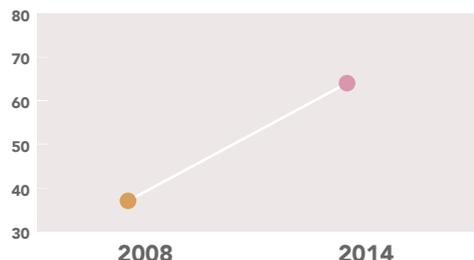
### Georgia

Percentage of cases resolved through trial waiver systems



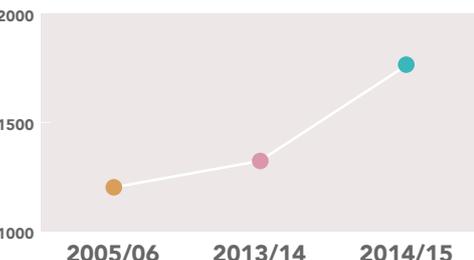
### Russia

Percentage of cases disposed of using Abbreviated Trial Procedure

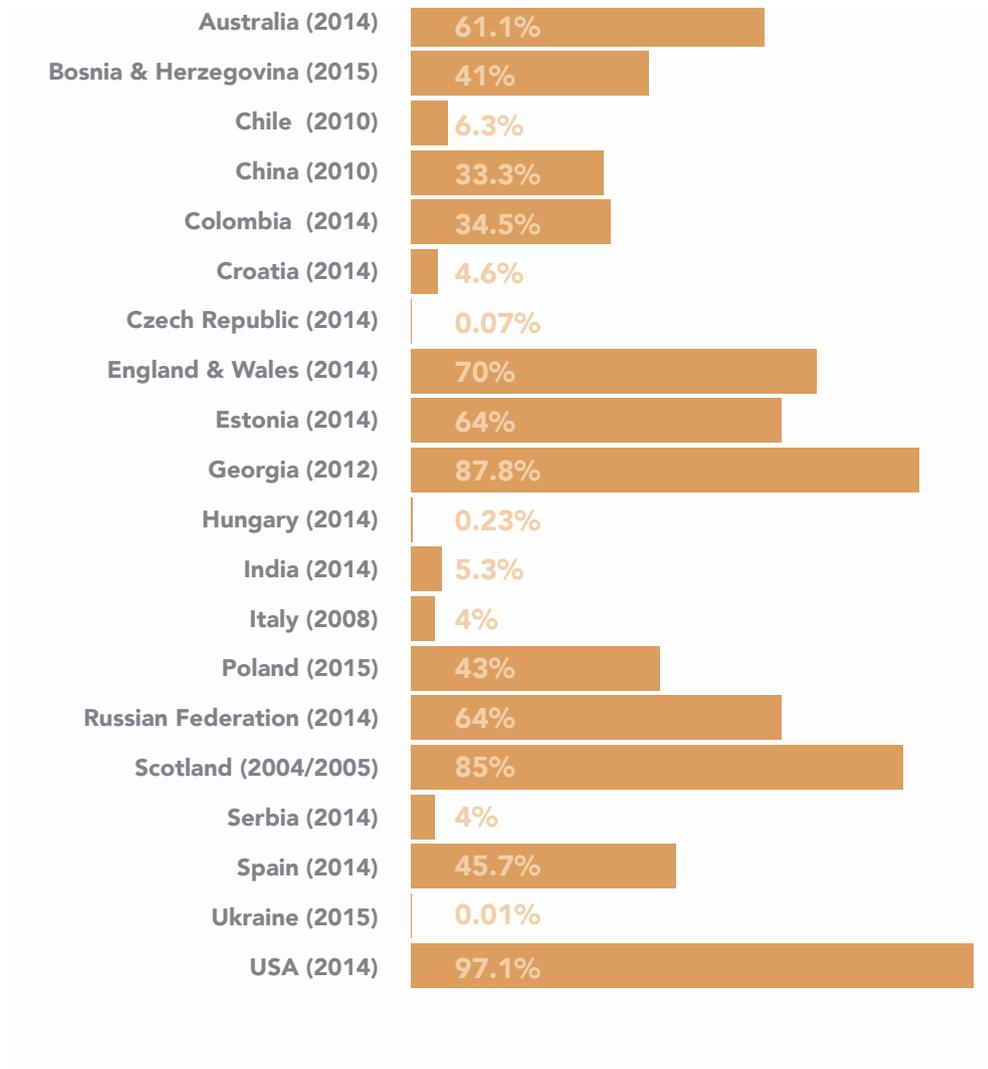


### South Africa

Number of plea agreements concluded



## Percentage of cases resolved through trial waiver systems



55. Even when data is available, there is no existing indicator that would establish an optimal percentage of cases that should be dealt with using full trial procedure as opposed to trial waivers. However, it is worth noting that in a substantial minority of jurisdictions employing trial waivers, the practice comes to all but replace trials, sometimes in a very short time frame. As illustrated through the previous analysis of the US system, a number of risks to due process and human rights protection, as well as unintended system-wide effects on the behaviour of police, prosecutors, defendants, judges, and legislators devising criminal policy, may accompany such reliance on trial waiver systems in place of trials.

## Case study: Flavia Totoro

Flavia Totoro was arrested at a public protest organised in Madrid in 2011 after she was involved in an altercation with police officers. Eight more demonstrators were arrested in the aftermath of the protest. After spending forty five hours in detention, Flavia was charged with an offence of assaulting a police officer for which the prosecution sought a penalty of a year and a half imprisonment. She also found that despite the fact that she did not know or have any connection with the other protesters, she and all the other detainees were to be heard as co-accused in one single judicial proceeding.

In 2016, before the start of her trial, the prosecutor offered Flavia a settlement whereby her penalty would be reduced to a monetary fine if she was to plead guilty for the alleged offences. Given the refusal of the prosecution to separate the proceedings for each one of the accused, she was faced with the dilemma of either taking the plea deal and have her penalty and those of her co-accused (who were facing much higher penalties) reduced to monetary fines or refusing to plead guilty and continue with the proceedings to demonstrate her innocence (which she maintains to date).

Flavia was told that "she either plead guilty or all the others accused would be at risk of being sentenced to prison". Despite having enough evidence to prove her own

innocence in trial, she felt coerced to accept her guilt in order to protect her fellow demonstrators from being found guilty at trial and put in prison. As a result, all the accused, including herself, had their prospective penalties reduced to monetary fines.

Flavia maintains that she was arbitrarily detained and that she was forced to admit to acts that she had not committed and to take the guilty plea despite being innocent, all in order to avoid causing harm to the co-accused. Flavia just could not bear the burden of putting her fellow demonstrators at risk of imprisonment. Taking the plea deal was also an opportunity to put an end to the judicial proceedings that had been going on for over five years.

### C. Reasons for introduction of trial waiver systems

56. Many different justifications are cited as reasons for adopting trial waiver systems, most related to efficiency aims, but there is a nearly uniform failure on the part of authorities to assess whether these aims are achieved in practice. The Phase 1 survey asked respondents why trial waiver systems were introduced or used in each jurisdiction.<sup>77</sup> In some cases, where the practice was formally introduced in legislation (rather than, for example, jurisdictions in which higher courts ratified the practice through case law), it was possible for respondents to identify the stated intent of the statute. Other respondents cited commentary by judges in key cases or guidelines provided to prosecutors in relation to trial waivers. Still others provided rationales with no clear evidentiary basis, apparently reflecting the common views of stakeholders in the criminal justice system.

57. 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.

#### i. Efficiency

58. Efficiency-related justifications were the most cited reasons given in the surveys for the use of trial waiver systems. These rationales take a variety of related forms.

##### *Reduction in case backlogs*

59. Many countries represented in the survey have justified the use of trial waiver systems as a means to clear long-standing case backlogs, which create often intolerable delays. This is a serious concern for countries regularly found to be violating defendants' right to a trial within a reasonable period of time. Finland, for example, adopted a trial waiver system in 2015 which is made up of several mechanisms, including a process whereby guilty pleas are made during the pre-trial investigation (known as "*tunnustamismenettely*"), in which the case is heard in a full criminal trial, and a plea bargaining procedure which takes place post-investigation (known as "*syyteneuvottelu*"). The law which came into force in

January 2015 was introduced as a result of concerns by the Ministry of Justice about the number of European Court of Human Rights (ECtHR) cases in which Finland was found to have violated Article 6(1) of the European Convention on Human Rights (ECHR), which ensures trial within a reasonable period of time.

60. Some jurisdictions, according to the surveys, have justified the adoption of a trial waiver system as "simplifying" proceedings or reducing procedural requirements and associated timeframes. This view is supported by the Council of Europe, which has recommended the use of simplified judicial proceedings including trial waivers (which it refers to as "guilty pleas") and other forms of simplified and abbreviated proceedings, along with increased prosecutorial discretion to dismiss charges.<sup>78</sup> The survey from Macedonia, for example, specifically cited the influence of the Council of Europe's recommendation as part of the government's adoption of a trial waiver system (known as "plea bargaining").

##### *Human resources savings*

61. Many of the responses to the Phase 1 surveys and the experts surveyed in Phase 2 of the research expressed the belief that trial waiver systems allowed straightforward cases with little in dispute to be resolved more quickly, freeing up prosecutors' and judges' time for contested cases. However, some respondents, for example from Serbia, indicated that trial waivers (which include both "plea agreements" and a witness collaborator programme) have in fact increased workloads in particular for prosecutors.

##### *Public spending*

62. In 23 survey responses, the rationale given for the introduction of trial waiver systems was the savings in public spending on the justice system which can be achieved as a result. Little data is collected in many jurisdictions to establish what savings, if any, had actually been made due to the adoption of trial waiver systems, 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, for

77. Responses to this query from survey respondents are summarised in the table available at Annex I.

78. 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. Available at: [http://www.barobirlik.org.tr/dosyalar/duyurular/hsykanunteklifi/recR\(87\)18e.pdf](http://www.barobirlik.org.tr/dosyalar/duyurular/hsykanunteklifi/recR(87)18e.pdf). At part III, paras. 7–9, it reads: "Wherever constitutional and legal traditions so allow, the procedure of "guilty pleas", whereby an alleged offender is required to appear before a court at an early stage of the proceedings in order to state publicly to the court whether he accepts or denies the charges against him, or similar procedures, should be introduced. In such cases, the trial court should be able to decide to do without all or part of the investigation process and proceed immediately to the consideration of the personality of the offender, the imposition of the sentence and, where appropriate, to decide the question of compensation. 8.(i) The "guilty plea" procedure must be carried out in a court at a public hearing. (ii.) There should be a positive response by the offender to the charge against him. (iii.) Before proceeding to sentence an offender under the "guilty plea" procedure, there should be an opportunity for the judge to hear both sides of the case. 9. Where the investigation process at the court hearing is retained, notwithstanding the willingness of the accused to admit his guilt, it should be restricted to those steps absolutely necessary for establishing the facts, taking account of procedure already gone through prior to the trial. In particular, the hearing of witnesses who have previously testified before a judicial authority should be avoided as far as possible."

example, impose further costs on the criminal justice system, due to the increased capacity to prosecute high volumes of cases and unforeseen changes to sentencing. Budgets for government agencies with authority over trial procedures (for example, Ministries of Justice) are often separate from those involving sentenced prisoners (for example, Ministries of Prisons and Correctional Services), which can make tracking the full impact of trial waiver systems difficult.

63. For example, a resource assessment from the Sentencing Council of England and Wales (the Sentencing Council) considered that a change in policy designed to encourage earlier guilty pleas might result in an additional cost of £20 million (under what is termed the “optimistic scenario”) to £50 million (under the “pessimistic scenario”) due to a potential increase in the number of prison places required. The Sentencing Council was unable to quantify the potential savings in costs due to reductions in length of the procedure.<sup>79</sup> Similarly, while a slight reduction in the rate of pre-trial detention in Colombia could be detected following the adoption of a trial waiver system (known as “*reconocimiento de culpabilidad*”), growth in the population of convicted prisoners cast into doubt whether cost savings as such were achieved.<sup>80</sup>

#### *Mass prosecutions and minor offences*

64. Some trial waiver systems, particularly those which take the form of abbreviated trials or other summary proceedings, are designed primarily to deal with minor crimes. This is evidenced by the fact that in many countries, trial waivers are limited to offences carrying certain maximum sentences (for example, less than six years in the Argentine system). The use of trial waivers to deal specifically with minor crimes is usually related to efficiency goals.
65. However, it is not always clear that these goals are being achieved depending on the indicator of efficiency used. This is because an increase in the ease of processing minor cases allows for a greater number of such prosecutions. More minor cases may therefore proceed to conviction with trial waivers where they may otherwise have been dropped by prosecutors, or

the form of trial waiver system adopted may promote overcharging by prosecutors, as noted in the US.

#### **ii. Trial waiver systems introduced as part of larger reforms to criminal procedure codes**

66. It is relatively common for trial waiver systems to be introduced together with a package of reforms in an overhaul of 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<sup>81</sup> (e.g. Chile, Argentina, Colombia, and Mexico), in the Western Balkans (e.g. Macedonia, Serbia, and Bosnia and Herzegovina), as well as in South Africa. Several EU jurisdictions have also recently adopted various forms of trial waiver systems as part of a move to include more adversarial practices such as oral trials. For example, Italy crafted its system of *patteggiamento* as part of a new Criminal Procedure Code which came into force in 1989 and which adopted certain elements of adversarialism inspired by the US legal system, justified by both efficiency and due process considerations.<sup>82</sup> Romania too included a trial waiver system (known as “recognition of guilt”) in its new Criminal Procedure Code adopted in 2014, and the respondent to our survey explicitly noted the influence of the US model on this process.
67. In these situations, the introduction of trial waiver systems is part of a larger ideological and political project with a number of aims and changes to procedure made at once or as part of one legislative motivation. These reforms are generally associated with a legal system that is more democratic, transparent, and inclusive, with better access to justice for victims and defendants alike.<sup>83</sup> In situations in which trial waiver systems are adopted as part of larger reforms, it can sometimes be difficult to identify the precise justification for such systems themselves as a discrete aspect of new criminal codes and practices. This complexity can also make it difficult to determine whether or not trial waiver systems are indeed functioning as intended.

79. “Consultation Stage Resource Assessment: Reduction in Sentence for a Guilty Plea”, the Sentencing Council, paras. 4.1–4.9. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Consultation-Resource-Assessment-Reduction-in-sentence-for-a-guilty-plea.pdf>.

80. Zorro, A., “The Impact of Adversarial Criminal Justice in the Prison Population: Evidence from the Colombian Case” (June 26, 2015). Available at: <https://ssrn.com/abstract=2623741>; or <http://dx.doi.org/10.2139/ssrn.2623741>.

81. Langer, M., “Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery”, *American Journal of Comparative Law*, Vol. 55, No. 4 (Fall 2007), pp. 662-665, highlighting the work of regional activists and experts in promoting comprehensive reforms to criminal procedure. Available at: [http://live.v1.udesa.edu.ar/files/UA\\_Derecho/SGD%202013/Lange-Revolutionin-Latin-American-Criminal-Procedure.pdf](http://live.v1.udesa.edu.ar/files/UA_Derecho/SGD%202013/Lange-Revolutionin-Latin-American-Criminal-Procedure.pdf).

82. Langer, “From Legal Transplants to Legal Translations”, *supra* at n. 8, p. 60.

83. See, e.g., DeShazo, P. and Vargas, J. E., “Judicial Reform in Latin America: An Assessment”, Center for Strategic and International Studies, Policy Papers on the Americas, Vol. XVII, Study 2 (Sept. 2006). Available at: [http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/0609\\_latam\\_judicial\\_reform.pdf](http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/0609_latam_judicial_reform.pdf).

### iii. Tool in the fight against complex crime

68. Another reason commonly put forward as a justification for the introduction of trial waiver systems is to aid in the effective detection and prosecution of complex crime. It was the view of some survey respondents that trial waiver systems, usually those taking the form of cooperation agreements or crown witness systems, were necessary in order to build cases in prosecutions for which little evidence was available to investigators without the assistance of insider witnesses. The kinds of investigations usually cited were financial crime, environmental crime, corruption, and drug trafficking.
69. The use of trial waivers (known as “*delação premiada*”) in relation to cooperating witnesses in the Lavo Jato/Petrobras prosecution in Brazil is a high-profile example of this practice, which has been subject to some public criticism. The media reported that a group of Brazilian public defenders had accused investigators in the case of using arrests “to get plea-bargain agreements like in an inquisition.”<sup>84</sup> At the same time, the trial waivers came under criticism from other quarters for appearing to allow defendants to evade justice with substantial sentence reductions, and for the potentially unreliable nature of co-conspirators’ testimony.<sup>85</sup>
70. Some respondents to the surveys questioned whether trial waiver systems did indeed produce more or better quality prosecutions in these areas. On the contrary, trial waivers can sometimes cut short investigations by prematurely concluding proceedings. States are increasingly mounting high-profile anti-corruption prosecutions in order to tackle public perceptions of impunity of business and government actors. When these rely on trial waivers in order to secure convictions, the public often perceives further corruption in the justice system.<sup>86</sup> The use of trial waiver systems to secure convictions in cases involving public corruption and government collusion is a double-edged sword for governments seeking to rebuild public faith in justice systems – trial waivers may be necessary to combat impunity and complex crime, but at the same time may undermine public faith in the system.

### iv. Accurate and individualised charging and sentencing

71. Though it was not specifically mentioned by survey respondents, it has been suggested that trial waivers are seen as a method of arriving at more accurate charges through direct communication between the parties that does not use court time and resources. Related to this is the ability of some courts to ratify creative, individualised and problem-solving sentences struck between the parties; for example, crafting sentences that do not trigger particular collateral consequences or that permit defendants to maintain employment, or may be used in the context of “problem solving courts” with special procedures for drug users or defendants with mental illness.<sup>87</sup> However, individualised sentencing can also lead to inconsistent, potentially arbitrary, and at times, discriminatory outcomes.<sup>88</sup>

### v. Victims’ interests

72. Many jurisdictions employing trial waiver systems do so in order to spare victims the trauma of testifying, or being subjected to lengthy proceedings with uncertain conclusions. For example, England and Wales is due to introduce changes to its trial waiver system (in particular, the guidelines on reductions in sentence for a guilty plea) to incentivise defendants to plead guilty at the first appearance in court. The Sentencing Council has stated that one of the primary reasons for this change is so that “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>89</sup> Surveys from jurisdictions including the Cayman Islands, Croatia, New Zealand, Norway and South Africa similarly cited the desire to avoid victims being re-traumatised by trial as a motivating factor for introducing trial waiver systems.

84. Costa, P. C., “What if the ‘pre-plea bargain’ doesn’t turn into a real plea bargain?”, *Folha de S. Paulo* (Jul. 11, 2016). Available at: <http://www1.folha.uol.com.br/internacional/en/ombudsman/2016/07/1790539-what-if-the-pre-plea-bargain-doesnt-turn-into-a-real-plea-bargain.shtml>. See also “Weird Justice: Corruption in Brazil”, *The Economist* (Dec. 10 2015). Available at: <http://www.economist.com/news/americas/21679861-courts-treat-suspects-too-harshly-and-convicts-too-leniently-weird-justice>.

85. Vieira, L., “Argentina to Expand Use of Plea Bargaining Inspired by Brazil”, *Americas Quarterly* (Mar. 24, 2016). Available at: <http://www.americasquarterly.org/content/argentina-expand-use-plea-bargaining-inspired-brazil>.

86. See Alkon, “Plea Bargaining as a Legal Transplant”, *supra* at n. 10, p. 357, stating that ‘informal negotiation may look like another form of corruption in countries whose legal systems already suffer from endemic corruption and serious legitimacy problems’. Available at: <http://scholarship.law.tamu.edu/facscholar/268/>. See also Alkon, “Introducing Plea Bargaining into Post-Conflict Legal Systems”, *supra* at n. 66, p. 16, discussing the example of Nigeria.

87. See, e.g., Alkon, “Introducing Plea Bargaining into Post-Conflict Legal Systems”, *supra* at n. 66, p. 10.

88. Smith, R. J. and Levinson, J. D., “The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion”, *Seattle University Law Review*, Vol. 35 (2012), pp. 816–818. Available at: <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/levinson.pdf>.

89. “Reduction in Sentence for a Guilty Plea Guideline: Consultation”, the Sentencing Council (Feb. 11, 2016), p. 7. Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf>.

73. However, it is not always clear that victims' interests are routinely served by trial waivers. The Sentencing Council's own research noted that "not all of the victims who took part supported the idea of offenders receiving a reduced sentence for pleading guilty."<sup>90</sup> Some victims object not only to the reduction in sentence, but also to the perceived loss of the public, truth-seeking function of criminal trials. In New South Wales in Australia, for example, where an informal system of charge incentives has long been tolerated, trial waivers (known as "charge negotiations") became more formally regulated due to concerns that fact and charge negotiations did not sufficiently respect victims. According to the Phase 1 survey response, in 2001 prosecutors negotiated a plea deal in a high-profile rape case in which the statement of facts agreed upon by the prosecution and the defendants differed substantially from the version of events told by the victims.<sup>91</sup> The case received outrage in the media, and led to a review and new guidelines for prosecutors. Similarly, at Fair Trials' roundtable on trial waiver systems at the Pan-African Lawyers Union Conference in 2016, participants from Kenya suggested that under-use of the trial waiver system was driven in part by concerns about the lack of victim participation in the process.

#### vi. Increasing conviction rates and fighting impunity

74. Another reason given for adopting trial waiver systems is to improve conviction rates (as in Argentina, for example). One prosecutor in South Africa surveyed in Phase 2 of the research specifically stated that 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.
75. However, as observed earlier in relation to cooperation agreements, where convictions are won through trial waivers in situations where they would not have been possible following trial due to evidentiary weaknesses, loss of public faith in the justice system can result, undermining hoped-for gains in public trust as a result of improved conviction rates.

#### vii. Improving human rights protection

76. Trial waiver systems have the potential to make a positive impact on human rights protection in criminal proceedings. Crowded court dockets create bottlenecks in case processing that lead to excessive periods of pre-trial detention, a serious and widespread human rights abuse. Trial waivers are often seen as a way to reduce pre-trial detention (as was mentioned for example in the survey from India, and has been noted in relation to Chile and Bolivia, among others), both in individual cases and on a national level. Other jurisdictions have been motivated to introduce a trial waiver system in order to reduce rates of detention overall, and to promote the development of more case-specific, restitution-based sentences. China is considering expanding its trial waiver systems in order to reduce reliance on torture and other unlawful methods of interrogation.<sup>92</sup> Nonetheless, without other systematic procedural safeguards for defendants, the confession-based justice system preserved by reliance on trial waivers means that increased respect for human rights in criminal proceedings has not necessarily resulted.<sup>93</sup>

90. *Ibid.*, p. 9.

91. For a detailed overview of the events and subsequent debate, see Johns, R., "Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services", NSW Parliamentary Library Research Service, Briefing Paper No. 10/02 (Jun. 2002), ss. 7.2.1–7.2.2. Available at: <https://www.parliament.nsw.gov.au/researchpapers/Documents/victims-of-crime-plea-bargains-compensation-vict/10-02.pdf>.

92. "China Considers Plea Bargaining in Criminal Cases," Xinhua. (August 29 2016). Available at: [http://news.xinhuanet.com/english/2016-08/29/c\\_135642723.htm](http://news.xinhuanet.com/english/2016-08/29/c_135642723.htm)

93. Lynch, E. M., "May Be a Plea, but is it a Bargain? An Initial Study of the Use of the Simplified Procedure in China", Human Rights in China (Apr. 1, 2009). Available at: <http://www.hrichina.org/en/content/3703#ft27>.

# Type of trial waiver system

## Number of countries with each type of trial waiver system



**Sentence incentives**



**Charge incentives**



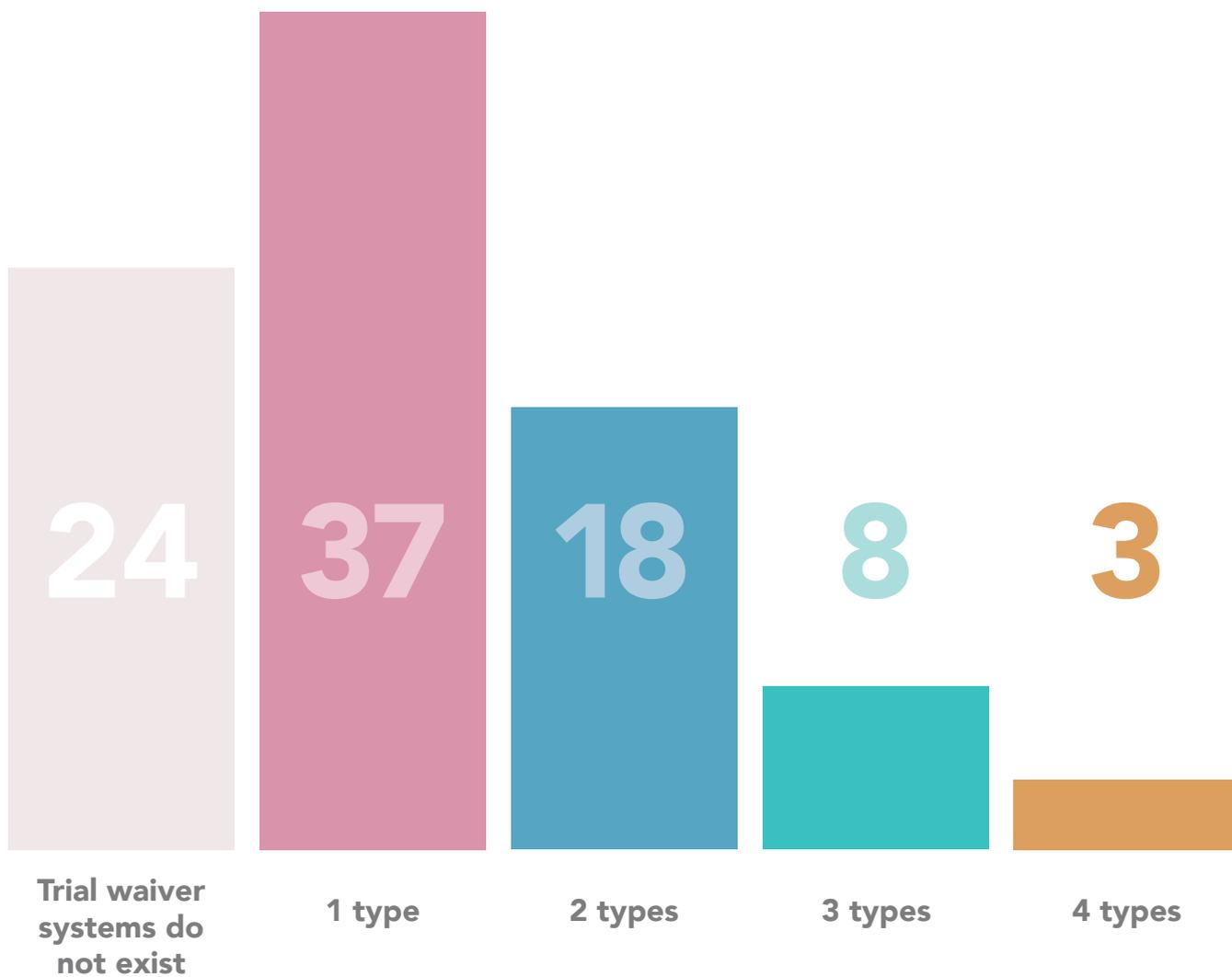
**Fact incentives**



**Crown witness/  
co-operation agreement**



## Number of jurisdictions with multiple types of trial waiver system



#### D. Types of trial waiver system

77. The practices uncovered by the survey research are diverse and take place within very different legal frameworks. Without attempting a comprehensive taxonomy of types of trial waiver system, we have set out some of the different practices that were mentioned in the surveys which fell within the given definition of trial waiver system.
78. The first distinction to be made is between formal and informal systems. The Phase 1 surveys reflected primarily trial waiver systems that were recognised by law, either in statute or in case law. We know however that informal negotiation, particularly around facts and charges, also takes place in many countries around the edges of formal systems or where trial waivers are not deemed to exist. These systems have not been captured by this research.
79. For the purposes of understanding the data we have gathered in relation to the different trial waiver systems in operation across the globe, we have categorised them according to the reliance on charge, fact and sentence incentives, defined as follows:
- Sentence incentives: The type of punishment and/or the length of 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 and/or certain facts may not be introduced into evidence in exchange for a concession by the defendant.
  - Charge incentives: Charges against the defendant may be reduced and/or terminated in exchange for a concession by the defendant.
  - Cooperation agreement/crown witness system: The defendant agrees to assist with the investigation and/or prosecution of offences (including, but not limited to, by testifying against others), in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences.
80. According to our research, around 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 with trial waiver systems provide for crown witness systems or cooperation agreements.<sup>94</sup>
81. Of course, these are not always cleanly defined and separable categories, and 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. This complexity has been captured to some extent by the identification of jurisdictions that feature more than one type of system. 37 jurisdictions have only one type – the majority of these are sentencing incentives or cooperation agreements; 18 jurisdictions feature two types of trial waiver system; eight feature three types; and three jurisdictions allow for all four types. The three jurisdictions which allow for all four types – the US, England and Wales, and Australia – are the classic common law examples in which prosecutors have a largely unfettered ability to negotiate directly with defendants. At the other end of the spectrum, in 20 of the surveyed jurisdictions, respondents indicated that trial waivers are “part of the full criminal trial,” as reflected in surveys from Costa Rica and Egypt amongst others.
82. Within these categories, substantial variation also exists. Of the countries which fall in the category of sentence incentives, some jurisdictions allow for sentencing below statutory guidelines. In Costa Rica, for example, the “special procedure” permits defendants to serve as little as one third of the minimum sentence. Other jurisdictions allow for the payment of a fine in place of, or to reduce the length of, imprisonment (as in Georgia) while others (such as Armenia, Germany and South Africa) do not allow for sentences falling below given guidelines. Judges also have differing levels of discretion over sentencing across jurisdictions. For example, some jurisdictions regulate discounts by statute (for example, in Turkey, different discounts are available for different offences i.e. one quarter discount for trading in organ and tissues, two thirds discount for deprivation of freedom, and a half discount for larceny), and others more loosely by case law or custom (for example, it is generally customary for defendants in Hong Kong to receive a one third discount for pleading guilty). Some jurisdictions, such as Canada, generally

94. A full table of findings in relation to types of plea bargaining available in each of the studied jurisdictions is available at Annex I.

require sentencing judges to follow the joint recommendations of parties on sentencing, while in others, such as Australia, judges maintain more discretion over sentencing (although discounts are systematic and predictable in practice). Further, in some jurisdictions, it is sometimes possible to receive a sentence indication from the judge so that parties can better anticipate the ultimate result of negotiations, as is the case in New Zealand.

83. 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<sup>95</sup> (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 over procedure and evidential requirements as opposed to other types of trial waiver systems.
84. Some jurisdictions, such as Chile, which have introduced trial waiver systems more recently, have attempted to combine elements of varying existing types. When considering whether or not to adopt a trial waiver system, Chile's Constitutional Commission (the Commission) drafted a report which involved comparative examples of different systems worldwide. The Commission identified two major types of trial waiver system: the "North American system, where the defendant is asked if he pleads guilty or not" and "the European system that refers only to the proceeding, where the defendant remains innocent but accepts to renounce his right to an oral trial."<sup>96</sup> The Commission went on to claim that the European system "has not worked in practice, because the sentence reduction is minimum and the investigation is too rigid."<sup>97</sup> Instead, it suggested a hybrid model in which the defendant pleads guilty, but the prosecutor must provide additional evidence to support the charges.

#### E. Jurisdictions without trial waiver systems

85. It is also worth noting that not all of the jurisdictions surveyed have trial waiver systems, as defined for the purpose of the research. In 24 jurisdictions out of the 90 surveyed, no practice falling within the definition was identified. Portugal is an example of a jurisdiction in which, after trial waivers (known as "negotiated sentence agreements") had been tolerated for some time, the Supreme Court overtly prohibited these as unconstitutional through a judgment in 2013.<sup>98</sup> The Supreme Court found that not only does Portuguese criminal procedure law prohibit negotiated sentence agreements, but that it is, more broadly, forbidden to produce evidence of the defendant's confession obtained in return for the promise of reduced punishment by the Public Prosecutor. This decision was based mainly on an interpretation of the Portuguese constitutional understanding of the separation of powers, which holds that it is the Public Prosecutor's job to investigate and prosecute, and the judge's job to pass judgment and impose punishment. As a consequence of that ruling, the General Prosecutor issued a directive to all prosecutors prohibiting them from engaging in any trial waivers.
86. Despite the fact that trial waivers per se are prohibited, Portugal nonetheless permits a variety of mechanisms for diversion of cases that do not conform to the given definition of trial waiver systems (due to the fact that they do not result in a criminal conviction), but nonetheless seek to deal with criminal accusations using means other than a full trial.

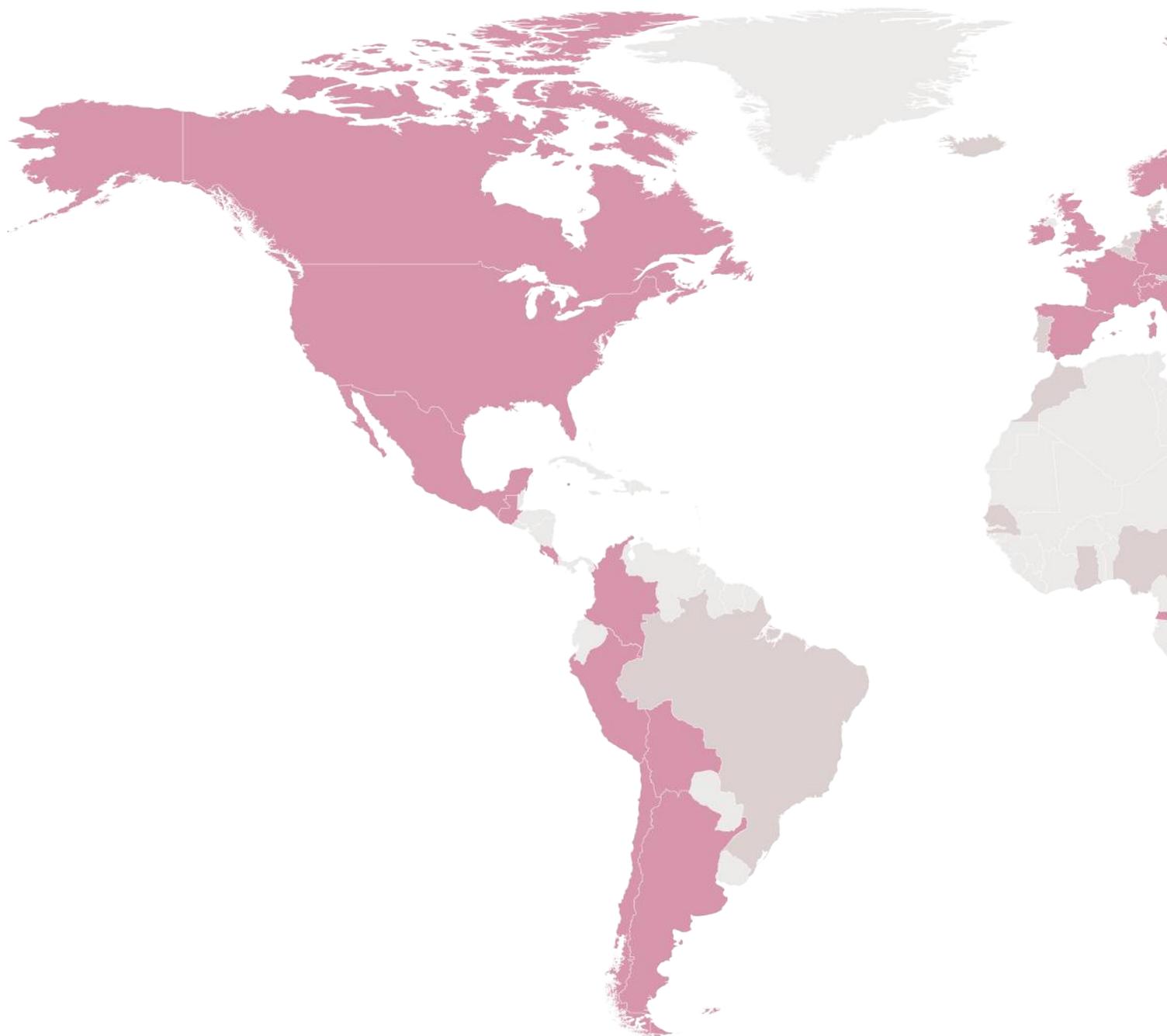
95. Alkon, "Plea Bargaining as a Legal Transplant", *supra* at n. 10, pp. 384–386.

96. "Historia de la ley No. 19.696: Establece Código Procesal Penal", Biblioteca del Congreso Nacional de Chile (Oct. 12, 2000), p. 1541.

97. *Ibid.*, pp. 1541–1542.

98. Crown Court: *Decisão Soanes*, 1948; *Caso Coward*, 1979. Tribunal De Recurso No *Caso Hollintong And Emmens*, De 1986. Tribunal Constitucional Alemão: – Nstz 87, 419. Available at: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/533bc8aa516702b980257b4e003281f0?OpenDocument>.

## Type of trial waiver system



**45**  
countries

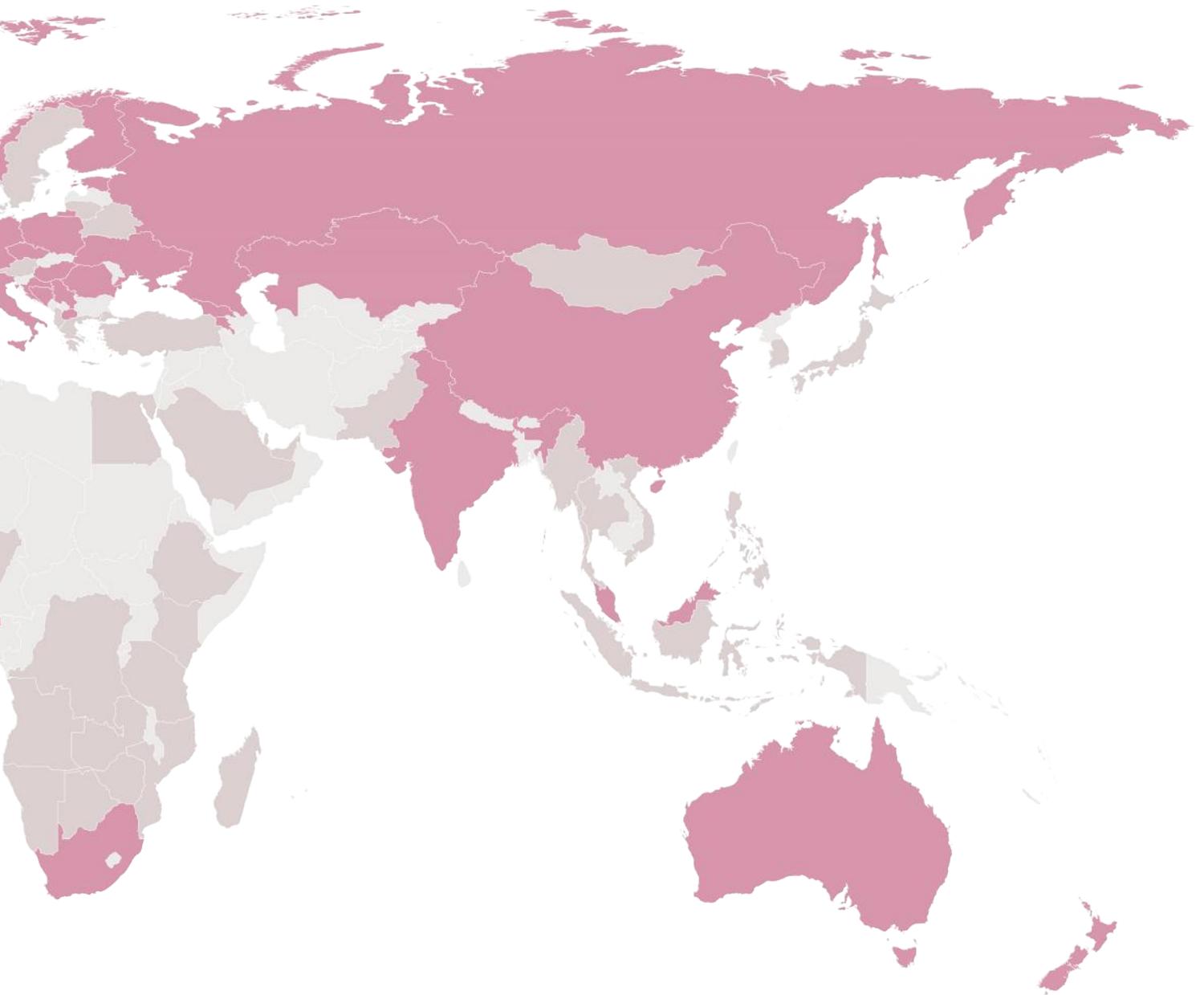
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CHINA

COLOMBIA  
COSTA RICA  
CROATIA  
CZECH REPUBLIC  
ENGLAND & WALES  
EQ. GUINEA  
ESTONIA  
FRANCE  
FINLAND  
GEORGIA

GERMANY  
GUATEMALA  
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ITALY  
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KAZAKHSTAN  
LUXEMBOURG

## Sentence incentives

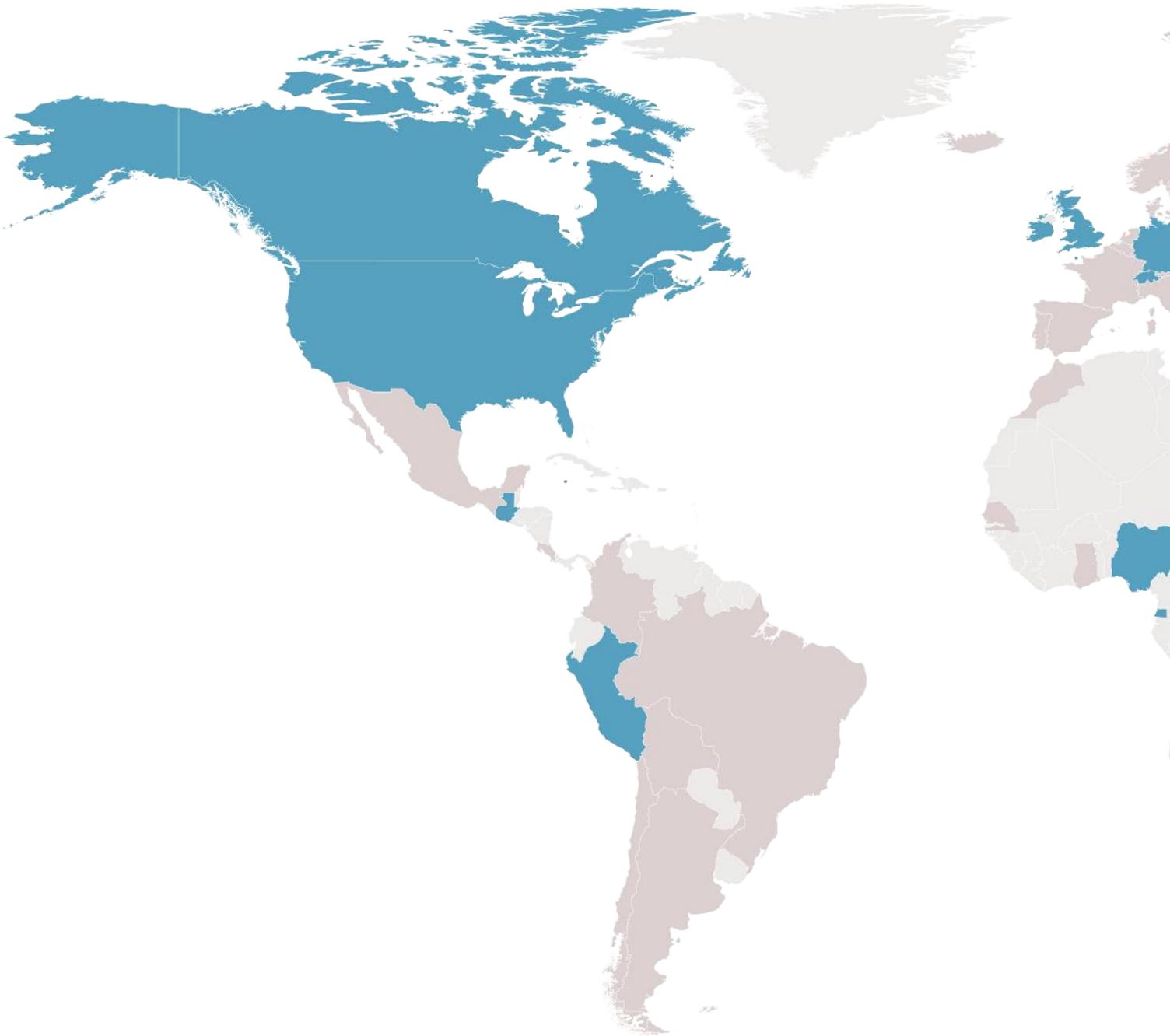
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**MACEDONIA**  
**MALAYSIA**  
**MEXICO**  
**NEW ZEALAND**  
**NORWAY**  
**PERU**  
**POLAND**  
**ROMANIA**  
**RUSSIAN FEDERATION**  
**SCOTLAND**

**SERBIA**  
**SOUTH AFRICA**  
**SPAIN**  
**SWITZERLAND**  
**UKRAINE**  
**USA**

## Type of trial waiver system



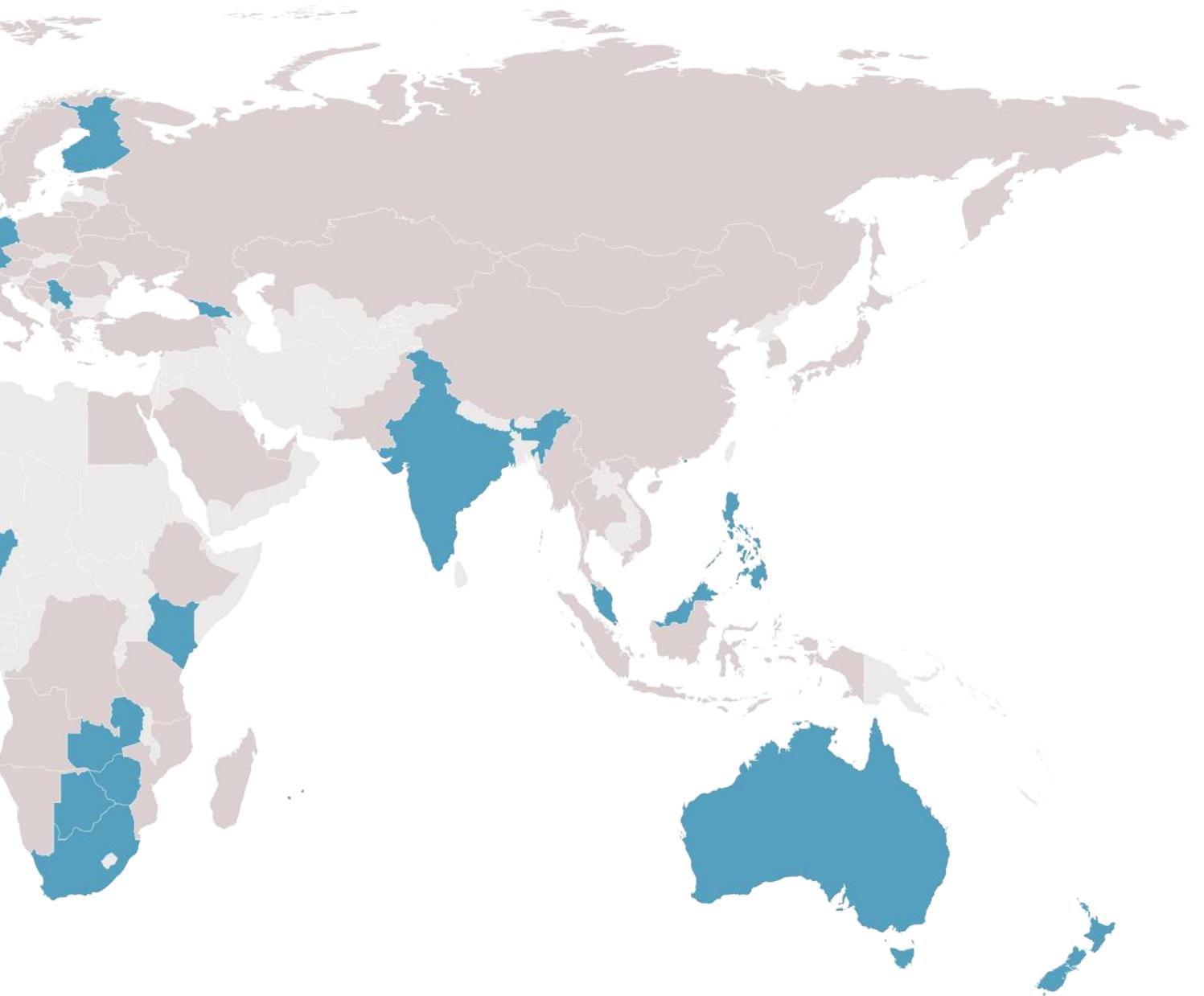
**29**  
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FINLAND  
GEORGIA

GERMANY  
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KENYA  
MALAYSIA

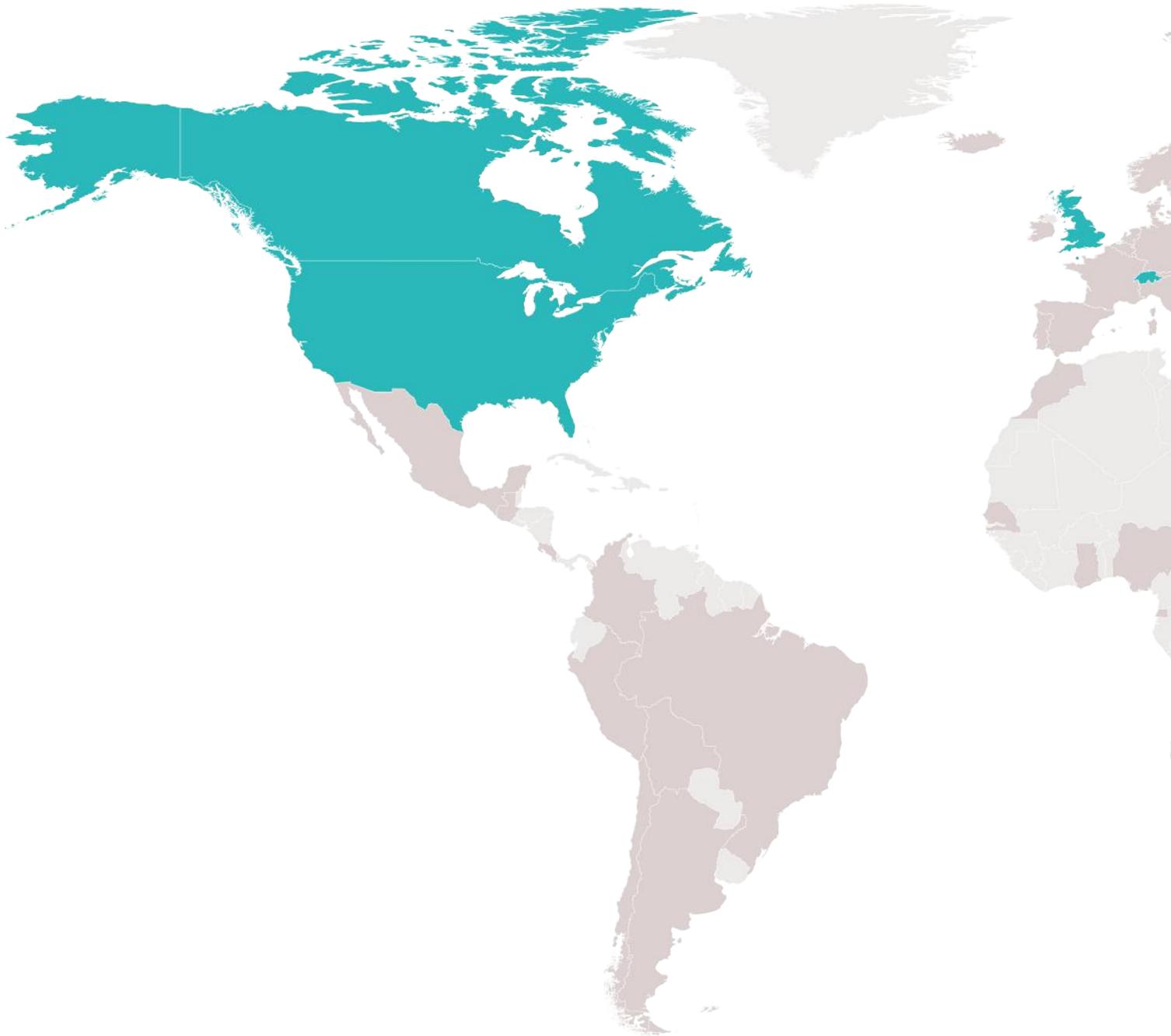
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PERU  
PHILIPPINES  
SCOTLAND  
SERBIA  
SINGAPORE

## Charge incentives



**SOUTH AFRICA  
SWITZERLAND  
USA  
ZAMBIA  
ZIMBABWE**

## Type of trial waiver system

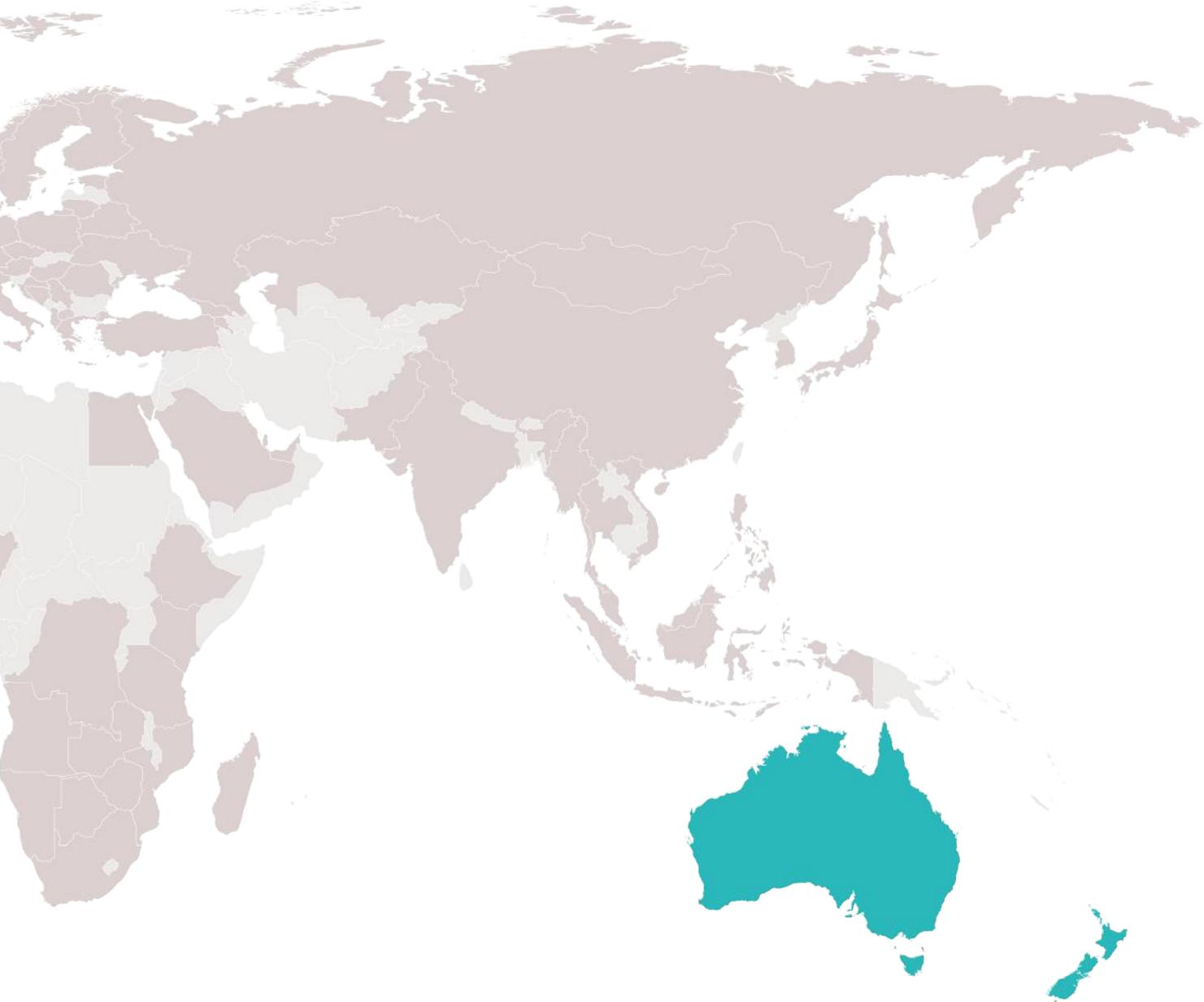


**8**  
countries

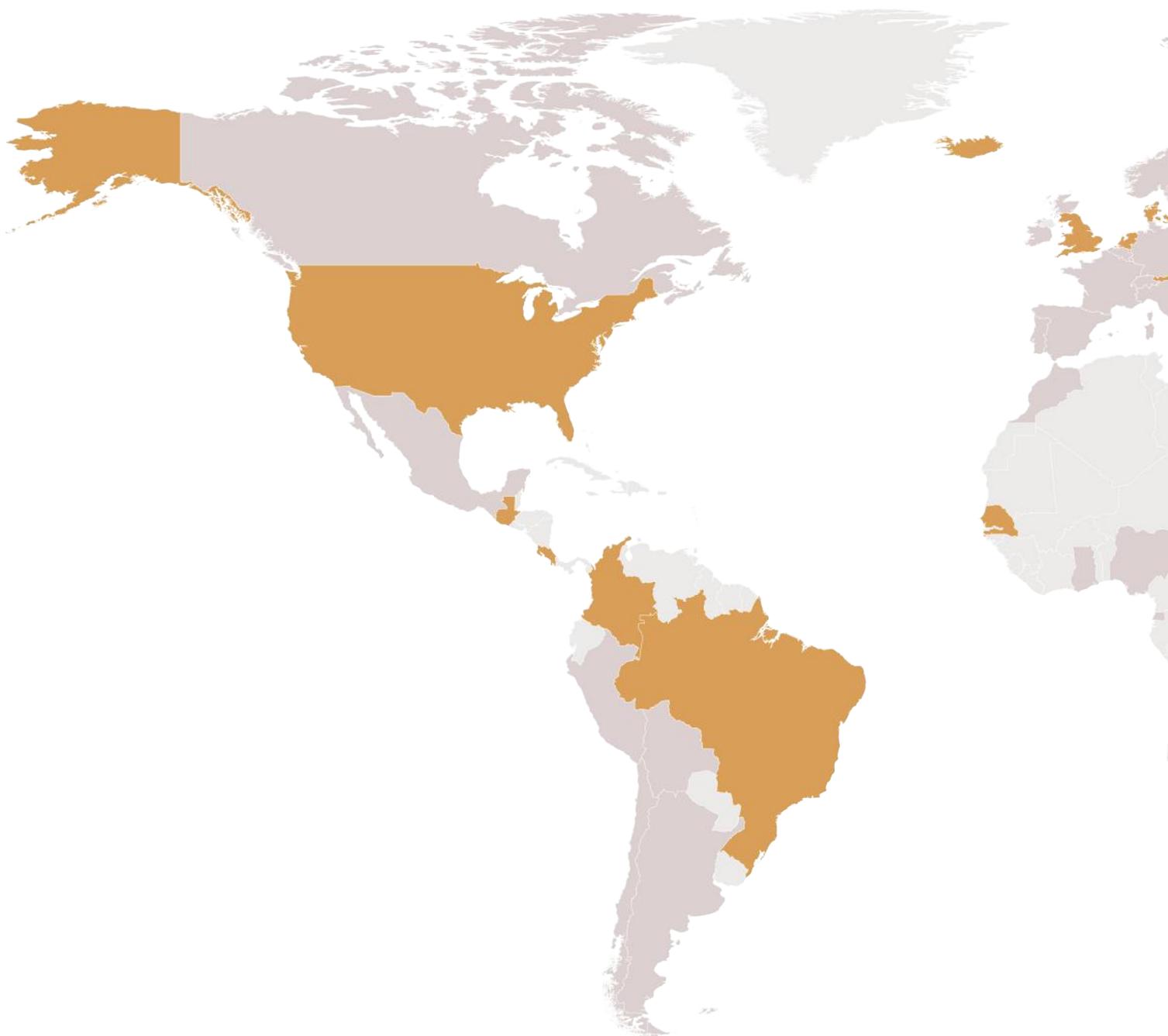
AUSTRALIA  
CANADA  
ENGLAND & WALES  
JERSEY

NEW ZEALAND  
SCOTLAND  
SWITZERLAND  
USA

# Fact incentives



## Type of trial waiver system



**26**  
countries

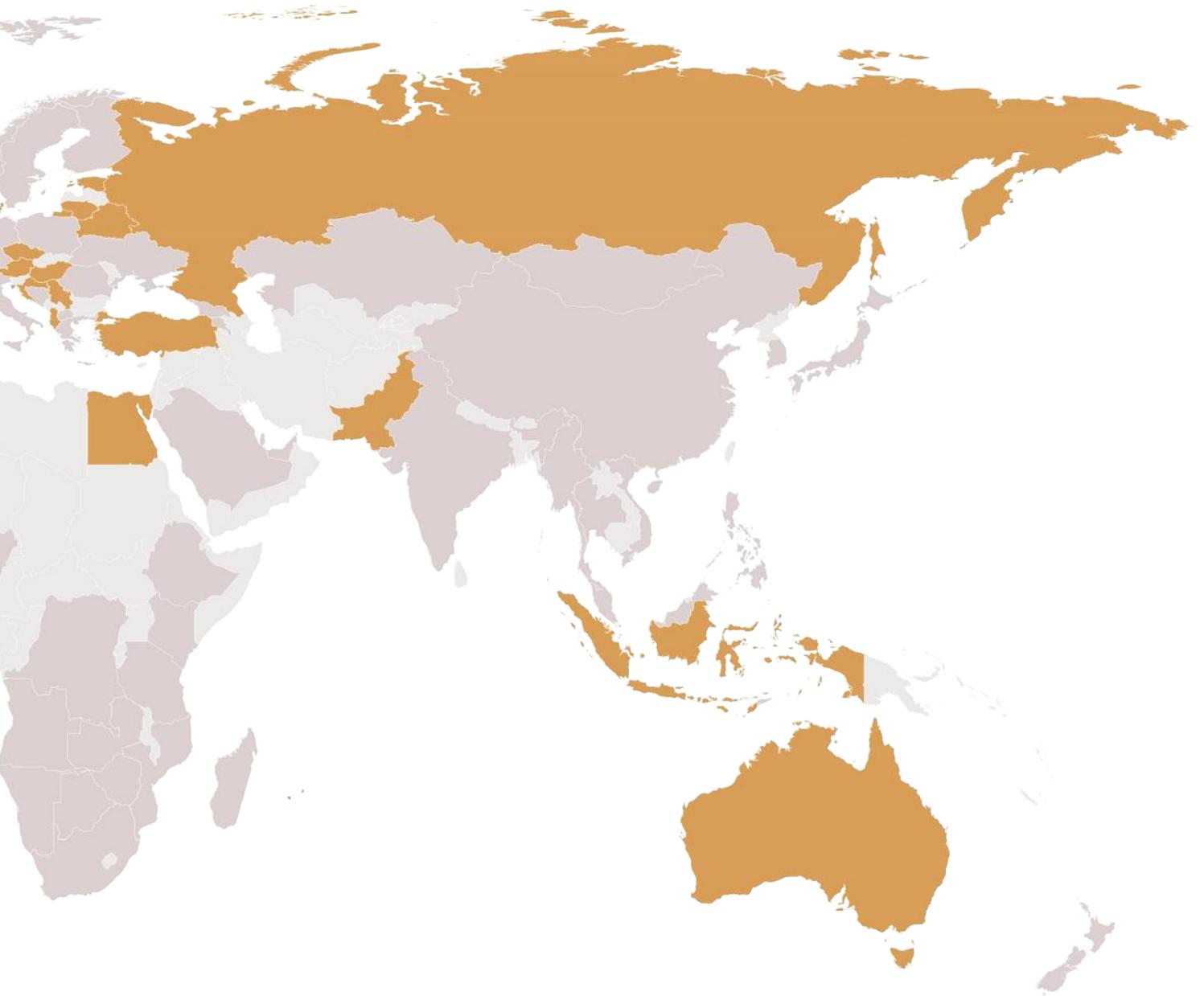
ALBANIA  
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AUSTRIA  
BELARUS  
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COLOMBIA  
COSTA RICA

CROATIA  
CZECH REPUBLIC  
DENMARK  
EGYPT  
ENGLAND & WALES  
ESTONIA  
GUATEMALA

HUNGARY  
ICELAND  
INDONESIA  
LITHUANIA  
MAURITIUS  
NETHERLANDS  
PAKISTAN

## Crown witness/co-operation agreement

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**RUSSIAN FEDERATION**  
**SENEGAL**  
**SERBIA**  
**TURKEY**  
**USA**

## F. Safeguards

87. The human rights challenges that trial waiver systems can present to criminal justice systems do not necessarily indicate that the adoption of such systems should not be encouraged. The jurisdictions studied here implement trial waiver systems in a variety of ways, some of which feature important safeguards against the kind of abuses and unintended consequences of plea bargaining in the US identified at the Washington roundtable and in academic literature. The surveys did not specifically ask about safeguards, so comprehensive information is not available. Nonetheless, it is possible to identify some key measures that different jurisdictions are undertaking to try to mitigate the potential dangers of trial waivers.

### i. Mandatory access to a lawyer

88. 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 realised. Even in jurisdictions considered to have quite robust legal aid systems (such as England and Wales), there are indications that defendants are at times agreeing to waive their right to a trial without having had access to a lawyer. This can be due to practical problems in appointing lawyers (particularly in cases where the defence is publicly funded) at very early stages in the proceedings, or because defendants waive their right to a lawyer. The concerning phenomenon of unrepresented defendants entering trial waivers tends to arise more often in the context of minor offences even though the long-term impact of convictions for minor offences carrying no custodial sentence can be significant. To address these concerns, some jurisdictions, according to the research, insist on the participation of a defence lawyer in order for a trial waiver to be valid. These include (but are not limited to) Argentina, Australia, Brazil, Croatia, Estonia, France, Georgia, Ireland, Luxembourg, Macedonia, South Africa, Switzerland and Zambia. In Kenya, draft prosecutorial guidelines state that if no defence lawyer is present, the negotiations must be electronically recorded, and children may not enter into trial waivers (known as "plea agreements") without legal representation.<sup>99</sup>

### ii. Enhanced disclosure requirements

89. The problems discussed earlier in relation to the risk of wrongful convictions and poor quality investigations are addressed in some jurisdictions by the requirement for prosecutors to provide more extensive disclosure of evidence before the trial waiver than may have ordinarily occurred at the pre-trial stage in the course of a full trial procedure. Luxembourg, for example, has a specific provision that permits a defendant who has indicated interest in a trial waiver (known as "*jugement sur accord*") to be granted access to the full criminal file held by prosecuting authorities. Finland too provides for full disclosure prior to trial waivers (known as "*sytteneuvottelu*").

90. Other jurisdictions may not feature disclosure provisions that are specific to the trial waiver system, but have general disclosure regimes that provide defendants with sufficient access to evidence in time to make decisions about trial waivers. For example, in Germany, South Africa, and Spain, survey respondents indicated that defendants receive a copy of all evidence intended to be used at trial before they are asked to make a decision to waive their right to a full trial.

### iii. Timing of agreements

91. Whether defendants have sufficient access to information, evidence and legal advice depends in part on the timing of the trial waiver. Many jurisdictions, including Australia, England and Wales, and New Zealand, 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 (though the desire to spare victims further trauma and to encourage defendants to express sincere remorse are also often stated motivations for such a policy). However, the push for greater efficiency at greater speeds comes at the cost of procedural protections.

99. "ODPP Draft Rules on Plea Agreements", Office of the Director of Public Prosecutions (Jul. 2014). Available at: [http://www.kenyalaw.org/ki/ODPP\\_Draft\\_Rules\\_On\\_Plea\\_Bargaining.pdf](http://www.kenyalaw.org/ki/ODPP_Draft_Rules_On_Plea_Bargaining.pdf).

92. In other jurisdictions such as China and Spain, 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. In response to this practice, the Madrid Bar has circulated amongst its lawyers a sample request for additional time for consideration of trial waiver offers (known either as “*conformidad*” or “accelerated procedure” depending on the type of mechanism used).
93. Some jurisdictions provide a more relaxed timeline in which trial waivers can take place, for example by delaying the trial waiver until after the pre-trial period or by mandating timelines for filing documents and setting down hearings necessary to ratify a trial waiver (as in Argentina and Chile). Although this is often simply a function of the procedure available (often in abbreviated trial systems) rather than an intended safeguard against abuse, in practice it may allow defendants to better exercise their rights before agreeing to a trial waiver. There were some examples of timelines for trial waivers being relaxed on a case-by-case basis where the interests of justice demanded it. In Singapore, for example, a judge responding to the survey indicated that unrepresented defendants were provided additional time so that they could seek legal advice prior to deciding whether or not to accept trial waivers (known as “plea bargaining”).
94. It is worth noting, however, that in some systems, such as in Germany, in which the trial waiver is not entered until the (abbreviated) trial begins and where sentence discounts are strictly limited, practitioners sometimes complain that there are not sufficient time and resource savings to incentivise optimum use of the procedure. Similarly, the resource assessment report produced in relation to guidelines in England and Wales encouraging early trial waivers (known as “guilty pleas”) considered that over-incentivising early pleading, and under-incentivising later trial waivers, may result in fewer defendants choosing to waive their right to a trial later in the proceedings, as the benefit to doing so later in the process would be so minimal.<sup>100</sup>

100. “Consultation Stage Resource Assessment: Reduction in Sentence for a Guilty Plea”, the Sentencing Council, *supra* at n. 77, para. 2.2.

#### iv. Judicial scrutiny of evidence

95. Many jurisdictions prohibit the judge from independently scrutinising the evidence supporting the conviction (for example, the Philippines, with its US-influenced criminal justice system). However other jurisdictions require judicial authorities to satisfy themselves that the conviction is supported by evidence beyond the defendant's admission of guilt. Chile, for example, requires the prosecution to adduce evidence beyond the facts in the indictment to which the defendant agrees as part of the trial waiver (known as "*procedimiento abreviado*") in order to sustain a conviction. In Macedonia, a judge can reject the trial waiver (known as a "plea agreement") if the evidence does not support the charges to which the defendant has pleaded guilty.
96. Judicial scrutiny of the evidence tends to be more comprehensive in systems that utilise abbreviated trials, such as Finland, Germany, Romania and Russia. In these systems, guilty pleas or confessions may constitute one piece of evidence that may be considered by the judge, but is not necessarily dispositive in itself. In Argentina, there are multiple levels of judicial review available: after the request for a summary trial, the court evaluates the evidence and fairness of the proceedings and either convicts or acquits the defendant. However, parties can also reach partial agreement, in which they settle exclusively the facts of the offence and request a trial regarding the guilt and penalty of the established facts.
97. However, how meaningful this scrutiny is differs substantially between and within jurisdictions. 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; for example, 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 in order to verify the confession of the defendant.
98. In New South Wales in Australia, while judges do not engage in independent scrutiny of the evidence in cases involving trial waivers (known as "guilty pleas"),

prosecutors must consult with victims and police to ensure that any agreed-upon statement of facts arising from charge negotiations constitutes a fair and accurate account of the objective criminality of the offender. There is, therefore, another mechanism in a common law context in which the evidence, or at least the agreed facts, is evaluated. Guidelines for prosecutors also preclude them from engaging in trial waivers where the evidence would be distorted, or where the accused maintains his/her innocence.<sup>101</sup>

#### v. Judicial scrutiny of procedure

99. It is much more common for systems to require some level of judicial scrutiny over the procedure, most often through a mechanism by which judges assure themselves that a trial waiver is given voluntarily. This can be achieved through US-style allocution, in which the judge may directly question the defendant. An allocution, including an in-court confession, features in the Finnish trial waiver system, for example. In India and in Malaysia, the judge may interview the defendant regarding the voluntariness of his trial waiver (known in both jurisdictions as "plea bargaining") in camera, rather than in open court, to reduce the level of intimidation the defendant may feel speaking before the public prosecutor.
100. However it is notable that no similar mechanism exists, for example, in England and Wales despite other systemic similarities to the US. Indeed in many jurisdictions the judge has a duty, either explicit or established through constitutional or other constraints, to be satisfied that the trial waiver is being entered into voluntarily, but no specific mechanism for ensuring this is provided for in practice.
101. An additional opportunity for scrutiny of the procedure 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, as in Macedonia and New Zealand. However, many jurisdictions do allow for complaints of some nature after a trial waiver. Waivers of appeal rights in Germany are considered to be unlawful and can be overcome on appeal, according to our respondents, and Georgia, for example, provides for a 15-day appeal period for defendants who consider their procedural rights to have been violated. In Chile, defendants may, in limited cases, waive their right to a trial on the alleged facts while still challenging that the activity constitutes a criminal offence.<sup>102</sup>

101. Despite this guideline, defendants may plead guilty whilst maintaining innocence if they provide specific written instructions to that effect to counsel. See *R v. Allison* [2003] QCA 125 at para. 26 per Jerrard JA.

102. *The People vs Lavanderos* 16 de julio de 2005, Rol 532-2005-RPP.

102. Though practice in many jurisdictions within the US has been for prosecutors to require as a condition of the plea deal waivers of the right to appeal on the basis of ineffective assistance of counsel, the US Supreme Court has affirmed defendants' right to make such appeals.<sup>103</sup> The cases of *Padilla v. Kentucky*,<sup>104</sup> *Lafler v. Cooper*<sup>105</sup> and *Frye v. Missouri*<sup>106</sup> have affirmed the ability of defendants to appeal against conviction following a plea deal where poor or absent advice from a lawyer has led them either to accept an unfavourable plea deal (in *Padilla*, in relation to collateral immigration consequences) or where it has led them to proceed to trial against their interests (*Lafler* and *Frye*).

#### vi. Involvement of judge in negotiations

103. In many trial waiver systems, judges take a very limited role in negotiations and in many jurisdictions are prohibited from becoming involved. However this is not universal. In some civil law systems, notably in Germany, trial waiver systems are formed through negotiations involving all parties – defendants, prosecutors, and judges.

104. Even in adversarial systems where it is typical for judges to play no part in negotiations between the parties, some examples of judicial involvement can be found. In a number of jurisdictions, such as Hong Kong and New Zealand, in which sentencing remains within the discretion of the judge, the parties can seek a sentence indication from the judge prior to agreeing to waive their right to a trial. While not a formal intervention in negotiations, sentence indications nonetheless draw judges into the information-sharing process that informs trial waivers.

105. Singapore has a particularly developed system of judicial mediation, in which trial waivers (known as "plea agreements") are negotiated through a formal process called Criminal Case Resolution. This involves a voluntary meeting between the prosecutor and defence, mediated by a senior District Judge, whose role is not to evaluate the case but to facilitate the parties in identifying issues on which agreement can be reached. Any admissions made or contemplated in this meeting are precluded for use as later evidence if a trial waiver is not agreed.

103. Cf. "Memorandum to Federal Prosecutors from James M. Cole, Deputy Attorney General, recommending against the use of such waivers by federal prosecutor", 2014. Available at [https://www.fd.org/docs/select-topics/pleas/memorandum-to-all-federal-prosecutors-from-james-m-cole-deputy-attorney-general-on-waivers-of-ineffective-assistance-of-counsel-in-plea-agreements-\(10-14-14\).pdf?sfvrsn=6](https://www.fd.org/docs/select-topics/pleas/memorandum-to-all-federal-prosecutors-from-james-m-cole-deputy-attorney-general-on-waivers-of-ineffective-assistance-of-counsel-in-plea-agreements-(10-14-14).pdf?sfvrsn=6).

104. *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010).

105. *Lafler v. Cooper*, 566 U.S. (2012).

106. *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

**vii. Enhanced recording/data collection**

106. A record of the terms of the negotiation leading to a trial waiver (where such negotiations occur), or the details of the resulting benefit conferred on the defendant, is not always produced. In Hong Kong, for example, a record of the terms of the negotiation is only produced when the defendant is unrepresented. Similarly, as earlier noted in relation to Kenya, guidelines suggest that trial waiver negotiations involving defendants without a lawyer should be electronically recorded. In systems featuring only sentence incentives with statutory control over benefits conferred, the production of a record may not be as vital as in jurisdictions featuring charge or fact incentives, or in cooperation agreements, where the benefits offered and concessions made by the parties are more variable. Without such a record, appeals become practically difficult, as does tracking the effect of prosecutorial guidelines and other instruments.
107. Furthermore, opacity of negotiations (where they take place as part of the trial waiver system) contributes to public distrust in trial waivers. There is particular concern about the lack of openness of terms of agreements when they involve the payment of financial penalties as a condition of sentence reduction (as is common in Georgia and Russia, for example, and has also been raised as a feature of the trial waiver system (*delação premiada*) used in Brazil). Where it is perceived that highly resourced defendants are able to evade justice through the payment of fines, the purpose of using trial waivers to tackle public corruption is seriously undermined.
108. Where trial waiver systems are newly adopted or have recently undergone reforms, authorities are in the unique position of being able to track more easily the effects of the change in procedure and to adjust policy accordingly. Bosnia and Herzegovina and Georgia are both examples of countries where the implementation of the trial waiver system was heavily monitored, and reforms were made in response to findings. However, much of this monitoring was conducted by civil society organisations, rather than government actors, potentially diminishing the scope and sustainability of the data collection.<sup>107</sup>

109. There are a few examples of countries that 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 will state what the sentence would have been if the conviction had occurred following a full trial rather than as a result of a trial waiver. In England and Wales, the sentence discount granted following a trial waiver (known as a “guilty plea”) in line with the sentencing guidelines is calculated and applied separately, after adjustments have been made to reflect other mitigating factors, and so should be clear on the record. In New Zealand, negotiations between the defence and prosecution are memorialised in a case management memorandum.

**viii. Limitations on benefits**

110. 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 highlighted the coercive effect of the large sentencing differential in the US between the potential sentences faced after conviction at trial as opposed to those available through plea deals. The coercive effect of this trial penalty has been well-documented.<sup>108</sup>
111. The wide discretion US prosecutors have, through plea deals, to offer sentences drastically shorter than those possible after conviction at trial relies on several features that are distinct to US law and practice, principally the unusually long sentences and heavy use of mandatory minimums, coupled with a criminal legal culture characterised by powerful and largely unaccountable prosecutors. Many other jurisdictions, even those with substantial procedural similarities to the US criminal justice system, control the extent of sentencing discounts either by statute or in practice. The Federal Constitutional Court of Germany has recognised that a significant sentence differential between trial waiver and trial can act as an “illegal influence” on the defendant’s free will.<sup>109</sup>

107. See, e.g., “Plea Bargaining in Georgia: Negotiated Justice”, Transparency International: Georgia (Dec. 15, 2010). Available at: <http://www.transparency.ge/en/node/1061>. See also “Plea Agreements in Bosnia and Herzegovina: Practices before the Courts and their Compliance with International Human Rights Standards”, Organization for Security and Co-operation in Europe (OSCE): Mission to Bosnia and Herzegovina (2006).

108. See, e.g., Fellner, “An Offer You Can’t Refuse”, *supra* at n. 34.

109. ‘Plea Bargaining and its History’, Albert Alschuler, *Columbia Law Review*, Vol 79, No. 1, January 1979. See also Altenhain, K., “Absprachen in German Criminal Trials”, from *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*, Thaman, S. C., ed., Carolina Academic Press, Durham, NC. (2010), pp. 169–170.

112. Sentence discounts can be limited in the following ways:

- By empowering judges to determine final sentences: 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. Many jurisdictions (including but not limited to Australia, New Zealand and Singapore) permit judges to establish sentences following trial waivers within existing sentencing guidelines.
- By regulating discounts in statute: England and Wales has agreed 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). The discount would be applied after any mitigation had been accounted for, making it possible to perceive the effect of the trial waiver discount as separate from any other aspect of sentencing. In other jurisdictions, such as Germany, the bargained-for sentence cannot be lower than statutory minimums. The size of sentence discounts vary by jurisdiction and relevant factors in individual cases, but where they are regulated either by statute or judicial control, they range from 10–15% in Australia and Peru, up to 25% in New Zealand, and to a maximum of a third off the sentence in England and Wales, for example.

#### ix. Limitations on types of cases

113. There are also limitations in many jurisdictions on the types of cases for which trial waiver systems can be used. In Chile, the law makes clear that trial waivers (known as “*procedimientos abreviados*”) should not be entered into if the defendant could avail himself or herself of a more diversionary alternative. 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 (from a maximum sentence of five years in Luxembourg, seven years in Romania and India and 10 years in Singapore and

Armenia). Others are limited to financial or organised crime cases (usually in conjunction with cooperating witness procedures, as in Brazil) and others exempt certain types of offences (for example, sexual offences, murder, or death penalty cases). In the Philippines, trial waivers (known as “plea bargaining”) cannot be used in drug prosecutions.

114. Some systems require extra levels of review for the use of trial waivers in relation to certain crimes. In New Zealand, for example, any trial waiver (known variously as “plea and charge discussions”, “plea discussions” and “plea negotiation”) in relation to a charge of murder must receive special approval by the Solicitor General. In Croatia, for cases involving offences against life, body or sexual freedom for which a sentence of at least five years is envisaged, the State Attorney is required to consult the victim regarding the content of the trial waiver (known as “plea agreement”) prior to entering into a trial waiver with the accused.

115. The diversity of types of safeguards within different trial waivers and unique characteristics of each can provide models of good practice for jurisdictions considering reforms to their own systems, and provide a counter-narrative to the mistaken notion that the US model of trial waivers is the characteristic or exemplary form of the practice. Their inconsistent use across jurisdictions, however, points to the need for a more systematic and comprehensive approach to the rule of law and human rights implications of the practice.

# In the news

*Headlines from around the world*

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Dec. 3, 2015



<http://on.wsj.com/1N6Xtdr>

WASHINGTON POST

## Americans are bargaining away their innocence

Tim Lynch, Jan. 20, 2016



<http://wapo.st/2ooVpJl>

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## In plea bargaining, who really gets the bargain?

Nov. 14, 2014



<http://bit.ly/2p8sObw>

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Mary E. Buser, Oct. 6, 2015



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Natasha Vargas-Cooper, Nov. 7, 2014

 <http://bit.ly/2ooQYyg>

NEW YORK BOOKS

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Jed S. Rakoff, Nov. 20, 2014

 <http://bit.ly/1OD8rHb>

SAHARA REPORTERS

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Peter Odia, June 23, 2011

 <http://bit.ly/2nYDKeV>

THE MARSHALL PROJECT

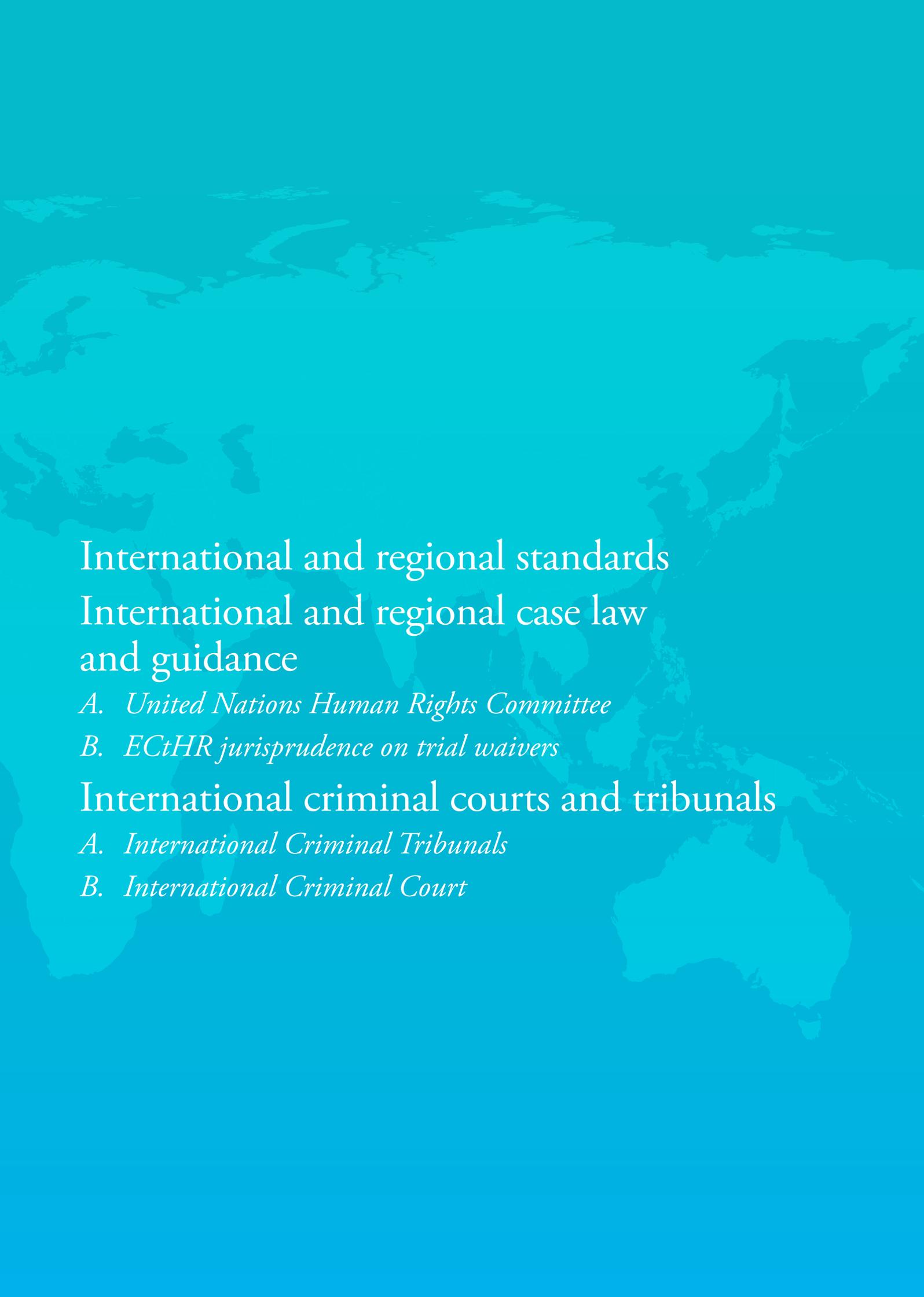
## Plea bargaining and the innocent

US District Judge John L. Kane, Dec. 26, 2014

 <http://bit.ly/2oI19OC>

# International Legal Framework:





International and regional standards  
International and regional case law  
and guidance

*A. United Nations Human Rights Committee*

*B. ECtHR jurisprudence on trial waivers*

International criminal courts and tribunals

*A. International Criminal Tribunals*

*B. International Criminal Court*

## International and regional standards

116. Given the fact that, in many countries, trial waivers account for the majority of convictions, it is astonishing that international standards have so little to say on such systems. Recognition of the application of fair trial standards to criminal proceedings, like trial waivers, that do not necessarily constitute a “trial” would also be in line with the broader recognition by international human rights bodies that the fairness of the “trial” is affected by earlier proceedings, and requires certain procedural safeguards in the post-arrest and pre-trial period.<sup>110</sup> There is currently no specific articulation of how existing international and regional standards on the right to a fair trial apply to trial waiver systems. Within the provisions of major human rights treaties that protect the right to a fair trial – Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 6 of the ECHR, Article 7 of the African Charter on Human and Peoples’ Rights (ACHPR), and Article 8 of the American Convention on Human Rights (ACHR) – only the last mentions something like trial waiver systems explicitly, as a component of the right to presumption of innocence. Article 8(2)(g) of the ACHR articulates “the right not to be compelled to be a witness against himself or to plead guilty.”<sup>111</sup> No decisions by the Inter-American Court of Human Rights (IACHR), however, interpret that provision specifically in relation to trial waiver systems.
117. This silence of international and regional human rights instruments on the issue of trial waiver systems may be due to the fact that at the time they were drafted, full trials were the norm in most regions and jurisdictions. Recent developments suggest, however, that the tide is turning.

118. There have, for example, been recent efforts to promote trial waiver systems (for example, by Recommendation No. R(87)18 of the Committee of Ministers of the Council of Europe<sup>112</sup> promoting measures to simplify criminal proceedings) but these have not given adequate consideration to the need for human rights safeguards. Recommendation No. R(87)18, for example, mentions only the need for the trial waiver system (which it calls a “guilty plea”) to be “carried out in a court at a public hearing”, and that “[t]here should be a positive response by the offender to the charge against him.” It does not mention, for example, any required procedural safeguards nor the kinds of cases to which such proceedings might be restricted.
119. The reduction in use of full trials also poses a problem for the law’s ability to remedy rights violations that occur during arrest, investigation and the pre-trial period. In the context of a trial, the remedy for due process violations (including torture, abuse of process by police, and unlawful arrest, search and seizure) includes exclusion or special treatment of the tainted evidence obtained through unlawful means. Where there is no trial, such violations are likely to go unremedied and in some cases undiscovered, with a potentially serious impact on both individual victims of such abuses as well as the integrity of the criminal justice system as a whole. The U.N. Special Rapporteur on Torture has 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>113</sup>

110. I.e. *Salduz v. Turkey*, European Court of Human Rights, App No 36391/02 (Nov 27 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.

111. Note that Article 14(3)(g) of the ICCPR similarly provides for the right not to testify against oneself or to “confess guilt” – neither “pleading guilty” nor “confessing guilt” necessarily relate directly to trial waivers, though they may be used as the basis for protections within trial waiver systems.

112. Recommendation No. R (87)18 of the Committee of Ministers, *supra* at n. 78.

113. “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 (Aug. 2016), para. 100. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/250/31/PDF/N1625031.pdf?OpenElement>.

120. Based on the safeguards set out in the previous section which have been identified through the research, it is evident that the articulation of procedural safeguards which contribute to protection of the right to a fair trial could also be of benefit within trial waiver systems. Article 14(3)(g) of the ICCPR, for example, protects the right not to be compelled to testify against oneself or to confess guilt. This includes the right for defendants to be 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>114</sup> What constitutes psychological pressure or duress sufficient to violate this principle has not yet been established, however.
121. Jurisprudence and guidance from regional human rights mechanisms, such as the ECtHR, which have developed standards in relation to safeguards for defendants’ waiver of rights in criminal proceedings, will have relevance in the context of trial waiver systems. For example, the ECtHR has held that in order to be effective for ECHR purposes, a waiver must be unequivocal and attended by safeguards commensurate to its importance.<sup>115</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>116</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>117</sup> and whether the accused has had sufficient information on his rights presented to him in simple, non-legalistic language, with the assistance of interpretation and translation if necessary.<sup>118</sup>
- It has considered whether the accused had particular vulnerabilities, such as withdrawing from drugs<sup>119</sup> or having low levels of literacy,<sup>120</sup> which may have made it harder for the accused to understand and foresee the consequences of their waiver. These general safeguards necessary for waivers of fair trial rights should also apply to trial waiver systems.
122. There have been some attempts to start the development of a normative framework applicable to trial waiver systems. The United Nations Office on Drugs and Crime (UNODC), together with the International Association of Prosecutors (IAP), in 2014 produced a guide called “The Status and Role of Prosecutors” which contains some guidance for prosecutors on the proper use of their discretion in what they term “plea bargaining”.<sup>121</sup> The U.N. Special Rapporteur on Torture, interpreting the Convention Against Torture,<sup>122</sup> has warned against inducements or “promises of immunity or lighter sentences in exchange for confessions...These methods are improper because they ultimately deprive a person of his or her freedom of decision.”<sup>123</sup> The U.N. Guidelines on the Role of Prosecutors provides that “The office of prosecutors shall be strictly separated from judicial functions.”<sup>124</sup> Other U.N. guidelines have recognised the need for “special protection for all detained persons, who, during questioning, must not be subjected to violence, threats or practices that impair their capacity of decision or their judgment or force them to confess, incriminate themselves or testify against another person.”<sup>125</sup> However, taken together these do not yet point towards a systematic approach to the protection of human rights in trial waiver systems.

114. “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 (Aug. 23, 2007). Available at: <http://www.refworld.org/docid/478b2b2f2.html>.

115. *Pishchalnikov v. Russia*, App. No. 7025/04 (Sept. 24, 2009), para. 77.

116. *Ibid.*

117. *Ibid.*, para. 78.

118. *Hermi v. Italy*, App. No. 18114/02 (Oct. 18, 2006), para. 41.

119. *Plonka v. Poland*, App. No. 20310/02 (Mar. 31, 2009), para. 38.

120. *Kaciu and Kotorri v. Albania*, App. Nos. 33192/07 and 33194/07 (Dec. 9, 2013), para. 120.

121. “The Status and Role of Prosecutors”, UNODC and IAP (Dec. 2014), p. 43. Available at: [https://www.unodc.org/documents/justice-and-prison-reform/14-07304\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf).

122. “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, UN General Assembly, Treaty Series, Vol. 1465 (Dec. 10, 1984). Available at: <http://www.refworld.org/docid/3ae6b3a94.html>.

123. “Interim report of the Special Rapporteur on torture”, UNGA, A/71/298, *supra* at n. 113, para. 40.

124. “Guidelines on the Role of Prosecutors: Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba”, UN Human Rights, Office of the High Commissioner (Sept. 1990), para. 10. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

125. “Interim report of the Special Rapporteur on torture”, UNGA, A/71/298, *supra* at n. 113, para. 37.

## International and regional case law and guidance

### A. United Nations Human Rights Committee

123. The United Nations Human Rights Committee (HRC) has not directly considered a challenge to trial waivers per se. The only context in which it has been considered was in relation to the complaint of *Hicks v. Australia*,<sup>126</sup> a decision published in 2016. Hicks, an Australian national, was apprehended by US actors in Afghanistan in November 2001 and thereafter held in Guantanamo Bay detention camp (Guantanamo). He claims that he was subject to torture and ill-treatment there and held without charge for several years, after which time repeated attempts to try him in Guantanamo at the military commission were blocked as unconstitutional.
124. Finally Hicks was charged anew in February 2007, entering into a plea deal through which he pleaded guilty to providing material support for terrorism, in return for which he was sentenced to seven years' imprisonment. The terms of the deal included his subsequent deportation to Australia, where the sentence imposed in Guantanamo would be enforced. He ultimately served seven months of his sentence in Australia and was then made subject to a control order for a year following his release.<sup>127</sup>
125. The HRC held Australia responsible for its part in the negotiation of the plea deal. It recognised that Hicks had no choice but to accept the terms of the plea deal that was offered to him; therefore it was incumbent on Australia to show that it had done everything possible to ensure that the terms of the arrangement that had been negotiated with the US did not cause it to violate the ICCPR. In the absence of such evidence, the HRC considered that, by giving effect to the remainder of the sentence imposed under the plea deal and depriving Hicks of his liberty for seven months, Australia violated Hicks' rights under Article 9(1) (protecting liberty and the security of the person) of the ICCPR.<sup>128</sup>

126. The facts of the Hicks case highlight the way in which trial waivers can be used to cleanse a history of human rights and fair trial rights violations that make a successful trial (meaning one that would lead to a conviction) impossible. The case demonstrates that courts can and should be interrogating the voluntariness of trial waivers in more than a formalistic way. It is clear that Hicks understood what the terms were and knowingly waived his right to a trial, but it is equally clear that there was no reasonable alternative to the plea deal, making the "choice" an illusory one. The chances of obtaining a fair trial in Guantanamo had proven to be nil; by rejecting the plea deal he would essentially be sentencing himself to an indefinite period of further detention in inhuman and degrading conditions.

### B. European Court of Human Rights jurisprudence on trial waivers

127. 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>129</sup> The case concerns the prosecution of the managing director of what was one of the largest public companies in Georgia, and the former mayor of a town called Kutaisi. Mr Natsvlishvili 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 the proceeds without regard for the company's interests. Several features of the case suggested political motivation. His arrest was filmed and broadcast on local television. The Governor of the Region also made a declaration, without directly referring to Mr Natsvlishvili, that it was the State's intention to pursue and identify all those who had misappropriated public money. During the first four 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.

126. See "Communication No. 2005/2010: Views adopted by the Committee at its 115th session", UN HRC, CCPR/C/115/D/2005/2010 (Feb. 19 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).

127. Joseph, S., "Australia found to have breached the human rights of David Hicks", *The Conversation* (Feb. 21, 2016). Available at: <http://theconversation.com/australia-found-to-have-breached-the-human-rights-of-david-hicks-55120>.

128. "Communication No. 2005/2010", UN HRC, *supra* at n. 126, para 4.10.

129. App. no. 9043/05 (Apr. 29, 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 (Apr. 29 2014). Available at: <https://www.fairtrials.org/wp-content/uploads/10B-Natsvlishvili-and-Togonidze-press-release.pdf>.

128. Mr Natsvlshvili eventually accepted a trial waiver (known as a “plea agreement”), then a new feature of Georgian law ushered in together with a raft of other legal reforms after the Rose Revolution.<sup>130</sup> He agreed to make a payment equivalent to nearly €15,000 plus 22.5% of his factory’s shares to the State while maintaining his factual innocence. He later challenged the conviction as an abuse of process in violation of Article 6(1) of the ECHR (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).
129. The Court took account of criticisms of Georgia’s trial waiver system made by Transparency International<sup>131</sup> and the Parliamentary Assembly of the Council of Europe.<sup>132</sup> It also provided a summary of the existence of trial waivers in Council of Europe member states, noting that some form of the practice existed in all but three Council of Europe Member States.<sup>133</sup> It also noted the approval with which the Council of Europe generally looked upon trial waiver systems.<sup>134</sup>
130. Ultimately, the ECtHR found no violation of Article 6, based on the fact that Mr Natsvlshvili’s decision to enter into the trial waiver was “undoubtedly a conscious and voluntary decision.”<sup>135</sup> The Court stated that the safeguards necessary to ensure the legality of the trial waiver were that: (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>136</sup> As evidence of the voluntariness of the agreement, the Court noted that the defendant, rather than the prosecution, initiated negotiations. It also highlighted several additional safeguards, including the recording of the terms of the negotiation, and a public hearing to ratify the bargain during which the judge was free to depart from the terms of the agreement.
131. Judge Gyulumyan dissented however, arguing that it would have been impossible for the local judge to evaluate the fairness of the negotiations without access to a full recording of them (noting that there was evidence of informal negotiation that was unrecorded). She also pointed to “[s]everal shady factual circumstances of the case” that “taint[ed] the presumption of equality between the parties pending the relevant negotiations”,<sup>137</sup> including the fact that the company shares were transferred and monetary payments made to the State before the trial waiver was negotiated and that the applicant was detained in deliberately stressful conditions. She also 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, which she felt could not have been adequately reviewed in one day, as it was in Natsvlshvili’s case.

130. The Rose Revolution refers to the transfer of power in November 2003 from the Russia-aligned Shevardnadze government to the European/Atlantic-oriented government of the United National Movement, leading to the election of President Saakashvili.

131. “Plea Bargaining in Georgia”, Transparency International, *supra* at n. 107.

132. “Honouring of obligations and commitments by Georgia”, Parliamentary Assembly of the Council of Europe, Resolution 1415 (2005). Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17288&lang=en>.

133. See *Natsvlshvili v. Georgia*, *supra* at n. 129, paras. 62–75.

134. Recommendation No. R (87)18 of the Committee of Ministers, *supra* at n. 78.

135. See *Natsvlshvili v. Georgia*, *supra* at n. 129, para. 97.

136. *Ibid.*, para. 92.

137. *Natsvlshvili v. Georgia*, *supra* at n. 129, “Partially dissenting opinion of Judge Gyulumyan”, para. 3.

132. The judgment in *Natsvlishvili* provides a potential set of safeguards specific to the trial waiver context, in order to consider that a defendant has effectively entered into such an agreement: (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. However, as the dissenting opinion points out, these safeguards alone failed to establish the voluntariness of the trial waiver, given the high conviction rate at trial in Georgia in the relevant period and the “take it or leave it” attitude of the prosecutor.<sup>138</sup> Further indicators of due process and safeguards must be developed to guard against coercive proceedings that undermine the presumption of innocence.
133. The relatively cursory acceptance of trial waivers by the ECtHR with reference to only relatively formalistic safeguarding of rights is disappointing given the quite serious indications of irregularities in the case before it. Judge Gyulumyan alone seemed willing to probe the coercive potential of the possibility of a trial waiver itself in the context of the Georgian legal system at the time, rather than treating it as an uncomplicated waiver of rights. One area where potential safeguards may be developed, identified by Judge Gyulumyan in her partially dissenting opinion, may be in relation to charging practices by prosecutors. Judge Gyulumyan notes that part of the coercive element in the case related to threats by the prosecution to lodge further charges unsupported by prima facie evidence, in order to induce the trial waiver.<sup>139</sup> Though similar prosecutorial threats in relation to charging have been deemed constitutional by the US Supreme Court,<sup>140</sup> European standards may well regulate excessive charging by prosecutors differently.
134. The ECtHR did not, in its first consideration of trial waiver systems in the *Natsvlishvili* case, meaningfully develop a framework to ensure that procedural rights are respected in trial waiver proceedings. Nor did it consider the implications of trial waivers for the rule of law and the role of prosecutors and judges. Further jurisprudence on trial waivers from regional and international courts must ensure that fair trial standards apply in full to trial waiver proceedings. An approach that substitutes principled application of rights for a cursory analysis of individual consent to waive them is insufficient to ensure justice in the context of the systematic replacement of full trials with trial waivers in many jurisdictions. The existence of full trial rights in law is meaningless if authorities can avoid procedural requirements by systematically disincanting defendants from exercising them.

### International criminal courts and tribunals

135. Apart from the U.N. and regional human rights mechanisms, 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. Examples of the operation of trial waiver systems in the International Criminal Tribunal for the Former Yugoslavia (the ICTY) and the International Criminal Court (the ICC) provide valuable case studies which provide further insight into the legal standards and normative framework which could be developed to govern the use of trial waivers.

138. *Ibid.*, para. 4.

139. *Ibid.*, para. 5.

140. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), finding that a prosecutor would not violate due process if he adds additional charges, solely to punish a defendant for exercising a constitutional or statutory right.

## A. International Criminal Tribunals

136. The ICTY has substantial experience in administering trial waivers (known as “plea agreements”), which were codified into the Rules of Procedure and Evidence of the ICTY in 2001. Rule 62 lays out three possible agreements that can be made between a prosecutor and a defendant, including charge incentives (amending the indictment) and sentence incentives (requesting a specific sentence or sentencing range, or not opposing a request by the accused for a specific sentence).<sup>141</sup> Any agreement reached between the two parties must be disclosed in an open session<sup>142</sup> unless good cause can be shown for doing so in a closed session; however, the Trial Chamber is not bound to the terms and may sentence the defendant to any appropriate sentence. Even before formalising trial waivers, the Rules of Procedure and Evidence required a trial waiver to meet certain minimum procedural requirements. The Trial Chamber must be satisfied that:

- the trial waiver has been made voluntarily;
- the trial waiver is informed;
- the trial waiver is not equivocal; and
- there is a sufficient factual basis for the crime and the accuser’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case.<sup>143</sup>

137. In the first case involving a trial waiver at the ICTY, *Prosecutor v. Dražen Erdemović*,<sup>144</sup> the defendant entered a guilty plea to a charge of murder as a crime of war, without any promise of benefit, and was sentenced to 10 years imprisonment. He later appealed his conviction, arguing that his guilty plea was invalid. The Court noted that no international authority existed that could help it interpret the meaning of a valid guilty plea.<sup>145</sup> Despite the fact that Erdemović had, during the course of proceedings, affirmed his guilty plea on more than one occasion, the Appeals Chamber found that Erdemović had not fully understood the consequences of his plea, based on evidence of misleading communications from the judge and ineffective assistance of defence counsel in relation to the nature of the charges and the consequences of pleading guilty. At the rehearing, Erdemović and the prosecutor reached a more considered plea agreement as to the charges, facts, and recommended sentence with additional assistance from the Trial Chamber to ensure that the defendant fully understood the charges. Although the agreement requested a sentence of seven years, the Trial Chamber exercised its discretion to sentence Erdemović to only five years.<sup>146</sup>

138. Some observers have been concerned about the lack of detailed and individualised analysis of the procedural requirements for trial waivers in the ICTY.<sup>147</sup> In the high-stakes and public context of accusations of serious international crimes, pressures on defendants to make trial waivers may be particularly acute. These issues are especially important given the inequality of arms between prosecution and defence long noted in relation to international criminal tribunals including the ICTY.<sup>148</sup> Nonetheless, the Erdemović case demonstrates that the ICTY is willing to probe the specific circumstances surrounding the guilty plea to make a meaningful determination of voluntariness of the trial waiver (and can therefore be contrasted with the approach of the ECtHR in *Natsvlshvili*), and to take an active role to ensure that sentencing is not excessive even when formally agreed upon by prosecution and defence.

141. “Rules of Procedure and Evidence”, ICTY, UN Doc. IT/32/Rev. 37 (Apr. 6, 2006), Rule 62 ter (A). Available at: <http://www.icty.org/en/documents/rules-procedure-evidence>.

142. *Ibid.*, at Rule 62 ter (C).

143. *Ibid.*, at Rule 62 bis.

144. *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22. Case documents available at: <http://www.icty.org/case/erdemovic/4>.

145. *Prosecutor v. Erdemović*, UN ICTY, Appeals Chamber Judgement, “Joint Separate Opinion of Judge McDonald and Judge Vohrah”, Case No. IT-96-22-A (appended) (Oct. 7, 1997), at paras. 3-6. Available at: <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

146. *Ibid.*

147. See Cook, J. A., “Plea Bargaining at The Hague”, *Yale Journal of International Law*, Vol. 30 (2005), p. 482. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=578581](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=578581). See also Nicol, K., “Plea bargaining in international criminal courts: dealing with the devil”, LL.M(R) thesis, University of Glasgow (2016). Available at: [http://theses.gla.ac.uk/7254/1/2016NicolLLM\(R\).pdf](http://theses.gla.ac.uk/7254/1/2016NicolLLM(R).pdf).

148. See, e.g., Starr, S. B., “Ensuring Defense Counsel Competence at International Criminal Tribunals”, *UCLA Journal of International Law & Foreign Affairs*, Vol. 14, No. 1 (2009). Available at: <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2187&context=articles>.

## B. International Criminal Court

139. The founding document of the ICC, the Rome Statute,<sup>149</sup> establishes a trial waiver system (known as “plea agreement”).<sup>150</sup> The ICC has stated that an effort was made in drafting the Rome Statute to blend civil and common law traditions in relation to admissions of guilt.<sup>151</sup> The ‘third avenue’ between the traditional common law and civil law approaches reflected in Article 65 of the Rome Statute permits the accused to admit guilt and waive the right to a trial at the commencement of the trial, similar to the common law guilty plea, and may engage in negotiations with the prosecution as to the benefits to be received in exchange. However, the Trial Chamber is required to ensure that the trial waiver is supported by the facts of the case, similar to summary or abbreviated procedure traditionally associated with civil law systems.<sup>152</sup> In addition to that requirement, the Trial Chamber must also satisfy itself that “(a) [t]he accused understands the nature and consequences of the admission of guilt; and (b) [t]he admission is voluntarily made by the accused after sufficient consultation with defence counsel.” Where such safeguards are not met, the trial waiver is not effective and the case proceeds to trial. The Rome Statute permits the Trial Chamber a substantial level of discretion over trial waivers. For example, it may request additional evidence or reject the trial waiver in the interests of justice (in particular the interests of the victims), and is not bound by agreements made between prosecutors and defendants as to the penalty to be imposed.<sup>153</sup>

140. These provisions however have not been much tested in practice. The ICC ratified its first trial waiver in August 2016. Ahmad Al-Faqi Al-Mahdi entered a plea of guilty in relation to a war crime consisting of the destruction of historical and religious monuments in Mali. This happened in a proceeding the ICC termed a “trial”, in which Mr Al-Mahdi admitted guilt and the prosecution subsequently presented its evidence and called three witnesses. The judgment and sentencing took place on 27 September 2016, in which the Trial Chamber recognised the mitigating value of his admission of guilt and expression of remorse and examined the voluntary nature of his waivers of rights pursuant to the agreement.<sup>154</sup>

141. The use of trial waivers in the ICC offers the possibility of another venue in which the normative framework around this practice is likely to develop, which, in turn, allows for an increase in acceptance of trial waivers on the international stage. Commentators have suggested various frameworks for ensuring that plea agreements at the ICC are conducted coherently and predictably, on the grounds that without strong prosecutorial guidelines, the judicial discretion afforded to the Trial Chamber may disincentivise defendants from entering into plea agreements that may not be upheld at court.<sup>155</sup> These suggestions include: (a) the prosecution refusing to enter into plea agreements with the most culpable defendants, or in relation to charges for which there is strong evidence; (b) a sentence discount that incentivises defendants without inviting rejection by the Trial Chamber; (c) an insistence on cooperation and the provision of truthful information by the defendant in order to receive a benefit; (d) consultation with victims prior to finalising an agreement; and (e) transparency with respect to the factors that lead to the agreement in each case.<sup>156</sup>

149. Rome Statute of the International Criminal Court, A/CONF.183/9 (Jul. 17, 1998). Available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

150. *Ibid*, Article 65.

151. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15 (Sept. 27, 2016), para. 24. Available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF).

152. *Ibid*, para 27.

153. Rome Statute of the International Criminal Court, *supra* at n. 149.

154. See *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* at n. 151, para. 109. See also the ICC’s press release, available at: <https://www.icc-cpi.int/mali/al-mahdi/Documents/AlMahdiEng.pdf>. See also the public sentencing hearing, available at: <https://www.youtube.com/watch?v=wy2RJW8v-Xg>.

155. Whiting, A., “Encouraging the acceptance of guilty pleas at the ICC”, Post-Conflict Justice (Feb. 11, 2015). Available at: <http://postconflictjustice.com/encouraging-the-acceptance-of-guilty-pleas-at-the-icc/>.

156. *Ibid*.

142. As trial waiver practice develops in international criminal courts and tribunals, it may provide examples of approaches to trial waivers that combine useful elements from national jurisdictions around the world, as well as contributing to the corpus of law which might form the basis of a normative framework for regulating trial waivers. Trial waivers in international tribunals present unique challenges in terms of human rights protection, particularly in relation to addressing the interests of justice and establishing and preserving an accurate historical record of mass atrocities.<sup>157</sup> The broad public interest in retribution following mass murder, genocide, or similar atrocities means that reductions in sentence following admissions of guilt are not always accepted by victims and other stakeholders.<sup>158</sup> Charge incentives and fact incentives can distort the historical record and downplay the involvement of certain actors.<sup>159</sup> The experience of international criminal courts in administering trial waivers may be a useful example in particular for other highly visible prosecutions with strong public interest, such as public corruption cases.

157. Rauxloh, "Plea bargaining in national and international law", *supra* at n. 67, pp. 16–18. See also Clark, J. N., "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation", *The European Journal of International Law*, Vol. 20, No. 2 (2009) (citing Forsberg, T., "The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues", from Biggar, N., ed., *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (2003), p. 73).

158. Rauxloh, R. E., "Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining", *International Criminal Law Review*, Vol. 10, No. 5 (2010), pp. 12–14. See also Nicol, "Plea bargaining in international criminal courts", *supra* at n. 147, pp. 66–67.

159. See Nicol, "Plea bargaining in international criminal courts", *supra* at n. 147, pp. 66–67.

# Conclusions and Recommendations:





Conclusions

Recommendations:

*Cross-sector collaboration*

*Development of a human rights-based legal framework*

*Human rights audit*

*Monitoring and data collection*

Annex I: Survey data on trial waiver systems

Annex II: Safeguards

## Conclusions

143. The results of the research conducted by Fair Trials and Freshfields reveal: (a) the notable growth worldwide in reliance on trial waivers in place of trials; (b) the wide variation between trial waiver systems in diverse jurisdictions comprising both good and problematic practices; and (c) the lack of existing international human rights standards governing these systems.
144. No “one-size-fits-all” solution can meet the unique characteristics and challenges present in every jurisdiction. Nevertheless, it is clear that stakeholders in criminal justice and human rights must recognise trial waivers as a pressing issue for the rule of law and human rights, both in terms of the potential benefits and the potential violations that they can produce.

## Recommendations

### 145. Cross-sector collaboration

Cross-sector collaboration, in the form of further jurisdiction-specific and comparative research and experimentation with different procedural safeguards, is needed to ensure that the full effect of trial waiver systems is understood by all who are potentially affected by their influence. The growth in use of trial waivers should be understood as a human rights and rule of law issue. Analyses of the impact of trial waiver systems must be applied not only through the framework of fair trials protections but in relation to equality and non-discrimination, protection from torture and ill-treatment, and anti-corruption efforts amongst others.

### 146. Development of a human rights-based legal framework

International and regional human rights mechanisms should develop a framework for human rights protection in criminal proceedings that recognises that the full safeguards of trials are frequently not engaged, and that human rights protections must also attach to out of court proceedings and those involving waivers of rights in general. Such a framework could: (a) draw on existing relevant standards relating not only to trial waivers per se, but also waivers of rights in criminal proceedings more generally; (b) draw on good practice from domestic procedures, procedures of international criminal tribunals and courts and jurisprudence of regional and international human rights mechanisms; and (c) encourage a review of any regional/international instrument which promotes the use of trial waivers without providing guidance on necessary safeguards.

### 147. Human rights audit

States should be encouraged to reflect on the nature of the trial waiver system in operation, and new schemes under consideration, to identify whether they give rise to human rights or rule of law concerns. They might consider the following lines of enquiry:

- Are defendants who waive their right to a trial provided with timely, comprehensive information about their rights and the specific consequences of waiving them?
- Are defendants guaranteed access to a lawyer prior to waiving their right to a trial – and, in practice, are defendants (including those without the means to pay for a lawyer) able to exercise this right?
- Do prosecutors or judicial authorities provide robust disclosure of both inculpatory and exculpatory evidence prior to trial waivers?
- Do judicial authorities provide meaningful review of procedure and evidence to verify the integrity of investigations and the effectiveness of defendants’ trial waivers, with the ability to reject or delay trial waivers or to require trial or other, further, proceedings where evidence relied on by prosecuting authorities is particularly unreliable or in need of further vetting (for example, in cases involving a single witness, or those requiring forensic testing)?
- Is there rational regulation of the benefits granted in return for a trial waiver to protect against discriminatory and arbitrary outcomes resulting from such waivers?
- Where relevant, are the terms on which a trial waiver is made systematically recorded in a transparent manner?
- Are strong systems of oversight of police and prosecutorial conduct, and redress for victims of misconduct in place to ensure that rights violations occurring outside of the trial may be remedied even when the right to a trial is waived?

- Do defendants have the ability to appeal convictions resulting from trial waivers where procedural violations or new evidence make the conviction unsafe?
- Where relevant, is monitoring taking place to assess whether the human rights purpose for which the trial waiver system was introduced (e.g. reduction of pre-trial detention, moderation of sentences, reduction of reliance on incarceration) has been fulfilled? And are other efforts to fulfil that human rights purpose (e.g. sentencing and pre-trial detention reform, decriminalisation, and diversion from the criminal justice system for minor offences or certain vulnerable suspects) continuing?
- The percentage of defendants in pre-trial detention who waive their right to trial, versus the percentage of defendants not in pre-trial detention who do so.
- The percentage of defendants in pre-trial detention who waive their right to trial, versus the percentage of defendants in pre-trial detention who do not waive their right to trial.
- Average sentences imposed on defendants who waive their right to trial, versus those who proceed to trial (disaggregated by offence charged).
- Number of case dismissals per year before the introduction of a trial waiver system versus the number of case dismissals following the introduction of a trial waiver system.

#### 148. Monitoring and data collection

Jurisdictions with trial waiver systems should also endeavour to collect key data in relation to the operation of the system to help evaluate its overall impact on justice outcomes and expenditure, most of which, our research has indicated, is not currently being systematically collected. States considering the introduction of trial waiver systems or in the process of adopting such systems should take the opportunity to establish baselines of data along these lines prior to implementation, so that the impact of the trial waiver system can subsequently be measured. States should gather the following data, where relevant according to the different features of each trial waiver system:

- Percentage of convictions obtained through trial waivers, disaggregated by type of charge and demographics of the defendant.
- Average length of pre-trial detention in cases resolved by trial waivers versus those which proceed to trial.
- Data on patterns in charging behaviour by prosecutors following the introduction of a trial waiver system (for example, whether prosecutors increase the number or severity of charges in order to incentivise trial waivers).
- Rate of arrest and rate of charge/prosecution following arrest prior to and following introduction of a trial waiver system or changes to that system.
- Percentage or number of cases concluded through a trial waiver in which an appeal against conviction is later made, and the success rate of these appeals.
- Percentage of people who waive their right to a trial who are subsequently exonerated.
- Percentage of defendants who waive their right to a trial without legal representation.

*Please get in contact with us if you have questions or information to share, if you disagree with our analysis or want to discuss further.*

## Annex I: Survey data on trial waiver systems

The table below sets out data collected as part of the research on trial waiver systems, including whether a trial waiver system exists in each country surveyed, the type of trial waiver system in operation, the date the trial waiver system was adopted, and reason for its introduction.

Country	Trial waiver system?	Date of adoption <sup>160</sup>	Type of trial waiver system	Reason for introduction
Albania	Yes	2000–2009	Cooperation arrangement/ crown witness system	To reduce costs, reduce the number of trials, and save time
Angola	No	-	-	-
Argentina	Yes	1990–1999	Sentence incentives	To increase prosecution and conviction rates, reduce costs, reduce the number of trials, save time, and shorten procedural deadlines/requirements
Armenia	Yes	2000–2009	Sentence incentives	To shorten procedural deadlines/requirements
Australia	Yes	1990–1999	Sentence incentives, charge incentives, fact incentives, cooperation arrangement/crown witness system	To improve efficiency and ensure victim input
Austria	Yes	Pre-1990	Cooperation arrangement/ crown witness system	To ensure adequate compensation for victims, promote restorative justice, and provide a more moderate means of punishment
Bahrain	No	-	-	-
Belarus	Yes	2010–2016	Cooperation arrangement/ crown witness system	To ensure adequate compensation for victims, promote restorative justice, improve efficiency, and to incentivise cooperation
Belgium	No	-	-	-
Bolivia	Yes	1990–1999	Sentence incentives	To save time, reduce the case backlog and reduce the overuse of pre-trial detention
Bosnia and Herzegovina	Yes	2000–2009	Sentence incentives	To improve efficiency and save time
Botswana	Yes	2010–2016	Charge incentives	Unknown
Brazil	Yes	1990–1999	Cooperation arrangement/ crown witness system	To incentivise cooperation, and to simplify/modernise the criminal justice system
Canada	Yes	Pre-1990	Sentence incentives, charge incentives, fact incentives	To promote certainty of the resolution of an offence, reduce costs, reduce the number of trials, and save time

Country	Trial waiver system?	Date of adoption <sup>160</sup>	Type of trial waiver system	Reason for introduction
Cayman Islands	Yes	Pre-1990	Sentence incentives, charge incentives	To avoid re-victimisation, incentivise cooperation, reduce costs, and reduce the number of trials
Chile	Yes	2000–2009	Sentence incentives	To improve efficiency and focus on higher priority cases
China	Yes	1990–1999	Sentence incentives	To reduce caseload faced by courts
Colombia	Yes	2000–2009	Sentence incentives, cooperation arrangement/ crown witness system	To incentivise cooperation and save time
Congo DR	No	-	-	-
Costa Rica	Yes	1990–1999	Sentence incentives, cooperation arrangement/ crown witness system	To reduce costs and reduce the number of trials
Croatia	Yes	2000–2009	Sentence incentives, cooperation arrangement/ crown witness system	To avoid re-victimisation, incentivise cooperation, provide more moderate means of punishment, reduce costs, reduce the number of trials, save time, and shorten procedural deadlines/requirements
Czech Republic	Yes	2010–2016	Sentence incentives, cooperation arrangement/ crown witness system	To provide adequate compensation to victims, improve efficiency, incentivise cooperation, promote restorative justice, provide a more moderate means of punishment, reduce the number of trials, save time, and to simplify/modernise the criminal justice system
Denmark	Yes	2000–2009	Cooperation arrangement/ crown witness system	To assist in difficult investigations
Egypt	Yes	Pre-1990	Cooperation arrangement/ crown witness system	To incentivise cooperation
England & Wales	Yes	Pre-1990	Sentence incentives, charge incentives, fact incentives, cooperation arrangement/crown witness system	To avoid re-victimisation, improve efficiency, focus on higher priority cases, provide a more moderate means of punishment, reduce costs and to save resources and time
Equatorial Guinea	Yes	Pre-1990	Sentence incentives, charge incentives	To promote efficiency, reduce costs, and save time
Estonia	Yes	1990–1999	Sentence incentives, cooperation arrangement/ crown witness system	To promote efficiency and save time

160. We have used the dates that trial waivers were recognised in legislation or case law, meaning that an informal or unregulated trial waiver system may have existed before the date range identified in the table.

Country	Trial waiver system?	Date of adoption <sup>160</sup>	Type of trial waiver system	Reason for introduction
Ethiopia	No	-	-	-
Finland	Yes	2010–2016	Sentence incentives, charge incentives	To focus on higher priority cases and to save time
France	Yes	2000–2009	Sentence incentives	To provide a more moderate means of punishment, reduce the number of trials, and to save time
Georgia	Yes	2000–2009	Sentence incentives, charge incentives	To incentivise cooperation, and to simplify/modernise the criminal justice system
Germany	Yes	2000–2009	Sentence incentives, charge incentives	To reduce costs
Ghana	No	-	-	-
Greece	No	-	-	-
Guatemala	Yes	1990–1999	Sentence incentives, charge incentives, cooperation arrangement/crown witness system	To incentivise cooperation, and to simplify/modernise the criminal justice system
Hong Kong	Yes	Pre-1990	Sentence incentives, charge incentives	To focus on higher priority cases, reduce costs, and save time
Hungary	Yes	1990–1999	Sentence incentives, cooperation arrangement/crown witness system	To incentivise cooperation, reduce costs, save resources, and to simplify/modernise the criminal justice system
Iceland	Yes	2000–2009	Cooperation arrangement/crown witness system	To incentivise cooperation
India	Yes	2000–2009	Sentence incentives, charge incentives	To reduce costs, reduce the number of trials, save time, and to reduce the use of pre-trial detention
Indonesia	Yes	2000–2009	Cooperation arrangement/crown witness system	To incentivise cooperation
Ireland	Yes	Pre-1990	Sentence incentives, charge incentives	To save time
Italy	Yes	Pre-1990	Sentence incentives	To save time and simplify/modernise the criminal justice system

Country	Trial waiver system?	Date of adoption <sup>160</sup>	Type of trial waiver system	Reason for introduction
Japan	No	-	-	-
Jersey	Yes	Pre-1990	Sentence incentives, charge incentives, fact incentives	Unknown
Kazakhstan	Yes	2010–2016	Sentence incentives	To promote efficiency, incentivise cooperation, reduce costs, and save time
Kenya	Yes	2000–2009	Charge incentives	To provide a more moderate means of punishment and to reduce the number of trials
Liechtenstein	No	-	-	-
Lithuania	Yes	2000–2009	Cooperation arrangement/crown witness system	To simplify/modernise the criminal justice system
Luxembourg	Yes	2010–2016	Sentence incentives	To reduce costs, reduce the number of trials, save time, and to simplify/modernise the criminal justice system
Macedonia	Yes	2010–2016	Sentence incentives	To promote efficiency, reduce costs, reduce number of trials, save time, and to simplify/modernise the criminal justice system
Madagascar	No	-	-	-
Malaysia	Yes	2010–2016	Sentence incentives, charge incentives	To simplify/modernise the criminal justice system
Mauritius	Yes	Pre-1990	Charge incentives, cooperation arrangement/crown witness system	To incentivise cooperation, reduce costs, save resources, reduce number of trials, and save time
Mexico	Yes	2000–2009	Sentence incentives	To provide greater access to justice and greater transparency of the criminal justice system
Mongolia	No	-	-	-
Morocco	No	-	-	-
Mozambique	No	-	-	-
Myanmar	No	-	-	-
Namibia	No	-	-	-

160. We have used the dates that trial waivers were recognised in legislation or case law, meaning that an informal or unregulated trial waiver system may have existed before the date range identified in the table.

Country	Trial waiver system?	Date of adoption <sup>160</sup>	Type of trial waiver system	Reason for introduction
Netherlands	Yes	2000–2009	Cooperation arrangement/ crown witness system	To improve efficiency, ensure enforceability, promote greater transparency of the criminal justice system, incentivise cooperation, and save time
New Zealand	Yes	2010–2016	Sentence incentives, charge incentives, fact incentives	To avoid re-victimisation, reduce cost, save resources, and to simplify/modernise the criminal justice system
Nigeria	Yes	2000–2009	Charge incentives	To incentivise cooperation, and save time
Norway	Yes	2000–2009	Sentence incentives	To avoid re-victimisation, incentivise cooperation, and reduce cost
Pakistan	Yes	1990–1999	Cooperation arrangement/ crown witness system	To incentivise cooperation and encourage religious development
Peru	Yes	1990–1999	Sentence incentives, charge incentives	To simplify/modernise the criminal justice system
Philippines	Yes	Pre-1990	Charge incentives	To save time
Poland	Yes	1990–1999	Sentence incentives	To save time
Portugal	No	-	-	-
Qatar	No	-	-	-
Romania	Yes	2010–2016	Sentence incentives	Unknown
Russia	Yes	Pre-1990	Sentence incentives, cooperation arrangement/ crown witness system	To promote efficiency, incentivise cooperation, reduce costs, and to save resources and time
Saudi Arabia	No	-	-	-
Scotland	Yes	Pre-1990	Sentence incentives, charge incentives, fact incentives	To avoid re-victimisation, improve efficiency, reduce costs, and to save resources and time
Senegal	Yes	Pre-1990	Cooperation arrangement/ crown witness system	Unknown

Country	Trial waiver system?	Date of adoption <sup>160</sup>	Type of trial waiver system	Reason for introduction
Serbia	Yes	2000–2009	Sentence incentives, charge incentives, cooperation arrangement/crown witness system	To reduce costs, reduce the number of trials, and to save time
Singapore	Yes	1990–1999	Charge incentives	To provide a more moderate means of punishment, reduce costs, and to save resources and time
South Africa	Yes	2000–2009	Sentence incentives, charge incentives	To avoid re-victimisation, reduce costs, save resources, reduce the number of trials, and to simplify/modernise the criminal justice system
South Korea	No	-	-	-
Spain	Yes	Pre-1990	Sentence incentives	To promote efficiency and save time
Sweden	No	-	-	-
Switzerland	Yes	2000–2009	Sentence incentives, charge incentives, fact incentives	To incentivise cooperation
Tanzania	No	-	-	-
Thailand	No	-	-	-
Turkey	Yes	Pre-1990	Cooperation arrangement/crown witness system	To incentivise cooperation
UAE	No	-	-	-
Ukraine	Yes	2010–2016	Sentence incentives	To increase the effectiveness of investigations, reduce the number of trials, and to simplify/modernise the criminal justice system
USA	Yes	Pre-1990	Sentence incentives, charge incentives, fact incentives, cooperation arrangement/crown witness system	Unknown
Vietnam	No	-	-	-
Zambia	Yes	2010–2016	Charge incentives	To incentivise cooperation and reduce the number of trials
Zimbabwe	Yes	Pre-1990	Charge incentives	To recognise the autonomy of the prosecutor

160. We have used the dates that trial waivers were recognised in legislation or case law, meaning that an informal or unregulated trial waiver system may have existed before the date range identified in the table.

## Annex II: Safeguards

The table below sets out safeguards present in the trial waiver systems of certain jurisdictions. The information is not comprehensive, as no specific question in the survey requested information on safeguards, so the table below shows only countries for which sufficient information was included in the survey response.

Country	Albania	Argentina	Armenia	Australia	Austria	Bosnia and Herzegovina	Brazil	Canada	Chile	Costa Rica	Croatia	Czech Republic	England and Wales	Estonia	Finland	France	Georgia	Germany	Hong Kong
Mandatory access to a lawyer	N	Y	N	Y	U	N	Y	U	U	U	Y	U	N	Y	N	Y	Y	U	N
Enhanced disclosure requirements	Y	U	U	Y	N	Y	N/A	N	Y	U	Y	Y	Y	U	Y	U	Y	Y	Y
Judicial scrutiny – evidence	N	Y	N	Y	N	Y	Y	Y	Y	Y	N	N	Y	Y	U	U	Y	Y	Y
Judicial scrutiny – process	Y	Y	Y	Y	N	Y	N	Y	Y	Y	Y	Y	Y	U	Y	U	Y	Y	U
Involvement of judge in negotiations	Y	N	N	N	N	N	N	N	U	U	N	N	N	Y	N	N	N	Y	N
Enhanced recording of terms of agreement	Y	N/A	U	U	Y	Y	Y	U	Y	U	Y	U	Y	N	U	Y	Y	Y	N
Part of full criminal trial	N	N	N	U	N	N	Y	U	U	Y	N	N	N	N	Y	Y	Y	Y	Y
Ethical guidelines for lawyers	U	U	U	Y	N/A	U	U	Y	Y	U	Y	U	Y	U	Y	U	U	U	U
Limitations on benefits	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	U	Y	Y	U	U	Y	Y	Y	Y
Limitations on types of cases	Y	Y	Y	U	Y	N	Y	U	Y	Y	Y	Y	U	Y	Y	Y	U	U	Y
Limitations on waivers	Y	U	Y	U	Y	Y	Y	Y	U	U	U	U	Y	U	U	U	Y	Y	U
Confidentiality if plea withdrawn	Y	U	U	U	U	Y	N/A	U	Y	Y	U	Y	U	U	U	Y	Y	U	U

Key: Y = yes; N = no; N/A = safeguard not applicable within the given system; U = unknown (not enough information obtained by the survey to answer)

Hungary	Ireland	Italy	Jersey	Kazakhstan	Kenya	Luxembourg	Macedonia	Malaysia	Mauritius	Netherlands	New Zealand	Norway	Philippines	Romania	Russia	Scotland	Singapore	South Africa	Switzerland	USA	Zambia
U	Y	U	U	U	N	Y	Y	N	U	U	N	U	U	U	U	U	U	Y	Y	N	Y
U	U	U	U	U	U	Y	U	U	U	U	U	Y	U	U	U	N	Y	U	U	N	N
Y	N	Y	N	Y	Y	Y	Y	U	N	N	U	Y	Y	Y	U	N	Y	N	N	N	N
Y	N	Y	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y
N	N	Y	N	N	N	N	N	Y	N	U	Y	Y	N	N	N	N	Y	N	Y	N	N
N	Y	U	U	U	N	U	U	N	U	U	Y	Y	U	U	U	N	U	N	U	N	U
U	N	N	N	N	N	Y	N	U	N	N	N	Y	N	Y	Y	N	N	N	N	N	N
Y	U	U	U	U	U	U	U	U	U	U	U	Y	N	U	U	U	N	U	U	Y	U
U	Y	Y	Y	U	U	U	Y	Y	U	U	U	U	N	U	Y	Y	Y	Y	U	N	U
Y	Y	Y	U	U	Y	Y	N	U	N	Y	U	N	Y	Y	Y	N	Y	N	Y	N	N
U	U	Y	U	U	Y	Y	U	Y	Y	Y	U	Y	U	N	U	U	Y	U	U	Y	U
N	Y	U	U	U	Y	Y	Y	U	U	U	U	N	U	U	U	U	Y	Y	Y	Y	Y

